Noteworthy Decision Summary

Decision: WCAT-2008-03257 **Panel**: Teresa White **Decision Date:** October 31, 2008

Sections 23(1)9, 23(3), 23(5) of the Workers Compensation Act – Policy items #39.20, #43.10, #43.20 Rehabilitation Services and Claims Manual, Volume II –Chronic pain award – Disfigurement award -– Additional Factors Outline

This decision is noteworthy for its analysis of the factors to consider with regard to chronic pain and disfigurement awards.

In the fall of 2004, the worker sustained serious injuries to her left arm when it was caught in a cheese manufacturing machine. The Workers' Compensation Board, operating as WorkSafeBC (Board), awarded the worker a permanent disability award for the conditions of supracondylar/intracondylar fracture of the left humerus, fracture/dislocation of all carpal/metacarpal joints, chronic pain, and the permanent psychological condition of dysthymic disorder. The award under section 23(1) of the *Workers Compensation Act* (Act) was equivalent to 83.02% of total disability on the loss of function basis plus 2.5% for chronic pain. The worker was found not to be entitled to a section 23(3) award. The Review Division decision confirmed the Board's decision. The worker appealed that decision to WCAT, as well as a decision regarding an award for disfigurement made under section 23(5) of the Act.

The worker's appeal was allowed in part. The worker requested a second chronic pain award relating to her left shoulder. The panel accepted that the physiological mechanism producing pain in the worker's shoulder may differ from the mechanism producing pain in the remainder of the worker's left upper extremity. However, the panel found this distinction did not form a basis for two chronic pain awards as the worker's chronic pain award was intended to compensate the worker for pain throughout her left upper limb, including her shoulder.

The panel referred to the Additional Factors Outline and found that there was a failure to consider the worker's impairment under the category of "peripheral nerve conditions" resulting in a failure to address the worker's sensory loss, which was due to peripheral nerve neurotemesis, and a failure to compensate the worker for loss of strength. The panel found the worker was entitled to additional awards for sensory and motor impairment in the left elbow. With regard to the disfigurement award the panel considered each of the factors in the Board's "Disfigurement Entitlement Calculation Sheet" and found that the award for the left hand and the arm should be increased.

The panel concluded that the worker was not entitled to an assessment based on section 23(3) of the Act as the worker's situation did not meet all three criteria in policy item #40.00 in the *Rehabilitation Services and Claims Manual, Volume II* for a loss of earnings assessment. In particular, the worker has adapted to another suitable occupation, namely work as a Certified General Accountant, without sustaining a significant loss of earnings.

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Panel: Teresa White, Vice Chair

Introduction

[1] The worker immigrated to Canada in December 2003. On September 27, 2004, the worker was working in a cheese factory. She sustained very serious injuries to her left arm when it was caught in a cheese manufacturing machine. The Workers' Compensation Board (Board), doing business as WorkSafeBC, accepted the worker's claim for compensation.

[2] In June 2007, after a lengthy period of recovery and rehabilitation, the worker was granted a permanent disability award (pension) for the permanent conditions of supracondylar/intracondylar fracture of the left humerus, fracture/dislocation of all carpal/metacarpal joints, chronic pain, and the permanent psychological condition of dysthymic disorder. The award was equivalent to 83.02% of total disability, based on permanent functional impairment (including psychological impairment) (PFI), plus 2.5% for chronic pain. An award for sensory loss was included. The award was made under section 23(1) of the *Workers Compensation Act* (Act).

[3] The worker was found not to be entitled to a section 23(3) award based on loss of earnings. This was because the worker had returned to work, part-time, on a "contract" basis, as a Certified General Accountant (CGA).

[4] The worker sought a review. In a Review Division decision dated February 15, 2008, the review officer confirmed the Board's decision of June 29, 2007 respecting the worker's permanent partial disability award based on functional impairment, and the decision to deny a loss of earnings assessment.

[5] In September 2007, the worker was granted a further award, for disfigurement under section 23(5) of the Act. The worker was granted a lump sum of $8,920.18, based on total points of 171. The worker sought a review. In a Review Division decision dated April 22, 2008 a review officer varied the Board's decision, finding that an award of 231 points is more appropriate.

[6] The worker has appealed both pension decisions to the Workers' Compensation Appeal Tribunal (WCAT). She specifically objects to the disfigurement award, requests a second chronic pain award relating to her left shoulder, and submits that she should be assessed for a loss of earnings award under section 23(3) of the Act.

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[7] The worker has provided hand-written submissions and some photographs of her left upper extremity. Based on the worker's submissions, I understand that these photographs were taken after the worker's most recent surgery, in May 2008. The disfigurement award before me is based on the appearance of the worker's left upper extremity in September 2007. The issue of an increased disfigurement award after the most recent surgery is not before me. It is open to the worker to approach the Board and ask that the changes in scarring since the last surgery be taken into account. My jurisdiction is limited to the disfigurement award originally appealed.

Issue(s)

[8] Was the worker's permanent disability award based on physical functional impairment properly determined?

[9] Was the worker's permanent disability award for psychological impairment properly determined?

[10] Is the worker's award for disfigurement properly determined?

[11] Is the worker entitled to assessment for a pension based on loss of earnings?

[12] I recognize that the worker did not make specific submissions about several aspects of her permanent disability award, such as the percentage of functional impairment. However, she did not state that she accepted those decisions. I have decided to consider all aspects of the worker's permanent disability award properly before me. This accords with item #14.30 in the WCAT *Manual of Rules of Practice and Proc*edure (MRPP), which states that panels may address any aspect of the permanent disability award decision (i.e., which was addressed in the Board decision letter, the subject of review by the Review Division, or which was addressed in the Review Division decision) without notice to the parties.

