

CLAIM HISTORY AND APPEAL PROCEEDINGS:

The Worker had several claims with the Board between 1978 and 2002. The most significant were for bilateral osteoarthritis of his knees. The Board has awarded the Worker with a 10% permanent medical impairment rating for his right knee and a 15% permanent medical impairment rating for his left knee.

The Worker sought compensation under the new *Chronic Pain Regulations*. This led to the following two decisions:

- TST Decision (April 28, 2006) - Found that the Worker's pain symptoms did not meet the Regulation's definition of "chronic pain". Found that the pain was not excessive for advanced bilateral osteoarthritis.

- Hearing Officer Decision (July 24, 2006) - Confirmed the TST Decision.

My decision addresses the Worker's appeal of the Hearing Officer Decision. His representative argues that the application of the Regulations' definition of "chronic pain" violates s. 15 of the *Canadian Charter of Rights and Freedoms*. In the alternative she argues that the pain associated with osteoarthritis meets the definition of "chronic pain" in that they are a like or a related condition to a pain syndrome.

The Attorney-General argues that the application of the "chronic pain" definition does not result in a *Charter* violation as the Regulations provide compensation to the very group that had been discriminated against.

ISSUES AND OUTCOMES:

Does the application of the definition of "chronic pain" found in the *Chronic Pain Regulations* violate the Worker's equality rights?

No. They do not discriminate against the Worker on the basis of physical disability. He is compensated under the general scheme of the *Workers' Compensation Act*.

Does the Worker have "chronic pain" as defined in the *Chronic Pain Regulations*?

No. His pain is not a like or related condition to a chronic pain syndrome, fibromyalgia or a myofascial pain syndrome.

ANALYSIS:**Does the application of the definition of “chronic pain” found in the *Chronic Pain Regulations* violate the Worker’s equality rights?**

The Worker’s representative argues that the definition of “chronic pain” used by the Board is narrower than most definitions of chronic pain. In the representative’s view, the application of this definition has the effect of denying chronic pain benefits to many workers who suffer from chronic pain, as that term is more generally used.

She submits that, compared with those who meet the statutory definition, other workers with ongoing, long-term pain face discrimination that violates their equality rights under the *Charter*. It is the representative’s view that they do not have equal access to the benefits under the *Workers’ Compensation Act*. It is her view that the 2003 *Martin* decision of the Supreme Court of Canada dealt with chronic pain in general, not merely the statutory definition of “chronic pain”.

In *Decision 2006-079-AD* (December 12, 2006), I found that the application of the definition of “chronic pain” as found in the *Regulations* did not result in a violation of the equality provisions of the *Charter*. A summary of my reasoning follows.

The *FRP Regulations* (Functional Restoration Program 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. Those regulations defined “chronic pain” as follows:

- (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 for 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 rating was awarded for

“chronic pain”.

As can be seen from this definition, the intent was to exclude from the *Workers' Compensation Act* excess pain in the context of verifiable medical conditions that cause pain, or where there are well-established pain syndromes in the absence of significant identifiable organ dysfunction to explain the pain. It did not exclude pain which was usual for a type of injury.

The current *Workers' Compensation Act* was amended by S.N.S. 1999, c. 1 (commonly referred to as Bill 90). 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*.

In *Martin*, the Supreme Court of Canada was not dealing with chronic pain in general. Instead it was dealing with a specific disability as defined in the *FRP Regulations* and s. 10A of the *Workers' Compensation Act*. It does not matter that the disability was labelled “chronic pain”. It could have been given another name and it would not have impacted the outcome or analysis in *Martin*.

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 *Workers' Compensation Act* and the *FRP Regulations* clearly imposed differential treatment upon injured workers suffering from “chronic pain”. The basis of the differential treatment was 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 *Workers' Compensation 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”.

Under s. 3 of the *Chronic Pain Regulations*, workers with “chronic pain” are brought into the general scheme of the *Workers’ Compensation Act*. Section 7 of the *Chronic Pain Regulations* creates a method of assigning a permanent impairment rating to “chronic pain”.

The intent behind the *Chronic Pain Regulations* is to bring workers with “chronic pain” into the general scheme of the *Workers’ Compensation Act*.

