



**WORKPLACE SAFETY AND INSURANCE  
APPEALS TRIBUNAL**

**DECISION NO. 1357/05**

**BEFORE:**

S. Martel: Vice-Chair

**HEARING:**

July 27, 2005 at Toronto  
Written  
Post-hearing activity completed on January 31, 2006

**DATE OF DECISION:**

July 31, 2006

**NEUTRAL CITATION:**

2006 ONWSIAT 1694

**DECISION(S) UNDER APPEAL:** WSIB ARO decision dated November 12, 2004

**APPEARANCES:**

**For the worker:**

Mr. M. Blythe, Union representative

**For the employer:**

Not participating

**Interpreter:**

N/A

## REASONS

### (i) Issue

- [1] The issue in this appeal is whether the Board appropriately applied the Combined Values Chart of the American Medical Association Guides to the Evaluation of Permanent Impairment (third edition revised) (the “AMA Guides”) when a worker receives non-economic loss (NEL) awards in two different claims.

### (ii) Background

- [2] The worker has been granted NEL awards in respect of four different accidents:
1. The worker suffered a left elbow and forearm repetitive strain injury in February 2000. He was examined for NEL purposes on January 14, 2003 and granted a 6% NEL award in April 2003.
  2. The worker injured his low back at work on January 7, 2002. He was examined for NEL purposes on March 31, 2003 and granted a 16% NEL award on June 11, 2003.<sup>1</sup>
  3. On October 30, 2000, the worker injured his left knee. He was examined for NEL purposes on August 27, 2003 and granted a 12 % NEL award. The actual rating for this particular injury was 14% but it was reduced to 12% when combined with the worker’s previous NEL awards.
  4. The worker injured his right arm at work on October 12, 1994. He was examined for NEL purposes on April 2, 2004 and granted a 3% NEL award. The actual rating for this particular injury was 5% but when combined with the worker’s previous NEL awards, it was reduced to 3%.

- [3] The issue on appeal in this case concerns the NEL awards in respect of the left knee and right arm claims. In calculating the worker’s NEL benefit in the last 2 NEL awards, the Board applied the Combined Values Chart of the AMA Guides. The Board combined the previous NEL awards with the new NEL awards to reflect the whole person impairment.

- [4] The worker’s representative, Mr. Blythe, submits that the Board’s policy does not permit combining NEL values in respect of permanent impairments from different claims.

### (iii) The Law and Board Policy

#### (a) Legislation

- [5] Provisions for NEL awards were first introduced as of January 1990 by Bill 162. Under this legislation, an injured worker may receive a NEL award to reflect the non-economic loss resulting from permanent impairment.

- [6] Section 42 of this legislation, now known as the pre-1997 Act, sets out the NEL provisions.

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<sup>1</sup> The calculation of this NEL award is not at issue in the current appeal.

**42(1)** A worker who suffers permanent impairment as a result of an injury is entitled to receive compensation for non-economic loss in addition to any other benefit receivable under this Act.

...

**(5)** 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.

...

[7] The rating schedule referred to in subsection 42(5) was established in section 15 of Regulation 1102 and consisted of the American Medical Association Guides to the Evaluation of Permanent Impairment (third edition revised) (the “AMA Guides”).

[8] Many of the NEL provisions of the *Worker's Compensation Act* were repealed and replaced by the *Workplace Safety and Insurance Act, 1997* (the WSIA), effective January 1, 1998. While the pre-1997 Act continues to apply to accidents that took place prior to January 1, 1998, section 106(2) of the WSIA deems sections 42(5) to (25) of the pre-1997 Act repealed and replaced by subsections 47(1) to (13) of the WSIA. The WSIA NEL provisions state:

46. (1) If a worker's injury results in permanent impairment, the worker is entitled to compensation under this section for his or her non-economic loss.

...

47. (1) If a worker suffers permanent impairment as a result of the injury the Board shall determine the degree of his or her permanent impairment expressed as a percentage of total impairment.

(2) The determination must be made in accordance with the prescribed rating schedule (or, if the schedule does not provide for the impairment, the prescribed criteria) and

(a) having regard to medical assessments, if any, conducted under this section; and

(b) having regard to the health information about the worker on file with the Board.

[9] Similarly to the Regulation under the pre-1997 Act, section 18(1) of *Regulation 175/98* also provides that the AMA Guides (third edition revised) is the prescribed rating schedule for the purposes of section 47(2).

[10] Under section 126 of the WSIA, the Tribunal is required to apply Board policy.

### **(b) The AMA Guides**

[11] According to the legislation and regulations, the rating of impairments under the pre-1997 Act and the WSIA is based on the AMA Guides. *Decision No. 1119/04R* dated November 29, 2005, includes a good description of the AMA Guides:

The AMA Guides include specific ratings for physical impairments. They also include a “Combined Values Chart”.

