

Noteworthy Decision Summary

Decision: WCAT-2008-03007 **Panel:** Cathy Agnew **Decision Date:** October 14, 2008

Item 39.40 of the Rehabilitation Services and Claims Manual, Volume II – Sensory loss award – Permanent Disability Evaluation Schedule – Hand Charts – Additional Factors Outline – Percentage of impairment

This decision is noteworthy as it provides an analysis of the percentage of impairment to be awarded for sensory loss under policy item #39.40 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) and the Additional Factors Outline (AFO) guidelines.

This appeal concerns the permanent partial disability award provided to the worker by the Workers' Compensation Board, operating as WorkSafeBC (Board), for injuries sustained in a July 7, 2003 work accident. The worker sustained amputations of her right thumb up to the IP (interphalangeal) joint level and of her right index finger up to the PIP (proximal interphalangeal) joint level. She also sustained comminuted fractures across the base of the distal phalanx of her thumb and the middle phalanx of her index finger. The Board had assessed the worker's disability award based at 19.71% of total disability on the loss of function basis. This award was increased by 0.25% for sensory losses in the thumb and index finger. The decision regarding the quantum awarded for sensory losses was confirmed by the Review Division, and that decision was appealed to WCAT.

WCAT confirmed the increased disability award of 0.25%. The panel noted that the worker was awarded 10% of total disability for the complete loss of the distal phalanx of her right thumb in accordance with hand chart #1 of the Permanent Disability Evaluation Schedule (PDES) and 3.2% of total disability for the complete loss of the distal and middle phalanx of her right index finger in accordance with hand chart #2. The panel noted that item #4(d) of the AFO provides that the amputation value includes loss of sensation at the amputation site and any resulting loss of pinch/grip strength. Therefore, the awards of 10% for her thumb amputation and 3.2% for her index finger amputation already include a component of sensory loss as part of the scheduled award.

In accordance with item #39.40 of the RSCM II, an additional amount for sensory loss may be awarded on a judgment basis. When the fingers lose sensitivity as the result of an injury, an award up to the full amputated value of the joint can be granted. The maximum percentage that can be provided for the proximal phalanx of the thumb is 6%. The worker was provided with a total award for that joint of 1.98%. This is almost one-third of the full amputation value of that joint. The maximum percentage that can be provided for the proximal phalanx of the index finger is 0.8%. The worker was provided a total award for that joint of 0.43%, which is more than one-half of the full amputation value of that joint. The panel concluded that the increased award of 0.25% of total disability was consistent with the guidance contained in the policy and the AFO.

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Panel:Cathy Agnew, Vice Chair

Introduction

- [1] This appeal concerns the permanent partial disability award provided to the worker by the Workers' Compensation Board, operating as WorkSafeBC (Board), for injuries she sustained in a July 7, 2003 work accident. The Board had previously assessed the worker's disability award based on 19.71% of total disability and calculated on a loss of function basis. In a July 4, 2006 WCAT decision, a vice chair determined that the worker was entitled to an additional award for "the constant but fluctuating sensory losses in her thumb and index finger." The vice chair left the quantum of the award up to the Disability Awards Department, stating that he considered them experts in the calculation of such awards.
- [2] The July 4, 2006 Workers' Compensation Appeal Tribunal (WCAT) decision was implemented in a November 27, 2006 decision by a disability awards officer in the Board's Disability Awards Department. The disability awards officer increased the worker's disability award by 0.25%. This decision was confirmed in a July 23, 2007 Review Division decision from which the worker now appeals.
- [3] The worker did not request an oral hearing and I am satisfied after reviewing the file that I can fully consider and fairly decide the issue without an oral hearing. The matter primarily involves the application of law and policy to facts that are not in dispute.
- [4] The worker is represented by legal counsel in this appeal. The employer is no longer active. The Employers' Advisers Office filed a notice of participation as the deemed employer, but did not provide submissions.

Issue(s)

- [5] Should the worker be provided with more than 0.25% of total disability for the sensory losses identified in the July 4, 2006 WCAT decision?

Jurisdiction

- [6] 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.

Background and Evidence

- [7] The background to this appeal has been adequately summarized in the July 4, 2006 WCAT decision and the July 23, 2007 Review Division decision and the details will not be repeated here except to the extent necessary to place the worker's appeal in context and to explain the reasons for my decision.
- [8] The worker sustained amputations of her right thumb up to IP (interphalangeal) joint level and of her right index finger up to the PIP (proximal interphalangeal) joint level. She also sustained comminuted fractures across the base of the distal phalanx of her thumb and comminuted fractures involving the middle phalanx of her index finger.
- [9] The worker was examined on December 1, 2004 for the purpose of determining the extent of residual disability resulting from her permanent injuries. The worker reported that she experienced constant numbness at the tip of her right thumb and index finger that does not change. She also reported intermittent dull ache and cold feeling along the right thumb and index finger, which comes on in cold temperature. Tingling at the tip of the right index finger comes on with increased activity. Shooting pain over the MP (metacarpophalangeal) joint of the right thumb comes on with moderate to high contact pressure or impact.
- [10] The examination results showed that the worker had suffered some sensory loss in her thumb and index finger. Her ability to detect touch on both sides of the stump of her thumb was rated at "2," reflecting a loss of sensitivity between 7 and 15 millimetres. The sides of the stump of her right index finger was rated at "1," reflecting a loss of sensitivity greater than 15 millimetres. The permanent functional impairment (PFI) physician felt that these findings were consistent with the worker's diagnosis.
- [11] The worker's impairment was calculated as follows:

