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NOVA SCOTIA COURT OF APPEAL

[Cite as: Nova Scotia (Workers' Compensation Board) v. Ryan, 2000 NSCA 56]

Pugsley, Flinn and Cromwell, JJ.A.

BETWEEN:

WORKERS' COMPENSATION BOARD OF NOVA SCOTIA

Appellant

- and -

WORKERS' COMPENSATION APPEALS TRIBUNAL OF NOVA SCOTIA and LEONARD RYAN

Respondents

REASONS FOR JUDGMENT

Counsel:	David Farrar and John R. Ratchford for the appellant Sarah Bradfield and Patricia C. MacPhee for the respondent Tribunal Anne Clark for the respondent Ryan
Appeal Heard:	February 2, 2000
Judgment Delivered:	May 1st, 2000

THE COURT: Appeal allowed and the decision of the Workers' Compensation Appeals Tribunal is set aside per reasons for judgment of Cromwell, J.A.; Pugsley and Flinn, JJ.A. concurring.

CROMWELL J.A.:

I. Introduction:

[1] In 1995 and 1996, the Nova Scotia's worker's compensation system received a comprehensive legislative overhaul. There were significant changes to rights and benefits. As a result, questions arose of what to do about claims that had been decided or were pending under the former legislation: to what extent did the new scheme apply?

[2] The law's general approach to this issue has been settled for a long time: new legislation should not be interpreted as taking away rights which have vested under the old law unless that is clearly the legislation's intent.

[3] The Legislature foresaw these sorts of transitional issues. The new workers' compensation legislation addressed them in several of its provisions. For workers injured between March 23, 1990 and February 1, 1996 (known as the "window" period), and receiving or entitled to receive compensation for a permanent disability, the transitional provisions deem the compensation awarded between those dates to be and always to have been awarded in accordance with the **Workers' Compensation Act**, R.S.N.S. 1989, c. 508 (the "former **Act**"). In addition, there is a formula for recalculation of the award to bring it within the **Workers Compensation Act**, S.N.S. 1994 - 95, c. 10, as amended (the "current **Act**"): see s. 228.

[4] The meaning of the transitional provisions, and particularly the one in s. 228 to which I have just referred, however, has not been easy to discern. Their interpretation has been a source of difficulty for injured workers, the Board, the Tribunal and this Court.

[5] In 1997 this Court held that workers whose claims fall under s. 228 are entitled to have their compensation for the March 1990 to February 1996 period awarded in accordance with the former **Act**: **Doward v. Workers' Compensation Board (N.S.)** (1997), 160 N.S.R. (2d) 22 (C.A.). The Court has never determined, however, precisely what this entitlement requires of the Board. That is the issue raised on this appeal.

II. Background:

[6] The question of which rules apply to compensation for permanent disabilities resulting from injuries during this transitional period is particularly intricate. This is because there was a marked difference between what the former **Act** called for by way of benefits and what, in fact, was awarded by the Board.

[7] Under the former **Act**, compensation for permanent partial disabilities was to consist of a weekly payment of 75% of the difference between the average weekly earnings before the accident and the average amount the worker was earning (or able to earn) after it: see s. 45 of the former **Act**. However, compensation was awarded by the Board on an entirely different basis. What the Board did, in fact, was to make a finding of the percentage level of physical disability based on a clinical rating. Once the rating was determined, compensation for permanent partial disability was calculated by multiplying the percentage of physical impairment times 75% of the worker's gross average weekly earnings prior to the accident.

[8] In **Hayden v. Workers' Compensation Appeal Board (No. 2)** (1990), 96 N.S.R. (2d) 108 (N.S.C.A.) (judgment delivered March 23, 1990), this Court held that the Board's approach to compensation was not in accordance with s. 45 (then s. 38) of

the former **Act**. The Court found that s. 45(1) (then s. 38(1)) established an award based on wage loss, not the degree of physical impairment. Matthews, J.A. for the majority said at § 24:

> In my view, that which governs the compensation award is not the percentage of physical impairment stated by a medical doctor. ... compensation is to be determined by the Board and Appeal Board on the basis of the loss of earnings occasioned by an injury which resulted in the disability. It follows that it is not sufficient for the Board or Appeal Board to merely apply a degree of "physical impairment" as found by the medical doctor, as it did here when determining the award.
>
> ... The compensation to be awarded ... is the difference between loss of wages before and after injury ... "

[9] As noted, prior to **Hayden**, all awards for permanent partial disability had been made using a clinical ratings schedule rather than on the wage loss basis described in **Hayden**. The Board found itself unable to implement the **Hayden** decision with the result that awards made from the date of **Hayden** to the coming into force of the current **Act**, continued to be made on bases that were not in accordance with the former **Act**. We are advised that there were three approaches to compensation employed by the Board during this period:

1. From the date of **Hayden** (March 23, 1990) to November 25, 1992, claims for compensation for permanent injuries were decided as they had been prior to **Hayden;**

2. From November 25, 1992 to November 24, 1993, claims for compensation for permanent injuries were decided pursuant to the Board's interim earnings-loss policy. This policy provided for payment of compensation decided according to the methods and policies in place prior to **Hayden**, subject to review when the anticipated new policies would be issued. The interim policy provided that, at the time of review (i.e. once the anticipated new policies were in force), workers who had a greater entitlement under the new policy than they had received under the interim policy would receive a retroactive adjustment; where the situation was the reverse, awards would be adjusted or stopped but not retroactively.