The Foreword to the third edition of the *Guides* states (at p. xviii)

The *Guides* continues to espouse the principles that all impairments affect the individual as a whole and that all impairments should be expressed as

impairments of the “whole person.” This is done with the aid of the “Combined Values Chart” (p.254). Practically all impairment values involving several organ systems or multiple parts of the same system should be combined using the Combined Values Chart unless the text gives other instructions.

The Foreword to the Second Edition, which has been included in the Third Edition as pages xix and xx, states at the bottom of page xix:

The Guides continue to espouse the philosophy that all physical and mental impairments affect the whole person, and therefore, all impairment ratings should be combined to be expressed as impairment of the whole person. This is done with the aid of a “Combined Values Chart”.

Chapter 1 of the Guides is entitled “Concepts of Impairment Evaluation”. Part 1 of Chapter 1 is the Introduction to those concepts. At subsection 1.2: “Structure and Use of the Guides”, on page 3 of the Introduction, the *Guides* state:

First, Chapter 2 of the Guides lists the kinds of information needed to document the nature of the impairment...

Second, the chapters about the organ systems contain medical evaluation protocols or descriptions of specific procedures for evaluating a particular body part, function, or system, each developed by qualified medical consultants...

Third the chapters contain reference tables specifically keyed to the evaluation protocols. If the protocols and tables have been followed, the clinical findings may be compared directly with the impairment criteria and related to impairment percentages. The use of other tables, including the Combined Values Chart (p. 254) may be necessary to express the impairment in terms of the “whole person” that is, the general physiologic functioning of the impaired person,

At page 4 of Chapter 1, the Guides state:

Because not all conditions that can arise out of an injury are accounted for in a schedule, there is likely to be a provision of state law, as in Maryland, that in cases of permanent disability other than those that are specifically listed, the workers’ compensation commission must determine the percentage by which the “industrial use” of the employee’s body was impaired, considering the nature of the injury and the employee’s occupation, experience, training, and age, and then award a proportional amount of compensation...

It is evident that the Guides does not offer a solution for this situation, nor is it intended to do so. Each administration or legal system using permanent impairment as a basis for disability rating should define its own process for translating knowledge of a medical condition into an estimate of the degree to which the individual’s capacity to meet personal, social or occupational demands, or to meet statutory or regulatory requirements, is limited by the impairment.

At page 6 of the Introduction, under 2.2: “Evaluating the Whole Person”, the *Guides* state:

To support systems that require such determinations, the reference tables of the *Guides* take into account all relevant considerations in reaching “whole person” impairment ratings. A final impairment percentage, whether the result of single or combined percentage, may be rounded to the nearer of the two nearest values, ending in “0” or “5”.

....

If "apportionment" is needed, the analysis must consider the nature of the impairment and its possible relationship to each alleged factor, and it must provide an explanation of the medical basis for all conclusions and opinions. To establish that a factor could have contributed to the impairment, the analysis must include a discussion of pathophysiology of the particular condition and of pertinent host characteristics. A conclusion that a factor did contribute to an impairment must rely on documentation of the circumstances under which the factor was present and verification that the type and magnitude of the factor were sufficient and bore the necessary temporal relationship to the condition. The existence of an impairment does not create a presumption of contribution by a factor with which the impairment is often associated.

At page 19 under the heading "Combining Impairment Values", the *Guides* note:

Multiple regional impairments, as in the hand, wrist, elbow, and shoulder, are expressed in terms of impairment of the upper extremity and are combined using the Combined Values Chart.

At page 52 of the *Guides*, under the heading "Other Musculoskeletal System Defects", the *Guides* indicate:

In rare cases, the severity of the clinical findings (e.g. loss of shoulder motion) does not correspond to the true extent of the musculoskeletal defect (e.g. severe and irreparable rotator cuff tear of the shoulder)... If the examiner feels that the measured anatomical impairment does not appropriately rate the severity of the patient's condition, an additional impairment can be given at discretion.

### (c) Board Policy

[12] There are two relevant policies in this appeal. *Operational Policy Manual* ("OPM"), Document No. 05-06-07 entitled "Effect of a Pre-Existing Condition or Impairment" is dated September 4, 1991. This policy, however, has been superseded by the document OPM Document No. 18-05-05 also entitled "Effect of a Pre-existing Impairment". The current version of this policy dated October 12, 2004 applies "to all decisions made on or after January 1, 1998 for accidents on or after January 2, 1990". The Board provided OPM Document No. 18-05-05 dated October 12, 2004 as the applicable policy in this appeal.

#### (1) Document No. 05-06-07

[13] OPM Document No. 05-06-07 provides the following "policy statement":

If a worker being rated for a permanent impairment has a pre-existing condition or impairment, the Board should apply the rating schedule of the A.M.A. *Guides* without using the combined values approach. Each impairment should be rated independently, with the pre-existing condition having no impact on the rating of the work-related impairment, unless the same body area is involved, in which case the prior impairment will be subtracted to determine the work-related impairment.

