

## Decision of the Appeal Division

**Number:** 92-0193  
**Date:** January 22, 1992  
**Panel:** Connie Munro, Chief Appeal Commissioner  
**Subject:** Section 23(1) – Measuring Disability

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This is an appeal from the Workers' Compensation Review Board decision dated March 6, 1991. The issue on this appeal is whether the worker is entitled to a permanent partial disability award pursuant to Section 23(1) of the *Act*.

The history of this case is of considerable importance to the matter currently under consideration. On January 13, 1983, the worker, then a fifty-year-old stock tester in a pulp mill, was struck by a car in the employer's parking lot. He suffered injuries to his right shoulder and left leg. He returned to work in August of 1983. The problems with respect to his left leg resolved satisfactorily; however, he was left with some complaints of problems with his right shoulder.

In light of his ongoing physical restrictions, the worker's employment in the stock tester's job was "frozen," which meant that he would not be eligible for promotion.

The worker originally pursued compensation through I.C.B.C.; however, the issuance of a Section 11 certificate by the W.C.B. finding him to be a worker in the course of his employment at the time of the injury foreclosed that possibility. As a result his claim was pursued with the W.C.B.

An examination for pension purposes was conducted January 21, 1987. The disability awards medical advisor indicated there were only minimal findings and did not recommend a permanent partial disability award. The worker appealed to the Review Board. A decision of December 18, 1987, found the worker was entitled to a permanent partial disability award in respect of his shoulder on the basis that there was demonstrable evidence of an ongoing disability affecting his earning capacity and preventing his future promotion. Pursuant to Section 96(2) of the *Act*, the commissioners issued a decision February 17, 1989, reversing the Review Board finding.

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The worker appealed the decision with respect to the existence of a functional impairment in his shoulder to a medical review panel who issued a certificate dated March 27, 1990. That certificate stated (in part):

1. The condition of the worker is fair.
2. He now has a disability with respect to his right shoulder.
3. He has post-traumatic osteoarthritis of the right acromioclavicular joint secondary to grade I acromial clavicular separation. Pain and crepitus in the right acromioclavicular joint limit function in his right arm, particularly in adduction and with movements requiring strength or power.

The certificate went on to certify that the disability described in the right shoulder was a result of the work injury of January 13, 1983 and was not wholly or partly the result of causes other than that injury.

In a letter dated May 8, 1990, a disability awards claims adjudicator informed the worker that subsequent to the medical review panel certificate finding that he had a disability with respect to his right shoulder, the claims adjudicator had compared the findings of the medical review panel examination with the findings of the permanent partial disability examination. He concluded that the findings were so minimal as to have no effect on his earning capacity and, therefore, no permanent partial disability award would be payable. The worker's appeal to the Review Board from that decision was denied in the decision dated March 6, 1991 presently before the Appeal Division.

This appeal raises the question as to whether the May 8, 1990 decision of the disability awards claims adjudicator gave proper consideration to the binding medical review panel certificate. Section 61(1)(b) provides that the chair of a medical review panel can certify to the Board as to "the existence or non-existence of a disability." In this instance the panel certified the existence of a disability. Section 23(1) of the *Workers Compensation Act* requires that where a permanent partial disability results from the injury:

... the impairment of earning capacity shall be estimated from the nature and degree of the injury, and the compensation shall be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment ...

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*Workers Compensation in Canada* (Second Edition), by Dr. Terence Ison, states the following with respect to the statutory language of Section 23(1):

Although that language requires the boards to achieve what is logically impossible, it is generally interpreted as a mandate to adopt a physical impairment of calculation, and that interpretation is enhanced by other statutory provisions authorizing the boards to adopt disability rating schedules. To ascertain the nature and severity of any residual disability, a board doctor usually makes a clinical examination of the worker. That may be supplemented by other evidence, including the testimony of the worker about the physical significance of a disability, but evidence of the impact on actual earnings of the worker is irrelevant.

Section 23(1) mandates the physical impairment method of pension calculation. Section 23(2) authorizes the Board to adopt a disability rating schedule. Section 23(3) provides for the payment of pensions on a projected loss of earnings basis.

The analysis advanced by Dr. Ison is reflected in the *Rehabilitation Services and Claims Manual* adopted as policy by the governors. *Rehabilitation Services and Claims Manual* #39.00 states:

The physical impairment method is the primary one used for measuring permanent disabilities. It is the method provided for in Section 23(1). In applying this method, the Board does not normally have regard to the individual worker's actual loss of earnings. It considers only the physical condition of the worker. It results in a percentage of disability being allocated to the claimant's condition.

The original pension decision in this case did not acknowledge the existence of a disability. It referred to the problems experienced by the worker as a "residual permanent condition." The Review Board decision of December 18, 1987, found both that the worker had a disability and also that he was entitled to a pension award for the disability. That Review Board decision, however, was reversed by the commissioners. Once the medical review panel certificate was issued the Board was bound by the finding that the worker had a disability. All that remained under Section 23(1) was for the Board to estimate the impairment of earning capacity from the nature and degree of the injury and to make the payment that would follow upon such calculation.

