

### Noteworthy Decision Summary

---

**Decision:** WCAT-2009-01863 **Panel:** Michael Carleton **Decision Date:** July 15, 2009

***Section 23(1) of the Workers Compensation Act – Permanent functional impairment award - Cold intolerance – Additional Factors Outline – Policy item #39.10 of Rehabilitation Services and Claims Manual***

This decision provides an analysis of whether it was appropriate to increase a permanent functional impairment award for cold intolerance in a case where the worker's employment as a long haul truck driver required periods of working in a refrigerated container.

The worker appealed a February 26, 2009 decision by a review officer with the Review Division of the Workers' Compensation Board, operating as WorkSafeBC. In that decision the review officer confirmed the July 11, 2008 decision by a disability awards officer awarding the worker a PFI of 6.57% of total disability in connection with a fracture of the base of the right little finger metacarpal. That award was based on loss of range of motion, loss of sensation, and enhancement by reason of a prior right thumb injury and a prior index finger injury. The worker appealed to WCAT seeking an increased award based on cold intolerance he experiences in the right little finger.

The WCAT panel varied the review officer's decision, finding that the worker's award should be increased by 0.50% for cold intolerance. The worker was a sawyer, but due to cold intolerance changed to a long haul truck driver. In his employment as a truck driver driving a refrigerated container, the worker was required to be in the refrigerated container both when items were being loaded and unloaded, as well as during the course of transport. The panel noted that the Additional Factors Outline indicates that generally conditions such as cold intolerance do not constitute impairment as these conditions are variable and unreliable in their presentation. However, in this case the panel found that the worker's cold intolerance was not variable and unreliable in its presentation and had an adverse impact on the worker's earning capacity. The panel noted that the general range for awards for cold intolerance is between 0.50% and 1.50%, and awarded an additional 0.50% in this case as the worker's cold intolerance did not have a significant impact on his earning capacity.

**WCAT Decision Number :** WCAT-2009-01863  
**WCAT Decision Date:** July 15, 2009  
**Panel:** Michael Carleton, Vice Chair

---

## Introduction

- [1] The worker appeals a February 26, 2009 decision by a review officer with the Review Division of the Workers' Compensation Board (Board), operating as WorkSafeBC. In that decision the review officer confirmed the July 11, 2008 decision by a disability awards officer (DAO) concerning the extent of the worker's entitlement to an award for permanent functional impairment (PFI).
- [2] The review officer confirmed the worker was entitled to an award for permanent partial disability, under section 23(1) of the *Workers Compensation Act* (Act), in the amount of 6.57% of total disability in connection with a fracture of the base of the right little finger metacarpal. That award was based on loss of range of motion, loss of sensation and enhancement, by reason of a prior right thumb injury and a prior index finger injury.
- [3] The DAO indicated in the June 24, 2008 memo, which accompanied the July 11, 2008 decision that no determination had been made under section 23(3) of the Act for a loss of earnings award. The DAO noted that information on the file indicated the worker had returned to the pre-injury employment.
- [4] The worker seeks an increased award based on cold intolerance he experiences in the right little finger.

## Issue(s)

- [5] At issue is whether the Board properly determined the worker's entitlement to an award for permanent partial disability following an injury to his right little finger.

## Jurisdiction

- [6] This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the Act.
- [7] WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (see section 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board that is applicable in the case. WCAT has exclusive jurisdiction to

inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal before it (section 254 of the Act).

- [8] This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.
- [9] The standard of proof is the balance of probabilities, subject to section 250(4) of the Act. Section 250(4) of the Act states that on an appeal respecting the compensation of a worker, if the evidence supporting different findings on an issue is evenly weighted, the issue must be resolved in favour of the worker.