[14] The "guidelines" part of the document sets out six specific scenarios as follows:

1. If the worker has a measurable non-work-related impairment and then suffers a work-related impairment to a different area of the body, the work-related impairment is rated independently.
2. If the worker has a measurable non-work-related impairment and then suffers a work-related impairment to the same body area, the work-related impairment is rated

independently, with the prior impairment being subtracted to determine the work-related impairment.

3. 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. If the worker has a measurable work-related impairment (pre-Bill 162) and suffers another work-related impairment (under Bill 162) to the same body area, the Bill 162 work-related impairment is rated independently and the prior impairment is subtracted to determine the Bill 162 work-related impairment. When subtracting a pre-Bill 162 impairment from a Bill 162 impairment, the actual permanent disability rating based on the Ontario Rating Schedule is used as the pre-Bill 162 impairment in the calculations.
4. If the worker has a non-measurable non-work-related impairment and suffers another work-related impairment to the same body area, the impairment rating is determined using the combined values chart if applicable and the impairment may be reduced based on a moderate or major pre-accident disability.
5. If the worker has a non-measurable non-work-related impairment and suffers another work-related impairment to a different body area, the non-measurable non-work-related impairment is ignored.
6. For occupational disease claims, an impairment for a non work-related disease is subtracted from an impairment of a work-related occupational disease only if the diseases are the same and the pre-existing non-work-related disease is measurable.
7. In all other cases, a rating of impairment should follow the *Guides*, using the combined values chart.

[15] None of the specific scenarios listed deal with a worker who has a measurable work-related impairment under Bill 162 and then suffers another work-related impairment to a different body area. The Board's practice under OPM Document No. 05-06-07 appears to have been to use the Combined Values Chart when a worker had multiple NEL injuries arising from different claims. A number of Tribunal decisions considered the application of the AMA Guides Combined Values Chart in these circumstances and endorsed its use: *Decision Nos. 439/99, 2628/01, and 103/01*.

[16] The Vice-Chair of *Decision No. 594/02* (November 28, 2002), however, determined that the policy did not provide for the application of the Combined Values Chart when there were multiple NEL injuries arising in different claims:

The reason given by the Board decision makers for using the combined values approach in this case is point 7 in the guidelines section of 05-06-07:

In all other cases, a rating of impairment should follow the *Guides*, using the combined values chart.

Since the situation that arises in this case – where the worker has two impairments in two different claims with two NEL awards for two different body areas – is not listed in the scenarios set out in the guidelines, the decision makers have reasoned that this case falls under the blanket provision.

I note that in the examples that are given in the guidelines, the rating for a new impairment is affected by a pre-existing condition only when the pre-existing condition affects the same body area. In the examples where the pre-existing condition affects a different body area, the new impairment is rated separately and the new rating is not affected by the pre-existing condition.

In my view, when interpreting *Operational Policy Manual* Document No. 05-06-07 as it pertains to this case, the policy statement portion of the document should prevail over the guidelines section. The policy statement clearly states that each impairment should be rated independently, with the pre-existing condition having no impact on the rating of the work-related impairment, unless the same body area is involved. The policy portion of the document sets out the Board's actual policy. The guidelines are intended to provide examples, to give effect to the policy in certain specified situations. The specific examples set out in the guidelines portion of the document are consistent with the policy statement in that in each, the pre-existing impairment is only factored in if it involves the same body area.

To be consistent with the policy statement, it would appear to me that the blanket statement set out in point 7 of the guidelines would apply to other situations where the same body area is involved.

In this case, the two impairments involve different body areas, the low back and the knee. The application of the policy statement of *Operational Policy Manual* Document No. 05-06-07 means that the two impairments should be assessed separately. The Combined Values Chart should not be used and there should be no deduction from the assessment of either impairment because of the existence of the other impairment.

[17] The Vice-Chair concluded that the policy statement and the guidelines set out in OPM Document No. 05-06-07 should be read to exclude the application of the Combined Values Chart in the case of a pre-existing NEL award granted for a different body area.

[18] The Panel's reasoning in *Decision No. 594/02* was adopted in *Decision No. 1185/03* without further analysis.

## (2) OPM Document No. 18-05-05

[19] The current version of OPM Document No. 18-05-05 dated October 2, 2004 is the version that the Board provided to the Tribunal in this appeal. It states that it applies to all decisions made on or after January 1, 1998 for accidents on or after January 2, 1990. A prior version dated June 15, 1999 was the same as the current version except its application date, which stated that the "policy applies to all accidents occurring on or after January 1, 1998".

[20] The policy statement of this document states:

When calculating NEL benefits for workers who have a pre-existing permanent impairment, the WSIB

- rates the area of the body affected by the new permanent impairment.
- disregards any pre-existing permanent impairments affecting other areas of the body, and
- factors out pre-existing permanent impairments affecting the same area of the body.

