

**NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL**

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

Participants entitled to  
respond to this appeal:    **Service Nova Scotia & Municipal Services (Employer) and  
The Workers' Compensation Board of Nova Scotia  
(Board)**

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**APPEAL DECISION**

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Representatives:            Linda L. Zambolin for the Worker

Form of Appeal:             Oral hearing held at Wolfville, NS on May 8, 2008

WCB Claim No.(s):         [\*]

Date of Decision:            August 18, 2008

Decision:                     The appeal of the November 30, 2007 Board Hearing Officer  
decision is allowed, 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 November 30, 2007, in which the Hearing Officer determined that the Worker could not have his massage therapy treatments from Jerusha Young at Eau Spa, paid for by the Board, as Eau Spa was not recognized by the Board as an approved service provider. The Worker appealed that decision to the Workers' Compensation Appeals Tribunal [the "Tribunal"] on January 4, 2008.

Prior to the hearing, the Workers' Adviser filed a report from Dr. Blanchard, dated May 8, 2008, a letter from the owner of Eau Spa, and a report from Jerusha Young, Registered Massage Therapist [RMT] dated May 6, 2008. The Board filed submissions dated April 16, 2008, in response to the Worker's Notice of Appeal.

Subsequent to the hearing, the Workers' Adviser submitted a letter dated June 18, 2008, confirming her submissions on this appeal. She attached her letter to the Executive Director of the Massage Therapists' Association of Nova Scotia, dated July 22, 2008, and documentation from the Massage Therapists' Association website. On July 22, 2008 the Workers' Adviser filed a letter from the Executive Director of the Massage Therapists' Association of Nova Scotia, also dated July 22, 2008. Although this information was requested by me at the hearing, it has not been forwarded to the Board for comment, as it was found in the process of my deliberations to have no bearing on the rationale of my decision.

**ISSUE AND OUTCOME:**

Is the Worker entitled to receive his massage therapy treatments from Jerusha Young at Eau Spa even though the facility is not a Board-approved service provider?

Yes. The Worker's family doctors, Board-approved service providers, have the ability to direct and control the treatments. The Board has the ability to monitor the treatments through contact with the Worker's family doctors and Ms. Young.

**ANALYSIS:**

The legislation applicable to this appeal is the *Worker's 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 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 was employed as a Field Assessor, performing real property appraisals for the Employer at the time of his injury. The Worker slipped on ice on April 10, 1997, injuring his back. He has had two surgeries on his back, and has suffered from pain ever since. According to Form 8/10's from Dr. Verryn-Stuart, the Worker has failed back syndrome.

The Worker testified that shortly after his surgeries, he began getting massage therapy. Before that, he had gone to physiotherapy, but the procedures employed there had caused him pain. According to a March 27, 2000 report from Dr. Verryn-Stuart, the Worker was finding physiotherapy painful to the point of intolerance. A massage therapist, named Heather Porter, was brought into Kings Physiotherapy and he began receiving treatments from her. He found that they relieved his pain.

In 2002 the Worker received massage treatments from Valley Massage Therapy. Valley Massage Therapy was a stand-alone clinic, not associated with physiotherapy. Both Heather Porter and Tammy Peckford were RMT's who were employed there. At this time the Worker was also receiving treatment at the Pain Clinic. The Worker testified that the doctors at the Pain Clinic were aware that he was having massage therapy at that time, which he was paying for himself. As far as the Worker understood, Dr. Lynch and Dr. Clarke of the Pain Clinic were advocates of massage therapy. The Worker stated that he had MRI's and CAT Scan's done at the Pain Clinic and it was known by his doctors that he could not tolerate any pulling on the dura of his back and therefore he was not given any physiotherapy. He stated that he went for massage therapy from approximately 1997 to 2003 at Valley Massage. He was never assessed by a physiotherapist when he attended Valley Massage.

The Worker testified that he was having a difficult time getting appointments at Valley Massage after awhile as there were only two massage therapists there and they were very busy. He decided to go elsewhere. He testified that two or three days without a session would be problematic as he would develop spasms and pain.

