WORKERS COMPENSATION
APPEAL TRIBUNAL

CASE ID [personal information]

BETWEEN:

WORKER

APPELLANT

AND:

WORKERS COMPENSATION BOARD
OF PRINCE EDWARD ISLAND

RESPONDENT

DECISION # 66

Worker	Represented by Krista MacKay, Solicitor for the Worker
Respondent	Represented by John K. Mitchell, Q.C. Stewart McKelvey Stirling Scales
Place and Date of Hearing	February 23, 2007 - 10:00 a.m. Best Western Charlottetown - MacLauchlans 238 Grafton Street Charlottetown, P.E.I. Dalvay Room
Date of Decision	April 12, 2007

STATEMENT OF FACTS AND BACKGROUND

1. This is an appeal of Internal Reconsideration Decision IR-05-13, dated May 9, 2005, denying the Worker's claim for entitlement to compensation benefits for an alleged chronic pain condition, and upholding the Entitlement Officer's December 13, 2004, decision.

2. The basis for the IRO's denial can be summarized as follows:

   (a) the work incident giving rise to the Worker's claim was minor and occurred while the Worker was performing her regular duties;

   (b) the Worker has a pre-existing osteoarthritic condition, chondromalacia patella, which may have made her more susceptible to injury;

   (c) the Worker's Compensation Board (the "Board") chronic pain policy provides that chronic pain benefits do not apply to cases of persistent lingering pain symptoms caused by a discernable organic condition;

   (d) the Worker's condition was not caused by the work incident but was "aggravated" by the work incident;

   (e) the Worker has received compensation for the "aggravation" of her condition as a result of the work incident.

A. The Accident

3. At the time of the incident, the Worker had been employed as a "[personal information]," for four years, since [personal information], 1985.

4. On [personal information], 1989, she was [personal information] which was part of her regular duties. The task required her to climb up and down a ladder.

5. It appears that on [personal information], 1989, she saw Dr. Davison, who diagnosed her with a stiff right knee.

6. The flowchart in the Appeal record reads stiff right knee? Hurt at work.

7. Four days later, on [personal information], 1989, she advised her employer that she had suffered a "knee injury" as a result of [personal information]. She indicated that she had delayed reporting the injury because she had not realized that she had hurt her knee at the time of the incident.

8. In a medical report dated [personal information], 1989, Dr. Kass determined that she suffered from "early chondromalacia" - (an abnormal softening in the cartilage in the knee).

9. She was examined by Board Medical Consultant Dr. DeMarsh on January 3, 1990, during which time he confirmed that she suffered from "chondromalacia patella" in both knees, but worse on the right knee than on the left. He indicated that this condition had been aggravated in her right knee as a result of her work duties:

> *This young woman has got chondromalacia patella which is worse on the right than the left and which was aggravated by her work. There is some minimal evidence of an impairment based on the arthroscopy and physical examination.* ***This problem should settle down with time****, however, I can't say that there is a permanent impairment here.* (Emphasis Added)

10. Three months later, in a subsequent report by Dr. DeMarsh dated March 6, 1990, based on the January 3, 1990, examination, he found that there was **minimal evidence** that she had suffered a permanent impairment and therefore assessed her as having a permanent partial disability of 7%:

> *This young woman* ***appears*** *to have a* ***chondromalacia patella*** *on the* ***right side****. There is minimal evidence of a permanent impairment. This includes tenderness over the patella and some minor findings on her arthroscopy. I think that at this point this should be considered a permanent impairment.*
>
> *I would suggest a PPD of 7%. I would recommend that this be used to help her with re-training.*

11. Apart from the [personal information], 1990, report from Dr. Steeves, there is no further mention in any medical reports of left knee chondromalacia patella. In that report he opines that the right knee chondromalacia patella may have "precipitated" (brought about prematurely) at work.

12. On March 27, 1990, she was approved for a permanent partial disability ("PPD") award of 7%. She opted to receive this in the form of a one time lump sum payment in the amount of $12, 097.11.

13. The Appeal Record does not indicate that she signed a settlement agreement. The Worker apparently received this amount, in any event.

14. It appears that no wage loss benefits were paid to the Worker.

15. In a report by Dr. Steeves, dated [personal information], 1990, he concluded as follows:

> *I think her problem is essentially that of chondromalacia patella as mentioned by Dr. Vello Kass. Although this may have been* ***precipitated*** *at work,* ***she does have a genetic tendency as demonstrated by her wide Q angle, of problems with the patellofemoral joint:*** *and indeed she has some symptoms already in her other knee* (Emphasis added).

16. The Worker later expressed concerns regarding the correctness of the 7% PPD assessment, however, Dr. DeMarsh reassessed her on March 1, 1991, and confirmed that she was still within the 7% disability range. He found there to be no increase in her disablement level.

17. While there is some difference in opinion between Dr. Steeves and Dr. DeMarsh as to whether her right knee chondromalacia patella was "aggravated by" or precipitated at work, the record does not indicate that the Worker had any pre-injury (1989) problems (no symptoms) with her right knee.

18. In a report dated [personal information], 1991, Dr. Profitt commented that her knee had no swelling or effusion and was stable:

> *Clinically there is no swelling or effusion in the knee and it was stable to ligamentous testing. There was* ***some patellar facet tenderness*** *but the only different finding today was that of* ***slight medial joint line tenderness*** *although McMurray's apley's tests were equivocal.*

19. On [personal information], 1992, she underwent a diagnostic arthroscopy and debridement patellofemoral joint to her right knee.

