

SUMMARY

DECISION NO. 122/96

Permanent impairment (rating schedule) (AMA Guides) (applicability); Permanent impairment (rating schedule) (unlisted condition); Permanent impairment (degree of impairment) (enhancement factor); Merits and justice.

The worker appealed a Hearings Officer decision confirming a 0% NEL award for a right ankle injury.

According to the AMA Guides, there is no impairment of the ankle when the degree of eversion of the ankle is 20 degrees and there is a 2% impairment when the degree of eversion is only 10%. A 2% impairment of the ankle results in a 1% impairment of the whole body. On his NEL assessment, the worker was found to have an eversion in the ankle of 15 degrees. As this was half way between the 10 degrees and 20 degrees of eversion listed in the AMA Guides, the Board found that the worker had impairment of the ankle of 1%, which, according to the AMA Guides, results in a 0% impairment of the whole body.

In Decision No. 269/93, a panel held that the Board could not add listings to the AMA Guides. It found that the Guides were the statutorily prescribed method for determining permanent impairment and that much of the Board's discretionary power in rating impairment had been taken away by the 1989 amendments to the Act.

The Panel did not follow Decision No. 269/93. The AMA Guides contemplate that situations may arise where a condition is not listed. Section 42(5) of the Act provides for determining permanent impairment in accordance with the rating schedule and having regard to medical assessments conducted under the section. This contemplates that the medical assessor will do more than mechanically apply the Guides. Although the third edition of the AMA Guides has been adopted as the rating schedule, the Panel noted that the fourth edition grants doctors greater discretion in applying ratings. The Panel also noted the obligation to make decisions on the real merits and justice. The Panel found that the Board must continue to enjoy some reasonable judgment in applying the Guides and obtaining an accurate assessment of the worker's condition when determining impairment. Accordingly, it is not always inappropriate to assess a degree of permanent impairment that is not expressly provided for in the Guides.

In this case, in addition to the eversion of the ankle, the worker was also suffering from pain. Considering the degree of eversion and the pain, the Panel found that the worker was suffering from the equivalent of a 2% impairment of the ankle, which resulted in a 1% impairment of the whole body. Accordingly, the worker was entitled to a 1% NEL award.

The worker also had a previous left ankle injury for which she received a 3% pension under the pre-1989 Act. The worker submitted that there should be a multiple factor included in the award. Board

policy did not provide for multiple factors between pre-1989 and post-1989 injuries. The Panel saw no reason to apply a multiple factor in this case.

The appeal was allowed. [10 pages]

PANEL: Flanagan; Klym; Chapman

DATE: 29/04/96

SS: 42(5)

WCAT DECISIONS CONSIDERED: Decision No. 269/93 (1994), 30 W.C.A.T.R. 123 not folld;
Decisions No. 503/95 refd to, 503/95R refd to

REGULATIONS CONSIDERED: Reg. 1102, s. 15

BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Document No. 05-06-07

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 122/96

This written appeal was considered in Toronto on February 9, 1996, by a Tribunal Panel consisting of:

W.F. Flanagan: Vice-Chair,
S.L. Chapman : Member representative of employers,
P. Klym : Member representative of workers.

THE APPEAL PROCEEDINGS

The worker is appealing a decision of the Hearings Officer dated September 30, 1994, which confirmed the worker's 0% non-economic loss (NEL) award.

In the Written Hearing Process Reply Form, dated November 19, 1995, the worker's representative, M. Grimaldi of the Office of the Worker Adviser, agreed on behalf of the worker to proceed with the appeal on the basis of a written hearing. The employer was notified of the appeal and the employer informed the Tribunal that it would not be participating. Accordingly, the Panel proceeded with a written appeal, and an oral hearing was not held.

THE EVIDENCE

Documentary evidence marked as exhibits was as follows:

Exhibit #1: Case Description; and

Exhibit #2: Addendum #1 to the Case Description.

