

## Noteworthy Decision Summary

**Decision:** WCAT-2005-06645 **Panel:** Marguerite Mousseau **Decision Date:** December 13, 2005

***Board discretion – Additional Factors Outline – Permanent Disability Evaluation Schedule – Loss of strength – Section 23(1) of the Workers Compensation Act – Policy items #39.10 and #97.40 of the Rehabilitation Services and Claims Manual, Volume II***

The Workers' Compensation Board (Board) awarded the worker a permanent disability award (PDA) of 8.6% for amputation, reduced range of motion (ROM), and sensory deficits of his right hand with an additional 9.0% for reduced grip strength. The Board later rescinded the 9.0% PDA for reduced grip strength. The panel upheld the Board's decision. The initial Board officer had clearly incorrectly applied the *Additional Factors Outline* (Outline) by not turning her mind to whether the worker's reduced grip strength had already been taken into account in the PDA for reduced ROM. The discretion provided under item #39.10 is not an unfettered discretion which may be exercised in an arbitrary manner. The Outline was established as a guide to the exercise of discretion under item #39.10.

The worker, a production foreman, injured his right hand. His right long finger was amputated. Seven months later he returned to work full-time. A Disability Awards Officer (DAO) awarded the worker 8.6% for the amputation, reduced ROM, and sensory deficits and an additional 9.0% for reduced grip strength. A supervising officer at the Board reviewed the PDA and concluded the 9.0% PDA for reduced grip strength was inappropriate. The Board issued a second decision to the worker stating that the earlier decision had been reconsidered and his PDA had been reduced to 8.6%. The worker requested a review by the Review Division of the Board, which confirmed the decision. The worker appealed to the Workers' Compensation Appeal Tribunal.

The panel noted that the *Permanent Disability Evaluation Schedule* (PDES) is used as guidance in the measurement of partial disability under section 23(1) of the *Workers Compensation Act*. Policy item #39.10 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) provides that, where a PDA is made by application of the PDES, the DAO is free to apply other variables in arriving at the final amount. Item #97.40 RSCM II further states that the DAO has discretion to depart from the amount determined under the PDES.

The panel concluded the DAO had improperly exercised her discretion to consider other variables and thus the Board had authority to reconsider its decision based on item #C14-103.01. Although item #39.10 provides discretion to take other variables into account, the PDES establishes the fundamental framework for rating the degree of impairment associated with the types of injuries that are included in the PDES. The use of the PDES is intended to result in compensation that reflects the intention of section 23(1) and to effect consistency in awards for similar types of injuries. The discretion to consider other variables under item #39.10 assists in modifying a PDA so that it reflects the unique impact that similar types of injuries may have on different individuals. But, the discretion provided under item #39.10 is not an unfettered discretion which may be exercised in an arbitrary manner. The Outline was established as a guide to the exercise of discretion under item #39.10.

The Outline provides that a PDA for loss of hand/grip strength should only be made on rare occasions when the loss of strength has not already been taken into account by the amputation,

the impairment of motion, not limited by pain and not covered by peripheral nerve ratings. There was no evidence the examining Disability Awards Medical Advisor turned his mind to the issue of whether the loss of strength had been taken into account in the award for reduced ROM.

The improper application of the Outline resulted in a conclusion that the impairment resulting from injuries that left stiffness in the two affected fingers was significantly greater than the impairment resulting from the amputation of both of those fingers. It was inconsistent for the Board to provide an impairment rating for the worker's injury that was grossly disproportionate to the impairment ratings under the PDES in the absence of any indication that the worker's injuries represented a rare case. The panel concluded the DAO's application of item #39.10 was clearly incorrect. The impairment related to reduced grip strength had already been taken into account in the PDA for reduced ROM.

The worker's appeal was denied.

<b>WCAT Decision Number :</b>	WCAT-2005-06645
<b>WCAT Decision Date:</b>	December 13, 2005
<b>Panel:</b>	Marguerite Mousseau, Vice Chair

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## Introduction

The worker appeals *Review Division Decision #23613*, dated March 15, 2005. In that decision the review officer confirmed a reconsideration decision of an officer of the Workers' Compensation Board (Board) which resulted in a reduction of the worker's permanent disability award.

The Workers' Compensation Appeal Tribunal (WCAT) has jurisdiction to consider this appeal under section 239(1) of the *Workers Compensation Act* (Act) as an appeal from a final decision made by a review officer under section 96.2 of the Act.

The worker has received advice and assistance from a workers' adviser but has prepared his own submission in support of his appeal. The employer, though notified of the appeal, is not participating.

## Issue(s)

The issues on this appeal are whether the Board had authority under the Act and policies to reconsider the worker's permanent disability award decision and, if yes, whether it was appropriate to reduce the worker's permanent disability award by 9%.

