

**CLAIM HISTORY AND APPEAL PROCEEDINGS:**

On June 1, 1989, the Worker injured his left foot. The Board accepted the Worker's claim and found him to have a 20% permanent medical impairment.

The Board paid his pension as follows:

November 1, 1991 to November 24, 1993	- Clinical Rating System pension
November 24, 1993 to February 1, 1996	- Amended Interim Earnings Loss pension
February 1, 1996 to January 1, 1999	- Clinical Rating System pension
January 1, 1999 to February 28, 2006	- Amended Interim Earnings Loss pension
February 28, 2006 to present	- Clinical Rating System pension

Following a successful appeal, the Worker established that he was entitled to compensation under the *Chronic Pain Regulations*. This led to the following two decisions:

- TST Decision (October 31, 2006) - Found that the Worker had a "slight" pain-related impairment (a 3% rating). Found that the 3% benefit was payable during the time periods that the Worker was in receipt of a Clinical Rating System pension, but not during the time periods the Worker received an Amended Interim Earnings Loss pension.

- Hearing Officer Decision (February 9, 2007) - Confirmed the TST Decision.

My decision addresses the Worker's appeal of the Hearing Officer Decision. His representative argues that the Worker has a "substantial" pain-related impairment (a 6% rating). He argues that the Worker should receive chronic pain benefits during the time periods he was paid an Amended Interim Earnings Loss pension as it is not permissible to give retroactive application to the *Workers' Compensation Act* to deny such compensation.

**ISSUES AND OUTCOMES:****Does the Worker have a "substantial" pain-related impairment?**

No. The Board correctly determined him to have a "slight" pain-related impairment.

**Is the Worker entitled to retroactive payments under the *Chronic Pain Regulations* during the time periods he was paid an Amended Interim**

### **Earnings Loss pension?**

No. The award under s. 8 of the *Chronic Pain Regulations* is replaced by a greater amended interim earnings loss pension.

### **ANALYSIS:**

#### **Does the Worker have a “substantial” pain-related impairment?**

In *Decision 2006-64-AD* (July 27, 2006), this Tribunal identified the Worker’s chronic pain as being the pain that he experienced while his foot was at rest. The pain during weight bearing was not considered chronic pain as it was considered “usual”, given the foot impairment.

Board policy 3.3.5 requires that a questionnaire and opinion from a Board physician be considered when rating a pain-related impairment for chronic pain. Whether such an impairment is “slight” or “substantial” is determined by considering five factors set out in table 18-3 of the AMA Guides. The term “slight” is misleading as the upper end of the “slight” category includes things such as having to make home modifications due to pain.

I will now consider the five factors. In doing so, I must decide disputed possibilities in the Worker’s favour if they are evenly balanced (section 187 of the *Workers’ Compensation Act*).

#### **1. Pain Severity**

Under table 18-3, pain that is present most of the time and may reach a severity of 9/10 is considered “substantial”. Pain that is moderate in frequency and intensity falls in the “slight” category.

The Worker wrote in his Questionnaire that on average he rates his pain at 5, but it can reach 10 on bad days. The pain is present all the time, and becomes worse if he puts weight on his foot. The longer he puts weight on the foot, the worse the pain becomes. He wrote that his foot is not as sore when he lays down to rest and he is more relaxed.

The Worker’s description of his pain appears borderline between “slight” and “substantial” when he describes the chronic pain - the pain when there is no weight on the foot. It is the least pain he experiences.

#### **2. The impact on the activities of daily living**

Under table 18-3, pain that causes moderate difficulties in activities of daily living and which may require an individual to make significant modifications to perform them (such as moving to a one-level home) is considered “slight”.

Pain that prevents activities of daily living, except with substantial modifications, and which prevents many routine activities, such as driving a car, is considered “substantial”.

On his Questionnaire, the Worker wrote that he has no difficulties with personal care and writing. However, he is not able to walk very far without sitting down and this causes many restrictions. He no longer hunts or dances. Driving aggravates his pain.

The Worker has moderate restrictions in his activities of daily living. Overall, this description is most consistent with the “slight” category.

### 3. The psychological impact

Whether pain results in “mild to moderate” emotional distress or “moderate to severe” emotional distress determines whether the psychological distress should be considered “slight” or “substantial”.

On his Questionnaire, the Worker wrote that he is sometimes anxious, irritable, and worried. On rare occasions he is frustrated, depressed, and stressed. On rare occasions he is afraid. He has not discussed this with a psychologist.

The Worker’s description of the impact of pain on his mental health is consistent with a mild to moderate impact - the “slight” category.

