

WORKERS COMPENSATION  
APPEAL TRIBUNAL

BETWEEN:

[Personal Information]  
CASE ID # [Personal Information]

APPELLANT

AND:

WORKERS COMPENSATION BOARD OF  
PRINCE EDWARD ISLAND

DEFENDANT

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DECISION #53

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[Personal Information]

Appellant

John K. Mitchell, Q.C.

Solicitor representing the Workers  
Compensation Board

Place and Date of Hearing

November 8, 2006  
Best Western – MacLauchlans  
Charlottetown, Prince Edward Island

Date of Decision

January 31, 2007

**FACTS**

1. This is an Appeal of Internal Reconsideration Decision IR-05-14, dated April 18, 2005, which denied the Appellant's request for a review of her permanent medical impairment ("PMI") assessment.
2. The Appellant, [personal information] who was injured on [personal information], 2000, while [personal information], Prince Edward Island. This injury resulted in a herniated disc in her neck which required surgery. In [personal information] 2004, she was evaluated by Dr. Don Ling, the medical consultant to the Workers Compensation Board (the "Board"), and using the 4<sup>th</sup> edition of the American Medical Association Guides to Evaluation of Permanent Medical Impairment ("AMA Guides") as a reference, he determined the Appellant did have a permanent medical impairment. Dr. Ling, in considering her rating equated her fusion to a IV.D. Classification resulting in a 10% whole body impairment. He further stated that, "this 10% does not appear to reflect her current functional status which is significantly impaired", and determined that she had a whole body impairment of 15%.
3. The Board confirmed to the Appellant that her lump sum impairment award based on s. 49 of the Workers Compensation Act (the "Act") and provided payment by letter dated December 16, 2004.
4. Dr. MacLean submitted a report dated [personal information], 2005, which indicated that in his opinion the Appellant had a "persistent chronic pain syndrome which seems to be mainly myofascial pain."
5. The Appellant submitted a request for Internal Reconsideration which was received by the Board on March 10, 2005. The Appellant requested that Dr. Ling review his assessment to include the report from Dr. MacLean. In addition, she requested that Board medical consultant use the latest version of the AMA Guides for evaluating permanent impairment. The Appellant quoted from the 5<sup>th</sup> edition AMA Guides, Chapter One, p. 2:

*Since this edition encompasses the most current criteria and procedures for impairment assessment, it is strongly recommended that physicians use this latest edition, the fifth edition, when rating impairment.*

6. The Appellant submitted that the Chapter on Chronic Pain in the 5<sup>th</sup> edition of the AMA Guides has been completely revised from the 4<sup>th</sup> edition.
7. The Appellant further referred the Internal Reconsideration Officer to s. 56(2) of the Act, which states that, “the decisions of the Board shall always be given upon the real merits and justice of the case, and it is not bound to follow strict legal interpretation”.
8. The Internal Reconsideration Decision denied the Appellant’s request for review of her PMI assessment on the basis of the following findings:
  - i. The required waiting period before worker may request review of a PMI assessment had not yet expired;
  - ii. The correct AMA Guides edition was used in calculating the appellant’s total body impairment; and,
  - iii. Dr. MacLean’s report did not contain new evidence which had not already been considered in the decision making process, which included, the PMI assessment.
9. The Appellant filed a Notice of Appeal dated May 17, 2005 to this Tribunal. In her Notice of Appeal, the Appellant continues to take issue with the edition of the AMA Guide which was used to rate her impairment. She submits that this represents bad faith on the part of the Board and violates s. 15(1) of the Charter of Rights and Freedoms. As the Appellant summarized, she is alleging the Board acted contrary to the law based on the following points:
  1. *Misinterpretation of the Law;*
  2. *Contrary to the Rules of Natural Justice;*
  3. *Contrary to the Rules of Fundamental Fairness;*
  4. *Failure to Act in a Timely Manner;*
  5. *Benefiting from the Failure to Act*
  6. *Violating the Charter of Rights and Freedoms.*