20. Dr. Profitt confirmed in a report dated [personal information], 1992, that the results of the diagnostic surgery were normal. He indicated that he believed the Worker suffered from **chronic pain syndrome**.

21. In subsequent medical reports Dr. Profitt restated his diagnosis of chronic pain syndrome:

On [personal information], 1993, he reported:

> *She went through rather exhaustive conservative treatment for her knee with physiotherapy and medications. She has seen Dr. Barry Ling, Dr. Vello Kass, and myself. She has had* ***two diagnostic arthroscopies of the right knee which were essentially normal*** *other than some mild degenerative changes of the patellofemoral joint.*
> *She has persistent pain in the knee and feels it is somewhat worse as of late. Her pain occurs not only with activity but at rest and at*

> *night. .....*
>
> ***Radiographs in the past have been normal** and I have mentioned the results of arthroscopy.*
>
> ***She has a chronic pain syndrome or a variant of a reflex sympathetic dystrophy of her right knee. I do not feel there are any surgical indications here. …My only other thought would be a trial of sympathetic nerve blocks to her right leg.***

On [personal information], 1993, he reported:

> ***She had epidural steroid or sympathetic** block by Dr. Doug MacDonald and **this has not been beneficial to her.** .....*
>
> ***At present she has a chronic pain syndrome or sympathetic dystrophy of her leg … She is looking for employment at present.***

Seven years later on [personal information], 2000, he reported to Human Resources Development Canada:

> *I am a specialist I orthopaedic Surgery and a member of the Royal College of Physicians and Surgeons of Canada. .....*
>
> *My first assessment of her was in [personal information] 1990. I concluded at that time that she was suffering with chronic pain about her right knee. .....*
>
> ***She has gone on to have chronic and seemingly progressive pain in her right leg which at present seems more diffuse. The pain is present even at rest.***
>
> ***She has seen numerous physicians with multiple conservative treatment modalities, none of which have been helpful**. She has gone through extensive physiotherapy, tried a number of different braces as well as a number of different medications including anti-inflammatories, analgesics and medications for long term pain including amitriptyline at night.*
>
> *Plain radiographs of the knee have been **normal … bone scan which showed no abnormalities .....***
>
> ***It is my feeling at present that she is fitting into a variant of <u>chronic pain syndrome</u> and is <u>functionally disabled.</u> … She does not feel***

> ***she can continue in the work force because her ongoing pain does not allow her to stand, walk or even sit for that matter, and she cannot concentrate on any task.***

22. Notwithstanding a multitude of diagnostic tests taken over the years, none showed objective medical evidence of an injury, specifically:

    (a) a radiology report dated [personal information], 1997, indicated that the Worker's bone and joint spaces were "normal";

    (b) a radiology report dated [personal information], 1998, showed "no evidence of fracture or other significant bone, joint or soft tissue abnormality";

    (c) a radiology report dated [personal information], 1999, indicated that there was "[n]o evidence of fracture or of other significant bone, joint or soft tissue abnormality";

    (d) the results of a bone scan dated [personal information], 2000, were normal.

23. On March 27, 1998, the Board denied the Worker's request for an increase in her benefits.

24. The Worker made a request for Internal Reconsideration of the Entitlement Officer's decision, however, she then requested that the hearing be delayed until after her appointment with Dr. Stanish.

25. Some five (5) months earlier, Dr. Stanish in his [personal information], 1999, report diagnosed her with mild osteoarthrosis of her patella, not chronic pain syndrome:

> *Succinctly**, she suffers with mild osteoarthrosis of the patella**. This degree of chondromalacia patella is a benign impairment, **does not lead to progressive osteoarthrosis and should be treated without any surgical intervention and aggressive/progressive return to full and unrestricted activities**.*

26. In an Internal Reconsideration decision dated June 16, 2000, it was determined that there was no evidence of an on-going process regarding her knee injury and therefore the claim remained closed.

27. Another MRI of the Worker's right knee, dated [personal information], 2000, **showed that her right knee was normal**. On that basis **Dr. Muzumdar indicated that the previous working diagnosis of osteochondritis dessicans and minuscule lesion in the posterior horn should be discarded.** He indicated however, that he did not have a "specific diagnosis for her chronic knee pain", and, he did not diagnose, nor confirm any diagnosis of the early physicians who were of the opinion that she suffered chondromalacia patella of the right knee. He concluded:

> ..... *An MRI examination of her right knee was reported as normal. In light of this, I feel that the previous working diagnosis of osteochondritis dessicans (meaning a bone and its adjacent cartilage loses blood supply) as well as minuscule lesion in the posterior horn, on the medial or lateral meniscus, will have to be discarded. Thus, I have explained to the patient that I do not have a specific diagnosis for her chronic knee pain.*

Note: in August of 2002 Dr. Carruthers, Medical Consultant to the Board concluded no specialists have been able to appreciate any significant knee pathology compatible with her degree of distress.

28. After a further review of her file by the Board, - said to be for the purposes of determining if the Worker would be entitled to any further entitlement to benefits in light of the October 3 decision of the Supreme Court of Canada ***Martin and Laseur*** case on matters involving chronic pain, in a decision dated October 25, 2000, the Case Manager found that on a review of the report from Dr. Muzumdar and the MRI results she would not be reversing her decisions dated January 29, 1999, and May 16, 2000.

