NOVA SCOTIA COURT OF APPEAL

Citation: *Maritime Paper Products Limited Partnership v. LeBlanc*, 2016 NSCA 13

Date: 20160225
Docket: CA 432343
Registry: Halifax

Between:

Maritime Paper Products Limited Partnership

Appellant

v.

John LeBlanc (Worker), Workers' Compensation Appeals Tribunal (Nova Scotia), Workers' Compensation Board (Nova Scotia), Nova Scotia Attorney General,

Respondents

Judges:	Farrar, Bourgeois and Van den Eynden, JJ.A.
Appeal Heard:	November 16, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Farrar, J.A.; Bourgeois and Van den Eynden, JJ.A. concurring.
Counsel:	Bernadine MacAulay, for the appellant Kenneth LeBlanc, for the respondent John LeBlanc Alexander MacIntosh, for the respondent Workers' Compensation Appeals Tribunal of Nova Scotia Paula Arab, Q.C., for the respondent Workers' Compensation Board of Nova Scotia

Reasons for judgment:

[1] By order dated June 3, 2015, Maritime Paper Products Limited Partnership, formerly Maritime Paper Limited ("Maritime Paper"), was granted leave to appeal the decision of the Workers' Compensation Appeal Tribunal dated September 16, 2014 (reported WCAT #2013-562-AD) on the following grounds:

> Did the Workers' Compensation Appeals Tribunal err in law by:
>
> a. not properly applying the burden of proof as prescribed by s. 187 of the *Workers' Compensation Act*, S.N.S. 1990, c. 10; or
>
> b. not properly interpreting or applying Board Policy 3.3.4R, 1.4.3 or 3.9.11R1.

[2] For the reasons that follow, I would dismiss the appeal without costs to any party.

Background

[3] Mr. LeBlanc was employed with Maritime Paper when he injured his left shoulder on April 28, 2011. Following his injury, he attended a course of physiotherapy and performed modified duties for a period of time. Eventually he had shoulder surgery on September 27, 2011.

[4] He underwent a Permanent Medical Impairment ("PMI") assessment on April 23, 2013. The Workers' Compensation Board Medical Advisor, in a report for that exam, recorded range of motion deficits in flexion, abduction and internal rotation. He concluded that Mr. LeBlanc had a whole person impairment of 14%. As a result, he was awarded a 14% PMI by the Board.

[5] Maritime Paper appealed the Board's PMI rating to a Hearing Officer on the basis that the Board Medical Advisor had determined the PMI by rating the worker's lack of range of motion (ROM) as well as the presence of crepitus. This, they argued, was rating the same impairment twice which offended the *American Medical Association's Guides to The Evaluation of Permanent Impairment*, 4th ed. (*AMA Guides*).

[6] In response to Maritime Paper's appeal, the Board sought a follow-up opinion from its Medical Advisor to address this issue.

[7] On August 14, 2013, the Board Medical Advisor issued a follow-up opinion. He was of the view that it was an unusual shoulder injury and that there were two impairing conditions: one in relation to a labral tear; and the other, a tendon injury. As such, he was of the view that there was no duplication in the determination of the permanent medical impairment. He explained:

> This worker had a labral tear which is an intra-capsular joint pathology and tendonosis which is extra-capsular joint pathology. This is an unusual shoulder injury. Hence, the decision of Dr. Daigle on July 27, '11 to address both problems i.e.: an arthroplasty to facilitate inflammed tendon glide and a labral procedure to stabilise the head of the humerus in the glenoid. Typically when I examined the worker I found G/H tenderness indicating intra-articular pathology and supraspinatus fossa tenderness indication residual tendonitis. I judged that the crepitus was caused by cartilage breakdown post labral tear plus repair and that the loss of range of motion was caused by the extracapsular tendon injury and subsequent acromial surgery. This I judged to be two impairing conditions which were likely to be related to the described mechanism of injury.
>
> I judged that this worker's impairment required evaluation by both the crepitation rating for intra-articular pathology and range of motion for extra-articular pathology. I was comfortable with this decision based on section 1.3 page 3 and felt that I had taken "care to avoid duplication of impairments …" (table 18, page 58).
>
> …the decision to use both methods was based on my clinical judgement as a 4-times-certified independent medical examiner, review of this worker's medical file and my clinical examination. It represents the best method of evaluation of his shoulder impairment.

