C.A. No. 132627

NOVA SCOTIA COURT OF APPEAL

Cite as: Doward v. Nova Scotia (Workers' Compensation Board), 1997 NSCA 71
Chipman, Jones and Bateman, JJ.A.

BETWEEN:	)	
	)	
LORRAINE DOWARD	)	D. William MacDonald
	)	and Anne S. Clark
Appellant	)	for the Appellant
	)	
- and -	)	
	)	
THE WORKERS' COMPENSATION APPEALS TRIBUNAL and THE WORKERS' COMPENSATION BOARD OF NOVA SCOTIA	)	Jonathan Davies for the Respondent, Worker's Compensation Appeals Tribunal
Respondents	)	
	)	David Farrar and John R. Ratchford for the Respondent, Workers' Compensation Board of Nova Scotia
	)	
	)	
	)	Appeal Heard: January 21, 1997
	)	
	)	
	)	Judgment Delivered: April 18, 1997

THE COURT: The appeal is allowed without costs and the matter is remitted to the Tribunal as per reasons for judgment of Chipman, J.A.; Jones and Bateman, JJ.A., concurring.

CHIPMAN, J.A.:

This appeal concerns the interpretation of the **Workers' Compensation Act**, Chapter 10 of the Acts of 1994-95 as amended (the current **Act**), **Workers' Compensation Act**, R.S.N.S. 1989, c. 509 as amended (the former **Act**), and regulations and policies

created under both of these statutes. It requires a review by this Court of the process by which the appellant's claim for workers' compensation has been adjudicated.

The parties hereto are the appellant, an injured worker, and the respondents, the Workers' Compensation Board of Nova Scotia (the Board) and the Nova Scotia Workers' Compensation Appeals Tribunal (the Tribunal).

In 1985, the appellant suffered injuries in a car accident, following which she was treated extensively for "mild myofascial pain syndrome" at the Pain Management Unit of the Victoria General Hospital from 1986 to 1989.

On March 23, 1990, this Court rendered its decision in **Hayden v. Workers' Compensation Appeal Board (N.S.) (No. 2)** (1990), 96 N.S.R. (2d) 108. The majority of the Court disapproved of the Workers' Compensation Appeal Board's formula for calculating a percentage award for permanent partial disability - the way the Board had been calculating it since the legislation was first enacted in 1911. The Court addressed ss. 36 and 38 of the former **Act** (now s. 43 and s. 45) which provided for permanent partial or permanent total disability pensions based on 75% of loss of earnings as a result of a compensable injury. If the worker had a 20% partial disability, the practice of the Board was to award 20% of the 75% of lost earnings. The Court held that this formula was improper, because it may be that a greater impairment of earning capacity resulted from a lower percentage of physical impairment or the converse might be true. Compensation was to be determined not on the basis of the percentage of physical impairment, but on the basis of loss of earnings resulting from that physical impairment.

At p. 116, Matthews, J.A., said:

> The proper test under s. 38(1) is that the Board must first determine if there is an injury which results in permanent partial disability . . . The Board must then determine if the disability is one which results in loss of wages or diminishes the worker's earning capacity. Compensable disability is a relative concept which occurs if the injury has adversely affected the worker's earning capacity. A worker is to be compensated when he or she has lost, in whole or in part, temporarily or permanently,

> capacity to earn by reason of personal injury caused by accident arising out of the course of employment.

During the period March 23, 1990 to February 1, 1996, the Workers' Compensation regime was in a state of transition as a result of the decision in **Hayden, supra**. By Chapter 35 of the Acts of 1992, amendments to the former **Act** gave the Minister of Labour a right to be heard in any court proceeding where "a question arises with respect to anything" in Part I of the **Act**, and reconstituted the Board and the Workers' Compensation Appeal Board. The Board, we are told, made all decisions regarding workers' compensation on the basis of an interim wage loss policy pending a complete revision of the legislation. We are told that **Hayden, supra**, created a situation with which the Board could not deal, and which required the enactment of the new legislative regime with transitional provisions and regulations designed specifically to deal with the backlog of cases which had built up.

Counsel for the Board advises this Court that no worker has ever received benefits in this Province under the former **Act** based on the interpretation given to the former **Act** by this Court in **Hayden, supra**.

Sections 225 - 237 of the current **Act** are transitional provisions which make reference to the former **Act** and the extent to which it continues to be applicable. Sections 227 - 229 deal specifically with what legislation applies and to what extent, depending on the time when a worker sustains an injury. A distinction is made between injuries sustained before and injuries sustained after March 23, 1990.

On November 22, 1990, the appellant, while in the course of her employment, fell and struck her head, sustaining injuries to her neck and right shoulder. She was laid off work on November 23, 1990 as a result.

In a report dated February 1, 1991, Dr. Margaret MacMurdo indicated that the appellant would be able to return to work on February 25, 1991. The Board awarded her temporary total disability benefits from November 23, 1990 until February 25, 1991.

The appellant was laid off from work again on June 30, 1991 and claims to be unable to return to work.

On February 11, 1994, a claims adjudicator of the Board determined that the appellant's claim would remain closed as her ongoing problems could not be attributed to the work related injury of November 22, 1990.

The appellant's file was reviewed by the Board's medical department respecting an assessment for permanent medical impairment. On June 20, 1994, the Administrator of Medical Services of the Board advised that there was no objective medical evidence to warrant a permanent medical impairment assessment.

On July 8, 1994, a review officer of the Board determined that there was insufficient medical evidence to warrant an award to the appellant for permanent partial disability.

On February 6, 1995, the current **Act** received royal assent, to come into force upon proclamation.

On May 23, 1995, regulations known as the Workers' Compensation Transitional Appeal Regulations were made pursuant to the former **Act**.

On June 15, 1995, a hearing officer heard an appeal by the appellant from the decision of the review officer.

The hearing officer stated the issue to be whether the appellant was entitled to a permanent medical impairment assessment to determine eligibility for a permanent partial disability award pursuant to s. 45(1) of the former **Act**.

By decision dated August 4, 1995, the hearing officer concluded:

> . . . All the doctors who have examined the worker concur with the diagnosis of myofascial pain syndrome. Furthermore, there has been no objective medical evidence to suggest that the worker is permanently partially disabled as a result of the work related injury. The medical evidence clearly supports a finding that the worker has developed myofascial pain syndrome, and as her soft tissue injuries have healed, I am unable to relate any ongoing impairment to her work related accident.

(emphasis added)

The appeal was dismissed by the hearing officer. Her decision was based on two conclusions reached in her reasons: (a) that myofascial pain syndrome is a non-compensable condition in this Province; and, (b) that with respect to soft tissue injuries of the lumbar spine, the Board's PMI Guidelines state that an award of 0% "will be made where there are ongoing subjective complaints with no significant objective abnormalities on examination".

On December 15, 1995, the decision of the hearing officer was appealed to the Tribunal which was constituted pursuant to s. 275(10) of the current **Act** proclaimed in force on June 1, 1995, and the Transitional Appeal Regulations. This appeal formed part of the appeal backlog which was defined in the Transitional Appeal Regulations as those appeals filed with the Worker's Compensation Appeal Board before the coming into force of the current **Act**.