Jurisdiction

[13] This appeal is brought under section 239(1) of the Act which permits appeals of Review Division findings to WCAT. Section 250(4) of the Act provides that if the evidence supporting different findings on an issue is evenly weighted, the issue must be resolved in a manner that favours the worker.

[14] I am required to apply Board policy in making a decision. Policy relevant to this appeal is in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

[15] The worker asked that these appeals proceed on the basis of a read and review of the evidence and submissions on file. I agree this is an appropriate method of hearing this appeal, which does not involve questions of credibility and is resolved largely on the

basis of the application of law and policy to evidence readily available on the file and in the submissions. The worker has filed written submissions that are legible and clearly understandable.

[16] The accident employer was notified of these appeals and invited to participate but is not participating.

[17] Section 239(2)(c) of the Act restricts WCAT's jurisdiction in the case of a permanent disability award based on the application of the Permanent Disability Evaluation Schedule (PDES) (which is Appendix 4 of the RSCM II), when the impairment range does not exceed 5%. In many instances, the particular impairment range for a finger does not exceed 5%. In this case, the overall potential impairment is substantially greater than 5%. I agree with the reasoning in *WCAT Decision #2005-06031* (November 10, 2005), a noteworthy decision available on WCAT's website (www.wcat.bc.ca) that the upper end of the range of motion value for those joints where measurable impairment is noted should determine jurisdiction. If the range exceeds 5%, as in this case, WCAT would have jurisdiction over the entire percentage granted without being faced with the situation where it has jurisdiction over only some of the fingers.

[18] I therefore find that WCAT has jurisdiction over the permanent functional impairment award relating to the worker's left upper extremity, including her left hand.

Background, Evidence, Reasons, and Findings

[19] Given the complexity of the issues relating to the worker's permanent disability and disfigurement awards, I have decided to address background, evidence, reasons, and findings under sub-headings relating to the specific aspects of the award.

Permanent Functional Impairment (Physical)

Background and Evidence

[20] The history of the worker's injury and claim is lengthy and complex. I will not repeat it in its entirety here. Rather, I will refer only to those aspects of the evidence necessary to explain my decision.

[21] On January 20, 2005, orthopaedic surgeon Dr. Perey reported that the biggest problem in the worker's left upper extremity was neurological dysfunction, which was expected as the worker sustained a severe crush injury. He said this "should return in time."

[22] On January 26, 2005 Dr. Tai, a neurologist, saw the worker and did nerve conduction studies. His conclusion was that the worker had nerve injury in her left forearm involving median, ulnar, and radial nerves. There was active denervation in muscles

innervated by all three nerves. The worker could not sustain motor units in her "FDI [first dorsal interosseous], EDC [extensor digitorum communis], FCU [flexor carpi ulnaris] and abductor pollicis brevis." Dr. Tai could not find any motor units in the worker's abductor pollicis brevis. She could not sustain motor units in her FDI for recording, but they were present. Motor units were jittery and complex in the worker's FDI, EDC, and FCU.

[23] Dr. Tai's conclusion was that the worker had a nerve injury in her left forearm involving median, ulnar, and radial nerves. There was active denervation in muscles innervated by all three nerves. These findings were consistent with neurotemesis (which I understand to mean transection of a peripheral nerve) affecting all three major nerves in the worker's left arm. There was evidence of healing proximally, but it was likely healing would be incomplete. Dr. Tai said that, hopefully, the worker would regain some function in her left hand but ultimately tendon transfers might be necessary.

[24] A hand therapy program discharge summary of May 16, 2006 states that the worker was "trying to use her hand/arm as gross assist." At her last therapy session she had been able to pick up small objects using a key pinch (paperclips, coins, etc.) and to use her left hand as a gross assist to open bottles.

[25] The worker attended an occupational rehabilitation (OR2) program in May, June, and July 2006. The discharge report states, in part (summarized and paraphrased):

- The left wrist rested in approximately 20 degrees of ulnar variation.
- There were well-healed scars along the left thumb, dorsal elbow, and ventral elbow.
- Skin on the left thumb was shiny and taut.
- Minimal spontaneous movement of the left upper limb was noted.
- The worker reported altered sensation to light touch (tested using a tissue) from the left elbow to the hand. These areas were also hypersensitive.
- Grip strength was 38 kilograms on the right and 0 kilograms on the left.
- The worker was unable to oppose the thumb to the tips of the second and third digits on her left hand.
- The worker reported that pain was her biggest problem. The worker reported that it felt like there was something caught inside, and sometimes her arm hurts so badly she wants to cut it off. She reported feeling like she was going crazy because of the pain.

[26] The worker was also observed to have significant difficulties with self-care. The OR2 report states that the worker was unable to use her left hand to assist with opening caps and jars. She could not use her hand to undo buttons and was unable to tie shoelaces. She had difficulties with working in the kitchen, being unable to handle dishes, woks, frying pans and to tie garbage bags using her left hand.

[27] The worker was examined for PFI of her left upper extremity by a disability awards medical advisor (DAMA) on December 19, 2006.

[28] The report prepared by the DAMA notes that the worker complained of pain throughout her left upper extremity, including her shoulder. She also described difficulty with personal care and housekeeping activities.

[29] The DAMA measured the range of motion of all of the joints in the worker's bilateral upper extremities. She also tested strength and sensation. The worker was unable to make a tight fist or pinch grips with the left hand. She reported reduction in light touch and pinprick sensation on the lateral aspect of the left upper arm and hyperesthesias in her entire left forearm and left hand. Two-point discrimination was more than 15 mm in the tips of the thumbs and fingers.

[30] Regarding grip and pinch strength, the DAMA recorded that the worker "declined" left-sided testing due to an inability to grip the device.

