**CLAIM HISTORY AND APPEAL PROCEEDINGS:**

On August 30, 1983, the Worker* injured his lower back while lifting an arch rail. The Board accepted his claim and provided him with 22 weeks of temporary benefits until he returned to work.

On July 22, 1988, the Worker again injured his lower back at work. The Board accepted this claim as well. In October of 1988, the Worker underwent a disc removal (laminectomy) at L5-S1. On October 30, 1990, the Worker was found to have a 18% permanent medical impairment. He was awarded a CRS pension effective April 16, 1990.

The Worker sought compensation under the new *Chronic Pain Regulations*. This led to the following two decisions:

- TST Decision (October 11, 2005) - Found that the Worker did not have "chronic pain" as defined in the regulations, as the existence and degree of the Worker's pain was explained by objective findings in the Worker's lumbar spinal region.

- Hearing Officer Decision (January 26, 2006) - Confirmed the TST Decision.

My decision addresses the Worker's appeal of the Hearing Officer Decision. It is the position of the Worker's representative that the Regulation's definition of "chronic pain" results in a violation of the Worker's equality rights under the *Canadian Charter of Rights and Freedoms.* It is her position that the Worker should receive a pain-related impairment rating for chronic pain.

It is the position of the Attorney-General that the *Chronic Pain Regulations* do not raise a *Charter* issue as they provide compensation to the very group who previously had been discriminated against (as identified in the first paragraph of *Nova Scotia (Workers' Compensation Board) v. Martin* [2003] S.C.J. No. 54).

It is the position of the Employer that the Worker's pain is not "chronic pain" as defined in the Regulations. The Employer also wants me to rule on generic evidence submitted on behalf of the Worker, such that it would not have to acquire medical opinion evidence to address such evidence in the future. The Employer believes that the *Chronic Pain Regulations* are valid, but also states that it does not have the resources to fully respond to a *Charter* challenge.

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* This decision contains personal information and may be published. For this reason, I have not referred to the participants by name.

**ISSUES AND OUTCOMES:**

> **Does the definition of "chronic pain" found in the *Chronic Pain Regulations* violate the Worker's equality rights?**
>
> No. The application of the definition does not result in differential treatment. Instead, it ends discrimination against a specific disability. I must apply the definition in deciding the Worker's entitlement to compensation under the *Chronic Pain Regulations.*
>
> **Does the Worker have "chronic pain" entitling him to benefits under the *Chronic Pain Regulations?***
>
> No. While he experiences ongoing pain, it does not meet the Regulation's definition of "chronic pain".

**ANALYSIS:**

**Does the definition of "chronic pain" found in the *Chronic Pain Regulations* violate the Worker's equality rights?**

In short, the Worker's representative argues that the definition of "chronic pain" used by the Board is narrower than most definitions of chronic pain. In the representative's view, the application of this definition has the effect of denying chronic pain benefits to many workers who suffer from chronic pain, as that term is more generally used.

She submits that, compared with those who meet the statutory definition, other workers with ongoing, long-term pain face discrimination that violates their equality rights under the *Charter.* It is the representative's view that they do not have equal access to the benefits under the *Workers' Compensation Act.* It is her view that the *Martin* decision (*Nova Scotia (Workers' Compensation Board) v. Martin* [2003] S.C.J. No. 54) dealt with chronic pain in general, not merely the statutory definition of "chronic pain".

<u>Legislative History for Chronic Pain</u>

The *FRP Regulations* (Functional Restoration Program Regulations) were enacted on March 26, 1996, and applied to all decisions made under the *Workers' Compensation Act* on or after February 1, 1996, the date the current *Workers' Compensation Act* came into force. Those regulations defined "chronic pain" as follows:

(b) "chronic pain" means pain

(i) continuing beyond the normal recovery time for the type of personal

injury that precipitated, triggered or otherwise predated the pain; or

(ii) disproportionate to the type of personal injury that precipitated, triggered or otherwise predated the pain,

and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed;

The *FRP Regulations* provided that no compensation was payable in connection with “chronic pain”, except in accordance with the *FRP Regulations*. These benefits were limited to a four-week functional restoration program once a worker injured after February 1, 1996 was found to have “chronic pain”. “Chronic pain” sufferers were excluded from permanent benefits as no permanent impairment rating was awarded for “chronic pain”.