29. The Worker was denied a referral to a pain clinic due to the "lack of objective findings" regarding her knee on August 6, 2002, presumably on the basis of the Board's Medical Director's conclusion to that effect on August 1, 2002.

30. The Worker, of her own accord, underwent a pain clinic assessment on [personal information], 2002, in which it was concluded that she had "**chronic knee pain**, which has gradually become generalized and now involves a very minor degree of sympathetic features producing thermal asymmetry".

31. In a decision by John Bruce, Director of Client Services, dated December 13, 2004, the Worker's claim was again reviewed and denied in relation to her claimed chronic pain condition. Mr. Bruce based the denial on Dr. DeMarsh's January 3, 1990, findings:

    (a) the Worker had chondromalacia patella;

    (b) this condition pre-existed the work incident and was not caused by the Worker's work; and

    (c) the work incident caused the Worker to suffer an aggravation of her pre-existing condition of chondromalacia patella.

32. Mr. Bruce concluded as follows:

> *The pain that you suffer as a result of your condition, **chondromalacia patella, although sometimes referred to by physicians as chronic pain** does not fall under the definition of*

> *chronic pain as cited above* ***as you have a discernable organic diagnosis*** *which may very well explain your pain. It would be very difficult to establish that the progression of your symptoms can be attributed to one day's increased activity without any identified trauma as opposed to the progression of symptoms related to your underlying degenerative condition. In effect, the pension you were awarded was to compensate you for the ongoing symptoms attributable to a relatively minor work incident and the progression of those symptoms is more reasonably attributable to your underlying condition.*
>
> *…*
>
> *Having reviewed your file and rendered this decision, I do not want to minimize the fact that you may have pain.* ***The only decision I can make is whether that pain can be reasonably attributed to your accident or whether it is more probably associated with your ongoing non-compensable chondromalacia patella condition.***

33. It is noted that since there is no mention of the series of reports from the Worker's family physician, Dr. Davidson, and especially those of her treating orthopaedic specialist, Dr. Profitt, except his [personal information], 1993, report, who provided upwards of ten (10) reports, all diagnosing chronic pain getting progressively worse, up to [personal information] 2007 where he concluded that the Worker's chronic pain has reached the point where she is "functionally disabled", Mr. Bruce either ignored this information or summarily dismissed it as having no relevant significance into his "complete" review of the Worker's file "in its entirety" on the single issue involving chronic pain.

34. It is worthy of note, that in Mr. Bruce's reference to Dr. Profitt's [personal information], 1993, report the only relative significance to be found in same was Dr. Profitt's opinion that "squatting or climbing stairs gives you the worst pain," when Mr. Bruce was relying heavily on the opinion of Dr. Steeves, an independent medical consultant. That physician supplied information on the relation of a wide Q angle to the Worker's diagnosed condition of chondromalacia patella as earlier diagnosed in 1989 by Dr. DeMarsh, the Board's Medical Director, who on January 3, 1990, diagnosed the Worker as having chondromalacia patella in both knees, and, who was of the opinion that "this problem should settle down with time."

35. The record shows that Dr. DeMarsh was in fact wrong on both counts.

    (i.) Notwithstanding that he assessed the Worker as "appearing" to have a permanent impairment involving her chondromalacia patella, and awarded her a 7% disability, Dr. Muzumdar clearly indicated that in [personal information], 2000, that "the previous working diagnosis osteoarthrosis and minuscule lesion in the posterior horn should be discarded." This was after

he reviewed the MRI of her right knee and found it to be "normal" at that time.

(ii.) The appeal record clearly shows that the Worker's condition, rather than settling down with time, deteriorated to the point where she was diagnosed by Dr. Profitt in [personal information] of 2000 as "functionally disabled." A fact that was again confirmed after an analysis by the Pension Review Board which held:

> *debilitating pain in her right knee for the last 13 years, she has made a genuine and concerted effort to retrain so that she can find employment suited to her condition. Unfortunately, the pain that she has endured and will probably continue to endure has made it difficult for her to do even sedentary employment. In my view she has established that her disability is both severe and prolonged and that it renders her incapable of regularly pursuing any substantially gainful employment.*

Note: This is simply an observation that in the eyes of another panel, there was convincing evidence of severe and prolonged incapacitating pain.

36. Mr. Bruce did not mention that the Board's Medical Consultant noted that no specialists were able to appreciate any significant knee pathology compatible with the Worker's degree of distress.

37. At that time he is still of the opinion that the Worker suffers from chondromalacia patella, "a discernable organic diagnosis" for which chronic pain is not compensable - as it does not meet the definition required of the Board policy on chronic pain.

38. The Worker requested an IRO hearing on the issue identified as:

> Is the Worker entitled to compensation benefits related to a chronic pain condition?

39. The IRO conducted a paper file review and issued her decision on May 9, 2005, in which she upheld the decision of Mr. Bruce the Director of Client Services, who denied the claim for compensation benefits related to her chronic pain condition.

GROUNDS OF APPEAL

As neither the Worker's Solicitor nor the Worker took issue with the grounds of appeal as set out in

the Respondent's factum, and as this Tribunal is of the opinion that same are accurately summarized therein, we adopt same which are as follows:

(a) the IRO decision was unfair and unjust;

(b) she meets the criteria for chronic pain as set out in the Nova Scotia decision ***Martin and Laseur***;

(c) she meets the criteria for chronic pain as set out in Board policy;

(d) there is no evidence that she had a pre-existing problem with her right knee prior to the work incident;

(e) Dr. Profitt's [personal information], 1992, report states that her injury "fits into" a chronic pain syndrome;

(f) her pain has continued and worsened over the years;

(g) she now receives CPP disability as a result of a decision panel recognizing that she suffers from chronic pain syndrome and reflex sympathetic dystrophy.

