

## **INTRODUCTION:**

The Worker is aware of injured workers with injuries similar to his who are being paid the wage-loss benefits that he is being denied. He knows that some of them have been awarded a 12.5% permanent impairment rating, while his is 6%. It is his view that he is facing discrimination that was outlawed by the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin* [2003] S.C.J. No. 54.

## **CLAIM HISTORY AND APPEAL PROCEEDINGS:**

On May 13, 1987, the Worker injured his back. The Board accepted his claim. He was found to have a 10% permanent medical impairment rating for his back injury.

The Worker sought compensation under the new *Chronic Pain Regulations*.

On October 27, 2005, a TST Decision found that the Worker had chronic pain and was entitled to a 6% pain-related impairment award, the maximum that can be awarded under the regulations. This was awarded retroactive to September 14, 1987, when the Worker's temporary benefits ended.

On March 15, 2006, a Hearing Officer Decision found that the Worker was not entitled to additional compensation as the *Chronic Pain Regulations* do not violate the Worker's *Charter* equality rights.

This decision addresses the Worker's appeal of the Hearing Officer Decision. It is his position that he is entitled to economic-loss benefits. It is his position that his chronic pain should be rated at 12.5%.

## **ISSUES AND OUTCOMES:**

**Do the *Chronic Pain Regulations*, and sections 226 and 227 of the *Workers' Compensation Act*, violate the Worker's equality rights?**

No. The different treatment he receives is not due to his type of disability. It is not prohibited by the *Canadian Charter of Rights and Freedoms*.

## **ANALYSIS:**

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)*. 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* also contains transitional provisions to determine how injuries prior to February 1, 1996 are to be compensated.

Section 226 of the *Act* deems the Board's old method to have been valid for workers with a permanent impairment before March 23, 1990. Under s. 227 of the *Act*, these workers receive 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 additional benefits.

At paragraph 25 of *Lowe v. Nova Scotia (Workers' Compensation Appeals Tribunal)* (1998), 166 N.S.R. (2d) 321, Justice Roscoe, speaking for the Court of Appeal, wrote:

... Section 227(2) is very similar to s. 226(b). It deems that the compensation payable under the section "always to have been" 75% of the lost earnings multiplied by the permanent impairment rating determined by the Board. Once again, in my opinion, this clearly ratifies the use of permanent impairment rating, and consequently rescinds the effect of the *Hayden* decision for people injured before March 23, 1990 ...

In short, sections 226 and 227 of the current *Workers' Compensation Act* reverse the *Hayden* decision for workers with a permanent medical impairment before March 23, 1990.

In 1999, the current *Workers' Compensation Act* was amended by what is commonly referred to as Bill 90. Under s. 10E, a 12.5% permanent impairment benefit is paid to a Worker who meets all the following three criteria:

- injured between March 23, 1990, and February 1, 1996;
- developed chronic pain following the injury; and
- on November 25, 1998, had or could have appealed a decision concerning chronic pain, or was in receipt of temporary benefits.

Section 10E also made these workers eligible for partial wage-loss benefits.

The Worker and his representative assert that some workers whose injury was before March 23, 1990 were awarded a 12.5% permanent impairment rating and earnings-loss benefits for chronic pain. I am not aware of any such awards, nor am I aware of any basis in law for it.

The Worker's representative raised the same *Charter* challenge in Tribunal *Decision 2006-285-AD* (August 21, 2006). In that decision, the Tribunal found that there was no arguable *Charter* violation. The Tribunal dealt with a related issue in *Decision 2006-109-AD* (August 16, 2006), where it found that the "cap" on permanent impairment ratings for chronic pain contained in the *Chronic Pain Regulations* did not violate the *Charter*. In short, I agree with the reasoning in both of those decisions, but I will elaborate.

The reason that the Worker is not assessed for an extended earnings-replacement benefit and awarded a 12.5% permanent medical impairment rating for chronic pain is primarily due to his claim not meeting the date criteria for those benefits. It is not due to the type of physical disability he suffers - people with chronic pain who met the date criteria do get those benefits. He, therefore, is not being discriminated against on the basis of physical disability.

Section 15(1) of the *Charter* protects against discrimination on the basis of things like religion, gender and physical disability. Drawing distinctions based on date criteria is not prohibited by the *Charter*.

The March 2002 report of the Workers' Compensation Review Committee describes the history and impact of date-driven compensation. It concluded that the date criteria controls costs in a system where employers are paying the second highest rate of assessments in Canada. However, they also: create an element of "process lottery" where similar situations are treated differently; add complexity to the system; increase the rate of appeals.

As the Review Committee noted, the legislated reversal of the *Hayden* decision in 1996 left many workers with a sense that an injustice had been done to them. It noted that the pre-*Hayden* workers are not going to go away.

However, it is beyond the power of courts or this Tribunal to ignore or strike down the date criteria. The Legislature is allowed to make retroactive changes to the law. Date criteria do not violate the *Charter*. Instead, the changes that the Worker and his representative seek can only be addressed by a change in the law.

**CONCLUSION:**

The appeal is denied. There is no violation of the Worker's equality rights as guaranteed under the *Canadian Charter of Rights and Freedoms*.