Noteworthy Decision Summary

Decision: WCAT-2006-02310 **Panel**: Steven Adamson **Decision Date:** May 30, 2006

Psychological assessment – Permanent functional impairment – Post Traumatic Stress Disorder – American Medical Association Guide to Evaluation of Permanent Impairment – Workers Compensation Board Guidelines on Permanent Psychological Impairment – Policy item #115 of the Permanent Disability Evaluation Schedule – Item #38.00 of the Rehabilitation Services and Claims Manual, Volume I

This decision is noteworthy for providing a detailed discussion of the process for determining permanent functional impairment awards for psychological impairment.

The worker, a railway worker, was attacked by a cougar. The Workers' Compensation Board (Board) awarded the worker a permanent disability award based on 9.1%. This included an award of 5% for functional psychological impairment. The worker appealed to the former Review Board, which denied his appeal on this issue. The worker appealed to the Workers' Compensation Appeal Tribunal (WCAT).

The panel reviewed the history of the claim. A Board psychologist had assessed the worker for Post Traumatic Stress Disorder (PTSD) over a number of years. He diagnosed the worker with PTSD under Axis 1 of the *Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition*. He concluded the worker's psychological impairment, according to the *American Medical Association Guide to Evaluation of Permanent Impairment* (AMA Guides) ratings for Category 115, Emotional (Mental) and Behavioural Disturbances should be rated at Class A, Level L. The range of compensation for this category was 0% to 25%. The Board subsequently rated the worker's functional psychological impairment at 5%.

The worker agreed that his permanent psychological impairment was appropriately categorized under mild Category 115 – Emotional (Mental) and Behavioural Disturbances. However, he submitted the percentage should have been in the range of 15% to 20%.

The panel noted that policy item #38.00 of the *Rehabilitation Services and Claims Manual, Volume I* details the decision-making procedure for assessing permanent psychological impairment. The panel also noted that item #115 of the *Permanent Disability Evaluation Schedule* provides the guidelines for assessing the level of permanent psychological impairment. The panel further noted that the Board introduced guidelines for assessing permanent psychological impairment in 2004. While these guidelines were not in effect at the time of the worker's assessment, the panel found they provided a valuable reference point to ensure consistency of adjudication.

The panel then addressed the issue of whether the Board correctly assessed the worker's permanent psychological impairment at 5%. The panel noted that, in assigning a percentage for impairment within a mild category of psychological impairment, it is necessary to consider a number of factors including the nature of the residual symptoms, the increased risk of significant decompensation, the likely attenuation of psychological impairments through job accommodation and the amount of ongoing treatment and support necessary. In this case, the panel concluded that the worker suffered from a mild residual degree of PTSD, had some increased risk of decompensation under stressful situations, did not have his permanent psychological

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impairment completely attenuated by his job placement, and was not currently receiving any treatment or support. The panel concluded the worker was entitled to a 12.5% award for his permanent functional psychological impairment. The worker's appeal was allowed.

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Panel: Steven Adamson, Vice Chair

Introduction

A cougar attacked this railway worker on May 25, 1995 as he inspected a section of track at work. In a May 15, 2000 decision letter, the Workers' Compensation Board (Board) informed the worker he was entitled to a 9.1% permanent functional impairment (PFI) based disability award, effective January 6, 1997, using a wage rate based on earnings during the three years prior to the date of injury. The worker appealed this decision to the former Workers' Compensation Review Board (Review Board). In findings dated August 5, 2003, a Review Board panel allowed the worker's appeal after concluding it was appropriate to add 0.5% to the physical impairment component of the award for hypersensitivity and tenderness that resulted in a fairly significant reduction in grip strength. The worker appealed the Review Board findings to the Workers' Compensation Appeal Tribunal (WCAT).

Issue(s)

Whether the worker's disability award was properly assessed pursuant to section 23 of the *Workers Compensation Act* (Act). Specifically,

(1) whether the disability award wage rate was properly determined;

(2) whether the percentage awarded for functional psychological impairment (5%) was properly determined; and

(3) whether the worker suffered any loss of earnings (LOE) as a result of his permanent injuries.

In defining the issues above, I note item #14.30 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) provides that WCAT will generally restrict its decision to the issues raised by the appellant in the appellant's notice of appeal and submissions to WCAT. However, an exception to this general proposition occurs where the subject of appeal is a permanent disability award. In such cases, panels may address any aspect of the award decision without notice to the parties.

In this case, the worker's counsel carefully set out the issues the worker wished to appeal in his November 4, 2003 written submission. Counsel took issue with the wage rate used to determine the disability award. By implication, if this panel determines the worker is entitled to a higher wage rate, then the issue of whether an LOE has occurred will need to be revisited. Counsel also took issue with the percentage assigned for the

worker's functional psychological impairment. While agreeing with the assignment of Category 115 – Emotional (Mental) and Behavioural Disturbances, counsel disagreed with the Board's determination that the worker was only entitled to a 5% award where the possible range was 0% to 25%. Counsel did not take issue with the calculation of the worker's physical PFI and the effective date of the award.