On February 1, 1996, the current **Act**, with exceptions not here material, came into force. The former **Act** was repealed. The Transitional Appeal Regulations were also repealed.

On March 7, 1996, the Tribunal issued a notice of leave respecting the appellant's appeal.

On April 23, 1996, the Governor in Council made the Worker's Compensation Appeal Backlog Regulations pursuant to s. 236(1) of the current **Act**. These replaced the Transitional Appeal Regulations. As this is a backlog appeal it is governed by the Backlog Regulations. These state that their purpose is to assure that appeals filed under s. 174 of the former **Act** would be heard and decided by the Tribunal in accordance with the Transitional Appeal Regulations. Sections 238 - 258 of the current **Act** with the exception of s. 248 apply to such appeals. These are the sections contained in Part II of the current

Act dealing with the Tribunal and appeals from decisions of the Tribunal to this Court pursuant to s. 256.

On May 7, 1996, the Tribunal held a preliminary hearing of the appellant's appeal to address preliminary issues.

On May 21, 1996, the Tribunal held an oral hearing of the appellant's appeal. At the oral hearing, the Tribunal determined that the appellant's testimony should be restricted to a discrepancy in the hearing officer's statement of her testimony which the Tribunal discovered subsequent to the pre-trial conference. The Tribunal considered that the existence of the appellant's condition was not in dispute, but the legal issue of compensability for it was.

On October 4, 1996, the Tribunal filed a lengthy decision dismissing the appellant's appeal. At the outset, it observed that this was the first appeal decision rendered by the Tribunal, and there were issues of general application to all appeals to the Tribunal to be determined. These were difficult issues, involving the interpretation and applicability of the former **Act** and the current **Act**:

(i) Standard of review applicable to the Tribunal in reviewing the hearing officer's decision:

The Tribunal concluded that there was no global standard of review applicable to all grounds of appeal. The standard varied from a standard of correctness to one of patent unreasonableness depending upon the issue under appeal.

(ii) Is the former **Act** or the current **Act** applicable to this appeal?

The Tribunal concluded that the appeal should be adjudicated in accordance with the entitlement provisions for permanent benefits contained in the former **Act**.

(iii) Do the Functional Restoration Program Regulations (the FRP Regulations) limit the jurisdiction of the Tribunal to apply the former **Act** to the issue of the appellant's entitlement to permanent benefits?

The Tribunal found that the FRP Regulations did not apply to the adjudication of this appeal.

(iv) Was the hearing officer's decision beyond her powers?

The Tribunal found that the hearing officer erred in stating that the appellant's condition was not compensable. Although the former **Act** "is applicable" to the determination of the merits, the Tribunal must observe any current **Act** provisions which expressly or by necessary implication affect this task. Section 183 of the current **Act** provides that every policy adopted by the Board pursuant to its provisions is binding on the Tribunal.

The PMI Guidelines is the permanent impairment rating schedule attached to Policy 3.3.2 approved by the Board of Directors on September 15, 1995, effective February 1, 1996 by virtue of the current **Act**, and applicable to all decisions made on or after February 1, 1996. Applying that schedule to the appellant's case, she was not entitled to a permanent impairment benefit.

(v) Did the appeal raise a novel issue of law and general policy of significance in the general administration of the **Act**?

A novel issue of law was raised under the former **Act**, but not under the current **Act**. The appellant was precluded from permanent benefits because of the retroactive and binding nature of the PMI Guidelines found in Policy 3.3.2, the application of which is mandated by s. 183 of the current **Act** and Policy 3.3.1.

(vi) Was there a greater functional disability than that found by the hearing officer (s. 243(7)(e)(ii))?

The Tribunal found that it was not necessary to address this issue given its finding under issue no. (iv).

The Tribunal's decision concluded:

> The Panel finds that the Hearing Officer erred in deciding the chronic pain syndromes are not compensable in Nova Scotia.

> Further, the Panel finds that in certain circumstances chronic pain syndromes can result in both a physical impairment and economic loss, and that a traumatic incident such as a work place accident, can be both the factual and the legal cause of a chronic pain syndrome. However, the Panel is prevented from finding that the appellant is entitled to an assessment for a permanent medical impairment leading to an award of permanent benefits, in this case, as it is bound by section 183 of the Current Act and by Board Policies 3.3.1 and 3.3.2 which require that the Board's PMI Guidelines be applied in determining all questions of permanent medical impairment. In view of the definition of chronic pain syndromes which the Panel has adopted, the appellant's condition would not meet the "objective findings" criterion in the PMI Guidelines.
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> (emphasis added)

On October 31, 1996, the appellant and the Board, presumably acting under s. 17(1) of the Transitional Appeal Regulations secured from a judge of this Court in Chambers leave to appeal, and file a notice of contention from, the Tribunal's decision to this Court. The appellant filed her notice of appeal on that same day and the Board filed a notice of contention on that day and a notice of intention to participate on November 7, 1996.

THIS COURT'S POWER OF REVIEW:

At the argument of this appeal, both counsel for the appellant and the Board agreed that the right of appeal and the powers of this Court to review the Tribunal's decision are found in s. 256 of the current **Act**:

> 256 (1) Any participant in a final order, ruling or decision of the Appeals Tribunal may appeal to the Nova Scotia Court of Appeal on any question as to the jurisdiction of the Appeals Tribunal but on no other question of law or fact.
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> (2) No appeal shall be made pursuant to subsection (1) without leave of the Nova Scotia Court of Appeal.
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> (3) The Nova Scotia Court of Appeal shall not grant leave to appeal pursuant to this Section unless
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> (a) leave is applied for in accordance with the **Civil Procedure Rules** within thirty days

> of the receipt of written communication of the decision of the Appeals Tribunal; and
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> (b) all other avenues of appeal provided for in this Act have been exhausted.
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> (4) Any participant applying for leave to appeal pursuant to subsection (1) shall ensure that notice of the hearing of the application is given to
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> (a) the Board;
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> (b) the Appeals Tribunal; and
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> (c) all participants of record in the matter being appealed,
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> at least four clear days before the application is heard.
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> (5) Where leave to appeal has been granted, the participant to whom the leave has been granted shall commence the appeal by serving a notice of appeal on
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> (a) the Board;
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> (b) the Appeals Tribunal; and
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> (c) any other party to the appeal,
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> within ten days after the leave to appeal is granted.
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> (6) The notice of appeal served pursuant to subsection (5) shall contain
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> (a) the names of the parties to the appeal;
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> (b) the date of the decision appealed from; and
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> (c) any other particular the judge granting leave to appeal may require.

It will be seen that s. 256(2) which states the requirement for leave clearly specifies that it must be obtained from this Court and not from a judge thereof in Chambers. The reference in s. 256(6) to the "judge granting leave to appeal" is inconsistent with this requirement. I am of the view that s. 256(2) which sets out the requirement for leave

governs, and that leave must be obtained from the Court. **Rule** 62.30 governs the procedure for applications to the Court.