## Background

The worker was employed as a production foreman for a manufacturing company. On October 7, 2003 a press machine dropped on his right hand, causing a crush injury to the hand which included a comminuted fracture of the head of the middle phalanx of the long finger and vascular compromise of the long index finger. He had surgery on October 7, 2003 and October 12, 2003, the latter to amputate his right long finger at the distal interphalangeal joint. Dr. Kester, the plastic and reconstructive surgeon who performed the surgery, saw the worker over the course of the next year in follow-up.

The worker participated in a physiotherapy program followed by an occupational rehabilitation program during which he completed a five week graduated return to work. He returned to full hours and duties on May 6, 2004.

The worker was assessed for permanent functional impairment (PFI) by a disability awards medical advisor (DAMA) on June 14, 2004. The DAMA's report of the physical findings includes a description of the worker's symptoms as well as the DAMA's observation of the site of injury, the worker's response to palpation, a

neurological assessment, range of motion (ROM) findings and grip strength testing results.

The DAMA noted the specific degrees of loss of ROM at each joint of the index finger and at the remaining joints of the long finger, as well as measurements of reduced grip strength. In addition there was impairment of sensation at the distal interphalangeal joint of the index finger and of the proximal interphalangeal joint of the long finger.

In a memo accompanying his PFI assessment report, the DAMA noted that an additional factor that could be considered was the worker's reduced grip strength. He said it was likely that the worker's grip strength would increase with time but would likely not reach his pre-injury strength. The DAO also noted that it was just over eight months since the injury incident and he underlined this comment.

The disability awards officer (DAO) reviewed the DAMA's report and memorandum and, using the computerized impairment rating calculator, determined that the worker's permanent functional impairment based on the amputation and range of motion and sensory deficit testing was 8.61%. The DAO then determined that the worker should receive an additional 9.0% for reduced grip strength based on the *Additional Factors Outline*.

The memo setting out this decision is dated June 30, 2004 and the decision was communicated to the worker by letter dated July 9, 2004.

A subsequent claim log entry by the DAO states that a quality review of the worker's permanent disability award has revealed an error in the award. The DAO states that the award and the medical information on which it was based were reviewed by the senior DAMA and the supervisor of disability awards. In their view, it was not appropriate to award the additional 9% for reduced grip strength in that such an award is only granted in rare circumstances when the award for reduced ROM does not adequately reflect the extent of the impairment due to the injuries. In this case, it was felt that the award based on the ROM findings was sufficient. The DAO also noted that the examining DAMA had indicated it was too early to grant an award of this nature.

This claim log entry was followed by an entry by the senior DAMA who stated that the DAO's entry was an accurate statement of their conclusions, following discussion of the worker's case. The senior DAMA stated that it would not be appropriate to award an additional impairment rating for loss of strength, given that the award for reduced ROM took into account the loss of strength in this case.

In keeping with the above, a second decision was issued to the worker on August 10, 2004 stating that the earlier decision regarding his permanent disability award had been reconsidered and, as a result, his permanent disability award had been reduced by the 9% previously awarded for loss of grip strength. The worker requested a review of that

decision and now appeals the decision of the review officer which confirmed the reconsideration decision.

## **Submission**

In his submission to WCAT, the worker describes ongoing symptoms of pain and swelling and difficulties with his activities of daily living. He states that some of the test results included in the DAMA's assessment report were not taken into account in the reconsidered decision. He submits that his permanent disability award should be based on the DAMA's test results not the DAO's interpretation of those results.

## **Law and Policy**

The worker's injury occurred after June 30, 2002. As a result, his entitlement to compensation is adjudicated under the provisions of the Act as amended by the *Workers Compensation Amendment Act, 2002* (Bill 49). Additional amendments to the Act, which deal with the appeal structure, appeal rights, the application of policy and other procedural matters which are contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63) are also relevant to the appeal.

Pursuant to the amendments enacted by Bill 63, WCAT panels must apply the published policies of the Board's board of directors. The policies relevant to this appeal are set out in the *Rehabilitation Services and Claims Manual Volume II* (RSCM II).

The worker's permanent disability award was based on the application of Chart 3 of the Permanent Disability Evaluation Schedule (PDES), which is a rating schedule compiled under section 23(2) of the Act. Section 239(2)(c) of the Act provides that WCAT has no jurisdiction to address a decision respecting the application of rating schedules compiled under section 23(2) "where the specified range of impairment has no range or has a range that does not exceed 5%." In this case, the range of impairment for each injured finger exceeds 5%. Accordingly, I consider that WCAT has jurisdiction to address the worker's appeal.

