

Date: 20010221

Docket No.: CA 164877

NOVA SCOTIA COURT OF APPEAL

Cite as: Huphman v. Nova Scotia (Workers' Compensation Appeals Tribunal),
2001 NSCA 40

Roscoe, Flinn and Oland, JJ.A.

BETWEEN:

RANDALL R. HUPHMAN

Appellant

- and -

NOVA SCOTIA WORKERS' COMPENSATION APPEALS
TRIBUNAL and the WORKERS' COMPENSATION BOARD OF
NOVA SCOTIA

Respondents

REASONS FOR JUDGMENT

Counsel: Kenneth LeBlanc and Gary Levine, for the appellant
Sarah Bradfield, for the respondent, Workers'
Compensation Appeals Tribunal
David Farrar and Paula Arab-O'Leary, for the
respondent, Workers' Compensation Board of Nova
Scotia

Appeal Heard: February 7, 2001

Judgment Delivered: February 21, 2001

THE COURT: Appeal dismissed as per reasons for judgment of Flinn,
J.A.; Roscoe and Oland, JJ.A. concurring.

FLINN, J.A.:

[1] This is an appeal taken by a worker pursuant to s. 256(1) of the **Workers' Compensation Act**, S.N.S. 1994-95, c. 10, from a decision of the Nova Scotia Workers' Compensation Appeals Tribunal dismissing his appeal from the decision of a Hearing Officer restricting an award of compensation for a workplace injury to those benefits prescribed in s.10B of the **Act**.

[2] The appellant injured his knee in a workplace accident on December 15, 1995. He was first seen by his family physician, and as he continued to have ongoing knee pain he was diagnosed as having patello-femoral syndrome and referred to Dr. Roy Englund. Dr. Englund performed an arthroscopy and partial medial meniscectomy on December 22, 1997. The appellant subsequently underwent physiotherapy and anti-inflammatory injections but his knee pain did not subside. He was then referred to Dr. William Stanish, an orthopaedic surgeon, who performed another arthroscopy on April 19, 1999. Dr. Stanish found little pathology within the knee.

[3] The appellant continued to suffer pain in the knee which became chronic and did not respond to treatment. He became despondent regarding his inability to provide for his family, and he became depressed and suicidal. He was subsequently admitted to hospital on numerous occasions for depression and on one occasion attempted suicide. He was seen by a psychiatrist and treated with anti-depressants and anxiolytics. He did have some improvement but he has not been able to return to work.

[4] By a decision dated November 1, 1999, the Workers' Compensation Board, Special Services Unit, found that the appellant had chronic pain and that he had met the other criteria of s. 10E of the **Act** and was thus entitled to the limited compensation benefits available under that section. The worker appealed to a Hearing Officer who, by decision dated January 17, 2000, denied his appeal for an increase in compensation benefits beyond those provided for in s. 10E of the **Act**.

[5] A further appeal from the decision of the Hearing Office to the Tribunal was dismissed by decision dated June 30, 2000.

[6] An appeal from the Tribunal's decision lies to this court on a question of law or jurisdiction by reason of s. 256(1) of the **Act**, subject to a limitation

provided for in s. 10F to which I will refer hereafter.

[7] The relevant sections of the **Act** for the purpose of this appeal are ss. 10A,10B, 10E, 10F and 10G;

Interpretation

10A In this Act, “chronic Pain” means pain

(a) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise predated the pain; or

(b) disproportionate to the type of personal injury that precipitated, triggered or otherwise predated the pain,

and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed.

Exclusions

10B Notwithstanding this Act, Chapter 508 of the Revised Statutes, 1989, or any of its predecessors, the *Interpretation Act* or any other enactment,

....

(c) no compensation is payable to a worker in connection with chronic pain, except as provided in this Section or in Section 10E or 10G . . .

Permanent-impairment benefit

10E Where a worker

(a) was injured on or after March 23, 1990, and before February 1, 1996;

(b) has chronic pain that commenced following the injury referred to in clause (a); and

(c) as of November 25, 1998, was in receipt of temporary earnings-replacement benefits; or

(d) as of November 25, 1998, had a claim under appeal

(i) for reconsideration,

- (ii) to a hearing officer,
- (iii) to the Appeals Tribunal, or
- (iv) to the Nova Scotia Court of Appeal,

or whose appeal period with respect to an appeal referred to in subclauses (i) to (iv) had not expired,

the Board shall pay to the worker a permanent-impairment benefit based on a permanent medical impairment award of twenty-five per cent multiplied by fifty per cent, and an extended earnings replacement benefit, if payable pursuant to Sections 37 to 49, multiplied by fifty per cent and any appeal referred to in clause (d) is null and void regardless of the issue or issues on appeal.

Finality of decision

10F A decision of the Appeals Tribunal on a matter referred to in Section 10E is not subject to appeal, review or challenge in any court.

Entitlement to medical aid

10G A worker who is entitled to receive a benefit pursuant to Section 10E may also be entitled to receive medical aid and Sections 102 to 111 apply *mutatis mutandis*.

[8] In dismissing the appellant's appeal, the Tribunal referred to the relevant sections including the definition of chronic pain. The Tribunal found that the appellant had chronic pain that commenced following the injury of December 15, 1995. Since the appellant was injured in the window period provided for in s.10E, suffered from chronic pain that commenced following the injury and, as of November 25, 1998, was in receipt of temporary earnings replacement benefits, the Tribunal affirmed the award by the Board of benefits under s. 10E of the **Act**, that is to say, a 12 ½% permanent impairment benefit and a 50% extended earnings replacement benefit.

