

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

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

Participants entitled to
respond to this appeal: **[*] (Employer) and**

The Workers' Compensation Board of Nova Scotia
(Board)

APPEAL DECISION

Representatives: Kenny LeBlanc for the Worker

Form of Appeal: Oral Hearing, December 4, 2008, Windsor

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

Date of Decision: January 27, 2009

Decision: The appeal of the July 23, 2008 Board Hearing Officer decision is allowed, according to the reasons of Appeal Commissioner David Pearson.

CLAIM HISTORY AND APPEAL PROCEEDINGS:

The Worker had a compensable low back injury on November 6, 2004. The Board accepted that her injury was compensable and provided her with various benefits until October 16, 2006, when she began a graduated return to work program. The Worker was unable to complete this program. The Board initially suspended the Worker's benefits, but later reinstated them as her Employer could no longer provide modified work within her capabilities. The Board provided the Worker with additional benefits while she looked for alternate work, but then terminated her benefits on July 13, 2007.

In a June 29, 2007 decision, the Board determined that the Worker was not entitled to a permanent impairment benefit ("PIB") or an extended earnings-replacement benefit ("EERB"). On appeal, the issue was returned to the Board for further consideration. A Board Case Manager decided on February 6, 2008 that the Worker did not have a permanent impairment as a result of her injury. The Worker appealed this decision to a Hearing Officer. The Hearing Officer first issued a May 21, 2008 preliminary decision in which she asked a Board doctor for an opinion on the Worker's pre-injury and post-injury impairments. Upon receipt of that opinion, the Hearing Officer issued a July 23, 2008 supplementary decision, finding the Worker had a pain-related impairment ("PRI"), but that no portion of it could be attributed to the compensable injury. The Worker appealed the Hearing Officer's decision to the Tribunal.

The Tribunal appeal proceeded by oral hearing on December 4, 2008 in Windsor. The Worker was the only statutory participant in attendance at the hearing. The Worker testified, and her Adviser provided oral submissions. I also agreed to accept post-hearing written submissions, which I received on December 9, 2008. I received no other written submissions or evidence from any participant.

ISSUE AND OUTCOME:

Is the Worker's chronic pain compensable?

Yes, in part. The Worker had pre-existing chronic pain, but it was permanently worsened by her compensable injury. The Worker's total pain-related impairment is substantial, warranting a six percent rating. The permanent impairment benefit should be apportioned, as only half the total impairment, or three percent, can be attributed to the compensable injury. As the Worker has a permanent impairment, and a loss of wages, the Board needs to assess the Worker's eligibility for an EERB.

ANALYSIS:

The *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended (the "Act") applies to this appeal.

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 Board determined that the Worker had chronic pain, within the statutory definition, but that it entirely pre-existed the compensable injury, and that the chronic pain was not permanently worsened as a result of the compensable injury.

The Worker acknowledged that she had pre-existing chronic pain, but said that it was permanently worsened by the compensable injury, such that at least a portion of her chronic pain is compensable.

The Worker's Adviser acknowledged that the Worker had pre-existing chronic pain, but said that the Board did not correctly apportion the Worker's benefits.

The authority to apportion compensation comes from s. 10(5) of the *Act*, which states,

10 (5) Where a personal injury by accident referred to in subsection (1) results in loss of earnings or permanent impairment

(a) due in part to the injury and in part to causes other than the injury;
or

(b) due to an aggravation, activation or acceleration of a disease or disability existing prior to the injury,

compensation is payable for the proportion of the loss of earnings or permanent impairment that may reasonably be attributed to the injury.

The manner in which apportionment of compensation is accomplished is by means of Board Policy 3.9.11 R1. In the case of permanent impairment benefits, s. 4 applies. Generally, under s. 4.3.1, the Board is charged with determining the total permanent impairment, using the applicable rating schedule. Once this is done, then the Board will assign an impairment rating for the non-compensable part, which it then subtracts from the total impairment. If it is not possible to assign an impairment rating for the non-compensable part, then under s. 4.3.2, the Board will categorize the pre-existing impairment as minor, moderate, major or severe, with corresponding apportionment percentages.