### 4. Degree of ongoing medical care

When pain requires ongoing medical monitoring, and a worker is taking medication much of the time, the pain’s impact on medication usage is considered “slight”.

Where medication is required on a maintenance basis, the ongoing medical care is considered “substantial”.

The Worker reported seeing his family doctor every three months to get refills of his medication. He takes Aporanictidine 150 mg and Loralodine 10 mg every day. He takes Tylonel #3 when the pain is unbearable.

Overall the Worker’s degree of ongoing medical care is best described as borderline between the “slight” and “substantial” category.

### 5. The degree of pain behaviour

A Worker with relatively few pain behaviours during examination is rated as “slight”. If several pain behaviours are noted then the rating is “substantial”.

There is no discussion of pain behaviours in the Worker’s medical reports. I am unable

to rate the degree of the Worker's pain behaviours.

On October 17, 2006, Dr. Shaw, Board physician, reviewed the Worker's file to recommend a pain-related impairment rating. He felt that the chronic pain was rated as slight as the permanent medical impairment explained the mobility restrictions.

Considering that two of the factors support a borderline finding between slight and substantial, while two others support a finding of slight, and the Board's physician's opinion is that the chronic pain is categorized as slight, I find that the Board properly assessed the Worker with a slight pain-related impairment.

**Is the Worker entitled to retroactive payments under the *Chronic Pain Regulations* during the time periods he was paid an Amended Interim Earnings Loss pension?**

Since 1938, the Board used a clinical rating system (sometimes referred to as the meat chart) to assign a degree of physical impairment (permanent medical impairment rating) to most injuries. The percentage was then used to determine the extent of the worker's loss of earnings capacity. In other words, permanent partial disability pensions were based on permanent impairment ratings, not actual earnings-loss.

On March 23, 1990, the Court of Appeal issued the *Hayden* decision which found that the Board's approach of basing permanent benefits on impairment ratings instead of disability was not permitted by the wording of the former *Workers' Compensation Act*.

The *Hayden* decision threw the workers' compensation system into disarray. It took six years for a new system for the payment of permanent benefits to be created.

Immediately following the *Hayden* decision, the Board continued paying clinical rating system pensions.

On November 24, 1993, the Board issued its amended interim earnings loss policies (policies 7.3.1 to 7.3.13). These were intended to be a temporary step until a new *Workers' Compensation Act* was passed to deal with the *Hayden* decision.

An amended interim earnings loss pension is not based on level of permanent impairment. Instead, it was based on 50% of gross earnings loss.

On February 1, 1996, the new *Workers' Compensation Act* came into force. It retroactively restored clinical rating system pensions to workers injured before March 23, 1990. This was done through sections 226 and 227 of the *Workers' Compensation Act*.

On April 16, 1999, Bill 90 was proclaimed which restored amended interim earnings-loss pensions to workers who received less when they lost them in 1996. This was done through s. 10D of the *Workers' Compensation Act*. The restored awards were effective

January 1, 1999. These awards continue until a worker reaches age 65. The Worker turned 65 on February 28, 2006.

Section 10D makes it clear that an amended interim earning loss pension replaces a clinical rating system pension. It reads “ ... for greater certainty, this benefit is in substitution of any permanent partial disability or permanent total disability the worker was receiving with respect to the claim ...”.

The calculation of the two types of pension is the same, except that an amended interim earnings loss pension is multiplied by 50%, while a clinical rating system pension is multiplied by a permanent impairment rating. Therefore, a clinical rating system pension can only be greater than an amended interim earnings loss pension if a worker has a total level of permanent impairment greater than 50%.

So, the level of permanent impairment, whether a pain-related impairment or a permanent medical impairment, does not change the calculation of an amended interim earnings loss pension.

The Worker's total permanent impairment rating is 23% (a 20% permanent medical impairment rating plus a 3% pain-related impairment rating). As 23% is less than 50%, the Worker retains his amended interim earnings loss pension.

There is no unlawful retroactive application of the *Workers' Compensation Act* to deny the Worker compensation for chronic pain as argued by the Worker's representative. Instead, permanent impairment ratings are not relevant to the calculation of an amended interim earnings loss pension. However, if the Worker's total impairment rating had increased beyond 50% due to the award of chronic pain benefits, he would have received the difference between the increased clinical rating system pension and the amended interim earnings loss pension.

I find that the Board correctly found no additional compensation was payable during the time periods when the Worker received an amended interim earnings loss pension.

#### **CONCLUSION:**

The appeal is denied. The Worker has a slight pain-related impairment. The Board correctly calculated his compensation under the *Chronic Pain Regulations*.