Noteworthy Decision Summary

Decision: WCAT-2005-06121 **Panel**: Guy Riecken **Decision Date:** November 16, 2005

Permanent functional impairment – WCAT jurisdiction – Anterior cruciate ligament tear – Ligament laxity – Discrepancy between PFI and treating physician's report – Section 239(2)(c) of the Workers Compensation Act – Policy item #36(iii) of Permanent Disability Evaluation Schedule

The Workers' Compensation Appeal Tribunal (WCAT) has jurisdiction to consider appeals of decisions by the Review Division of the Workers' Compensation Board (Review Division) with respect to the degree of knee ligament laxity as the total impairment may exceed 5% if a worker has laxity in more than one knee ligament.

The worker, a tree faller, injured his right knee. The Workers' Compensation Board (Board) granted a permanent disability award (PDA) of 4.59% for an anterior cruciate ligament tear based on reduced range of motion and ligament laxity in the right knee as measured during a permanent functional impairment (PFI) evaluation. The worker was also examined by an orthopaedic surgeon, who found greater ligament laxity than was measured at the PFI evaluation. The Review Division confirmed this decision. The worker appealed to WCAT.

The panel considered the issue of whether it had jurisdiction with respect to the degree of ligament laxity. Section 239(2)(c) of the *Workers Compensation Act* provides that a decision of a review officer may not be appealed to WCAT if it is in respect of an injury for which the specified percentage of impairment in the *Permanent Disability Evaluation Schedule* (PDES) has no range or has a range that does not exceed 5%. Policy item #36(iii) of the PDES provides the percentage impairment ratings for ligament laxity. Although there are only three distinct percentages of impairment for each ligament under item #36(iii), there are a continuous range of possible openings of the knee joint from 0 to greater than 15 mm. Thus, the ligament laxity values involve a range of impairment. Further, although none of the ratings for an individual ligament exceeds 5%, if a worker has laxity in more than one ligament in a knee, the total impairment may exceed 5%. The panel concluded it had jurisdiction.

The panel concluded the orthopaedic surgeon's measurements were more reliable than those measured on the PFI evaluation, based on his specialized knowledge of the functioning of the musculoskeletal system, and the fact he had performed surgery on the worker's right knee and followed his progress. Furthermore, the inconsistency was not the result of a change in the knee, as the orthopaedic surgeon examined the worker only two months after the PFI.

The panel concluded the worker was entitled to a PDA corresponding to the degree of knee ligament laxity measured by the orthopaedic surgeon.

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An amendment was issued for WCAT-2005-06121 and is attached to this document.

WCAT Decision Number: WCAT-2005-06121
WCAT Decision Date: November 16, 2005
Panel: Guy Riecken, Vice Chair

Introduction

On April 20, 2003 the worker was employed as a tree faller when he suffered a right knee injury. The Workers' Compensation Board (Board) accepted his claim for an anterior cruciate ligament (ACL) tear and for ACL reconstruction surgery on December 10, 2003.

The worker appeals the April 6, 2005 decision of a review officer (*Review Decision #25116*), which confirmed the Board's October 26, 2004 decision to grant the worker a permanent partial disability (PPD) award on the basis of a permanent functional impairment (PFI) of 4.59% of total disability.

Issue(s)

The issue in this appeal is whether the 4.59% PFI award accurately reflects the impairment of earning capacity resulting from the worker's compensable back injury.

Jurisdiction and Procedural Matters

The appeal of the review officer's decision was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the *Workers Compensation Act* (Act).

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal before it (section 254).

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

The worker did not request an oral hearing. The employer is participating in the appeal and both the worker's representative and the employer's representative provided written submissions to WCAT. I have considered the material in the worker's claim file and the written submissions. The appeal does not involve significant issues of credibility. It involves the assessment of medical evidence and the interpretation and application of

law and policy. I am satisfied that an oral hearing is not necessary to fairly decide the appeal.