3. From November 24, 1993 to February 1, 1996, the Board amended

> its interim earnings-loss policy. The amended policy provided for the payment of an interim earnings-loss award equivalent to 50% of the projected earnings-loss benefits using simplified rules. Once again, this interim policy contemplated review of awards made under it once the final policy was put in place.

[10] As matters developed, the current **Act** became, in effect, the final policies contemplated by the interim earnings-loss policies.

[11] Thus, in the so-called window period between the date of **Hayden** (March 23, 1990) and the coming into force of the current **Act** on February 1, 1996, there were two sets of rules for determining compensation for permanent disabilities. First, there was the benefit authorized by the former **Act** based on earnings loss as set out in s. 45 of the former **Act** and described in **Hayden**. This rule, however, existed only on paper. No such awards were ever made. Second, there were the rules actually applied by the Board which resulted in a benefit based on the pre-**Hayden** approaches or the amended earnings-loss policies. There were accordingly scores of awards that were not in accordance with the former **Act**, and many claims relating to this transitional period that were not fully resolved when the current **Act** came into force.

[12] After years of consultations, new legislation (the current **Act**) was enacted. It revamped the approach to compensation by, among other things, providing for two types of benefits for permanent impairments. First, there was an earnings-replacement benefit and second, an award for a permanent impairment that did not depend on the worker establishing a loss of earnings. In addition, the new legislation addressed, in its transitional provisions, the question of what to do about workers with awards or claims relating to the period before the new legislation came into force.

[13] The most troublesome of these transitional provisions is the one that applies

to this case, s. 228 of the current **Act**. As already noted, it deals with cases that fall under s. 45 of the former **Act** and, therefore, with a particularly intricate set of circumstances. This section applies to workers suffering permanent partial or total impairment as a result of injuries in the so-called window period between March 23, 1990 and the coming into force of the current **Act**. It provides that compensation awarded between those dates is deemed to be and always to have been awarded in accordance with the former **Act** and sets out a recalculation to bring the benefit into the new legislative scheme. The section reads:

> **228 (1)** Subject to subsection (2), where a worker
>
> (a) was injured on or after March 23, 1990, and before the date this Part comes into force;
>
> (b) suffered a permanent impairment as a result of the injury; and
>
> (c) at the date this Part comes into force, is receiving or is entitled to receive compensation for permanent partial disability or permanent total disability as a result of the injury,
>
> the compensation awarded between March 23, 1990, and the date this Part comes into force is deemed to be and always to have been awarded in accordance with the former Act.
>
> **(2)** The Board shall recalculate the amount of compensation payable to the worker in accordance with Sections 34 to 58.
>
> **(3)** Where a recalculation made pursuant to subsection (2) entitles the worker to a greater award than the award the worker was receiving when this Part comes into force, the Board shall commence payment of the recalculated amount of compensation as of the latest of
>
> (a) the date on which the Board determines the worker has a permanent impairment, whether pursuant to Section 34 or the former Act;
>
> (b) the date on which the worker completes a rehabilitation program pursuant to Sections 112 and 113, where the worker is engaged in a rehabilitation program on or after the date the Board determines the worker has a permanent impairment pursuant to Section 34; or
>
> (c) November 26, 1992.
>
> **(4)** Where a recalculation made pursuant to subsection (2) entitles the worker to a smaller award than the award the worker was receiving when this Part comes into force, the Board
>
> (a) shall commence payment of the recalculated amount of compensation as of the date of recalculation; and

(b) shall not collect any amount as an overpayment from the worker in respect of the difference between the two awards.

(4A) For the purpose of clause (4)(a), the date of recalculation is deemed to be and always to have been February 1, 1996, regardless of when the recalculation is made.

(5) For greater certainty, nothing in this Section entitles any person to compensation for a period prior to November 26, 1992. (emphasis added)

[14] In April of 1997, this Court handed down its first decision interpreting s. 228 of the current **Act**. see: **Doward, supra**. **Doward** specifically addressed the question of what rules apply to persons entitled to, but not actually awarded, compensation for injuries during the window period. The Court held that these benefits were to be determined under the former **Act**. Chipman, J.A. said:

> Section 228 of the current **Act** applies specifically to transitional appeals such as the appellant's. It addresses the period of time between March 23, 1990 and February 1, 1996, the period during which the appellant was injured. I have accepted the Tribunal's conclusion that if she can establish a permanent injury, she is "entitled" within the meaning of s. 228(1)(c) of the current **Act**. What is deemed to be awarded in accordance with the former **Act** is "compensation awarded between March 23, 1990 and the date this part comes into force". What does this mean? This section is, in my opinion, difficult to interpret. The Tribunal stated:
>
> > Section 228(1) states that compensation awarded for the period prior to the proclamation of the current **Act** will be awarded in accordance with the former **Act** subject to the recalculation provisions in s. 228(3) and (4).
>
> .....
>
> The Board's position is that s. 228(1) is limited in application to those already awarded compensation prior to February 1, 1996. Such a position is inconsistent with the words "or is entitled to receive compensation" in s. 228(1)(c). If the Legislature had intended that s. 228 was restricted to those already awarded compensation, it could so easily have said so.
>
> Section 228 speaks of compensation awarded between March 23, 1990 and February 1, 1996. No compensation respecting permanent disability was awarded to the appellant in that time frame, and the question is whether s. 228 of the **Act** should be read to apply to compensation which should or could or would have been awarded during that time. On consideration, I interpret the expression to apply to compensation that could have been awarded to a worker injured during the period March 23, 1990 to February 1, 1996 by the Board during that window period. This view is reinforced by the provisions of the **Interpretation Act** and the presumptions against retroactivity and interference with vested rights: **Dreidger**, supra, p. 508, et seq. The Board heard the appellant's claim during the window