While I recognize that it is open to me to address all the issues related to the decisions that make up the worker's May 15, 2000 disability award, I have chosen to restrict myself to the three issues set out above. The worker's counsel and the employer have not raised any arguments concerning the other components of the disability award decision and I see no reason to disturb them.

Jurisdiction and Procedural Matters

The worker appealed the August 5, 2003 Review Board findings to WCAT in the notice of appeal dated September 2, 2003. On March 3, 2003, the former Appeal Division and the Review Board were replaced by WCAT. Section 41(3) of the *Workers Compensation Amendment Act (No. 2), 2002* (Amendment Act) authorizes WCAT to hear this appeal as it arises from a finding issued by a Review Board panel that was seized of the appeal on March 3, 2003. My jurisdiction in these appeal proceedings, therefore, arises under the provisions of section 41 of the Amendment Act.

Under section 254 of the Act, 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.

The worker is represented by counsel in his appeal. The employer is participating in the worker's appeal. In the notice of appeal, the worker did not seek an oral hearing. I have reviewed the criteria respecting oral hearings found in WCAT's MRPP. The rule in item #8.90 in the MRPP states that WCAT will normally grant a request for an oral hearing where the appeal involves a significant issue of credibility. This appeal does not.

An oral hearing may also be granted where there are significant factual issues to be determined. In this case, the facts are not significantly in dispute. An oral hearing may also be held where there are multiple appeals of a complex nature, complex issues with important implications for the compensation system or other compelling reasons for convening an oral hearing. The example given under item #8.90(d) of the MRPP is where an unrepresented appellant has difficulty communicating in writing.

The MRPP states that WCAT will normally conduct an appeal on a read and review basis where the issues are largely medical, legal or policy based and credibility is not at issue. The issues in this appeal are largely medical and policy based. As credibility is not at issue and there is no other compelling reason for convening an oral hearing, this appeal will proceed on a read and review basis.

I have considered the question of what policy applies in this case and find, per the *Rehabilitation Services and Claims Manual, Volumes I & II* (RSCM I and RSCM II) at policy item #1.03(b), that the former provisions found in the RSCM I apply as the injury in question and the first indication that the injury was permanent both occurred before June 30, 2002. I have also considered which version of the *Permanent Disability Evaluation Schedule* (PDES) applies. In this case, the worker's section 23(1) permanent disability award assessment occurred before August 1, 2003. As such, the applicable rating schedule compiled under section 23(2) is the PDES published as Appendix 4 of the RSCM I. (See *Resolution 2003/06/17-06* of the board of directors of the Board.)

Background and Evidence in General

The background and evidence concerning this appeal was set out in detail in the Review Board findings dated August 5, 2003 (Appeal #966647-C) and will not be repeated in this decision.

(1) Disability Award Wage Rate

Evidence, Findings and Reasons

When attacked on May 25, 1995, the worker was employed as a relief deputy road master. The employer's report of injury dated May 25, 1995 noted the worker started this position on April 21, 1995 and was earning $22.075 per hour.

A June 13, 1995 handwritten memo to file, which recorded information received from the employer, indicated the worker had earnings of $7,417.20 during the three months prior to his injury and $39,886.05 during the year before his injury. The worker was in a new position at the date of injury. He had lost 11 days pay ($1,942.60) from March 10 to 26, 1995 due to a strike.

In a memo dated August 2, 1995, a vocational rehabilitation consultant (VRC) noted her conversation with the employer regarding the worker's possible return to work. The employer informed the VRC that the worker's job was still available. The VRC stated she was able to determine that the job at the date of injury was a relief supervisory position, which began in April 1995. The employer was uncertain as to what the worker's actual position would be once he returned to work.

A telephone memo dated February 20, 1996 recorded the employer's statement that the worker's earnings during three and five years prior to the date of injury were $126,690.58 and $205,020.00, respectively. The employer confirmed the worker was in the relief supervisory position on the date of injury and would have remained in that position had it not been for the injury. The worker's regular job was that of a section foreman earning $18.299 per hour.

A telephone memo dated February 26, 1996 noted the worker's relief supervisory position would not have become permanent. The employer explained the job was temporary to perform rock patrols.

In her memo dated March 4, 1996, the claims adjudicator explained her decision to use the worker's earnings for three years prior to the date of injury to calculate his long-term wage rate ($809.89 per week gross). She noted the one-year and three-months amounts resulted in lower weekly rates because of a strike. The adjudicator also noted the worker had often performed the relief supervisory job each year and, therefore, thought it was best to use a three-year period to best reflect his long-term earnings.

The March 11, 1996 letter, from the Board to the worker, explained the adjudicator's decision to use the period of three-years earnings prior to the date of injury to calculate the long-term wage rate on the claim. The adjudicator stated she chose this figure as it best reflected the worker's relief work earnings, strike periods and layoffs.

