

CLAIM HISTORY AND APPEAL PROCEEDINGS:

The Worker had four compensable low back injuries between 1979 and 1988, for which the Board provided him with various benefits and services. The Former Appeal Board awarded the Worker a six percent permanent partial disability (“PPD”) award with respect to his October 21, 1988 injury.

In 2005, the Board reviewed the Worker’s claims to determine whether he had chronic pain, and was entitled to benefits and services under the chronic pain regulations. An adjudicator determined in an October 17, 2005 decision that the Worker had a substantial pain-related impairment (“PRI”), but that the six percent PPD compensated for that pain, and he was not entitled to any further benefits and services for chronic pain. The Worker appealed that decision to a Hearing Officer, who denied the appeal in an April 10, 2006 decision. The Worker appealed the Hearing Officer’s decision to the Tribunal.

The appeal before the Tribunal proceeded by way of written submissions. The Worker’s Adviser provided submissions on August 1, 2006. The Worker was the only active participant in the appeal.

ISSUE AND OUTCOME:

Is the Worker entitled to benefits and services under the chronic pain regulations?

The Worker’s six percent PPD award compensated him for permanent impairment related to chronic pain. Therefore, he is not entitled to any additional PRI award. By virtue of the fact that the Worker has chronic pain, causally related to a compensable injury, he is eligible to be considered for any other forms of compensation or services available.

ANALYSIS:

The *Workers’ Compensation Act*, S.N.S. 1994-95, c.10, as amended (the “*Act*”) applies to this appeal.

Section 187 of the *Act* requires me to give the Worker the benefit of the doubt, which means that if the disputed possibilities are evenly balanced on an issue of compensation, then the issue will be resolved in the Worker’s favour.

The Worker seeks a finding that he has chronic pain, and that he is entitled to benefits and

services under the chronic pain regulations.

Chronic pain has a particular meaning under the *Act*. It does not merely mean pain that is of longstanding. Rather, chronic pain is pain that is disproportionate to that which should result from the type of personal injury. It is also pain that lasts beyond the normal recovery time for a particular type of personal injury.

Included within the definition of chronic pain are myofascial pain syndrome, chronic pain syndrome, fibromyalgia, and any other like or related conditions.

Equally as important is what is not chronic pain. Usual pain is pain that is explained by significant and objective physical findings at the site of injury. This type of pain does not come within the definition of chronic pain.

In order for chronic pain to be compensable, it must be causally connected to a compensable injury.

The Board has found that the Worker has chronic pain, but that the Appeal Board award of a six percent PPD was on the basis of chronic pain, and that the Worker is not entitled to further compensation in respect of this condition.

The Worker's Adviser says the Worker's circumstances are akin to the worker in *Decision 2006-182-AD* (May 31, 2006, WCAT), and asks that I resolve the present appeal in a similar fashion.

In that decision, a worker had a serious leg injury that required surgery, and which might in future have required an amputation. The former Appeal Board awarded a 60 percent PPD in respect of the injury. The percentage awarded was beyond what was permitted under the Board's permanent impairment guidelines. The Board found that the award took into account not only the objectively verifiable results of the injury and treatment, but also a chronic pain condition. On that basis, the Board denied the Worker chronic pain benefits and services. On appeal, the Tribunal agreed that the Worker had chronic pain, but found insufficient evidence to conclude that the former Appeal Board had compensated for this condition. The Tribunal allowed the appeal, finding the Worker had chronic pain, and remitted the matter of what compensation should result to the Board.

I do not find that decision to be applicable to the facts of this case. In this case, the Worker has had several strain-type injuries to his low back, but no serious, objectively verifiable condition resulting from the injuries. In addition, there are no significant objective findings to explain any of the Worker's pain.

I will briefly review the Worker's claim histories below.