The current *Workers’ Compensation Act* was amended by S.N.S. 1999, c. 1 (commonly referred to as Bill 90). The amendments to the *Act* specifically included provisions dealing with “chronic pain”. Section 10A of the *Act* reiterated the definition of “chronic pain”, as found in the *FRP Regulations*. Bill 90 provided specific benefits (s. 10E benefits) to “window period” chronic pain sufferers (workers injured on or after March 23, 1990 and before February 1, 1996) who had a decision under appeal or were receiving temporary benefits as of November 25, 1998. However, under the amendments, no worker would receive compensation for “chronic pain” outside of the FRP program and s. 10E of the *Workers’ Compensation Act* [s.10B].

The Supreme Court of Canada in *Martin* struck down s. 10B (b) and (c) of the *Workers’ Compensation Act* and the *FRP Regulations.*

The Court found that by entirely excluding “chronic pain” from the application of the general compensation provisions of the *Workers' Compensation Act*, and by limiting the applicable benefits to a four-week Functional Restoration Program for workers injured after February 1, 1996, the *Workers’ Compensation Act* and the *FRP Regulations* clearly imposed differential treatment upon injured workers suffering from “chronic pain”. The basis of the differential treatment was the nature of their physical disability - an enumerated ground under s. 15(1) of the *Charter.*

The Court found that, in the context of the *Workers’ Compensation Act* and given the nature of “chronic pain”, the differential treatment was discriminatory and the violation could not be justified under s. 1 of the *Charter,* as the blanket exclusion of “chronic pain” from the workers’ compensation system did not minimally impair the rights of “chronic pain” sufferers.

In response to the *Martin* decision, the Nova Scotia government enacted the *Chronic Pain Regulations*.

The *Chronic Pain Regulations* did not alter the definition of “chronic pain”. “Chronic pain” is pain which lasts beyond the normal recovery time following an injury, or pain that is disproportionate to the amount of pain usually associated with an injury. Conditions like chronic pain syndrome, fibromyalgia, and myofascial pain syndrome are considered to be “chronic pain”. “Chronic pain” is not pain explained by significant, objective, physical findings at the site of injury.

Under s. 3 of the *Chronic Pain Regulations*, workers with “chronic pain” are brought into the general scheme of the *Workers’ Compensation Act*. Section 7 of the *Chronic Pain Regulations* creates a method of assigning a permanent impairment rating to “chronic pain”.

Under s. 7 of the *Chronic Pain Regulations*, where a worker has “chronic pain” that is causally connected to a compensable injury, the Board must pay the worker a permanent benefit based on a permanent impairment rating of:

(a) 3 per cent, if the worker experiences a slight pain-related impairment; or
(b) 6 per cent if the worker experiences a substantial pain-related impairment.

A worker is considered to have a slight pain-related impairment where the “chronic pain” has increased the impact of the original compensable injury mildly to moderately, as set out in Table 18-3 of the *AMA 5th Guides*. However, if the “chronic pain” increases the impact of the original compensable injury moderately-severely to severely, then the worker is considered to have a substantial pain-related impairment.

Table 18-3 of the *AMA 5th Guides* rates impairments by requiring an assessment of five factors: (1) pain severity; (2) the impact on activities of daily living; (3) the psychological impact; (4) medication use, and (5) the degree of pain behaviour.

The *Chronic Pain Regulations* provide for a modified application of Chapter 18 of the *AMA 5th Guides*. The *AMA*'s requirement for an existing permanent impairment as a prerequisite for an assessment of a pain-related impairment is waived. The Board must also apply the slight pain-related impairment and substantial pain-related impairment percentages outlined in s. 7 to “unratable pain” as described in the *AMA 5th Guides* (pain syndromes).

The Worker in this appeal was assessed under the *Chronic Pain Regulations* and he was found not to have “chronic pain”, as the existence and degree of his pain were explained by objective findings at the site of injury - an exclusion from the statutory definition of “chronic pain”.