THE ISSUES

(a) Did the Worker sustain an injury arising out of or in the course of her employment?

(b) Does the pre-disposition to such injury detract from the Worker's entitlement to compensation?

(c) Is the Worker's chronic pain syndrome a compensable condition?

THE LEGISLATION

Workers Compensation Act, Chapter W-7.1

Section 1(1):

(a) *"**Accident**" means, subject to subsection (1.1) a chance event occasioned by a physical or natural cause, and includes:*

(A) *event rising out of, and in the course of, employment, or*
(B) *thing that is done and the doing of which arises out of, and in the course of employment and as a result of which a worker is injured.*

(n) *"**impairment**" means a medically measurable permanent anatomical loss or disfigurement and includes, amputation, loss of vision, loss of hearing; impaired nerve function, scarring causing disfigurement, joint ankylosis, or joint fusion from surgery;*

Section 6:

(1) *Where, in any industry within the scope of the Part, personal injury by accident arising out of and in the course of employment is **caused** to a worker, the Board shall pay compensation as provided by this Part out of the Accident Fund.*

(4) *Where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment, and where the accident occurred in the course of employment, unless the contrary is shown, it shall be presumed that it arose out of the employment.*

Section 17:

Notwithstanding anything in the Act, on any application for compensation the decision shall be made in accordance with the real merits and justice of the case and where it is not practicable to determine an issue because the evidence for or against the issue is approximately equal in weight the issue shall be resolved in favour of the claimant.

18.(1) *The Board may provide any worker entitled to compensation under this Part with medical aid, and every such worker is entitled to such prosthetic appliances and to such dental appliances and apparatus as may be necessary as a result of any accident, and to have the same kept in repair or replaced in the discretion of the Board, and to such corrective lenses as may be necessary as a result of the injury, which corrective lenses may, in the discretion of the Board, be renewed from time to time.*

18.(2) *The medical aid is at all times subject to the supervision and control of the Board*

and shall be paid for by the Board out of the Accident Fund, and such amount as the Board may consider necessary therefore shall be included in the assessment levied upon the employers.

Section 49:

(1) The Board may determine that a worker has suffered an impairment as the result of an accident.

(2) Where the Board determines that a worker referred to in subsection (1) has suffered an impairment,

(a) the Board shall pay to the worker a lump sum impairment award calculated in accordance with the regulations; and

(b) where the worker suffers a change in his or her medical condition, the worker may apply to the Board to review the degree of impairment.

(3) A worker may not apply under clause (2)(b) until the expiry of 16 months from the time of the Board's most recent determination respecting the degree of impairment of the worker.

(4) Clause (2)(b) and subsection (3) apply to a worker who was awarded a lump sum impairment award between January 1, 1995, and the date this section comes into force.

(5) This section applies to a worker who suffered an accident between January 1, 1995, and the date this section comes into force, where the degree of the worker's impairment was not assessed by the Board before the effective date of this section.

(6) The following exceptions apply:

(a) this section does not apply in respect of a worker who died as a result of an accident that occurred before a determination of an impairment award was made;

(b) ***clause 2(a) does not apply to a worker who suffered an impairment as a result of an accident that occurred prior to January 1, 1995. 2001, c.20, s.16.***

Section 56:

(17) The Appeal Tribunal shall be bound by and shall fully implement the policies of the Board and the Appeal Tribunal, its chairperson and members are prohibited from enacting or attempting to enact or implement policies with respect to anything within the scope of the Part.

POLICIES

POLICY NUMBER: POL 04-64

CHRONIC PAIN

2. "Chronic pain" means pain that:
   - **continues beyond the normal healing** time **for the type of personal injury** that precipitated, **triggered** or otherwise **predated the pain**; and
   - **does not apply to cases** of persistent **lingering pain** due to **discernable organic diagnosis** or a psychiatric condition.

5. "**Objective medical evidence**" means evidence presented through a physical examination **including** diagnostic tests of a worker and reported by the treating or family physician.

Entitlement to Temporary Wage Loss Benefits and Medical Aid

6. There are three possible scenarios related to the diagnosis of chronic pain and entitlement to compensation benefits:

Chronic Pain as a Complication of a Compensable Injury

Where a worker has a compensable injury and;

- **the recovery exceeds the normal healing time for a compensable injury**
- the worker has not returned to work despite all appropriate return to work interventions; and
- **chronic pain is diagnosed**

the Workers Compensation Board will evaluate the chronic pain to determine if it is a complication of the compensable injury.

To determine entitlement, the Workers Compensation Board must determine whether the chronic pain is related to the original compensable injury, a pre-existing condition, or a non-compensable condition.

Chronic Pain as a Recurrence of Injury

Where a worker files a claim for benefits for chronic pain some time after treatment for a compensable injury has concluded and;

- it was determined the worker was capable of returning to work; and
- compensation benefits were discontinued

the Workers Compensation Board will adjudicate the claim to determine entitlement to benefits for chronic pain.

