

CLAIM HISTORY AND APPEAL PROCEEDINGS:

The Worker* was injured on June 30, 1989, when the forklift he was operating was struck from behind by another forklift. He suffered injuries to his cervical spine and lower back. The Board accepted the Worker's claim. After a period of time, the Worker returned to his occupation as a longshoreman. However, he was unable to remain in that position due to ongoing back pain. He has not returned to work since December, 1991.

The Worker's claim file details various benefits received by the Worker from the Board over time and also the various appeal proceedings launched by the Worker in order to obtain some of these benefits. As was the case of many workers in the early 1990s and prior to 2003, who suffered from pain but had minimal objective findings, the Worker's struggle for adequate compensation has been long and arduous.

In a decision dated February 27, 1991, the former Workers' Compensation Appeal Board [the "Appeal Board"] awarded the Worker a 10.5 per cent permanent partial disability benefit effective November 21, 1990.

In a decision dated November 6, 1992, the Appeal Board ordered that the Worker's permanent partial disability benefits be increased by 4.5 per cent, to a total of 15 per cent, effective May 1, 1992. The Appeal Board also awarded the Worker temporary total disability benefits from December 16, 1991 (the date he left work) to April 30, 1992 and ordered that he be assessed for vocational rehabilitation in an attempt to return him to the workforce.

In *Decision 99-796-PAD* (April 10, 2000, NSWCAT), the Tribunal made a preliminary decision finding that the Worker had "chronic pain" as defined by s. 10A of the *Workers' Compensation Act*⁽¹⁾. The Hearing Officer's decision then under appeal had also determined that the Worker suffered from chronic pain, in accordance with the definition of chronic pain in the *FRP Regulations*⁽²⁾.

The Tribunal did not proceed to a final decision at the time pending the appeal by the Board of *Decision 99-641-AD* (January 31, 2000, NSWCAT) in which the Tribunal found that s.10B of the *Workers' Compensation Act* violated s. 15(1) of the *Charter*⁽³⁾.

The Nova Scotia Court of Appeal released *Martin v. Workers' Compensation Board (N.S.) et al.*⁽⁴⁾ on November 8, 2000. The Court found that s. 10B of the *Workers' Compensation Act* did not infringe s. 15(1) of the *Charter*. The Tribunal proceeded to a final decision and, in *Decision 99-796-AD* (February 28, 2001, NSWCAT), the Tribunal found that no compensation was payable in connection with the Worker's chronic pain according to s. 10B of the *Workers' Compensation Act*.

The Worker was eventually assessed for entitlement to benefits under the new *Chronic Pain Regulations*⁽⁵⁾. A decision by the Board's Transitional Services Team dated August

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

25, 2005 found that the Worker had pain causally related to his June 30, 1989 injury, which was chronic pain as defined in the *Workers' Compensation Act*. He was found to have a substantial pain-related impairment and therefore entitled to a permanent impairment rating of 6 per cent for his chronic pain.

The Worker was therefore eligible for benefits and services under the *Chronic Pain Regulations*. As the Worker had a substantial pain-related impairment (6 per cent), the maximum award permitted under the *Regulations*, he was entitled to a pension based on his 6 per cent pain-related impairment, effective December 4, 1989. The Worker's benefits were recalculated and he was paid retroactive benefits, taking into consideration that he had a total permanent impairment rating of 21 per cent.

The Worker appealed the August 25, 2005 decision, challenging the validity of s. 7 of the *Chronic Pain Regulations*, as well as s. 10B of the *Workers' Compensation Act*. The Hearing Officer, in the January 23, 2006 decision now under appeal, found that the Worker had not provided a basis for his claims and determined that the appeal was without merit.

The Worker appealed to this Tribunal. His Representative filed a Notice of Appeal on March 2, 2006. The Worker seeks a finding that s. 7 of the *Chronic Pain Regulations* infringes s. 15(1) of the *Charter*, arguing that the 6 per cent "cap" on benefits for workers disabled by chronic pain discriminates when compared to other disabled workers who do not suffer chronic pain.

Section 10B of the *Workers' Compensation Act* will not be considered on this appeal. The Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*⁽⁶⁾ [*Martin*] struck down s. 10B of the *Act* and the *FRP Regulations* which limited benefits for workers suffering from chronic pain. It is not s.10B which is limiting the Worker's permanent impairment rating to 6 per cent for chronic pain.