A preliminary issue arises with respect to the worker's appeal of the PFI percentage for his right knee. The worker's PPD award for his right knee included 2.54% for reduced range of motion, 1.67% for ligament laxity and 0.35% for the age adaptability factor. Section 239(2)(c) of the Act provides that a decision of a review officer may not be appealed to WCAT if that decision is in respect to the application under section 23(1) of rating schedules compiled under section 23(2) where the specified percentage of impairment has no range or a range that does not exceed 5%. I have considered whether the review officer's decision with respect to the PFI for the worker's right knee may be appealed to WCAT.

Under section 23(2) of the Act the Board has established the Permanent Disability Evaluation Schedule (PDES) in Appendix IV of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) as a rating schedule to be referred to in disability award assessments and reassessments undertaken on or after August 1, 2003. There are two items in the PDES that are relevant to the worker's PPD award. Item #28 provides a range of impairment from 0% to 25% for immobility of a knee. This item was applied with respect to the impairment rating of 2.54% for loss of range of motion of the worker's right knee. Because section 239(2)(c) refers to the impairment rating in the schedule, and not the actual impairment rating assessed in a specific claim, that section does not limit WCAT's jurisdiction to consider the worker's appeal with respect to the application of item #28 of the PDES in the PPD award for his knee injury. Accordingly, I can consider the application of the PDES rating for range of motion of the worker's right knee.

The worker's award also included 1.67% for ligament laxity. At item #36(iii) the PDES provides the following percentage impairment ratings for ligament laxity of a knee:

(a) ACL or PCL	
Grade I/Mild (5 – 9 mm)	1.67
Grade II/Moderate (10 – 14 mm)	3.34
Grade III/Marked (15 mm or more)	5.00
(b) MCL or LCL	
Grade I/Mild (5 – 9 mm)	0.83
Grade II/Moderate (10 – 14 mm)	1.66
Grade II/Marked (15 mm or more)	2.50

None of these ratings for an individual ligament exceeds 5%, but if a worker has laxity in more than one ligament in a knee, the total impairment may exceed 5%.

I have also considered whether these impairment ratings from the PDES have a range. Given the fact that there are only three distinct percentages of impairment for each ligament, it may appear that the ratings do not involve a range. However, I consider the more significant element of the ratings to be the size of the openings in the knee joint resulting from the laxity, which are also included in the PDES item. In effect, the PDES item addresses a continuous range of possible openings of the knee joint from 0 to greater than 15-mm. Openings of up to 4-mm are considered normal and do not receive an impairment rating. Openings of 5-mm or more are divided into three grades. While the method of measurement is different (degrees of movement of the joint as opposed to mm of opening in the joint), the expression of the impairment ratings for laxity in the PDES is similar to the expression of the impairment rating for loss of movement of the knee joint. Both loss of range of movement and knee joint openings due to laxity are expressed in a range of values in the PDES. I conclude that the ligament laxity values in item #36(iii) of the PDES involve a range of impairment and that an appeal of a review officer's decision respecting the application of these impairment ratings in a PPD award is not precluded by section 239(2)(c) of the Act.

Background and Evidence

The worker was examined by Dr. Bhachu, an orthopaedic surgeon, on May 7, 2003. Dr. Bhachu's consultation report of that date indicates the worker reported that on April 30, 2003 he fell off a log at work. His left foot slipped and went into a hole while his right leg struck a rock and he sustained a valgus type injury. He felt a pulling sensation of the medial aspect of his knee and could not bear weight on it. On examination, Dr. Bhachu determined that the worker had sustained a Grade III injury to the medial collateral ligament (MCL) of his right knee. Dr. Bhachu applied a Generation II rehabilitation brace locked at 30 degrees and advised the worker to bear weight on his right leg as tolerated. For the time being he recommended conservative treatment.

Dr. Bhachu continued to follow the worker and his reports from May to September 2003 describe the worker's gradual progress while receiving physiotherapy treatments.

