

CLAIM HISTORY AND APPEAL PROCEEDINGS:

On December 23, 1988, the Worker suffered a low back injury at work. The Board accepted his claim and paid him a temporary total disability benefit until January 9, 1990. The Worker was found to have a 6% permanent medical impairment and was paid benefits based on that rating.

On February 20, 2006, a TST Decision found that the Worker had a 6% pain-related impairment and made the award effective January 9, 1990. It found that the Worker was entitled to retroactive compensation from January 9, 1990 until November 4, 1993; and from February 1, 1996 until January 1, 1999.

However, the TST Decision found that he was not entitled to retroactive compensation under the *Chronic Pain Regulations* during the time periods that he had been paid an Amended Interim Earnings-Loss benefit (November 23, 1993 to February 1, 1996) nor while he receives an award under s. 10D of the *Workers' Compensation Act* (January 1, 1999 onwards).

Following some appeal proceedings, on March 12, 2007, a Hearing Officer confirmed the TST Decision.

This decision addresses the Worker's appeal of the Hearing Officer Decision. His representative argues that compensation under the *Chronic Pain Regulations* should have been paid for the time periods during which the Worker had received a Amended Interim Earnings-Loss pension or s. 10D benefit.

Before the hearing, I provided the Worker's representative with a copy of Tribunal *Decision 2007-213-AD* (July 24, 2007), where I had found that a pain-related impairment award should be treated like a retroactive permanent medical impairment award.

Following the hearing, I wrote the Worker's representative and the Board requesting additional submissions regarding *Decision 2007-213-AD*, and whether portions of Board policy 3.3.5 were inconsistent with the Regulations.

On November 5, 2007, counsel for the Board wrote conceding that there is no express provision stating that a Worker cannot receive both an Amended Interim Earnings-Loss pension and chronic pain benefits. However, she stated that s. 10D should be interpreted as providing for this outcome.

She argued that it is contrary to the general scheme of the Act for a Worker to receive both Amended Interim Earnings-Loss pension and chronic pain benefits at the same time. She submits that workers with chronic pain would be treated differently than other workers

receiving Amended Interim Earnings-Loss pensions, if the Worker's representative's arguments were accepted.

ISSUES AND OUTCOMES:

Can the Worker receive a pain-related impairment award during times when he was being paid an Amended Interim Earnings-Loss pension or s. 10D pension?

Yes. There is no authority under the *Chronic Pain Regulations* for recalculating the Worker's pain-related impairment award as if it were a retroactive permanent medical impairment award.

ANALYSIS:

I said the following in *Decision 2007-213-AD* :

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 intent behind the *Chronic Pain Regulations* is to integrate chronic pain into the general scheme of the *Workers' Compensation Act*. In *Decision 2007-213-AD*, I concluded that this intention leads to the conclusion that a retroactive pain-related impairment must be treated the same as a retroactive permanent medical impairment.

Since *Decision 2007-213-AD* was released, the Court of Appeal has clarified some of interaction between the *Chronic Pain Regulations* and the *Workers' Compensation Act*.

In *Martell v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2007 NSCA 107 (November 8, 2007), the Court looked at whether a difference between compensation awarded under the *Chronic Pain Regulations* and the *Workers' Compensation Act* meant that the Regulations violated the Act.

The *Workers' Compensation Act* allows a Worker to be paid an extended earnings-replacement benefit for injuries before March 23, 1990, where a permanent medical impairment first exists after February 1, 1996. The *Chronic Pain Regulations* prohibit the payment of an extended earnings-replacement benefit for chronic pain for injuries before

March 23, 1990, regardless of when the entitlement to a pain-related impairment award began.

At paragraphs 18 to 20, the Court held that s. 10(7) of the *Workers' Compensation Act* allowed the Board, by regulations, to set out rules for compensation of conditions not already covered by the *Act*, that may differ from how other conditions are compensated under the *Act*.

The Court held that the terms or conditions for payment of a pain-related impairment benefit under s. 8 of the *Chronic Pain Regulations* is a separate scheme from the *Act*.

Section 8 of the *Chronic Pain Regulations* simply states that where an injury before March 23, 1990 results in a pain-related impairment, the worker's "permanent benefit will be calculated in accordance with Sections 226 and 227 of the *Act*".

Section 8 does not contain any direction to award and then recalculate the award (such as that found with s. 228 of the *Workers' Compensation Act*). The Regulations are their own separate code to deal with chronic pain.

Section 10D directs the replacement of a permanent partial disability award or permanent total disability award with an Amended Interim Earnings Loss award. It does not direct the replacement of an award under s. 8 of the *Chronic Pain Regulations*. An award under s. 8 is not an award of a permanent partial disability or permanent total disability pension.

I can find no authority in the *Chronic Pain Regulations* directing the recalculation of the Worker's pain-related impairment award as if it were a retroactive permanent medical impairment award.

In short, I find that Tribunal *Decision 2007-213-AD* was wrongly decided.

I find that sections 19 to 23 of Board Policy 3.3.5 are inconsistent with the *Chronic Pain Regulations* insofar as they direct no payment of the s. 8 award while a worker had or is receiving a benefit under the Amended Interim Earnings-Loss policies or under s. 10D of the *Workers' Compensation Act*.

The Worker is entitled to his s. 8 chronic pain award during the time periods he received his Amended Interim Earnings-Loss Award and also during payment of his s. 10D award.

CONCLUSION:

The Appeal is allowed. The Worker is entitled to his award under s. 8 of the *Chronic Pain Regulations* from November 23, 1993 to February 1, 1996 and after January 1, 1999.