The parties appear to have erred in initially thinking that this appeal was governed by the Transitional Appeal Regulations which require leave of a judge of this Court in Chambers. Both counsel in effect acknowledged this to be the case in that they sought the leave of this panel as the requisite leave of the Court pursuant to s. 256(2). The Court reserved judgment on this point.

I would exercise the power to extend the time within which to seek leave to appeal and would grant leave **nunc pro tunc**, but only as to those specific issues which I consider necessary to address in resolving this appeal (**Judicature Act**, s. 50, **Civil Procedure Rule** 62.34). The Board and all participants of record in the matter appealed are before us, as well as the Appeals Tribunal whose counsel attended at the argument of this appeal and offered no objection to the request. Both the appellant and the Board formed the intention to appeal and file a notice of contention within the requisite time limit for seeking leave and leave was, in fact, sought by them in the wrong place. The proliferation of legislation and regulations, both current and former, which confronted counsel in addressing the numerous issues arising out of the lengthy history of this claim furnishes the explanation.

This Court was concerned about s. 176 of the **Act** and asked for and received submissions from the parties respecting it.

> 176 (1) Where, in a court in the Province, a question arises with respect to anything in this Part, the court shall not judge the question until after notice is served on the Board and the Minister in accordance with this Section.
>
> (2) Subject to subsection (3), the notice referred to in subsection (1) shall be served at least thirty days before the day of argument.
>
> (3) The court may, on an *ex parte* application made for the purpose, order an abridgement of the time for service of the notice referred to in subsection (2).

> (4) The notice referred to in subsection (1) shall state
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> (a) the action, cause, matter or proceeding in which the question arises or application is made;
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> (b) the provision in question;
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> (c) the day and place for the hearing of the question; and
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> (d) the particulars of the issue being argued.
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> (5) The Minister and the Board may appear and be heard in any action, cause, matter or proceeding to which subsection (1) applies.
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> (6) Where the Minister or the Board appear in an action, cause, matter or proceeding to which subsection (1) applies, the Minister or the Board are parties for the purpose of appeal from an adjudication in the action, cause, matter or proceeding.

I am of the opinion that s. 256 is a specific provision stating the parties to an appeal to this Court from the Tribunal. Section 176 is a provision external to the appeal process which appears to be aimed at cases where the interpretation of Part I of the current **Act** comes up incidently in the course of litigation. In my opinion, s. 176 does not apply to this appeal.

The scope of this Court's power on appeal is akin to a power of review. We are confined to determining whether the Tribunal exceeded its jurisdiction. We cannot canvass any other question of law or fact.

In my opinion, the approach we must take is found in the following passage from the decision of Beetz, J. speaking for the Supreme Court of Canada in **U.E.S., Local 298 v. Bibeault**, [1988] 2 S.C.R. 1048 at p. 1086.

> It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:

> 1. if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
>
> 2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.

This test has been subsequently discussed and applied on a number of occasions.

As I shall show, the current **Act** provides (in addition to an appeal to this Court pursuant to s. 183(8) and a stated case to this Court pursuant to s. 206) for a unique two-tiered appellate procedure beyond the appeal to the hearing officer. First, there is an appeal to the Tribunal from the hearing officer, with leave, and then there is a limited appeal on a jurisdictional question to this Court. As I shall show, the power of the Tribunal on appeal from the hearing officer is broad, akin to an appeal from a trial judge to an appeal court.

On the limited appeal from the Tribunal to this Court, a jurisdictional error appears if the Tribunal incorrectly interprets provisions of the current **Act** limiting its appellate jurisdiction. A jurisdictional error also appears if the Tribunal errs in a patently unreasonable manner in resolving a question of law within its jurisdiction.

The appeal and cross-appeal raise a number of issues. As I have concluded that the matter must be remitted to the Tribunal, it is only necessary to deal with some of them.

1. Did the Tribunal err in denying the appellant a fair hearing?

In conducting the hearing, the Tribunal was acting within its jurisdiction. The appellant has the burden of showing that the Tribunal acted in a patently unreasonable manner unless it made an error in construing provisions of the **Act** defining its powers.

The appellant wished to testify before the Tribunal respecting her injury and consequent disability. The Tribunal decided to hold an oral hearing for the purpose only of resolving legal issues. It considered that it was not necessary to receive testimony from the appellant in order to adjudicate the appeal, except for the discrepancy to which I have referred.

The Tribunal received the **viva voce** evidence of Dr. T. J. Murray and Krista Connell. Dr. Murray testified generally with respect to chronic pain, fibromyalgia and myofascial pain syndrome. He testified with respect to the FRP Regulations made by the Governor in Council on March 26, 1996. Ms. Connell testified respecting the Regulations.

The appellant contends that in denying her the opportunity to testify, the Tribunal erred in jurisdiction in denying her a fair hearing and otherwise in contravening the rules of natural justice. The appellant makes reference to the well-known principle that a Tribunal must hear both sides to a dispute. The appellant also refers to s. 246 of the **Act**:

> 246 (1) The Appeals Tribunal shall decide an appeal according to the provisions of this Act, the regulations and the policies of the Board, and
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> (a) documentary evidence previously submitted to or collected by the Board;
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> (b) subject to Section 251, any additional evidence the participants present;
>
> (c) the decision under appeal;
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> (d) the submissions of the participants; and
>
> (e) any other evidence the Appeals Tribunal may request or obtain.
>
> (emphasis added)

The appellant's contention is that s. 246(1)(b) requires the Tribunal to hear any additional evidence the participants choose to present (s. 251 permits the Tribunal to refer the matter to a hearing officer for reconsideration). This section, it is said, gives the participants the right to present evidence. The Board submits that the section must be read in the light of ss. 240(1) and 245(2):

> 240 (1) The Appeals Tribunal shall determine its own procedures and may make rules governing the making and hearing of appeals.
>
> 245 (2) The presiding appeal commissioner may hold an oral hearing where requested, in writing, by any participant in the appeal.
>
> (emphasis added)

No rules respecting appeals made by the Tribunal have been placed before us.

The Board points out that the Tribunal chose in this appeal to determine its own procedure by way of holding an oral hearing respecting issues of law. The oral testimony that it did hear did not relate to the factual basis of the appellant's claim but to the FRP Regulations. It says that as an appeal tribunal with the power to regulate its own procedure, it was not required to hear **viva voce** evidence. Section 246 merely mandates that it consider such evidence if it chooses to hear it. It must be read with s. 245(2) which gives the Tribunal an overall discretion not to hold any oral hearing at all.

