

Noteworthy Decision Summary

Decision: WCAT-2010-01894 **Panel:** David Newell **Decision Date:** July 9, 2010

Section 23(1) and 23(2) of the Workers Compensation Act – Permanent Functional Impairment – Additional Factors Outline – Cold Intolerance -- Knee

The worker injured his right knee when he fell from a ladder in April 2006. His claim was accepted for right knee anterior cruciate ligament instability and subsequent surgical repair, and chronic right knee pain. The worker sought an increased permanent functional impairment (PFI) award for cold intolerance.

The worker underwent a functional capacity evaluation in May 2008. He did not mention cold intolerance during the evaluation. Reports from a pain management program in 2008 did not mention cold intolerance. At his permanent functional impairment examination in February 2009 the worker described pain in his right knee that became worse the longer he was on his feet or in the cold. At the WCAT oral hearing the worker said his knee was quite significantly more painful in the cold. The pain was not only more intense, but it was sharper and radiated down his leg. The worker said his knee was stiff when it was cold, which reduced his range of motion, and that it “popped” and “clicked” more frequently. The worker said he took more pain medication during cold weather.

The worker had taken a training course to operate an excavator. During the course he was exposed to the cold for as long as ten hours a day. Many of the machines had cab heaters but many did not work, and the windows needed to be open for visibility. Other activities related to the work were outdoors. The worker described his knee become very sore and “like a stick.” He expressed concern that the increased pain made it harder to focus on work.

The vice chair accepted the worker’s evidence that he experiences increased pain and stiffness when exposed to cold temperatures, and that working as an excavator operator would expose the worker to cold during the winter months. The vice chair accepted that increased stiffness and pain in his right knee could affect the worker’s ability to operate the foot pedal controls.

The vice chair reviewed a number of previous WCAT decisions involving cold intolerance cited by the worker. All of them involved hand injuries, and awards of 1% or 1.5% of total disability. The vice chair noted that the decisions were not binding on him, but they did clearly indicate that an award of up to 1.5% of total disability may be appropriate to recognize the effects of cold intolerance that are not adequately covered by an award based on loss of range of motion alone.

The vice chair noted that all the decisions involved workers with hand injuries and said that, as a general principle, increased pain or diminished sensitivity in the fingers or a hand is likely to have a greater impact on a person’s ability to carry out work tasks than similar symptoms in a knee. The vice chair agreed that some recognition of the worker’s cold intolerance was appropriate, but did not think an award of 1.5% was warranted. An award of 1.5% appears to be

in the upper end of previous awards for cold intolerance involving the hands. An award of 0.5% was appropriate in this case.

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Panel: David Newell, Vice Chair

Introduction

- [1] By a decision dated March 16, 2009 the Workers' Compensation Board (Board), operating as WorkSafeBC, granted the worker a permanent functional impairment (PFI) award equal to 11.15% of total disability. The Review Division confirmed the Board's decision in its decision dated September 15, 2009 (*Review Reference #R0106447*). The worker appealed that decision.

Issue(s)

- [2] The issue in this appeal is whether the worker was entitled to an increased PFI award because of cold intolerance. The worker raised other issues at the Review Division; however, at the outset of the oral hearing in this matter, the worker advised that his appeal was limited to the issue of cold intolerance.

Jurisdiction

- [3] Section 239(1) of the *Workers Compensation Act* (Act) gives the Workers' Compensation Appeal Tribunal (WCAT) jurisdiction with respect to a final decision of a review officer respecting a compensation matter.
- [4] WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent (section 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but in doing so, must apply policy of the Board that is applicable in the case.
- [5] The appeal proceeded by way of oral hearing on May 11, 2010. The worker attended the hearing with his representative. The employer was invited to participate in the appeal but did not do so.
- [6] All references to policy in this decision, unless otherwise specified, pertain to the Board's *Rehabilitation Services and Claims Manual, Volume II*.

Background and Evidence

- [7] The worker injured his right knee when he fell from a ladder in April 2006. The Board accepted the worker's claim for right knee anterior cruciate ligament instability and subsequent surgical repair, and chronic right knee pain.
- [8] The worker's conditions were eventually determined to be permanent, and he was assessed for a PFI award. In its March 16, 2009 decision, the Board granted the worker a PFI award of 11.15% of total disability, comprising 8.65% for loss of range of motion in the right knee, and 2.5% for chronic pain.
- [9] The worker underwent a functional capacity evaluation on May 8, 2008. The evaluation report includes the worker's subjective comments with respect to his injury. The worker identified primary limitations for activities that required kneeling, crouching, crawling, heavy lifting or carrying, and pivoting on his right leg, due to ongoing pain, weakness and instability in his right knee. He did not mention cold intolerance.
- [10] The worker participated in a pain management program in July 2008. The intake assessment report for that program noted the worker's then current complaints as right knee pain, particularly after activity. The report did not mention cold intolerance. Similarly, the August 21, 2008 discharge report from the program did not note cold intolerance; however, no formal physical assessment was done at that time.
- [11] The worker attended a PFI evaluation (PFIE) on February 13, 2009. As part of the evaluation process the worker completed a questionnaire. He described the pain in his right knee as a dull ache in the posterior/medial aspect of the knee and in the knee joint that became worse the longer he was on his feet or in the cold. The PFIE report noted that description, but otherwise did not mention cold intolerance.
- [12] The worker testified at the WCAT oral hearing. He said his knee was quite significantly more painful in the cold. He said the pain was not only more intense but it was a sharper pain than what he felt on a daily basis, and it radiated down his leg. The worker said that when it was cold, his knee became stiff, further reducing the range of motion, and it "popped" and "clicked" more frequently. The worker said he took more ibuprofen for pain during cold weather, and he found that using a heating pad sometimes helped.
- [13] The worker said he had taken a training course to operate excavators during which his knee was exposed to the cold for as long as ten hours in a day. Although many of the machines he was training on had cab heaters, most of them did not work and he was obliged to keep the windows open for visibility. Other activities included inspecting the machines, daily greasing, changing excavator buckets, cleaning, and fuelling the machines. All of those activities were outdoors. The worker said his knee became very

stiff and made his leg “like a stick.” He noted that controlling the excavators require the use of both legs and feet to operate control pedals. The worker also expressed concern that the increased pain made it harder to focus on the work, which was potentially dangerous. The worker commented that working as an excavator operator, he would be regularly exposed to similar conditions.

