

HALLETT, J.A.:

This is an appeal from the Workers' Compensation Appeals Tribunal.

The appellant, Mr. Brown, was injured on April 1st, 1993. He received temporary total disability benefits for approximately five (5) months. Subsequently he applied for compensation for permanent partial disability under the **Workers' Compensation Act**, R.S.N.S. 1989, c. 508 (the former **Act**).

The current **Act**, the **Workers' Compensation Act**, S.N.S. 1994-95, c. 10 received Royal Assent on February 6th, 1995, to come into effect on Proclamation. The sections relevant to the issues we have under consideration came in force on February 1st, 1996.

On June 29th, 1995, a Hearing Officer of the Board decided to affirm previous Board decisions denying the appellant's claim for permanent partial disability benefits.

On March 6th, 1997, the Appeals Tribunal denied the

appellant's claim for permanent partial disability benefits. It is from that decision that this appeal has been taken with leave of this Court.

On April 18th, 1997, this Court in **Doward v. Workers' Compensation Board (N.S.)** (1997), 160 N.S.R. (2d) 22 decided that claimants who fitted within **s. 228(1)** of the current **Act**; that is, claimants (i) who were injured between March 23rd, 1990, and February 1st, 1996; and (ii) whose claim was heard by the Board in that period; were entitled to have their claim adjudicated upon in accordance with **s. 228** of the current **Act**.

In support of the foregoing conclusion I will make reference to portions of this Court's decision in **Doward**. Justice Chipman stated at paragraphs 113 and 114:

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.

Justice Chipman went on to state in paragraph 118:

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).

Justice Chipman further stated at paragraphs 137 and 142:

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.

.....

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.

A review of the Appeals Tribunal decision clearly shows that the Appeals Tribunal applied the Permanent Medical Impairment Guidelines created under the authority of the current **Act** in dismissing Brown's appeal from the Hearing Officer's decision.

Adopting the reasons expressed in **Doward**, this constituted a jurisdictional error as the appellant Brown fits within **s. 228(1)** of the **Act**; he was injured in the period between March 23, 1990, and February 1st, 1996, and the Board, through its Hearing Officer, rejected his claim within that period.

I would note that the decision of this Court in **Doward** had not been filed prior to the Appeals Tribunal denying Brown's appeal.

I would allow the appeal and remit the matter to the Appeals Tribunal to be heard and considered applying the law as expressed in

Doward.

Hallett, J.A.

Concurred in:

Clarke, C.J.N.S.

Bateman, J.A.

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

WAYNE BROWN, Workers' Compensation
Claimant, No. 1528397)

Appellant)

- and -)

THE WORKERS' COMPENSATION)
APPEALS TRIBUNAL and THE)
WORKERS' COMPENSATION BOARD)
OF NOVA SCOTIA)

Respondents)

REASONS FOR
JUDGMENT BY:

HALLETT, J.A.