Item #97.40 sets out the role of the DAO with respect to determining a permanent disability award. It provides, in part:

It is the responsibility of the Board officer in Disability Awards to classify the disability as a percentage of total disability. In doing this, it is proper for the Board Officer to consider other factual and medical evidence as well as the report of the Disability Awards Medical Advisor or the External Service Provider. However, although the report of the Disability Awards Medical Advisor or the External Service Provider is not the only medical input that a Board officer may use, it will usually be the primary input, and caution will be used in referring to any other medical opinion.

The report of a Disability Awards Medical Advisor or External Service Provider takes the form of expert evidence which, in the absence of other expert evidence to the contrary, should not be disregarded. This does not mean that a Board officer must adopt the percentage indicated by the Disability Awards Medical Advisor or External Service Provider. It is always open to the Board officer to conclude that, although the functional impairment of the claimant is a certain percentage, the disability (i.e. the extent to which that impairment affects the claimant's ability to earn a living) is greater or less than the percentage of impairment.

The introduction to the PDES states that it is used for guidance in the measurement of partial disability under section 23(1) of the Act. It states that the PDES "does not necessarily determine the final amount of the section 23(1) award" and that "The Board is free to take other factors into account."

Item #39.10 of the RSCM II provides that, where an award is made by application of the PDES, the DAO is free to apply other variables in arriving at the final amount of the permanent disability award.

The Board has developed a document called the *Additional Factors Outline* which provides guidance regarding "other variables" that may be considered in determining the permanent disability award, where a scheduled award is involved. Section 111, Upper Extremity Conditions, addresses factors that may be taken into account where the worker has sustained injury to a hand and/or fingers. Under the heading *Strength*, it states:

In a **rare** case, if the DAMA believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods, the loss of strength may be rated separately...Decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (i.e., thumb amputation) that prevent effective application of maximal force in the region being evaluated.

[emphasis in original]

The formula and table provided for calculation of the loss of hand/grip strength as another variable are accompanied by a statement that these are only to be applied "on the **rare** occasion when the DAMA feels there is strong, consistent, objective evidence of weakness not taken into account by the amputation, the impairment of motion, not limited by pain and not covered by peripheral nerve ratings." [Emphasis in original.]

Subsections 96(4) and 96(5) of the Act establish the Board's authority to reconsider a previous decision and the limitations on that power. They state:

- (4) Despite subsection (1), the Board may, on its own initiative, reconsider a decision or order that the Board or an officer or employee of the Board has made under this Part.
- (5) Despite subsection (4), the Board may not reconsider a decision or order if
  - (a) more than 75 days have elapsed since that decision or order was made,
  - (b) a review has been requested in respect of that decision or order under section 96.2, or
  - (c) an appeal has been filed in respect of that decision or order under section 240.

The policy at item #C14-103.01 provides direction on the situations in which a Board decision may be reconsidered. It provides, in part:

**(e) Grounds for reconsideration**

Subject to the limitations set out above, the Board may reconsider a decision on its own initiative where:

- there is new evidence indicating that a prior decision or order was made in error;
- there has been a mistake of evidence, such as:
  - material evidence was initially overlooked, or
  - facts were mistakenly taken as established which were not supported by any evidence or by any reasonable inference from the evidence;
- there has been a policy error such as:
  - applying an applicable policy clearly incorrectly, or
  - not applying an applicable policy; or
- there has been a clear error of law, such as a failure by the Board to follow the express terms of the Act.

**Reasons and Decision**

The first issue is whether the Board had the authority to reconsider the permanent disability award of July 9, 2004. On this point, I am satisfied that there were grounds for reconsideration in keeping with policy item #C14-103.01. For the reasons set out below, I consider that the DAO clearly, incorrectly applied an applicable policy in arriving at the decision of July 9, 2004. I find that the DAO improperly exercised the discretion to consider other factors in the application of the PDES and policy at item #39.10 of RSCM II.

In *Administrative Law in Canada* (3<sup>rd</sup> edition), the author Sara Blake discusses the proper exercise of discretion by statutory decision makers. She states, at pages 89 and 90:

Discretion is not absolute or unfettered. Decision makers cannot simply do as they please. All discretionary powers must be exercised within certain basic parameters. The primary rule is that discretion should be used to promote the policies and objects of the governing Act. These are gleaned from a reading of the statute as a whole using ordinary methods of interpretation. Conversely, discretion may not be used to frustrate or thwart the intent of the statute. A discretionary power should not be used to achieve a purpose not contemplated by the Act that grants the power. This use is labelled as an “improper purpose”.

All discretionary decisions must be based primarily upon a weighing of factors pertinent to the policy and objects of the governing statute. “A public authority in the exercise of its statutory powers may not act on extraneous, irrelevant and collateral considerations”. Nor may the public authority ignore relevant considerations. It should consider all factors relevant to the proper fulfillment of its statutory decision-making duties.

It of course follows that discretionary decisions should be based on evidence relevant to the powers to be exercised. Selective use of facts is unacceptable.