[31] In a December 19, 2006 memorandum, the DAMA noted that sensory function was considered markedly impaired, but pain was not considered disproportionate. Range of motion findings were reliable. Motor strength function was considered moderately reduced in the worker's hand (I have difficulty understanding the rating of "moderate" given the worker's complete inability to perform grip or pinch testing).

[32] The worker had multiple flexion deformities in her left hand and her elbow was held in a flexed position. The DAMA said there were no additional factors to be considered. I observe that it is not clear from the DAMA's statement about additional factors whether it was her opinion that the observed sensory loss (such as two-point discrimination greater than 15 millimetres) should not be given an additional rating under the Board's *Additional Factors Outline* (Outline) or that there were no factors other than the loss of sensation and strength that should be considered. Given that the Board ultimately granted the worker an award for sensory loss, it seems that latter interpretation was adopted.

[33] No comment was made about the damage to the worker's peripheral nerves (median, ulnar, and radial nerves).

[34] The Outline is not Board policy and is therefore not binding. However, it discusses and rates impairments caused by injuries not formally covered by the PDES. It provides guidance to adjudicators and fosters consistency. In that sense it is a useful reference with significant persuasive value.

[35] The loss of range motion findings were determined by the Board to amount to a PFI of 60.52% for functional loss to the upper extremity. Despite the DAMA's comment that the worker's pain was not disproportionate, she was granted an award of 2.5% of total disability for chronic pain.

[36] Dr. Perey wrote on January 3, 2008 that the worker was quite unhappy with her disability award. He also said:

> I believe her hand is virtually completely incapacitated, as she has no functional use of that hand in light of the complex bony and soft tissue injuries. She essentially has a dysfunctional left upper extremity with very minimal use of her hand. There is nothing further I can offer from a surgical perspective. I have asked that she discuss disability matters with the compensation board regarding her longterm situation.

[37] On June 26, 2008, Dr. Perey noted that the worker was six weeks from another surgery. Her carpometacarpal joint (CMC) joint had become quite stiff. The worker was asked to proceed with aggressive range of motion exercises to try to improve the motion at her thumb CMC joint, "although her longterm prognosis is guarded in light of the complexity of the neuromuscular injury."

[38] The worker's wage rate is not an issue in this appeal. However, I observe that the long-term wage rate used for the worker's permanent disability award is very low, because she was earning only $9.00 per hour in her position with the cheese factory, and a similar status worker earned $18,451.04 in the 12 months before the injury. This results in a net weekly rate of only $346.04 and a daily rate of $69.21. This is despite the worker having qualified as a CGA before her accident and, although she was employed on a regular basis, she was intending to begin searching for work as a CGA when she received her then pending certificate.

Reasons and Findings

Range of Motion

[39] I compared the range of motion findings from the July 2006 report of the OR2 to the range of motion findings of the DAMA during the PFI examination in December 2006. While the measurements are not the same, taking into account the error inherent in the measurement of range of motion, and the passage of time, they are roughly equivalent. Some of the range of motion deficits are slightly less, and some are slightly more. I can see no potential error in the DAMA's measurements that would warrant further investigation or appellate intervention. The range of motion findings are consistent with other medical evidence on the file. They confirm the severity of the worker's left upper extremity disability.

[40] I furthermore can find no error in the Board's calculations relating to the percentage of functional impairment. The calculations are performed in accordance with the Board's "Disability Awards Calculator," which is publicly available on the Board's website (www.worksafebc.com).

Chronic Pain

[41] I agree with the conclusion that the circumstances support an award for chronic pain. The worker clearly has specific chronic pain (pain that has persisted beyond six months and has clear medical causation or reason). However, in order to provide the basis for a 2.5% award for chronic pain, specific chronic pain must be disproportionate to the associated objective physical or psychological impairment. The DAMA stated that the pain was not disproportionate.

[42] None of the previous decision-makers have specifically explained their rationale for granting an award for chronic pain under policy item #39.02. I am satisfied an award is justified, despite the DAMA's opinion. The worker's own evidence emphasizes the significant impact of the pain in her left upper extremity, including her shoulder. The worker's shoulder was not specifically injured in the accident. Indeed, the worker asserts that the pain in her shoulder is different and results from a different mechanism. The worker also stresses the severity of the pain.

[43] Policy item #39.02 says that specific chronic pain is disproportionate where it is generalized rather than limited. I consider the pain in the worker's shoulder to be greater than expected and generalized such that it is disproportionate.

[44] The worker's primary objection to her PFI award is that she should have two chronic pain awards. She says that the pain in her shoulder is physiologically distinct from the pain in her elbow, forearm, wrist, and hand. She states that the pain in her shoulder and the pain in her elbow, forearm, wrist and hand are two physiologically distinct injuries and distinct areas of chronic pain. The worker says that although the pain came from the same accident, the shoulder pain is the result of "pulling" and the pain from her elbow to her hand comes from the broken bones and nerve damage. The worker said her upper arm skin is numb, with no pain. Muscle damage in her shoulder causes persistent pain under the skin in the block of muscles. The worker said that the shoulder pain was "totally different" than the forearm and hand pain.

[45] I accept that the physiological mechanism producing pain in the worker's shoulder may differ from the mechanism producing pain in the remainder of the worker's left upper extremity. However, I am not persuaded that this distinction can form a basis for two chronic pain awards. I explain why below.

[46] There may be circumstances where it is appropriate to grant an additional chronic pain award. See for example, the reasoning in *WCAT #2005-03569* (July 6, 2005), in which the vice chair concluded that the Act and policy allow multiple chronic pain awards. The analysis in that decision has been frequently referred to and applied, primarily in situations where there are different areas of chronic pain that have arisen from separate areas of injury.