In the May 3, 2000 memo to file, the disability awards claims adjudicator (DACA) recorded her decision to use the worker's earnings in the three years prior to the date of injury ($3,519.00 per month) to calculate the wage rate for pension purposes.

At the Review Board oral hearing on October 23, 2002, the worker testified that at the time of his injury in 1995 he was working as a relief deputy road master. He enjoyed this work and his goal was to become a permanent deputy road master. The worker testified that he began working as a relief deputy road master in another location from 1985 to 1987. He explained he returned to his track maintenance foreman position in the mid to late 1980s to retain his union seniority. From April 1987 until July 1987, he worked as a surfacing supervisor in order to get more experience on the road. From July 1987 until February 1991, the worker was in a track maintenance foreman union position. After this, from early 1991 until the date of injury, he alternated between working as a relief deputy road master and a track maintenance foreman. With reference to the Per Pay Work History sheet (December 1981 until March 1995) submitted to the Review Board, the worker reviewed the periods between 1991 and 1995 where he worked in both positions. In early 1995, he had worked as a relief deputy road master and, with the exception of the strike period, stayed in this position up until the time of his injury in May 1995.

The worker told the panel he intended to apply for a deputy road master job if one became available. After the work injury, he stated one of these positions (now renamed as assistant track maintenance supervisor) became available. The worker testified that the company acknowledged he was qualified, but for his injuries, for such a position. In fact, the individual who got the job was a lead hand, who had worked under him prior to the injury.

The worker agreed the assistant track maintenance supervisor job he missed out on paid considerably more than his date of injury earnings (approximately $66,000.00

full-time with reference to the MS05 grade in the employer's 2002 salary program submitted to the Review Board at the oral hearing).

The Review Board panel concluded the wage rate used for the worker's disability award was properly based on his actual earnings prior to the injury rather than the earnings he possibly would have earned had it not been for his injury. The panel found the worker had worked on and off as a relief deputy road master and track maintenance foreman from 1985 until the attack in 1995. The panel made findings regarding periods the worker was engaged in these two positions during the three-year period prior to the work injury in 1995. It found the worker worked 9 months, between May 25, 1992 and March 9, 1993, in the relief deputy road master position and 16 months, between March 9, 1993 and July 25, 1994, in the track maintenance foreman position. From August 1994 until the injury in May 1995, the worker alternated back and forth between the two positions.

While the panel acknowledged the worker's goal was to become a full-time permanent deputy road master, it concluded this was not his position at the date of injury. The panel concluded the worker would have continued performing both his relief supervisory position and his foreman position in the pattern established prior to the injury. While appreciating the worker was qualified for two assistant track maintenance supervisor positions that became available two years after the injury, the panel concluded it was too speculative to conclude the worker would have attained one of these positions.

The Review Board panel went on to decide the use of three-years earnings prior to the date of injury was the period best reflective of the worker's historical earnings pattern. In making that finding, the panel concluded the use of the three-month period prior to the date of injury was not appropriate as there had not been a relatively fixed change in the worker's pattern of earnings. The panel also rejected the use of the one-year earnings period because it contained a period of unemployment due to a strike.

In his November 4, 2003 written submission, the worker's counsel argued the Review Board failed to properly assess the rate used to calculate the worker's disability award. Counsel argued it was not speculative to conclude the worker would have attained the permanent deputy road master position had it not been for his work injury. During the three-year period prior to the injury, counsel calculated, the worker actually worked 47% of his time as a deputy road master. Further, counsel submitted the worker had the skill and experience to perform this job and was merely waiting for a position to open up so he could compete for it. Counsel argued it was the worker's absence from work after the injury that gave a subordinate the opportunity to acquire the necessary qualifications to attain the deputy road master job. Had it not been for the cougar attack, counsel argued it was more likely that the worker, with his greater experience, would have attained this higher paying job. Counsel acknowledged the lack of certainty of the worker getting the deputy road master position and, therefore, reduced the increased wage rate requested to 25% from the actual 50% increase the worker would have received if he had attained the deputy road master job.

The employer responded with a written submission dated June 11, 2004. The employer noted the Board cannot set a wage rate for any purpose higher than the maximum allowed ($52,400.00 in 1995). The employer explained what a realistic yearly income would have been in the assistant track maintenance supervisor position and criticized the worker's counsel's calculation that the worker would have earned double his pre-injury income in the future. Additionally, the employer argued that a great deal of competition occurs for the assistant track maintenance supervisor positions and workers do not automatically move up into these positions. The employer argued the worker's current position as "SAP super user" (teaching and mentoring others in the use of this accounting program) may be upgraded from an administrative to a management grade position with a resulting rate of earnings close to the Board maximum in 1995.

At the relevant time, section 33(1) of the Act set out a variety of methods for calculating a worker's average earnings and earnings capacity. The section stated that the method chosen to calculate the average earnings should be the one that best represents the actual LOE suffered by the worker by reason of his injury.

