

CLAIM HISTORY AND APPEAL PROCEEDINGS:

The Worker* was formerly employed as a driver for a courier service. He had three compensable injuries as a result of workplace accidents.

On January 14, 1981, he was involved in a motor vehicle accident. He suffered a whiplash type injury to his thoracic and lumbar spine. He was treated conservatively and returned to work as a courier. The Board accepted his claim for medical aid. It appears from the file that he only missed two days work.

On February 22, 1983, he suffered a lumbar strain while lifting mail bags. This injury was also treated conservatively. Temporary benefits were paid from February 23, 1983 to April 11, 1983. The Worker again returned to his employment as a courier.

On June 3, 1983, the Worker suffered an acute neck strain. He was treated conservatively and received temporary benefits from June 6, 1983 until December 5, 1983. He did not return to work as a courier after this injury. He changed careers and worked for approximately five years as a hair dresser.

He was forced to abandon employment as a hair dresser due to physical problems. Subsequently, he received further benefits from the Board. He was paid temporary benefits from December 1, 1992 to April 5, 1993, and then, paid further benefits during a vocational rehabilitation program from August 31, 1993 to February 16, 1995.

He was never awarded permanent benefits as a result of any of his injuries. Previous decisions addressed this issue. An Appeal Board decision dated December 1, 1992 directed that attempts should be made by the Board's rehabilitation department to assess the Worker with regard to having him return to the workforce in some capacity.

On March 13, 1995, the Worker's Case Manager advised the Worker that the Board's medical department had reviewed his file and found no justification for him to be examined for any possible permanent medical impairment which may have resulted from the June 1983 claim. This issue was revisited in 2004 and a Board decision dated August 23, 2004 found that the Worker did not have a permanent medical impairment as a result of his April and June 1983 injuries. This was a final decision of the Board on this issue as it was not appealed.

The Worker was assessed by the Board for entitlement to benefits under the *Chronic Pain Regulations*. The Board considered the evidence available in both the Worker's 1983 claim files. The Transitional Services Team decision dated February 12, 2007 found that the Worker was not eligible for benefits under the *Chronic Pain Regulations* as he had non-compensable significant objective physical findings at the site of his neck and back injuries

*This decision contains personal information and may be published. For this reason, I have not referred to the participants by name.

to substantiate the pain he was experiencing. Therefore, he did not have chronic pain as defined by the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended [the "Act"]. In addition, the TST decision indicated that a PMI assessment was not warranted.

On appeal to the Hearing Officer, the Hearing Officer dealt only with entitlement to chronic pain benefits. In a decision dated March 29, 2007, the Hearing Officer found that the Worker's pain was not consistent with the definition of chronic pain under the *Act* and *Regulations* as it was supported by significant objective physical findings at the site of the injury. The Worker appeals from the March 29, 2007 decision to this Tribunal seeking a pain-related impairment assessment and a permanent medical impairment assessment.

The appeal proceeded by way of oral hearing. The Worker appeared and gave testimony in support of his appeal. He was assisted by a Workers' Adviser. The Employer is not an active employer at this time. The Worker's representative filed submissions following the hearing which included a copy of the Worker's first compensable claim file resulting from an injury that occurred on January 14, 1981. I have also considered the contents of the Worker's 1983 Board files which included recently submitted medical evidence from Dr. Christine Short dated April 17, 2007.

ISSUES AND OUTCOMES:

1. *Does the Worker have chronic pain as the term is defined in s.10A of the Act and the Chronic Pain Regulations?*

No. The Worker's pain is supported by and is explained by significant, objective physical findings due to a congenital condition.

2. *Is the Worker entitled to a permanent medical impairment assessment?*

This issue will be reconsidered by the Board under Policy 8.1.7R1.

ANALYSIS:

PRI Assessment

The Worker seeks chronic pain benefits.

The Worker is entitled to the benefit of the doubt on any issue involving compensation under s.187 of the *Act*. Where there is a doubt on an issue and the disputed possibilities are evenly balanced, the issue must be resolved in the Worker's favour.

Many injured workers have pain that is "chronic" in the sense that it is long-lasting, and not amenable to treatment. However, these qualities, alone, may not make it compensable.

If that permanent, intractable pain is directly related to a physical and permanent injury, and is medically expected – if it is usual pain, no matter how severe – then it is excluded from compensation; it is not compensable chronic pain.

“Chronic pain” is defined in the *Chronic Pain Regulations* as pain continuing beyond the normal recovery time for an injury, or pain that is disproportionate to the amount of pain usually associated with an injury. Conditions such as chronic pain syndrome, fibromyalgia and myofascial pain syndrome are automatically considered to be chronic pain. However, chronic pain is not pain caused by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed.

So, “chronic pain” under the *Chronic Pain Regulations* is pain that is both chronic and unusual for an injury.