[47] I agree with the review officer that the chronic pain award in this case is to compensate the worker for chronic pain in her left upper extremity, and this includes her shoulder. Indeed, the worker's entitlement to a chronic pain award is, in part, because the pain is generalized to her entire upper extremity.

[48] I accept the worker's submission that the pain in her shoulder is likely based on a different "pain mechanism." The worker's left shoulder was not injured in the same manner as the remainder of her upper extremity, which suffered nerve, bone and soft tissue injuries. The evidence supports a conclusion that the pain in the worker's upper extremity other than her shoulder is primarily neurogenic in origin, resulting from the significant nerve damage. On the other hand, the pain in the worker's shoulder resulted from less direct injury, such as strain due to awkward postures, heavy casts, and difficulty positioning the limb. However, the pain is all in the upper extremity and it results from the same injury.

[49] Hence, despite that difference, I agree with the review officer that the worker's chronic pain award was intended to compensate the worker for pain throughout her left upper limb, including her shoulder.

Additional Factors

[50] Policy item #39.10 in the RSCM II states that the PDES is a set of guide-rules, not a set of fixed rules. The Board is free to apply other variables in arriving at a final award; but the "other variables" referred to means other variables relating to the degree of physical or psychological impairment, not other variables relating to social or economic factors, nor rules (including schedules and guide-rules) established in other jurisdictions. In particular, the actual or projected loss of earnings of a worker because of the disability is not a variable which can be considered.

[51] Under this policy, the worker was awarded an additional amount for impairment of sensory function, which the DAMA indicated was marked. This was awarded under the Outline. However, the Outline specifically states that in cases of sensory loss due to peripheral nerve injury, the section of the Outline titled "Peripheral Nerve Conditions" should be referenced. It does not appear that this was done in the worker's case. I have concluded that the failure to address the worker's sensory loss, which appears clearly due to peripheral nerve neurotemesis, is a significant error.

[52] I have also concluded that the failure to compensate the worker for loss of strength also is an error that flows from the failure to consider the worker's impairment under the category of "peripheral nerve conditions." The result is that, despite documented loss of strength due to peripheral nerve damage, the worker has no PFI award recognizing her very significant strength deficits.

[53] To the DAMA, the worker demonstrated moderate weakness of her grip and pinch strength in her left hand and was unable to make a tight fist or pinch grips. The worker had severe muscle wasting of all the intrinsic muscles of her left hand, including the thenar and hypothenar areas.

[54] The DAMA said the worker "declined" testing of her grip and pinch strength in the left hand. With respect, an inability to grip the device means the worker was "unable" to perform the left-sided testing rather than that she "declined," which suggests the worker could have tried but decided not to. I observe that the worker being unable to grip the devices used for grip and pinch strength testing is wholly consistent with the evidence on file.

[55] The Outline states the following regarding additional awards for loss of strength:

> 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. An example of this situation would be loss of strength due to a severe muscle tear that healed leaving a palpable muscle defect. If the DAMA judges that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength could be combined with the other impairments, only if based on unrelated etiologic or pathomechanical causes. Otherwise, the impairment ratings based on objective anatomic findings take precedence.
>
> 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]

[56] The Outline states further under the values awarded for loss of grip/pinch strength, that the table is 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 the peripheral nerve ratings.

[57] The problem here is that the worker does not have any rating for peripheral nerve damage. I consider that this paragraph in the Outline was incorrectly applied to the worker's case. She should have an award for peripheral nerve damage. I considered whether it was necessary to suspend this appeal under section 246(3) and ask the Board to assess the worker's peripheral nerve damage in accordance with the Outline. However, I concluded this was not necessary. There is sufficient medical evidence on the file to reach a conclusion without additional input from the Board.

[58] The Outline commences its discussion of peripheral nerve injuries on page 15. I have reviewed the medical evidence on file, including the evidence of functional ability contained, for example, in the OR2 discharge report. Dr. Tai's report clearly states that the worker has findings consistent with neurotemesis. I recognize that he hoped the worker may regain some function in her left hand.

[59] Although the worker may have regained some function, this appears to be minimal. The most recent operative report, dated May 16, 2008, states that the worker had a left first web space contracture, and median neuropathy of the left hand with absent abduction of the left thumb. A tendon transfer and first web space release was performed by Dr. Perey. This clearly shows that, at least in respect of the median nerve, any function the worker has regained continues to suggest a marked level of impairment.

[60] I cannot conclude that the worker has complete loss of function of either of her median, ulnar or radial nerves. However, I do conclude that she has marked impairment of sensory and motor function of her left median and ulnar nerves at approximately the elbow level. The ratings for radial nerve impairment do not specify the anatomical location of lesion. I conclude that the worker has marked impairment of sensory and motor function of the radial nerve.

[61] For moderate impairment of the left median nerve at the elbow, the worker is entitled to an additional 10% for sensory and 15% for motor impairment.

[62] For moderate impairment of the left ulnar nerve at the elbow, the worker is entitled to an additional 1.5% for sensory and 3.5% for motor impairment.

[63] For impairment of the left radial nerve, the worker is entitled to 1.5% for sensory and 13.5% for motor impairment.

[64] As the Outline specifies that for peripheral nerve impairment, these ratings are considered rather than the ratings for sensory impairment (of two-point discrimination), the worker is no longer entitled to the percentage ratings currently in place for sensory impairment. The peripheral nerve ratings take these into account.

[65] These amounts are of course subject to devaluation as required by published policy. I will leave it to the Board to perform the appropriate calculations.

Psychological Impairment

[66] The worker underwent a psychological PFI examination on February 21, 2007. The psychologist, Dr. S, noted that the worker sustained a mangling injury to her entire left arm. She had received psychological treatment during her recovery and rehabilitation, and was thought to have reached a stable state regarding her emotional functioning.

[67] Dr. S speaks the worker's first language and assessed her in that language.