Policy item #40.11 entitled "Average Earnings Prior to Injury" notes that the average earnings prior to the injury are calculated according to the normal rules set out in policy item #68.00 of the RSCM I. In making this calculation, regard will not normally be had to promotions which might have been received if the worker had not been injured. This is so even though the worker returns to the pre-injury job following the injury, is promoted, but is unable to remain in the job because of the disability.

Policy items found in the RSCM I provide guidance for determining how average earnings at the time relevant to this appeal are calculated. Policy item #67.20 of the RSCM I discusses the requirement for an eight-week review of the wage rate set on the claim to determine the rate that best represents the worker's long-term earnings loss. Normally, earnings in the one-year period prior to the injury are obtained and used to reflect the worker's long-term wage loss. A prior three-month period can also be used if there has been a relatively fixed change in the worker's earning pattern which is deemed likely to continue into the future. The policy item goes on to state that in some instances, the adjudicator may decide to select the three-year earnings figure prior to the injury. These situations are normally limited to cases where there are extenuating circumstances in the one-year period prior to the injury and, therefore, the use of that one-year period would be incompatible with the worker's normal historical earnings pattern.

Policy item #68.00 of the RSCM I states that permanent disability pensions are normally based on the long-term wage rate used for temporary disability benefits, but that a different rate can be used for pension purposes, if there are valid reasons for this.

After reviewing the evidence on file and the parties' written submissions, I find the Board appropriately calculated the worker's wage rate for pension purposes. While appreciating the worker had goals for advancement to a deputy road master (later

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renamed the assistant track maintenance supervisor) position, I find that, at the time of the injury in May 1995, the balance of the evidence fails to indicate the worker would have attained this position had it not been for his injury. It is true that the worker's pattern of employment in the years and months prior to the injury indicated he often provided relief in the deputy road master position. However, at the time of the injury, there was no offer of a permanent position or even an indication that such a position was opening and that the worker was the most likely successful candidate. The evidence indicates that it was not until two years after the injury that a similar position opened up and I find insufficient evidence to indicate it was more likely than not that the worker would have been the successful candidate. In making this finding, I appreciate the worker had a great deal of experience in relieving in the deputy road master job and he was qualified to attain it permanently. However, based on the evidence before me, I find it speculative to conclude the worker would have attained the deputy road master job permanently and, therefore, I do not find his wage rate for pension should reflect the attainment of this position.

I have considered what the most appropriate period of earnings prior to the date of injury is to calculate the wage rate for pension purposes and find the Board properly utilized the three-year period in calculating the wage rate. I agree with the Review Board panel's conclusion that a three-month period prior to the date of injury is not appropriate as the evidence fails to indicate a relatively fixed change in the worker's earning pattern. Further, I agree with the Review Board panel's conclusion that a three-year period is preferable to a one-year period because of the time the worker went without earnings due to a strike. Overall, I find the three-year pre-injury earnings period provides the best representation of the worker's actual LOE by reason of his injury. This period captures an established pattern of his work in the track maintenance foreman position with periods of time spend relieving in the deputy road master position.

(2) Percentage Awarded for Permanent Psychological Impairment

Evidence, Findings and Reasons

Dr. L, a Board psychologist, assessed the worker in February 1996 for the purposes of confirming the diagnosis of post-traumatic stress disorder (PTSD), determining whether any such problem found was permanent and recommending treatment. Dr. L noted the worker's description of his ongoing difficulties with flashbacks and with sleeping because of his dreams. Seeing bush country, seeing cougars on television and even seeing cats, triggered his flashbacks. The worker stated he had a hard time making decisions and was fearful of camping and going into the bush. Dr. L concluded that ongoing symptoms of re-experiencing the attack through flashbacks and dreams, the phobic reactions to situations that remind him of the attack, increased autonomic reactivity, cognitive indecisiveness, withdrawal and irritability, all tended to confirm the PTSD diagnosis. Dr. L found it was too early to decide if the condition was permanent and recommended further psychological treatment.

Dr. L assessed the worker again in June 1997. In his report, Dr. L noted the worker felt his move to a new job in the lower mainland in September 1996, despite the stress associated with relocating, had helped his PTSD symptoms. When pressed, the worker felt he was 20% better. He still had flashbacks, but they were less frequent occurring three times over the course of ten days. The worker stated he still awoke in a sweat at times. The worker remained acutely aware of any reports of cougar attacks or sightings in the media. He stated that the sight of cougars on television triggered intrusive thoughts. The worker stated he was unable to barbecue in any campground due his fearfulness. He questioned his memory and checked doors and locks because of this problem. The worker stated his libido was decreased since the attack. After the attack, he often "blew up" at his wife. These episodes continue, but he was controlling outbursts better now. Dr. K concluded the worker's PTSD symptoms had improved and recommended further psychological treatment.