[8] The Hearing Officer accepted the opinion of the Board Medical Advisor and upheld the 14% PMI.

[9] Maritime Paper appealed the Hearing Officer's decision to WCAT. I will address Maritime Paper's submissions to WCAT in more detail later in this decision.

[10] WCAT upheld the decision of the Hearing Officer. Maritime Paper now appeals to this Court.

Issues

[11] Although leave to appeal was granted on only two grounds, four distinct issues arise from the grounds of appeal. I will summarize and address them as follows:

Issue #1 Did WCAT err in law by not properly applying the burden of proof as described by s. 187 of the *Act*?

Issue #2 Did WCAT err with respect to the interpretation and application of Policy 3.3.4R?

Issue #3 Did the Board Medical Advisor fail to follow Policy 1.4.3 – Weighing Medical Evidence?

Issue #4 Did WCAT fail to follow the *Act* and Policy 3.9.11R1 when dealing with non-compensable factors?

Standard of Review

[12] It is well-settled and accepted by all parties to this proceeding that the standard of review for WCAT's decision is reasonableness (*Enterprise Cape Breton Corporation (Cape Breton Development Corporation) v. Southwell*, 2012 NSCA 23, ¶44). All of the issues identified will be reviewed on a reasonableness standard.

Issue #1 Did WCAT err in law by not properly applying the burden of proof as described by s. 187 of the *Act*?

[13] In its factum Maritime Paper says that WCAT reversed the burden of proof. It argues:

> 49. In its reasons for decision, the Tribunal consistently stated its conclusions on the basis that the Employer had not satisfied its burden to prove "it is more likely than not" that the PMI rating is inaccurate or incorrect. Specifically,
>
> > It is **not more likely than not**, that the Board Medical Advisor applied the American Medical Association's Guides to the Evaluation of Permanent Impairment, 4 edition [the "AMA Guides"] incorrectly in rating the Worker's PMI, or that he failed to consider all relevant information. [Emphasis added] (p. 2)

…

> **In assessing the evidence before me in conjunction with the AMA Guides and the law and policy as it pertains to PMIs, I do not find it more likely than not** that the Worker's assessment by the Board Medical Advisor resulted in a PMI that was too high because of rating both crepitus and ROM. [Emphasis Added] (p. 5)
>
> …
>
> There is **insufficient evidence** before me to suggest that the range of motion findings by the **Board Medical Advisor were inaccurate or incorrect**. [Emphasis added] (p. 6)

50. In effect, therefore, the Tribunal did not examine what, if any, credible evidence was provided to support the Worker's PMI rating of 14%; rather it assumed that Dr. Haigh's opinion was credible and in keeping with Policy and put the burden on the employer to show why the Worker was not entitle [sic] to a PMI rating at 14%.

51. The Worker has the initial burden of proving the he is entitled to the benefit to which he seeks. This is both an evidentiary and a legal burden, and it is submitted that the Tribunal did not assess whether or not the Worker met that burden. Such failure affects [sic] is submitted to be an error justifying the quashing of the Tribunal's Award. (Emphasis in original)

[14] With respect, WCAT committed no such error.

[15] The position of Maritime Paper fails to recognize that the proceeding before WCAT is an appeal. Its position assumes that throughout the appeal process Mr. LeBlanc would have the burden of proof. With respect, that is not the case.

[16] Policy 3.3.4R directs a worker's permanent medical impairment is to be determined by a Board Medical Advisor:

> 7. A worker's permanent medical impairment rating will be determined by a Board Medical Adviser …

[17] The determination of the Board Medical Advisor was communicated to the parties on June 17, 2013. The PMI determination by the Board Medical Advisor became the decision of the Board.