If there is a NEL benefit for the pre-existing permanent impairment, the WSIB calculates a second NEL benefit for the new permanent impairment.

NOTE: The WSIB only combines values when rating multiple impairments eligible for a NEL.

[21] The "guidelines" portion of the document defines pre-existing permanent impairment and provides for the rating of a work-related impairment in several scenarios including for pre-existing non-work related impairments, pre-existing permanent disability pension and pre-existing NELs. For pre-existing NELs, the policy provides:

**New injury affecting a different area of the body**

If a worker with a pre-existing NEL benefit has a new permanent impairment that affects another area of the body, the WSIB determines the second NEL benefit

- by rating the new impairment independently of the prior impairment
- combining the old and new ratings using the Combined Values Chart (see 18-05-04), and
- subtracting the prior impairment's rating from the combined value.

**(iv) Tribunal decisions that have considered OPM Document No. 18-05-05**

[22] A couple of decisions have considered the issue of multiple NEL awards in the context of the 1998 policy. Interestingly, Mr. Blythe has been the worker's representative in all of these cases. Mr. Blythe is therefore well aware of the reasoning applied in each of these decisions.

**(a) Decision Nos. 384/04, 384/04R and 384/04R2**

[23] These three decisions discussed OPM Document Nos. 05-06-07 and 18-05-05 in the context of three different claims. The facts, claims and order in which the worker's various impairments were rated were very confusing and may have been the reason why there were two reconsiderations of the decision. The worker's claims, injuries, permanent impairment awards and dates of medical examinations were as follows:

July 28, 1988	Back Injury	10% Pension (allowed on July 6, 2001)
July 12, 1996	Aggravation of cervical disc disease	20% NEL award (examination April 30, 2002)
October 19, 1998	Back injury	20% NEL award (examination August 28, 2001)

[24] The worker was appealing the calculation of the NEL award granted in respect of his cervical disc disease. In *Decision No. 384/04* (March 8, 2004), the Vice-Chair held that while the Board should not have subtracted the worker's 10% pension (July 28, 1988 injury) from his cervical disc award, the Board appropriately combined the worker's 20% NEL for the neck with the 10% NEL award for the back, for a whole person award of 28%. She relied on Document No. 18-05-05 rather than Document No. 05-06-07 and stated that "Document No. 05-06-07 did not contain the specific instruction with respect to when to combine values that is [sic] found in Document No. 18-05-05."

[25] In *Decision No. 384/04R* (October 4, 2004), the Vice-Chair denied the worker's request for a reconsideration. The worker argued that the Vice-Chair inappropriately dealt with the calculation of the worker's NEL award in the 1998 back claim rather than the neck claim and applied the wrong policy. The Vice-Chair disagreed and held:

It can be seen from the above excerpt that I applied Document No. 05-06-07 in the matter of the worker's neck injury, which was to be assessed independently of the 1988 back pension.

Document No. 05-06-07 does not seem to address the situation where there are two NEL awards and seems to say that the impairments would be rated independently of pre-existing impairments unless the same body part is involved. This policy seems to address



only the situations of a non-work-related impairment or a pension followed by a NEL. Document No. 18-05-05 addresses this, and the situation of two NEL awards, with the combining of the two NEL awards in certain circumstances.

There are two facts that seem to be confusing this appeal. The first is that the worker's application to the Board for benefits for his neck was made on April 29, 1998. If that had been accepted as the accident date, then Document No. 18-05-05 would have been applicable. The Board accepted that the aggravation was evident on July 12, 1996, and that became the "accident date." Given the July 12, 1996, accident date, the applicable policy was Document No. 05-06-07.

The second confusing fact is that the residual impairment in the worker's low back was evaluated on August 28, 2001, and the residual impairment in his neck was evaluated on April 30, 2002. In other words, the injury with the earlier accident date was assessed after the assessment for the injury with the later accident date and different policy considerations apply in calculating the awards for each injury. I am quite sure that had the earlier accident been assessed before the later one, the confusion would not have arisen.

Throughout this process, Mr. Blythe has argued that Document No. 05-06-07 ought to be applied with respect to the NEL award for the worker's neck. I agree. However, Document No. 18-05-05 is applicable with respect to the NEL award for the worker's back injury of October 19, 1998. As I set out in *Decision No. 384/04*, that document requires that the values of multiple NEL awards for multiple impairments be combined. Put another way, if the worker's only post-January 2, 1990, compensable injury had been to his neck, he would have received the full NEL award. The fact that he had a second compensable injury and that injury happened after January 1, 1998, brought the policy in Document No. 18-05-05 into play with respect to the calculation of the NEL for the October 1998 back injury.