In this case, the DAO’s decision involved the exercise of discretion under a policy, not under the Act. But, I consider that some of the same principles apply in this circumstance, given that the policies at item #39.10 and the PDES are intended to give effect to section 23(1) of the Act and that sections 99 and 250(2) of the Act impose an obligation on the adjudicators deciding matters under the Act to “apply a policy of the board of directors that is applicable in that case.”

Although item #39.10 states there is discretion to take other variables into account in determining the percentage of impairment resulting from an injury, the PDES establishes the fundamental framework for rating the degree of impairment associated with the types of injuries that are included in the PDES. The use of the PDES is intended to result in compensation that reflects the intention of section 23(1) of the Act and to effect consistency in permanent functional impairment awards for similar types of injuries. The discretion to consider other variables under item #39.10 assists in modifying an award so that it reflects the unique impact that similar types of injuries may have on different individuals. But, the discretion provided under item #39.10 of the RSCM II is not an unfettered discretion which may be exercised in an arbitrary manner. The *Additional Factors Outline* was established as a guide to the exercise of discretion under item #39.10.



The *Additional Factors Outline* states that loss of strength is an additional factor which may be taken into account when assessing an injury to a hand but loss of strength cannot be rated in the presence of decreased motion, which is a factor that prevents effective application of maximal force in the area being evaluated. In this case, the worker has reduced ROM which would interfere with his grip strength. Accordingly, his loss of grip strength should not be used as a factor in determining the extent of his impairment. In addition, the *Additional Factors Outline* states that loss of strength is only taken into account in those rare cases where the DAMA believes that the loss of strength is an impairing factor not adequately recognized by other factors. In this case, the examining DAMA merely commented that loss of strength could be taken into account in determining the worker's permanent disability award; there is no indication that he turned his mind to the relationship between the impairment attributable to reduced ROM and loss of grip strength. In addition, the examining DAMA did not indicate that the worker's case might be one of those rare cases where the percentage of impairment based on reduced ROM did not adequately compensate for the impairment due to reduced strength. As a result, there was no basis for taking into account loss of grip strength in the worker's case, and according to the *Additional Factors Outline*, grip strength should not have been taken into account in assessing the impairment due to the compensable injuries.

The improper application of the *Additional Factors Outline* resulted in a conclusion that the impairment resulting from injuries that left stiffness in the two affected fingers was significantly greater than the impairment resulting from the amputation of both of those fingers. It is inconsistent with the objectives of the PDES to provide an impairment rating for the worker's injury that is grossly disproportionate to the impairment ratings under the PDES for injuries of this nature in the absence of any indication that the worker's injuries represented a "rare" case. As a result, I consider that the policy at item #39.10 was clearly incorrectly applied.

Turning to the substance of the reconsideration decision, I am satisfied that the percentage of impairment related to reduced grip strength had already been taken into account in the percentage of impairment based on the measurements of reduced ROM.

I consider that the further consideration suggested by the examining DAMA was undertaken by the senior DAMA and supervisor of disability awards and that they specifically considered the relationship between the reduced ROM and the loss of strength in arriving at the conclusion that there had been an error made in assessing the level of impairment.

In this regard, Dr. Kester's final report of December 2, 2004 supports the conclusion of the senior DAMA that the award of 8.61% adequately reflects the extent of the PFI due to the worker's injuries. In this report, Dr. Kester notes the worker's concerns regarding the continued decrease in grip strength. Dr. Kester states that he thinks this is a permanent factor given the stiffness in the worker's hand and the amputation. He also states there will likely be some improvement in grip strength but it will never return to

normal. In addition, he also notes the worker's concern regarding the reviewed disability award which is now based on a rating of impairment of slightly over 8%. Dr. Kester made the following comment on this latter point "Given his functional abilities and the level of his amputation I think that this is a reasonable number based roughly on the American Society for Surgery of the Hand Disability Evaluation report readings." He said that he had advised the worker, through his interpreter, "that his 8% disability was reasonable."

In view of these comments made by Dr. Kester and the review undertaken by the senior DAMA, there is no basis for awarding the worker an additional amount for loss of strength given that such an award is only to be made in rare situations and that the senior DAMA and Dr. Kester have both indicated that the award of 8.61% appropriately reflects the worker's PFI.

### **Conclusion**

I find that the Board had authority under the Act and policies to reconsider the permanent disability award decision. I find that the permanent disability award was appropriately reduced by 9%.

I confirm the decision of the review officer in *Review Division Decision #23613*, dated March 15, 2005.

No expenses were requested, and it does not appear from a review of the file that any expenses were incurred related to this appeal. I therefore make no order regarding expenses in this appeal.

Marguerite Mousseau  
Vice Chair

MM/ec/gw