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The position of the Board, expressed in the May 8, 1990 decision, varied slightly from the approach taken in their earlier denial of a pension. The disability awards claims adjudicator stated:

In your case, it is acknowledged that you have a disability in your right shoulder. However, it is not felt that your present condition, will, in the future affect your earning capacity and, therefore, no permanent partial disability award is payable on your claim.

It is *theoretically* possible to have a permanent partial disability that does not justify an award under Section 23(1). That statement, however, must be qualified by consideration of the Permanent Disability Evaluation Schedule.

There are two basic methods for assessing the percentage of a worker's permanent disability. These are the scheduled method and the non-scheduled method. Under the physical impairment method (Section 23(1)), the schedule is used to establish degrees of partial disability.

The intent of the Permanent Disability Evaluation Schedule was discussed at length in the report of the commissioner of inquiry into the *Workers Compensation Act* reporting in 1965 (the Tysoe Commission). Mr. Justice Tysoe stated (at 273):

A percentage of impairment of earning capacity allotted under the schedule or awarded in a judgement (non-scheduled) award represents an effort to state in terms of percentages, and on the average, the extent to which the particular disability will impair the workman's ability to earn. In arriving at this percentage, those preparing the schedule, or in the case of a judgement award those making the award, have had regard to the ability to the workman to do average labouring work. That is to say, regard is not had to the particular class of employment in which the particular workman has been engaged at the time of the injury.

The Tysoe Commission analysis is reflected in the policy manual excerpt that the Board does not normally have regard to the individual worker's actual loss of earnings in applying the physical impairment method of measuring a permanent disability. As Mr. Justice Tysoe stated, the functional award is an effort to state in terms of percentages and on the average the extent to which the particular disability would impair the worker's ability to earn. That principle is common to both scheduled and non-scheduled awards. There is nothing in the *Act* that would suggest scheduled awards ought to be any more or less generous to workers than non-scheduled awards.

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The Permanent Disability Evaluation Schedule (Appendix 4, *Rehabilitation Services and Claims Manual*) provides for a wide range of percentage awards. For example, immobility of the great toe at the distal joint warrants an award of .5%. There are at least nineteen (19) items in the permanent disability evaluation where awards are made of less than 2% of total. This includes such disabilities as amputation of the index finger at the D.I.P. joint, the middle finger at the M.P. or D.I.P. joint, the ring finger at the P.I.P. or D.I.P. joint, amputation of the little finger at the P.I.P. or D.I.P. joint, amputation of any toe other than the great toe, shortening of the lower extremity by 2.5 centimetres and several levels of hearing loss. The schedule acknowledges a hearing loss disability as low as .2%.

It follows that, to conclude a worker is not entitled to an award, once it is established that he has a disability, his ability to do “average labouring work” must be impaired less than the lowest assessment made under the Schedule. Is the disability in this worker’s shoulder of less significance to performance of “average labouring work” than, for example, immobility of the great toe at the distal joint? In considering the minor degrees of disability acknowledged by the Permanent Disability Evaluation Schedule it is difficult to conclude that this worker is not entitled to any award whatsoever for his disability.

In reviewing the correspondence the worker has received from the Board since 1983, and in particular the decision letter of May 8, 1990, it is apparent that the Board did not examine the worker’s disability from the perspective described in the Tysoe Commission Report. Rather the award was refused on the basis that it was not felt

that your present condition will, in the future, effect *your* earning capacity. (emphasis added)

That reasoning is inconsistent with the Board policy that the individual worker’s actual loss of earnings is not the relevant consideration.

Having reviewed all of the evidence in this matter I am satisfied that this worker is entitled to receive a disability award. The worker’s counsel contends that award ought to be in the amount of 5% of total. *Rehabilitation Services and Claims Manual* #39.10 provides:

In cases where the specific impairment is not covered by the schedule, but the part of the body in question is covered, the Disability Awards Officer or Adjudicator must first determine the percentage loss of function in the damaged area. This determination is based on the findings of the Disability Awards Medical Advisor and other medical and non-medical evidence available.

The final award is arrived at by taking this percentage of the percentage allocated in the schedule to the disabled part of the body. Because the schedule is used in the calculation this type of award is still considered as a scheduled one.

Problems of immobility of the shoulder joint are covered by the following items in the schedule:

	<b>Percentage</b>
41. Shoulder, complete with no scapular movement (so called frozen shoulder)	35
42. Shoulder, gleno-humeral fusion, scapula free	20
43. Shoulder, limited to 90° of abduction	5

The nature of the problems experienced by this worker as described in the medical review panel certificate and other medical reports suggest that the disability on a judgment basis would be approximately 75% of item 43 or 3.75%.

I appreciate that it was argued before the Tysoe Commission that the general effect of the Permanent Disability Evaluation Schedule allows percentage awards that are too high having regard to modern technology and advances in prostheses. That may well be the case. The schedule, however, has been set as a policy of the governors and they are the body to consider amendments. It is the responsibility of Board officers to make pension awards that do not treat workers inequitably simply because their particular disability is not specifically referred to in the schedule.

THE WORKER'S APPEAL IS ALLOWED.