To determine entitlement, the Workers Compensation Board must determine whether the chronic pain is related to the **original** compensable injury, a pre-existing condition, or a non-compensable condition.
Based on the adjudicative decision the Workers Compensation Board will conclude either:

- there is no entitlement to further treatment or benefits; **or**
- **the chronic pain is a complication of the original injury and the worker is entitled to appropriate treatment and benefits.**

Entitlement to Extended Wage Loss Benefits

7. Once approval to temporary wage loss benefits and medical aid benefits have been approved and appropriate treatment and programs for chronic pain have been completed, the Workers Compensation **Board must determine whether the chronic pain condition has become permanent and has resulted in a reduction in functional ability that affects earning capacity.**

9. The worker is entitled to extended **wage loss benefits** if **all** of the following criteria are met:

   - the evidence shows that the **chronic pain is a complication of the original compensable injury**
   - there is a **reduced functional capacity** that **affects** the worker's **earning capacity**
   - the worker has been assessed and determined to have a permanent impairment resulting from the compensable injury
   - the **worker has completed all treatment for the injury** and chronic pain; and
   - the worker has completed vocational rehabilitation, if applicable, and a loss of earning capacity exists.

Note: ***See Dr. Profitt's* [personal information]*, 2000, assessment:***

Note: ***It is my feeling at present that she is fitting into a variant of chronic pain syndrome and is functionally disabled. … She does not feel she can continue in the work force because her ongoing pain does not allow her to stand, walk or even sit for that matter, and she cannot concentrate on any task.***

POLICY NUMBER: POL 04-23

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

1. "Arising out of employment" means an injury that must be linked to, originate from, or be the result of, in whole or in part, an activity or action undertaken because of a worker's employment.

BOARD POLICY: Pol 04-30: Weighing of Evidence

Policy:

1. In determining entitlement, the Workers Compensation Board requires **evidence** that:

   · an injury has occurred;
   · the injury was caused by an accident arising out of and in the course of employment;
   · the diagnosed condition is compatible with the history provided; and
   · medical treatment was sought or wages were lost as a result of the injury.

2. The Workers Compensation Board will examine the evidence to see whether it is sufficiently complete and reliable to allow a decision to be made with confidence.

3. The standard of proof for decisions made under the Act is the balance of probabilities - - a degree of proof which is more probable than not.

4. Decision makers must assess and weigh all relevant evidence. Conflicting evidence must be weighed to determine whether it weighs more toward one possibility than another. Where the evidence weighs more in one direction then that shall determine the issue.

8. Medical evidence:

   Medical evidence and medical opinion provided by a **treating** physician or chiropractor will be used in determining the validity of a claim:

   Where there is conflicting medical evidence presented on a claim, the evidence must be analyzed objectively, keeping the following criteria:

   · the expertise of the individual providing the opinion;
   · the correctness of the facts

THE STANDARD OF REVIEW

One of the first considerations to be undertaken is to examine the role of the Appeal Tribunal and the role of the final decision maker of the Workers Compensation Board of PEI, in this case the Internal Reconsideration Officer (IRO).

As a prerequisite to this, one must first examine the overall authority of the **Workers Compensation Act**, especially its mandate, as well as the power, duties, obligations, and mandate of the IRO and the Appeal Tribunal, in their respective decision making functions in any given case.

The Workers Compensation Board is charged with the responsibility of collecting revenues, and all things incidental thereto, including but not limited to establishing assessment rates to employers, and, investigating, processing and paying out claims to eligible workers who suffered work-related compensable injuries - provided that it does not commit an error appealable to this Tribunal or to the Supreme Court.

The Province of PEI having ultimate authority over the workers compensation scheme has, through the **Workers Compensation Act**, provided for the adjudication of claims within the confines of the Act, and, thereafter to the Court of Appeal of this province in appropriate cases.

Suffice to say, that within the confines of the **Act**, any interested party may apply to the IRO for a reconsideration of a decision of the Case Entitlement Manager, (in the case of a claim for compensation) for a review of the decision by the IRO, who makes a final decision.

The **Act** thereafter provides for an Appeal to an external agency, the Appeal Tribunal.

The Province has delegated part of its mandate or responsibility to the Appeal Tribunal which is an external quasi-judicial administrative body consisting of a chair and two panel members, none of which on any given occasion have an interest in the hearing before the Appeal Tribunal except to the extent that one of the panel members represent all employers within the Province, one represents the employees and the chair is neutral.

Some of the relevant sections of the **Act** are as follows:

Section 17 states:

> Notwithstanding anything in this Act, on any application for compensation the decision shall be made in accordance with the real merits and justice of the case and where it is not practicable to determine an issue because the evidence for or against the issue is approximately equal in weight, the issue shall be resolved in favour of the claimant. 1994, c.67, s.17.

Section 32.(1) states:

> **Subject to sections 56 and 56.1**, the Board has exclusive jurisdiction to examine into, hear, and

determine, all matters and questions arising under this Act and as to any matter or thing in respect of which any power, authority, or discretion, is conferred upon the Board; and the action or decision of the Board thereon is final and conclusive and is not open to question or review in any court, and no proceedings by or before the Board shall be restrained by injunction.

Section 32.(2):

Without limiting the generality of subsection (1) the decisions and findings of the Board upon all questions of law and fact are final and conclusive, and in particular, the following shall be deemed to be questions of fact:

(a) whether any injury or death in respect of which compensation is claimed was caused by an accident within the meaning of this Part;
(b) the question whether any injury has arisen out of or in the course of an employment within the scope of this Part;
(c.) the existence and degree of disability by reason of any injury;
(d) the permanence of disability by reason of any injury;
(e) the existence and degree of an impairment and whether it is the result of an accident;
(f) the amount of loss of earning capacity by reason of any injury

Section 56:

(2) The decisions of the Board shall always be given upon the real merits and justice of the case, and it is not bound to follow strict legal precedent.