The Worker went to see Sarah Armstrong, RMT, at Eau Spa. He saw her for at least a year, and following that, receiving treatments from Jerusha Young. His understanding of the goal of massage therapy was to control his pain and figure out where it was coming from. He stated that Ms. Young worked on his problem and through a process of trial and error was able to provide him with good pain relief.

The Worker testified that where he had had to have three massage therapy treatments per week in 2004, by 2007 he was down to approximately one. While receiving massage therapy from Ms. Young, the Worker testified that his need for medication decreased significantly. He stated that he was able to exercise more and he lost weight. He stated that Ms. Young stayed on top of his problem and was continually studying to progress in her field. In her report of May 6, 2008, she details the approach she has taken to treat his specific problem.

The Worker testified that the Board terminated his massage therapy with Ms. Young by way of letter, in August of 2007. The Worker was not examined by a Board Medical Advisor prior to having his massage therapy treatments terminated. The Worker testified that his family doctors over the years, Dr. Blanchard and Dr. Verryn-Stuart, knew about his massage therapy treatments and knew that he was lessening his medication as a result.

The Board informed the Worker in its letter of August 16, 2007, that he was no longer entitled to treatment from his current RMT's as they were not Board-approved service providers. He was told that the Board had arranged treatment for him at Kings Physiotherapy, a Board-approved service provider, which had RMT's on staff. There was to be an assessment of symptoms and functional capacity on a regular basis.

The Worker testified that in furtherance of the Board's direction, he attended at Kings Physiotherapy for treatments. He stated that the RMT he saw there told him that she was not trained to treat the type of spinal cord problem he had. He said he never saw a physiotherapist when he was at Kings Physiotherapy.

The Worker searched for another massage therapist. The Worker started going to Valley Physiotherapy. In early 2008 he saw a massage therapist by the name of Elizabeth Pullen, who rented space in conjunction with the physiotherapist. He attended three times a week. He saw the physiotherapist on site, Kathy Reid, for an assessment every couple of weeks. The massage therapist at Valley Physiotherapy told him that she did not have the experience necessary to do the treatments that Ms. Young had been doing on him at Eau Spa.

There is a report on file from Kathy Reid dated January 16, 2008, which sets out the treatment goals for the Worker. Ms. Reid also provided a report to the Board dated March 14, 2008, which stated that the Worker showed increased lifting strength and range of motion yet continued to have acute flare-ups for which he sought treatment from Ms. Young. The Worker stated that he did not notice an increase in his lifting ability or range of motion, and attributed his flare-ups to the stretching and lifting that he was forced to do during his physiotherapy assessments.

The Worker was referred to a letter from Ms. Reid dated March 28, 2008. The Worker took issue with the improvements in his condition noted in this report and stated that he always could lift what was stated, although he would "pay the price." He stated that he had not increased his walking to any significant degree since receiving treatments at Valley Physiotherapy. The report notes that the Worker was advised that reducing his amount of massage therapy would be advisable. The Worker said he did not understand why it was stated that his treatments should be reduced, unless it referred to the attempt that was being made to stretch them out until his scheduled Tribunal hearing.

There is a report from Kathy Reid on file dated April 2008. In it she noted that the Worker

was walking with an antalgic gait. She stated that the Worker was having flare-ups, which he stated that massage therapy helped. She noted that the Worker's morphine intake had not decreased since being at Valley Physiotherapy and she was concerned about that.

The Worker testified that since the time his massage therapy regime was changed by the Board, his condition has deteriorated to its 2003 state. He is taking as much morphine as he was then, and his ability to do household tasks has been reduced. He wants his treatment at Eau Spa from Ms. Young, to be approved by the Board. He said he has been seeing her as needed and paying for it himself.

According to the Board's letters to the Worker, the success of the Worker's massage treatment had not been appraised on a regular basis, and this was to be addressed by having the treatment rendered through a Board-approved service provider; in this case, Kings Physiotherapy. The Board interpreted its policy to suggest that the provision of service by a non-Board-approved service provider( in this case a massage therapist) is permitted as long as it is provided under the direction and control of a Board-approved service provider.

Dr. Verryn-Stuart's May 23, 2005 report to the Board, notes that he discussed massage with the Worker in 2003 and the Worker had been "thrilled with the results". He stated he was unaware that the Worker had changed the location of his treatments but he recommended he continue with massage therapy. A report from Dr. Verryn-Stuart dated July 26, 2005, states that the Worker finds his current massage therapist very good. His report of June 15, 2005, indicates that he discussed the Worker's massage treatment with the Board that day.