[18] Section 185(1) of the *Act* provides:

> 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.

[19] The *Act* then goes on to provide for an appeal to a Hearing Officer from a decision of the Board:

> 197 (1) Any worker or the worker's employer may request that an appeal from a decision made pursuant to Section 185 be heard by a hearing officer.

[20] Maritime Paper exercised its right of appeal to a Hearing Officer by filing a Notice of Appeal to a Hearing Officer on July 3, 2013. It provided written submissions to the Hearing Officer on September 25, 2013 and the Hearing Officer rendered his decision on October 8, 2013, finding:

> I find that the explanation provided by Dr. Haigh is entirely reasonable. He found that the evidence and examination findings supported that the Worker was suffering from two separate impairing conditions in his left shoulder and that each deserved to be rated under the *AMA Guides* in determining the Worker's overall level of impairment. The *AMA Guides* do not indicate that range of motion measures and crepitation can never be considered simultaneously in assessing a PMI. Instead, the *Guides* appear to indicate that, while not generally the case, both methods can be combined when the assessor feels that utilizing only one method of assessment will not adequately capture the totality of the impairment resulting from the sustained injury.

[21] The *Act* also provides for an appeal from a decision of a Hearing Officer to WCAT:

> 243 (1) Any person entitled to be a participant before a hearing officer may, within thirty days of the participant being notified of the decision of the hearing officer, appeal to the Appeals Tribunal.

[22] Maritime Paper, again, exercised its right of appeal to WCAT by filing a Notice of Appeal dated October 11, 2013.

[23] The matter then proceeded to a hearing before WCAT by way of written submissions.

[24] The issue before WCAT was not whether Mr. LeBlanc was entitled to a PMI of 14% but rather, whether the Board and the Hearing Officer erred in making that determination. It was not a situation where Mr. LeBlanc had to prove to WCAT that he was entitled to a PMI rating of 14%. That determination had already been made. Clearly, the burden was on Maritime Paper to show an error had been

made. The Appeal Commissioner correctly identified the respective burdens. At the outset of her decision she said:

> …Section 187 gives the worker the benefit of the doubt on any issue involving compensation. As a consequence of s. 187, the Worker's burden of proof is on an "as likely as not" basis while the Employer's burden of proof remains on a "more likely than not" basis.

[25] Section 187 of the *Act* provides:

> 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.

[26] Mr. LeBlanc had established his entitlement to a PMI. Maritime Paper opposed that claim. Therefore, in opposition to the claim it had to meet the civil standard of proof, i.e., it was more likely than not that Mr. LeBlanc was not entitled to a PMI of 14% (see *Nova Scotia (Workers' Compensation Board) v. Johnstone*, 1999 NSCA 164, ¶19 and ¶25).

[27] After directing herself on the correct burden of proof, the Appeal Commissioner turned her mind to the medical opinion of Dr. Colin F. Davey, an expert retained by Maritime Paper, to determine whether Maritime Paper had met its burden. His report of March 26, 2014 called into question the degree of impairment assigned, opining there was a duplication of rating by the Board Medical Advisor in assessing for both range of motion and crepitus. After reviewing Dr. Davey's opinion the Appeal Commissioner concluded:

> In assessing the evidence before me in conjunction with the AMA Guides and the law and policy as it pertains to PMIs, I do not find it more likely than not that the Worker's assessment by the Board Medical Advisor resulted in a PMI that was too high because of rating both crepitus and ROM. In arriving at this decision, I have considered Dr. Davey's opinion. He took issue with the Board Medical Advisor's view that there were two impairing conditions; one in relation to the labral tear and the other, the tendon injury. In that regard, he stated that the rotator cuff did not demonstrate any "thru and thru" tear; and that it is not possible to determine the exact cause of crepitation in a shoulder.
>
> … In giving the Worker the benefit of the doubt, as I am bound to, however, I accept the Board Medical Advisor's assessment on the issue. I accept his finding that the Worker has two impairing conditions, both related to the injury, and in that regard can be assessed under both the crepitus and range of motion