In this case, I find, after reviewing the totality of the evidence, that the Worker does not have chronic pain as defined in the *Act* and *Chronic Pain Regulations*. The Worker definitely has long-lasting pain which has worsened over time as he has a very serious congenital condition. His condition worsened after recent surgery. His pain, however, is not disproportionate to his physical findings. It is explained by significant, objective findings associated with his condition.

I will refer specifically to the more relevant medical evidence.

There is no doubt that the Worker has a serious congenital condition. Dr. P. Daniel McNeely in a March 20, 2007 report confirmed that the Worker was born with occult spinal dysraphism including diastematomyelia and tethered spinal cord. Dr. McNeely stated in his report that pain is a common presenting symptom in patients with tethered spinal cord, and pain can be exacerbated and precipitated by trauma. He concluded his report by saying that the Worker’s underlying tethered spinal cord likely played an important role in the persistence of his ongoing back pain.

Dr. Thomas D. Loane who had previously treated the Worker also had an opportunity to review updated medical evidence. He reported his findings in a report dated January 24, 2007. Having reviewed the Worker’s MRI report from 2005 as well as the operative report dated September 14, 2005, he noted that the Worker had very significant congenital abnormalities of the spine which would have inevitably led to degenerative changes secondary to the skeletal anomalies and scoliosis. These degenerative changes he noted were seen in x-rays taken at the rehabilitation centre in 1983.

The MRI report showed very significant neurologic and musculoskeletal anomalies with a syringomyelia, a diastematomyelia and tethered spinal cord. Dr. Loane concluded his report by saying that the Worker’s serious skeletal and neurologic anomalies would have produced increased symptoms and risk of functional disability. He noted as well that nothing on the MRI or operative reports suggested to him that there were post-traumatic problems present related to his previous work-related injuries.

I therefore cannot accept the Worker's representative's argument that the Worker's continuous pain is evidence that his three soft tissue injuries did not heal. On the contrary, his pain is explained by his serious congenital problems. It is possible, as suggested by his family physician, Dr. Garnhum, in 1991 that he was slower to recover from injuries due to his congenital condition but this phenomenon is explained by the condition and is not chronic pain under the *Act*.

In a report dated March 20, 2006, Dr. Christine Short, a specialist at the Nova Scotia Rehabilitation Centre, indicated that since 1983, there are better neuro-imaging and diagnostic capabilities for the spinal cord. She noted that since 1983, the Worker has been diagnosed with tethered cord syndrome. Due to his persistent back pain, he was assessed by Dr. McNeely, Neurosurgeon. An MRI revealed not only bony abnormalities in the spinal column due to spina bifida, but abnormalities in the spinal cord, including a dysraphism with a split cord and a bony spike protruding through the split aspect of the cord. The final diagnosis she noted was tethered cord syndrome.

Dr. Short added that this diagnosis is commonly associated with back pain and therefore could have contributed to the severity of his back pain after his work-related injuries and could be contributing to the persistence of his difficulties and subsequent inability to return to work. She concluded that it was likely that the underlying tethered cord syndrome played an important part in the persistence and ongoing severity of the Worker's back difficulties.

Board Medical Advisor, Dr. Acres, also had an opportunity to review the available medical evidence. In a report dated January 4, 2007, he noted that the Worker had congenital abnormalities of his spine which caused his pain. There was no evidence that the pain was disproportionate to the abnormalities observed.

I accept Dr. Acres opinion as it is consistent with the medical opinions available on file. There is no evidence to suggest that the Worker did not recover from his soft injuries as such. He was able to work as a hair dresser for a fairly lengthy period of time after these injuries. What is contentious is the effect of these injuries on his underlying condition.

I therefore conclude that the Worker does not have pain that is disproportionate to the injuries suffered. He has not been diagnosed with conditions such as chronic pain syndrome, fibromyalgia or myofascial pain syndrome. His pain is supported by, and is explained by, significant, objective physical findings due to a congenital condition.

Therefore, he is not entitled to benefits under the *Chronic Pain Regulations*.

PMI Assessment

As mentioned, a final Board decision in 2004 found that the Worker had no permanent impairment as a result of his 1983 injuries notwithstanding Dr. Loane's October 1, 1991 opinion that the injuries may have accelerated the onset of symptoms. Dr. Loane has

since provided an updated opinion dated January 24, 2007.

Dr. Acres, in his January 4, 2007 opinion, opined that the 2005 studies not only negated there being chronic pain, they added nothing to the Board's understanding of the role of the injuries in producing the condition of the spine as it is seen on these studies nor in the production of the Worker's pain. Therefore he found that there was no indication to change the previous Board decision regarding the presence of PMI. This opinion was accepted by the TST which simply indicated in their decision that a PMI assessment was not warranted at this time.

The Worker's representative argued that I have jurisdiction to deal with the issue of the Worker's entitlement to a PMI assessment notwithstanding the final decision of the Board for two reasons. Firstly, because an assessment under the *Chronic Pain Regulations* opens up entitlement to any benefit. Secondly, because the Board Medical Advisor appears to do a new evidence analysis without specifically stating that he is applying Board Policy 8.1.7R1. He says that I can infer, from the Board's actions in requesting reports from Dr. Short and Dr. Loane and by assessing them with regards to the role that the injuries have played in the development of the Worker's condition, that the Board has reconsidered the Worker's entitlement without specifically referring to the new evidence policy.

