

CLAIM HISTORY AND APPEAL PROCEEDINGS:

The *Chronic Pain Regulations* provide for compensation for workers who have “chronic pain” that meets a particular definition. However, that definition of chronic pain is not the ordinary dictionary definition of chronic pain. Instead, it only includes pain that is both chronic and unusual. The Worker challenges whether decision-makers should apply that definition and how they apply it.

On March 13, 1991, the Worker fell due to ice in a parking lot fracturing her lumbar spine. The Board has provided that Worker with compensation including a permanent impairment benefit based on a permanent medical impairment rating of 10.5%. The Board is paying the Worker an extended earnings-replacement benefit.

The Board reviewed the Worker’s claim to determine whether she was entitled to benefits under the *Chronic Pain Regulations*. This led to the following two decisions:

- TST Decision (November 22, 2005) - A Case Manager found that while the Worker has ongoing pain, it was within the normal range of pain for her medical condition. He found that the pain did not meet the statutory definition of “chronic pain”. As such, it could not be compensated under the *Chronic Pain Regulations*.

- Hearing Officer Decision (February 28, 2006) - Confirmed the TST Decision.

The Worker has appealed the Hearing Officer Decision to this Tribunal. It is her position that the Supreme Court of Canada ruled that the definition of chronic pain used by the Board is invalid (*Nova Scotia (Workers’ Compensation Board) v. Martin* [2003] S.C.J. No. 54). She argues that I should find the Worker to have chronic pain, and direct the Board to provide benefits for the chronic pain. She also argues that I should direct the Board to re-assess the Worker’s permanent medical impairment rating as part of this appeal.

ISSUES AND OUTCOMES:

Did the *Martin* decision rule that the definition of “chronic pain” violated the *Charter*?

No. It ruled that exclusion of chronic pain from the ordinary scheme of the *Workers’ Compensation Act* was invalid. It was not argued before the Supreme Court of Canada that the definition itself was invalid. Therefore, I must apply the definition as set out in the *Chronic Pain Regulations* .

Does the Worker have “chronic pain”?

No. The medical opinion evidence strongly supports the finding that the Worker’s pain is normal for her condition. She is not entitled to compensation under the *Chronic Pain Regulations*.

Should I direct the Board to re-assess the Worker’s permanent medical impairment rating?

No. Entitlement to a re-assessment will be addressed by a Board decision-maker instead.

ANALYSIS:

Did the *Martin* decision rule that the Board cannot use its definition of “chronic pain” in the adjudication of claims?

Chronic pain is defined in the *Chronic Pain Regulations* as pain continuing beyond the normal recovery time for an injury, or pain that is disproportionate to the amount of pain usually associated with an injury. Conditions such as chronic pain syndrome, fibromyalgia and myofascial pain syndrome are automatically considered to be chronic pain; however, it does not include pain that is supported by significant, objective findings at the site of the injury which indicate that the injury has not healed.

This definition of chronic pain is the same as was used in the former *FRP Regulations*. At paragraph 118 of the *Martin* decision, the Supreme Court of Canada stated that the *FRP Regulations* were invalid “in their entirety”.

A literal reading of paragraph 118 in isolation supports the Worker’s position. However, when you read the entire decision, it is clear that the definition itself was not challenged before the Court; rather, it was the consequences flowing from the automatic exclusion of chronic pain from the general compensation scheme of the *Workers’ Compensation Act* that were challenged.

Therefore, I have to apply the definition of “chronic pain” contained in the *Chronic Pain Regulations* in deciding this appeal.

Does the Worker have chronic pain?

Section 187 of the *Workers’ Compensation Act* provides that I must give the Worker the benefit of the doubt. This means that if disputed possibilities on an issue are evenly balanced, the issue must be decided in the Worker’s favour.

The Worker’s claim file contains some particularly strong opinion evidence that the Worker’s pain is usual for, and not disproportionate to, her compensable injury.

On February 23, 1994, Dr. Watt, a specialist in physical medicine and rehabilitation, stated that the Worker “obviously” has pathology of her low back consistent with her pain symptoms. He repeated this opinion in a September 26, 1995 medical report.

On April 15, 1996, Dr. Collicutt, orthopaedic surgeon, stated the Worker had “a very, very severe injury and certainly the amount of subjective disability and objective findings that she has are very much in keeping with the injury.” In other words, Dr. Collicutt viewed the Worker’s pain as being usual for her injury.

On July 6, 2005, Dr. Shaw, Board physician, reviewed the Worker’s file and stated that the Worker’s pain was normal for her injury. On November 15, 2005, he repeated this opinion. On November 22, 2005, Dr. Acres, Board physician, also concurred with the same opinion.

I conclude, based on the opinions of Drs. Watt, Collicutt, Shaw and Acres, that the Worker’s pain is within the normal range of pain that would be expected from her injury. As such, it is usual pain. It is not “chronic pain” under the *Chronic Pain Regulations*.

The Worker is not entitled to compensation under the *Chronic Pain Regulations*.

Should I direct the Board to re-assess the Worker’s permanent medical impairment rating?

On February 1, 1993, Dr. Smith, a Board physician, examined the Worker in order to assess her level of permanent medical impairment. The Board has not re-assessed her rating since that time.

The November 22, 2005 TST Decision did not consider whether the Worker should have her level of permanent medical impairment re-assessed.

The Notice of Appeal to Hearing Officer filed by the Worker did request a permanent medical impairment assessment. However, the Hearing Officer Decision is silent on that ground of appeal.

The Notice of Appeal to the Tribunal repeats the request for a re-assessment.

The Worker’s Representative argues that the TST could have considered entitlement to a re-assessment as part of its decision, and, therefore that issue is properly before me.

I disagree. The Tribunal is an appeal body, and as such, generally should not consider issues that were not dealt with by the Board.

Workers cannot be expected to always raise issues with the correct person. However, the appeals system should ensure that issues get addressed - either by informing the Worker where to raise their issue, or by directing the correct person to address the issue.

As the Worker is not represented by legal counsel, I direct that the Board's Client Services Department make a decision regarding the Worker's entitlement to a permanent medical impairment re-assessment.

CONCLUSION:

The appeal is denied. The Worker is not entitled to compensation under the *Chronic Pain Regulations*. I am not deciding whether the Worker is entitled to a permanent medical impairment re-assessment. However, the Board will make a decision regarding the Worker's entitlement to a permanent medical impairment re-assessment.