The grounds upon which an appeal may be asserted to the Tribunal are provided for in s. 243(7) of the current **Act**:

> 243 (7) Subject to subsection 183(7), the Chief Appeal Commissioner may grant leave to appeal if the Chief Appeal Commissioner is satisfied it is fairly arguable that
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> (a) the decision of the hearing officer depends on an error of law on the face of the record;

> (b) there has been a failure to comply with Section 197 or a denial of natural justice by the hearing officer;
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> (c) the hearing officer's decision is beyond the powers of the hearing officer;
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> (d) the appeal raises a novel issue of law and general policy of significance in the general administration of the Act; or
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> (e) the hearing officer erred in granting or denying a benefit or right pursuant to this Act and the error was based on, but not limited to, the fact that
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> > (i) the medical opinion upon which compensation was given or refused was erroneous or incomplete,
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> > (ii) a greater functional disability exists than that found by the hearing officer, or
> >
> > (iii) a continuance of compensation beyond the period allowed by the hearing officer is required.

The appellant says that her interpretation of s. 246(1) is supported because a permitted ground of appeal included, by s. 7(e)(ii), error based on, but not limited to, the fact that there was a greater functional disability than found by the hearing officer.

Although there is some difficulty presented in the interpretation of these sections, I am of the opinion that, at the very least, if the presiding appeal commissioner exercises the discretion under s. 245(2) to hold an oral hearing, s. 246(1) operates to require the Tribunal to receive the evidence that "the participants present". This was an oral hearing. The appellant asked to present evidence. The Tribunal erred in not receiving it. This conclusion is reinforced by a comparison between the discretion given to the Tribunal under s. 246(1)(e) with its duty under s. 246(1)(b). If the participants present any additional evidence, the Tribunal "shall decide an appeal according to" **inter alia**, that evidence.

I conclude that here the Tribunal erred in construing s. 246(1). It should have permitted the appellant to testify. It thus erred in jurisdiction.

2. Did the Tribunal err in determining its standard of review on appeal?

Because this issue concerns the legislative provisions limiting the Tribunal's powers of review, a mere error in the interpretation of those provisions would cause it to lose jurisdiction.

In approaching its function on appeal from a decision of the hearing officer, the Tribunal viewed its standard of review in terms of a sliding scale. It stated:

> It is the decision of the Tribunal that the correctness test should be applied to issues which are found by the Tribunal to be jurisdiction - limiting in nature, while the less strict patently unreasonable test should be applied to matters which the Legislature intended the Hearing Officer to determine.

The Tribunal, in addressing the appellant's position under s. 243(7)(e)(ii), concluded that s. 24 of the former **Act** was relevant:

> 24 Notwithstanding anything in this Act, on any application for compensation an applicant shall be entitled to the benefit of the doubt, which shall mean that it shall not be necessary for the applicant to adduce conclusive proof of his right to the compensation applied for, but that the Board shall be entitled to draw and shall draw from all the circumstances of the case, the evidence and medical opinions, all reasonable inferences in favour of the applicant.

The Tribunal said:

> The Panel is also of the view that it is the function of the Tribunal to review the Hearing Officer's exercise of jurisdiction, not to substitute its view of the evidence for that of the trier of fact. Thus, should the Tribunal have found that the Hearing Officer must be correct in determining whether an inference is a reasonable one it would, as a matter of practice, substitute its view of the evidence and the weight to be given it. The Tribunal would then become the trier of fact, thereby obviating the role of the Hearing Officer and effectively eliminating the final appeal level within the workers' compensation system. It is the opinion of the Panel that such could not have been the intention of the Legislature in enacting the Current Act.

. . .

> In view of these considerations and the purpose of the Legislation, generally, the Panel sees the interpretation and application of s. 24 as a matter suggestive of the exercise of curial deference on the part of the Tribunal. As such, the Tribunal would apply the patently unreasonable standard to the decision of the Hearing Officer, on the issue under s. 243(7)(e)(ii) concerning the weight given to the evidence by the Hearing Officer.

The Tribunal referred to a number of decisions in which superior courts considered the appropriate standard of review applicable to the decisions of administrative tribunals. The appellant contends that the issue here is different. The issue is the correct standard of review to be applied by the Tribunal in reviewing decisions of the Board pursuant to s. 243(7) of the current **Act**. The appellant submits that as a reviewing body, the Tribunal has the ability to substitute its opinion for that of the hearing officer, as the hearing officer has no greater expertise than the Tribunal on the issues in question. In short, the appellant's position is that the Tribunal is more like that of a hearing officer than an appeal court or a court exercising the power of judicial review. The grounds of appeal set out in s. 243(7) of the current **Act** encompass a broad range of issues which include errors of law, denial of natural justice, jurisdiction, novel issues of law and fact and errors by the hearing officer. It is said that the use of the words "but not limited to" in s. 243(7)(e) shows an intention on the part of the Legislature to expand the list of decisions of the Board which may be reviewed by the Tribunal under the appeal process.

Did the Tribunal err in applying the patently unreasonable standard of review to the decision of the hearing officer on the issue under s. 243(7)(e)(ii) concerning the weight given to the evidence by the hearing officer?

In **Pezim v. British Columbia**, [1994] 2. S.C.R. 557, Iacobucci, J. said at p. 590:

> Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of

> reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal . . .
>
> At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the Tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the Tribunal and where the Tribunal has no greater expertise than the court on the issue in question, as for example in the area of human rights . . .

The scope of judicial review on a statutory appeal from the decision of a tribunal has been reviewed by the Supreme Court of Canada again in **Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.**, as yet unreported, [1996] S.C.J. No. 116 No. 116.

In determining what is the appropriate standard of review, it is necessary to examine the powers of the hearing officer and the Tribunal under the current **Act**, keeping in mind the grounds of appeal permitted by s. 243(7).

Section 197(4) of the current **Act** provides that in a proceeding before the hearing officer, the participants include the worker, the employer and any other interested party. Section 245(1) of the current **Act** provides that in proceedings before the Tribunal, the participants are the same, plus the Board.

Procedure on an appeal to the hearing officer is dealt with by s. 197(5):

> The hearing officer to whom an appeal pursuant to this section has been referred may hold an oral hearing where requested, in writing, by any participant in the appeal.

Procedure on an appeal to the Tribunal is dealt with by s. 245(2):

> The presiding appeal commissioner may hold an oral hearing where requested, in writing, by any participant in the appeal.

Section 198(1) outlines the duty of the hearing officer in reaching a decision:

> 198 (1) A hearing officer shall decide the appeal according to the provisions of this Part, the regulations and the policies of the Board, and
>
> (a) documentary evidence previously submitted to or collected by the Board;
>
> (b) any additional evidence the participants present;
>
> (c) the decision under appeal;
>
> (d) the submissions of the participants; and
>
> (e) any other evidence the hearing officer may request or obtain.

These duties are virtually identical to those of the Tribunal under s. 246(1) previously set out.

Participants before both the hearing officer and the Tribunal are entitled to have representation (s. 197(6), s. 245(3)).

The hearing officer may refer matters to either the Board of Directors of the Board (established by s. 151 of the current **Act**) or the Tribunal; the Tribunal may refer matters to the Board of Directors. Both the hearing officer and the Tribunal have the discretion to hold oral hearings or a paper review. Both may solicit or hear evidence pursuant to the powers in the current **Act** which I have set out.