EVIDENCE AND SUBMISSIONS:

This appeal was adjudicated by a Panel of three Appeal Commissioners. Participants in the appeal were the Worker, the Board and the Attorney General of Nova Scotia, who was given notice of the proceedings under the *Constitutional Questions Act*⁽⁷⁾. The Employer chose not to participate in the appeal proceedings.

Under s. 246(1) of the *Workers' Compensation Act*, the Panel considered documentary evidence previously submitted to or collected by the Board; specifically, the contents of the Worker's Board claim file and additional evidence submitted by the Attorney General, including an Affidavit of Gail Boone, deposed to on May 30, 2006.

The appeal proceeded by written submissions. Written submissions in support of the appeal were filed by the Worker's Representative, with the Notice of Appeal, on March 2, 2006. Written submissions and supporting authorities were filed by Counsel for the

Attorney General on May 31, 2006. By letter dated June 1, 2006, Counsel for the Board indicated that the Board adopted the reasoning set out by the Attorney General in its Memorandum of May 31, 2006. Counsel for the Worker provided rebuttal submissions and authorities on June 23, 2006.

ISSUES AND OUTCOMES:

Does s. 7 of the *Chronic Pain Regulations* infringe the equality rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

No. The Panel finds that s. 7 of the *Chronic Pain Regulations* imposes differential treatment upon injured workers suffering from chronic pain, on the basis of the nature of their physical disability, an enumerated ground under s. 15(1) of the *Charter*. However, in the context of the *Chronic Pain Regulations* and the *Workers' Compensation Act*, and given the nature of chronic pain, this differential treatment is not discriminatory.

ANALYSIS:

Tribunal's Jurisdiction

This Tribunal has jurisdiction to consider the validity of s. 7 of the *Chronic Pain Regulations* under s. 15(1) of the *Charter* following the Supreme Court of Canada in *Martin*.

Martin established that the Tribunal can properly consider and decide the *Charter* issue raised in this matter. However, the Tribunal's jurisdiction is a limited one. The Supreme Court of Canada in *Martin* articulated the Tribunal's jurisdiction as follows: "It is thus presumed to have jurisdiction to consider the validity of these provisions under s. 15(1) of the *Charter* and to disregard these provisions if it finds them to be unconstitutional"⁽⁸⁾.

Legislative History for Chronic Pain

The *FRP 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. The *Regulations* define chronic pain as:

- (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 was awarded for chronic pain. The former *Workers' Compensation Act*⁽⁹⁾ did not specifically mention chronic pain, nor did the current *Act*, until it was amended.

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 *Act* and the *FRP Regulations* clearly imposed differential treatment upon injured workers suffering from chronic pain on the basis of 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 *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. Although the *FRP Regulations* were struck down by the Supreme Court of Canada in *Martin*, the definition of chronic pain as found in s. 10A survives and was replicated in the *Chronic Pain Regulations*. 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*, except as set out in s. 7 of the *Chronic Pain Regulations*.

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.

The *Chronic Pain Regulations* provide that in determining whether a worker has a pain-related impairment, the Board must use an individualized approach based on the *American Medical Association Guides to the Evaluation of Permanent Impairment* (5th edition) [*AMA 5th Guides*], as modified by the regulations or Board policy.

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 medical 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*.

The Board adopted a Chronic Pain Policy, Board Policy 3.3.5, effective September 10, 2004, to define the process for adjudicating chronic pain claims. The Policy provides that a pain-related impairment is assessed using a pain-related impairment assessment tool and by seeking a clinical opinion of a Board Medical Advisor.

The Worker in this appeal was assessed under the *Chronic Pain Regulations* and found to have a substantial pain-related impairment. He was therefore awarded a permanent impairment rating of 6 per cent, the maximum allowed under the *Regulations*. As his compensable injury occurred before March 23, 1990, the Worker's permanent benefits were calculated in accordance with s. 226 and s. 227 of the *Workers' Compensation Act*.

Permanent Benefits Under the *Workers' Compensation Act*

Under the former *Workers' Compensation Act*, the Board used a clinical rating system to assign a percentage of physical impairment (permanent medical impairment rating) to most injuries. Permanent partial disability pensions were based on permanent medical impairment ratings which did not necessarily reflect impairment of earnings capacity.

