



# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

## DECISION NO. 204/14

**BEFORE:** S. Netten: Vice-Chair

**HEARING:** February 5, 2014 at Toronto  
Written

**DATE OF DECISION:** February 12, 2014

**NEUTRAL CITATION:** 2014 ONWSIAT 301

**DECISION UNDER APPEAL:** WSIB Appeals Resolution Officer decision dated  
September 26, 2012

**APPEARANCES:**

**For the worker:** V. Pilnitz, Lawyer

**For the employer:** Not participating

**Interpreter:** None

## REASONS

### (i) Issue

[1] The issue under appeal is the quantum of the 11% non-economic loss (NEL) award for the worker's permanent right shoulder impairment.

### (ii) Overview

[2] The worker sustained a right shoulder injury when she tripped and fell at work on December 4, 2009. The Board granted entitlement for a moderate full thickness rotator cuff tear and shoulder impingement. The worker underwent surgery in September 2010. The Board subsequently recognized a permanent impairment, which was rated for NEL purposes based upon the file documentation. On January 27, 2012, the shoulder impairment was rated at 30%, equivalent to a whole person rating of 18%; this was reduced by one-quarter for a moderate pre-existing condition, resulting in a 13.5% NEL award. Following the worker's objection, the NEL rating was reconsidered. On June 6, 2012, the shoulder impairment was increased to 36%, equivalent to a whole person rating of 22%, but this was reduced by one-half based upon a severe pre-existing condition, resulting in an 11% NEL award.

[3] The worker's objection to the NEL quantum was denied at the appeals level of the Board. The worker now appeals to the Tribunal.

[4] This appeal was selected for a written hearing pursuant to the Tribunal's *Practice Direction on Written Appeals*.

### (iii) Legal framework

[5] The *Workplace Safety and Insurance Act, 1997* ("WSIA") applies to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated. Section 126 requires the Tribunal to apply Board policy when making its decisions.

[6] The standard of proof applicable in workers' compensation proceedings is the balance of probabilities. Pursuant to section 124(2), the benefit of the doubt is given to the claimant in resolving an issue where the evidence for and against is approximately equal in weight.

[7] Section 46 grants compensation for non-economic loss when a worker suffers permanent impairment as a result of a compensable injury. A NEL award acknowledges a worker's continuing non-economic physical and functional losses through a modest level of compensation; it is distinct from (and in addition to) compensation for lost income or health care expenses. The level of compensation does not relate to the worker's earnings, but is calculated by multiplying the percentage of impairment by a dollar amount which is set according to the worker's age and date of injury.

### (iv) Permanent impairment of 36% for the upper extremity

#### (a) Law, policy and the Board's rating guideline

[8] Section 47 of the WSIA obliges the Board to determine the degree of permanent impairment "expressed as a percentage of total permanent impairment." Specifically, the impairment determination must be made in accordance with the American Medical Association's

*Guides to the Evaluation of Permanent Impairment*, 3<sup>rd</sup> edition (revised) (“the AMA Guides”), which is the prescribed rating schedule.

- [9] For upper extremity impairments, section 3.1g of the AMA Guides establishes ratings for reduced shoulder flexion, extension, abduction, adduction, internal rotation and external rotation, reflecting the impact of an injury on shoulder function. Sections 3.1h and 3.1i address upper extremity impairment due to nervous system and vascular disorders, and are not applicable to the case at hand. Section 3.1j addresses “impairment due to other disorders of the upper extremity”. This section contemplates an additional discretionary rating where “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).” In order to ensure consistent application of this discretion, the Board developed a “Permanent Impairment (NEL) Rating Guideline for Acromioplasty” which states:

**Acromioplasty**

Using a discretionary rating, an acromioplasty, including distal clavicle resection, will be rated at 10% upper extremity. This would be combined with other impairment values, such as range of motion loss and would then be reduced to whole person as per AMA guide calculation.

**Other shoulder surgeries**

Any shoulder surgery that is more invasive than an acromioplasty but does not involve major alteration of the GH joint will be rated at 12% upper extremity. This would be combined with other impairment values as above.

**(b) The NEL rating for the shoulder**

- [10] The June 2012 NEL rating utilized the shoulder mobility measurements recorded on November 8, 2011, by physiotherapist A. Bean and occupational therapist C. Edmonds of the Shoulder and Elbow Specialty Clinic. Application of these measurements (flexion of 44°, extension of 10°, abduction of 25°, adduction of 0°, external rotation of 25° and internal rotation of 0°) to Figures 38, 41 and 44 of the AMA Guides yields a rating of 27%.