<u>What was the Court in *Martin* referring to when it discussed chronic pain?</u>

Most legislation contains a definition section where the Legislature sets out how certain words contained in that legislation are interpreted for purposes of the legislation. The reason certain words are defined is to clarify legislative intent. Statutory definitions often differ from dictionary definitions through expanding or restricting the ordinary meaning of words.

For example, the Workers' Compensation Appeals Tribunal is not a court. However, s. 2 of the *Evidence Act* defines "court" to include any person having by law the authority to receive evidence. Therefore, while this tribunal is not a court, it is considered to be one for purposes of the *Evidence Act.*

Effective 1996, the *FRP Regulations* had defined the term "chronic pain" differently than the common usage of that term for the purposes of the *FRP Regulations*. This was done so as not to exclude "usual" pain (even if chronic in nature) from the general scheme of the *Workers' Compensation Act.* Only disproportionate pain, pain lasting beyond normal recovery times, and pain syndromes were intended to be excluded from the general scheme of the *Workers' Compensation Act* by the *FRP Regulations.*

In *Martin,* the Supreme Court of Canada was not dealing with chronic pain in general. Instead it was dealing with a specific disability as defined in the *FRP Regulations* and s. 10A of the *Workers' Compensation Act.* It does not matter that the disability was labelled "chronic pain". It could have been given another name and it would not have impacted the outcome or analysis in *Martin.*

In the first paragraph of the *Martin* decision, Justice Gonthier discusses chronic pain syndromes and related conditions. He discusses pain that persists beyond the normal healing time for an injury or that is disproportionate to such injury, and "whose existence is not supported by objective findings at the site of injury under current medical techniques". It is clear from the opening paragraph of *Martin* that the Court was dealing solely with the statutory definition of "chronic pain", and whether its treatment under the *Workers' Compensation Act* and the *FRP Regulations* violated the *Charter*.

<u>Differential treatment under s. 15 of the *Charter*</u>

There is a three-step approach to determine whether s. 15(1) of the *Charter* has been breached. In *Martin*, Gonthier, J., referred with approval to the three-step approach as described by Iacobucci, J. In *Law v. Canada (Minister of Employment and Immigration)*:

> First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position

> within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

As set out in this test, the first step is to look for either (a) a formal distinction being drawn on the basis of personal characteristics, or (b) a failure to take into account an already disadvantaged position resulting in substantially different treatment due to personal characteristics. It is necessary to identify a comparator group in order to look for a distinction.

In *Martin*, the Court found that the Board treated the disability of "chronic pain" differently than other injuries. The Court found this differential treatment to be discriminatory. There was no individual assessment of the needs and circumstances of workers with "chronic pain"; instead, they were all provided with the same limited benefits. None were provided with any type of compensation in the long-term (not even pain medication) despite the fact that many had permanent disabilities due to work-related "chronic pain".

The intent behind the *Chronic Pain Regulations* is to bring workers with "chronic pain" into the general scheme of the *Workers' Compensation Act.*

It is not surprising that the same definition that was used to exclude this disability from the general scheme of the *Workers' Compensation Act* is used to bring it into the general scheme. It was this specific group that was discriminated against, not workers with painful conditions in general.

The representative submits that workers with work-related ongoing, long-term pain that does not meet the statutory definition of "chronic pain" are being discriminated against compared to workers with "chronic pain".

However, workers with work-related ongoing, long-term pain that does not meet the statutory definition of "chronic pain" were never excluded from the general scheme of the *Workers' Compensation Act.* They were always entitled to be assessed for the full range of compensation provided under the *Workers' Compensation Act*. For example, they were entitled to be assessed for a temporary earnings-replacement benefit, medical aid, and whether they had a permanent medical impairment. If a permanent medical impairment was identified, they were provided with the associated benefits.

Permanent medical impairments before 2000 are rated under the Board's Guidelines for the Assessment of Permanent Medical Impairment. For injuries after January 1, 2000, they are rated under the AMA Guides (4th edition).