THE NATURE OF THE CASE

The worker suffered a compensable accident on July 25, 1990, when the worker slipped and suffered a right ankle injury, and was diagnosed with a fracture at the distal end of the lateral malleolus with ligamentous damage. In the Hearings Officer's decision dated December 21, 1992, the worker was granted an assessment for an evaluation of permanent impairment. An evaluation was conducted on April 23, 1993, by Dr. K.J. Armitage. The evaluation was reviewed and accepted by the NEL Adjudicator and there was a 0% NEL award payable. This decision was confirmed by the NEL Medical Coordinator, in a letter dated August 25, 1993, and further upheld by the Hearings Officer's decision dated September 30, 1994. It is this decision that is being appealed in this case.

The issue for the Panel to determine is the quantum of the worker's NEL award.

THE PANEL'S REASONS

(i) The submissions of the worker's representative

In the written submissions the worker's representative indicated that the worker was appealing the Hearings Officer's decision on three grounds:

1. the Board did not properly interpret the American Medical Association Guide;;
2. the Board did not take into consideration the “full medical” on file; and
3. the Board did not take into account the “multiple factor”.

With regard to the first point, the worker’s representative referred to the NEL assessment conducted by Dr. K.J. Armitage dated April 23, 1993, where Dr. Armitage noted that the degree of eversion in the right ankle (turning the foot outward) was 15 degrees, and the degree of inversion (turning the foot inward) was 30 degrees. The American Medical Association *Guides to the Evaluation of Permanent Impairment* (3rd ed.) (the “AMA Guides”) is used by the Board to determine the degree of permanent impairment for a NEL award. The *AMA Guides*, at p. 67, indicates that there is no impairment when the degree of eversion of the ankle is 20 degrees, there is a 2% impairment when the degree of eversion is only 10%, and a 4% impairment when the eversion is only 0%. The *AMA Guides* provides only these three examples, and the eversion ratings go from 0% - 2% - 4%. In this case, the worker has an eversion rating of 15%, one half way between 10 degrees (with a 2% impairment) and 20 degrees (with a 0% impairment). As a result, the Board rated the worker’s percentage impairment of the right ankle at 1%, which under the *AMA Guides*, at p. 72, results in a 0% impairment of the whole body. Accordingly, the worker was granted a 0% NEL award.

The worker’s representative submitted that there is no provision for a 1% award in the *AMA Guides*; there is only a provision for a 0%, 2%, or 4% award. He submitted that if the worker had an eversion of 20 degrees, the impairment would be 0%, but anything between an eversion of less than 20 degrees, and an eversion of 10 degrees (such as the worker’s 15 degrees) must result in a 2% impairment. He submitted that it is not open to the Board to calculate an impairment of 1%, as this level of impairment is not expressly included in the *AMA Guides*. Accordingly, the representative submitted that the worker’s impairment should be rated at 2%, not 1%. This would result in a 1% impairment of the whole person, as indicated in the *AMA Guides* at p. 72, rather than the 0% currently recognized by the Board.

With regard to the second point, the worker’s representative submitted that the Board had also failed to take into account other medical information on file. The representative noted that Dr. Armitage recorded the worker’s complaints of increased pain with turning, increased pain with weather changes, increased pain with activity, increased pain on rough grades, and some effect on the ligaments and limping when running. The representative also referred to an assessment of the worker, conducted on October 30, 1992, by Dr. D. Cole, occupational physician, where he notes that “there was no swelling or redness during the examination but apparently this was brought on and there was some swelling on the day following the examination.” The representative submitted that these factors, increased pain and swelling, should also be taken into account when determining the worker’s rating for a NEL award.

With regard to the third point, the worker’s representative noted that the worker had been granted a 3% pension for a permanent impairment in her left ankle, with respect to an earlier, unrelated compensable accident. He submitted that this injury to the other ankle should be taken into account, and the worker should be granted a “multiple factor” in this case.

(ii) The reasoning

The issue for the Panel to determine is whether the Board has correctly assessed the worker's NEL award for the permanent impairment in her right ankle.

The worker's representative has raised three separate issues, the interpretation of the *AMA Guides*, the consideration of the worker's full medical file, and the application of a multiple factor. Each issue is dealt with separately below.