On March 23, 1990, the Court of Appeal released *Hayden v. Nova Scotia (Workers' Compensation Appeal Board)* ⁽¹⁰⁾. The Court found that the Board's approach of basing disability pensions on impairments, instead of the effect of disability on earnings capacity, was not permitted by the wording of the former *Workers' Compensation Act*.

The Board never paid benefits as directed by *Hayden*. Six years after *Hayden*, the current *Workers' Compensation Act* came into effect. It provides a new regime for permanent benefits consisting of permanent impairment benefits, based on permanent impairment ratings, and extended earnings-replacement benefits, to compensate for loss of earnings.

The current *Workers' Compensation Act* provides that permanent benefits for injuries that occur after February 1, 1996, are to be determined on the basis of impairment, not disability. Section 34 of the *Act* allows the Board to establish a permanent impairment rating schedule to be applied in calculating the awards for permanent impairment. Board Policy 3.3.2R2 requires the Board to use the permanent impairment rating schedule attached to the Policy (the *PMI Guidelines*) for injuries prior to January 1, 2000. Board Policy 3.3.4R requires the Board to use the *AMA Guides (4th edition)* for injuries which occur on or after January 1, 2000.

The current *Workers' Compensation Act* also contains transitional provisions to determine how injuries prior to February 1, 1996 are to be treated.

Section 226 of the *Act* deems the old method to have been valid for workers with a permanent impairment before March 23, 1990. Under s. 227 of the *Act*, these workers get a pension based on the clinical rating system, sometimes referred to as a CRS Pension. They are not entitled to wage loss benefits; however, under s. 227 and s. 10D, they may be entitled to supplementary benefits. Generally, supplementary benefits are paid to pre-Hayden workers who are receiving a Canada Pension Plan disability pension, as is the case for the Worker in this matter.

The Worker thus receives permanent benefits based on the permanent impairment rating of 21 per cent (15 per cent permanent medical impairment plus 6 per cent pain-related impairment). As his benefits are calculated under s. 227, he receives the pension for life. He challenges the 6 per cent "cap" on his pain-related impairment.

Application of s. 15(1) of the Charter

The Worker challenges the validity of s. 7 of the *Chronic Pain Regulations*.

Section 15(1) of the *Charter* provides as follows:

Every individual is equal before the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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)*⁽¹¹⁾ [Law]:

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).

Following this approach, the Panel now turns to an analysis of the Worker's challenge based on the three inquiries required by s. 15(1).

(a) Is there differential treatment for purposes of s. 15(1) of the *Charter*?

The first step of this analysis requires the identification of a comparator group.

In *Martin*, the Court found that s.10B of the *Workers' Compensation Act* and the *FRP Regulations* made a distinction between workers who suffered from chronic pain and workers who did not have chronic pain. The *Act* and *FRP Regulations* disentitled the chronic pain sufferers from compensation and other benefits, as well as to individual assessments of their condition and needs, as compared to those workers without chronic pain who were eligible for compensation for their work-related injuries.

Counsel for the Worker has suggested that the appropriate comparator group in this matter is similar to the group identified in *Martin*, that is, "the group of workers subject to the Act who do not have chronic pain and are eligible for compensation for their work-related injuries". In the alternative, he suggests that the comparator group are those workers with permanent disabilities or permanent partial disabilities of greater than 6 per cent who do not experience chronic pain but are eligible for compensation proportionate to their disabilities.

Counsel for the Attorney General agrees that the first comparator group suggested by the Worker (injured workers without chronic pain and eligible for compensation for their work-related injuries) is an appropriate comparator group. She adds that the second comparator group suggested by the Worker's Counsel is merely a subset of the first comparator group.

Section 7 of the *Chronic Pain Regulations* deals with eligibility for permanent benefits based on a permanent impairment rating for pain. The Panel therefore finds that the appropriate comparator group is "injured workers subject to the *Act* who do not have chronic pain and who are eligible for permanent benefits as a result of a permanent medical impairment".