Although objective measures are used in rating permanent medical impairments, pain is a feature that was taken into account in the creation of the rating schemes. Pain is more explicitly recognised under the AMA Guides than under the Board's Guidelines.

For example, under the Board's Guidelines, a lumbar disc injury resulting in a laminectomy with minimal symptoms and minimal objective findings is rated between 0% and 10%. However, if the symptoms and objective findings are significant, then it is rated between 10% and 20%. Therefore, a difference between minimal pain and significant pain can impact a permanent medical impairment rating.

The degree of the Worker's pain is part of the reason why his permanent medical impairment is rating at 18%, instead of somewhere between 0% and 10%.

At page 304 of the AMA Guides, the authors state that the degree of pain usually associated with an injury was taken into account when creating the Guides:

> In general, the impairment percents given in the tables and figures applicable to permanent impairments of the various organ systems include allowances for the pain that may occur with those impairments.

While the Worker's representative argues that the *Chronic Pain Regulations* cause discrimination, the opposite is true. The *Chronic Pain Regulations* address discrimination against workers with "chronic pain" as that term is defined. Workers with "chronic pain" can now receive all services under the *Workers' Compensation Act.* The Workers in the comparator group suggested by the representative were never subject to this discrimination.

I find that workers with work-related ongoing, long-term pain that does not meet the statutory definition of "chronic pain" are not treated differently than workers whose condition meets the definition of "chronic pain". Instead of creating a distinction based on a personal characteristic, the *Chronic Pain Regulations* eliminate a distinction. A worker with "chronic pain" receives a pension based on a permanent impairment award called a "pain-related impairment". However, this is not different in substance from a worker with work-related, ongoing, long-term pain that does not meet the statutory definition of "chronic pain" who receives a pension based on a permanent impairment award called a "permanent medical impairment". There is no discrimination under s. 15(1) of the *Charter.*

Therefore, I must apply the statutory definition of "chronic pain" in deciding whether the Worker is entitled to benefits under the *Chronic Pain Regulations.*

**Does the Worker have "chronic pain" entitling him to benefits under the *Chronic Pain Regulations?***

In deciding this appeal, I must give the Worker the benefit of the doubt. This means that if the disputed possibilities are even, then the issue is decided in the Worker's favour. However, the Employer must prove its case on a more likely than not basis (section 187 *Workers' Compensation Act*).

The Worker testified that he initially experienced some pain relief following his 1988 back surgery, but then things went downhill. He testified that he falls and he feels that he has lost control over his legs. He walks with the assistance of a cane. He testified that he has a hard time getting out of bed or a chair. He testified that he was never reassessed for his 18% permanent medical impairment rating following the initial assessment in 1990.

The Worker's representative argues that the Worker's permanent medical impairment award compensates the Worker only for loss of function. She questions whether the permanent medical impairment award takes into account the nerve root damage. She notes increased symptoms since the Worker's permanent medical impairment was last assessed. She submits that a larger permanent medical impairment would have been awarded had the Worker been assessed under the AMA Guides. She submits that as a herniated disc normally heals naturally, the Worker's pain is "chronic pain" that has lasted beyond the normal recovery time. She questions how someone can call pain usual for an injury without performing a physical examination.

The Employer's representative argues that the adequacy of the Worker's permanent medical impairment rating is not under appeal. He argues that a spinal stenosis is a natural precursor to pain symptoms. It is the Employer's position that the Worker's pain is normal for his condition, and is compensated by the permanent medical impairment rating.

Medical evidence specific to the Worker

On August 17, 1989, Dr. Huestis, neurological surgeon, wrote that the Worker's surgery had not gone as well as he had hoped. The Worker had back pain, and complained of his left leg giving out. He did not believe further surgery would help.

On October 31, 1989, Dr. Aggarwal, radiologist, interpreted a CT scan of the Worker's lumbar spine as revealing spinal canal stenosis particularly marked at L4-5, where the Worker had the surgery.

Between December 10th and 15th, 1989, the Worker was seen by Drs. Huestis and Holness. They were of the view that the Worker had deficits in his lumbar spine at L4-5

as well as at L5-S1 on the left (the “appropriate side” according to Dr. Huestis). However, despite these deficits, they did not think more surgery would help, particularly given that the Worker had already been off-work for two years, was on compensation and was a bit overweight.