An MRI report from September 12, 2003 described findings consistent with partial tears of the ACL and posterior cruciate ligament (PCL). There was also evidence of the injury to the MCL.

The October 20, 2003 report from Dr. Kokan, orthopaedic surgeon, indicates that there was moderate sized effusion of the worker's right knee, slightly restricted flexion compared to the left side, and pain along the MCL and medial joint. McMurray's sign was equivocal. There was still some opening, probably Grade I, of the MCL. The worker had a fair amount of patellofemoral pain. Dr. Kokan noted that the recent MRI showed partial tears of the ACL and PCL but that no meniscus tears were shown.

Dr. Kokan recommended an arthroscopy to rule out internal derangement of the knee and to assess the condition of the cruciate ligaments.

The October 28, 2003 consultation report from Dr. Tarazi, an orthopaedic surgeon, indicates that the worker's main problem was patellofemoral syndrome. The worker also had some laxity in his right knee. Dr. Tarazi recommended an evaluation of the knee laxity under anaesthetic as well as an arthroscopy.

On November 26, 2003 the worker was discharged from an occupational rehabilitation (OR2) program he had been attending since September 16, 2003 for further medical investigations.

Dr. Tarazi's December 10, 2003 operative report describes a right knee arthroscopic ACL reconstruction.

Dr. Tarazi followed the worker's progress after the surgery. His reports from December 18, 2003 onward describe slow progress. On December 18, 2003 Dr. Tarazi recommended the worker start physiotherapy. In January 2003 Dr. Tarazi recommended that the worker be very aggressive with his range of motion exercises. On May 31, 2004 Dr. Tarazi acknowledged that the worker's progress was slow and recommended that he persist with rehabilitation.

In his July 12, 2004 report Dr. Tarazi opined that there was very little further improvement to come with the worker's right knee (mistakenly identified as the left knee in the report). Dr. Tarazi reviewed the worker's job duties and concluded that he would not be able to return to his pre-injury job as a tree faller.

An OR2 discharge report indicates that the worker had participated in the program from June 9 to July 16, 2004. Treatment consisted of general and injury specific stretching and strengthening exercises, cardiovascular conditioning, group sessions with a psychologist and education on a variety of health and rehabilitation topics. The worker did not report a significant improvement in his right knee symptoms. He still reported pain that he rated at between two to five out of ten on a scale where ten is the worst possible pain. On discharge active range of motion was recorded at 130 degrees of flexion on the right compared to 135 degrees on the left. Extension was normal and symmetrical bilaterally. The worker was tender over the medial joint line on palpation. A mild instability was noted in MCL testing. Barriers to a return to work were the worker's constant right knee pain, difficulty walking on uneven ground and the medical restrictions identified by Dr. Tarazi. The worker was discharged from the program as fit to return to work with limitations.

In the August 17, 2004 referral memo to Disability Awards the case manager stated that the permanent conditions accepted under the claim were "right knee ACL tear – surgery December 10, 2003."

The worker underwent a PFI evaluation on October 5, 2004 at the Functional Abilities & Impairment Rating Assessment Centres Inc. (FAIR). At the time of the evaluation the worker identified his main complaint as pain in his right knee. The worker also described experiencing the following symptoms on a constant basis: decreased sensation on the medial aspect of the right knee and distal thigh, swelling of the right knee, and aching on the medial aspect of the right knee. He described the following intermittent symptoms: pinching on the medial aspect of the right knee when walking or pivoting on the right foot, aching under the right patella when descending stairs and dull pain below the right patella that radiates down the right shin.

The FAIR clinician recorded the following knee ligament laxity findings:

	MCL	LCL	ACL	PCL	
					0 = 0 - 4 mm opening
					1 = 5 - 9 mm opening
Right	0	0	0	1	2 = 10 - 14 opening
Left	0	0	0	0	3 = more than 14 mm

The following range of motion findings were recorded for the worker's knees:

	Left	Right
Flexion	138 degrees	132 degrees
Extension	-3 degrees	8 degrees

Dr. Khunkhun, the PFI physician, stated in the PFI evaluation report that on reviewing the test results from the evaluation he felt that the range of motion findings were likely reliable and consistent with the worker's diagnosis. The non range of motion findings, which include the laxity findings, also appeared to be consistent with the worker's diagnosis.