> categories. I understand Dr. Davey's opinion as not ruling out the assessment of two separate aspects of impairment, if it were possible to attribute crepitus to one condition and loss of ROM to the other. …
>
> [Emphasis added]

[28] The Appeal Commissioner did not embark on an impermissible application of the burden of proof. To the contrary, she correctly considered the burden on Maritime Paper when challenging Mr. LeBlanc's claim. After weighing all of the evidence in a well-reasoned and thoughtful decision she determined it had not met that burden.

[29] I would dismiss this ground of appeal.

Issue #2 Did WCAT err with respect to the interpretation and application of Policy 3.3.4R?

[30] The relevant portions of Policy 3.3.4R provide:

> 7. A worker's permanent medical impairment rating will be determined by a Board Medical Adviser, taking into consideration the following factors:
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> (a) a review of all pertinent information contained in the worker's WCB claim file(s);
>
> (b) the results of a physical examination of the worker conducted by a Board Medical Adviser or, where the Board considers it appropriate, by an external medical specialist appropriate to the type of impairment; and
>
> (c) the criteria set out in the AMA Guides – 4th Edition, as applicable.
>
> If an impairment description does not match the AMA Guides – 4th Edition, the Board Medical Adviser will make a judgement rating following discussion with other Board Medical Advisers if necessary. A judgement rating may be determined by the Medical Adviser at any time if the scheduled rating is inappropriate to the worker's condition.
>
> …
>
> 9. Where multiple injuries result in more than one impairment, the impairments are evaluated on the basis of the whole person, rather than by adding the individual values. This is done with the use of the Combined Values Chart contained in the AMA Guides – 4th Edition.
>
> …

> 11. The AMA Guides – 4th Edition are used to assess impairment, not disability. The existence and degree of permanent medical impairment are determined by medical means and are based solely on a demonstrable loss of bodily function.

[31] In the definition section of the Policy, "impairment" is defined as follows:

> "impairment" means the loss of, loss of use of, or derangement of any body part, system or function;

[32] Maritime Paper says that the Board Medical Advisor made two errors in the assessment of Mr. LeBlanc's medical condition:

i. He (and the Hearing Officer and WCAT by accepting his opinion), expanded the Policy by finding that "demonstrable loss of bodily function" need not be demonstrated when the impairment is a "derangement"; and

ii. He failed to take into consideration the requirements as set out in Board Policy 3.3.4R, in particular, he failed to review all of the pertinent information as required by s. 7(a) of the Policy.

[33] I will address each of these arguments separately.

Requirement that impairment be solely based on a demonstrable loss of body function.

[34] Maritime Paper's argument is summarized in ¶70 of its factum:

> 70. While a derangement "can contribute" to an impairment, it is only appropriate to provide a PMI rating under the Policy when the derangement leads to a demonstrable loss of bodily function. Further crepitation, in and of itself, is not a type of derangement where loss of bodily function can be inferred.

[35] I take it from this and the oral arguments made at the hearing Maritime Paper asserts that WCAT and the Board Medical Advisor erred when they concluded that a PMI for crepitus could be awarded when there was not a demonstrable loss of bodily function.

[36] At this point, it is worthwhile to review what the Board Medical Advisor said in his report:

> This worker had a labral tear which is an intra-capsular joint pathology and tendonosis which is extra-capsular joint pathology. This is an unusual shoulder injury. Hence the decision of Dr. Daigle on July 27, '11 to address both

> problems, i.e., an arthroplasty to facilitate inflamed tendon glide and a labral procedure to stabilize the head of the humerus in the glenoid. Typically when I examined the worker I found G/H tenderness indicating intra-articular pathology and supraspinatus fossa tenderness indication residual tendonitis. I judged that the crepitus was caused by cartilage breakdown post labral tear plus repair and the loss of range of motion was caused by the extracapsular tendon injury and subsequent acromial surgery. This I judged to be two impairing conditions which were likely to be related to the described mechanism of injury.
>
> I judged that the worker's impairment required evaluation by both the crepitation rating for intra-articular pathology and range of motion for extra-articular pathology. I was comfortable with this decision based on section 1.3 page 3 and felt that I had taken "care to avoid duplication of impairments…" (table 18, page 58).