I agree with counsel for the appellant that a comparison between the provisions governing a hearing before a hearing officer and those governing a hearing before the Tribunal shows that each has a similar method of operation, must consider similar matters in reaching a decision and has similar discretions which may be exercised.

The Board submits that s. 185 constitutes a privative clause:

> 185 (1) Subject to the rights of appeal provided in this Act, the Board has exclusive jurisdiction to inquire into, hear and determine all questions of fact and law arising pursuant to this Part, and any decision, order or ruling of the

> Board on the question is final and conclusive and is not subject to appeal, review or challenge in any court.
>
> (2) Notwithstanding subsection (1) but subject to Sections 71 to 73, the Board may
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> (a) reconsider any decision, order or ruling made by it; and
>
> (b) confirm, vary or reverse the decision, order or ruling.

This section was probably inserted in the **Act** to prevent **certiorari** applications. It is subject to the right of appeal to a hearing officer and thence to the Tribunal as provided in the **Act**. It affords the Board no protection where an appeal lies on any of the grounds permitted under s. 243(7) which, by necessary implication, gives jurisdiction to the Tribunal with respect to the matters therein mentioned.

The Tribunal also considered that s. 150 of the former **Act** might be substantive in nature and therefore survive the repeal of that **Act** in light of s. 23(1) of the **Interpretation Act**. Section 150 of the former **Act** protected decisions of the Board prior to February 1, 1996. That section, however, was also subject to a statutory appeal to the Workers' Compensation Appeal Board. It is also subject to the statutory appeal to the Tribunal which was available to the appellant in a transitional appeal. Like s. 185 of the current **Act**, it does not insulate the Board respecting any of the issues which may form the subject of an appeal from a decision of the Board.

There is no reason to think that the Tribunal is any less expert generally in matters relating to workers' compensation that fall within s. 243(7) than the hearing officer. The Tribunal appeared to think otherwise in the discussion at p. 16 of its decision, but when carefully examined, the only support for its position is found in cases where the hearing officer heard evidence and the Tribunal did not. The Tribunal must, in such cases, afford the usual appellate deference to a trier of fact.

Support for this approach can be found in the very wide scope of review of a hearing officer's decision given to the Tribunal by s. 243(7)(e). This suggests that the Legislature intended the Tribunal to be able to substitute its judgment for that of the hearing officer in the instances where an appeal lies. The deference that courts owe to specialized tribunals as discussed in **Pezim, supra**, and **Southam, supra**, is not owed to the same extent by the Tribunal. In **Southam, supra**, Iacobucci, J. said paragraph 32:

> That Parliament granted such a broad, even unfettered right of appeal, as if from a judgment of a trial court, perhaps counsels a less-than-deferential posture for appellate courts than would be appropriate if a privative clause were present. However, as this Court has noted several times recently, the absence of a privative clause does not settle the question. See Pezim, supra, at p. 591; Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722, at p. 1746.

In paragraph 47 **et seq**, Iacobucci, J. considered the nature of an appeal under the **Competition Act** from a decision of the Competition Tribunal. At paragraph 54, he concluded where, in the spectrum, deference was owed by the court in such a statutory appeal:

> In my view, considering all of the factors I have canvassed, what is dictated is a standard more deferential than correctness but less deferential than "not patently unreasonable". Several considerations counsel deference: the fact that the dispute is over a question of mixed law and fact; the fact that the purpose of the Competition Act is broadly economic, and so is better served by the exercise of economic judgment; and the fact that the application of principles of competition law falls squarely within the area of the Tribunal's expertise. Other considerations counsel a more exacting form of review: the existence of an unfettered statutory right of appeal from decisions of the Tribunal and the presence of judges on the Tribunal. Because there are indications both ways, the proper standard of review falls somewhere between the ends of the spectrum. Because the expertise of the Tribunal, which is the most important consideration, suggests deference, a posture more deferential than exacting is warranted.

In my view, considering all the circumstances, I have concluded that less deference is owed by the Tribunal to a hearing officer under the appeal regime spelled out in s. 243(7) of the current **Act**.

By their very nature, decisions tested under s. 243(7)(a), (b), (c) and (d) are subject to review by the Tribunal for correctness. Under s. 243(7)(e), the Tribunal is given power to exercise an independent judgment in areas where the hearing officer has made findings. There is no apparent difference in the degree of expertise between the hearing officer and the Tribunal, as was the case between the Competition Tribunal and the court in **Southam, supra**.

An appeal to the Tribunal is a statutory appeal. I have concluded that if a case qualifies for appellate review under s. 243(7), the deference that the Tribunal must show is only with respect to the advantages the hearing officer may have in the fact finding process in any particular case.

In the context of this appeal, I am of the opinion that the Tribunal erred in concluding that any decision of the hearing officer on an issue under s. 243(7)(e)(ii) was subject to review only on the basis of the "patently unreasonable" standard.

3. To what extent was the appellant's appeal governed by provisions of the current Act and the policies made by the Board pursuant to it?

In interpreting the current **Act** in the course of deciding appeals, the Tribunal is acting within its jurisdiction and its decisions must be tested by the patently unreasonable standard. **Bibeault, supra**, p. 1086.

In **PSAC No. 2,** [1993] 1 S.C.R. 941, Cory J., for the majority discussed the supervisory role of the courts in reviewing decisions of administrative Tribunals. After reviewing **Bibeault, supra; PSAC No. 1,** [1991] 1 S.C.R. 614; **Bell Canada**, [1989] 1 S.C.R. 1722 and other cases, he stated at p. 961:

> In summary, the courts have an important role to play in reviewing the decisions of specialized administrative tribunals. Indeed, judicial review has a constitutional foundation. See *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220. In undertaking the review courts must ensure first that the board has acted within its jurisdiction by following the rules of procedural fairness, second, that it acted within the bounds of the jurisdiction conferred upon it by its empowering statute, and third, that the decision it reached when acting within its jurisdiction was not patently unreasonable. On the last issue, courts should accord substantial deference to administrative tribunals, particularly when composed of experts operating in a sensitive area.

In the matter of the interpretation of the transitional provisions of the current **Act** and the application of the principles of statutory interpretation, the Tribunal is not acting as experts in a sensitive area with which this Court is not familiar. It is no more expert than this Court. Therefore a less substantial degree of curial deference is called for.

The appellant was injured on November 22, 1990. At that time, the former **Act** was in force. By the time the appellant appealed from the decision of the hearing officer, the Tribunal was then the only body to which she could appeal. We must determine what laws governed the Tribunal in the adjudication of the appeal. I repeat a portion of s. 246(1) of the current **Act**:

> 246 (1) The Appeals Tribunal <u>shall decide an appeal according to the provisions of this Act,</u> the regulations and the policies of the Board, and
>
> . . .
>
> (emphasis added)

The "provisions" of the current **Act** include the transitional provisions.

Section 226 deals with cases where a worker was injured before March 23, 1990 and has already been awarded compensation by the Board for permanent partial or

permanent total disability under the former **Act**. Such compensation is deemed always to have been awarded under the former **Act**.