- [11] The Operative Note of September 17, 2010 described the worker’s surgical procedure:
- Right shoulder open rotator cuff repair to bone trough with suture anchors
  - Complete subacromial bursectomy
  - Acromioplasty and distal clavicle excision complex

- [12] The Board considered this to be a shoulder surgery more invasive than an acromioplasty, but without alteration of the glenohumeral joint. Applying the Board’s rating guideline, a 12% rating was granted. When combined with the 27% rating for abnormal motion as required by the AMA Guides (using the AMA Guides’ Combined Values Chart), the total impairment of the right shoulder was 36%.

**(c) Submissions**

- [13] In a written submission of October 16, 2013, the worker’s representative requested simply that “the impairment be increased to 36%”. He provided copies of several documents already on file (ultrasound and MRI reports, the NEL rating sheet, and a letter from the orthopedic surgeon).

[14] In her initial objection to the Board in July 2012, the worker did not express any concerns with respect to the range of motion measurements from 2011 or the calculation of the shoulder impairment at 36%. Although she wrote that “not all factors were considered when calculating the WPI based on the AMA guidelines”, she did not identify any physical or functional losses of the shoulder which were not reflected in the NEL rating. She did note her likely inability to find employment but, as outlined in section (iii), a NEL award compensates for non-economic loss and not loss of earnings.

**(d) Conclusion**

[15] There is no conflicting evidence with respect to the worker’s range of shoulder motion or the nature of her shoulder surgery, and the worker’s representative appears to support the 36% calculation. I find that the upper extremity impairment itself was correctly calculated at 36%, based upon the application of shoulder mobility measurements to the AMA Guides, and based upon a complex rotator cuff surgery warranting the higher rating within the Board’s rating guideline for acromioplasty.

**(v) The conversion to 22% whole person impairment**

[16] The worker’s representative requests a “36% impairment”, whereas this figure was converted to a 22% whole person impairment. Similarly, in July 2012 the worker wrote:

My NEL benefit was based on a Whole Person impairment (WPI) however it does not appear that the percentage applied was based on my whole person impairment as the only area which was considered was my right shoulder.

[17] Unfortunately, the term “whole person impairment” lends itself to misunderstanding. It does not mean that the whole person is assessed in every case. To the contrary, entitlement to benefits under the WSIA is limited to the compensable permanent impairment, in this case the worker’s right shoulder. In order to cover all types of injuries, NEL awards are based upon the degree of impairment of the whole person, or, using the language of the WSIA, “expressed as a percentage of *total* permanent impairment.” As one might expect, a 100% finger or ankle impairment, or even a 100% shoulder impairment, would not constitute total permanent impairment and would not generate a 100% NEL rating.

[18] Accordingly, the impairment of the worker’s right upper extremity must be converted to what may be better referred to as the contribution of the right upper extremity to whole person or total impairment. Table 3 of the AMA Guides, titled “Relationship of Impairment of the Upper Extremity to Impairment of the Whole Person” indicates that a 36% upper extremity impairment contributes 22% to the whole person impairment. Thus, I find that the degree of the worker’s compensable permanent shoulder impairment was correctly calculated at 22% of total permanent impairment.

**(vi) The reduction for pre-existing degenerative changes**

**(a) Submissions**

[19] The worker’s representative did not provide any reasons to support his implicit request that the impairment rating not be further reduced. However, in her July 2012 objection letter, the worker wrote:

A 50% reduction was applied because of degenerative changes. These degenerative changes that have been noted did not affect my ability to work and continue with my activities of daily living. According to WSIB policy 18-05-05 the percentage used (50%) is for major pre-existing impairments. How was this determined? It was noted that there were degenerative changes evident on file. Is this considered a major pre-existing impairment?

**(b) Board policy**

[20] Board policy on the Effect of a Pre-existing Impairment (*Operational Policy Manual* (OPM) Document No. 18-05-05) 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 the pre-existing impairment is not measurable, the WSIB

- rates the total area's impairment, and
- reduces this rating according to the significance of the pre-existing impairment (see pre-accident disability in 14-05-03, Second Injury and Enhancement Fund).
  - if minor, there is no reduction
  - if moderate, there is a 25% reduction
  - if major, there is a 50% reduction.

[21] This policy does not contain a definition of “pre-existing impairment.”