I disagree with the submission that an assessment under the *Chronic Pain Regulations* opens up a review of all benefits to which a worker may be entitled. An assessment under the *Chronic Pain Regulations* opens up an assessment for eligibility for benefits under the *Regulations* if a worker is found to have chronic pain causally related to a compensable injury.

It is common practice for the TST to review the Worker's entitlement to a re-assessment under s.71 of the *Act* if, for example, upon a review for entitlement to chronic pain benefits it appears that a worker merits a re-assessment. This is strictly a s.71 analysis which is available at any time.

However, the situation is not the same if there is a final decision finding that the Worker does not have a permanent impairment as a result of his injuries. In such a case, Policy 8.1.7R1 applies and a worker must submit evidence that satisfies the criteria of new evidence to have this issue reconsidered.

In the circumstances of this appeal, I will give the Worker the benefit of the doubt. Although the Hearing Officer did not deal with the PMI issue, the Board Medical Advisor and the TST appear to have considered whether or not there was new evidence sufficient to reconsider the Worker's entitlement to a PMI assessment. I will deal with the issue to the extent only of considering whether there is new evidence that merits a reconsideration of the issue. I will, therefore, only deal with part one of the analysis required under Policy 8.1.7R1.

It is only possible to re-visit previous final decisions using s.185(2) of the *Act* provided that there is new evidence as that term is defined in Board Policy 8.1.7R1.

Policy 8.1.7R1 sets out a two-step analysis. First, a decision-maker must determine whether the additional materials constitute “new evidence” as defined in section 1.2 of Policy 8.1.7R1. Second, the decision-maker must then determine whether the “new evidence” does in fact alter the original decision, as per section 2 of Policy 8.1.7R1.

My jurisdiction in this appeal is limited to deciding whether the additional materials meet the requirements of section 1.2 of Policy 8.1.7R1.

In order to conduct a s. 185(2) reconsideration, the new evidence must satisfy the following two criteria:

- (1) It must be truly new evidence. It must not be a reiteration of the evidence already on file or a new argument based on the same evidence or evidence which is inconsequential and therefore even if accepted, would not impact on the Board’s final decision; and
- (2) the evidence could not have been presented by the worker or employer at the time the final decision was made.

The final decision that the Worker seeks to reconsider is the August 23, 2004 decision. It simply indicated that there was no medical evidence to support the fact that the Worker suffered a permanent impairment as a result of his soft tissue injuries in 1983. The Board Case Manager accepted the Board Medical Advisor’s opinion dated August 5, 2004 that the Worker did not have a rateable deficit as a result of his back and neck injuries of February and June 1983.

There has been significant medical evidence since 2004, including the 2005 MRI and the reports from Dr. Loane, Dr. McNeely and Dr. Short. The Board has not had an opportunity to review Dr. Short’s April 17, 2007 report nor Dr. McNeely’s March 20, 2007 report. In her report, Dr. Short indicated that the Worker’s work-related injuries were important factors in the etiology of his difficulties relating to his ongoing pain. Dr. McNeely stated in his report that pain associated with the Worker’s condition can be exacerbated and precipitated by trauma. Both of these reports constitute new evidence under Policy 8.1.7R1.

I find that the Worker has adduced at least some medical information which constitutes new evidence under section 1.2 of Policy 8.1.7R1. Therefore, the matter is remitted to the first level of Board decision making for the rendering of a reconsideration decision on the merits of the Worker’s entitlement to a PMI assessment pursuant to section 2 of Policy 8.1.7R1. This reconsideration is to encompass all of the medical evidence on file. The Board is of course free to request any further clarifications if deemed necessary.

For the record, I also note the Worker's testimony at the hearing before the Tribunal. The Worker testified that, although he had surgery as a child, he had no limitations growing up. He played hockey and baseball. He worked at Sears and Capitol stores while he was attending high school. He graduated from high school and went to work as a courier driver. He had to leave this employment after suffering his 1983 injuries. He continued to have back pain and had to eventually give up hair dressing in 1990. The Board's vocational rehabilitation efforts were not successful. He did not return to work. His only source of income derives from CPP benefits. He has been confined to a wheel chair since his 2005 surgery.

CONCLUSION:

The Worker's appeal is allowed in part. The Worker does not have chronic pain as defined by the *Act* and *Chronic Pain Regulations*. His pain is supported by and is explained by significant, objective physical findings due to a congenital condition. His entitlement to a pain-related impairment assessment is denied.

The Worker has adduced at least some information which constitutes new evidence under Policy 8.1.7R1. The Worker's entitlement to a PMI assessment is remitted to the first level of Board decision making for a reconsideration under section 2 of Policy 8.1.7R1.