In her termination report dated July 15, 1998, the worker's treating counsellor listed the accomplished recovery tasks associated with the worker's PTSD. These included psychological healing in the form of a reduction in both the intensity and frequency of re-experiencing symptoms, the establishment of effective coping strategies in response to triggered reactions and the reduction of avoidance coping sufficiently to allow the worker to function comfortably without restriction in his current work and personal life. However, the counsellor believed it was likely the worker would permanently choose to avoid wooded and remote areas. She also found the worker had accomplished a lifestyle adjustment to an urban area reasonably safe from wild animal attack. He had also accomplished a successful re-entry into work, albeit at an underemployment level.

The July 15, 1998 report concluded the worker likely had permanent residual PTSD symptoms. While the worker experienced significant improvement in coping and in the reduction in intensity and frequency of distress, he still reacted to representations of cougars, wooded settings, discussions or questions about the event or his hand by others and occasionally he experienced a repetitive nightmare of the attack event. The worker's physical scars on his face and the loss of his finger, and his pain and disability in his hand were constant reminders of the event and his loss. Further, his frustration with work and uncertainty with its future reminded him he was not continuing with his anticipated career path because of the attack. The counsellor stated that all reminders tended to reactivate the memory of the attack to some degree, the permanent effects of the sustained injuries, the changes to self and identity and losses. It was concluded that the symptoms of re-experiencing had faded and were more difficult to activate, but were not extinguished. The worker's avoidance symptoms were less restrictive in his current lifestyle, but prohibited him from working outdoors in wooded or remote settings and from selecting natural wooded areas for personal recreation. These symptoms remained more easily activated during circumstances of higher general stress, thus it was the counsellor's opinion that the worker's tolerance for stress, noise and multiple demands would likely remain lower than normal for him.

The report also noted the worker still struggled with anger and irritability accompanied by emotional outbursts, all of which were much less intense than earlier in the claim. This problem appeared most frequently in residual reactions of frustration, sadness, anxiety, over-stimulation or fatigue. The worker also had some degree of sadness, loss of enjoyment and motivation and depressive reaction due to concrete losses and loss of his former identity. After noting progress in more effective and constructive coping strategies, the counsellor saw a more relaxed and engaging personal style, with more smiles and humour, with motivation and plans for continued recovery, improvement and desire for career opportunities.

The counsellor concluded the worker had successfully established a constructive life routine with his home and family in the lower mainland. The worker described himself as productive and reliable in his work and hoped to have more career opportunity. It was noted, however, that his sensitivity to stress and residual trauma reactions likely caused him to be more emotionally reactive in his familial interactions, and to isolate himself more than was typical prior to the trauma. The counsellor stated the worker would benefit from further therapeutic reprocessing sessions, which may continue to reduce the re-experiencing cluster of symptoms, as well as reduce his expression of anxiety, fear and/or depression as irritability and anger.

In his July 19, 1999 psychological assessment, Dr. L noted the worker seemed somewhat subdued with more resignation and a desire for closure, when compared to his previous assessments. Despite becoming tearful at times during the interview, Dr. L found the worker's affect was appropriate overall, he was oriented to time, person and place and had no signs of any obvious cognitive deficits, hallucinations, delusions nor gross suicidal ideation. The worker reported ongoing antidepressant drug treatment. While he wondered about the need for occasional psychological support, he had not seen a counsellor since the previous year. The worker felt his work situation was "not great" because he was earning less now in his office job than he would be making in the field. He was dissatisfied that some individuals who used to work below him were now above him in standing. Despite working hard and a willingness to train, the worker felt his vocational options were limited. He also noted his wife had only found part-time work since the move and he complained about higher costs of living in the lower mainland. The worker described his psychological state as "not being too good." He noted ongoing problems with irritability and anger, which resulted in blowing up and screaming at his wife and children. He was also more argumentative with his wife and had a decreased libido. The worker reported some conflict with an individual at work. He stated his mood was up and down and admitted to being depressed at times. The worker reported being bothered when others discussed going camping and being outdoors on vacation. He also had flashbacks when he looked at or thought about his scars and how he is stuck in his present work situation. The worker stated his flashbacks occurred a couple of times a week and the number of occurrences increased when he was under stress. He also reported nightmares a couple of times a

month where he awoke in a cold sweat. The worker felt his concentration and memory were not as good as he had to check to see if the door was locked. The worker reported difficulty in tolerating noise.

Based on the file information and his current assessment, Dr. L concluded the worker made some significant improvements in his symptoms over the years. However, in terms of his flashbacks, nightmares, intense distress and persistent avoidance of cues of the attack, irritability, sleep problems and impaired concentration, Dr. L believed the worker still seemed to be experiencing sufficient symptoms to warrant the diagnosis of a mild residual degree of PTSD.

