

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

Appellant: **[*] (Worker)**

Participants entitled to
respond to this appeal: **Otis Canada Inc. (Employer) and**

 The Workers' Compensation Board of Nova Scotia
 (Board)

APPEAL DECISION

Representatives: Jane A. Spurr for the Worker

Form of Appeal: Written submission

WCB Claim No.(s): **[*]**

Date of Decision: June 23, 2008

Decision: The appeal of the December 11, 2007 Board Hearing Officer
decision is denied, according to the reasons of Appeal
Commissioner Alison Hickey.

CLAIM HISTORY AND APPEAL PROCEEDINGS:

This is an appeal of a decision of a Hearing Officer of the Board dated December 11, 2007, in which the Hearing Officer determined that the Worker's pain-related impairment ["PRI"] was appropriately rated at 3%. The Worker appealed this decision to the Workers' Compensation Appeals Tribunal [the "Tribunal"] on December 19, 2007.

This appeal proceeded by written submission. Written submissions were received from the Workers' Adviser on April 1, 2008.

ISSUE AND OUTCOME:

Is the Worker entitled to a PRI rating greater than 3%?

No. There is insufficient evidence to support the conclusion that the Worker's PRI is "substantial" as that term is used in Board Policy 3.3.5.

ANALYSIS:

The legislation applicable to this appeal is the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended [the "Act"]. Section 187 of the *Act* requires me to give the worker the benefit of the doubt, which means 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 fell approximately 8 feet down an elevator shaft on March 4, 1986. He fractured his left scapula, left ribs, and sustained thoracic spine compression fractures of T3, 4, 5 and 6. The Worker has been found as a result of his injury to be suffering from chronic pain and has been awarded a PRI of 3% by the Board. The Worker has appealed the Board's evaluation of his PRI and asserts that he should be entitled to a 6% PRI rating.

According to Board Policy 3.3.5, where a worker develops chronic pain causally connected to an injury he will be assessed for a PRI. The Board shall rate the worker's PRI at either 3% (a slight PRI) or 6% (a substantial PRI). A slight PRI is defined as a PRI, that in the opinion of the Board, has increased the impact of the worker's original injury, mildly to moderately as described in Table 18-3 of c. 18 of the American Medical Association's Guides to the Evaluation of Permanent Impairment 5th Edition [the "AMA Guides"]. A substantial PRI means a PRI that has increased the impact of the worker's original injury moderately-severely to severely. In determining the appropriate class of impairment the Board will use a PRI assessment tool. Table 18-3 rates impairments by requiring an assessment of five things: (1) pain severity; (2) the impact on the activities of daily living; (3) the psychological impact; (4) medication use and (5) the degree of pain behaviour.

On the basis of the above noted criteria, the Board has found that the Worker has a slight

PRI which is rated at 3%; that is to say that the Board found that the Worker's PRI increased the impact of his original injury mildly to moderately. The Worker filled out a Client Information Questionnaire on March 7, 2006. The questionnaire is used by the Board in addition to all other medical evidence on file, to evaluate whether a worker would fall into a slight, or substantial PRI category.

Pain severity was rated by the Hearing Officer at 6%, as was the Worker's medication use. This would place the Worker in the moderately-severe to severe category, warranting a "substantial", or 6% rating in those two categories. The evidence supports the Hearing Officer's determinations and I accept them.

There is no evidence before me upon which I could take issue with the Hearing Officer's view of the category of "the degree of pain behaviour". The Hearing Officer stated that a review of the evidence revealed mild to moderate expressions of pain, stress and suffering. The Hearing Officer found that the Worker's pain behaviour was supported in the medical evidence and falls under the "slight" section of Table 18-3. This would support a finding of a 3% PRI for that category. There is no clear indication in the medical evidence on file, that the Worker is demonstrating significant pain behaviours which would be considered inappropriate. Specifically, there is no mention in the Worker's Permanent Medical Impairment Assessment dated September 12, 2006, that there is any visible reaction to the Worker's pain which would be considered inappropriate given his injuries. I agree with the Hearing Officer and her assessment of 3% for that category.