Reasons and Findings

- [14] When a worker has a permanent partial disability, section 23(1) of the Act requires the Board to estimate the impairment of the worker’s earning capacity from the nature and degree of the injury. This is known as the PFI method of assessment. As stated in policy #39.00 the percentage of disability determined for the worker’s condition under section 23(1)(a) reflects the extent to which a particular injury is likely to impair a worker’s ability to earn in the future. Policy #39.00 also states that a permanent partial disability award calculated under section 23(1) also reflects short-term fluctuations in the compensable condition, among other factors.
- [15] Section 23(2) of the Act provides that the Board may compile a rating schedule of percentages of impairment of earning capacity for specific injuries which may be used as a guide in determining the compensation payable in permanent disability cases. The Board has compiled such a schedule, called the Permanent Disability Evaluation Schedule (PDES).
- [16] Policy #39.10 states that the PDES is a set of guidelines, not a set of fixed rules. The Board is free to apply other variables in arriving at a final award. To provide guidance in applying other variables, the Board has published the Additional Factors Outline (AFO). The AFO states “[g]enerally, 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.”
- [17] In a submission to the Review Division, repeated at the WCAT oral hearing, the worker referred to a number of WCAT decisions concerning cold intolerance.
- [18] In *WCAT-2006-02533* the worker sustained injuries to the thumb and fingers of his left hand, which resulted in loss of range of motion of the digits, and increased sensitivity in the tips of his fingers and thumb. The evidence established that the sensitivity of the worker’s fingertips increased significantly when exposed to cold temperatures, which reduced his ability to handle materials. Since the worker’s occupation required him to handle materials outside, including in the winter, the panel in the case concluded that the worker’s cold intolerance had a significant impact on his ability to earn income. The work was awarded an additional 1.0% of total disability for cold intolerance.

- [19] In *WCAT-2006-03446* the worker sustained injuries that resulted in amputation of her index and middle fingers on both hands. In addition to other impairments, the worker experienced painful sensations in her fingers when they were exposed to cold temperatures. The Board had included in the worker's PFI award 1.0% of total disability on account of cold intolerance and weakness. The WCAT panel confirmed that aspect of the award.
- [20] In *WCAT-2008-01552* also concerned a worker with a finger injury. In that case the panel noted that other WCAT decisions had provided awards in the area of 1.0% of total disability for cold intolerance where it clearly affected the worker's work abilities on a routine basis. The panel noted that the worker was routinely required to work in cold temperatures, and the decreased ability to manipulate objects affected his work abilities. The panel increased the award for cold intolerance from 0.25% to 1.0% of total disability.
- [21] In *WCAT-2008-02606* the worker sustained several fractures and a large laceration of his right thumb. He was left with a permanent partial disability that included pain in the tip of his right thumb and numbness along his right thumb and the right side of his hand. The pain and numbness were aggravated by cold temperatures and reduced his fine handling abilities. The panel noted that the worker needed both his hands to do his work, which included having to place his hands in tanks of ice and water, and awarded 1.5% of total disability for cold intolerance.
- [22] I accept the worker's evidence that he experiences increased pain and stiffness in his right knee when it is exposed to cold temperatures. Although the worker did not mention cold intolerance during the functional capacity evaluation or pain management intake assessment in 2008, I note that both those evaluations took place in the summer months; when the worker attended the PFIE in February 2009, he did mention increased symptoms with exposure to cold.
- [23] I also accept that working as an excavator operator would expose the worker to cold temperatures during the winter months, and that increased stiffness and pain in his right knee could affect his ability to operate the foot-pedal controls of an excavator. The WCAT decisions the worker cited, although not binding on me, clearly indicate that an award of up to 1.5% of total disability may be appropriate to recognize the effects of cold intolerance that are not adequately covered by an award based on loss of range of motion alone. However, I note that all of those decisions concerned workers with hand injuries. In my view, as a general principle, increased pain or diminished sensitivity in the fingers or a hand is likely to have a greater impact on a person's ability to carry out work tasks than similar symptoms in a knee. While I agree that some recognition of the worker's cold intolerance is appropriate, I do not think it warrants an award of 1.5% as he submitted. That appears to be in the upper end of previous awards for cold

intolerance involving the hands. I conclude that an increase of 0.5% is appropriate in this case.

Conclusion

- [24] I allow the worker's appeal and vary the Review Division decision dated September 15, 2009 (*Review Reference #R0106447*) to increase the worker's PFI award by 0.5% for cold intolerance.

Expenses

- [25] The worker requested reimbursement for the expense of travelling to attend the WCAT oral hearing. The oral hearing was held in Richmond, British Columbia. The worker travelled from a locale within the area known as the Lower Mainland, but possibly more than 25 kilometers distant. I direct the Board to reimburse the worker for the expense of travelling to attend the hearing to the extent that travel exceeded 25 kilometers in each direction.

David Newell
Vice Chair

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