> period. In my opinion, s. 228 mandates the Tribunal to address what the hearing officer should have done, and since the hearing officer was dealing with the matter during the window period, the compensation should be awarded in accordance with the former **Act**.
>
> Subject to the recalculation provisions in s. 228 of the current **Act** such compensation must be continued on that basis after February 1, 1996.
>
> This view is further reinforced by a reading of s. 228(3) and (4). These deal with the effective times of increased and reduced compensation resulting from the recalculation process. Such times are not limited to times prior to February 1, 1996.
>
> I reject the Board's submission that if compensation is not actually awarded during this period, it is simply awarded in accordance with the current **Act** as if the claim arose out of an injury after February 1, 1996. (emphasis added)

[15] **Doward** thus placed persons entitled to receive (but not actually receiving) permanent disability benefits during the window period on the same footing for the purposes of s. 228 as persons who actually received such benefits during that time. Specifically, **Doward** held that the provision in s. 228(1) which deems the compensation awarded during the window period "... to be and always to have been awarded in accordance with the former **Act**" applies not only to persons receiving awards during that period, but also to persons entitled to receive compensation during that period. As Chipman, J.A. put it, s. 228 should be read to apply to compensation which could have been awarded during that time: see § 114.

[16] The fundamental question on this appeal, in my view, is how to implement the directive given by **Doward** in the award of compensation due to a worker who suffered an injury during the window period which caused a permanent partial disability but who did not actually receive such an award during that period. Before turning to that issue, it is necessary to set out the facts and procedural history of this case.

III. Facts and Procedural History:

[17] This appeal has come to the Court by a tortuous path. The issue now raised

in this case could and should have been raised much earlier in its procedural life. Now here for the second time, it is necessary to review all of the proceedings in this case leading to the first appeal (which I shall call **Ryan No. 1**) as well as to this one (**Ryan No. 2**).

Ryan No 1:

[18] Mr. Ryan suffered a series of injuries, the most recent of which occurred on August 12, 1992. He received Temporary Total Disability and Vocational Rehabilitation between August of 1992 and August of 1994 and then applied for permanent partial disability benefits. These were denied, the Hearing Officer deciding on June 2, 1995 that Mr. Ryan's permanent partial disability did not result from his work place injuries, but rather from either congenital defects or degenerative changes in his spine.

[19] Mr. Ryan appealed to the Tribunal but was caught up in the backlog of appeals and the changes to the **Act**. The Tribunal issued a preliminary transitional appeal decision on February 26, 1997 finding that Mr. Ryan was entitled to a permanent partial disability award resulting from the August 12, 1992 injury pursuant to s. 45 of the former **Act**.

[20] The Tribunal's decision predated this Court's judgment in **Doward** and the Tribunal assumed, in accordance with its own decisions, that the former **Act** was the correct statute to apply both to the review of the Hearing Officer's decision and for determining the merits of the case if required.

[21] The Tribunal found that the Hearing Officer had erred in the interpretation of the Permanent Medical Impairment Guidelines ("PMI Guidelines") relative to the spine. The submission made on behalf of Mr. Ryan and accepted by the Tribunal was that the

Hearing Officer failed to consider the spondylolisthesis section of the Guidelines when that was the diagnosis given with respect to Mr. Ryan's condition and failed to reconcile s. 9(2) of the former **Act** (i.e., the section dealing with apportioning compensation for injury due in part to employment and in part to other causes) with the section of the PMI Guidelines dealing with spondylolisthesis. Having found these errors, the Tribunal turned to make a determination of the merits of the appeal based on the former **Act**.

[22] As noted, the Tribunal also wrestled with what has now become the central issue in this appeal: How is the permanent partial disability award to be calculated for the period before the current **Act** came into force? In essence, the Tribunal held that:

1. Section 228 applied to this case. (This is not in dispute);

2. The words of s. 228(1) mean that where a worker was injured during the window period and was entitled to receive (although did not actually receive) compensation for permanent partial disability, the compensation is to be determined in accordance with the former **Act**;

3. In order to award compensation for the window period in accordance with the former **Act**, it is necessary to calculate the award according to s. 45 of the former **Act** as interpreted by this Court in **Hayden**, **(supra)**;

4. Accordingly, the benefit was to be determined by taking 75% of the difference between Mr. Ryan's average weekly earnings before his August 12, 1992 injury and his average weekly wage after August 2, 1994; (The date of August 2, 1994 was selected because that was

the date of the end of the Temporary Total Disability Benefits and Vocational Rehabilitation which Mr. Ryan received in relation to the August 12, 1992 injury.); and

5. For the purpose of calculating Mr. Ryan's permanent partial disability effective February 1, 1996, the benefit must be recalculated as required by s. 228(2).

[23] An independent medical opinion was ordered to permit the Tribunal to determine the percentage of disability to which Mr. Ryan was entitled as of February 1, 1996 and to determine the amount by which the award should be discounted as a result of his pre-existing condition.