[68] The worker's father was a medical doctor, and her mother a teacher. The worker obtained a university degree in mathematics in 1988, and then taught mathematics at a college. In 1993 the worker commenced work on a Masters degree in economics, which she completed.

[69] When she decided to leave her country of origin and come to Canada, the worker began taking courses to complete her CGA. She passed the CGA examination in August 2004 and was waiting to receive her certificate when the accident happened.

[70] The worker described the accident and said that she was in horrific pain and screamed for help. At the time of the interview, the worker expressed her view that pain and functional limitation in her left arm led her to feel it was completely useless. The worker showed decreased interest in life situations and avoided social involvement. The psychologist said that resentment and blaming in the early stages of the injury had given way to feelings of depression, helplessness, and withdrawal.

[71] The worker frequently felt tense, worried, and sad. She also commonly had irritability, brooding, and depression.

[72] The worker underwent psychological testing. Overall, the psychologist concluded that the worker had the following DSM diagnosis:

Axis I	:	300.4 Dysthymic Disorder
Axis II	:	None
Axis II	:	Severe Injury at Work
Axis IV	:	Divorced Single Parent with economic problems
Axis V	:	GAF = 57

[73] The psychologist said there was no known history of depression and the work injury was most likely the main cause of the Dysthymic Disorder.

[74] The worker was eager to start work as an accountant, a position she had spent years preparing for. Her biggest limitation was inability to use her left arm, meaning that the worker could only use one hand to operate her computer keyboard. The prognosis for recovering from the dysthymic disorder was fair, and would be dependent on how successful the worker was at obtaining employment as an accountant.

[75] In a May 23, 2007 memorandum, the Psychological Disability Awards Committee (PDAC) considered the worker's psychological impairment. They considered the impact of the compensable injury and conditions on the worker's overall and vocational functioning, and in particular the narrative portion dealing with impact on work performance meant that the worker's psychological impairment was rated at 20%.

[76] The PFI ratings for psychological disability are found in the PDES. For emotional (mental) and behavioural disturbances, the category where the worker's dysthymic disorder falls, the rating for "mild" states this means the impairment levels are compatible with most useful functioning. The range is 20 to 25%.

[77] The "moderate" rating specifies impairment levels that are compatible with some, but not all useful functioning. The rating there is from 30 to 70%.

[78] The worker's Global Assessment of Functioning "GAF" score was 57 out of a possible 100. This relates to moderate symptoms and moderate difficulty in social, occupational, or school functioning. This might suggest that the worker's impairment is closer to 43%. However, the GAF is a tool that only estimates functioning, and takes into account aspects of function based on different definitions. This is pointed out in the May 23, 2007 memorandum from the PDAC. The GAF is not the definitive indication of impairment of function; rather, it is only one indication.

[79] Although the worker's claim was accepted for post traumatic stress disorder, I accept that at the time of the PFI examination the worker was not showing signs of PTSD. That is not to say that the disorder may not resurface, but such a significant change or recurrence would be adjudicated as such under section 96(2) of the Act.

[80] I accept the opinion of the PDAC that the worker's psychological impairment is equivalent to 20% of a totally disabled person.

Disfigurement

[81] At the PFI examination, the DAMA recorded the following:

> Examination revealed an 8-cm long well healed surgical scar over her thumb, a 5-cm scar over the first left web-space and a 17-cm surgical scar over her elbow. She had a 7 X 5 cm scarred area over the dorsal hand secondary to the injury and a smaller area over her elbow.

> In the gross there were no differences between the arms with respect to coloration, temperature and arterial pulses. Her skin texture over her left hand was shiny and smooth. There was severe muscle wasting of all the intrinsic muscles of her left including the thenar and hypothenar areas. Her left arm was held close to her body with the elbow flexed. Her left hand was resting with her wrist flexed and ulnar deviated, her thumb abducted and all her fingers in a flexed position.

[82] Section 23(5) of the Act provides that:

> Where the worker has suffered a serious and permanent disfigurement which the Board considers is capable of impairing his or her earning capacity, a lump sum in compensation may be paid, although the amount the worker was earning before the injury has not been diminished.

[83] The RSCM II contains published policy about disfigurement in policy item #43.10. It establishes three criteria for an award based on disfigurement. Disfigurement must be permanent, serious, and capable of impairing a worker's earning capacity.

[84] Policy item #43.20 was amended by a resolution of the board of directors of the Board (*Resolution #2008/03/19-02*). The resolution is effective May 1, 2008, and it applies to "all decisions, including appellate decisions, made on or after May 1, 2008. I find it applies to this decision. The Board's website states that the amendments were "to ensure that disfigurement awards increase uniformly within each class for greater degrees of disfigurement."

[85] The process for determining the amount of a disfigurement award is as follows:

1. Points falling within four ranges are assigned to each of five factors. They are:

    a. Surface area of part of body
    b. Texture and thickening; keloid scarring, hardening
    c. Colour
    d. Visibility
    e. Loss of bodily form

2. An average of the points is taken by dividing the total by five. The resulting number is rounded up to the nearest whole number. The number will fall in one of four classes.

3. The area of the body affected is determined and a dollar value determined from charts based on the class (number of points).

[86] The Board's "Disfigurement Entitlement Calculation Sheet" is dated September 20, 2007. For the left hand, the disability awards officer (DAO) assigned the following points:

Area of disfigurement: Left Hand

	Points
Surface	40
Texture/Keloid	30
Colour	60
Visibility	99
Loss of bodily form	25
Total Points	254

Area of disfigurement: Left Arm

	Points
Surface	8
Texture/Keloid	35
Colour	48
Visibility	80
Loss of bodily form	0
Total Points	171

…

[87] The review officer concluded that for the hand, factor #2 (texture, keloid, thickening, hardening), for which the range is 25-49, a rating of 40 rather than 30 was more appropriate. For loss of bodily form, the review officer increased the point value to 50. Respecting the left arm, the review officer added 60 points for loss of bodily form instead of the 0 points assigned by the DAO.