Section 102 of the *Act* states that the Board may provide medical aid which it considers necessary or expedient as a result of an injury. The Tribunal, in *Decision 2002-542-AD* (May 20, 2003, NSWCAT), determined that massage therapy treatment was expedient, and approved treatments for the Worker.

The Hearing Officer, in her decision, noted that according to s. 102 of the *Act*, the provision of medical aid is subject to the supervision and control of the Board. She referred to Board Policy 2.3.1R and its requirement that health care be provided by Board-approved service providers to ensure that workers receive quality health care.

Section 1 of Policy 2.3.1R establishes the conditions under which the Board provides medical aid assistance. It states:

The WCB will assist in providing health care (services and treatments) by *WCB-approved service providers to injured workers*. Assistance is provided where the health care is:

- (a) appropriate for the type of compensable injury, and
- (b) consistent with the standards of health care practices in Canada.  
[emphasis added]

Sections 2, and 3 of the Policy establish a framework for decision makers to determine the most appropriate, effective and efficient health care. It sets out among other factors to be considered, the recommendations of Board-approved service providers.

According to s. 102(2)(a) of the *Act*, medical aid provided by the Board is subject to the supervision and control of the Board. Section 104 gives the Board authority to determine the necessity, character, and sufficiency of any medical aid it furnishes. As stated in *Decision 2005-433-AD* (February 27, 2006, NSWCAT), Policy 2.3.1R complements the powers of the Board to manage and control medical aid.

The Worker's Adviser acknowledged that s. 102 of the *Act* is a discretionary provision. She further acknowledged that Board Policy 2.3.1R must be considered. She submitted, however, that it must be interpreted and applied in a manner that is consistent with the *Act*.

I have reviewed the Tribunal's decisions which have dealt with this Policy. In my view, these decisions have confirmed the validity of the Board's Policy, and its ability to be interpreted in a manner that is entirely consistent with the *Act*, and the discretion clearly afforded to the Board by the *Act*.

The Board has interpreted its policy to allow for the provision of massage therapy treatment by a non-Board approved service provider, as long as it is provided on the premises of a Board-approved service provider and subject to supervision. This is obviously meant to address the Board's intention in enacting the policy that it maintain "supervision and control" over the Worker's treatment. The Board's practice in this regard, has been rejected as being binding on the Tribunal. By way of *Decision 2003-323-AD*, (December 29, 2003, NSWCAT), the Tribunal awarded massage treatments by a massage therapist who was not Board-approved, given that the treatments were found to be recommended by doctors who were Board-approved service providers who could direct and control the treatments.

Besides the reporting issue, however, there is also a safety issue underlining the Policy. The Board's ability to supervise and control a worker's treatment by the use of Board-approved service providers addresses any concerns that may arise relating to standards of qualification, and consistency of service from service providers. In summarizing the rationale of previous Tribunal decisions which allowed treatment by non-approved service providers, the Tribunal stated as follows in *Decision 2007-487-AD*, (December 17, 2007, NSWCAT):

In both cases, the massage therapy had been recommended by approved

service providers. In addition, those service providers were monitoring the progress of treatments. It was that monitoring that allowed the Tribunal to make exceptions to the general rule. The concerns over safety and appropriateness of the treatment were addressed by the massage therapy being recommended by an approved service provider, who also had the ability to direct and control the treatment.

The issue of whether the Worker is entitled to massage therapy or not has been determined. What the Worker wants in this case, is massage therapy treatments from a specific massage therapist whom he trusts understands his condition, and whose treatments he has found helpful. He has tried the massage therapists he was directed to attend by the Board, and I accept his evidence and the evidence of Dr. Blanchard, that subjectively, and objectively in terms of medication, his condition has deteriorated.

I am convinced that the issues that are sought to be addressed by the Board through its Policy, are not concerns in this case. I am satisfied that the Worker's family doctors, both Dr. Verryn-Stuart and Dr. Blanchard have supported the Worker's receipt of this treatment as an effective means of pain control. The Board has received information about the treatments by way of their reports. Dr. Verryn-Stuart was consistently in favor of the Worker receiving massage therapy treatment as is evident from his reports in May and July of 2005.