On October 10, 1990, Dr. Kelly, Board physician, examined the Worker to assess his degree of permanent medical impairment. Dr. Kelly felt that the Worker had objective signs of nerve root irritation (definite weakness of dorsi-flexion of the left foot and some disruption of sensation on the lateral aspect of the left thigh). He noted muscle spasms in the Worker’s back. He noted the Worker to have a fairly major disability. He recommended a 18% permanent medical impairment rating.

On December 14, 1992, Dr. Huestis examined the Worker due to a flare-up of back pain. He felt that the Worker was left with a neurological deficit in the left lower extremity. He suggested conservative treatment to deal with the flare-up.

On March 3, 2000, Dr. Oei reported that the Worker has back pain that radiates into both legs. He wrote that the Worker wanted the Board to reassess his pension due to increased back pain.

In August of 2005, Dr. Acres, Board physician, reviewed the Worker’s file. It was his view that the Worker’s symptoms were not unusual given his failed back surgery. He felt that the underlying objective abnormalities explained the degree of the Worker’s pain. He stated that the Board would consider a permanent medical impairment reassessment if the Worker’s family physician submitted a detailed physical examination that showed changes in range of motion, reflex, strength or sensory since 1990.

On August 14, 2006, Dr. Burnstein, occupational medicine specialist, reviewed portions of the Worker’s file as well as some generic evidence submitted on behalf of the Worker. He also testified at the hearing. It was his view that the Worker had spinal canal stenosis at the site of his surgery. He stated that this was a painful condition which is not uncommon following spinal surgery. Scar tissue causes a narrowing of the spinal canal. It is a chronic, painful condition. Complaints of severe pain and reliance on narcotic analgesics are common for individuals with this condition. He did not feel that the Worker’s condition met the statutory definition of “chronic pain” as the pain was explained by objective findings. Dr. Burnstein testified that most herniations heal spontaneously.

<u>Generic evidence</u>

The Worker’s representative has filed several volumes of generic evidence with the Tribunal for use in this and future appeals. She represents a significant number of appellants, including a significant number who are former employees of the Employer. The Employer is concerned about how to respond to the generic materials. It does not want

to retain an expert to respond to all appeals. It is hoping for some direction as to how the Tribunal will treat these materials in the future.

While I understand the Employer's concerns regarding the generic evidence, I cannot make findings of fact that are in any way binding on future decision-makers.

However, I will make a few general observations concerning opinion evidence and the use of generic evidence:

1) The Tribunal is not bound by the rules of evidence used in Courts. Instead, it weighs all evidence that is relevant and reliable, unless there is a public policy reason not to consider that evidence, such as privilege or fairness.

2) The closer an opinion goes to addressing the ultimate issue being decided, the stricter the Tribunal must consider its reliability, particularly if the opinion advances a novel scientific theory or technique (*R. v. Mohan*, [1994] 2 S.C.R. 9).

3) Relevant scientific studies can assist in weighing conflicting opinion evidence (see policy 1.4.3).

4) No weight can be given to opinion evidence where the Tribunal is unable to determine the qualifications of the expert. Typically, the Tribunal does not formally qualify most experts. For example, often the knowledge that a person is an orthopaedic surgeon is sufficient for the Tribunal to give weight to their opinion regarding a dysfunction of the bones and related structures.

5) Widely used texts or consensus documents (such as the AMA Guides) may be given more weight than a conflicting individual's opinion.

6) More current generic evidence may be given more weight than older material.

7) Meta-studies (a study of studies) may be given more weight than an individual study.

8) The inability to cross-examine the author of generic evidence can affect the weight the Tribunal gives the evidence.

9) The lack of an expert to explain the relevance and reliability of generic scientific evidence may affect the weight put on the evidence.

Now, I look at the most relevant of the generic evidence filed on behalf of the Worker. I will not discuss the documents that the Worker's representative filed as part of her *Charter* arguments concerning the definition of "chronic pain". As discussed above, the Legislature can define words for purposes of legislation.