In his March 17, 2000 summary of evaluation of permanent psychological impairment, Dr. L reviewed the worker's psychological history in detail. Dr. L diagnosed the worker with a Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition (DSM-IV) diagnosis of: Axis I, PTSD, Chronic; Axis II, no diagnosis; Axis III, multiple injuries to the right hand, shoulder and face from cougar attack including amputated right middle finger and multiple scars; Axis IV, occupational problems (dissatisfaction with present position), economic problems (decreased earnings and higher cost of living in new location); Axis V, global assessment of functioning currently at 70 (pre-accident 90).

Dr. L concluded the worker's psychological impairment, according to the American Medical Association (AMA) Guides for Category 115, Emotional (Mental) and Behavioural Disturbances, was Class A, Level L.

Dr. L described the PTSD psychological impairment under the heading of Activities of Daily Living as having a partial impact on sexual function, sleep and basic social and recreational activities. He noted the worker had minor memory problems at times with work procedures and detailed instructions. In the area of social functioning, Dr. L noted evidence of an increase in irritability or intolerance, as well as sensitivity to criticism from superiors. Overall, however, the worker had the ongoing ability to interact appropriately with other individuals. In terms of concentration, persistence and pace, the worker has some distractibility but had an ongoing ability to carry out instructions, perform within a schedule, be punctual, maintain a regular schedule and complete a normal workday and week. Under the heading Deterioration and Decompensation in Work or Work-like Settings, Dr. L noted the worker's ability to adapt to stressful situations may be marked by increased irritability, but he was still able to respond appropriately to changes, be aware of hazards, use public transportation, travel, set realistic goals and make plans independently.

Dr. L stated the impact of the permanent psychological impairment was such that it would be mild within the safety of an office setting in terms of work factors (type of schedule, degree of structure, occupational stress, cognitive demands and social demands) and work performance areas (understanding and memory, sustained concentration and persistence, social interaction and adaptation).

Dr. L opined the worker was unable to function in settings that triggered fears of the trauma of the cougar attack, such as working in rural, outdoor environments similar to the site of his attack.

In a memo dated April 13, 2000, the Board's Disability Awards Department's director recorded the Psychological Disability Award Committee (PDAC) had met and decided, according to the interim schedule of psychological impairments, to rate the worker's functional psychological impairment at 5%. The director noted that the committee had considered the medical, psychological and neurological examination and assessments on file along with other information in rendering its rating. It had also considered the impact of the compensable injury and conditions on the worker's overall and vocational functioning in rating the level of impairment.

In the May 3, 2000 memo, the DACA noted the PDAC's rating of 5% permanent functional psychological impairment and added this percentage to the amount assessed for the worker's physical impairment without further discussion. The May 3, 2000 memo formed part of the May 15, 2000 disability award decision letter.

In the Review Board findings dated August 5, 2003, the panel recounted the worker's testimony at the oral hearing that he continued to perform a clerk type job in the lower mainland. He was angered when he met workers he used to supervise who were now more senior to him. The worker stated this anger spilled out and affected his relationship with his children. He identified his stress as being related to the wage issue and his anger with the Board and the system. The worker noted his anger resulted in increased drinking. He stated he no longer had a good relationship with his wife. The worker informed that he lost his temper with his wife for no apparent reason. He noted that he was forced to deny his children a pet dog or cat because it would cause flashbacks, sweating and anger. The worker told he panel he suffered more than 10 flashbacks lasting 10 to 15 minutes in the previous month. He also reported dreaming of the event approximately 4 times a week. The worker described his need to double check door locks to feel secure. He was unable to ski since the incident. He felt his memory was not as good since the incident, especially when it came to numbers. The worker confirmed he had not sought any further psychological treatment since July 1998 and believed his condition had remained the same since that time.

In the August 5, 2003 findings, the Review Board panel noted the worker did not dispute Dr. L's conclusion that he had mild Category 115 impairment, as noted above. The panel identified the worker's issue as one concerning how the PDAC arrived at the 5% rating where the range for this measured impairment was 0% to 25%. The panel concluded the PDAC's rating was correct, as it appeared to be consistent with the conclusions reached in the July 15, 1998 report from the treating counsellor. The panel went on to conclude the worker had some residual PTSD symptoms, but these did not appear to impair his ability to function in his adapted life routine. His symptoms, however, were likely to limit the range of choice in his personal and occupational domains.

In his written submission dated November 4, 2003, the worker's counsel agreed Dr. L appropriately categorized the worker's permanent psychological impairment as mild Category 115 – Emotional (Mental) and Behavioural Disturbances. Counsel argued the assignment of 5% to the worker's impairment was incorrect, however. After noting the possible range of percentage in this category, counsel submitted it was more appropriate to assign a percentage in the range of 15% to 20%. In seeking this higher percentage, counsel recognized the AMA Guide to Evaluation of Permanent Impairment (4d) does not contain guidelines to assist with the selection of the percentage within the ranges listed. Counsel argued a higher percentage is warranted because the worker's psychological impairment, based on his uncontested evidence, continues to be considerable. He emphasized the worker's ongoing symptoms, which included anger with his lost opportunities for advancement at work, losing his temper with his children, excessive use of alcohol, a souring of relations with his wife, continuing flashbacks and dreams of the attack, the need to be hyper-vigilant with security, an inability to use parks and camp and a loss of memory ability, demanded a higher percentage award.