(6) Following reconsideration, a person who has a direct interest in the matter may, in writing, appeal the decision to the Appeal Tribunal.

(17) The Appeal Tribunal shall be bound by and shall fully implement the policies of the Board and the Appeal Tribunal, its chairperson and members are prohibited from enacting or attempting to enact or

implement policies with respect to anything within the scope of this Part.

(20) The Appeal Tribunal has exclusive jurisdiction to hear and determine all matters and questions arising under this Part in respect of:

(a) appeals under subsection (6):

(21) The Appeal Tribunal has all the powers conferred on the Board by Section 26.

(23) In hearing a matter under subsection (20), the Appeal Tribunal shall not allow the presentation of new or additional evidence and it shall, pursuant to subsection (22), immediately refer a matter to the Board where there is new or additional evidence.

(24) On hearing an appeal, the Appeal Tribunal may confirm, vary or reverse the decision appealed from and shall, on the written request of a person with a direct interest in the matter, provide a written summary of its reasons within 90 days of the completion of the hearing.

Section 56.2 (1) Subject to subsection (2), a person directly affected by a final decision of the Appeal Tribunal may appeal the decision to the Court of Appeal on a question of law or jurisdiction.

The merits of each case, at the Board level, are to be determined by the Entitlement Officer, in the case of a workplace injury, and ultimately, by the IRO on a reconsideration of the claim.

The Act provides a right of appeal from a final decision of the Appeal Tribunal on a question of law or jurisdiction to the Supreme Court.

Notwithstanding this, in considering the appropriate standard of review from an IRO Decision to this Tribunal, we are of the opinion that the usual administrative law principles pertaining to the appropriate standard of review nevertheless apply in this and in all cases before this Tribunal. Accordingly, in determining the appropriate standard of review, we are guided by the ultimate Canadian Law on this matter as set out by the Supreme Court of Canada in **Dr. Q v. College of Physicians and Surgeons of British Columbia (2003) D.L.R. (4th) 599.**
In that case the Supreme Court at Paragraph 21 held:

21. In every case where a statute delegates power to an administrative decision-maker,

> the reviewing judge must begin by determining the standard of review on the pragmatic and functional approach. In ***Pushpanathan,*** this Court unequivocally accepted the primacy of the pragmatic and functional approach to determining the standard of judicial review of administrative decisions. Bastarache J. affirmed that "[t]he central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed" (para. 26). However, this approach also gives due regard to "the consequences that flow from a grant of powers" (***Bibeault***, at p. 1089) and, while safeguarding "[t]he role of the superior courts in maintaining the rule of law" (p. 1090), reinforces that this reviewing power should not be employed unnecessarily. In this way, the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law. .....
>
> 22. … the pragmatic and functional approach calls upon the court to weigh a series of factors in an effort to discern whether a particular issue before the administrative body should receive exacting review by a court, undergo "significant searching or testing", or be left to the near exclusive determination of the decision-maker. These various postures of deference correspond, respectively, to the standards of correctness, reasonableness ***simpliciter,*** and patent unreasonableness .....
>
> 25. For this reason, it is no longer sufficient to slot a particular issue into a pigeon hole of judicial review and, on this basis, demand correctness from the decision-maker. Nor is a reviewing court's interpretation of a privative clause or mechanism of review solely dispositive of a particular standard of review ..... The pragmatic and functional approach demands a more nuanced analysis based on consideration of a number of factors. This approach applies whenever a court reviews the decision of an administrative body. .....
>
> **(3) <u>A Review of the Pragmatic and Functional Factors</u>**
>
> 26. In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors – the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question – law, fact, or mixed law and fact. The factors may overlap.

(i.) ***The Presence or absence of a Privative Clause or Statutory Right of Appeal***

The Supreme Court held:

> 27. The first factor focuses generally on the statutory mechanism of review. A statute may afford a broad

> right of appeal to a superior court or provide for a certified question to be posed to the reviewing court, suggesting a more searching standard of review. … A statute may be silent on the question of review; silence is neutral, and "does not imply a high standard of scrutiny": ***Pushpanathan, supra***, at para. 30. Finally, a statute may contain a privative clause, militating in favour of a more deferential posture. The stronger a privative clause, the more deference is generally due. (Emphasis added)

While the **Act** provides for a right of appeal in certain cases, i.e., a question of law or jurisdiction (which is also a question of law) this coupled with the exclusive jurisdiction of the Board (Section 32(2)) on all matters of fact and/or law, at first glance would support the proposition that significant deference should be afforded the decision maker (the IRO in this case).

Having said that, the clear wording of section 32 indicates that its exclusive jurisdiction on questions of fact and law is subject to the specific powers of the Appeal Tribunal to hear and determine all matters that come before it.

In the present case, we are of the opinion that the wording in Section 32 and 56 must be given its ordinary and plain meaning. Accordingly, little or no deference is due to the Decision of the IRO in applying this factor. We noted that the privative clause purports to exclude the "court" from reviewing decisions of the Board.