[22] The referenced policy on the Second Injury and Enhancement Fund (SIEF) (OPM Document No. 14-05-03) primarily addresses cost relief for employers due to a pre-existing disability or condition, but also addresses the impact on workers’ NEL benefits. A definition of “pre-accident disability” is found in the SIEF policy, where it is contrasted with “pre-existing condition”:

**Definitions**

Pre-accident disability is defined as a condition which has produced periods of disability in the past requiring treatment and disrupting employment.

Pre-existing condition is defined as an underlying or asymptomatic condition which only becomes manifest post-accident.

[23] The SIEF policy restates the impact on permanent benefits, including NEL benefits:

**Worker Permanent Benefits**

When the pre-existing condition is not measurable, but creates a pre-accident disability that enhances a residual work-related disability, the worker's benefit for work-related disability may be reduced according to the percentage of disability produced by the pre-existing condition. The application is as follows:

**Application to employee award where prior condition is not measurable**

Prior Condition	Amount of relief
Minor	100% (full assessment)
Moderate	75%
Major	50%

[24] While not mentioned in OPM Document No. 18-05-05, a definition of “pre-accident impairment” is found in Board policy on aggravation basis entitlement (OPM Document No. 11-01-15):

A pre-accident impairment is a condition, which has produced periods of impairment/illness requiring health care and has caused a disruption in employment.

**(c) Discussion**

[25] The above-cited Board policies refer to three different terms: pre-existing (or pre-accident) impairment, pre-accident disability, and pre-existing condition. The first is defined in a separate Board policy; the latter two are defined in Board policy on the SIEF. “Disability” is the language of the *Workers’ Compensation Act* (pre-1985, pre-1989, and, in part, pre-1997); it has been superseded by the language of “impairment” in the WSIA, but certain Board policies continue to refer to disability.

[26] The directly applicable Board policy on the effect of a “pre-existing impairment” uses this exact term exclusively, except when incorporating, by reference, the term “pre-accident disability” from the SIEF policy. There is no reference to the term “pre-existing condition.” In discussing the impact on permanent benefits, the SIEF policy refers to both pre-existing condition and pre-accident disability, but specifically requires a pre-accident disability for a reduction in benefits. Accordingly, I find that a NEL award may be reduced pursuant to OPM Document No. 18-05-05 only where a pre-existing impairment or disability is present.<sup>1</sup> Noting the definitions found in OPM Documents No. 14-05-03 and 11-01-15, I conclude that a pre-existing impairment exists where there have been periods of disability, impairment or illness in the past which have required treatment and disrupted employment. A pre-existing condition alone, being an underlying or asymptomatic condition made manifest, is not sufficient to permit a reduction of NEL benefits pursuant to Board policy.

[27] It is uncontroversial that the worker had pre-existing degenerative changes in her right shoulder, and undisputed that she had no previous problems in the shoulder *per se*. A prior claim from 1996 was allowed for a cervical strain which was causing referred pain to the right shoulder, but there was no diagnosis for the shoulder itself. X-rays in February 2010 found “degeneration of the AC joints”. Orthopedic surgeon Dr. R. Abughaduma noted “moderate osteoarthritis in her AC joint” in April 2010. A June 2010 report of the Shoulder and Elbow Specialty Clinic reported “no pre-existing problems with the right shoulder prior to this injury” and, by x-ray, “moderate to severe degenerative changes in the acromioclavicular joint”; the diagnosis was “traumatic rotator cuff tear with a dislocated biceps tendon proximally in the context of underlying degenerative changes.” An MRI dated June 16, 2010 found “severe acromioclavicular joint degenerative changes”, and an MRI dated February 11, 2011 found “moderate glenohumeral joint OA with degenerative superior labral tear.”

<sup>1</sup> This is consistent with the interpretation made by the Vice-Chair in *Decision No. 530/05*.

[28] In the absence of any evidence that the degenerative changes in the worker's right shoulder had required treatment in the past and had disrupted her employment, this degenerative condition is not a pre-existing impairment within the meaning of Board policy. Consequently, there is no basis upon which the NEL award may be reduced pursuant to OPM Document No. 18-05-05.

**(vii) Conclusion**

[29] The worker's compensable permanent impairment was correctly determined to be a 36% right shoulder impairment, equivalent to 22% of total permanent impairment. The worker did not have a pre-existing impairment within the meaning of Board policy, and hence the NEL award may not be reduced. Therefore, 22% is the correct quantum of the worker's NEL award.

**DISPOSITION**

[30]           The appeal is allowed. The correct NEL quantum for the right shoulder is 22%.

DATED: February 12, 2014

SIGNED: S. Netten