10. The Appellant in her submissions expands on her grounds of her appeal to include the following:
  - i. The 5<sup>th</sup> Edition of the AMA Guides should have been used in the PMI assessment as it was the latest version of the AMA Guides at the time the assessment was carried out;
  - ii. The amendment to Section 9 (c) in 2002, changing the requirement to use of an “approved” edition as opposed to use of the “latest” edition was an in bad faith, mistake in law, and against the rules of natural justice and fundamental fairness;
  - iii. The Board failed to approve the 5<sup>th</sup> Edition of the AMA Guides in a timely manner;
  - iv. The Board is benefiting from this failure to approve the 5<sup>th</sup> Edition of the AMA Guides;
  - v. The procedure of using the AMA Guides to determine a workers PMI assessment is discriminatory in that it denies workers the right to be evaluated as an individual;
  - vi. The Board misinterpreted Section 9 (c) as it presently reads and this misinterpretation violates the Appellants Section 15.1 Charter right, denying equal benefit of the law to workers with permanent medical impairment.
  
11. The Respondent has identified the following issues:
  - i. Whether the Appellant can presently apply for a review of her PMI assessment, pursuant to Sections 49(2) and (3) of the Act;
  - ii. Whether the Appellant can request that the review of her PMI assessment be based on the 5<sup>th</sup> Edition of the AMA Guides as opposed to the 4<sup>th</sup> Edition of the AMA Guides; and,
  - iii. Whether Dr. MacLean’s Report dated [personal information], 2005, constitutes new evidence of a change in the Appellant’s medical condition pursuant to 49(2)(b) of the Act.

12. The Appellant by correspondence dated November 4, 2006, submits that she does not agree with the Respondent's outline of the issues and confirms that only issue (ii) is at dispute in this Appeal. While the Appellant is in agreement with Dr. Ling's assessment of her condition based on the 4<sup>th</sup> Edition of the AMA Guides, it is her position that 15% in no way reflects the degree to which she is impaired or to the amount of pain that she suffers on a daily basis.
13. In her appeal, the Appellant specifically takes issue with the fact that the 4<sup>th</sup> edition of the AMA Guides was used to rate her impairment. This is not the latest edition available to the medical community, but it was the edition which the Board used to determine the PMI. The Appellant recognizes that she is now entitled to a review of her PMI based on s. 49(3) of the *Act*, but maintains that the Board should not be using the 4<sup>th</sup> edition of the AMA Guidelines.
14. The Appellant was injured on [personal information], 2000, and at that time Section 9 (c) of the *Workers Compensation Act*, General Regulations stated:

“9. the schedule for lump sum impairment awards payable to a worker under section 49 of the Act shall be as follows:

...

(c) impairment awards will be based on the percentage of total body impairment as established by the Board Medical Consultant or another qualified medical practitioner designated by the Board using the **latest version** of the AMA Guides to Evaluation of Permanent Impairment as a reference;”

This section was amended on July 13, 2002 to read as it currently reads.

“(c) impairment awards will be based on the percentage of total body impairment as established by the Board Medical Consultant or another qualified medical practitioner designated by the Board using the version of the AMA Guides to Evaluation of Permanent Impairment as **approved** by the Board;”

15. The Appellant's PMI Assessment was made on [personal information], 2004, and therefore the Board used the approved version of the AMA Guides which was the 4<sup>th</sup> Edition at that time.

16. The Appellant's position is that she should be entitled to the latest medical information available and that as such the 5<sup>th</sup> Edition of the AMA Guides should have been used in determining her PMI. The Appellant submits that the Chapters in the Guides applicable to her assessment, being Chapter One, Chapter Fifteen (Spine) and Chapter Eighteen (Chronic Pain) have undergone major revisions since the 4<sup>th</sup> Edition of the AMA Guides, and in fact, the Chapter on Chronic Pain has been completely revised.
17. Interestingly, this Tribunal notes that, if the Appellant had been assessed for her PMI prior to 2004, the 5<sup>th</sup> Edition AMA Guides, would have been applied and presumably they were in use at one time by the Board.
18. This Tribunal also notes that by letter dated December 16, 2004, to the Appellant from the Board, Section 9 of the Regulations as cited refers to the "*latest version*" of the AMA Guides to be used.

### **ANALYSIS and DECISION**

19. [Personal information]. In Decision #37, the Appeal Tribunal determined that the applicable standard of review for decision of the Board is one of correctness. Prior to this decision, the Appeal Tribunal applied the standard of review of correctness for matters involving jurisdiction and findings of law and the standard of patent unreasonableness to findings of fact, in other words the Board had to be "clearly wrong" with respect to overturning any determination of fact.
20. This Tribunal, therefore, will apply the standard of correctness as per Decision #37, but will also address in the alternative, the application of the previously applied standard of review applies prior to Decision #37.