[24] The Board applied for leave to appeal this transitional preliminary decision. The grounds raised included the applicability of the former **Act** and the interpretation of s. 228. This application was adjourned indefinitely at the request of the Board on April 24, 1997, the Board stating in its submission to the Court in relation to the adjournment that:

> "... the Board has sought to preserve its rights of appeal with respect to issues upon which a final decision has been made by the Tribunal in the form of a "Preliminary Decision". In this particular instance, however, the Board does not believe it is necessary to pursue the appeal until a final decision is rendered. An adjournment, it is submitted, it (sic) therefore warranted. (emphasis added)

[25] On October 15, 1997, the Tribunal rendered its "final" decision. The proceedings leading up to this point were summarized by the Tribunal in part as follows:

> I concluded that such calculation was to be made in accordance with s. 228(1) of the *Workers' Compensation Act* S.N.S., 1994-95, c. 10, [the "*Act*"]. I directed, that the Appellant's permanent partial disability award from August 2, 1994 to January 31, 1996 be calculated in accordance with s. 45 of the *Workers' Compensation Act*, R.S.N.S. 1989, c. 508, [the *"former Act"*] on a wage loss basis. I directed the calculation to be 75% of the difference between the average weekly earnings of the Appellant before his August 12, 1992 work accident and his average weekly

> wage after August 2, 1994.

[26] The Tribunal reviewed the new medical evidence and concluded that Mr. Ryan suffered a 15% work-related impairment disability and that an award should be discounted by 25% because of Mr. Ryan's pre-existing condition. Accordingly, the Tribunal directed as follows:

> The Appellant's permanent partial disability award resulting from his August 12, 1992 work-related accident is to be calculated by the Board in accordance with my Preliminary Transitional Appeal Decision on a wage loss formula. The award thus determined is to be discounted by 25% in keeping with this final Appeal Decision.
>
> The recalculation of the Appellant's permanent partial disability award is to be made in accordance with s. 228 of the *Act* as interpreted by the Nova Scotia Court of Appeal in *Doward, supra*, and Dr. Alexander's determination that the Appellant has a 15% work-related permanent partial disability along with my findings and conclusions above. (emphasis added)

[27] The Tribunal's final decision on October 15, 1997 came after the decision of the Court in **Doward, (supra)** (released April 18, 1997). In referring to **Doward**, the Tribunal stated:

> I have concluded in my Preliminary Transitional Appeal Decision, that s. 228 of the *Act* was applicable to the Appellant's appeal. The Appellant's remedies will be determined in accordance with the *former Act*. I find nothing in *Doward, supra*, alters or changes my Preliminary Transitional Appeal Decision in the applicable legislation in this case.

[28] Mr. Ryan, but not the Board, applied for leave to appeal the Tribunal's decision to this Court. The Board did not reactivate its earlier application for leave to appeal from the "Preliminary Decision"; it filed a factum opposing the granting of leave to Mr. Ryan to appeal the final decision. Leave was granted after an oral hearing on January 14, 1998 on ground (a) only set out in Mr. Ryan's application for leave which related solely to the effective date for the recalculation of his award. Ground (a) reads

as follows:

> "... that the Tribunal erred on a question of jurisdiction:
>
> > (a) in determining that pursuant to Section 228 of the current Act the effective date for the recalculation of the Appellant's permanent partial disability award was February 1, 1996."

[29] It is clear from this outline of the history of the case that the only issue for which leave to appeal was granted and, therefore, the only issue raised on the appeal in **Ryan No. 1** was the effective date for the recalculation of the appellant's permanent partial disability award. By this point, that is as of October of 1997, the Tribunal had ordered, in both its preliminary and its final decision, that the window period compensation was to be determined in accordance with s. 45 of the former **Act** as interpreted in **Hayden**, that is, on a wage loss basis. The Board's application for leave to appeal the Tribunal's preliminary decision was not pursued and it did not seek leave to appeal the Tribunal's "final" decision. These directives of the Tribunal were, therefore, unchallenged and binding.

[30] In the Board's factum filed on Mr. Ryan's appeal from the Tribunal's final decision, it agreed that the issue on appeal related solely to the effective date of recalculation. The factum said:

> **I S S U E S**
>
> 2. The WCB agrees that the issue in this appeal is as it has been set forth in the factum of the Appellant, that is,
>
> > *whether the Tribunal erred on a question of jurisdiction in determining that pursuant to section 228 of the current Act the effective date for the recalculation of the Appellant's permanent partial disability award was February 1, 1996.*

[31] The position of the Board on the appeal did not in any way challenge the Tribunal's decision that compensation for the window period was to be awarded

pursuant to the former **Act** on a wage loss basis. In its factum, the Board submitted as follows:

> 6. In summary, sub-subsections 228(1)(a) through (c) indicate that compensation is payable to workers:
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> - injured within the "window period";
> - who have already suffered a permanent impairment, and
> - who are entitled to compensation for a permanent disability.
>
> 7. For these workers, the compensation "awarded" in the window period is deemed to be in accordance with the former *Act*. Doward has clarified this particular clause of section 228 to mean that the compensation in this period is determined according to the former *Act*.
>
> 12. Within the window period, the compensation payable for the permanent disability is to be calculated in accordance with the former *Act*. This is clear from the wording in the last clause of subsection 228(1). (emphasis added)
>
> . . . . .
>
> 14. The combination of subsection 228(1) and subsection 228(2) indicates that compensation in the window period is determined in accordance with the former *Act*. Once the current *Act* comes into force, however, any further compensation is recalculated in accordance with the current *Act*. Since the recalculation would only become necessary upon the coming into force of the current *Act*, the recalculation requirement only became effective as of the date of the coming into force of the current *Act*, on February 1, 1996. (emphasis added)

[32] During oral argument in **Ryan No. 1** before this Court, counsel for the Board said as follows:

> .... The issue and the sole issue that arises in this case, I would submit, deals with the recalculation of benefits inasmuch as s. 228 tells us that compensation in the window period, so called in **Doward**, will continue as under the former *Act*, s. 228 also tells us that the compensation must be recalculated. The learned Appeal Commissioner below did just that - she awarded the benefits to the worker in accordance with the former *Act* for the window period. Then she recalculated the benefits for the time following the window period. (emphasis added)

[33] It is crystal clear that there was no misapprehension by the Board about what the Tribunal had ordered: compensation for the window period was to be determined on a wage loss basis pursuant to the former **Act**. The Board did not challenge these directions on appeal in **Ryan No. 1**.