Section 227 deals with cases where a worker was injured before March 23, 1990, and at the date Part I of the current **Act** comes into force, is receiving or entitled to receive compensation for permanent partial disability or permanent total disability as a result of the injury. There are no provisions for recalculation.

Section 229 deals with cases where a worker suffered an injury before the date the current **Act** came into force and was receiving or was entitled to receive compensation for temporary total disability under s. 37 of the former **Act** or temporary partial disability under s. 38 of the former **Act**. In such cases, compensation is recalculated in accordance with ss. 37 to 49 of the current **Act**.

The transitional provision which is central to this appeal is s. 228:

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

With respect to November 26, 1992, referred to in s.s. (5), we are told by counsel for the Board that it was an arbitrary cut-off date chosen for the purpose of the recalculation of benefits.

The appellant was injured after March 21, 1990, and "before this Part comes into force" (February 1, 1996).

Did the appellant suffer "a permanent impairment as a result of the injury"? That is not for this Court to decide. It is for the Board. Subject to appeal to this Court, the Tribunal's function is to determine what legislation governs the Board in reaching its conclusions. What is the legislation? Did the Tribunal exceed its jurisdiction in deciding in a patently unreasonable manner what it was?

I will now outline how the Tribunal addressed this issue.

Dr. MacMurdo had outlined the symptoms suffered by the appellant following her work related injury. The diagnosis was myofascial pain syndrome. Dr. Murray testified before the Tribunal respecting chronic pain. The Tribunal in its decision referred to his statement that the suffering associated with chronic pain could limit the ability to work and could be disabling. Dr. Murray acknowledged that if a person had been suffering from chronic pain for a period of five years and had not returned to work there was a very small chance of being able to do so in the future. The Tribunal accepted that there was no requirement for objective findings of impairment anywhere under the former **Act**. For this reason the hearing officer was wrong in concluding that chronic pain syndromes could not support a claim for compensation on the basis of the law which existed at the time of her decision.

However, the Tribunal found that s. 183 of the current **Act** contained express and unambiguous statements of the intention of the Legislature that written policies of the Board could bind the Tribunal and that they could be retrospective in application. I shall refer to s. 183 later.

The Tribunal then referred to policies 3.3.1 and 3.3.2 of the Board which became effective February 1, 1996. These contained the PMI Guidelines which, **inter alia**, provided with respect to soft tissue injuries of the cervical spine:

(1)	Ongoing subjective complaints with no significant objective abnormalities on examination.	0%
(2)	Same as (1), but with persistent spasm and other objective abnormalities on examination.	0 - 10%
(3)	Same as (2), but with gross degenerative changes on x-ray. Awards here are generally under s. 10(5) with only a portion of the total amount granted.	5 - 20%

The Tribunal considered that the appellant's situation fell within the first guideline and for this reason the appellant was not entitled to compensation.

In my opinion, the Tribunal erred in a patently unreasonable manner in this approach to the appellant's claim.

We must examine the Tribunal's interpretation of the provisions of ss. 183, 228 and 246 of the legislation and regulations referred to therein. In the interpretation of this legislation and regulations ss. 6(1) and 23(1) of the **Interpretation Act** governs in the absence of a specific transitional provision (Dreidger on the **Construction of Statutes**, Third Edition, 1994, pp. 526, 539).

> 6 (1) Except where a contrary intention appears, every provision of this Act applies to this Act and to every enactment made at the time, before or after this Act comes into force.
>
> 23 (1) Where an enactment is repealed, the repeal does not
>
> . . .
>
> (b) affect the previous operation of the enactment so repealed or anything duly done or suffered under it;
>
> (c) affect a right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment;
>
> . . .
>
> (e) affect an investigation, legal proceeding or remedy concerning any right, privilege, obligation, liability, penalty, forfeiture or punishment acquired or incurred under the enactment.

The Tribunal specifically addressed the issue whether the former **Act** or the current **Act** was applicable to its adjudication of the appellant's appeal. After referring to ss. 246(1) and 228(1), the Tribunal referred to the presumption against retroactive application of legislation and the presumption against interference with vested rights.

The Tribunal concluded that the presumption against interference with vested rights was not "rebutted by" the current **Act**. Therefore the **Interpretation Act** (s. 23) was

applicable and gave the Tribunal the authority to adjudicate the appeal in accordance with the entitlement provisions for permanent benefits contained in the former **Act**.

Section 9(1) of the former **Act** provides:

> 9 (1) Where, in any industry to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, compensation as hereinafter provided shall be paid to such worker, or his dependents . . .

The Tribunal had in mind the difference between s. 24 of the former **Act** and s. 187 of the current **Act**. I repeat s. 24 of the former **Act**.

> 24 Notwithstanding anything in this Act, on any application for compensation an applicant shall be entitled to the benefit of the doubt, which shall mean that it shall not be necessary for the applicant to adduce conclusive proof of his right to the compensation applied for, but that the Board shall be entitled to draw and shall draw from all the circumstances of the case, the evidence and medical opinions, all reasonable inferences in favour of the applicant.

Section 187 of the current **Act** reads:

> 187 Notwithstanding anything contained in this Act, on any application for compensation an applicant is entitled to the benefit of the doubt which means that, where there is doubt on an issue respecting the application and the disputed possibilities are evenly balanced, the issue shall be resolved in the worker's favour.

Section 187 of the current **Act** may or may not impose a higher burden on a worker to establish compensation than does s. 24 of the former **Act**. It is not necessary here to engage in an exercise of determining the extent of the difference between the two sections. This will be determined as and if necessary in individual cases dealt with by the Board and the Tribunal under the current **Act**. Here the Tribunal has clearly stated that s. 24 of the former **Act** governs and I agree. Generally, I consider that the reasoning of the Tribunal, pp. 29 - 34, which supports the conclusion that the appellant falls within s. 228(1)(c) is not patently unreasonable.

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).

This section does not speak of compensation awarded <u>for the period</u> between March 23, 1990 and the date Part I came into force.

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 <u>between</u> 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. (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).

I will refer to the mechanics of recalculation again.

Section 43 of the former **Act** deals with compensation for <u>permanent total</u> disability. The weekly payment during the life of the worker is equal to 75% of the worker's

average weekly earnings during the previous twelve months with a minimum payment. Under s. 45, compensation for permanent partial disability is a weekly payment during the life of the worker of 75% of the difference between the average weekly earnings of the worker before the accident, and the average amount he is earning or able to earn in some suitable employment or business after the accident. In applying these sections, the decision of this Court in **Hayden, supra**, must be kept in mind.

We were not provided with any evidence of policies or regulations or guidelines under the former **Act** which would limit compensation for permanent disability where there were no objective symptoms.