The Worker's Adviser said that it was not possible to apply s. 4.3.1 to the pre-existing chronic pain condition, and that s. 4.3.2 should have been applied. Alternatively, he said

that the evidence did not support that the Worker's pain-related impairment should have been rated at six percent prior to her workplace injury.

The Board assessed the impact of the Worker's chronic pain using a modified version of the approach taken in chapter 18 of the AMA Guides, 5th edition. This process involves a review of evidence in five categories. On the basis of that evidence, the Board makes a determination as to the impact of the chronic pain on a worker. Those five categories are: (1) pain severity; (2) activities of daily living; (3) emotional distress; (4) medication use; and (5) pain behaviour.

The Board addressed the Worker's chronic pain three times. In December 2005, Dr. Allen Hall, Board doctor, provided an opinion that the Worker had a substantial pain-related impairment, warranting a six percent rating. Dr. Hall reviewed the information on file, both before and after the compensable injury, but he did not compare the evidence pre-injury to that post-injury to determine whether there had been a change. He merely recommended a six percent pain-related impairment.

The next time the issue was considered was in a June 29, 2007 decision, finding the Worker's did not have a permanent impairment on the basis that her chronic pain was not caused by or permanently worsened by the compensable injury. The Worker was denied further earnings-replacement benefits. Through a series of decisions, further justification was sought for the chronic pain finding. This resulted in a February 6, 2008 Case Manager's analysis which determined that the Worker had a substantial pain-related impairment, but that it pre-existed the compensable injury. In a May 27, 2008 opinion, Dr. Hall agreed with the Case Manager's analysis.

I agree that the proper method of determining the Worker's eligibility for chronic pain compensation is to apply the apportionment policy, particularly s. 4.3.1. If there is not enough evidence to determine a pre-injury impairment rating, then s. 4.3.2 is used, requiring the characterization of the pre-injury impairment as minor, moderate, major or severe. In this case, there is a considerable volume of medical evidence, both chart notes and specialist consultations, with which to address the pre-injury impairment rating. I find that there is sufficient evidence to apply s. 4.3.1, and resort to s. 4.3.2 is not required. I will look at the five factors below.

Board Policy 3.3.5 provides for the use of Table 18-3 of the AMA Guides, 5th edition. The Policy stipulates that a "slight" pain-related impairment designation will apply if pain has increased the impact of the compensable injury to a mild or moderate degree, as described in the table. If pain has increased the impact of the compensable injury to either a moderately severe or severe degree, then a "substantial" pain-related impairment designation will be made. Appendix "A" to that Policy contains the Assessment Tool to be used for this analysis.

As the Worker's Adviser does not take issue with the post-injury pain-related impairment rating of six percent, I need not address the adequacy of that rating. The issue that is contested is the pre-injury rating. I will restrict my analysis to that finding, although I may refer to other post-injury evidence in performing the analysis.

Pain Severity

According to the Assessment Tool, in order to address pain severity, one looks at the frequency and intensity of the pain, whether the pain is aggravated by activity, how often there are visits to a physician because of pain, whether medication is required for pain, and whether there are functional limitations due to the pain.

There are many reports of back pain and chronic back pain in the medical evidence, both before and after the compensable injury. There are, however, very few actual reports detailing the severity of the pain.

The Board relied largely on the pain reports cited by Dr. Alison Kelland, in a report dated February 18, 2004. The Worker reported to Dr. Kelland at that time that her pain was constant and that it reached levels 7/10 at best, and 10/10 at worst. At Columbia Health, the Worker reported average pain of 7-8/10 at best, and 10/10 at worst. The Worker later reported pain of 9/10 at best and 10/10 at worst. Using the Tool, this would fall in the substantial category.

