



accepted the claim for bilateral carpal tunnel syndrome and right cubital tunnel syndrome and authorized carpal tunnel surgery and revise ulnar nerve at the elbow which was performed on November 24, 2003. On October 27, 2005 appellant filed a claim for a schedule award.

In a July 25, 2005 report, Dr. David Weiss, a Board-certified orthopedic specialist, provided findings on physical examination. He found that appellant had a 39 percent combined impairment of his right upper extremity, including 20 percent for lateral pinch deficit, based on Tables 16-33 and 16-34 at page 509 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,<sup>1</sup> 9 percent for Grade 4/5 abduction motor strength deficit of the thumb, based on Table 16-11 at page 484 and Table 16-15 at page 492, 6 percent for Grade 4/5 motor strength deficit of the biceps, based on Table 16-11 at page 484 and Table 16-15 at page 492, 10 percent for a Grade 4 median nerve sensory deficit, based on Table 16-10 at page 482 and Table 16-15 at page 492 and 2 percent for Grade 4 ulnar nerve sensory deficit, based on Table 16-10 at page 482 and Table 16-15 at page 492. Dr. Weiss found a 35 percent combined impairment of appellant's left upper extremity, including 20 percent for lateral pinch deficit, based on Tables 16-33 and 16-34 at page 509, 9 percent for Grade 4/5 abduction motor strength deficit of the thumb, based on Table 16-11 at page 484 and Table 16-15 at page 492, 10 percent for a Grade 4 median sensory nerve deficit, based on Table 16-10 at page 482 and Table 16-15 at page 492 and 2 percent for Grade 4 ulnar nerve sensory deficit, based on Table 16-10 at page 482 and Table 16-15 at page 492.

In a November 28, 2005 report, the Office medical adviser noted that maximum medical improvement occurred on July 25, 2005. He found that appellant had a 15 percent combined impairment of his left upper extremity, including 5 percent for Grade 4 thumb abduction and 10 percent for Grade 4 median nerve sensory deficit, based on Table 16-11 at page 484 and Table 16-15 at page 492. The Office medical adviser found a 15 percent combined impairment of his right upper extremity, including 5 percent for Grade 4 thumb abduction and 10 percent for Grade 4 median nerve sensory deficit, based on Table 16-11 at page 484 and Table 16-15 at page 492. With respect to an impairment rating for lateral strength deficit, the Office medical adviser stated that he did not include this as "lat[eral] strength is a lot of ulnar nerve involvement." He further noted that appellant's ulnar nerve dysfunction "has nothing to do with cubital thumb syndrome" and the condition of cubital thumb syndrome was not listed as an accepted condition on the statement of accepted facts supplied by the Office.

On March 29, 2006 the Office referred appellant to Dr. David Bundens, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Weiss and the Office medical adviser on the issue of diagnosis and any permanent impairment rating.

In a report dated April 11, 2006, Dr. Bundens, based upon a review of the medical evidence, statement of accepted facts and physical examination, concluded that appellant suffers from bilateral carpal tunnel syndrome and right cubital syndrome. A physical examination revealed positive Tinel's sign at wrist, a negative Phalen's test at the wrist and "very slight intrinsic weakness" on the right and a negative Tinel's sign at the elbow on the left and a positive wrist Phalen's test. Dr. Bundens found good sensation and strength in the left carpal tunnel,

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<sup>1</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

which resulted in a zero percent impairment of the left upper extremity. He found that appellant had combined whole person impairment of 12.4 percent or a 24 percent impairment<sup>2</sup> of the right upper extremity, including a 2 percent impairment for a Grade 4 motor deficit in his right upper extremity, based on Table 16-11 at page 484 and Table 16-15 at page 492, a 9.2 percent impairment for Grade 4/5 ulnar nerve strength loss, based on Table 16-11 at page 484 and Table 16-15 at page 492, a 7.8 percent impairment for “sensation and a five m[illi]m[eter] point in all five fingers” and a 1.4 percent of the ulnar nerve.

The Office medical adviser reviewed Dr. Bundens’ report on April 18, 2006 and agreed with his impairment determination. However, in adding the impairment ratings for the right upper extremity of 2 percent + 9.2 percent + 7.8 percent + 1.4 percent, the Office medical adviser found a total impairment of 20.4 percent. He concluded that appellant had a zero percent impairment of the left upper extremity based on page 495.

On May 8, 2006 the Office granted appellant a schedule award for 62.4 weeks<sup>3</sup> from April 11, 2006 to June 21, 2007 based on a 20 percent impairment of the right upper extremity.

By letter dated May 15, 2006, appellant’s counsel requested an oral hearing which was held on October 16, 2006.