[34] This Court gave judgment in the appeal in **Ryan No. 1 (Ryan v. Workers'**

Compensation Board (N.S.) (1998), 168 N.S.R. (2d) 141) on April 30, 1998. Addressing the only question before it, the Court, speaking through Roscoe, J.A., found that the recalculated amount would become payable as provided for in sections 228(3) and 228(4) at dates that would vary depending on whether the benefit payable under the current **Act** is larger or smaller than the amount as determined under the former **Act**. The decision was summarized by Roscoe, J.A. as follows:

> In this case the appellant's s. 45 award ordered by the Tribunal to be paid commencing August 2, 1994 must first be calculated by the Board and if it has not been paid, it should be. Then the recalculation in accordance with section 34 to 58 of the current **Act** must be carried out. The two awards have to be compared. If the former is larger, the lower amount should commence payment on the date the recalculation is performed. If the new **Act** award is larger, its commencement date is as of August 2, 1994.

[35] The Court remitted the case to the Board " ...to follow the directives of the Tribunal's decisions, subject to this decision respecting the date of commencement of the payment of the appellant's recalculated award."

[36] ***Ryan No 2:***

[37] Between the judgment of the Court and a decision by the Board on the remission of the case, further legislative change intervened. The 1999 amendments to the **Act** (An Act to Amend Chapter 10 of the Acts of 1994 - 95, the **Workers' Compensation Act**, S.N. 1999, c. 1, s. 28) added subsection 4A to section 228, deeming the date of recalculation referred to in s. 228(4)(a) "... to be and always to have been February 1, 1996, regardless of when the recalculation is made." This amendment was to have effect on and after February 6, 1995 and was assented to on April 16, 1999. Therefore, the result reached by the Court in **Ryan No. 1** under the previous version of s. 228 (4) was, in cases in which the current **Act** award is smaller than the former **Act** award, altered by a specific legislative amendment.

[38] The Hearing Officer before whom the matter came after remission to the Board following the decision in **Ryan No. 1** noted this legislative change and ruled that it confirmed the recalculation date applicable to Mr. Ryan as being February 1, 1996.

[39] As noted, the Board had been directed by the Tribunal to calculate Mr. Ryan's permanent partial disability award on a wage loss basis in accordance with its preliminary transitional appeal decision. This was specified to be on the basis of 75% of the difference between Mr. Ryan's average weekly earnings before his August 12, 1992 work accident and his average weekly earnings after August 2, 1994. This direction was not appealed and was not considered by this Court in the appeal of **Ryan No 1**. However, on remission, the Hearing Officer found that Mr. Ryan's award should be calculated entirely under the current **Act,** even though the directions from the Tribunal to the contrary, twice given, were not in any way affected by the appeal to this Court.

[40] The Hearing Officer opined that the judgment of this Court in **Workers Compensation Board (N.S.) v. Richard** (1999), 170 N.S.R. (2d) 270 (C.A.) held that in section 228 cases, the former **Act** applies only to the determination of entitlement but that the current **Act** and policies apply to the calculation of benefits. On the basis of this interpretation of **Richard**, implementation of the **Ryan** decision was suspended. The hearing officer said: " ... I accept that the decision in **Richard**, which followed the Court's decision in **Ryan**, is the definitive statement from the courts regarding the issue of recalculation ... ."

[41] Mr. Ryan appealed to the Tribunal again. In its decision, the Tribunal noted that the only action taken by the Board to implement the Court's decision had been to award Mr. Ryan a Permanent Impairment Benefit (PIB) pursuant to s. 34 of the current

Act commencing February 1, 1996. The Tribunal rejected the interpretation of **Richard** adopted by the Hearing Officer, noting that there was no language in **Richard** to the effect that entitlement is determined under the former **Act** but calculation under the current one. The Tribunal stated:

> ..... *Richard* has no impact on *Ryan*; it does not modify it in any way. *Richard*, rather, stands for the proposition that current *Act* policies apply to section 228 cases, where otherwise applicable, provided they do not take away a vested right. Section 228 makes explicit reference to the application of the former *Act* to the determination of compensation for the period March 23, 1990 to January 31, 1996. Section 45(1) of the former *Act* defines the nature of the benefit, including the formula for determining compensation (ie. calculation). To apply current *Act* policies in a way that utilizes a different formula to determine the quantum of the benefit is to take away a vested right which has been expressly preserved by section 228(1). To use a formula other than that set out in section 45 of the former *Act* is to act in a way that is contrary to *Richard*, not consistent with it. (emphasis added)

[42] With respect to the impact of the legislative amendment, the Tribunal stated:

> The Board argued that legislative amendments to the *Act* in April, 1999, confirmed that the appropriate date for recalculation is February 1, 1996. This conclusion is not wholly accurate. *Workers' Compensation Act*, S.N.S. 1999, c. 1, amended section 228, by adding section (4A) which states that the recalculation date referred to in section 228(4), is February 1, 1996. Thus, where the permanent partial disability benefit is greater than the compensation recalculated under the current *Act*, the current *Act* benefits are payable commencing February 1, 1996. In effect, the amendments to section 228 operate to amend only one line in the *Ryan* decision. As a practical matter, it is likely that the Appellant's current *Act* benefits are payable on February 1, 1996, because the formula used to determine compensation payable under the current *Act* will likely result in a lower amount paid than under section 45 of the former *Act*. However, the Board has not undertaken the steps outlined above.