Dr. Kelland stated that the Worker's pain was markedly exacerbated by every day activity. In many of the specialist consultation reports the Worker had prior to her injury, note was made that activity aggravated her pain. The Worker, however, continued to work, and did so until she had her compensable injury. Using the Tool, this would fall into the moderate, or slight category, as the Worker was able to perform most activities with modification, and her level of disruption was not extreme.

There was a lot of medical involvement prior to the injury, with the Worker trying to discover the source of her back pain. There were also regular and ongoing visits to the family doctor because of back pain, evident through the chart notes. It appears that those visits were generally no more frequent than once per month. Under the Tool, this frequency would indicate being placed in the slight category.

The Worker was prescribed medications of one variety or another to deal with the pain. These included anti-inflammatory medications, as well as pain medication up to and including quite strong narcotic medications. The Worker also had injections into her back in an attempt to relieve the pain. It is somewhat unclear whether the Worker took this medication all the time or not prior to her injury. She testified at the hearing about the prescription monitoring form in her file, indicating that she had three different narcotics at the time because the first two were not tolerated. She denied taking all three at the same

time. It is also clear when you compare the timing of those prescriptions to the medical evidence, that the Worker had a slip and fall accident at that time, hurting her tailbone. That would explain the need for acute injury (or stronger) pain medications, and may not be reflective of the level of pain medication taken generally at that time. Notwithstanding, there is considerable evidence of medication use, and that it appears that it was required in order to keep back pain under control while working. I find this factor falls into the substantial category.

There is considerable evidence that the Worker was functionally limited by her pain prior to her compensable injury. There are several reports of restrictions in prolonged standing and sitting, driving, and that some household chores had become more difficult, such as vacuuming, dishes, laundry, and picking her young child up. The Worker was still able to maintain her work. I find the Worker was functionally limited to a moderate degree, placing this in the slight category.

Considering the descriptors in the Assessment Tool, there are three factors under pain severity which rate as slight and two as substantial. I find the impact on pain severity was moderate, or slight. Of significance to this determination was the fact that while somewhat functionally limited by pain, the Worker continued to be self-sufficient at home, and at work.

Activities of Daily Living

According to the Tool, the factors considered here are whether there are impacts on activities such as lifting, walking, standing and sitting, household chores such as bathing, dressing, shopping or eating, as well as social activities and recreation. Also considered here are whether there is sleep disturbance, sexual dysfunction, or cognitive disturbance due to pain.

There is evidence that some of the Worker's activities of daily living were restricted prior to the compensable injury. In October 2002, Dr. Stalker noted aggravation of pain with hanging clothes up, lifting grocery bags, and excessive sitting. By February 2003, Dr. Stalker added difficulty vacuuming and picking her child up had become more difficult. In an April 28, 2003 report, Dr. Machel noted aggravation of pain with short periods of sitting, standing, driving or carrying. Dr. Connelly reported the Worker being unable to sit or stand for prolonged periods around the same time. Dr. Crawley, general surgeon, reported chronic back pain for some months, as well as some resulting sleep difficulties. Dr. Kelland reported the Worker as saying that her pain was markedly exacerbated by every day activities. Pulling clothes out of the dryer, standing and washing dishes, or sitting for any length of time really made the back pain worse. The Worker reported to Dr. Kelland that she spent most of the day on the couch with pillows between her legs. The Worker also had difficulty getting up the stairs, and frequently slept on the couch. There is little or no evidence of cognitive disturbance or sexual dysfunction.

In order to fit in the substantial category, the impact on activities of daily living must be extreme. Given the evidence noted above, I do not find the Worker fit this level of dysfunction prior to her injury. At worst, the Worker's level of restriction might be deemed moderate, as she maintained her work, and only some sleep problems were identified. The Worker fits into the slight category on this factor.

Emotional Distress

The Tool considers this factor on evidence of the Worker being frustrated, anxious, irritable, worried, afraid or stressed.

