

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

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

Participants entitled to
respond to this appeal: **Sydney Steel Corporation (Employer) and**

 The Workers' Compensation Board of Nova Scotia
 (Board)

APPEAL DECISION

Representatives: **[*] presented his own appeal**

Form of Appeal: **Oral hearing at Sydney, NS, on September 18, 2008**

WCB Claim No.(s): **[*]**

Date of Decision: **October 28, 2008**

Decision: **The appeal of the June 20, 2008 Board Hearing Officer decision is allowed in part, according to the reasons of Appeal Commissioner Sandy MacIntosh.**

CLAIM HISTORY AND APPEAL PROCEEDINGS:

The Worker injured his left ankle at work on July 14, 1973. He had several re-injuries to his left ankle at work, the last occurring in 1989. The ankle also required two major surgical procedures.

The Board accepted his left ankle claims, and paid him a permanent partial disability pension based on a 15% rating. In 1984, it increased this rating to 18%.

The Worker remained with the Employer until around 1990, when the Employer sponsored the Worker in a teaching program at the former teachers college. It was the Worker's goal to teach industrial arts, as that was consistent with his skills from his pre-accident employment. It appears that the Employer covered two years of the program, while the Worker covered the final two years.

Following the program, the Worker never secured a permanent teaching position in an industrial arts program. It was felt that pain limited him from teaching industrial arts, a position that includes more hands on physical activities than other teaching jobs.

The Worker sought vocational assistance from the Board for a fifth year of teaching education so that he could secure a more traditional classroom teaching position. However, the Board declined to cover additional education and instead provided coverage for several months of job search. This was not successful.

The Worker sought compensation under the *Chronic Pain Regulations*. This led to the following two decisions:

1. A TST Decision (February 21, 2008) found that the Worker was entitled to compensation under the *Regulations*. It found that the Worker had a substantial pain-related impairment (a 6% rating). It awarded the Worker a 6% increase in his permanent partial disability pension effective April 17, 1985.
2. A Hearing Officer Decision (June 20, 2008) confirmed the TST Decision. Found that, by operation of sections 226 and 227 of the *Workers' Compensation Act*, that the Worker was not entitled to an extended earnings-replacement benefit due to the date of his injury. Found that April 17, 1985 was the earliest effective date for an award under the *Chronic Pain Regulations*.

This decision addresses the Worker's appeal of the Hearing Officer Decision.

At the oral hearing, the Worker conceded that it was unlikely that he could succeed in his arguments for an earlier effective date for his chronic pain award and for an extended earnings-replacement benefit. He instead asked that I listen to his story and review his file to determine whether there was any additional compensation payable to him under the *Chronic Pain Regulations*.

ISSUES AND OUTCOMES:

Is the Worker entitled to an earlier effective date for his pain-related impairment award?

No. Only chronic pain on or after April 17, 1985 is assessable under the *Chronic Pain Regulations*.

Is the Worker entitled to an extended earnings-replacement benefit?

No. Section 8 of the *Regulations* provides that no extended earnings-replacement benefit is payable for a pre-March 23, 1990 injury.

Is the Worker entitled to additional compensation under the *Chronic Pain Regulations* ?

Maybe. The Board will assess whether it should provide retroactive vocational rehabilitation assistance in relation to the two years where the Worker covered his own expenses at the teachers college.

ANALYSIS:

Is the Worker entitled to an earlier effective date for his pain-related impairment award?

The Tribunal dealt with the issues as to whether chronic pain benefits could be paid prior to April 17, 1985 in *Decision 2008-293-AD* (September 8, 2008). In that decision the Appeal Commissioner interpreted the *Chronic Pain Regulations* in light of a recent Court of Appeal Decision and concluded that no compensation is payable before April 17, 1985.

The Appeal Commissioner wrote:

In *Martin v. Nova Scotia (Workers' Compensation Board)*; *Laseur v. Nova Scotia (Workers' Compensation Board)*, [2003] 2 S.C.R. 504, the Court found that the Act's denial of an assessment of eligibility for compensation for "chronic pain", violated s. 15(1) of the *Charter of Rights and Freedoms*.

Following the Court's decision, the *Chronic Pain Regulations* were enacted.

The *Chronic Pain Regulations* provide for compensation to be paid for pain which meets the specific definition of "chronic pain" set out in the *Act* and the *Regulations*. According to *Cohen v. WCB*, 2007 NSCA 118, at p. 13, "Only chronic pain on or after s. 15(1) came into force on April 17, 1985 would be assessable." Any benefits payable, for "chronic pain", then, cannot pre-date April 17, 1985, which was the date the *Charter of Rights and Freedoms* came into effect.