[43] The Tribunal also noted that the only part of its preliminary and final decisions which had been challenged was the recalculation date and that all other aspects of those decisions stood unchallenged.

[44] The Tribunal then set out the steps that the Board must follow to determine Mr. Ryan's entitlement:

> 1. Calculate the Appellant's permanent partial disability benefit, from August 2, 1994 to January 31, 1996, in accordance with the formula set

out in section 45 of the *former Act* (75% of the difference between the Appellant's average weekly earnings before the August 12, 1994 accident, and his average weekly earnings after the accident) and discounted by 25% (under section 9(2) of the *former Act*). This benefit is payable until the date the current *Act* benefits are to commence, as set out below.

2. Calculate the Appellant's PIB, under section 34 of the *Act*, applying a 15% PMI and ensuring to discount it by 25% (under section 10(5) of the *Act*).
3. Determine the Appellant's entitlement to an EERB, under sections 37 to 50, of the *Act*, and calculate it.
4. Total the PIB and the EERB, if any.
5. Compare the PIB and EERB total with the permanent partial disability benefit.
6. If the PIB and EERB total is greater than the permanent partial disability benefit, then payment of the PIB and EERB commences August 2, 1994 (the date the Appellant's permanent impairment commenced).
7. If the permanent partial disability benefit is greater, (the more likely scenario, given the nature of the formulas to determine compensation), then the payment of the PIB and EERB commences on February 1, 1996.

[45] Pursuant to leave being granted with the consent of the parties, the Board now appeals.

IV. Grounds of Appeal:

[46] The grounds of appeal, as set out by the Board, are:

1. That the Workers' Compensation Appeals Tribunal of Nova Scotia erred, in its decision below, on a question of law and of its own jurisdiction, by holding that the *Workers' Compensation Act*, R.S.N.S. 1989, c. 35 as amended (the "former Act") applies to the determination of entitlement to benefits, as well as to the calculation of benefits.

2. That the Workers' Compensation Appeals Tribunal of Nova Scotia erred, in its decision below, on a question of law and of its own jurisdiction, by failing to correctly interpret and apply the decisions of this Honourable Court in **Ryan v. Workers' Compensation Board (NS)** (1998), 168 N.S.R. (2d) 141; and **Richard v. Workers' Compensation Board** (1999), 170 N.S.R. (2d) 270.

V. Analysis:

[47] The unhappy procedural history of this case underlines the importance of the Board either implementing rulings or challenging them promptly. It has done neither in this case. The integrity of any legal process depends on everyone involved following

lawful directives of those who have been entrusted with the authority to give them or promptly taking the steps required by law to challenge and set aside those directives. In my view, the failure of the Board to appeal the earlier ruling of the Tribunal in this case and the failure of a Hearing Officer to carry out the directives of the Tribunal were serious affronts to the integrity of the appeal process under the **Workers' Compensation Act**.

[48] Nonetheless, the issue now raised in this case is an important one for the operation of the workers' compensation system; we are advised that there are numerous other cases which will turn on the result of this one. Therefore, it is in the interests of justice to address the merits of the appeal notwithstanding the most unsatisfactory path it has followed to reach this point.

[49] In my view, both the Board and the worker have expressed the issue in this case too broadly. The Board's submissions ignore **Doward** while the worker gives that decision an unduly broad effect.

[50] The Board submits that any compensation to Mr. Ryan pursuant to s. 228 of the current **Act** should be calculated and paid based solely on sections 34-58 of the current **Act**. This precise position was specifically rejected by Chipman, J.A. in **Doward**. He stated:

> I reject the Board's submission that if compensation is not actually awarded during this [i.e. the window] period, it is simply awarded in accordance with the current **Act** as if the claim arose out of an injury after February 1, 1996. (I leave for another day the question of workers injured between March 23, 1990 and February 1, 1996 whose claims have not been heard by the Board in the window period). The Board's argument ignores the fact that s. 228 is a transitional provision in a group of sections which sets out specific treatment for workers

> injured before February 1, 1996. Section 228 speaks of the period between March 23, 1990 and February 1, 1996. It applies to those workers injured during that period, and at the very least to those whose claims were heard by the Board during that period.
>
> The question of permanent impairment should be determined on the basis of the law which was applicable during the window period of March 23, 1990 to February 1, 1996. This is dealt with in s. 228. The only modification is the recalculation process referred to in s. 228(2).

[51] The Board has not asked us to reconsider **Doward**, yet it advances once again in this appeal precisely the argument that was flatly rejected by a unanimous Court in that case. There are avenues open to the Board to challenge or reverse the effects of that decision. None has been pursued in this case. I reject the Board's broad argument.

[52] Next, the Board attempts to develop a distinction between entitlement to a benefit and its calculation. It submits that s. 228 preserves any entitlement to compensation which arose under the former **Act**, but that the calculation of such a benefit is to be done according to the current **Act**. This distinction between entitlement and calculation is argued to arise from this Court's decision in **Workers' Compensation Board (N.S.) v. Richard**, **supra**.