The employer's written submission dated June 11, 2004 appears to support a finding that the worker's permanent psychological impairment award, as assessed by experts, should remain at 5%.

Policy item #38.00 of the RSCM I details the decision-making procedure for assessing permanent psychological impairment. This procedure authorizes the Board's PDAC to assess the percentage of disability resulting from a permanent psychological impairment.

Item #115 of the PDES provides the guidelines for assessing the level of permanent psychological impairment.

115	**Emotional (Mental) and Behavioural Disturbances** The impairment levels below relate to activities of daily living, social functioning, concentration, and adaptation	
(a)	Mild - impairment levels are compatible with most useful functioning	0-25%
(b)	Moderate - impairment levels are compatible with some, but not all useful functioning	30-70%
(c)	Marked - impairment levels significantly impede useful functioning	75-95%
(d)	Extreme - impairment levels preclude most useful functioning	100%

In order to provide consistency of adjudication, the Board introduced guidelines for assessing permanent psychological impairment effective July 19, 2004 [http://www.worksafebc.com/regulation_and_policy/practice_directives/disability_awards/assets/psych_impairment.pdf] (last visited May 23, 2006). These guidelines were developed within the approved schedule of impairments in the PDES and are intended to address "a lack of transparency to stakeholders as to how decisions are reached." While these guidelines were not in effect at the time of the March 2000 assessment and are not binding, I find they provide a valuable reference point to ensure consistency of adjudication. The guidelines for "mild" impairments are produced below:

MILD IMPAIRMENT LEVELS ARE COMPATIBLE WITH MOST USEFUL FUNCTIONING	
• minor residual symptoms • no, or little significant increased risk of decompensation • accommodation or different job would likely attenuate psychological impairments	5%
• minor residual symptoms • some increased risk of decompensation under stressful situations • accommodation or different job would not likely completely attenuate psychological impairments • only sporadic continuing treatment likely	10-15%
• mild residual symptoms • moderate increased risk of decompensation under stressful situations • accommodation or different job would not significantly attenuate psychological impairments • continuing treatment and support likely	20-25%

I start with a consideration as to whether the worker's permanent psychological functional impairment was properly determined to be Category 115 – Emotional (Mental) and Behavioural Disturbances of a mild degree. RSCM I at item #97.40 states that the PFI report, in this case Dr. L's March 2000 evaluation, takes the form of expert evidence, which in the absence of other expert evidence to the contrary, should not be disregarded. In the absence of expert evidence to the contrary and noting the parties did not dispute this categorization, I find the worker's permanent psychological functional impairment was properly identified as Category 115 – Emotional (Mental) and Behavioural Disturbances of a mild degree.

The more difficult question in this appeal concerns whether the Board correctly assessed the worker's permanent psychological impairment at 5%. As was noted above, a range of 0% to 25% is available with the type of impairment determined by Dr. L. In assigning a percentage for impairment within a mild category of psychological impairment, it is necessary to consider a number of factors including the nature of the residual symptoms, the increased risk of significant decompensation, the likely attenuation of psychological impairments through job accommodation and the amount of ongoing treatment and support necessary.

I have first considered the nature of the worker's residual symptoms. A finding of mild, as opposed to minor, residual symptoms supports the conclusion that a higher percentage is warranted. After considering the evidence on file, and with particular reference to Dr. L's July 1999 psychological assessment and his March 2000 evaluation, I find the worker suffered from a mild residual degree of PTSD. While I appreciate that Dr. L's reports fail to distinguish between minor and mild residual PTSD, I am satisfied his use of the term mild in connection with the worker's residual symptoms indicates they were mild as opposed to minor in nature.

I have next considered the evidence concerning the increased risk of significant decompensation. This factor indicates a 5% impairment where there is no, or little significant, decompensation found. Where there is some increased risk of decompensation under stressful situations, 10% to 15% impairment is indicated. Finally, where there is a moderate increased risk of decompensation under stressful situations, 20% to 25% impairment is indicated. In his March 2000 evaluation report, Dr. L found the worker's ability to adapt to stressful situations might be marked by increased irritability. He concluded, however, that the worker was still able to respond appropriately to changes, be aware of normal hazards, use public transportation, travel, set realistic goals and make plans independently. In her July 15, 1998 report, the worker's counsellor discussed the fact that the worker's symptoms of re-experiencing had faded and were more difficult to activate, but had not been extinguished. In her opinion, these symptoms were more easily activated during circumstances of higher general stress. As a result, the worker's tolerance of stress, noise and multiple demands would likely remain lower than normal for him. On balance, I find the evidence indicates the worker had some increased risk of decompensation under stressful situations. In making this finding, I rely on Dr. L's March 2000 evaluation which listed the worker's irritability response when under stress under the heading of Deterioration or Decompensation in Work or Work-like Settings. I note the degree of the increased risk of decompensation, rather than the nature of the decompensation itself, appears to be the more important criteria in assessing this factor. With reference to Dr. L's use of the term "may" when describing when stressful situations would result in irritability, I find it appropriate to conclude there was some increased risk of decompensation, as opposed to no risk or a moderate risk.