I agree with the reasoning of the Appeal Commissioner. Only chronic pain on or after April 17, 1985 is assessable under the *Chronic Pain Regulations*. The Worker is not entitled to an earlier effective date for his chronic pain award.

Is the Worker entitled to an extended earnings-replacement benefit?

Section 8 of the *Chronic Pain Regulations* deals with compensation for workers who have a pain-related impairment where the original compensable injury was before March 23, 1990. The relevant portion of that section reads as follows: "the worker is not eligible to receive an extended earnings-replacement benefit". Instead, such workers are restricted to an award under sections 226 and 227 of the *Workers' Compensation Act*.

Given the date of the Worker's injuries and the explicit wording of s. 8 of the *Regulations*, it is clear that the Worker is not entitled to an extended earnings-replacement benefit.

Is the Worker entitled to additional compensation under the *Chronic Pain Regulations* ?

The Worker testified the surgery did not relieve his pain symptoms, and that other than one period of eight months of pain relief, he has had no relief from pain from other treatments.

The Worker testified that the Employer offered re-education. He applied to, and was accepted at, the former teacher's college. Two years later the Employer's funding ended. During that time he had performed six weeks of practice teaching and believed based on this that he would be able to teach with pain.

The Worker testified that he cashed in his pension from the Employer to pay for the next two years of his teaching program. He felt that this was a wise career move given his limitations and abilities.

The Worker testified that the last semester of the 4th year of his program involved teaching in a wood lab at a rural school. He felt that he was putting the students at risk due to his restrictions in an environment where students work with industrial tools. He also no longer

drove due to the narcotic medicines he was on. He did not feel that he could “do justice” in the classroom.

The Worker testified that when the Employer closed his co-workers got pensioned off, and he missed that opportunity. Due to his limited finances, he is having difficulty maintaining himself at his mother’s home.

The Worker testified that his pain causes him to fall at times. He falls flat on his face. He suffered a broken collar bone three times last winter. These falls come on without warning. He testified that his pain is getting worse with time.

The Worker testified that the Board did provide him with several months of job hunt assistance. While this initially gave him some hope, he felt that his counsellor was just going through motions and no realistic assistance was given to him. His counsellor seemed indifferent to the outcome.

In the Worker’s Notice of Appeal to Hearing Officer, he had wrote that he was seeking compensation due to loss of opportunity due to chronic pain. He wrote that he was turned down medically to teach at the end of his program. He wrote that he wasted four years on a new career. He wrote that he had to use his pension to pay for the last two years of that program. In doing so, he wrote, he lost his pension from the Employer.

The Hearing Officer never explicitly dealt with these arguments.

Section 3 of the *Chronic Pain Regulations* provides that chronic pain is compensated like any other type of personal injury, subject to any particular conditions set out in the *Regulations*.

The *Workers’ Compensation Act* is a statutory scheme of compensation. It does not insure against all losses that may flow from an injury. Instead, it provides a specific statutory scheme for compensation.

The loss of a pension is not covered under the general scheme of the *Workers’ Compensation Act*. Therefore, no compensation for such loss flows under s. 3 of the *Chronic Pain Regulations*. Nor, in general, are lost opportunities directly compensated.

However, the general scheme of the *Workers’ Compensation Act* does provide a broad discretion to provide vocational rehabilitation services. There are policies that structure this discretion, including a “cap” on living allowances.

In the past, there have been claims where the Board has retroactively provided compensation where a worker pursued there own vocational rehabilitation plan prior to the Board accepting responsibility for a personal injury.

It appears that the Worker pursued, at his own expense, two years of education to acquire a teaching degree, only to have his hope of teaching frustrated by chronic pain. While the Board apparently decided not to provide the Worker with additional vocational assistance to acquire a position in a traditional classroom, it never addressed whether it would provide retroactive compensation in relation to those two years.

It is appropriate for the Board to consider, under s. 3 of the *Chronic Pain Regulations*, whether the Board should provide compensation for the two years of vocational rehabilitation that the Worker covered at his own expense.

CONCLUSION:

The appeal is allowed in part.

The Worker is not entitled to an earlier effective date for his chronic pain benefits. The Worker is not entitled to an extended earnings-replacement benefit.

The Board will assess whether to provide the Worker with retroactive compensation in relation to the two years where he pursued his own vocational rehabilitation plan.

DATED AT HALIFAX, NOVA SCOTIA, THIS 28th DAY OF OCTOBER, 2008.

Sandy MacIntosh
Appeal Commissioner