[Emphasis added]

[37] To summarize his conclusions he found:

i. The loss of range of motion was caused by the extra-scapular tendon injury and subsequent acromial surgery; and

ii. The crepitus was caused by cartilage breakdown post-labral tear plus repair. [Emphasis added]

[38] After reviewing the Board Medical Advisor's opinion, the Appeal Commissioner cited the following from the *AMA Guides* with respect to derangements:

> Derangements not previously described can contribute to impairments of the hand and upper extremity, and, if present, these should be considered in the final impairment determination. They include bone and joint disorders, presence of resection or implant arthroplasty, musculotendinous disorders, and loss of strength. The impairments are evaluated separately…

[39] Maritime Paper seizes on the Appeal Commissioner's words where she states "The rating of crepitus as a derangement that can contribute to an impairment of the shoulder is contemplated by the AMA Guides". It focuses on the words "can contribute" to say that although crepitus can contribute to an impairment, the Appeal Commissioner did not find that it had, in fact, contributed to an impairment. Therefore, she committed a reviewable error. With respect, this parses the Appeal Commissioner's words and fails to consider her decision in its entirety. The Board Medical Advisor found that the crepitus was as a result of

cartilage breakdown and that it was an impairing condition. The Appeal Commissioner accepted his evidence.

[40] The Appeal Commissioner clearly understood the argument being made by Maritime Paper and addressed it:

> The Employer referred to Board Policy 3.3.4R which outlines the methodology to be used to determine the existence and degree of a PMI. The Employer submitted that the Board Medical Advisor's assessment of the ROM in relation to the rotator cuff injury and the crepitus in relation to the SLAP tear, was contrary to Board Policy. The argument was that the Board Medical Advisor had arrived at the PMI by assessing the injury itself and not the loss of bodily function, as mandated by the *Act* and Board policy.
>
> I accept the Employer's submission that what is usually measured on a PMI assessment is the demonstrable loss of bodily function and not the type of injury. However, Board Policy 3.3.4R's definition of "impairment" includes the "loss of, loss of use of, or derangement of any body part, system or function". The rating of crepitus as a derangement that can contribute to an impairment of the shoulder is contemplated by the AMA Guides. In these circumstances, it does not fall outside the definition in the Policy. I find that considering the derangement as well as the demonstrable loss of bodily function could be part of the global impairment assessment in some circumstances.
>
> [Emphasis added]

[41] The Appeal Commissioner, therefore, concluded the crepitus resulted in a separate impairment.

[42] This conclusion is also apparent from her decision when she reviewed Dr. Davey's opinion, where he took issue with the Board Medical Advisor's opinion that there were two impairing conditions, she said:

> … In arriving at this decision, I have considered Dr. Davey's opinion. He took issue with the Board Medical Advisor's view that there were two impairing conditions; one in relation to the labral tear and the other, the tendon injury. In that regard, he stated that the rotator cuff did not demonstrate any "thru and thru" tear; and that it is not possible to determine the exact cause of crepitation in a shoulder.
>
> …
>
> … I accept the Board Medical Advisor's assessment on the issue. I accept his finding that the Worker has two impairing conditions, both related to the injury,

> and in that regard can be assessed under both the crepitus and range of motion categories. …
>
> [Emphasis added]

[43] I am satisfied, reading the decision as a whole and in context, that the Appeal Commissioner was satisfied that the crepitus contributed to an impairment of the shoulder and was properly considered in the final impairment determination as directed by the *AMA Guides*.