[88] In this appeal, the worker provided additional pictures and a submission specifically relating to her scarring. The worker said that the disfigurement points for her left hand were too low, considering factors #1, 2, and 3. She said that the points for her left arm were too low, considering factor #2.

[89] The worker pointed out that on May 16, 2008 she had another surgery. After that, there was more disfigurement of her left hand. The worker made specific reference to additional scarring resulting from the surgery. Although I acknowledge the worker's

submissions, the issue of an additional award based on the last surgery is not before WCAT. The worker should ask the Board to consider the additional scarring pursuant to section 96(2) of the Act. What is before me is the award based on the assessment made before the last surgery. As such, the new photographs submitted by the worker are not helpful in resolving this appeal. They will be sent by WCAT to the Board file for future reference.

[90] The disfigurement award was based on review of 18 photographs of the worker's left hand, forearm, and arm, taken on January 3, 2008. I have reviewed each and provide the following general descriptions. Unfortunately, some of the photographs are not of very good quality or do not show the disfigurement very clearly. I observe the following from the photographs:

- The dorsum of the worker's left hand has a large, puckered scar area, which is discoloured (white areas centrally, some surrounding darkening of the skin, and some pink or red areas). This overlies the central part of the dorsum of the hand and covers approximately 85% of the surface area, extending over the top of the metacarpophalangeal (MCP) joints. There are also some short, straight-line scars in the same area. There is a scaly looking area in the very center of the depression.

- The worker's dorsal MCP joint area is elevated and appears very swollen. The area underlying the above large puckered scar is depressed, giving the impression of loss of skeletal structure. Essentially, the top of the worker's hand looks "dished in," while the MCP joint area is very swollen and misshapen.

- There is also a scar across the dorsal surface of the MCP joints, which appears to be a surgical scar. It traverses the entire width of the dorsal MCP joints. It is white in colour.

- There is a linear scar visible in the center of the thumb web space with a red area surrounding it. This scar extends around the web space into the palm. It is not very visible on the views of the entire palm because the worker's thumb is adducted, concealing the scar. On one view this scar can be seen to extend around the base of the worker's thumb to the wrist on the palmar side.

- The skin of the worker's palm and the palmar side of the fingers shows some darkening and thickening. On one view the skin on the palmar side of the fingers looks thickened, brown, and dry.

- There are pimple-like lesions present on the dorsal side of the hand, in the center of the large scar and near the thumb web space. There is a reddened scaly area over the third MCP joint.

- Just visible in one photograph is a thickened, reddened area on the medial side of the worker's thumb.

- The contour of the ulnar side of the hand is altered.

- There is a white linear scar extending from the wrist level along the side of the worker's hand and along the dorsal side of her thumb. The surrounding area is reddened. The thumb web space appears tight and contracted. The swelling around the 2nd MCP joint creates an overlap and crease in the thumb web space.

- The thenar and hypothenar eminences of the left palm are wasted in appearance.

- The worker's left fingers are flexed slightly.

- The skin of the entire hand is shiny and appears more taut than the skin of the right hand.

- A posterior view of the worker's elbow, arm and forearm shows a series of very long linear scars that appear to be surgical. The scars are raised and discoloured. There are areas of thickening. There is bumpiness and puckering particularly just below the elbow. The skin appears wrinkled and dry. There is also obvious bony deformity, with depressions and flattening/widening of the area of the olecranon process. The photograph of the posterior aspect of the worker's elbow is not of very good quality.

- There is a thickened and discoloured area of scarring in the area of the cubital fossa. It spans approximately 75% of the width. The width of the worker's lower arm and the elbow area is reduced.

[91] I agree that the disfigurement is permanent, serious, and capable of impairing a worker's earning capacity.

[92] Given the complexity of the worker's claim and the disfigurement, I consider it worthwhile to reproduce the following table from policy item #43.20, which describes how points are assigned. It is notable that the hand and the arm constitute different areas of the body for the purpose of disfigurement. The table follows:

Points /Factors	**0 - 24 Points**	**25 - 49 Points**	**50 - 74 Points**	**75 - 99 Points**
Surface area of part of body **(see guideline 3)**	Less than 25%	25% - 49%	50% - 74%	75% or more

Texture and thickening. **Keloid scarring, hardening.**	Mild alteration of texture. Slight wrinkly, furrows or marks	Moderate thickening. Moderate hardening. Mild dryness or scaling. Prone to pimples	Major thickening. Major hardening. Moderate dryness or scaling. Frequent pimples. Prone to ulceration.	Severe Severe Major dryness or scaling. Frequent ulceration. Significant irregularity of scar.
Colour	Mild alteration of colour	Moderate alteration of colour	Major alteration of colour	Severe alteration of colour
Visibility	Less than 25% visible with work clothing	25 to 49% visible with work clothing	50 to 74% visible with work clothing	75% visible or greater with work clothing
Loss of bodily form	Mild depression or elevation	Moderate depression or elevation	Major depression or elevation. Moderate to major atrophy. Moderate to major irregularity of body.	Severe depression or elevation. Severe muscle or tissue loss.

[93] I will first consider the disfigurement award for the left hand.

[94] For factor #1, which relates to the surface area, the worker was awarded 40 points. The amended policy provides for 25-49 points when 25% to 29% of the part of the body is affected. The review officer confirmed the Board officer's conclusion that approximately 40% of the overall area of the worker's left hand was affected, since the points are assessed based on the total surface area of the hand, including the back, the palm, and the fingers.

