

**CLAIM HISTORY AND APPEAL PROCEEDINGS:**

This is an appeal of a decision of a Hearing Officer of the Board dated July 25, 2007, in which the Hearing Officer determined that the Worker was not entitled to an increase in his permanent medical impairment [PMI] ratings, nor was he entitled to chronic pain benefits or an extended earnings replacement benefit [EERB]. The Worker appealed this decision to the Workers' Compensation Appeals Tribunal on August 30, 2007.

This appeal proceeded by way of oral hearing at which the Worker testified. Presented at the hearing were the following exhibits:

Exhibit#1 - Letter from Best Buy Flooring Ltd.

Exhibit#2 - Letter from Cleveland's Decor Center

Exhibit#3 - Letter from Roysons' Flooring and Woodworking Limited

**ISSUES AND OUTCOMES:**

-Is the Worker entitled to an increase in his PMI ratings?

The Worker is entitled to a PMI examination by the Board, to assess whether his left knee condition has deteriorated since 1995. The matter of an increase in the Worker's PMI for his back is not decided on this appeal, and can be pursued directly with the Board once information on possible surgical treatment is available.

-Does the Worker have "chronic pain" as that term is defined in the *Worker's Compensation Act*, S.N.S.1994-95, c.10, as amended [the "Act"]?

The Worker's back pain is supported by significant objective physical findings which account for his pain, and, therefore, his pain does not meet the definition of "chronic pain" in the *Act*.

The question of whether the Worker has "chronic pain" as it relates to the knee can be reconsidered by the Board once the PMI examination is done.

-Is the Worker entitled to an EERB?

The Worker is unable to work at his pre-accident employment as a result of his compensable back injury. His earnings loss is a result of that injury. The Board is to determine the Worker's entitlement to an EERB based on this finding.

**ANALYSIS:**

The legislation applicable to this appeal is the *Act*. Section 187 of the Act requires me to give the worker the benefit of the doubt, which means that 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 testified that he went as far as Grade 7 in school. When he was 17 he went to work with his father in the flooring installation business. He worked for his father for approximately a year and a half, and then went to Alberta for a year and did the same type of work. He said that, essentially, installing floors was "his life". When he returned to Nova Scotia he hired a couple of people and sub-contracted with different companies to do flooring installations. He formed TLC Flooring, and at one point had eleven people working for him. He worked jobs in the Valley, in Metro Halifax, and as far as Cape Breton and Prince Edward Island. He testified that his business was good.

The Worker described the work of flooring installation as physically demanding. It involves having to move washing machines, fridges, stoves and dryers, as well as other furniture. The flooring material itself is heavy, and depending on floor size could weigh up to 691 pounds. An average roll would be up to 400 pounds. The work involves kneeling, crawling, and a lot of lifting.

The Worker sustained a compensable left knee injury on January 6, 1994. He had surgery on that knee. He was found by the Board to be suffering from a PMI of 3 percent. After his knee surgery, and recovery, the Worker testified that he did not do as much lifting and he did more of the technical aspect of installations. He did use the "knee kicker" following his injury only not as much as before. He favoured his left knee, and he had to be careful while lifting and turning.

The Worker testified that eventually, his business went beyond installations. He built up a small retail store, selling flooring, paint, blinds, and rugs. His wife ran the retail outlet. Both the installation aspect of the business and the retail outlet were in the same building. He separated from his wife in 2002 and although he tried to keep the store going for a while, financially he found it too hard and he was shutting it down slowly. He stated that the final shut down took place around Christmas 2003. His company is still in good standing with the Registry of Joint Stocks.

On April 30, 2004, the Worker was in the process of cleaning out his building, to sell it. This process had been going on since June of 2003. He was hoisting a roll of underlay to his back when he felt a sharp pain in the bottom of his back on the right side.

The Worker has not worked in flooring installations since his compensable back injury. He says he is unable to physically do the work due to his back problems. He is on medication, including morphine, for back pain. He has trouble doing household chores such as dishes,

and vacuuming. Sitting for any length of time causes pain. The Worker is taking his GED and is hoping to get back into the work force in some capacity.

The Worker has central disc bulges at L4-5 and L5-S1. A CT-scan from September of 2004 showed broad base central disc bulging at L4-5 and at L5-S1 and some degenerative disc disease.

According to the medical evidence, the Worker is having ongoing investigations with respect to his back. Dr. Kazimirski's notes for a visit February 8, 2008, state that the Worker's MRI showed a small annular tear. He stated that the Worker is due to see Dr. Kelland at the Pain Clinic for more injections, and is receiving extensive medications to control his pain. He further stated that the Worker's problem should be considered from a surgical point of view and to that end, he would ask Dr. Alexander, orthopaedic surgeon, to see him. The Worker testified that he does not yet have an appointment to see Dr. Alexander.

