

Noteworthy Decision Summary

Decision: WCAT-2010-00191 **Panel:** D. Reid **Decision Date:** January 20, 2010

Section 23(1) of the Workers Compensation Act – Permanent functional impairment award – Cold intolerance

This decision is noteworthy for its analysis of when a separate permanent functional impairment award for cold intolerance will be awarded, in addition to a chronic pain award.

The worker, a welder, sustained a compensable crush injury to the right index finger. The Workers' Compensation Board, operating as WorkSafeBC (Board), awarded the worker a permanent partial disability award equal to 4.09% of total disability for the crush injury to the right index finger and chronic pain. No separate award was made for cold intolerance. The worker appealed the permanent partial disability award with respect to the issue of cold intolerance to WCAT.

WCAT denied the appeal, finding that worker was not entitled to an additional award for cold intolerance. The panel noted policy item #39.10 of the *Rehabilitation Services and Claim Manual, Volume II* provides that a decision-maker may make an award on the basis of scheduled percentages for particular injuries, as set out in the Permanent Disability Evaluation Schedule (PDES). In addition to the PDES, a decision-maker may consider other non-scheduled variables in arriving at a final award. In this regard, the Board has developed an "Additional Factors Outline" (AFO) to provide non-binding guidance relevant to other variables that may entitle a worker to an increased Permanent Functional Impairment rating. The AFO states that cold intolerance will not generally constitute a separate impairment rating as it is a variable and unreliable condition in its presentation and significance.

The employer submitted that were the worker to receive an additional award for cold intolerance he would be compensated twice for the same condition as the worker's cold intolerance was manifested in the form of pain and thus covered by the chronic pain award. The worker submitted that he was entitled to an award for cold intolerance in keeping with similar decisions from WCAT that had found entitlement to a separate award for cold intolerance even in cases where a worker had received an award for chronic pain. The panel reviewed prior WCAT decisions that allowed a separate award for cold intolerance and found that such awards were only made where:

- the worker was employed in an industry where the accident employment was normally performed outdoors;
- the employment resulted in the worker being exposed to inclement weather and or cold temperatures;
- the work performed usually involved the part of the body that the permanent impairment was located in (i.e. the hands or fingers); and,
- the use of the body where the permanent impairment was located was integral to the work being performed.

In this case the panel found that the worker did not work out doors. There was no evidence that the worker was exposed to inclement weather or cold temperatures as a regular feature of his

employment. If cold intolerance affected the worker's functional impairment, it did so in relation to his chronic pain symptoms. The worker had not offered evidence or argument that cold further reduced the range of motion in his finger. Accordingly, a separate award for cold intolerance was denied.

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Panel: Dale Reid, Vice Chair

Introduction

- [1] On November 26, 2008 the Workers' Compensation Board (Board), operating as WorkSafeBC, informed the worker of his entitlement to a permanent partial disability award resulting from a crush injury to the right index finger and chronic pain. A disability awards officer (DAO) found entitlement to an award equal to 4.09% of total disability. With age adaptability, the overall award was 4.22% of a totally disabled person. On February 19, 2009, the worker requested a review of the decision by the Review Division of the Board.
- [2] On June 17, 2009, the worker was informed of the outcome of his request for review by the Review Division of the Board (#R0102295). The review officer addressed the worker's submission that he was entitled to an increase to the award for cold intolerance. She found the worker was not entitled to an award for cold intolerance as to do so would have the effect of compensating him twice for the same condition. In her view any adverse effect that the worker's hypersensitivity and cold intolerance may have on his earning capacity, had already been adequately compensated for by the worker's chronic pain award and thus he was not entitled to an additional award for cold intolerance or hypersensitivity of the right index finger.
- [3] The worker disagreed with the Review Division decision and appealed it to the Workers' Compensation Appeal Tribunal (WCAT) on July 8, 2009.

Issue(s)

- [4] The issue before me is whether the worker was entitled to an award for cold intolerance in his right index finger.

Jurisdiction

- [5] This appeal to WCAT is authorized under section 239 of the *Workers Compensation Act* (Act). As a member of WCAT, I am required to apply Board policy in coming to my decision.
- [6] The worker was represented by a lawyer in relation to this appeal. The employer participated in the appeal. The worker requested that the appeal be considered by written submissions. I considered this request in accordance with rule #7.5 of the *WCAT Manual of Rules of Practice and Procedure* (MRPP). I agree an oral hearing is not necessary in this case as the appeal does not involve the determination of

significant factual issues and credibility is not an issue. I have considered the appeal based upon a review of the file evidence and the written submissions from the parties to the appeal.

- [7] The standard of proof for compensation matters is the balance of probabilities, subject to section 250(4). Section 250(4) 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.