The Panel finds that the Worker is part of a group subject to differential treatment relative to the comparator group. Workers with chronic pain receive permanent benefits based on a pain-related impairment rating of 3 per cent or 6 per cent applying a modified version of the *AMA 5th Guides*. The comparator group, workers with a permanent medical impairment, receive benefits based on a permanent medical impairment rating under the *PMI Guidelines* between 0 and 100 per cent (or a permanent medical impairment under the *AMA Guides (4th edition)* to a maximum total body impairment of 100%).

b) Is the differential treatment based upon an enumerated ground?

Physical disability is a ground expressly included in s. 15(1) of the *Charter*. The Supreme Court of Canada in *Martin* found that the distinction between the claimants in that matter and the comparator group was made on the basis of the claimants' disability, specifically, on the basis of the claimants' chronic pain disability. The Supreme Court added that the fact that injured workers without chronic pain have their own disability too, was irrelevant. Distinguishing injured workers with chronic pain from those without is still a disability-based distinction. Whether that distinction is, in fact, discriminatory remains in each case to be determined under the third branch of the *Law* test⁽¹²⁾.

The Panel adopts the same reasoning and finds that the distinction between the Worker and the comparator group is made on the basis that the Worker has chronic pain. Therefore, there has been a distinction made on the basis of a physical disability.

Before embarking on the analysis under the third branch of the *Law* test in the *Martin* decision, the Supreme Court of Canada made the following statement which the Panel also finds relevant to our analysis:

Of course, government benefits or services cannot be fully customized. As a practical matter, general solutions will often have to be adopted, solutions which inevitably may not respond perfectly to the needs of every individual. This is particularly true in the context of large-scale compensation systems, such as the workers' compensation scheme under consideration. Such systems often need to classify various injuries and illnesses based on available medical evidence and use the resulting classifications to process the claims made by beneficiaries. This approach is necessary, both for

reasons of administrative efficiency and to ensure fairness in processing large numbers of claims. In addition, the beneficiaries themselves benefit from the reduced transaction costs and speed achieved through such techniques, and without which large-scale compensation might well be impossible. The state should therefore benefit from a certain margin of appreciation in this exercise, but it cannot be exempted from the requirements of s. 15(1) of the *Charter*. The distinction made will not be allowed to stand when it, intentionally or not, violates the essential human dignity of the individuals affected and thus constitutes discrimination.⁽¹³⁾

c) Does the differential treatment discriminate in a substantive way? Is it truly discriminatory?

Gonthier J. in *Martin*⁽¹⁴⁾ referred with approval to Iacobucci J.'s statement in *Law* that the substantive discrimination analysis must be informed by the purpose of s. 15(1), which is "to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration".

Gonthier J. noted further⁽¹⁵⁾ that Iacobucci J. went on to identify four contextual factors which may be referred to in order to determine whether the challenged legislation demeans the essential human dignity of the affected person or group. These factors are:

(1) the presence of pre-existing disadvantage, vulnerability, stereotyping or prejudice directed at this person or group; (2) the correspondence, or lack thereof, between the ground upon which the differential treatment is based and the actual needs, characteristics and circumstances of the affected person or group; (3) the ameliorative purpose or effect of the legislation upon a more disadvantaged group; and (4) the nature of the interest affected by the legislation. This list, of course, is not exhaustive, the goal of the analysis in each case being to determine whether a reasonable and dispassionate person, fully apprised of all the circumstances and possessed of similar attributes to the claimant, would conclude that his or her essential dignity had been adversely affected by the law. For the same reason, not all factors will be relevant in each case.

(i) Pre-existing disadvantage

The Panel accepts, as did the Supreme Court of Canada in *Martin*, that many elements point to the conclusion that chronic pain sufferers have historically been subject to disadvantage or stereotyping beyond that affecting other injured workers. This is evidenced by the Worker's own personal claim history. However, the finding that chronic pain sufferers have been subject to discrimination in the past is not determinative of the validity

of s. 7 of the *Chronic Pain Regulations*. The challenged provision is only one aspect of the overall response to *Martin* and must be viewed in that context.

(ii) Correspondence with the needs, capacities and circumstances of the workers

The Panel finds that the *Chronic Pain Regulations* take into account the actual needs, capacity and circumstances of workers suffering from chronic pain in a manner that respects their value as human beings and as members of Canadian society.

Section 7 of the *Chronic Pain Regulations* provides that workers who are found to have a pain-related impairment are entitled to permanent benefits. Workers are entitled to an individualized assessment. Their pain-related impairment is categorized as either slight or substantial. Workers then become eligible for all benefits associated with having a permanent impairment, regardless of whether their impairment is pain-related or not.