### **Background and Evidence**

- [10] The worker's claim had been accepted for a right fifth metacarpal fracture. In a referral memo to the Disability Awards Department (Disability Awards), dated February 24, 2008, a case manager indicated the worker had returned to his pre-injury job on November 28, 2005.
- [11] The worker underwent a PFI evaluation on June 16, 2008. The worker reported his main complaint was decreased grip strength of the right little finger. He indicated he was taking medication, having last taken Tylenol No. 3 in the afternoon for right hand pain.
- [12] The worker described other symptoms, including "sharp" shooting pain in the right little finger which radiated down to the right wrist. The worker said the symptoms increased with cold weather changes and increased activity.
- [13] The worker also described numbness in his right little finger which occurred after being active all day and in the mornings.
- [14] Following the assessment, the PFI physician, an external provider, expressed the opinion that range of motion findings were likely to be reliable. The physician also indicated that the "non range of motion findings appeared to be consistent with the client's diagnosis."
- [15] In the June 24, 2008 memo (form 24), which accompanied the DAO's July 11, 2008 decision, the DAO indicated that right little finger impairment had been calculated using the two-fingers hand chart (chart 3) contained in the Board's Permanent Disability Evaluation Schedule (PDES), which is found in appendix 4 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). Noting that the worker had a pre-existing right thumb disability and a pre-existing right index finger disability, the DAO determined under policy item #39.21 (incorrectly identified by the DAO as policy

item #39.24) of the RSCM II, that the worker was entitled to an enhancement factor of 6% of total disability, which was reduced by the amount of the combined awards provided to the worker for prior right hand injuries (1.70%). The DAO calculated that the enhancement factor was reduced to 4.30% of total disability. With the award for loss of range of motion and reduced sensation (2.27%), the worker's overall impairment was calculated at 6.57% of total disability.

- [16] The DAO found that the worker was not entitled to an additional award for cold sensitivity of the right little finger.
- [17] In proceeding with a request for review, the worker's legal representative argued that the worker should be provided with an increased award for cold intolerance in his right little finger. She cited various WCAT decisions in support of that position.
- [18] In providing the February 26, 2009 decision, the review officer found that the DAO had accurately determined the worker's entitlement to an award based on a loss of range of motion and sensation in his right little finger, by reference to the Board's policy and the Additional Factors Outline (AFO). The review officer also found that the worker's entitlement to an enhancement factor had been properly calculated, pursuant to policy item #39.21 of the RSCM II.
- [19] The review officer found the worker was not entitled to an award for cold intolerance. She noted that a number of the decisions cited by the worker's legal representative in support of the worker's position pre-dated the revision of the AFO on December 29, 2006. While the AFO previously provided guidance with respect to the consideration of cold intolerance, the December 29, 2006 revision set out that generally, conditions such as swelling, wasting, or cold intolerance, do not, in themselves, constitute impairment, as these conditions are variable and unreliable in their presentation and significance.
- [20] The review officer commented specifically on one of the decisions cited by the worker's legal representative, *WCAT-2008-02606*. In that decision, the worker was involved in an occupation that required direct immersion of his hands into tanks of ice and cold water. The review officer found that the worker's circumstances in the current appeal can be distinguished on the facts from the WCAT decision, and found that the mere fact that exposure to cold may occur is not a sufficient basis upon which to conclude that such exposure constitutes an exceptional circumstance that would warrant departure from the general rule.

### **Oral Hearing**

- [21] The worker was represented by legal counsel at an oral hearing on July 13, 2009. He provided his evidence through an interpreter.