I have next considered whether the worker's job accommodation attenuated his psychological impairments. At the lower end of the percentage of impairment scale, the

evidence should indicate an accommodation likely attenuated the psychological impairments. A higher percentage would be awarded where the accommodation would not likely completely attenuate the psychological impairment. At the upper end of the scale, the evidence would indicate the accommodation did not significantly attenuate the psychological impairment. In this case, the evidence on file indicates the worker's accommodation in an office position with the accident employer significantly attenuated his psychological impairments. With the move to an urban setting, there is little question that the worker's level of psychological impairment was greatly reduced. For example, in her July 15, 1998 report, the worker's counsellor listed the worker's lifestyle adjustment (a move to the lower mainland, working indoors in a setting safe from attack) as an accomplished recovery task. However, there is sufficient evidence on file to conclude the worker's permanent psychological impairment was not likely completely attenuated by his job placement. In making this finding, I refer to Dr. L's March 2000 report, which details the worker's ongoing impairment despite his job accommodation.

Finally, I have considered the level of continuing treatment and support the worker has been receiving as a result of his psychological impairment. Those workers receiving no treatment or support are placed at the lower end of the percentage range, while those receiving ongoing treatment and support are placed in the upper end of the range. The evidence on file indicates the worker did not receive any further treatment and support after he ended his session with his counsellor in mid 1998 (see Dr. L's March 2000 evaluation). As such, this factor indicates the worker's impairment should be assessed at a lower percentage.

While respecting the experience of the Board's PDAC, I am unwilling to defer to its decision to grant the worker a 5% functional psychological impairment as outlined in the in the April 13, 2000 memo. I find the PDAC's decision fails to provide a detailed explanation as to how the committee arrived at the percentage selected, despite having a range of 0% to 25% available. I find the evidence on file indicates the worker is entitled to an award of 12.5% for his functional psychological impairment. In making this decision, I find the balance of the evidence indicates the worker has mild residual PTSD symptoms, he has some increased risk of decompensation under stressful situations, he is in a job accommodation that does not completely attenuate his psychological impairments and he is not being treated or supported for his condition.

(3) Loss of Earnings

Evidence, Findings and Reasons

In a memo to file dated December 8, 1999, a VRC concluded the worker's earnings in the office job position was, as of that time, exceeding the long-term wage rate established on the claim.

In the May 3, 2000 memo, the DACA concluded the worker had not suffered any LOE since he was placed in suitable alternate employment with the accident employer, which exceeded the wage rate established on the claim.

The Review Board panel concluded in its August 5, 2003 findings that no LOE had occurred after finding the worker's then current earnings were in excess of the rate chosen by the Board (as upheld by the Review Board) to calculate his disability award.

The parties' written submissions to this panel do not discuss the LOE issue in any significant detail.

According to policy item #38.00 of the RSCM I, there are two methods for assessing permanent partial disabilities. These are the loss of function (physical impairment) method and the projected LOE method. Under this dual system, both methods are considered in each case and the higher of the two figures becomes the figure for the pension.

The LOE method for calculating a permanent award is found in section 23(3) of the Act. This method takes the difference between what the worker could earn before and after the permanent impairment and provides the worker with 75% of that figure.

Policy item #40.10 of the RSCM I sets out the rules regarding the calculation of the worker's LOE. Rule 3 states that earnings that maximize the worker's long-term potential will be selected from jobs that are suitable and reasonably available. Earnings in those occupations will be determined as at the time of the injury.

After considering the evidence on file and the parties' submissions, I find the worker did not suffer an LOE as a result of his permanent impairments. I find the evidence on file indicates the worker would not suffer any LOE in the long-term as he earns more in his office job accommodation position than the wage rate established for the calculation of his disability award (this rate I upheld in my findings above).

Conclusion

The worker's appeal is allowed, in part. The worker's wage rate for the purposes of calculating his disability award was properly determined using his earnings during the three-year period prior to the date of injury. The worker is entitled to a 12.5% award for his permanent functional psychological impairment. Finally, the worker is not likely to suffer an LOE as a result of his permanent impairments. As such, the Review Board findings of August 5, 2003 are varied.

I have considered whether it is appropriate to grant any expenses in this appeal. The parties have not requested any expenses, nor have I identified any potential expenses, and, as a result, I decline granting any expenses in this appeal.

Steven Adamson
Vice Chair

SA/lc