Right Hand			Calculated Impairment
Thumb			
Amputation			10.00%
ROM [range of motion]	MP		0.64%
	CMC		0.47%
Sensation	MP		<u>1.34%</u>
			12.45%
Index finger			
Amputation			3.20%
ROM	MP		0.07%
Sensation	MP		<u>0.36%</u>
			3.63%

Thumb/Finger Enhancement**3.63%**

Right Hand Total

19.71%

[reproduced as written,
emphasis in original]

- [12] In a PFI review memo (Form 24) dated December 29, 2004, the disability awards officer noted that she accepted the results of the PFI evaluation as a valid representation of the level of functional impairment in the worker's right thumb and index finger. She granted the worker an award of 19.71% of total disability for her amputations, loss of range of motion, sensory impairment and multiple digit enhancement.
- [13] In the July 4, 2006 WCAT decision, the vice chair confirmed the measured percentage of impairment (19.71%) that was calculated based on the results of the PFI evaluation. However, he found that the worker's sensory losses were greater than those set out in the Form 24 prepared by the disability awards officer. In particular, he noted that the worker had provided evidence that her sensory losses increased with exposure to cold and with activity and that her pinch grip limitations increased as her numbness increased with exposure to cold and activity. He felt that the measured impairment did not take this into account. Therefore, he found that "the worker should receive an additional award for the constant but fluctuating sensory losses in her thumb and index finger" in accordance with item #39.40 of the Board's policy.
- [14] The disability awards officer set out her considerations regarding the implementation of the July 4, 2006 WCAT decision in a PFI Review memo dated November 14, 2006. She noted that she had reviewed the vice chair's decision with her supervisor and her manager and that both had confirmed that her original decision had been consistent with current policy and practice. However, she recognized that the WCAT decision was binding and that the impairment rating to be provided for the worker's sensory loss was left to her discretion. She concluded that an additional award of 0.25% would be provided to the worker.
- [15] The worker's representative provided written submissions to the Review Division in which he was critical of the disability awards officer for having given a nominal increase to the worker because she felt that she had not made an error in her original decision. He said that the disability awards officer had made an absurd award motivated by personal animus rather than analysis. He argued that the effect of the WCAT decision required the disability awards officer to make a real and honest assessment of the worker's sensory loss, taking into account the provisions of the Board's policy item #39.40.

Reasons and Findings

- [16] Section 250(4) of the Act provides that, if the evidence supporting different findings on an issue is evenly weighted, I must resolve that issue in a manner that favours the worker.
- [17] Section 250(2) of the Act provides that I must base my decision on the merits and justice of the case but, in doing so, I must apply a policy of the board of directors of the Board that is applicable in this case. The policies applicable to this appeal are found in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).
- [18] Under section 23(1) of the Act, where a permanent partial disability 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.
- [19] Section 23(2) of the Act provides that the Board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries which may be used as a guide in determining the compensation payable in permanent disability cases. This is contained in the Permanent Disability Evaluation Schedule (PDES), which appears as Appendix 4 in the RSCM II.
- [20] The Board's policy item #39.40 provides as follows in regard to the assessment of sensory losses:

Some sensory losses are specifically listed in the *Schedule*. Others, though not specifically referred to, may be assessed on a judgment basis as part of the overall disability incurred in a part of the body covered in the schedule.

The complete loss of the major nerves in the arms and legs is covered in items 38 to 41 of the *Schedule*. When the fingers lose sensitivity as the result of an injury, an award of up to the full amputated value of the joint can be granted. This especially relates to the thumb, index and middle fingers, when the pinch grip is involved.

- [21] The worker's representative argued that the worker meets the criteria of this policy since she has thumb and index finger involvement and pinch grip involvement as well as the exacerbating feature of cold weather deterioration and activity enhancement. In addition, he pointed out that the worker's problems are constant, albeit fluctuating. He submitted that, in accordance with item #39.40, the worker has a potential assessment for sensory loss of 10% in her thumb and 3.2% in her index finger. Noting that the vice chair described the worker's sensory losses as "significant," he argued that the most

sensible finding would be an award of at least 50% of the maximum, i.e. 5% for the thumb and 1.6% for the index finger. Given the previous awards for sensory loss (1.34% for the thumb and 0.35% for the index finger), he argued that the worker's award should be increased by 4.9% (3.55% for the thumb and 1.24% for the index finger) to which should be added 1.24% for enhancement, relating to the increase in the index finger total assessment. The total increase would then be 6.14%.