- [22] The worker said he had initially returned to work as a sawyer, but found he was unable to perform that work because of loss of strength in his right hand and the effects of cold exposure while working outdoors. The worker said he was paid on a piece-work basis and he was unable to perform his work to the same level.
- [23] The worker said when exposed to cold weather his pain symptoms significantly increased. When exposed to cold weather, he takes two Tylenol tablets every four hours, to a maximum of eight Tylenol tablets per day. When the weather is not cold, he manages his pain symptoms by taking a maximum of four Tylenol tablets a day.
- [24] The worker said because of his inability to meet the production demands as a sawyer, he obtained employment as a truck driver, driving a refrigerated container. He said he had obtained his Class 1 licence three or four years ago.
- [25] The worker said he drives to Los Angeles to pick up perishable items, such as fruit and vegetables. He sometimes delivers milk on the trip down.
- [26] The worker said the refrigerated unit is kept at 28 to 30 degrees Fahrenheit.
- [27] The worker said he generally attends four different locations where perishable items are loaded into his refrigerated container. The worker said he has to be in the container when the items are loaded, in order to ensure that the load is evenly distributed, and to undertake an accurate count of the number of boxes of produce that are being loaded. He said he spends approximately two hours at each stop.
- [28] The worker provided evidence that he was also required to be in the refrigerated container when items were being unloaded, in order to ensure that only those perishable items that were to be delivered to a specific location were unloaded at that location. The worker said he also had to maintain an accurate count of the boxes of perishable items during the unloading process. The worker said he was required to be in the refrigerated container for extended periods when produce was being unloaded.
- [29] The worker said he wears two gloves on his right hand while inside the refrigerated container unit, or when exposed to cold weather. He said he still experienced increased symptoms when wearing two gloves.
- [30] The worker said on his return trip he has to enter the refrigerated unit every three to four hours to ensure that the load has not shifted, or to reorganize the load when shifting occurs during the course of transport.
- [31] The worker said when he is not at work he experiences a significant increase in symptoms when he is performing activities outdoors.

- [32] In providing a submission, the worker's legal representative argued that the worker's earning capacity was capable of being impaired because of cold intolerance. The worker's legal representative pointed out that it was necessary for the worker to be in a refrigerated unit both during loading and unloading of perishable items.
- [33] The worker's legal representative pointed out that the worker required a significantly increased intake of medication by reason of both his occupational and non-occupational exposure. He pointed out that even when the worker is wearing two gloves on his right hand, this is not sufficient for him to overcome the effects of cold exposure, as he also has to take increased dosages of medication.
- [34] The worker's legal representative submitted the worker is entitled to an award of 1%, which takes into consideration cold exposure as an additional variable under policy item #39.10 of the RSCM II.

## Decision and Reasons

- [35] The worker's legal representative has not challenged the calculation of entitlement in relation to restricted range of motion, loss of sensation, and enhancement. I have, nevertheless, reviewed the basis on which the Board calculated the worker's entitlement.
- [36] On review of the examination findings, which constitutes expert evidence, and the applicable policies, I find that the worker's right little finger impairment was properly calculated at 2.27% of total disability, with respect to restricted range of motion and loss of sensation. I also find that the Board properly calculated the enhancement factor, pursuant to policy item #39.21 of the RSCM II, at 4.30% of total disability.
- [37] The sole focus of the worker's appeal is his request for an award for cold intolerance.
- [38] Policy item #39.10 of the RSCM II states that the PDES is a set of guide rules, not a set of fixed rules. The Board officer in Disability Awards is free to apply other variables in arriving at a final award; but the "other variables" mean other variables leading to the degree of physical or psychological impairment, not other variables relating to social or economic factors, nor rules (including the schedules and guide rules) established in other jurisdictions.
- [39] The worker's legal representative had cited more than one WCAT decision where workers were provided with awards for cold intolerance after the AFO was revised in December 2006. In one decision, *WCAT-2008-01504*, the panel found that the worker's cold intolerance is always there, and the symptoms vary because of exposure to outdoor weather conditions. The panel was satisfied the cold intolerance resulted in increased pain and increased stiffness. The panel noted the worker would have been exposed to seasonal cold weather, which was mitigated to some extent, because the

worker performed only part of his job outdoors, as he was able to climb into a heated truck at certain times during the day. The panel found the worker was entitled to the lower end of the general range of 0.50% for each affected area, for the increased symptoms resulting from cold intolerance.