As noted in Decision #37 of this Tribunal, the **Act** was amended prior to this case being initiated; and, two sections that severely restricted the power of the Appeal Tribunal to remedy wrongs that it felt were committed, were repealed. These were Section 56 (26) and 27. During the review of the Act at that time, there was no intention to change, amend, or delete Section 56 (20), the exclusive jurisdiction section (to hear and determine all matters) or the "subject to" provisions of section 32 (its powers being subject to those of the Appeal Tribunal as set out in Section 56.)

In ***Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994)** at 176-177 *et seq.*, 192, Ruth Sullivan, ed., the following is stated:

> *Governing Principle*. It is presumed that the provisions of legislation are meant to work together_ as parts of a functioning whole_ It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other .....
> Where the legislature perceives the possibility of

> conflict among provisions, it may provide its own solution by expressly indicating which provision is to prevail. Sections may begin with the words "Subject to section _" or "Notwithstanding section _"; or the priority may be established in a separate declaratory provision.

Accordingly, the absence of any legislative directive that the Section 32 privative clause is to apply to this Tribunal, coupled with the exclusive jurisdiction provisions of Section 56 empowering this Tribunal to hear and determine all matters that come before it including appeals, leads us to the conclusion that little or no deference is to be afforded the Decisions in cases where the Appeal Tribunal is exercising its statutory authority to determine the issue on the "real merits and justice of the case" - when the matter includes a claim for compensation. (Section 17).

(ii.) ***The relative expertise of the Board and the Appeal Tribunal.***

As noted by the Supreme Court in the **Dr. Q** Case, expertise is a relative concept.

A review of the legislation does not indicate that either the Board or this Tribunal is "more expert than the courts" in deciding the issue in this case. In fact, it could be stated that in a personal injury case, one would be hard pressed to conclude that the IRO would be more qualified to interpret written medical reports than the panel members would be, especially in the absence of any evidence that the IRO had any special medical training in that field.

In addition, the issue - whether the worker suffered a compensable injury while engaged in some aspect of her job duties, in this case is not one of those that would fall within the scope of some area of greater expertise than the IRO or the Appeal Tribunal members have.

On the other hand, it is noted that the Board, on a daily basis, would likely become more familiar with some medical issues than the Chair or the regular panel members who represent employers and employees.

We are not of the view, in any event, that the IRO is more adept in reviewing medical reports than the panel members from which the Appeal Tribunal is constituted.

In addition, we are not of the opinion that the likely daily exposure of the IRO to medical reports and other reports involving the mechanism(s) of injury is such as would lead us to conclude that the IRO has gained a measure of "relative institutional expertise" as referred to in the **Dr. Q** Decision.

In the **Dr. Q** Case, one of the tests is:

> _ 'whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the **Act**', an administrative body called upon to answer a question that falls

> within its area of relative expertise will generally be entitled to greater curial deference.

This case does not fall within the situation envisaged by this test.

Accordingly, any deference due to the IRO, on this element of the functional and pragmatic analysis, would be minimal.

(iii.) ***The purpose of the statute and the particular provision.***

The general purpose of the **Workers Compensation Act** is to provide compensation to those persons who suffer work-related injuries once a determination has been made on the eligibility and/or duration of the compensation. The PEI Supreme Court referred to it as "remedial" legislation. The Act is apparently funded by employers operating within the Province.

One of the features of the legislation is to provide an avenue for addressing the concern of interested parties, be they employers or employees who are not satisfied with a "final" decision of the Board (IRO) without having to incur the expense, and expend significant time in complying with certain formalities involving the courts.

In this case, the enabling sections of the **Act** 6(1), and (2), and 18 provide for compensation (wage loss benefits including medical aid) to a worker who suffers a work-related injury. While Section 18 has wide discretionary powers, the prerequisite to the exercise of that discretion is a finding that in the first instance, the worker in fact suffered a workplace injury.

One of the significant features of the legislation is that for the protection afforded by this compensation scheme, the worker's right to sue his employer is barred by Section 12 of the statute.

The central issue in this case involves a question of fact: Is the Worker entitled to benefits for chronic pain?

In the instant case both the Board (IRO) and the Appeal Tribunal are to decide the issues "upon the real merits and justice of the case"(Section 17), while Section 56 stipulates that decisions of the "Board" shall always be given upon the real merits and justice of the case and it, the Board <u>is not bound to follow strict legal precedent.</u>

In the **Dr. Q** case, the following is stated:

> …In ***Mount Sinai, supra***, at para. 57, Binnie J. recognized that the express language of a statute may help to identify such a purpose. For example, provisions that require the decision-maker to "have regard to all such circumstances as it considers relevant" or confer a broad discretionary power upon a decision-maker will generally suggest policy-laden purposes and, consequently, a less searching standard of review. … A legislative purpose that deviates

> substantially from the normal role of the courts suggests that the legislature intended to leave the issue to the discretion of the administrative decision-maker and therefore, militates in favour of greater deference.

To some extent, the purpose of the statute was also referred to in the earlier part of this analysis where this Tribunal noted the unqualified exclusive jurisdiction provisions of Section 56 insofar as it relates to the reviewing authority of the Appeal Tribunal, as opposed to something less than a broad privative clause as set out in Section 32 which is "subject to" the Section 56 exclusive jurisdiction of the Appeal Tribunal to hear decisions on all matters that come before it.

While minimal deference is due, in our opinion, to the IRO; we are not of the view that the IRO is to be afforded considerable deference, when the Act, particular provisions and Board Policy are considered.