The Tribunal found that the hearing officer erred in law in deciding that chronic pain syndromes were not compensable. However, it found that the appellant was not entitled to an assessment for permanent medical impairment because the Tribunal was bound by s. 183 of the current **Act** and the Board's policies 3.3.1 and 3.3.2 requiring the Board's PMI Guidelines to be applied in determining all questions with permanent medical impairment. Section 183 of the **Act** provides:

> 183 (1) For the purpose of this Act, "policy" means a written statement of policy adopted by the Board of Directors and designated by the Board of Directors in writing as a statement of policy, and "policies" has a like meaning.
>
> (2) The Board of Directors may adopt policies consistent with this Part and the regulations to be followed in the application of this Part or the regulations.
>
> (3) The Board of Directors may invite submissions from interested parties before adopting a policy pursuant to this Section.
>
> (4) Every policy adopted by the Board of Directors pursuant to subsection (2) shall be available to the public.
>
> (5) Until a different policy is adopted, every policy adopted by the Board of Directors pursuant to subsection (2) is binding on the Board itself, the Chair, every officer and employee of the Board and on the Appeals Tribunal.

> (6) Any policy adopted by the Board of Directors may be retrospective or prospective in application and may be made retroactive to any date designated by the Board of Directors.
>
> (7) The Chair, every officer and employee of the Board and the Appeals Tribunal may, in the performance of functions under this Part, interpret the policies, but it is not within the jurisdiction of any of them to refuse to apply a policy on the ground that it is inconsistent with this Act or the regulations.
>
> (8) Any participant may appeal a final order of a hearing officer made pursuant to Section 197 to the Nova Scotia Court of Appeal on the ground that a policy upon which the decision of the hearing officer depends is not consistent with this Act or the regulations but there shall not be an appeal on any other question of law or fact.
>
> (9) Subsections 256(2) to (6) apply **mutatis mutandis** to appeals under subsection (7), provided however, it shall not be necessary to provide notice to the Chief Appeal Commissioner.
>
> (emphasis added)
>
> The Tribunal said:
>
> Although we have found that the former **Act** is applicable, to the determination of the merits, the Tribunal must observe any Current **Act** provisions which expressly, or by necessary implication, affect this task. In this respect, we note that the written Policies of the Board are binding on the Tribunal, and that such Policies may be retrospective, prospective or retroactive, in operation and effect.

In my opinion, the Tribunal erred in a patently unreasonable manner in holding that s. 183 was applicable to cases falling within s. 228. Section 228 is a transitional provision which provides a code for dealing with cases of workers who were injured between March 23, 1990 and February 1, 1996. Simply because the Tribunal is, generally, governed by the entire **Act** does not entitle it to apply sections therein which are contradictory to the legislative intention respecting transitional cases. The PMI Guidelines are only applicable if they are authorized by the transitional provisions of the current **Act**.

Section 34 of the current **Act**, by reason of s. 228(2), governs transitional cases for the purpose of recalculation of benefits:

> 34 (1) Where a permanent impairment results from an injury, the Board shall pay the worker a permanent impairment benefit.
>
> (2) The existence and degree of a worker's permanent impairment shall be
>
> (a) determined by the Board; and
>
> (b) expressed as a percentage of total impairment.
>
> (3) The Board
>
> (a) shall establish a permanent-impairment rating schedule to be applied in calculating the award for a permanent impairment resulting from an injury; and
>
> (b) may prescribe the rating schedule referred to in clause (a) as a regulation.
>
> (4) Subject to subsection (5), the Board shall determine the amount of a worker's permanent-impairment benefit by multiplying
>
> (a) thirty per cent of eighty-five per cent of the worker's net average earnings calculated in accordance with Sections 37 to 46; by
>
> (b) the percentage of permanent impairment suffered by the worker, calculated in accordance with the rating schedule established pursuant to subsection (3).
>
> (5) Subject to Section 71, the permanent-impairment benefit established by subsection (4) is payable for the lifetime of the worker.
>
> . . .
>
> (emphasis added)

Section 71 provides:

> 71 (1) The Board may review and adjust its determination of the amount of compensation payable as a permanent-impairment benefit where there is, in the Board's opinion, a change in the worker's condition that

> (a) was not taken into account at the most recent determination of the worker's permanent-impairment rating by the Board; and
>
> (b) represents a change of at least ten percentage points in the worker's permanent-impairment rating according to the schedule established pursuant to Section 34.
>
> (2) The Board shall not review or adjust a permanent-impairment benefit pursuant to subsection (1) until sixteen months have elapsed from the time of the Board's most recent determination of the worker's permanent-impairment rating.

Subsection (3) provides that the Board shall establish a permanent-impairment rating schedule to be applied in calculating the award for a permanent impairment. Subsection (4) provides a formula for determining the amount of the worker's benefit with reference to the worker's average earnings and the percentage of permanent impairment calculated according to the rating schedule.

The Board approved Policy 3.3.1 effective February 1, 1996 entitled "Calculation of Permanent Impairment Benefit" (PIB). It states that it applies to workers injured on or after March 23, 1990. It makes a general reference to the current **Act**, ss. 34 and 74(4). It reads:

> **Policy Statement**
>
> 1. When it has been determined by the Board that a worker has a permanent medical impairment as the result of a work related injury, the worker will be entitled to a Permanent Impairment Benefit (PIB).
>
> 2. The existence and degree of the permanent medical impairment will be determined by the Board. The Board's determination of the permanent medical impairment will be based on the rating schedule established by the Board (see Policy 3.3.2).
>
> 3. A PIB will be calculated in the following manner:
>
> > The percentage of permanent medical impairment as determined by the Board multiplied by 30% of 85% of the worker's net average earnings before the injury occurred.

4. A PIB is payable for the life of the worker.

To the extent that this policy is not inconsistent with s. 34 in recalculating "the compensation awarded in accordance with the former **Act**", it applies to the exercise. As I pointed out earlier, s. 228(1) of the current **Act** is subject to s. 228(2) which requires recalculation in accordance with ss. 34 - 58. Reference is made in paragraph 2 to Policy 3.3.2. This policy is not applicable if it is inconsistent with the entitlement provisions of the former **Act** because s. 228 provides that subject to recalculation "the compensation . . . is deemed to be and always to have been awarded in accordance with the former **Act**". There is no clear legislative intent in ss. 34 - 58 to make policies retroactive in such a manner as to render the compensation not in accordance with the former **Act**. To give ss. 34 - 58 that interpretation would be to ignore the presumption in the **Interpretation Act** against retroactivity and rewrite s. 228.

Anything in a permanent rating schedule made by the Board pursuant to s. 34 which has the effect of doing more than recalculating compensation awarded "in accordance with the former **Act**" would, in my opinion, not be authorized by s. 34. That section, unlike s. 183, does not authorize the making of policies with retroactive application.

Policy 3.3.2 makes reference on its face page to the current **Act**, ss. 34, 37(2) and (3). The topic is stated to be Permanent Impairment Rating Schedule. It states:

> This policy applies to all decisions made on or after February 1, 1996.

As I have pointed out, this is a transitional appeal. The appellant's hearings before the Board all took place before February 1, 1996. The "decision" which the Tribunal was called upon to review on appeal was the decision of the hearing officer which was made on August 4, 1995, before the effective date of Policy 3.3.2. In my opinion the Tribunal erred in a patently unreasonable manner in concluding that that policy applied to <u>its</u> decision because, in so doing, it was changing the rules in the middle of the game. For

this reason as well, Policy 3.3.2 and the PMI Guidelines are inapplicable to the appellant's case.