Following his April 30, 2004 injury, the Worker received temporary earnings replacement benefits [TERB] up until July 5, 2004. The Worker appealed the Board's decision to terminate his TERB, to the Tribunal, and that appeal resulted in *Decision 2005-238-AD* (May 9, 2006, NSWCAT). The decision notes that the Worker suffered a back injury on November 20, 1996, and another injury on October 13, 2000. The Worker suffered a further workplace back injury in September or October of 2001 which was reported to the Board, resulting in time off work. The Worker acknowledged at the hearing of the instant appeal that he had some trouble with his back before April of 2004, but nothing which had not resolved.

The Tribunal determined that the Worker was not entitled to further TERB as it was not persuaded that the April 30, 2004 aggravation, on its own, had caused the Worker's continuing loss of earnings. The Tribunal found that the Worker's condition had plateaued and he was not entitled to TERB on that basis. The Tribunal did state, however, that "that aggravation could conceivably have contributed to a global permanent impairment in the light of the apparently compensable knee injury, or could have contributed to the development of "chronic pain"." The Tribunal therefore, directed that the Worker be provided with a PMI assessment which would consider all of his compensable injuries.

Since the Tribunal's decision, the Board has found that the Worker has a PMI rating of 5 percent for his back under the claim for the injury of April 30, 2004. The aggravation has obviously been determined to have resulted in a permanent condition and, therefore, the Tribunal's findings in the context of TERB do not restrict my determination of the earnings loss issue on this appeal.

The Worker testified that he sold the building which housed his flooring business, but he did not close the business. His plan was to continue to handle installations. He stated that he hated paperwork and the paperwork involved in the installation aspect of the business

was minimal compared to the retail end. The Worker was clear in his testimony that his intention had been to sell the building and get out of the retail aspect of the business, but that he planned to continue with installations. He testified that he had more control over the physical aspects of the job without the retail store. The Workers' Advisor referred me to financial information on the Board file which indicated that the Worker's earnings from 2002 and 2003, were practically the same. This supports the Worker's testimony that despite the fact that he was winding down the retail end of his business, he was continuing to run the installation aspect.

The Worker referred to Exhibits 1, 2, and 3. These are letters from contacts the Worker stated he had, who would have been willing to have the Worker install carpet and flooring for them, if he was able to.

A worker is entitled to earnings replacement benefits, where he suffers a loss of earnings which is related to his compensable injuries. There are numerous reports from the Worker's family doctor, Dr. Kazimirski, which state that the Worker is unable to pursue his line of work due to his injuries. Dr. Kazimirski's report from August 29, 2006 states that, "he has lost almost his entire ability to earn an income as a result of his back pain and injury suffered during his work." The Worker is taking significant amounts of medication, undergoing pain injections, and the option of back surgery is one that is being explored.

Dr. Howatt, orthopaedic surgeon, in a report dated November 17, 2004, stated that he had suggested the Worker consider upgrading in the event that he had recurrent episodes of pain and had to pursue a sedentary position. He stated that recurrent episodes were likely.

I find it at least as likely as not that the Worker would be working in flooring installation if it were not for his compensable injury. Regardless of whether the Worker was continuing work for his own company or doing work for other companies, he is unable to pursue this line of work due to his back problems.

The Workers' Adviser argued that the Board had not appropriately implemented *Decision 2005-238-AD*, as it did not conduct a PMI examination of the Worker's knee. The Board did have its Medical Advisor review the documentation available on the Worker's left knee, and his opinion is dated March 1, 2007. He noted that the 3% was on the basis of muscle wasting of calf and thigh muscles, then stated that there was no evidence before him of compensable injury-related change.

What the Tribunal ordered was a PMI assessment. I am not of the view that a PMI assessment necessarily requires a physical examination of a worker in every case, however, given the basis for the Worker's initial PMI, and the time that has passed, I find that the best assessment of the Worker's knee would be by physical examination. Although in my view, there should be some medical evidence of worsening to support a worker's request for a reassessment, and in this case there is not, the Tribunal directed an assessment in the context of its other findings. The Worker should have a PMI examination

to determine whether any increase in his PMI rating for his left knee is warranted.

It would appear premature at this time to consider whether the Worker is entitled to an increase in his 5% PMI, when it is possible he may be considering surgery. I leave the increase issue to the Worker and his Workers' Adviser to pursue directly with the Board at the appropriate time.

The objective findings in the Worker's back would take his pain out of the definition of "chronic pain". This is conceded by the Workers' Adviser, and I find that the Worker does not have chronic pain in relation to his back.

With respect to the chronic pain issue and the Worker's knee, I agree with the Workers' Adviser that it remains an open question, given that the Worker has not had an exam since 1995.

I find that the Worker is unable to return to his previous occupation on the basis of his compensable injuries.

**CONCLUSION:**

This appeal is allowed in part. The Board is directed to perform a PMI examination on the Worker's left knee to determine whether an increase in his PMI rating is warranted, and whether he has "chronic pain". The Worker does not have "chronic pain" in relation to his back. No PMI increase is awarded for the Worker's back. The Worker is unable to return to his pre-accident employment as a result of his back injury of April 30, 1994. The Board should assess the Worker for the appropriate benefits and services that flow from that finding.