In his submissions, Mr. Blythe said: "the issue to be resolved in this case is not the proper calculation of the NEL award for the back injury (claim #2) but is the proper calculation of the NEL award for the neck injury (claim #3). While it is open to the WSIB to reconsider the 10% NEL award for the low back claim in light of the NEL award in the neck claim, this has not been done by the NEL Division and there is no final decision regarding this matter from the Board." As I explained in the previous paragraph, the two claims are intertwined because of the dates of the compensable injuries and the applicable policies. In addition, the Appeals Resolution Officer discussed both claims in her decision, thus giving me jurisdiction.

[26] More recently, in *Decision No. 384/04R2* (May 24, 2006), the Vice-Chair clarified how the 28% combined NEL award was assigned. The Vice-Chair clarified:

The worker has a 10% pension for his low back, a 10% NEL award for his low back, and an 18% NEL award for his neck.

In his letter dated February 2, 2005, Mr. Blythe quoted from the Tribunal's Chair's letter of January 18, 2005:

The effect of the new policy was to render the previous policy no longer applicable for pre-1998 injuries when there was also a post-1998 NEL award.

The Tribunal Chair accurately captured my findings and phrased them more elegantly than I did in either *Decision No 384/04* or *384/04R*. As noted above, OPM Document No. 05-06-07 addresses the interaction between a pension award and a NEL under the pre-1997 Act. OPM Document No. 18-05-05 addresses the interaction between NEL awards under two NEL schemes.

I find that the Board was entitled to consider OPM Document No. 18-05-05, which sets out how NEL awards under the two Acts are to be assessed.

**(b) Decision Nos. 1119/04 and 1119/04R**

[27] In *Decision No. 1119/04* (November 22, 2004), the Vice-Chair was clearly faced with OPM Document No. 18-05-05 but applied the same reasoning of *Decision 594/02* in interpreting that document. She held:

I agree with previous Tribunal decisions that have found that the Policy statements in Board documents contain the essence of the policy and prevail over the guidelines.

The policy applicable in this case, Document No. 18-05-05, clearly says that the Board will disregard “any pre-existing permanent impairment affecting other areas of the body.” The note following the policy statement says “The WSIB only combines values when rating multiple impairments eligible for *a* NEL” [emphasis added]. I interpret that to mean that the only time the Board will combine values is if a worker suffers several impairments in one accident and one NEL award is being granted to reflect all the impairments.

The guidelines in Document No. 05-06-07, as noted by the Vice-Chair in *Decision No. 594/02*, did not address the question of how NEL awards ought to be handled when workers had two awards for impairments in different body areas. The guideline that states that the combined values chart is to be used was apparently intended to address that void. However, the policy itself was not amended to reflect the additional guideline.

I am applying the policy, not the guideline, to the facts before me and allowing the worker's appeal.

[28] Interestingly, the Vice-Chair of *Decision No. 1119/04* was the same Vice-Chair as *Decision Nos. 384/04, 384/04R* and *384/04R2*. In the latter decisions, the Vice-Chair seems to have accepted that OPM Document No. 18-05-05 provides for the use of the Combined Values Chart when calculating NEL awards under two different claims.

[29] The Board disagreed with the reasoning found in *Decision No. 1119/04* and requested a reconsideration. The Board submitted that the wording of the policy is clear and that the Combined Values Chart is to be used when a worker with a pre-existing NEL benefit has a new injury resulting in both an increased impairment to the same area of the body and a new impairment to a different area of the body. The Board disagreed with *Decision No. 1119/04*'s finding that the policy statement of the policy prevails over the guidelines. The Board submitted that although the policy statement encapsulates the Board's general policy position on an issue, it cannot possibly address the more specific issues that must be considered by a decision-maker. That is the purpose of the guidelines. The guidelines expand on that general statement, providing more detailed guidance on particular issues.

[30] The Board's reconsideration request was referred to a different Vice-Chair who provided a detailed analysis of the 1991 and 1998 policies, the Administrative Minute that is the authority for OPM Document No. 05-06-07, the AMA Guides and Tribunal jurisprudence on this issue. While the Reconsideration Vice-Chair found that the analysis in *Decision No. 594/02* was a possible interpretation of the Board's 1991 policy (Document No. 05-06-07), she expressed some general concerns about how well it reflected the Administrative Minute behind it. With respect

to the 1998 policy, the Reconsideration Vice-Chair, disagreed with the interpretation of *Decision No. 1119/04*. She held:

However, with greatest respect, I do not agree with the interpretation of the 1998 policy found in *Decision No. 1119/04*.

There is no distinction in section 126 of the Act between different portions of a Board policy. Both the introductory “policy” statement and the guidelines are part of the policy and in my view are subject to section 126 of the Act. Therefore, as above, I consider the first rule of interpretation to be whether the different parts of the policy can be read together in a consistent way, to avoid an absurd result.