In March, 1979 the Worker injured his low back when he was unloading a truck, caught a

50 pound bag of flour and turned to load it on a trolley. The Worker got pain in his back, and down both legs. He also complained of numbness and tingling in his legs. Dr. Chaturvedi thought the injury was a severe strain involving the right posterior facet joint and sacroiliac joint at the L5-S1 level. X-rays showed no abnormalities. The Worker returned to work in April, and re-injured his back shortly thereafter in late May, but in a different location. This time, the pain was in the upper lumbar spine. He saw Dr. Yabsley in September, and he thought there were no real positive findings on examination. There were no neurologic findings to suggest a disc problem, and his x-rays were normal. He thought the Worker had a back strain, and that he should be encouraged to go back to work. The Worker went back to work in October, 1979.

In April 1980, the Worker hurt his mid-low back and left groin lifting 75 pound bags of potatoes. Dr. Chaturvedi thought the Worker had a ligamentous injury to the mid and low back and that he had compression of the D-12 nerve root. He noted that x-rays now showed some degenerative changes at L3-4-5. The Worker returned to work in mid-May, 1980, and a July 11, 1980 medical report noted "normal findings."

In February, 1988, the Worker injured his back again while lifting a case of bleach. The Worker was diagnosed with an "acute lumbar sprain". He returned to work two weeks later after having received pain medications, muscle relaxants, heat and rest for his back.

His last injury occurred in October, 1988, when he twisted his back loading stock in a truck. He had decreased range of motion, but no neurological deficit. He was diagnosed with a strain. He had some physiotherapy and returned to work in December 1988. The Worker's family doctor asked the Board to examine him [for purposes of a PPD], but the Board denied this request, finding it was not medically justified. It was the appeal of this decision that eventually led to the former Appeal Board awarding the Worker a six percent PPD.

In making that finding, the Appeal Board quoted from Dr. Reardon's April 20, 1990 report, wherein he said,

... it would appear that his radiographic findings have not increased in the past ten years although his clinical presentation certainly had worsened. It would appear that his man has significant soft tissue incompetence. His radiographic findings are surprisingly minimal, given his clinical presentation. This becomes quite a difficult case to asses (sic) as one would not expect such a severe clinical picture in the face of such relatively minor radiographic changes. Nevertheless, he certainly is having pain and his history is well-documented. I would assess his level of physical impairment at 6%. I cannot help, but feel that there is some hyperreactivity involved here, which is often the case in patient (sic) who have a chronic pain syndrome.

Dr. Reardon notes the lack of objective findings, and that the severe pain is not in keeping with those findings. He also specifically says the Worker has a chronic pain syndrome. In light of these facts, and that the Worker's radiographic findings had not changed over the previous ten years, it certainly suggests that the rationale for the six percent disability rating was for the severe, unexplained pain.

In November, 1993, Dr. Smith reassessed the Worker to see whether his PPD rating should be increased. Dr. Smith found the exam was very difficult because there was a "tremendous amount of hyperreactivity". He found no objective evidence of nerve root involvement, and indicated that the Worker's complaints did not conform to anatomical pathways. This exam suggests pain without support from objective physical findings, i.e. chronic pain.

In 1996, the Worker sought another reassessment of his PPD award. In an opinion by Dr. Shaw, a Board doctor, he said the Worker should not be reassessed because he had six percent from the Appeal Board for chronic pain syndrome, and that under the Board's guidelines, there would have been no award. This opinion supports the idea that the Appeal Board award was for chronic pain.

In 1998, the Worker again sought reassessment of his PPD award. Dr. Boswell, a Board doctor, noted the Appeal Board award, and indicated that the Worker had a soft-tissue injury to the lumbar spine with no significant objective findings when examined for PMI on 5/11/93. Under the guidelines, Dr. Boswell said that his PMI rating would be zero percent, and that there was no basis for reassessment.

Finally, Dr. Acres, another Board doctor, reviewed the Worker's claim files when he was being reviewed for entitlement to chronic pain benefits and services. He said that Dr. Reardon assessed the Worker with chronic pain syndrome in 1993, and there were no significant objective physical findings at the time. He reasoned that the Appeal Board award was compensation for the chronic pain syndrome. Dr. Acres indicated that there was no subsequent medical information to suggest that the Worker's limitations are attributable to anything but pain.