The functional impairment calculation report indicates that the range of motion findings resulted in an impairment rating of 2.54% and the laxity findings in an impairment rating of 1.67%, for a total of 4.21%.

In the October 19, 2004 PFI review memo the disability awards officer (DAO) reviewed the PFI evaluation report and the other information in the claim file. She concluded that the PFI evaluation findings were an accurate representation of the worker's current level of impairment. The DAO reviewed the worker's ongoing complaints and concluded that they are consistent with the objective findings and are not disabling to any degree beyond what is represented by the 4.21% PFI rating. The worker would receive an award based on a PFI of 4.21% of total disability.

The worker's representative provided to WCAT a medical-legal report from Dr. Tarazi dated May 12, 2005. When Dr. Tarazi examined the worker on May 12, 2005 the

worker complained of ongoing instability and pain in his right knee, with the pain being the more predominant symptom. On examination, the worker had Grade II laxity in the PCL and Grade I laxity in the MCL of the right knee. There was no LCL or ACL laxity. There was also limited range of motion of the right knee.

Findings and Reasons

The worker's representative states that the issue in dispute is the PFI award granted to the worker. Neither the wage rate nor the effective dates are disputed in the appeal. The worker's representative acknowledges that the issue of a loss of earnings award was not addressed in the decision under appeal, but was determined in a different Board decision that is currently under review.

The worker's representative submits that the Board's decision to grant an award based on a PFI of 4.21% involves an error. The FAIR clinician found that there was no compensable MCL laxity and rated the PCL laxity at Grade I. Dr. Tarazi, on the other hand, has reported on November 29, 2004 and May 12, 2005 that the worker has an opening of the medial joint space of 5 to 9-mm which corresponds to Grade I MCL laxity. The Board's decision ignores evidence of MCL laxity and underestimates the disability related to PCL laxity.

The worker's representative also disputes the review officer's decision that the issue of an award for chronic pain was not before her and that she had no jurisdiction over that issue. The representative argues that the DAO considered the worker's complaints under RSCM II policy item #39.10 and that would have included consideration of chronic pain under item #39.01.

The employer's representative submits that Dr. Tarazi's May 12, 2005 report does not provide any new evidence with respect to the worker's PFI. It mainly addresses the worker's ability to return to his pre-injury job, and that is not an issue in this appeal. The employer's representative submits that the review officer correctly applied the relevant Board policies to the facts. The review officer was correct not to take jurisdiction over the issue of chronic pain since that was not addressed in the Board's PPD award decision. Since neither the DAO nor the Board addressed the issue of chronic pain, it is not before me in this appeal. The employer's representative submits that the review officer's decision should be confirmed.

Under section 23(1) of the Act, where a PPD results from a worker's compensable injury, the Board must estimate the impairment of the worker's earning capacity from the nature and degree of the injury and pay the worker compensation based on the estimate of the loss of average net earnings resulting from the impairment.

RSCM II policy item #38.00 states that in all but exceptional cases, the effect of a disability on a worker will be appropriately compensated under section 23(1). Policy

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#39.00 states that the percentage of disability determined for the worker's condition under section 23(1) reflects the extent to which a particular injury is likely to impair his ability to earn in the future. The section 23(1) award reflects such factors as reduced prospects of promotion, restrictions in future employment and reduced capacity to compete in the labour market.

RSCM II item #39.01 describes the decision-making procedure under section 23(1) of the Act. PFI evaluations are conducted by either a disability awards medical advisor (DAMA) or a Board authorized external service provider. Under RSCM II item #97.40, the report of a DAMA or external service provider is considered to be expert evidence which, in the absence of other expert evidence to the contrary, should not be disregarded.