In contrast to the regime considered by the Court in *Martin*, chronic pain sufferers who develop a permanent impairment as a result of chronic pain are entitled to medical aid, permanent benefits, and assistance to return to work. They receive the same protection as other workers with permanent impairments.

There is no distinction between the types of benefits received by a worker as a result of a pain-related impairment under the *Chronic Pain Regulations* or a permanent medical impairment under the *PMI Guidelines* or *AMA Guides (4th edition)*. A permanent impairment of any type opens the door to the variety of benefits provided under the *Workers' Compensation Act*.

Counsel for the Worker argues that the *Act* and the *Chronic Pain Regulations* ignore the Worker's real needs by denying him long-term benefits which correspond to his actual disability. He says that "...Given that [the Worker's] disability has been assessed at considerably higher than 6% it cannot be said that the compensatory mechanism set up under the *Act* and its regulations corresponds to the actual needs and circumstances of [the Worker's] case."

This statement ignores the fact that permanent benefits under the *Workers' Compensation Act* are paid based on permanent impairment and not disability. This issue was addressed previously by the Tribunal in *Decision 2001-596-AD* (August 13, 2002, NSWCAT) [Leave to appeal to the Court of Appeal denied on January 14, 2003]. As noted by the Tribunal:

...I respectfully disagree with the submission of the Worker's Representative that the Tribunal "is free to award compensation on the basis of the actual disability suffered . . . rather than being restricted to the table for permanent medical impairment." The benefits in question in this appeal relate to the Worker's impairment. Even if the Worker's Representative had intended to refer to the Worker's impairment, it is not open to the Tribunal to award compensation on a basis other than as provided under the *Act*, Regulations, Board Policy and guidelines.

Whether it be pursuant to Board Policy 3.3.2R2, Policy 3.3.4R or Policy 3.3.5, guidelines are used to assess impairments, not disability. A disability refers to the decreased capacity or loss of ability of an individual to meet personal, social or occupational demands.

The *Chronic Pain Regulations*, and s. 7 in particular, are an attempt to fit chronic pain sufferers into an impairment-based system and, therefore, to treat them like all other workers with permanent impairments. Impairment rating systems are based on “objective” measures of impairment.

The *PMI Guidelines* provide that “the evaluation of permanent medical impairment is a medical matter which can be measured accurately and objectively”. An “impairment” refers to the loss of, loss of use of, or derangement of any body part, system or function (see the Introduction to the *PMI Guidelines*). Similarly, under the *AMA Guides (4th edition)*, “the existence and degree of permanent medical impairment are determined by medical means and are based solely on a demonstrable loss of bodily function” (s.11).

Under the *PMI Guidelines*, there are maximum ratings for many injuries that often carry with them a significant element of pain. For example, total immobility of a hip results in a rating of 30 per cent, total immobility of the knee, 25 per cent and total immobility of the ankle, 12 per cent. A cervical spine fracture with fusion and significant objective findings merits a 10-20 per cent rating and a lumbar disc excision with fusion, a 10-30 per cent rating. Impairment ratings for other types of injuries are also subject to maximum ratings, for example, 5 per cent for tinnitus or for complete deafness in one ear. Impairment ratings have no direct correlation to disability in the sense of functional ability. Workers who have two fingers amputated receive the same percentage rating, regardless of the differing impact that the amputation might have on their ability to work. Similar examples can be found in the *AMA Guides (4th edition)*.

The Panel notes further that the challenged pain-related impairment regime accords with a recognized impairment rating system, that being the *AMA 5th Guides*. The *Chronic Pain Regulations* scheme modifies the pain-related impairment scheme as outlined in Chapter 18 of the *AMA 5th Guides* in three ways: 1) by not requiring a medical impairment as a prerequisite for assessment; 2) by providing for a maximum rating of 6 per cent instead of 3 per cent; and 3) by rating “unratable” pain. These modifications are all to the benefit of injured workers with chronic pain.