The PMI Guidelines are substantive in nature and by the Tribunal's own decision, operated to eliminate the appellant's condition from consideration for permanent disability by a table with zero percentage. Subject only to recalculation, any rating schedule made pursuant to s. 34 which is not consistent with awarding compensation "in accordance with the former **Act**" is **ultra vires**. The presumptions against retroactivity and interference with vested rights operate.

Section 37 deals with the award and calculation of earnings replacement benefits:

> 37 (1) Where a loss of earnings results from an injury, an earnings-replacement benefit is payable to the worker in accordance with this Section.
>
> (2) The amount of any earnings-replacement benefit payable to a worker is the difference between
>
> (a) an amount equal to seventy-five per cent of the worker's loss of earnings; and
>
> (b) the amount of any permanent-impairment benefit payable to the worker pursuant to Section 34.
>
> (3) The amount of any earnings-replacement benefit payable to a worker after the worker has received compensation pursuant to subsection (2) for a total of twenty-six weeks is the difference between
>
> (a) an amount equal to eighty-five per cent of the worker's loss of earnings; and
>
> (b) the amount of any permanent-impairment benefit payable to the worker pursuant to Section 34.

Whereas under the former **Act**, compensation for permanent disability was calculated under ss. 43 and 45 as I have shown, the calculation under the current **Act** is under ss. 34 and 37. Section 34 provides for a permanent impairment benefit, calculated

on the basis of 30% of 85% of the worker's net average earnings calculated in accordance with ss. 37 to 46, multiplied by the percentage of permanent impairment calculated in accordance with a rating schedule. Under s. 37 there is also an earnings replacement benefit calculated as therein set out. In my opinion, the calculation aspects of these sections are applicable to compensation awarded pursuant to s. 228 in accordance with the former **Act**, but the introduction of a permanent impairment rating schedule which is inconsistent with the former **Act** and operates to reduce or eliminate the compensation is more than recalculation. The Legislature clearly recognized that the recalculation exercise under Part I of the current **Act** might result in either a greater award or a smaller award. I refer to s. 228(3) and (4). It was never intended that, apart from the recalculation process, persons in the position of the appellant should have their award altered or eliminated by the use of rating schedules, policies or regulations created under the current **Act**. Herein lies the basic error of the Tribunal.

The Tribunal found that s. 183(5), (6) and (7) were unambiguous statements of the intention of the Legislature that the written policies of the Board are to bind the considerations of the Tribunal. The Tribunal found that s. 183 of the current **Act** operates as an overriding contrary intention to the presumption against retroactive operation of legislation and the statutory presumptions in the **Interpretation Act** in relation to non-inference with vested rights. In its application of the critical sections of the current **Act** to the appellant's claim, the Tribunal has made striking errors of interpretation and overlooked fundamental principles of statutory interpretation. This constitutes error of a patently unreasonable nature.

In the result, I am of the opinion that the Tribunal has erred in jurisdiction in applying s. 183 of the current **Act** and in applying Policy 3.3.2. The matter should be remitted to the Tribunal to decide the appeal, and in particular whether there was a

permanent impairment as a result of the injury, according to the provisions of the former **Act** and s. 228 of the current **Act**, including the provisions for recalculation.

4. Did the Tribunal err in failing to exercise its jurisdiction when it refused to decide whether the appellant had a greater functional disability than that found by the hearing officer?

Since the PMI Guidelines should not have been taken into account by the Tribunal, this issue will have to be resolved by the Tribunal on a rehearing.

5. Did the Tribunal err in finding that the FRP Regulations were not applicable and did not limit the jurisdiction of the Tribunal to apply the former Act?

Here the Tribunal was acting within its jurisdiction. The question is whether it erred in a patently unreasonable manner.

The authority of the Board to enact the FRP Regulations is derived from s. 184 of the **Act**:

> 184 (1) The Board may, with the approval of the Governor in Council, make any regulation
>
> (a) authorized pursuant to this Part; and
>
> (b) that, in the opinion of the Board, is required to properly carry out the provisions of this Part.
>
> (2) Without restricting the generality of subsection (1), the Board, with the approval of the Governor in Council, may make regulations
>
> (a) prescribing any time limit not prescribed in this Part that the Board considers necessary for the efficient operation of the Board;
>
> (b) defining or further defining any word or expression not otherwise defined in this Part.

> (3) Notwithstanding subsection (1), the Governor in Council may make any regulation that may be made by the Board.
>
> (4) The exercise by the Board or the Governor in Council of the authority contained in this Section is regulations within the meaning of the **Regulations Act**.
>
> (5) Notwithstanding the **Regulations Act**, a regulation made pursuant to this Section may be made retroactive to any date.
>
> (emphasis added)

The FRP Regulations which the Tribunal held were not applicable to this case would, if applicable, impact upon the calculation of earnings replacement benefits under s. 37.

Again, in view of the fact that the Legislature has specifically enacted transitional provisions which incorporate the former law, it would defeat their purpose to make applicable to cases falling within them other provisions of the **Act** such as s. 184. Like s. 183 it is not applicable to cases falling within s. 228 of the current **Act**. The presumption against retroactivity set out in the **Interpretation Act** applies. Regulations and policies enacted pursuant to the former **Act** are what must be applied.

Moreover, the FRP Regulations were made by the Governor in Council under the current **Act** on March 26, 1996, with an effective date of February 1, 1996. Section 8 of the Regulations provide:

> 8 (1) These regulations apply to all decisions, orders or rulings made pursuant to the Act on or after February 1, 1996.
>
> (2) For greater certainty, these regulations apply to any decision, order or ruling made on or after February 1, 1996 concerning eligibility for compensation or the calculation or re-calculation of an amount of compensation.
>
> (3) Despite subsections (1) and (2), where a decision, order or ruling was made by the Board or the Appeal Board, before February 1, 1996, finding that a worker has a permanent impairment in connection with chronic pain but not fixing the worker's permanent-impairment rating, the rating

> shall be awarded pursuant to Section 34 and compensation may be paid accordingly pursuant to Sections 226, 227 or 228 of the Act, as the case may be.
>
> (4) Despite subsections (1) and (2), where a decision, order or ruling was made by the Board or the Appeal Board before February 1, 1996, fixing a worker's permanent-impairment rating, the rating is deemed to be the rating to which the worker is entitled and compensation shall be paid accordingly pursuant to Sections 226, 227 or 228 of the Act, as the case may be.

These Regulations, on their face, show an intention to apply the transitional provisions to transitional cases. The Tribunal did not err in its conclusions respecting the inapplicability of the FRP Regulations.

Because this case must be remitted to the Tribunal for disposition as I have indicated, it is not necessary or desirable to address other issues raised on the appeal or the notice of contention. I would deny leave to the parties on these points.

The appeal should, therefore, be allowed without costs and the matter remitted to the Tribunal.

Chipman, J.A.

Concurred in:

Jones, J.A.

Bateman, J.A.