

CLAIM HISTORY AND APPEAL PROCEEDINGS:

Nova Scotian Workers qualify for specific benefits and services if employment-related injuries leave them with chronic pain. To qualify for this compensation, workers must have chronic pain according to the definition for "chronic pain" in the *Workers' Compensation Act* S.N.S. 1994-95, c.10, as amended [the "Act"].

The Worker has a history of back problems dating back to at least 1983. She had employment-related back injuries on January 17, 1986; December 24, 1986; and March 5, 1987. All of her workplace back injuries happened while she was working as a mail filler, in the mail order department, of a retail business. She was able to return to her pre-accident job after her first two back injuries. She never returned to working as a mail filler after her March 9, 1987 injury.

The Board accepted each of the Worker's back injury claims. It has provided her with extensive compensation including wage loss benefits, medical aid, and vocational rehabilitation programming. On May 8, 1995, the Workers' Compensation Appeal Board ruled that the Worker had a permanent medical impairment as a result of her work-related back injuries, but did not set her impairment rating. On May 3, 1996, one of the Board's Case Managers set the Worker's rating at 5 percent, pursuant to Board Policy 3.9.6.

In 2005, the Board assessed the Worker to see if she qualified for chronic pain compensation. On February 10, 2006, an Adjudicator and an Assistant Manager, from the Board's Transition Services Team, recognized that the Worker had chronic pain according to the *Act*. They concluded that the permanent medical impairment the Appeal Board had recognized was actually a permanent impairment due to chronic pain. As a result, they increased the Worker's impairment rating to 6 percent, which is the maximum impairment rating that may be set for a pain-related impairment.

The Worker appealed the Adjudicator's and Assistant Manager's decision. On April 25, 2006, one of the Board's Hearing Officers denied her appeal.

This is the Worker's appeal of the Hearing Officer's decision. She does not dispute the finding that she has chronic pain. However, she objects to the ruling that the impairment the Appeal Board recognized, was a pain-related impairment. She wants this Tribunal to recognize that she has a pain-related impairment that is distinct from the permanent medical impairment the Appeal Board recognized. As a result, her existing 5 percent impairment rating would not be disturbed. She would be recognized with a separate pain-related impairment, with an impairment rating of 3 percent, or 6 percent.

ISSUE AND OUTCOME:

Should the Worker be recognized as having a pain-related impairment that is distinct from her existing 5 percent permanent medical impairment?

No. The permanent impairment that the Appeal Board recognized was pain.

ANALYSIS:

The *Act* applies to this appeal. I must decide any disputed issues in the Worker's favour if the possibilities supporting her position are at least as strong as the possibilities against her. [See s. 187.]

Section 10A defines "chronic pain" for the purposes of the *Act*:

"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 Tribunal has concluded that "objective" physical findings are findings that are unlikely to be influenced by workers because of their nature and the manner in which they are elicited. They do not depend upon workers' descriptions of sensation to be revealed. The Tribunal has concluded that "significant" physical findings are findings that play meaningful or important roles in explaining the existence and degree of workers' pain.

I have concluded that the permanent impairment the Appeal Board recognized was a pain-related impairment.

The Appeal Board did not identify any specific form of impairment that the Worker had. However, it is clear, from a plain reading of the Appeal Board's decision, that the Board considered pain when it recognized that the Worker was permanently impaired. Since the Appeal Board did not identify that the Worker had a non pain-related impairment, and the Board considered pain when it recognized that she was impaired, I find it is more likely than not that the permanent impairment the Board recognized was pain.

The Appeal Board Decision

The Appeal Board decision contains detailed summaries of the medical evidence before the Appeal Board panel, and the Worker's testimony. The panel's findings respecting the Worker's permanent impairment are contained in the following:

The Appeal Board finds that the Appellant has sustained a permanent medical impairment and that this impairment can be directly attributed to her work related injuries reported initially in 1986. The Appeal Board in coming to the conclusion does note and have regard to the fact that the first difficulties that the Appellant experienced with work related back pain occurred in the early 1980's as confirmed by Dr. Allen's report, also her symptoms over time are consistent with the nature of the Appellant's employment as described and corroborated in the medical evidence. The panel notes also the relationship of the Appellant's most troublesome symptom periods in January 1986, December 1986 and then ultimately March 1987 to Christmas and post Christmas return periods when a mail filler's work load would be most demanding.

...

Therefore on the basis of all the evidence before the Appeal Board, it is the finding of the panel that the Appellant's current symptomatology arises from her work related injuries and that there is no significant documented pre-existing condition that can be accountable for the Appellant's ongoing symptoms.

Medical Evidence Before the Appeal Board

In its decision, the Appeal Board summarized reports from:

- Dr. M Allen;
- Dr. D. Amirault;
- Dr. R. Martin;
- Dr. B. Flemming; and
- Dr. G. P. Reardon.

The only evidence the panel noted as showing that the Worker had a physical abnormality was contained in Dr. Flemming's June 2, 1987 x-ray report. Dr. Flemming noted that the Worker's x-rays showed that she had bilateral spondylolysis of the pedicles of her L5 vertebra, but no significant spondylolisthesis.

The panel noted that Dr. Reardon indicated that her bilateral spondylolysis "alone does not result in pain", in his May 14, 1991 report. Otherwise, the medical evidence the panel summarized established that the Worker was disabled due to pain.

I find that it is more likely than not that the Appeal Board panel found that the Worker was permanently impaired because of pain.

The excerpt of the Appeal Board's decision quoted above shows that the panel based its finding that the Worker was permanently impaired on the symptoms she experienced following her work-related back injuries. The medical evidence that the panel summarized, establishes that the Worker's "symptoms" amounted to low back pain radiating into her right leg. Dr. Reardon's uncontradicted evidence establishes that her pain was not explained by her only significant objective findings - bilateral spondylolysis of the pedicles of her L5 vertebra.

Since the panel based its finding that the Worker was permanently impaired on her symptoms, and her symptoms were low back pain radiating to her leg, I find that the panel recognized that the Worker was permanently impaired due to pain. I find that the medical evidence establishes that the Worker's pain was not explained by her significant objective findings.

The *Chronic Pain Regulations* provides that workers may receive a permanent benefit as compensation for chronic pain. Those benefits are based on either an impairment rating of 3 percent, or 6 percent, depending on whether workers have slight pain-related impairments, or substantial pain-related impairments.

The effect of the Hearing Officer's decision is to recognize that the Worker has a substantial pain-related impairment. Since the most permanent benefit compensation the Worker can receive for chronic pain would be based on a 6 percent impairment rating, the Hearing Officer has effectively provided the Worker with the maximum permanent benefit compensation she may receive. Consequently, I find that there is not basis for me to award her a greater increase than the 1 percent the Hearing Officer awarded her.

CONCLUSION:

The Worker's appeal is denied. She is not entitled to recognition that she has a separate pain-related impairment, in addition to the permanent medical impairment the Appeal Board recognized. She is entitled to the impairment rating increase the Hearing Officer awarded her.