In this policy, the wording of the guideline is very clear. It states explicitly that the Combined Values Chart is to be used in the case of multiple NEL-rated injuries:

**New injury affecting a different area of the body**

If a worker with a pre-existing NEL benefit has a new permanent impairment **that affects** another area of the body, the WSIB determines the second NEL benefit

- by rating the new impairment independently of the prior impairment
- combining the old and new ratings using the Combined Values Chart (see 18-05-04), and
- subtracting the prior impairment's rating from the combined value.

The policy statement in the 1998 policy is less clear than the guidelines. It states:

When calculating NEL benefits for workers who have a pre-existing permanent impairment, the WSIB

- rates the area of the body affected by the new permanent impairment.
- disregards any pre-existing permanent impairments affecting other areas of the body, and
- factors out pre-existing permanent impairments affecting the same area of the body.

If there is a NEL benefit for the pre-existing permanent impairment, the WSIB calculates a second NEL benefit for the new permanent impairment.

*NOTE: The WSIB only combines values when rating multiple impairments eligible for a NEL.*

I consider these words open to more than one interpretation. In *Decision No. 1119/04* the Vice-Chair placed emphasis on the reference to “a” NEL rating and on the requirement to “disregard any pre-existing impairments affecting other areas of the body”. She therefore interpreted the “note” to apply only to multiple impairments that involved a pre-existing impairment of the same body area.

However, that reading is inconsistent with the above-referenced portion of the guidelines.

I consider that there is an alternative possible reading, which would be consistent with the guidelines. In my view, the statement can be read as a step-by-step description of how the rating is derived. For the purposes of the first step the pre-existing permanent impairments of the other areas of the body are disregarded. Then, as a second step, I read the Note to indicate that if there are multiple impairments that are each eligible for a NEL award, the Combined Values Chart is applied.

That is not to say the wording of the policy statement is clear or satisfactory. I do find it confusing. However I find this a possible interpretation. It is also the interpretation that allows the different provisions in the policy to be read consistently.

Further, again with greatest respect, even if the policy statement and the guideline are considered inconsistent, I do not agree that the interpretation should be based on a firm rule that the policy statement is to be given more weight than the guidelines. Section 126 applies equally to all portions of the policy. I consider that the next rule of statutory interpretation to be applied is whether one provision of the policy is more specific. In this case, I consider the wording in the guidelines more specific than the wording in the general policy statement.

...

Therefore, with greatest respect, I read the 1998 policy to provide that the Combined Values Chart is to be applied when multiple NEL-rated impairments arise from different accidents or in different claims. I agree with the Board's interpretation of the policy.

[31] The Reconsideration Vice-Chair also expressed general concerns about the outcome of *Decision Nos. 594/02 and 1119/04*. She distinguished pre-Bill 162 pre-existing conditions from Bill 162 pre-existing conditions:

Further, in my view, there are good legal and policy reasons to exclude "non-Bill 162" pre-existing conditions from the application of the Chart. Those injuries are not subject to the Regulations that prescribe the use of the AMA Guides. Further, for Bill 162 or WSIA injuries, the NEL award is only one of the dual awards payable. Under the pre-1989 Act, the enhancement factors used by the Board addressed the impact of injuries on the earning capacity of the average unskilled worker. There was only one award. Under Bill 162 and the WSIA, the impact of the physical impairment on employment earnings is addressed separately, in the FEL or LOE awards, in a way intended to take into account the loss of earnings of the specific worker. As a practical matter, the multiple or "enhancement" aspects of multiple injuries are taken into account in this award even when not reflected (as they were in the past) in the award for physical impairment. The Foreword to the AMA Guides makes the statement that:

... Each administration or legal system using permanent impairment as a basis for disability rating should define its own process for translating knowledge of a medical condition into an estimate of the degree to which the individual's capacity to meet personal, social or occupational demands, or to meet statutory or regulatory requirements, is limited by the impairment.

In my view this "translation" of the knowledge about a worker's physical impairment into an award to reflect the occupational impact is found in the Ontario legislation in the FEL or LOE award.

However, for injuries that are not subject to the dual award system, there is no parallel award that recognizes the employment impacts of the disability. Therefore there is a rational basis that applies to exclude impairments that are not NEL-rated from the application of the Chart, which does not apply in the same way to NEL-rated injuries.

Finally, I have a further concern. I have some concern generally about an approach that rates impairment differently based on whether the ultimate compensable impairment arose from a single accident or from multiple accidents, when all the impairments are subject to the same legislation. Under my interpretation of the 1998 Policy, the effect of the Chart is excluded in the case of non-compensable pre-existing conditions as well as pre-existing conditions rated under the pre-1989 legislation. The result is that the "line is drawn" between all NEL rated injuries, and other injuries. The distinction is based on what legislation applies. There is no distinction based on whether or not the ultimate

impairment results from one compensable accident or from more than one compensable accident, unless the injuries are subject to different legislation.