[95] I agree that the majority of the scarring is visible on the dorsum of the worker's hand. However, close inspection of the photographs shows that skin of the worker's palm and the palmar side of the fingers shows some darkening and thickening. On one view the skin on the palmar side of the fingers looks thickened, brown, and dry. Furthermore, the thenar and hypothenar eminences are wasted and the palmar skin is taut appearing and shiny. In addition, the left hand rests in an abnormal-appearing posture, with the palm flattened, the fingers curved and the thumb adducted.

[96] On that basis, I do not agree that only 40% of the surface area of the worker's left hand is affected. I find that the abnormal appearing skin and topography encompasses, as suggested by the worker, 90% of her hand. I agree that the palm is less cosmetically affected, but I conclude it is affected. The contrast between the significant disfigurement of the dorsum and the palm is striking. However, that does not mean the disfigurement of the palmar side, including altered bodily form and skin changes should not be taken into account.

[97] The worker is entitled to 90 points for factor #1.

[98] Factor #2 is texture and thickening, and keloid scarring and hardening. The review officer noted that in order to be entitled to 50 points or more, there must be "major" thickening and/or hardening, moderate dryness or scaling, frequent pimples and a proneness to ulceration. The review officer found that the worker was entitled to points within the 25 to 49 range, for moderate thickening and/or hardening, mild dryness or scaling, and proneness to pimples.

[99] I agree that the worker's hand falls within the 25 to 49 range. There is moderate thickening, particularly on the dorsum. There is clearly a tendency to "pimples," which are visible in the pictures. There is also dryness and some scaling obvious in the palm. I agree with the review officer's conclusion that a point value of 40 is appropriate and reflects the degree of disfigurement.

[100] Factor #3 is colour. The worker was awarded 48 points, at the high end of the range for moderate alteration of colour. I agree.

[101] Factor #4 relates to visibility. The worker was awarded the highest point total, at 99 points, because the disfigurement is fully visible. I agree.

[102] Factor #5 is loss of bodily form. The review officer decided that the worker was entitled to 50 points. The range of 50 to 74 points is provided for "major depression or elevation," "moderate to major atrophy, and "moderate to major irregularity of body." One of the photographs is a close-up of the large scarred area on the dorsum of the hand. There is significant depression. Taking into account the size of a hand, I consider the depression "severe." There is also major atrophy of the thenar and hypothenar eminences, and a major irregularity in the shape of the hand, particularly the

dorsal side. The area over the MCP joints is very swollen and misshapen. I consider the loss of bodily form relating to the hand falls in the 75-99 point range, near the mid-point of the range. I would not place the loss of bodily form at the bottom of the range. The worker is entitled to 87 points for loss of bodily form of the left hand.

[103] The worker is entitled to a total of 364 points for disfigurement of her left hand.

[104] I turn now to the worker's arm.

[105] Factor #1 is surface area. The review officer confirmed the Board's award of 8 points. I do not agree. Close inspection of the one photograph showing the posterior aspect of the worker's left arm shows an area of scarring, discolouration and loss of bodily form corresponding to what I estimate to be 35% of the posterior aspect of the arm. On the anterior side, the worker has an area of scarring corresponding to approximately 2% of the surface area.

[106] Taking these two percentages together, I estimate that approximately 18.5% of the total surface area (anterior and posterior) is affected. The worker is entitled to 19 points rather than 8.

[107] Factor #2 relates to texture, thickening, keloid scarring and hardening. The review officer considered that the lumps referred to by the worker corresponded with moderate thickening or hardening. The worker was awarded 35 points in the 25-49 point range. I agree that 35 points in relation to factor #2 is reasonable.

[108] Factor #3 relates to colour. The worker was awarded 48 points by the DAO, and this was confirmed by the review officer. I agree that 48 points is reasonable, given that there is a moderate alteration of colour.

[109] Factor #4 relates to visibility. As was noted by the previous decision-makers, this assessment is somewhat arbitrary because if the worker is wearing long sleeves, the disfigurement would not be visible at all. The worker's employment as an accountant does not require her to wear short sleeves, although as observed by the review officer, the worker may be "inclined to wear short sleeves more often than long," so a finding that the arm scarring would be frequently visible is not unreasonable. I agree, and confirm the 80 points for visibility. The scarring would be clearly visible unless long sleeves are worn.

[110] With respect to factor #5, loss of bodily form, the DAO concluded there was none. The review officer noted muscle wasting, and a left elbow girth that is smaller than the right. In the accident, the worker sustained open fractures involving her elbow, and extensive reconstruction was undertaken. I agree with the review officer that the worker is entitled to an award for loss of bodily form of the elbow. However, I consider an award of

60 points to be too low. It was based on the loss of girth. From the photographs, it is apparent that the worker has also lost the normal contour of her elbow. The olecranon appears flattened and there are numerous lumps and bumpy areas that appear to be the result of the surgery and the bony injury rather than the texture or thickening of the scar. I consider an award closer to the upper end of the 50 to 74 points range is more reasonable. The worker is entitled to 70 points for loss of bodily form of her arm.

[111] The worker is entitled to a total of 252 points for disfigurement of her left arm.

Loss of Earnings Pension

[112] The worker asks that WCAT recognize that she is sustaining a loss of earnings.

[113] I accept that, as a result of her serious compensable injury, the worker's earning capacity has been significantly reduced and that in all likelihood she is sustaining a loss of earnings when one compares her capacity before the accident with her post-accident capacity. This is because, at the time of her compensable accident, the worker had qualified as a CGA and was awaiting her certificate. Based on what I have learned about the worker's abilities, motivation, and persistence, I have absolutely no doubt that the worker would have obtained full-time employment as an accountant within months of obtaining her certificate. There is also no doubt that the worker's earning capacity was far greater than what is reflected by her long-term wage rate.