- [40] In another decision cited by the worker's legal representative, *WCAT-2008-02606*, the panel had noted the general rule contained in the AFO. The panel had commented that firstly, it states "generally" and secondly, the AFO is a guideline, not policy. The panel noted that prior WCAT decisions had provided awards in the area of 1% for cold intolerance "where such symptoms affect the worker's ability to work on a routine basis, such as where the worker was performing manual work out of doors." The panel noted that in that appeal, the worker's exposure to the cold was constant and year round. His work activities relied on the use of his hands, including placing his hands into tanks of ice and water and using a pinch grip while skinning cold birds. In that case, the panel considered the worker's case to be an exception to the general rule, and an award of 1.50% for cold intolerance was granted.
- [41] I have considered the worker's evidence in the context of policy item #39.10 of the RSCM II and the guidance provided in the AFO. While the AFO is not policy, it provides guidance and promotes consistency in its determination of permanent disability awards.
- [42] I note that at the time the worker submitted a request for review to the Review Division, the worker was employed as a sawyer. The review officer considered the worker's entitlement to an award for cold exposure in the context of his employment as a sawyer, and found that the fact the worker was exposed to cold was not a sufficient basis upon which to conclude the exposure constituted an exceptional circumstance that warranted departure from the general rule.
- [43] The worker has provided evidence that the work injury had a negative impact on his production output as a sawyer, and the increased pain that he experienced by reason of cold exposure was a significant factor affecting his productivity. For that reason he changed jobs, and obtained employment as a long-haul driver.
- [44] At the oral hearing I found the worker presented his evidence without exaggeration. On reviewing the evidence on the claim file, I note the worker has consistently maintained that he experiences increased pain complaints with cold exposure. I accept the worker's evidence that he has to double his usual intake of medication in order to cope with the effects of cold exposure.
- [45] While the AFO indicates that generally conditions such as swelling, wasting, or cold intolerance do not, in themselves, constitute impairment, as these conditions are variable and unreliable in their presentation, I found the evidence the worker provided at the oral hearing regarding his cold intolerance to be consistent with other evidence on

the file. I am persuaded that the worker's cold intolerance in this case is not variable and unreliable in its presentation, but rather, is a factor which is always there, and as a result the worker consistently experiences increased symptoms when exposed to cold temperatures.

- [46] I accept the worker's evidence that the fracture at the base of the right little finger metacarpal and the resulting impairment and cold intolerance affected his production output as a sawyer, performing work on a piece-work basis. The worker would have had continuous and unavoidable cold exposure, beginning in the fall, and carrying on into the winter months and early spring. Since I have concluded that the worker's production output was affected, I find the injury has had an impact on his earning capacity.
- [47] While the worker has now obtained other employment as a long-haul truck driver, pulling a refrigerated container, that employment results in cold exposure while he is required to be in the refrigerated container during loading and unloading of perishable produce for periods of up to two hours at a time, at various stops he makes both during the loading and unloading processes.
- [48] Noting the worker's reduced production abilities in his pre-injury employment, I have already concluded that the injury has had an adverse impact on the worker's earning capacity. Although the worker has changed occupations, and he no longer has continuous exposure to cold, he nevertheless is exposed to cold conditions, with a resulting increase in his pain complaints for extended periods at various points of pick up and delivery, while loading and unloading perishable items. In these circumstances, I find there is sufficient reliable evidence to overcome the general position set out in the AFO that cold intolerance will not entitle a worker to a separate impairment rating.
- [49] While there is no specific guidance in determining the appropriate quantum for such a rating in the RSCM II, the PDES, or in the AFO, prior WCAT decisions, including those cited by the worker's representative, indicate that panels have provided awards ranging between 0.50% and 1.50%.
- [50] Although the worker experiences increased pain and must take additional medication as a result of both his occupational and non-occupational exposure to cold, I note that his current employment as a long-haul truck driver to some extent mitigates the effects of his cold exposure. Although the worker may return to outside work at some point, at present his cold intolerance does not have a significant impact on his earning capacity.
- [51] Having considered the worker's current circumstances, I find that an award at the lower end of the general range is appropriate. I find the worker is entitled to an additional PFI rating of 0.50% in relation to his cold intolerance.



## Conclusion

- [52] While I confirm the functional aspect of the worker's award in all other respects, I vary the review officer's decision and find that the worker's award should be recalculated on the basis of an increase of 0.50% for cold intolerance.
- [53] The worker did not lose time from work to attend the hearing. The worker is entitled to reimbursement of travel expenses to attend the hearing, subject to the Board's policy regarding reimbursement of such expenses.
- [54] Since it is not apparent the worker incurred any other expenses relating to this appeal, I make no further order regarding expenses.

Michael Carleton  
Vice Chair

MC/ml/gl