The *AMA 5th Guides* make it clear that it is difficult to reconcile pain-related impairments with an impairment rating system. The Guides describe the issue as follows:

There are several difficulties associated with integrating pain-related impairments into an impairment-rating system such as the *AMA Guides*. The basic challenge for a system of rating pain-related impairment is to incorporate the subjectivity associated with pain to an apparent rating system whose fundamental premise is that impairment assessment should be based on objective findings. The inherent subjectivity of pain is incongruent with the Guides’ attempts to assess impairment on the basis of objective

measures of organ dysfunction, as it requires that determinations of pain intensity and the restrictions imposed by it must be largely based on patients' reports.

This chapter assesses pain qualitatively. Because percentages for pain-related impairment have not been used and tested on a widespread basis, as have other impairment ratings used in the Guides, it was decided that impairment ratings for pain disorders would not be expressed as percentages of whole person impairment. Future scientific evidence may emerge that will enable a more quantifiable approach to be adopted. Nevertheless, the value of a qualitative assessment is that any identification of a significant pain component warrants additional consideration when interpreting impairment ratings used for allocation of medical resources, work placement, or financial compensation. [s. 18.3]

These excerpts from the *AMA 5th Guides* indicate how difficult it is to integrate a pain-related impairment into the conventional impairment rating system. Despite this difficulty, the workers' compensation system in Nova Scotia has integrated impairment awards for workers suffering from chronic pain into the general scheme of the legislation.

Compensation is not paid to the comparator group based on disability. Both groups are treated the same with respect to how their needs, capacities and circumstances are addressed.

(iii) Ameliorative purpose

The Panel agrees with the Court's analysis in paragraph 102 of *Martin* that the differential treatment is not aimed at improving the circumstances of some other, more disadvantaged group. However, unlike the situation considered in *Martin*, the challenged provision is consistent with the ameliorative purpose of the *Workers' Compensation Act*. It includes workers suffering from chronic pain in the normal compensation system. It has regard for their actual needs and circumstances. It gives them an opportunity to establish the validity of their individual claim on a fair basis.

(iv) Nature of the interest affected

The 3 per cent or 6 per cent "cap" on permanent impairment ratings for chronic pain affect the Worker's economic interest in the sense that permanent benefits are calculated based on impairment ratings, regardless of whether they are medical or pain-related impairments.

The Worker's benefits are calculated in the same manner as workers in the comparator group who have suffered a compensable injury prior to March 23, 1990. The Worker's permanent benefits are calculated under s. 226 and s. 227 of the *Workers' Compensation Act*. The calculation of benefits under these provisions does not reflect the impact of work-related injuries on one's earnings.

The Worker is subject to the same date-driven benefit system shared by all workers in the comparator group.

The Panel finds that the fourth contextual factor does not point to discrimination in this case.

The Panel concludes, after conducting the contextual inquiry mandated by *Law*, that a reasonable person in circumstances similar to those of the Worker, fully apprised of all the relevant circumstances and taking into account contextual factors, would conclude that the challenged provision does not have the effect of demeaning the Worker's dignity.

We find that the differential treatment does not amount to substantive discrimination under the *Charter*. Therefore, s. 7 of the *Chronic Pain Regulations* does not violate s. 15(1) of the *Charter*.

In light of the Panel's finding, there is no need to consider whether the challenged provision is saved by s. 1 of the *Charter*.

We find that the Worker was lawfully awarded a 6 per cent permanent impairment rating for his chronic pain.

CONCLUSION:

The appeal is denied. Section 7 of the *Chronic Pain Regulations* does not violate the Worker's right to equality under s. 15(1) of the *Charter*.

Footnotes:

1. *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended
2. *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96 [the "FRP Regulations"]
3. *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11 [the "Charter"]
4. *Martin v. Workers' Compensation Board (N.S.) et al.* (2000) NSCA 126
5. *Chronic Pain Regulations*, N.S. Reg. 187/2004
6. *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504 [Martin]
7. *Constitutional Questions Act*, 1989, R.S.N.S. c. 89.
8. *Martin*, at paragraph 65
9. *Workers' Compensation Act*, R.S.N.S. 1989, c. 508.
10. *Hayden v. Nova Scotia (Workers' Compensation Appeal Board)* (1990), 96 N.S.R. (2d) 108 (C.A.)
11. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 , at para. 39
12. *Martin*, at paragraph 80
13. *Martin*, at paragraph 82
14. *Martin*, at paragraph 85
15. *Martin*, at paragraph 85