In my view, it is fair that two workers that have the same ultimate level of NEL-rated compensable physical impairment should receive the same NEL award, irrespective of the history of how that impairment arose. It is not clear to me that the legislation suggests that two workers who have identical levels of compensable impairment will receive different awards because one worker suffered his injuries entirely as a result of one accident, and the other suffered his impairment as a result of multiple accidents. I find nothing in the AMA Guides that suggests that result. Section 46 provides that a worker is entitled to compensation for his or her non-economic loss. It is difficult to understand how, under that provision, one worker can be entitled to a 32% NEL award, and the other a 29% NEL award, for the same ultimate compensable impairment. Assuming that both workers were assessed at 16% for the first-rated injury, this approach effectively grants a 16% NEL award to one worker and 13% to the other worker for the identical (second-rated) compensable injury.

[32] Ultimately, however, while the Reconsideration Vice-Chair disagreed with the analysis of *Decision No. 1119/04*, she found that the Tribunal's reconsideration threshold test was not met. She was of the view that where two interpretations were possible, a different interpretation of Board policy was insufficient to be considered an "error" in the administration or content of a decision, under the Tribunal's threshold test.

**(v) Submissions of the worker's representative**

[33] Mr. Blythe provided detailed submissions on April 28, 2005 and December 20, 2005. I have carefully considered all of Mr. Blythe's submissions even though only a brief summary of those submissions appears in this decision.

[34] In his submissions of April 28, 2005, Mr. Blythe submitted that the document, OPM Document No. 05-06-07 applies to the right arm claim because it has an accident date of 1994 and the NEL decision was made in April 2004, prior to the Board's revision in October 2, 2004 of the application date of OPM Document No. 18-05-05. Since prior to October 12, 2004, OPM Document No. 18-05-05 only applied to accidents occurring on or after January 1, 1998, Mr. Blythe submits that the appropriate policy for the right arm NEL award is OPM Document No. 05-06-07.

[35] With respect to OPM Document No. 18-05-05, while Mr. Blythe accepts that this policy applies to the left knee claim, he submits that the policy portion of the document makes it clear that all pre-existing permanent impairments affecting other areas of the body are disregarded and that this includes pre-existing permanent impairments that are recognized by NELs unless it specifically states this exception. Mr. Blythe submits that the policy does not specifically state this exception. With respect to the "note", Mr. Blythe submits that it simply means that a worker receives only one NEL award for multiple impairments in any given claim but that a worker may receive multiple NEL awards for multiple claims.

[36] Given the extensive reasoning found in *Decision No. 1119/04R*, Mr. Blythe was given the opportunity to comment on this decision and provide additional written submissions if he wanted. Mr. Blythe provided his additional submissions on December 20, 2005. He submitted firstly that *Decision No. 1119/04* seemed to agree with the analysis of *Decision No. 594/02* in the context of the 1991 policy wording and that that analysis should apply to the worker's NEL

award in respect of the right arm. He submitted, however, that there was no difference between the 1991 and 1998 policy statements with the exception of the “note” found in the 1998 policy.

[37] Mr. Blythe submitted that there remained a contradiction in the document, OPM Document No. 18-05-05 between the policy and guidelines part of the document and that the policy statement should prevail. Mr. Blythe also disagreed that the Board has discretion in how to apply the AMA Guides to pre-existing conditions. He submitted that the Tribunal has a duty to determine to the best of its ability its understanding of the workings of the rating schedule imposed by the Regulation and that it is not sufficient to accept the Board’s interpretation of the rating schedule. Mr. Blythe submitted that the AMA Guides do not provide a single example of a pre-existing permanent impairment used to discount a final rating. He submitted that if the AMA Guides had intended this approach, they would have specifically said so.

[38] Mr. Blythe submitted that a worker should receive the same NEL award for the same compensable impairment whether or not he has a pre-existing impairment in a separate body part.

**(vi) Conclusion**

[39] The WSIA (and its predecessor, the pre-1997 Act) provides limited guidance in this case. It states that the Board is to determine a worker’s permanent impairment with the prescribed rating schedule, which by regulation is the AMA Guides. That is the extent of the legislation and regulation. There is no specific legislative direction regarding the effect of pre-existing impairments.

[40] The AMA Guides are also not conclusive on the effect of pre-existing impairments. They espouse the principle that all impairments affect the individual as a whole and that all impairments should be expressed as impairments of the “whole person”. The AMA Guides also understand that administrative and legal systems using permanent impairments should define their own processes.

[41] Given that the legislation and the AMA Guides are not specific with respect to pre-existing NELs, in my view, the Board is left with a considerable amount of discretion in rating permanent impairments. I now turn to the wording of OPM Document No. 18-05-05.