[53] I cannot accept this submission. **Richard** did not turn on a distinction between entitlement and calculation. The relevant issue in **Richard** was whether the Tribunal had erred in jurisdiction in deciding that policies of the Board made under the current **Act** do not apply to transitional cases under s. 228. The Court concluded, that "... current **Act** policies, which are otherwise lawful and applicable to s. 228 cases, must not be interpreted or applied so as to take away vested rights available to workers under

s. 228. There is no suggestion in the present case that the application of the policies would have that effect." (emphasis added) **Ryan No. 1** was not cited or discussed and there is not a word in the judgment about the effective date of recalculation or the basis of compensation to be awarded under the former **Act** for wage loss resulting from permanent partial disability. Moreover, the Tribunal had noted in that case that "[t]he actual degree of [Mr. Richard's] permanent medical impairment has no bearing on the wage loss award to which [he] is entitled pursuant to s. 45(1) of the former **Act**." No exception was taken by the Court to this statement; the decision addressed only the requirement that the Tribunal apply policies that are otherwise lawful and applicable. For these reasons, I cannot agree that **Richard** provides any guidance for the issue raised on this appeal.

[54] I, therefore, cannot accept the first argument advanced by the Board because it was considered and rejected by the Court in **Doward**. I cannot accept the second argument turning on the distinction between entitlement and calculation based on **Richard** because that case does not support such a distinction.

[55] The submission on behalf of Mr. Ryan is, in my view, overstated in the opposite direction. The submission, in essence, is that s. 228 preserves an entitlement to wage loss compensation determined in accordance with the **Hayden** decision. This submission turns on an interpretation of the deeming provision in s. 228 which, for reasons I will set out, I cannot accept.

[56] **Doward** addressed one aspect of this deeming provision. It held that compensation for window period injuries is to be determined according to the former **Act** so that current **Act** policies cannot take away rights which had become vested under the former **Act** absent clear statutory authority that they may have that effect.

Doward thus addressed the significance of the deeming provision for those whose entitlements arose during the window period but who did not actually receive awards. However, to determine how that entitlement under the former **Act** is to be implemented, it is necessary to consider the significance of the deeming provision for awards actually made during the window period.

[57] This aspect of the virtually identical deeming provision in s. 226 was considered by this Court in **Lowe v. Nova Scotia (Workers' Compensation Appeals Tribunal)** (1998), 166 N.S.R. (2d) 321 (March 17th, 1998). That section applies to permanent disabilities resulting from injuries before the **Hayden** decision (March 23, 1990). It contains, in s. 226(a), the same deeming provision as is found in s. 228(1), but s. 226(b) adds a provision "for greater clarity". The section reads as follows:

> **226** Where, before the date this Part comes into force, the Board has awarded compensation for permanent partial disability or permanent total disability pursuant to the former Act with respect to an injury occurring before March 23, 1990,
>
> (a) the compensation awarded is deemed to be and always to have been awarded in accordance with the former Act; and
>
> (b) for greater certainty, the amount of compensation is deemed to be and always to have been seventy-five per cent of the gross average weekly earnings of the worker before the accident multiplied by the permanent-impairment rating determined by the Board.

[58] Referring to sections 226 and 227, Roscoe, J.A., for the Court in **Lowe**, noted that they must be interpreted in the context of the chronology of events in relation to the **Hayden** decision that preceded their enactment; the purpose of the deeming provision in s. 226 is "to legitimize" these awards notwithstanding **Hayden**. She said:

> ..... The purpose of s. 226 is to legitimize those awards. They are first deemed to have been made in accordance with the former **Act**, that is, they were not, as the award made by the Board in **Hayden**, made contrary to the **Act**. Secondly, the awards are deemed to have always been 75% of the pre-accident earnings multiplied by the permanent impairment rating determined by the Board. The permanent impairment rating is the percentage of disability as determined by the Board in each case. The second "for greater certainty" subsection, is just that, inserted in case the first subsection was not clear. For example, if an award had been made that was 50% of the lost earnings, it is now deemed to have been 75%. There is no re-calculation or review of these awards provided for in s. 226. This section simply rectifies, ratifies and confirms those awards, and deems them to be lawful. It is clear that this section is intended to operate retroactively. (emphasis added)

[59] In **Lowe**, therefore, the deeming provision was held to legalize awards actually made in accordance with the Board's pre-**Hayden** approach to compensation. Although s. 228 does not have a provision comparable to the "for greater clarity" clause found in s. 226(b), the deeming provision itself in s. 228 has the same purpose. In my opinion, the absence of the "for greater clarity" provision does not take away from that intent; its absence may be explained by the fact that unlike the period prior to **Hayden** addressed by s. 226 when only one approach to determining the benefit was used, i.e., that set out in the "for greater clarity" section, in the window period addressed by s. 228, two approaches were used. In my view, the reasoning in **Lowe** on this aspect is applicable here. The deeming provision in s. 228 is intended not only to preserve entitlements to compensation that arose under the former **Act** during the window period but, in addition, to legitimize awards made according to the applicable policies of the Board during that period.

[60] I conclude, therefore, on the basis of **Doward** and **Lowe**, that the deeming provision in s. 228 has two effects. First, as held in **Doward**, it requires entitlement to compensation during the window period to be determined by reference to the former **Act**. Second, as held in **Lowe**, compensation awarded in accordance with the Board's policies relating to the calculation of benefits in place at the time are deemed to be and

to always have been lawful.

[61] The question raised on this appeal is not precisely addressed by either of these holdings. Here, the issue is how to determine the compensation to which Mr. Ryan became entitled, but did not actually receive, during the window period. This question was not resolved by **Ryan No. 1**. In that appeal, the only issue raised for decision was the effective date of recalculation. As I have shown by setting out the procedural history of the case, the comments of the Court in the judgment in **Ryan No. 1** in relation to s. 45 simply repeated the directions already given by the Tribunal and not challenged on appeal.