[44] Maritime Paper's argument on this issue fails.

Issue #3 - Did the Board Medical Advisor fail to follow the requirements in Policy 3.3.4R?

[45] Maritime Paper argues that the Board Medical Advisor failed to review all the "pertinent information" contained in the worker's WCB claim file as required by Section 7(a) of Policy 3.3.4R (cited in ¶27 above).

[46] The Appeal Commissioner addressed this argument:

> The Board Medical Advisor has training and expertise in conducting range of motion testing. Intrinsic to this testing would be an evaluation of effort and pain behaviours. I am not convinced by Dr. Davey's report that the ROM values gathered by the Board Medical Advisor are inaccurate. I am prepared to assume given the Board Medical Advisor's report, that he reviewed the Worker's medical record and should he have found anything of note that may have impacted the findings on examination, he would have documented same. …
>
> [Emphasis added]

[47] To this, Maritime Paper says: "There is nothing in the report (of the Board Medical Advisor) to support the conclusion that [he] reviewed "pertinent" information in the Worker's file such as the range of motion documentation by physiotherapy and the family physician. This is an error of law by the Tribunal because the evidence does not support the inference."

[48] With respect, I disagree. First of all, the *AMA Guide* specifically directs the Board Medical Advisor to review all of the pertinent information contained in the worker's WCB claim file. The Board Medical Advisor, in his report, says:

> I refer the reader to the Claim file for precise details of the Worker's injury and subsequent management.

[49] He then outlines the history of the worker's condition which included an MRI, surgical particulars, physiotherapy treatments and the results of an EMG. In concluding his initial report dated May 31, 2013, he says:

> After examination of the file and physical examination of the Worker, in accordance with the American Medical Association Guides to the Evaluation of Permanent Medical Impairment, 4th edition, and as well as per the attached detailed calculation, I find the Worker has a Whole Person Impairment of 14%.
>
> [Emphasis added]

[50] In his follow-up report dated August 14, 2013, he again reiterates that he reviewed the file:

> …the decision to use both methods was based on my clinical judgement as a 4-times-certified independent medical examiner, review of this worker's medical file and my clinical examination. …
>
> [Emphasis added]

[51] Maritime Paper's suggestion that the Board Medical Advisor had not reviewed the pertinent information in the worker's medical file is without merit. Although the Board Medical Advisor does not use the terminology that he had reviewed all the "pertinent" information in the file, he clearly says that he examined the file and specifically referred to the *AMA Guides* which required him to do so. There was ample evidence for WCAT to conclude he had reviewed Mr. LeBlanc's medical files.

[52] This argument also fails.

Issue #3 - Did WCAT fail to follow Policy 1.4.3 – Weighing Medical Evidence?

[53] The relevant portions of Policy 1.4.3 are as follows:

> 1.2 When addressing conflicting medical evidence, decision makers will not automatically prefer the medical evidence of one category of physicians or practitioners over that of another. Decision makers shall consider the following criteria in deciding what weight to give to such evidence:
>
> (a) the expertise of the individual providing the opinion

(b) the application of the expertise of the individual providing the opinion to the medical question being addressed

(c) the correctness of the facts relied upon by the provider of the opinion

(d) the timeliness of the opinion

(e) any issues of credibility within the opinion

(f) the credibility of the individual providing the opinion

(g) subjective versus objective medical evidence

(h) the findings of any relevant scientific studies referenced by a qualified medical practitioner

(i) the fact that treating physicians may have an advocacy role on behalf of their patients

[54] Maritime Paper's argument on this point is summarized in its factum as follows:

> 97. It is submitted that had the Tribunal properly applied Board Policy 1.4.3 *Conflicting Medical Evidence*, it would have come to the conclusion that Dr. Davey's opinion was more credible than that of Dr. Haigh. As such, the evidence and the proper application of the Policy supports the conclusion that the Worker received a double rating for crepitation and range of motion deficits.
>
> 98. Further, because there was no credible evidence to show that Dr. Haigh reviewed all of the pertinent information contained in the Worker's file as required by section 7 of Board Policy 3.3.4R, the Tribunal should have relied upon Dr. Davey's opinion as to the impact of the pertinent information.