[42] I am of the view that OPM Document No. 18-05-05, when read as a whole - policy statement and guidelines together - provides for the use of the Combined Values Chart in the case of pre-existing NEL awards. The note in the policy section of the document states that the Board combines values when rating multiple impairments eligible for a NEL. In case there should be any doubt as to what is meant by this note, the guidelines clarify the exact steps to be followed in the case of a pre-existing NEL followed by a new injury affecting a different area of the body. The Board will determine the second NEL benefit by rating the new impairment independently of the prior impairment, combining the old and new ratings, using the Combined Values Chart and subtracting the prior impairment’s rating from the combined value.

[43] There are references to combining values in both the policy and guidelines portions of the document so that one section of the document does not have to prevail over another. I agree with the analysis of *Decision No. 1119/04R* that different parts of the policy should be read together in

a consistent way, to avoid an absurd result. The effect of Document No. 18-05-05 as a whole is, in my view, quite clear in stating that the Board will use the Combined Values Chart when rating NEL awards arising from two different claims. This result is within the Board's discretion and not inconsistent with the legislation. I also agree with the comments made in *Decision No. 1119/04R* that it seems fair that two workers with the same ultimate level of NEL-rated compensable physical impairment should receive the same NEL award, irrespective of the history of how that impairment arose. In my view, two workers with identical impairments should not receive different awards simply because one worker suffered his injuries entirely as a result of one accident, and the other, as a result of multiple accidents. In my view it is appropriate that there be no distinction based on whether or not the ultimate impairment results from one compensable accident or from more than one compensable accident, unless the injuries are subject to different legislation.

[44] Mr. Blythe submitted, however, that OPM Document No. 18-05-05 does not apply to the right arm claim because it has an accident date of 1994 and the NEL decision was made in April 2004, prior to the Board's revision in October 2, 2004 of the application date of OPM Document No. 18-05-05. Since prior to October 12, 2004, OPM Document No. 18-05-05 only applied to accidents occurring on or after January 1, 1998, Mr. Blythe submits that the appropriate policy for the right arm NEL award is OPM Document No. 05-06-07.

[45] Firstly, even if OPM Document No. 05-06-07 applied, that document has been interpreted by Tribunal decisions in different ways regarding the use of the Combined Values Chart for prior work-related NEL impairments affecting other areas of the body. There was no consensus in the interpretation of the document and *Decision No. 1119/04R* expressed many concerns about the reasoning found in *Decision No. 594/02*, the decision relied upon by Mr. Blythe. As noted in *Decision Nos. 384/04, 384/04R and 384/04R2*, the document does not specifically state what is to be done in the case of a prior work-related post Bill 162 impairment. In my view, this is likely the reason why OPM Document No. 05-06-07 has been interpreted in different ways. I also note, however, that most of the NEL provisions in the pre-1997 Act have been repealed by the WSIA and that it seems logical that a new policy would be introduced to go with the new WSIA provisions, which now also apply to accidents that occurred from January 1990 to December 31, 1997.

[46] While I generally agree with the presumption against retroactivity of Board policy, I do not interpret OPM Document No. 18-05-05 as retroactively setting out a different method of calculating NEL awards in the case of post Bill 162 impairments. In my view, the situation in this appeal is to be contrasted with the situation found in *Decision No. 2828/01* dated December 9, 2003, which considered two versions of OPM Document No. 05-02-02 on the issue of whether insurance benefits were to be excluded from earnings. The Board argued in that case that the old policy always excluded employment insurance benefits from earnings and that the new policy did so explicitly. As found in *Decision No. 2828/01*, however, there was a "significant and increasingly unanimous body of Tribunal decisions" that allowed for the inclusion of employment insurance benefits in the earnings basis of seasonal workers. Accordingly, the Panel of *Decision No. 2828/01* held that "if the new policy changes the way the Tribunal is to determine the earnings basis of seasonal workers, that is a change in policy, not merely a clarification of policy".

[47] In my view, Document No. 18-05-05 does not change the way the Tribunal unanimously decided NEL awards arising from different claims. Rather, as was noted in the *Decision No. 384/04* and the reconsideration decisions as well as in *Decision No. 1119/04R*, OPM 05-06-07 was clear in the ways it dealt with pre-Bill 162 impairments but never clearly addressed post Bill 162 impairments especially in the context of pre and post 1998 accidents. In the present case, while the right arm claim has an accident date of 1994, all of the worker's other accidents for which he receives NEL awards occurred after 1998. Furthermore, there is no significant and unanimous body of Tribunal decisions that interpreted Document No. 05-06-07. On the contrary, there were only a handful of Tribunal decisions that arrived at different results. In my view therefore, OPM Document No. 18-05-05 is the only policy to address the combination of NEL awards when there are pre and post 1998 accidents. It is therefore the policy applicable to the worker's right arm and left knee NEL awards.

[48] I therefore conclude that the Board appropriately used the Combined Values Chart for the worker's NEL awards.



**DISPOSITION**

[49]           The appeal is denied.

DATED: July 31, 2006

SIGNED: S. Martel