[62] **Doward** held that section 228 " ... mandates the Tribunal to address what the Hearing Officer should have done, and since the Hearing Officer was dealing with the matter during the window period, the compensation should be awarded in accordance with the former **Act**." It is clear, however, from the record that when the Board awarded compensation for earnings loss during the window period, the benefit was determined either as it had been prior to **Hayden** or pursuant to the Board's amended earnings loss policy. **Hayden** compensation existed only in theory; it was never in fact awarded.

[63] Section 228 of the current **Act** addressed that problem by deeming compensation awarded on account of permanent partial or total disability during the window period " ... <u>to be and always to have been awarded in accordance with the former **Act**</u>.": see section 228(1). It follows, in my view, that where the Board awarded s. 45 compensation in accordance with its policies in force during that window period, the effect of s. 228 is to deem the method of calculating that benefit to have been in accordance with the former **Act**. Thus, scores of awards of doubtful legality are clearly deemed by s. 228 to be lawful.

[64] But what of persons who were entitled to permanent disability benefits during that period, but did not actually receive them? Chipman, J.A. in **Doward** held that the deeming words in section 228(1) include "...compensation that could have been awarded to a worker injured ..." during that period : at §113. In other words, both the claims actually paid and claims for which entitlement arose during the window period are deemed to be awarded in accordance with the former **Act**.

[65] In my opinion, **Doward** stands for the proposition that the right to awards that would have been payable under the former **Act** is preserved by s. 228, subject to recalculation. This is what I have referred to as the first effect of the deeming provision in s. 228. The focus of the **Doward** decision, as noted in **Richard**, was the Court's concern that the current **Act** policies were being applied to deny Ms. Doward a type of compensation to which she would have been entitled under the former **Act**. Whereas there had been in her case no requirement for objective findings of impairment under the former **Act**, the current **Act** policies applied by the Tribunal "zero-rated" her injury because there were no "significant objective abnormalities on examination". While Chipman, J.A. did refer to the "mechanics of recalculation" (at § 119) and that in determining benefits under sections 43 and 45 of the former **Act**, "... the decision of this Court in **Hayden** ... must be kept in mind," I do not think that this passing reference can be taken as a decision that s. 228 preserved what **Hayden** said should be awarded rather than what was, in fact, awarded pursuant to the Board's policies under the former **Act**. Such an approach would, to my way of thinking, be inconsistent with the second effect of the deeming provision in s. 228. It clearly was intended to legitimize what had actually been done by the Board in determining the amount of s. 45 awards

notwithstanding **Hayden**.

[66] In my opinion, what is preserved under s. 228 is the right to compensation as the Board actually would have calculated it pursuant to its policies even though that method of calculation, in light of **Hayden**, did not comply with s. 45 of the former **Act**. Such awards are deemed by s. 228 to have been awarded in accordance with the former **Act**.

[67] Any other result would, in effect, turn the reasoning of **Doward** on its head. **Doward** held that the former **Act** applied to Ms. Doward's claim because the deeming provision in s. 228(1) applied not only to benefits actually paid during that period, but also "... at the very least to those workers [injured during the window period] whose claims were heard by the Board during that period." : §117. However, that same deeming provision legitimizes the method of calculation of such awards actually made by deeming them to have been awarded in accordance with the former **Act**. It surely must follow that awards that could have been made during that period must be on the same basis. In other words, one must have regard to what the Board would actually have done to determine the quantum of the benefit at the time had it considered the case prior to the new **Act** coming into force. Such awards are deemed lawful by s. 228. The premise of **Doward** is that the deeming provision applies both to awards actually made and entitlements to such awards arising during the window period. To be consistent with that premise, the legitimation arising from that same deeming provision must also apply to both situations.

[68] In my view, the deeming provision of s. 228 preserves entitlements to compensation arising under the former **Act** and legitimizes non-**Hayden** s. 45 awards paid or arising during the window period to the extent that they are calculated in the

manner actually employed by the Board at the relevant time. Section 228 preserves Mr. Ryan's rights to compensation that accrued during that period, but only to the compensation calculated as the Board actually did it pursuant to its policies during that time; that method of calculation is deemed to be in accordance with the former **Act**.

[69] I set out at paragraph 42 the steps formulated by the Tribunal to determine the window period award. As noted, the first step described by the Tribunal was to determine the appellant's permanent partial disability award from August 2, 1994 to January 31, 1996. In my view, for the reasons just set out, this calculation should be done pursuant to the policies of the Board in place at that time. As this period falls within the time the Board's amended earnings-loss policy was being applied, the calculation should be made pursuant to that policy. To the extent the Tribunal directed a different method of calculation at this first step, I am respectfully of the view that it erred. The rest of the steps set out by the Tribunal are correct. Of course, where it is obvious that the benefits as determined under the current **Act** are greater than what would have been paid under the Board's window period policies, it is not necessary to go through all these steps.

[70] No issue arises in this case concerning the duration of the award. Neither is this a case in which it is alleged that the Board's practices during the window period were unlawful for any reason other than that addressed by **Hayden**. Consequently, I do not intend anything I have said to address those issues.

[71] It follows that I would allow the appeal and set aside the decision of the Tribunal. In light of the tortuous history of this matter, I would direct counsel to submit to the panel a draft order allowing the appeal and setting out the amounts of compensation payable to Mr. Ryan along with appropriate dates of commencement, it being

understood, of course, that such amounts are subject to whatever review and variation as may be authorized by the applicable law. The order will be submitted within 30 days of today's date. In the event counsel cannot agree on the form of order, the panel may be spoken to.

Cromwell, J.A.

Concurred in:

Pugsley, J.A.

Flinn, J.A.