(iii) The interpretation of the *AMA Guides*

The worker's representative has submitted that the Board has erred in assessing the worker's impairment at 1%. The representative submitted that an eversion of less than 20 degrees, but more than 10 degrees, must result in a 2% impairment. An eversion of 15 degrees, as in this case, cannot result in a 1% impairment, as this 1% figure is not expressly included in the *AMA Guides*.

A similar question was considered by a panel of the Tribunal in *Decision No. 269/93* (1994), 30 W.C.A.T.R. 123, at 134-143. In this case, the evidence suggested that the worker had been assessed with a 5 degree lumbar extension. The *AMA Guides* provided that where there was a 0 degree extension, the impairment is 7%, and where there is a 10 degree extension, the impairment is 5%. There was no express provision for a 5 degree extension, and no express provision for a 6% impairment. Nonetheless, the Board granted the worker a 6% impairment.

The Panel in *Decision No. 269/93* held that the Board had erred in its decision. The Panel referred to several American cases commenting on the *AMA Guides*, and while noting that the decisions were obviously not binding, the Panel found the decisions helpful, and stated at p. 142:

The court decisions we have reviewed indicate that, where the *AMA Guides* are to be used, interpretation and subjectivity should not be introduced into the assessment of impairment lightly. The courts appear to recognize that objectivity and a standardized system of assessment of impairment are the hallmarks of the *AMA Guides*.

The *AMA Guides* offer objective standards to follow in determining the degree of certain specified permanent impairments. They are designed to provide a structured set of criteria that comprise a reference with which to establish well-formulated medical ratings of these permanent impairments. They provide for standardized communications of medical information about the impact of certain medical impairments on an individual's activities of daily living.

The Panel added at p. 143:

We accept the submissions of the worker's representative that the Board is compelled to use the *AMA Guides* as they exist in determining the percentage of the worker's permanent impairment for lumbar extension. The Board cannot, in effect, amend those *Guides* by adding a separate line in Table 60 to the effect that a 5 degree lumbar extension

would result in a 6% impairment award. In our view, such an “amendment” is not a determination of the worker’s permanent lumbar extension impairment “in accordance with” the *AMA Guides*, as required by section 42(5) of the [Workers’ Compensation] Act.

The *AMA Guides*, despite their name, are not merely “guidelines” for the Board to use in rating types of impairment listed in the *Guides*. They are the statutorily prescribed method for determining a worker’s permanent impairment under the Act. The system put in place by the Legislature with the enactment of the 1989 amendments is substantially different from that which existed prior to 1989. Much of the Board’s discretionary power in rating permanent impairments is now gone. The Board’s discretionary powers have been replaced by what is intended to be an objective standard which can be more easily tested for accuracy by those not involved in the assessments.

The Panel took a very strict view of the application and interpretation of the *AMA Guides*, noting that section 42(5) of the *Worker’s Compensation Act* provides that the Board “shall determine in accordance with the prescribed rating schedule and having regard to medical assessments conducted under this section the degree of a worker’s permanent impairment expressed as a percentage of total permanent impairment.” Section 15 of *Regulation 1102*, R.R.O. 1990 (as amended by *O. Reg. 6/91* and *O. Reg. 758/91*) further provides that this rating schedule shall be the *AMA Guides, 3rd ed.*. The Panel found that the mandatory language of section 42(5) (the use of “shall”) imposed an obligation on the Board not only to apply the prescribed rating schedule, but to do so strictly.

A similar argument has been made by the worker’s representative in this case. The representative submitted that an eversion of less than 20 degrees, but more than 10 degrees, must result in a 2% impairment. An eversion of 15 degrees, as in this case, cannot result in a 1% impairment, as this figure is not included in the *AMA Guides*. Likewise, it would follow that an eversion of 19 degrees would also result in a 2% impairment, even though an eversion of 20 degrees will result in a 0% impairment. An eversion anywhere from 9 degrees to 0 degrees would similarly result in a 4% award, even though an eversion of 10 degrees results in only a 2% award.