Evidence, Reasons and Findings

- [8] In deciding this appeal I have reviewed the evidence on the claim file, the evidence from the Review Division proceeding, and the submissions from the worker and employer. I have considered the relevant statutory law and Board policy applicable to this appeal. In consideration of all of the circumstances related to this case, I find that the Review Division decision is correct and accordingly I confirm the decision of June 17, 2009.
- [9] The worker does not dispute any area of the permanent partial disability award other than the issue of cold intolerance. Item #3.3.1 of the WCAT's MRPP provides that an appeal may be limited to the issues raised by the appellant. I see no reason to depart from this guideline and I therefore limit the scope of this appeal to the issue of whether the worker's cold intolerance entitles him to an increased permanent partial disability award. In addition I have reviewed the remainder of the worker's permanent partial disability award and find no reason to disturb it.
- [10] Turning to the substance of the appeal, pursuant to subsection 23(1) of the Act, where a worker's compensable injury leads to a permanent partial disability, 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 90% of the estimate of the loss of average net earnings resulting from the impairment.
- [11] The policies relevant to this appeal are set out in the *Rehabilitation Services and Claim Manual, Volume II* (RSCM II). I note in particular policy item #39.10, which provides that a decision-maker may make an award on the basis of scheduled percentages for particular injuries, as set out in the Permanent Disability Evaluation Schedule (PDES).
- [12] In addition to the PDES, a decision-maker may consider other non-scheduled variables in arriving at a final award, provided that such variables relate to the degree of physical or psychological impairment, not other variables relating to social or economic factors. In this regard, the Board has developed an "Additional Factors Outline" to provide non-binding guidance relevant to other variables that may entitle a worker to an increased Permanent Functional Impairment (PFI) rating. Item III(f)(h) of the Additional Factors Outline states that cold intolerance will not generally constitute a separate

impairment rating. The basis for this conclusion is that cold intolerance is a variable and unreliable condition in its presentation and significance.

- [13] The worker in his submission makes no reference to the work that he performed. The evidence on the claim file is very limited in relation to his daily activities. The best description is contained in the initial assessment report from the hand clinic dated November 26, 2007. The report stated:

[The worker] is currently working full time at lighter duties as a welder which involves occasional light welding, no heavy lifting or hammering. His pre-injury work duties involve assembly/fabrication of metal parts to cast in concrete. Average weight handled 40-50 pounds sometimes the metal can be heavier.

- [14] The job description supported the worker's employment duties were hand intensive. He was right-hand dominant and the injury was to his dominant hand. He worked in a fabrication shop and does not appear to regularly work out of doors where he would be exposed to cold weather on a regular basis.

- [15] The worker was discharged from the hand clinic on January 6, 2008. The worker's subjective complaints at discharge were numbness to the distal tip of his finger and pain with end-range index finger flexion. He returned to his full duties as a welder/fabricator with the accident employer. There was no mention in the discharge report from the hand clinic of cold intolerance or that this was an issue for him upon return to full duties at work.

- [16] The medical evidence relied upon in assessing his permanent partial disability award included the discharge report from the hand clinic and the ongoing medical reports from the worker's physician that identified pain, numbness, stiffness, restricted range of motion, swelling and deformity of the right index finger. The worker's permanent partial disability award addressed the conditions described above. He was awarded 1.59% of total disability, consisting of right index finger restricted range of motion (1.17%) and loss of sensation (0.42%).

- [17] The Board accepted chronic pain as a compensable consequence of the crush injury to the finger on May 28, 2008. He was given a permanent partial disability award of 2.50% for this condition. In determining the worker's pension entitlement the Board took the position that the worker's cold intolerance was manifested in the form of pain. They reasoned that as the worker had received an award of 2.50% for chronic pain in his finger he had been compensated for the pain in the finger resulting from cold intolerance.

- [18] The employer, in their submission, supported the Board's position. They believed that were the worker to receive an additional award for cold intolerance he would be compensated twice for the same condition. The worker submitted that he was entitled to an award for cold intolerance in keeping with similar decisions from WCAT that had found entitlement to a separate award for cold intolerance even in cases where a worker had received an award for chronic pain (*WCAT-2006-03647*). He referenced prior WCAT decisions in which an award for cold intolerance was made, and submitted that as his circumstances were similar, he was entitled to such an award.
- [19] I have reviewed the decisions that were referred to in the worker's submission and they all have a recurring theme. The recurring theme is that a separate award for cold intolerance was made where:
- the worker was employed in an industry where the accident employment was normally performed outdoors;
 - the employment resulted in the worker being exposed to inclement weather and or cold temperatures;
 - the work performed usually involved the part of the body that the permanent impairment was located in (i.e. the hands or fingers); and,
 - the use of the body where the permanent impairment was located was integral to the work being performed.
- [20] The circumstances in this case fail to meet the criteria set out above where an additional award was made for cold intolerance. The worker does not work out doors. There was no evidence provided that the worker was exposed to inclement weather or cold temperatures as a regular feature of his employment. If cold intolerance affects the worker's functional impairment, it does so in relation to his chronic pain symptoms. The worker has not offered evidence or argument that cold further reduced the range of motion in his finger.
- [21] For example in *WCAT-2008-01552* the worker suffered increased pain in a finger when it was cold. The WCAT panel increased his functional impairment award by 0.75%. However, the evidence in that case indicated that the worker's ability to perform his job cutting cedar shingles was quantifiably reduced by the effect of the cold on his finger. The worker was paid on the basis of the number of shingles he could cut in a given period of time, so cold intolerance had a direct impact on his earning capacity.
- [22] In this matter the worker has been compensated for the effect of chronic pain on his earning capacity by the award for chronic pain, which has been made. The worker returned to his pre-injury employment with the accident employer. There was no evidence provided that the worker was unable to return to his pre-injury job as a result of the chronic pain he experienced generally, or the pain he experienced when exposed intermittently to cold. Consequently, I do not conclude that cold intolerance has had an

additional impact on his functional impairment. Accordingly, I conclude that the worker is not entitled to an increased award on account of cold intolerance.

Conclusion

- [23] I deny the worker's appeal and confirm the Review Division of June 17, 2009. I find the worker is not entitled to an additional award for cold intolerance.
- [24] No reimbursable expenses were claimed as a result of the appeal process and upon my review none are apparent to me. Consequently, I do not at this time order reimbursement of expenses pursuant to section 7 of the *Workers Compensation Act Appeal Regulation*.

Dale Reid
Vice Chair

DR/jd