A document entitled “Back Pain” was co-authored by a professor of orthopaedic surgery and a professor of neurosurgery for the Ontario Workplace Safety and Insurance Appeals Tribunal. The paper was last revised in 2003. Amongst other things, it discusses pain caused by irritation or compression of a spinal nerve root, such as what happens with a spinal stenosis. It states that such pain usually travels all the way down the lower limb. There are often neurological findings such as numbness following the nerve root distribution, decreased reflexes and limitations in straight leg raising. It notes that once established, spinal stenoisis is a permanent condition, although surgery to decompress the nerve sometimes helps. It states that the surgical treatment of a herniated disc can relieve sciatica, but commonly leaves patients with low back pain. The article also notes that most disc herniations heal with time, but that some require surgery. The article notes abnormalities on diagnostic imaging alone should not be used to diagnose a patient. A thorough evaluation of history, and physical findings is also necessary.

In 1996, Dr. Beattie, an associate professor of physiotherapy, published an article entitled “The relationship between symptoms and abnormal magnetic resonance images of lumbar intervertebral disks”. He did a literature review and found that abnormalities are commonly found by diagnostic testing where the patient is pain-free. He concluded that while MRIs are a very useful tool in the evaluation of back pain, diagnosis should not be made in the absence of clinical verification. He also found that merely telling a patient that they have findings on diagnostic testing can make them more disabled.

Dr. Burnstein agreed with the observation that a diagnosis should not be made solely on the basis of diagnostic testing.

A 1994 paper entitled “Magnetic Resonance Imaging of the Lumbar Spine in People without Back Pain” reached a similar conclusion about the limitations of relying on diagnostic testing alone.

Dr. Burnstein agreed with this conclusion. He wrote that a patient’s situation requires obtaining a history, performing a physical examination, laboratory evaluations, and then applying a clinical judgement. Several other documents provided by the Worker’s representative reached the same or a similar conclusion. Given that the Employer’s expert does not disagree with this conclusion, I will not set them out. It appears to be common ground between the Worker and the Employer that abnormalities revealed on diagnostic testing does not always correlate with pain, and that a clinical judgement requires a proper examination and understanding of the history behind the complaint.

<u>Weighing of evidence</u>

The Worker has not been diagnosed with a chronic pain syndrome-like condition, so I must instead consider whether the Worker’s pain has lasted beyond the normal recovery for his injury or is disproportionate to the injury.

While the original injury was a disc herniation, surgical treatment for the herniation resulted in spinal stenosis. There is nothing in the reports of Drs. Huestis or Holness that would lead me to conclude that they made their diagnoses solely relying on diagnostic testing. It is clear from reading their reports that they were aware of the history of the injury, and they physically examinated the Worker. The neurological deficits and pain as described by Dr. Kelly are consistent with what would be expected for a spinal stenosis according to the article entitled "Back Pain". I accept Dr. Burnstein's explanation of how scarring from surgery can cause spinal stenosis. I accept the evidence from the article "Back Pain" that spinal stenosis is a permanent condition. As spinal stenosis is a permanent condition, I find that the Worker's pain has not persisted beyond the normal recovery time.

I must now consider whether the pain is disproportionate to the spinal stenosis and surgically treated disc. There is no medical opinion on file expressing the view that the pain is disproportionate. Dr. Acres was of the view that the pain was not unusual given the injury. Dr. Burnstein was of the same view. I accept these uncontradicted opinions and find that the Worker's pain is not disproportionate to his injury.

I find that the Worker does not qualify for compensation under the *Chronic Pain Regulations.* His pain is not "chronic pain" as defined in those Regulations.

The Board has indicated that they would consider reassessing the Worker's permanent medical impairment rating should his treating physician provide the Board with a report setting out a detailed physical examination. The Worker may want to follow up on this.

**CONCLUSION:**

The appeal is denied. The application of the statutory definition of "chronic pain" does not violate the Worker's *Charter* equality rights. The Worker is not entitled to compensation under the *Chronic Pain Regulations* as his pain does not meet the Regulations definition of "chronic pain".