[9] As to the appellant's submission that the evidence supported a finding that he also suffered from a psychiatric impairment for which he must be compensated separately, the Tribunal reviewed the evidence of the appellant's family physician and of two psychiatrists who had submitted reports respecting his condition. The

Tribunal continued:

Although I find that the medical evidence supports a finding that the Appellant suffers from a psychiatric impairment as a result of his compensable injury, I do not

accept the argument advanced by the Worker's Representative that the Appellant is entitled to benefits outside of those provided for in Sections 10E and 10G respecting that impairment. . . . The medical reports from Drs. Robbins, Gordon and Appavoo all support a finding that the Appellant's psychiatric condition is connected with his chronic pain. . . .

[10] The Tribunal referred specifically to a statement in Dr. Robbins' report of February 8, 2000:

The fact that his knee pain never recovered from his initial injury would relate to a work injury and the subsequent psychiatric difficulties that he experienced.

[11] As, in its view, the psychiatric condition was "connected with" the chronic pain, the Tribunal concluded that s.10B operated to preclude the payment of compensation to the appellant except as provided in ss.10E and 10G.

[12] An appeal to this court is confined to questions of law or jurisdiction. As well, the respondent submits that by virtue of s.10F of the **Act** the decision of the Tribunal on a matter referred to in s. 10E is not subject to appeal in any event. I will address this latter argument at the outset. In my opinion this provision does not bar an appeal with respect to claims for compensation that do not fall within s.10E, that is to say, claims for other than chronic pain. The real question is whether the Tribunal erred in law or jurisdiction in finding that the appellant's claim fell within s.10E. If it did, then this court has jurisdiction to intervene.

[13] There is, in my mind, a live issue whether the appellant's psychiatric condition falls within the description of chronic pain as defined in the **Act**.

[14] I accept, as does counsel for the Board, the appellant's submission that s.10E does not operate to bar a worker from asserting a claim for injuries other than chronic pain in addition to a claim for the chronic pain itself.

[15] In the present case, however, the Tribunal has made a finding that the appellant's psychiatric condition is connected to his chronic pain. This is a finding of fact, or mixed law and fact, and cannot be attacked on an appeal confined to issues of law and jurisdiction unless it is patently unreasonable.

[16] The appellant does not challenge this finding of fact by the Tribunal.

[17] Counsel for the appellant submits that while the appellant's psychiatric condition may be connected with his chronic pain, it is a separate and distinct condition from chronic pain, and is causally connected to the work related accident in question. He submits that the Tribunal erred in law in its interpretation of s. 10A of the **Act**, by deciding that the appellant's psychiatric condition was to be dealt with in accordance with the provisions of the **Act** relating to chronic pain. Counsel's submissions are as follows:

(a) the appellant's psychiatric condition is not chronic pain within the meaning of s. 10A of the **Act**,

(b) the Tribunal was wrong, in law, to have equated the appellant's psychiatric condition with chronic pain because that decision involves an erroneous interpretation of the definition of chronic pain in s. 10A of the **Act**, and

(c) the appellant is entitled to additional compensation (over and above the compensation he now receives for chronic pain) because of his psychiatric condition.

[18] I do not accept the appellant's submissions.

[19] Chronic pain, by its very nature, was problematic for the Board prior to the enactment of s. 10A - 10H of the **Act**, and the Functional Restoration (Multi-Faceted Pain Services) Program Regulations (FRP Regulations) (see **Martin v. Workers' Compensation Board (N.S.) et al.**, 2000 NSCA 126, per Cromwell, J.A. at § 162 et. seq.).

[20] In **Martin**, Justice Cromwell referred, at some length, to a report on the medical aspects of chronic pain, by Dr. T.J. Murray. This report had been commissioned by the Board, and provided the basis upon which the current provisions of the **Act** dealing with chronic pain, and the FRP Regulations were enacted. In that report, Dr. Murray said the following about chronic pain at p.

5 - 6:

Chronic pain is not protective (Bonica, 1990). It has very complex and multi-faceted features, and cannot be understood by simply applying the concepts of acute pain in its causes and treatments. Chronic pain does not respond well to

analgesics and narcotics and is resistant to most traditional therapies for pain. There may not be an easily definable local cause. Only a third of the patients note an event or injury as initiating the pain and, in most of these instances, the pain seems out of proportion to the suspected underlying disorder or trauma. The presence of mild depressive undertones, and other psychological features in many of the patients, has led to a suspicion that psychological mechanisms underlie this disorder. As we shall see, it is much more complex than that, as many of the accompanying features may be a result of having chronic pain.

...

... Chronic pain is felt only by the patient, is difficult to assess and measure, and is a recognizable problem only because the patient says it is there. It is clearly a complex and multi-faceted problem, and so defies simplistic attempts to categorize or pigeon-hole cases as “organic or psychological”, “real or imaginary”, or “physical or hysterical”. It is also difficult to provide an objective assignment of the relative weight of all the physical, behavioural, psychological, social and cultural factors that are usually involved.

[21] The definition of chronic pain, in s. 10A of the **Act**, recognizes its complex and multi-faceted features by providing:

... and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions . . .

[22] There may very well be cases where a psychiatric condition does not come within the definition of chronic pain in s. 10A of the **Act** because it is not related to the chronic pain. However, that is not the case here. In view of the unchallenged factual finding by the Tribunal - that the appellant’s psychiatric condition is connected to his chronic pain - that psychiatric condition comes within the definition of chronic pain in s. 10A of the **Act**.

[23] In the result, the appellant is not entitled to compensation benefits for his psychiatric condition in addition to the benefits he is already receiving for chronic pain.

[24] The Tribunal made no error in law, or patently unreasonable finding of fact, in coming to this conclusion. Therefore, I would dismiss this appeal.

Flinn, J.A.

Concurred in:

Roscoe, J.A.

Oland, J.A.