The Worker said that she was prescribed the medication Paxil for only a short while before her accident, but that she was not taking it at the time of that accident. The Worker said that she did not have any psychological counselling prior to her injury.

There is some evidence of emotional distress prior to the injury, but according to the descriptors in the Assessment Tool, there is not enough evidence to warrant finding that her emotional state was frequently affected by pain prior to her compensable injury. As such, I find the Worker falls into the slight category on this factor.

Medication Usage

I considered the frequency and degree of medication use under the "pain severity" factor, as described in the Assessment Tool. While I found the pain severity to be in the slight category overall, I found the medication use factor to be in the substantial category. This was based on the frequency of medical contact to deal with the pain, as well as the nature, quantity and frequency with which the Worker required pain medications to deal with her pain. Thus, I conclude medication use was in the substantial category prior to the compensable injury.

Pain Behaviours

The Tool notes that pain behaviour can be observed and that it may result in unscheduled breaks because of pain, or objective signs of pain, and frequency of the pain. It would also include such things as audible pain reports or groaning or complaints of pain, limitations of activity based on pain, etc.

Of-times, there is little evidence of pain behaviour to properly analyze this factor. In the present case, Dr. Kelland noted some pain behaviours in her report. In contrast, during the Columbia Health assessment post-injury, they noted no evidence of overt pain behaviours.

This factor falls into the slight category.

What can be deduced from this review of the medical evidence, is that the Worker had fairly constant back pain following her surgery in 2002. She had significant medical involvement trying to alleviate the pain, with referrals to physiotherapy, chiropractic, orthopaedic, neurologic, and pain specialists. The Worker also received medication of various kinds, although it appeared that she did not tolerate some of the stronger narcotic medications well. It would also appear that as time went on, the pain worsened. In the early reports, the pain was entirely in the low back, while in the 2004 reports, there were also symptoms beginning to appear in the legs in the form of numbness and a pins and needles sensation.

The Worker said that while her pain levels restricted her activities to a degree prior to her compensable injury, she continued to be able to work with pain medication, and perform chores around the house. Afterwards, she said, the pain prevented her from working, and doing some chores altogether, while others she had to pace herself with because of the worsened pain.

On the basis of the five factors considered above, four of the five fell into the slight category. Those included pain severity, activities of daily living, pain behaviours, and emotional distress, while only medication use fell into the substantial category.

As such, I find the Worker's pre-injury impairment rating for chronic pain should have been rated at three percent. Her total impairment rating for chronic pain was six percent. Thus, the compensable portion is three percent. The Worker is entitled to compensation for the compensable portion. I return the matter to the Board for calculation, as well as a determination of other issues that may flow from my finding that a portion of the Worker's chronic pain is compensable.

Those issues include the Worker's eligibility for an EERB, as well as whether she has a permanent impairment outside of the chronic pain. There is some evidence suggesting the presence of a disc herniation, but it is not clear whether that is compensable. When the permanent impairment issue was returned to case management for further documentation, the issue narrowed to chronic pain, and permanent impairment outside of chronic pain was not addressed further. That issue should be squarely addressed to complete the adjudication of the claim.

CONCLUSION:

The Worker's appeal is allowed. The Worker has a total impairment rating of six percent for a substantial pain-related impairment. The Worker had chronic pain prior to her compensable injury. Using the apportionment provisions, the pre-existing chronic pain could be rated at three percent. Thus, the Worker's six percent total impairment rating

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should be apportioned to three percent because of the pre-existing nature of the chronic pain. The Worker is entitled to compensation for the remaining three percent pain-related impairment rating. The Board should address issues stemming from this finding, including whether the Worker is entitled to an EERB, and whether she has a permanent impairment outside of her chronic pain.

DATED AT HALIFAX, NOVA SCOTIA, THIS 27TH DAY OF JANUARY, 2009.

David Pearson
Appeal Commissioner