By decision dated December 8, 2006, an Office hearing representative affirmed the May 8, 2006 schedule award decision.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees’ Compensation Act<sup>4</sup> and its implementing regulations<sup>5</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body.<sup>6</sup> However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be

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<sup>2</sup> Dr. Bundens appears to have made an error in adding the impairment totals. Adding the impairment percentages noted by Dr. Bundens results in a total of 20.4 percent not 24 percent as he noted.

<sup>3</sup> The Act provides for 312 weeks of compensation for 100 percent loss or loss of use of an upper extremity. 5 U.S.C. § 8107(c)(1). Multiplying 312 weeks by 20 percent equals 62.4 weeks of compensation.

<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> See *Carol A. Smart*, 57 ECAB \_\_\_\_ (Docket No. 05-1873, issued January 24, 2006). (Section 8107 of the Act authorizes the payment of schedule awards for the loss or loss of use, of specified members or functions of the body. Such loss or loss of use is known as permanent impairment).

uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>7</sup>

Section 8123(a) of the Act<sup>8</sup> provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>9</sup> When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>10</sup>

### ANALYSIS

The Office accepted appellant's claim for bilateral carpal tunnel syndrome and right cubital tunnel syndrome. It found that a conflict had been created regarding appellant's degree of impairment. Dr. Weiss, appellant's examining physician, who found a 39 percent right upper extremity impairment and a 35 percent left upper extremity impairment while initially the Office medical adviser reportedly found a 15 percent right upper extremity impairment and a 15 percent left upper extremity impairment. On March 29, 2006 the Office referred appellant to Dr. Bundens for an impartial medical evaluation. In a report dated April 11, 2006, Dr. Bundens concluded that appellant had 20 percent right upper extremity impairment and a zero percent left upper extremity impairment. In an April 18, 2006 report, a second Office medical adviser assessed appellant's bilateral upper extremity impairment based on Dr. Bundens' physical findings and the A.M.A., *Guides* and agreed that appellant was entitled to a 20 percent right upper extremity impairment and a 0 percent left upper extremity impairment.

Dr. Bundens found that appellant had combined whole person impairment of 12.4 percent or a 20 percent impairment of the right upper extremity, including a 2 percent impairment for a Grade 4 motor deficit in his right upper extremity, based on Table 16-11 at page 484 and Table 16-15 at page 492, a 9.2 percent impairment for Grade 4/5 ulnar nerve strength loss, based on Table 16-11 at page 484 and Table 16-15 at page 492, a 7.8 percent impairment for "sensation and a five m[illi]m[eter] point in all five fingers" and a 1.4 percent of the ulnar nerve. He did not explain how he arrived at his conclusion that appellant had a 20 percent impairment of the right upper extremity. Table 16-11 is the table for grading upper extremity motor deficit impairment and Dr. Bundens graded the impairment at Grade 4 or between 1 and 25 percent of the maximum for the identified nerve.<sup>11</sup> Dr. Bundens did not cite any other tables or explain how the 20 percent impairment was calculated. Moreover, a schedule award is not payable for an

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<sup>7</sup> See *id.*; *P.C.*, 58 ECAB \_\_\_ (Docket No. 07-410, issued May 31, 2007); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>8</sup> 5 U.S.C. §§ 8101-8193.

<sup>9</sup> 5 U.S.C. § 8123(a); see *Geraldine Foster*, 54 ECAB 435 (2003).

<sup>10</sup> *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

<sup>11</sup> A.M.A., *Guides* 484, Table 16-11.

impairment of the whole person.<sup>12</sup> The Office medical adviser did not provide additional explanation.<sup>13</sup> The Board finds that the conflict in the medical evidence regarding a schedule award was not properly resolved. In this situation, the Office has a responsibility to secure a supplemental report from the impartial specialist that corrects the defect in the original opinion.<sup>14</sup> The case accordingly will be remanded to the Office to secure a medical report that properly resolves the conflict. After such further development as the Office deems necessary, it should issue a *de novo* decision.

### **CONCLUSION**

The Board finds that the conflict in the medical evidence was not properly resolved and the case requires further development.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 8, 2006 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: November 15, 2007  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>12</sup> *D.H.*, 58 ECAB \_\_\_\_ (Docket No. 06-2160, issued February 12, 2007).

<sup>13</sup> A.M.A., *Guides* 492, Table 16-15.

<sup>14</sup> See *Nancy Keenan*, 56 ECAB \_\_\_\_ (Docket No. 05-949, issued August 18, 2005); *Guiseppa Aversa*, 55 ECAB (2003).