The Tribunal has not had extensive opportunity to review the interpretation of the *AMA Guides*, as they have only recently been adopted by the legislation as the means to determine NEL awards. However, for the following reasons, in this case the Panel is not persuaded by the reasoning provided in *Decision No. 269/93*, which seems to require in most cases a rigid and inflexible interpretation of the *AMA Guides*.

First, the Panel notes that *Decision No. 269/93*, at p. 143, provides that the decision is “limited only to the use of the *AMA Guides* for lumbar extension”, a matter not before the Panel in this case. It is possible to distinguish the decision on this basis.

Second, as noted in *Decision No. 269/93*, the *AMA Guides*, at p. 4, contemplate that situations may arise where the permanent disability in question is not specifically listed in the *AMA Guides* and in such cases, workers’ compensation legislation typically provides for some kind of

discretion to determine an appropriate award. In the view of this Panel, this suggests that the *AMA Guides* are not intended to be a definitive guide to be applied rigidly to all disabilities.

Third, the Panel notes that section 42(5) of the *Act* provides that the “Board shall determine in accordance with the prescribed rating schedule *and having regard to medical assessments conducted under this section* the degree of the worker’s permanent impairment expressed as a percentage of total permanent impairment.” [Emphasis added]. Section 42(6) also provides the medical assessor shall “assess the extent of the worker’s permanent impairment, having regard to the existing and anticipated likely future consequences of the injury.” In the view of the Panel, the legislation contemplates that the medical assessor will do more than merely mechanically apply the *AMA Guides*, but shall as well provide some kind of independent medical assessment of the degree of the worker’s total permanent impairment. It is also helpful to note that the need for an adequate and complete medical assessment has been emphasized in *Decision No. 503/95* (July 21, 1995), reconsidered on another point in *Decision No. 503/95R* (February 2, 1996).

As noted earlier, the *AMA Guides* have been specifically adopted by regulation under the *Act* as the “prescribed rating schedule” referred to in section 42(5), and the Panel is bound by the adoption of the *AMA Guides*. However, the Panel is also of the view that the legislation itself, and the *AMA Guides*, contemplate that the *Guides* may in some cases be incomplete or insufficient, and the Board must continue to enjoy some reasonable judgment in applying the *Guides* and obtaining an accurate and complete assessment of the worker’s medical condition when determining the permanent degree of impairment.

Fourth, the Panel notes that the most recent edition of the *AMA Guides*, the fourth edition, appears to grant physicians greater discretion in applying the ratings contained in the *Guides*, and physicians may modify this impairment rating if there are sufficient medical grounds to do so [see Babitsky and Mangraviti, *Understanding the AMA Guides, A Comparison of the Fourth Edition to the Third Edition Revised*, Vol. 2, (1994)]. Although the regulations under the *Act* have specifically adopted the third edition of the *AMA Guides* (the fourth edition not having been issued at the time of the regulations), in the view of the Panel it is not unreasonable to take these comments into account when interpreting the provisions of the third edition, and considering the question of whether or not the third edition should be applied in a mechanical fashion that precludes the exercise of any additional medical assessment.

Finally, the Panel notes the provision of section 4(4) of the *Act*:

In determining any claim under this Act, the decision shall be made in accordance with the real merits and justice of the case and where it is not practicable to determine an issue because the evidence of or against the issue is approximately equal in weight, the issue shall be resolved in favour of the claimant.

In the view of the Panel, a rigid application of the *AMA Guides* might in some case result in a decision inconsistent with the “real merits and justice of the case”.

Accordingly, in this case the Panel is of the view that it is not always inappropriate for the Board to assess a worker’s degree of permanent impairment in a manner that is not expressly provided for

within the *AMA Guides*. In particular, the Panel is not of the view that it would amount to an impermissible “amendment” of the *AMA Guides* if the Board selected, as it has in this case, a degree of impairment not expressly included in the *AMA Guides*. Providing such a decision is based on sound medical grounds, and is the result of a complete and accurate medical assessment, the Panel is not of the view that the provisions of the *Act*, or the *AMA Guides* themselves, preclude such an assessment. In particular, the Panel is not of the view that an eversion of 18 or 19 degrees of the ankle must in all cases result in a 2% impairment, even though the *AMA Guides* provide that an eversion of 20 degrees results in a 0% impairment. Likewise, the Panel is not of the view that an eversion of 9 degrees must in all cases result in a 4% impairment, even though an eversion of 10 degrees results in only a 2% impairment.