21. This Tribunal will address the issue (ii) as outlined by the Respondent and will address the Appellant's grounds of appeal in this analysis.
  - ii. Use of the 5<sup>th</sup> Edition of the AMA Guides.
22. The Appellant does not dispute the use of the 4<sup>th</sup> Edition of the AMA Guides is in accordance with the regulation presently in place, but she takes strong issue with the fact that the general regulations were changed and feels that she is entitled to the use of the most recent medical AMA Guides with respect to her PMI.
23. This Tribunal cannot declare amendments to the legislation. That is the role of legislators. However, this Tribunal has the ability to review decisions of the Board and determine whether its actions are correct. In other words, this Tribunal can determine whether it is reasonable that the Board would be using the 4<sup>th</sup> version of the AMA Guides for the evaluation of permanent impairment as a reference when determining a PMI Assessment. The following time line provides some assistance in making this determination:
  - i. 1993 – the 4<sup>th</sup> Edition of the AMA Guides were published.
  - ii. 1999 – the Board adopted the AMA Guides to determine a PMI assessment.
  - iii. 2000 – the 5<sup>th</sup> Edition of the AMA Guides was published. General Regulation 9, provided for the “latest edition” to be used in a PMI assessment.
  - iv. 2002 – General Regulation 9 was amended to reflect the AMA Edition to be used would be that “as approved” by the Board.
  - v. 2004 – The Appellant had her PMI assessment and the 4<sup>th</sup> edition of the AMA Guides were used.
    - \* At some point, the Board approved the 4<sup>th</sup> edition of the AMA Guides were approved but this date was not provided to this Tribunal.
24. This Tribunal notes that pursuant to section 56(17), it is bound by and shall fully implement the policies of the Board. However, there is no indication that the approval of the Edition of the AMA Guides is subject to policy. The Internal Reconsideration Decision simply confirmed that it is the 4<sup>th</sup> Edition which is presently “approved” by the Board. There was no

rational provided as to why or why not a new edition has not been approved. It appears to be a discretionary function of the Board which is reviewable by this Tribunal by applying the appropriate standard of review.

25. The Appellant directed this Tribunal to Policy 06-01 which relates to internal reconsideration. It states under Policy – 1 “All decisions of the Workers Compensation Board are to reflect the intent of the *Workers Compensation Act* and Workers Compensation Board Policy and shall be made in accordance with the real merits of justice of each case.” Section 56(2) of the Act also provides legislative authority for this premise. Section 17 of the Act also supports the application of “real merits of justice of the case” to the Appellant’s situation.
  
26. In 2004, the Board was using the 4<sup>th</sup> Edition of the AMA Guidelines which would be eleven years old at the date of the assessment. There is no indication that the Board has subsequently approved the 5<sup>th</sup> Edition, which means the standards are now 14 years old. Although, the Tribunal can appreciate that the Board may not be able to immediately make decisions to adopt most recent editions, as certain training and education may need to be obtained by the medical consultants, the period of time which has passed without approving a newer version is too long and when examining the “real merits and justice” of this case, the Appellant should be entitled to a more recent medical standard. A lot can and has changed over the last decade in the medical field. Therefore, this Tribunal finds that the Board has erred by failing to properly apply s. 56(2) of the Act, which is an error in law and subject in any event to the standard of correctness. As such, the Appellant is entitled to have her reassessment completed under a more recent set of AMA Guides. It would seem reasonable to this Tribunal that the Board review and update its “approved” AMA Guides every five years. The Tribunal notes that there is no guarantee that the Appellant will receive an increase in her permanent impairment award, but she is entitled to have the application of reasonably current standards applied to her impairment rating.



27. It should be noted that the Appellant raised various arguments with respect to the Charter and acts of bad faith and discrimination as against the Board. However, this Tribunal finds that those arguments were not substantiated. Further, the Appellant has requested costs in this matter but it is not within the jurisdiction of this Tribunal to order costs in this regard.

Dated this 31st day of January, 2007.

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Pamela J. Williams, Vice Chair of the Workers Compensation Tribunal

Concurred:

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Neil MacFadyen, Employee Representative

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Don Turner, Employer Representative