[55] I have already addressed the argument of whether the Board Medical Advisor reviewed all of the pertinent information.

[56] Maritime Paper's argument that WCAT failed to properly apply Policy 1.4.3, amounts to nothing more than it asking this Court to reweigh the evidence and come to a different conclusion from that of the Appeal Commissioner.

[57] In her decision, the Appeal Commissioner referred to the competing medical opinions, referenced the expertise of both doctors, considered Maritime Paper expert's opinion with respect to the arguments it was making, and reached conclusions on the medical evidence which she preferred. She also said she was considering the evidence "in conjunction with the AMA Guides and the law and policy as it relates to PMIs". Obviously one of the policies relating to PMIs is Policy 1.4.3 relating to the weighing of conflicting medical evidence.

[58] I am satisfied she considered the Policy and properly applied it.

Issue #4 Did WCAT fail to follow the *Act* and Policy 3.9.11R1 when dealing with non-compensable factors?

[59] The *Act* provides:

> 10 (5) Where a personal injury by accident referred to in subsection (1) results in loss of earnings or permanent impairment
>
> (a) due in part to the injury and in part to causes other than the injury; or
>
> (b) due to an aggravation, activation or acceleration of a disease or disability existing prior to the injury,
>
> **compensation is payable for the proportion of the** loss of earnings or **permanent impairment that may reasonably be attributed to the injury**.
>
> 34 (1) Where a permanent impairment **results from** an injury, the Board shall pay the worker a permanent-impairment benefit.
>
> [Emphasis added]

[60] Policy 3.3.9.11R1 speaks to apportionment:

> **4. Permanent Impairment**
>
> 4.1 Where a non-compensable factor(s) is contributing to the worker's permanent impairment, the permanent impairment may be adjusted to reflect the impact of this non-compensable factor(s). Permanent impairment benefits will only be paid for the permanent impairment resulting from the compensable injury.
>
> . . .
>
> 4.2 To determine the impact of the non-compensable factor(s) on the permanent impairment:
>
> …
>
> (b) if the non-compensable factor(s) is degenerative in nature, the WCB will gather medical evidence with respect to how the condition would have progressed (up to the point of assessing permanent impairment) in the absence of the compensable injury.
>
> [Emphasis added]

[61] Maritime Paper argues that one of the grounds of appeal it argued at WCAT was the failure of the Board to apportion the claim based on "personal" or "pre-

existing" injury which contributed to the impairment. It says that WCAT failed to address this issue and, thereby, committed a reviewable error. In considering this compliant a bit of background is necessary.

[62] Maritime Paper's Notice of Appeal to WCAT dated October 11, 2013 raised as an issue the Hearing Officer's alleged failure to correctly apply Policy 3.9.11R1. Policy 3.9.11R1 addresses the apportionment of workers' compensation benefits where the workplace injury is only partially responsible for a worker's permanent impairment or loss of earnings. Maritime Paper's written submissions to WCAT dated February 28, 2014 also raised this issue and requested an order from WCAT for the production of Mr. LeBlanc's medical records.

[63] In a letter dated April 2, 2014, WCAT advised that it would issue an Order for Production for Mr. LeBlanc's family doctor's records dating back to 2006 in view of "the conflicting reports as to the Worker's history of left shoulder issues…to clarify the existence and/degree of such issues." At the end of this letter, WCAT's Acting Registrar stated, "If the evidence merits an apportionment analysis, a s. 251(1) referral to the Board may be entertained, as the Board has yet to undertake that analysis at first instance."

[64] WCAT issued the Order for Production and received the requested records from Mr. LeBlanc's family doctor. A copy of these records, vetted for relevance, were provided to the participants in the appeal.