[114] However, as the worker was employed less than 12 months with the accident employer, the Board set the worker's wage rate (short- and long-term) based on the application of section 33.3. This section mandates the use of 12 months earnings for a worker of similar status employed in the same type and classification of employment. Section 33.4 provides for exceptions relating to situations where the Board considers that the application of section 33.1(2) would be inequitable. Had the worker's average earnings been determined in accordance with section 33.1(2), one of the exceptional considerations may have applied. However, section 33.4 specifically excludes application to situations where the average earnings are determined under section 33.3. Given that the Board applied section 33.3, the exceptions would not apply to the worker.

[115] The worker's very low long-term wage rate seems inequitable given her plan to work at the cheese factory only temporarily while she waited for her CGA certificate and found employment as a CGA. The evidence is clear that the worker never intended work at the cheese factory to be a long-term goal. Although the worker was technically employed on a regular, full-time basis, her intention was clearly to qualify and find employment as a CGA. It is understandable given her circumstances, that the worker would not tell the accident employer that she intended to stay only until she could obtain employment as a CGA. As such, it could be argued that she was employed on a

temporary basis, and section 33.3 would not apply. In that instance, policy and practice may allow the use of some other method of determining the worker's long-term wage rate.

[116] However, in any event, as stated above, the worker's long term (average earnings) wage rate is not before WCAT. The comments in the above paragraph are not necessary for my decision. The worker's remedy, if any, would be an appeal to the Review Division, and she would require an extension of time to appeal.

[117] Thus, the worker's entitlement to a pension for loss of earnings must be determined in the context of her current long term average earnings (wage rate).

[118] Policy item #40.00 in the RSCM II sets out the criteria for consideration of a loss of earnings assessment. The policy states that all three criteria must be met in order that a worker be assessed for a loss of earnings. While the worker's situation met criteria #1 and #2, it did not meet criterion #3.

[119] Criterion #3 requires that the effect of the compensable disability is that the worker is unable to work in her occupation, or in an occupation of a similar type or nature, or to adapt to another suitable occupation, without incurring a significant loss of earnings.

[120] The worker has adapted to another suitable occupation, being work as a CGA. This is work that the worker was close to being qualified for at the time of her compensable injury. In addition, the Board has assisted her in achieving her long-term goal of work as an accountant.

[121] The Board's conclusion is that the worker can adapt to another suitable occupation without sustaining a significant loss of earnings. The evidence on file, including the worker's evidence, supports this conclusion. Even if the worker is unable to work full-time because of her injury, her earnings as a CGA are such that she is able to replace her pre-injury earnings. In addition, evidence on file indicates that the worker has worked full-time as a CGA. Taking the worker's PFI award and her earnings as a CGA into account, the worker is not sustaining a loss of earnings based on her long-term wage rate and pre-injury employment.

[122] I recognize that the worker does not have what might be called "regular full-time" employment as a CGA. The worker points out that her employment structure is based on an "independent contractor" or "subcontractor" model. This means the employer does not pay Canada Pension Plan (CPP) or employment insurance premiums for the worker. Thus, the worker submitted, if she lost her job she would not get employment insurance and she has to pay her CPP premiums herself. The worker said she has worked full-time but only for one to two weeks. She works part-time most often because the pain makes her exhausted.

[123] The worker said that her earnings from August 1, 2007 to March 15, 2003 amount to less than the statistical class average for the worker's pre-injury employment ($24,720.00 as of November 6, 2006). I accept that her earnings were less than the class average for her injury employment. However, the reason that the worker's earnings as an accountant are low is not readily apparent on the file. The worker's employer provided information to the Board that a similar status employee earned $20,415.60. This suggests that the structure of the employer and the employer/ employee relationship impacts earnings for all employees and not just the worker on the basis of her injury. However, the worker's hourly rate, at $18.00 is much higher than her hourly rate at the time of the injury.

[124] I cannot conclude that the worker is entitled to an assessment based on section 23(3) of the Act.

Conclusion

[125] I allow the worker's appeal, in part. The Review Division decision is varied as set out below.

Was the worker's permanent disability award based on physical functional impairment properly determined?

[126] For moderate impairment of the left median nerve at the elbow, the worker is entitled to an additional 10% of total for sensory and 15% of total for motor impairment.

[127] For moderate impairment of the left ulnar nerve at the elbow, the worker is entitled to an additional 1.5% of total for sensory and 3.5% of total for motor impairment.

[128] For impairment of the left radial nerve, the worker is entitled to 1.5% of total for sensory and 13.5% of total for motor impairment.

[129] These ratings for nerve impairment replace the current award relating to sensation.

[130] I leave it to the Board to calculate the worker's entitlements on the basis of these additional percentages, taking into account any devaluation required by law and policy.

Was the worker's permanent disability award for psychological impairment properly determined?

[131] I confirm the Review Division decision. The worker's psychological impairment is equivalent to 20% of a totally disabled person.

[132] The remainder of the award based on PFI is confirmed.

Is the worker's award for disfigurement properly determined?

[133] I vary the Review Division decision.

[134] The worker is entitled to a total of 364 points for disfigurement of her left hand.

[135] The worker is entitled to a total of 252 points for disfigurement of her left arm.

[136] I leave it to the Board to perform the necessary calculations. Policy item #43.20, as amended by the resolution of the board of directors of the Board dated March 19, 2008 *(Resolution #2008/03/19-02*) is applicable.

Is the worker entitled to assessment for a pension based on loss of earnings?

[137] I confirm the Review Division decision. The worker is not entitled to an assessment for a pension based on loss of earnings under section 23(3) of the Act.

[138] No expenses were claimed and none are awarded.

Teresa White
Vice Chair

TW/kk/jy