The representative submits that workers with work-related ongoing, long-term pain that does not meet the statutory definition of “chronic pain” are being discriminated against compared to workers with “chronic pain”.

However, workers with work-related ongoing, long-term pain that does not meet the statutory definition of “chronic pain” were never excluded from the general scheme of the *Workers’ Compensation Act*. They were always entitled to be assessed for the full range of compensation provided under the *Workers’ Compensation Act*. For example, they were entitled to be assessed for a temporary earnings-replacement benefit, medical aid, and whether they had a permanent medical impairment. If a permanent medical impairment was identified, they were provided with the associated benefits.

Permanent medical impairments before 2000 are rated under the Board’s Guidelines for the Assessment of Permanent Medical Impairment. For injuries after January 1, 2000, they are rated under the AMA Guides (4th edition).

At page 304 of the AMA Guides, the authors state that the degree of pain usually associated with an injury was taken into account when creating the Guides:

In general, the impairment percents given in the tables and figures applicable to permanent impairments of the various organ systems include allowances for the pain that may occur with those impairments.

While the Worker’s representative argues that the *Chronic Pain Regulations* cause discrimination, the opposite is true. The *Chronic Pain Regulations* address discrimination against workers with “chronic pain” as that term is defined. Workers with “chronic pain” can now receive all services under the *Workers’ Compensation Act*. The Workers in the comparator group suggested by the representative were never subject to this discrimination.

I find that workers with work-related ongoing, long-term pain that does not meet the statutory definition of “chronic pain” are not treated differently than workers whose condition meets the definition of “chronic pain”. Instead of creating a distinction based on a personal characteristic, the *Chronic Pain Regulations* eliminate a distinction.

A worker with “chronic pain” receives a pension based on a permanent impairment award called a “pain-related impairment”. However, this is not different in substance from a

worker with work-related, ongoing, long-term pain that does not meet the statutory definition of “chronic pain” who receives a pension based on a permanent impairment award called a “permanent medical impairment”. There is no discrimination under s. 15(1) of the *Charter*. There is no denial of access to the general scheme of the *Workers’ Compensation Act* caused by the *Chronic Pain Regulations*.

Therefore, I must apply the statutory definition of “chronic pain” in determining whether workers are entitled to compensation under the *Chronic Pain Regulations*.

Does the Worker have “chronic pain” as defined in the *Chronic Pain Regulations*?

In her March 14, 2007 submissions, the Worker’s representative argues that the phrase “all other like or related conditions” in s.10A of the *Act* must be interpreted as including conditions that are of the same underlying nature of fibromyalgia and myofascial pain syndrome. She argues that all like conditions means all musculoskeletal inflammatory disorders.

I do not accept the Worker’s representative’s argument that osteoarthritis is “like or related condition” to chronic pain syndrome, fibromyalgia, or myofascial pain syndrome.

I interpret the phrase “and all other like or related conditions” to mean pain syndromes without significant identifiable organ dysfunction to explain the pain.

Such pain syndromes are discussed at page 570 of the AMA Guides (5th edition). It explains that individuals in this group have pain syndromes that are widely accepted by physicians based on clinical presentation, but that are not associated with definable tissue pathology. It explains that such syndromes cannot be rated under the conventional rating system.

Osteoarthritis has a definable tissue pathology. It can be rated under the conventional rating system. It is not like or related conditions to chronic pain syndrome, fibromyalgia or a myofascial pain syndrome. The pain associated with osteoarthritis, unless excessive, does not fall within the Regulations’ definition of chronic pain.

The evidence in the Worker’s claim files strongly supports a finding that the Worker’s pain is usual for his injuries. For example, with respect to the right knee, Dr. Reardon, orthopaedic surgeon, wrote on March 26, 1998, that a gradual worsening of the knee symptoms was to be expected. On February 2, 2005, Dr. Collicutt, orthopaedic surgeon, wrote that the Worker’s knees were doing fine, but that the Worker would have ongoing troubles over time that would get worse. With respect to the left knee, on April 4, 2006, Dr. Acres, Board physician, expressed the view that the Worker did not have excessive pain given his permanent medical impairment.

I find that the Worker's pain is not disproportionate to his injuries. It is not "chronic pain" as defined in the Regulations.

CONCLUSION:

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