The Worker's Adviser says that in 1990, the Appeal Board's "oft stated policy" was that it did not "pay for pain". He argues that if the Board viewed the Appeal Board's decision as compensating for pain, it had the right to appeal. As it did not appeal, the Adviser reasons, the Board should not now be allowed to declare that the award was for chronic pain.

The Board might not appeal a Tribunal decision for a variety of reasons. It is not a foregone conclusion that the reason it did not appeal the decision here was because it reasoned that the Appeal Board's award was for some other condition than chronic pain.

The Worker's Adviser suggests that Dr. Reardon was "very familiar" with Board Policies

including the PMI guidelines. I interpret this comment as urging me to infer that Dr. Reardon knew the Board's policy [not to compensate] for chronic pain, and that he would not have made a six percent PPD recommendation if it were solely based on chronic pain. That is a conclusion that lacks a foundation and any supporting evidence. I will not impute that knowledge or draw that conclusion.

The Adviser says a careful reading of Dr. Reardon's report does not support the contention that the six percent was for chronic pain. He cites Dr. Reardon's mention of spurring at L4-5 and significant soft tissue incompetence. Dr. Reardon also noted that those degenerative changes had not progressed in 10 years, and even at that point in time, they were "relatively minor." The overall tenor I take from Dr. Reardon's report was that the pain was not in keeping with those findings. As such, while they are objective, there is insufficient evidence to demonstrate that they are significant in explaining any of the pain. As for the term "soft-tissue incompetence", Dr. Reardon has not explained what he means by this term. As the Worker had several soft-tissue injuries, perhaps it means soft-tissue pain. As the meaning is unclear, and as there are no other objective physical findings to help explain it, I find insufficient evidence to warrant classifying that as an objective finding.

The Adviser stresses that Dr. Reardon does not explicitly say that the six percent award is for chronic pain. He does, however, say that the Worker has a lot of hyperreactivity, which he says is often the case in patients with chronic pain syndrome. While not a direct attribution of this condition to the Worker, I find it clear that Dr. Reardon feels this is an appropriate diagnosis, especially in light of the absence of objective findings to explain his presentation.

The Adviser also urges me to find as significant the Appeal Board's comment that the Worker should take his PPD as a pension rather than a lump sum, as it may worsen in future. I see no obvious inference to take from that comment. Symptoms from a chronic pain condition might just as easily worsen as pain related to a condition supported and explained by objective physical findings.

I find the present facts are similar to those in *Decision 2006-279-AD* (June 29, 2006, NSWCAT). In that decision, the former Appeal Board had made a finding of permanent impairment on a worker, but left the rate-setting exercise to the Board. The Board subsequently assessed the worker with a five percent rating on the basis of Policy 3.9.6. That Policy provides that where the Appeal Board made a finding of permanent impairment, but the Board could not demonstrate an impairment at the time of an examination, a rating of up to five percent could be awarded. When the Board assessed the worker for chronic pain, it reasoned that the original Appeal Board award was for chronic pain, and that the worker was only entitled to an increase of one percent to six percent to come up to the rating applicable for a substantial pain-related impairment. The Tribunal upheld the Board's decision. There were objective findings, but they did not explain the worker's pain. The language of the Appeal Board decision made the finding

based on the worker's symptoms. Those symptoms were, essentially, pain not supported by objective physical findings, or chronic pain.

The primary symptoms in this case are pain too, and there are no objective physical findings that explain the pain. As Dr. Reardon described the problem, "significant soft tissue incompetence".

I find that the Worker's six percent PPD was in recognition of, and compensation for, his chronic pain. As such, the Worker is not entitled to an additional pain-related impairment rating in respect of that condition.

There may be other compensation or services the Worker is eligible for by virtue of his having chronic pain. I leave any assessment in respect of those benefits to the Board to sort out.

CONCLUSION:

The worker's appeal is allowed in part. The six percent PPD award was for chronic pain. He is not entitled to a separate PRI rating for that condition. The Worker may be eligible for other compensation or services by virtue of his chronic pain condition. I leave any assessment in respect of those benefits to the Board.