[65] Following WCAT's Order for Production and the disclosure of the records, Maritime Paper made its appeal submissions to WCAT on July 31, 2014. The submissions stated that, "after a closer review of the file and receipt of information from a medical file review", Maritime Paper was revising its grounds of appeal. Where previously Maritime Paper has raised the ground that the Hearing Officer failed to correctly apply Policy 3.9.11R1, the revised ground simply stated that Mr. LeBlanc's PMI rating was too high because crepitus was double-rated or due to pre-existing degenerative change. Under the heading, "Law and Policy", Maritime Paper referred to Policy 3.3.4R and the *AMA Guides*. Maritime Paper's submissions did not refer to Policy 3.9.11R1 nor did it make an argument supportive of apportionment under the criteria in that Policy.

[66] Maritime Paper's submissions to WCAT dated July 31, 2014 did, however, argue that the crepitus in Mr. LeBlanc's left shoulder was double-rated or due to pre-existing degenerative change.

[67] This argument was rejected by the Appeal Commissioner. Referring to the Board Medical Advisor's opinion, she says:

> He judged that the crepitus was caused by cartilage breakdown post-labral tear plus repair, and that the loss of range of motion was caused by the extra scapular tendon injury and subsequent acromial surgery.

[68] She went on to find:

> …I accept the Board Medical Advisor's assessment on the issue. I accept his finding that the Worker has two impairing conditions, both related to the injury, and in that regard can be assessed under both the crepitus and range of motion categories. …

[69] It follows that the Appeal Commissioner found that the crepitus was caused by cartilage breakdown and that it was not due to pre-existing degenerative change. By accepting the Board Medical Advisor's opinion the Appeal Commissioner was rejecting Maritime Paper's argument that it was due to a pre-existing degenerative change.

[70] The Appeal Commissioner also addressed the argument that the Board Medical Advisor should have questioned his findings on range of motion given that Mr. LeBlanc had exhibited better range of motion in January of 2010 than he did on April 23, 2013:

> The Employer raised the argument that the Board Medical Advisor should have questioned his findings on ROM, given that the Worker had exhibited better ROM in January of 2012 as noted in the physiotherapy report of January 12, 2012. Dr. Davey stated that the large discrepancies between physiotherapist's findings and the Board Medical Advisor's findings should have been explored and explained by the Board Medical Advisor. Dr. Davey noted that the Board Medical Advisor's assessment did not comment on observations of ROM, effort or pain behaviour.
>
> The Board Medical Advisor has training and expertise in conducting range of motion testing. Intrinsic to this testing would be an evaluation of effort and pain behaviours. I am not convinced by Dr. Davey's report that the ROM values gathered by the Board Medical Advisor are inaccurate. I am prepared to assume given the Board Medical Advisor's report, that he reviewed the Worker's medical record and should he have found anything of note that may have impacted the findings on examination, he would have documented same. …

[71] I am satisfied WCAT addressed all of the questions referred to it. The Appeal Commissioner found that the injuries for which Mr. LeBlanc was assessed

arose as a result of his workplace injury. The finding was made in light of the arguments and submissions of the parties, including those to which I have referred above. By necessary implication, by making those findings, she rejected the argument that the PMI should be reduced as a result of pre-existing conditions or non-compensable factors.

[72] Finally, I would make reference to s. 252(A) of the *Act* which provides:

> 252. The Appeals Tribunal shall issue a decision clearly stating the determination of the Appeals Tribunal on the appeal and shall state the reasons for the decision as briefly as possible without undue elaboration.
>
> [Emphasis added]

[73] The Appeal Commissioner reviewed the evidence, referenced the policies and the *AMA Guides*, made determinations based on the expert medical evidence and other evidence before her and concluded that the worker was entitled to a 14% PMI. Her reasons, without undue elaboration, clearly and thoroughly addressed all of the issues before her.

Conclusion

[74] I would dismiss the appeal without costs to any party.

Farrar, J.A.

Concurred in:

Bourgeois, J.A.

Van den Eynden, J.A.