The Worker testified that he sees his family doctor monthly. The Board is able to speak, and has spoken, with the Worker's doctors who are Board-approved service providers, about his massage treatments. The Board has exercised supervision and control over the Worker's treatments by requesting information about his treatments from both his family doctors and his massage therapists.

According to a Contact Sheet, the Board contacted Dr. Blanchard regarding the Worker's massage treatments in October of 2005. The Board requested reports from Ms. Armstrong in 2006. Dr. Blanchard's June 7, 2005 report to the Board addresses the issue of massage therapy, and his May 8, 2008 addresses the treatment as well.

In the decision under appeal, the Hearing Officer stated that the Board had failed to "receive updates concerning the Worker's treatment program and progress with his massage therapy" and, therefore, "the Board became aware that the registered massage therapist with whom the Worker had been receiving treatment is not a Board-approved service provider." The Workers' Adviser argued strenuously, on the issue of progress reports, that whenever reports were requested by the Board from the massage therapists at Eau Spa, they responded.

Having reviewed the record, I note that following a June 9, 2005 request from the Board, Ms. Armstrong provided a report received by the Board July 8, 2005, which sets out the

Worker's treatment plans and his goals and the focus of treatment. The Board again requested a report from Ms. Armstrong on March 31, 2006. She responded, with a comprehensive report dated April 18, 2006, detailing the Worker's treatment and treatment goals. It was not until a year later that the Board terminated the Worker's treatments rendered through Eau Spa.

The Board paid for the Worker's treatments from the time he commenced treatment at Eau Spa, which, according to Ms. Armstrong's report of March 2006, was August 2004. There is no evidence to suggest that his condition deteriorated while he received them, that there was anything unorthodox or unsafe about the treatments, or that they were inordinately expensive. The Board requested and received information about the treatments in 2005 and 2006, yet took no steps to terminate them until August of 2007.

On March 31, 2006, the Worker's Case Manager wrote to the Worker's family doctor. Despite the Tribunal decision with respect to the provision of massage therapy treatment for the Worker, (which decision had not been appealed by the Board) the Case Manager, stated in his letter, that passive therapy such as massage therapy did not help and could not be recommended as there was no evidence of its benefit for the treatment of chronic pain syndrome. The Case Manager wrote on April 5, 2007, to a Board Medical Advisor, for an opinion on the benefit of massage therapy treatments. The Board Medical Advisor responded with an opinion dated May 7, 2007, in which he stated that he was, "...unable to develop a sufficient understanding of this Worker's current condition or its management based on clinical information available in the claim file." The Board's Medical Advisor did not render an opinion on the Case Manager's question as to whether the massage therapy treatment the Worker was receiving could be obtained, "within a physiotherapy and as per WCB guidelines for the use of massage therapy".

The documentation on file from the Worker's Case Managers from 2005 on, suggests to me that the decision to rely on Policy 2.3.1R was an attempt to address a level of discomfort the Board may have had with the Worker being in receipt of massage therapy over a prolonged period of time. I am not convinced that the decision was made because the problems the policy was designed to address, existed in this case.

The change in the Worker's massage therapy regime had a negative effect on his condition. The Board is able to have any concerns it may have with respect to the Worker's progress and level of functioning in relation to massage therapy addressed by the Worker's family doctors and massage therapist, and is able to do so with the Worker continuing his treatments at Eau Spa.

Section 186 of the *Act*, which directs that decisions respecting compensation be based on the real merits and justice of the case dictates the result I have reached. My decision is not to be interpreted as allowing the Worker to seek massage therapy treatments from any service provider of his choice, however, I find that the Worker is entitled to discontinue any

attendance at Kings Physiotherapy and continue to have his massage therapy treatments with Ms. Young at Eau Spa.

**CONCLUSION:**

This appeal is allowed. The Worker is entitled to have his massage therapy treatments provided by Jerusha Young at Eau Spa.

DATED AT HALIFAX, NOVA SCOTIA, THIS 18<sup>TH</sup> DAY OF AUGUST, 2008.

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Alison Hickey  
Appeal Commissioner