- [22] 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 Board has developed an Additional Factors Outline (AFO), which is not binding policy, but which provides guidelines for consideration of factors pertaining to disability that are not formally contained in the PDES.
- [23] The worker was awarded 10% of total disability for the complete loss of the distal phalanx of her right thumb in accordance with hand chart #1 of the PDES and 3.2% of total disability for the complete loss of the distal and middle phalanx of her right index finger in accordance with hand chart #2. Finger amputations are dealt with at item #4 of the AFO. It provides at item #4(d) that the amputation value includes loss of sensation at the amputation site and any resulting loss of pinch/grip strength. Therefore, the awards of 10% for her thumb amputation and 3.2% for her index finger amputation already include a component of sensory loss as part of the scheduled award.
- [24] In accordance with item #39.40, an additional amount for sensory loss may be awarded on a judgment basis. When the fingers lose sensitivity as the result of an injury, an award up to the full amputated value of the joint can be granted. I do not agree with the submission of the worker's representative that the maximum potential percentage of impairment to be provided for the sensory loss in the worker's thumb and index finger is 10% and 3.2%, respectively. These percentages relate to the joints which were amputated and for which the worker has already received a scheduled award. The joints in respect of which the worker may be provided with an additional award for sensory loss pursuant to item #39.40 are those which now comprise the stump of the worker's right thumb and index finger after the amputation, i.e. the remaining proximal phalanx of the worker's right thumb and index finger.
- [25] According to hand chart #1, the maximum percentage that can be provided for the proximal phalanx of the thumb is 6%. The worker was provided with 1.34% for sensory loss. When combined with the 0.64% that she was awarded for loss of range of motion at that level, the total award for that joint totalled 1.98%. This is almost one-third of the full amputation value of that joint.

- [26] According to hand chart #2, the maximum percentage that can be provided for the proximal phalanx of the index finger is 0.8%. The worker was provided with 0.36% for the sensory loss at that level. When combined with the award of 0.07% for loss of range of motion, her total award for that joint was 0.43%, which is more than one-half of the full amputation value of that joint.
- [27] While I agree with the worker's representative that the disability awards officer was somewhat defensive in her tone when explaining the basis for her implementation of the July 4, 2006 WCAT decision, I have concluded that her decision to increase the worker's award by 0.25% ought to be confirmed. When combined with the amount of total disability already provided for the worker's sensory loss, I consider that it reflects a proper application of the law and policy to the evidence regarding the extent of the worker's sensory loss.
- [28] The AFO provides the following guidance at item #7(a) regarding loss of sensation:
- (a) If both radial and ulnar 2-Point discrimination are greater than 15 mm, this merits up to 50% of the digital value distal to the site of nerve division, less any other value for the phalanx being assessed. An award for complete sensory loss of the digit will only be considered if there is full loss of sensation to touch, pin, pressure, and vibratory stimulus. If the worker has 2-point discrimination in a finger which is greater than 15 mm, but still has some touch (or other) sensation, half of complete sensory loss is assessed.
- [29] In accordance with the guidance contained in the AFO, the worker is not entitled to be considered for an award for complete sensory loss, since she retains the ability for some sensation in both her thumb and index finger.
- [30] When combined with the amounts for loss of range of motion, the worker's total award for sensory loss on a judgment basis was more than approximately one-third of the maximum percentage that she could be awarded for the proximal phalanx of her thumb and more than one-half of the maximum percentage that she could be awarded for the proximal phalanx of her index finger. Since the sensory loss in the worker's index finger was somewhat greater than in the thumb, it makes sense that a larger proportion of the maximum percentage available for that phalanx would be awarded for the worker's index finger than for her thumb.
- [31] The disability awards officer increased the worker's award for sensory loss by 0.25%. This percentage was not allocated specifically to either the worker's thumb or index finger and therefore I consider it to represent a general increase made on a judgment basis and applicable to both digits.

- [32] The worker's representative emphasized that the WCAT vice chair described the worker's sensory loss as "significant." However, it is also important to recognize that the WCAT vice chair declined to assign a percentage of impairment to the increase in the worker's award for sensory loss, in deference to the expertise of the disability awards officer. I am not inclined to vary the decision of the disability awards officer to increase the worker's disability award by 0.25% of total disability. I find that the disability awards officer exercised her discretion in accordance with the law and the Board's policy. The increase is consistent with the guidance contained in the AFO. The award provided on a judgment basis to the worker for her sensory loss represents a significant proportion of the maximal value for the proximal phalanx of the thumb and index finger. I find that the award is in keeping with the July 4, 2006 WCAT decision.

Conclusion

- [33] I confirm *Review Reference #R0076306* in its entirety by finding that the worker should not be provided with more than 0.25% of total disability for the sensory losses identified in the July 4, 2006 WCAT decision.

Expenses

- [34] I make no order for appeal expenses as none were requested.

Cathy Agnew
Vice Chair

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