Under RSCM II policy item #96.30 the DAO must accept the decision of the case manager as to what permanent conditions have been accepted under the claim.

RSCM II policy item #39.02 provides guidelines for the assessment of section 23(1) awards for workers who experience disproportionate disabling chronic pain as a compensable consequence of an injury.

RSCM II item #39.10 provides that the PDES is a set of guide rules, not a set of fixed rules. The decision-maker is free to apply other variables in arriving at a final award, provided the "other variables" relate to the degree of physical or psychological impairment, not other variables relating to social or economic factors.

The May 12, 2005 report from Dr. Tarazi does not provide new medical evidence that contradicts the range of motion findings for the worker's right knee from the PFI evaluation. Dr. Tarazi's report describes the worker as having about five degrees less flexion and extension in the right knee than in the left knee. The PFI evaluation includes findings of 14 degrees reduction in range of motion in the right knee. Having compared the PFI evaluation findings with those in Dr. Tarazi's reports and the OR2 discharge report, and considering Dr. Khunkhun's opinion that the PFI evaluation range of motion findings are likely reliable, I find that the range of motion measurements in the PFI evaluation are reliable. I consider the slight difference between Dr. Tarazi's findings and those from the PFI evaluation to be due to the fact that range of motion may fluctuate from day-to-day.

The DAO input the range of motion measurements from the PFI evaluation into the Board's disability awards calculator, which automatically calculates the impairment rating under the PDES from the recorded range of motion values. I find that the 2.54% PFI rating accurately reflects the degree of the worker's impairment related to reduced mobility of his right knee resulting from his compensable injury.

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There is clearly a difference between the laxity findings in the PFI evaluation and those described in Dr. Tarazi's reports from November 2004 and May 2005. In examining the worker Dr. Tarazi has found laxity in the right MCL that he assessed as Grade I whereas the PFI clinician recorded no compensable laxity for the right MCL. Dr. Tarazi also assessed the laxity in the right PCL as Grade II, whereas the measurements by the PFI clinician place it in Grade I.

I accept that as an orthopaedic surgeon Dr. Tarazi's specialized knowledge includes the functioning of the musculoskeletal system, including the knee joints. It is also significant that he performed the reconstruction surgery on the worker's right knee and has followed his progress since then. I consider Dr. Tarazi's reports to be expert evidence for the purposes of RSCM II item #97.40 and I place significant weight on his November 2004 and May 2005 reports with respect to ligament laxity in the worker's right knee.

I have considered whether Dr. Tarazi's right knee laxity measurements in November 2004 and May 2005 reflect a change in the worker's knee condition since the PFI evaluation was undertaken rather than conflicting findings. I conclude that Dr. Tarazi's findings are not the result of changes in the knee. Dr. Tarazi's November 29, 2004 examination of the worker was only a little less than two months after the October 5, 2004 PFI evaluation and there is no reason to conclude that the worker's right knee changed so significantly between the two examinations. In addition, in his May 12, 2005 consultation report addressed to Dr. Bergman, the worker's attending physician, Dr. Tarazi stated that valgus stress "reproduced medial joint space opening which is unchanged compared to [the worker's] previous visits." I also note that MCL instability was mentioned in the OR2 discharge report. I conclude that Dr. Tarazi's laxity findings are not the result of changes in the workers' knee condition.

In light of the inconsistency between the laxity findings in Dr. Tarazi's reports and those in the PFI evaluation report, I conclude that the laxity findings from the PFI evaluation are not an accurate reflection of the impairment of the worker's earning capacity resulting from his compensable right knee injury for the purposes of section 23(1). I conclude that the worker is entitled to a PPD award under section 23(1) that recognizes the laxity in his right knee as recorded in Dr. Tarazi's reports dated May 12, 2005.