The Board's Medical Advisor, in his assessment dated September 12, 2007, stated that there was a lack of a psychiatric component which was significant. There is insufficient evidence to contradict the Board Medical Advisor's opinion. I am unable to find on the evidence before me, that the Worker's cognitive abilities and emotional state are greatly and frequently affected by pain, and that he is demonstrating a moderately-severe to severe psychological or emotional response to pain.

I acknowledge that the Worker has suffered emotional consequences to his personal injury, as noted by Dr. Dhawan in his report of March 9, 1997, who stated that at that time the Worker had been suffering from depression as a result of his injury. According to medical reports on file over the years, the Worker's pain has cost him some emotional endurance, and difficulty in concentration. There is no indication, however, that the Worker has been psychologically affected to the extent that he has had to take medication for the psychological impact of his pain, or receive any psychological counselling or treatment in that regard. I am unable to conclude that the psychological impact of the Worker's pain is more than mild to moderate.

The Workers' Adviser has taken issue with the Board's position that because the Worker has been able to return to work, the impact of his pain on his activities of daily living is mild to moderate. She submits that the nature of the Worker's character is an important factor in assessing whether the Worker's pain has increased the impact of his injury mildly to

moderately, or moderately-severely to severely, when looking at his activities of daily living.

I accept that the Worker has soldiered on with work in the presence of significant pain, and that his ability to do extra shifts has been compromised. I accept that the Worker is “well motivated”, as he is described in Dr. MacDonald’s report of March 21, 2006. While I understand that the concept of pain is a subjective one, and evaluating it relies to a great degree on the worker’s self-reports, in my view, the tool used to evaluate a PRI should be applied in as objective a manner as possible. The AMA Guides state at p. 569 as follows, under the heading, “Integrating Pain-Related Impairment Into the Conventional Impairment Rating System”:

A basic challenge for a system of rating pain-related impairment is to incorporate the subjectivity associated with pain into an impairment rating system whose fundamental premise is that impairment assessment should be based on objective findings.

Where possible the focus should be on how and to what degree the Worker’s PRI is manifesting itself. When looking at the category of the activities of daily living, it is important to note that what is being measured is the *impact* on the Worker’s activities of daily living, i.e. his ability to do them and not the level of pain he experiences when he does them. There is a category for pain severity. It is the first category in Table 18-3. In my view, it is a mistake for the decision-maker to venture into the issue of the character of an individual worker and attempt to measure stoicism or lack thereof, when applying the PRI tool.

In arriving at my decision on the Workers’ Adviser’s argument regarding the significance of the Worker’s character on his level of impairment, I have respectfully departed from the reasoning of the Tribunal in *Decision 2006-660-AD* (November 27, 2006, NSWCAT).

The Worker in this case is by many accounts a stoic individual who is able to continue with work and other activities despite his pain. He has not allowed his pain to have a paralyzing impact on his daily activities. When one looks at the impact and not the pain itself, the impact is mild to moderate.

I agree with the Board Medical Advisor and the Hearing Officer, that given the Worker’s ability to turn to work, albeit in a limited capacity, and given his Client Information Questionnaire which indicates that he can perform most activities of daily living, his impairment for that category is appropriately rated at 3%.

Having reviewed the medical evidence, and the Workers’ Adviser’s submissions, I find that the Worker’s PRI of 3% is appropriate. In so finding, I do not intend to trivialize the effect that the Worker’s pain has had on his life. In layman’s terms it could be viewed as “substantial”. In terms of the AMA Guides, however, the Worker’s impairment is “slight”

in that his PRI has increased the impact of his original compensable injury, mildly to moderately.

CONCLUSION:

This appeal is denied. The Worker's PRI is appropriately rated at 3%.

DATED AT HALIFAX, NOVA SCOTIA, THIS 23RD DAY OF JUNE, 2008.

Alison Hickey
Appeal Commissioner