However, consistent with the Panel’s approach to the interpretation of the *AMA Guides*, the Panel is of the view that there are sufficient medical reasons to exercise some judgment in the worker’s favour in this case, as discussed below.

(iv) Full medical

The worker’s representative has also submitted that the Board failed to take into account the other relevant medical information on file, including the worker’s subjective complaints of increased pain, swelling, and mobility problems. As noted in *Decision No. 269/93*, at p. 142, the *AMA Guides* are “designed to provide a structured set of criteria that comprise a reference with which to establish well-formulated medical ratings of these permanent impairments.” The Panel further notes, at p. 143, that “much of the Board’s discretionary power in rating permanent impairments is now gone.” Instead, the Board’s “discretionary powers have been replaced by what is intended to be an objective standard which can be more easily tested for accuracy by those not involved in the assessments.”

The Panel in this case agrees that the *AMA Guides* are intended to provide an objective standard of impairment, however the Panel is also of the view that there remains some room for the exercise of some reasonable judgment in the interpretation of the *AMA Guides*, as outlined above. In particular, some variation from the strict, mechanical application of the *AMA Guides* might be warranted if there are sound, documented medical grounds for concluding that the rates of impairment in the *AMA Guides* is insufficient to provide a fair assessment of a particular worker’s degree of impairment.

In the case, the Panel notes that the worker has an eversion of 15 degrees in her right ankle. This is slightly less than the normal eversion of 20 degrees, yet not sufficient to result in any permanent impairment award with respect to the whole body under the *AMA Guides*. The worker has also reported increased pain with turning, increased pain with weather changes, increased pain with activity, increased pain on rough grades, and some effect on the ligaments and limping when running. Although there is not much in the way of medical reports to support the worker’s complaints, the Panel is prepared to accept the worker’s account of increased pain. In the view of the Panel, it is not unreasonable to conclude that the worker is suffering some permanent impairment, and notwithstanding the fact that the worker’s has 15 degrees eversion in the injured ankle, this level of impairment, in the Panel’s view, is not simply *de minimis*. Considering the degree of eversion, and the worker’s report of pain, the Panel is of the view that it is reasonable to conclude that the worker’s degree of impairment in

her right ankle is the equivalent of 2%, resulting in a degree of impairment of the whole body at 1%. As a result, the Panel finds that the worker is entitled to a 1% NEL award.

(v) Multiple factors

With regard to the third point, the worker's representative noted that the worker had been granted a 3% pension for a permanent impairment in her left ankle, pre-Bill 162, with respect to a different compensable accident. He submitted that this "multiple factor" should be taken into account, and the worker should be granted a "multiple factor" in this case.

The Panel notes that *Operational Policy Document # 05-06-07* (September 4, 1991), provides that if "the worker has a measurable work-related impairment (pre-Bill 162) and suffers another work-related impairment (under Bill 162) to a different body area, the Bill 162 work-related impairment is rated independently." In effect, this policy precludes the application of the "Combined Value Chart" of the *AMA Guides*, which determines the effect of multiple impairments, and usually results in a lower total impairment figure than would otherwise be the case if the independent assessments were simply added together. There is also no provision for any "multiple factor" to apply when a worker has been assessed for a pre-Bill 162 impairment, and a second post-Bill 162 impairment. Consistent with Board policy, the Panel sees no reason to apply any "multiple factor" in this case. Moreover, for the reasons given above, the Panel is satisfied that its finding on the medical evidence, and the application of the *AMA Guides*, have adequately and accurately determined the degree of the worker's permanent impairment in this case.

THE DECISION

The appeal is allowed, and the Panel finds that the worker is entitled to a 1% NEL award for the impairment in her right ankle.

DATED: April 29, 1996

SIGNED: W.F. Flanagan, S.L. Chapman, P. Klym