I have considered the worker's complaints that he described at the time of the PFI evaluation. I find that they do not result in an additional impairment beyond that recognized in the range of motion and laxity findings. I conclude that the worker is not entitled to an additional award under RSCM II item #39.10.

I do not accept the argument of the worker's representative that the DAO addressed the worker's entitlement to a chronic pain award and that this issue is before me in this appeal. The only permanent condition referred to Disability Awards in the August 17, 2004 memo from the case manager was the right knee injury and the reconstruction

surgery. A chronic pain condition was not referred to the DAO, and in accordance with RSCM II item #96.30 the DAO did not address chronic pain in either the October 19, 2004 form 24 or in the October 26, 2004 decision letter.

The argument from the worker's representative that the DAO's consideration of other factors under RSCM II item #39.10 would have included consideration of chronic pain and subjective complaints under item #39.01 is not reflected in the form 24 and is not consistent with the relevant policies. Item #39.01 in the *Rehabilitation Services and Claims Manual, Volume I*, (RSCM I) Subjective Complaints, was replaced by the Board's new chronic pain policy on January 1, 2003. The new chronic pain policy applies to new claims received on or after January 1, 2003 and all active claims that were awaiting an initial adjudication of chronic pain on January 1, 2003 (see Board of directors' *Resolution #2002/11/19-04* which is accessible on the Board's website at www.worksafebc.com). There is no indication that there was adjudication of the worker's entitlement for pain or chronic pain under the former subjective complaints policy prior to January 1, 2003.

The fact that there is now a separate policy in RSCM I item #39.01 and RSCM II #39.02 on compensation for chronic pain that has become permanent indicates that chronic pain is not included in the additional factors that may considered under RSCM II item #39.10. Considering the contents of the chronic pain policy, the provisions of RSCM II item #39.10 with respect to additional factors and the contents of the form 24, I agree with the review officer that the DAO did not address chronic pain when considering additional factors under RSCM II item #39.10.

Since neither the DAO nor the review officer addressed the issue of chronic pain in their decisions, it is not before me in this appeal and I do not have jurisdiction to decide the issue of whether the worker is entitled to a PPD award for chronic pain. The worker is free to request the Board to adjudicate this issue.

As the worker's representative has acknowledged, the Board addressed the issue of entitlement to a loss of earnings assessment under section 23(3) of the Act in a separate decision dated December 22, 2004 and that decision is not before me in this appeal.

The worker's appeal is allowed in part. He is entitled to a PPD award that recognizes the laxity findings in Dr. Tarazi's May 12, 2005 reports.

Conclusion

I vary *Review Decision #25116* dated, April 6, 2005 in accordance with the above findings and reasons.

The worker's representative requested that the worker be reimbursed for the expense of obtaining Dr. Tarazi's May 12, 2005 medical-legal report. I found his report useful in deciding this appeal and find that he should be reimbursed by the Board for the expense of obtaining it, subject to the Board's tariff for such evidence. I make this order under section 7 of the *Workers Compensation Act Appeal Regulation.*

Guy Riecken
Vice Chair

GR/rb

WCAT Amended Decision Number: **WCAT-2005-06121a**
WCAT Amended Decision Date: **December 15, 2005**
Panel: Guy Riecken, Vice Chair

Amended Decision

In WCAT Decision #2005-06121, issued on November 16, 2005, I varied the worker's appeal regarding whether or not 4.59% PFI award accurately reflects the impairment of earning capacity resulting from the worker's compensable right knee injury. It has come to my attention that my decision contains a typographical error appearing in the third paragraph on page one. After reviewing the original decision, and based on the statutory authority set out in section 253.1(1) of the *Workers Compensation Act* regarding correction of decisions, I am amending (the third paragraph on page one of the original decision as follows (changes in bold):

Issue(s)

The issue in this appeal is whether the 4.59% PFI award accurately reflects the impairment of earning capacity resulting from the worker's compensable **right knee** injury.

Guy Riecken
Vice Chair

GR/rb

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