(iv.) ***The nature of the problem***

In the **Dr. Q** case, the Supreme Court held that:

> when the finding being reviewed is one of pure fact, this factor will militate in favour of showing more deference towards the Tribunal's Decisions.

As the central issue in this case (whether the worker is entitled to chronic pain benefits as a result of the [personal information], 1996, workplace injury?) involves a question of fact; then the pendulum shifts back to more deference to the IRO Decision.

As pointed out in the **Dr. Q** Decision, the nature of the problem, involving a question of fact in this case, is but one of the four factors to be considered in this pragmatic and functional approach.

Applying the pragmatic and functional test, in considering all of its four factors, we are of the view that while a case can be made for the test of reasonableness ***simpliciter,*** we cannot overlook the clear wording in the statute (Sections 32 and 56) which, in our opinion, cloaks this Tribunal with jurisdiction to review the IRO Decision on the standard of <u>correctness.</u>

In arriving at this decision we noted that while the statute provides a right of appeal from the IRO Decision directly to the Supreme Court, this right is limited to those cases involving questions of law and/or jurisdiction.

Subsequent to the hearing date in this case, the Appeals Court of this Province rendered a Decision in; **Workers' Comp. Bd.(PEI)v. MacDonald 2007 PESCAD 04.** The central issue before the Court involved the **scope of reviewing power** of this Tribunal under the **<u>Act</u>**. In that case, this Tribunal held that in a review of the decision of the Board (IRO), the review was to be conducted on the standard of "correctness," as opposed to either of two other standards namely: reasonableness ***simpliciter*** or the higher standard often referred to as "patent" unreasonableness.

At paragraph 50, the court held:

> The ***Act*** provides for an appeal from a decision of the WCAT on a question of law or jurisdiction to this division of the Supreme Court of Prince Edward Island. As stated in ***Dr. Q***, the choice of the standard of review by a reviewing court is a question of law and the reviewing court must be correct. Similarly, the choice of the standard of review by a reviewing tribunal, like WCAT, is a question of law and the reviewing tribunal must be correct. In my opinion the WCAT panel was correct in the choice of its standard of review or, perhaps more appropriately, it was correct in setting the parameters of its jurisdiction to review decisions of the Board.

THE IRO DECISION

In her claim summary the IRO highlighted some of the facts of the case referred to herein; and, she referred to a few of the numerous medical reports, in the fifteen (15) year period, following the workplace accident. Her summary in part states:

Claim Summary

> The Worker sustained an injury to her right knee in 1989 while working as a [personal information]. The Worker advised she had been up and down a ladder all day [personal information] and in doing so, sustained her knee injury. The Worker received a 7% permanent partial disability award as a result of her right knee injury. This injury was diagnosed as **chronic patellofemoral pain syndrome**

Note: The Board's Medical Director in his assessment for the award indicated that the Worker suffered from "chondromalacia patella in the right knee "which had been "aggravated" as a result of her work duties.

After referring to Dr. Profitt's [personal information], 1993, recommendations for nerve block treatments, (which were ineffective) she noted:

> Dr. Profitt did not see the worker again until [personal information] 1997. … He stated she has had three arthroscopic surgeries with the only abnormality being a mild PF fibrillation and that radiographs in the past had been normal. He felt the Worker was "*fitting into a chronic reflex sympathetic dystrophy*.....

> A memo from the WCB CEO dated March 17, 1998, advised the Worker was seen by a number of doctors and *"it appears that the general consensus was that she was suffering from chronic pain syndrome."* This memo went on to say that the Worker had an impairment that was less than ten percent so the Board paid out her pension in a lump sum amount which was considered a final settlement to her claim_

Note: (In 1989, the Board did not have a policy on chronic pain). .....

> A report from Dr. Stanish, an Orthopedic Specialist, dated [personal information], 1999, advised the Worker suffers from a very mild degeneration of the patellofemoral joint and that this type of impairment is extremely common and it was often an incidental finding on physical examination .....
>
> A report from Dr. Profitt, dated [personal information], 2000, states, "*Regardless of the diagnosis, ie. chronic pain or a chondromalacia patella, there is certainly no surgical indications here and ongoing management will be conservative measures and support. I have told (Worker) she has the hurting type of pain but not damaging pain and try to be as active as symptoms will allow."*
>
> In [personal information] 2000 Dr. Profitt reports that the Worker has gone on to have chronic and seemingly progressive pain in her right knee and she, in his opinion, was functionally disabled.
>
> A memo from Dr. Carruthers, WCB Medical Director, dated August 1, 2002, stated: "*This Worker had the full benefit of treatment to this area. In point of fact, no specialists have been able to appreciate any significant knee pathology compatible with her degree of distress. There is also no objective evidence of impairment from which the Worker has actually received a 7% disability."* .....

By this date, the Board did have a Chronic Pain Policy (1994). Although its ability to withstand a Charter challenge (no financial compensation, as such) is questionable.

The IRO then noted:

> On December 13, 2004, the Worker received a decision advising her claim for chronic pain benefits was denied as the WCB (Revised) chronic pain policy "*does not apply to cases of persistent lingering pain due to discernable organic diagnosis or a psychiatric condition."* The Worker was further advised the pain she suffered was a result of her condition, **chondromalacia patella**. Additionally,

> the Worker was advised she had a pre-existing condition that has contributed to her ongoing pain. Dr. Steeves reported in 1990, "*Although this may have been precipitated at work, she does have a genetic tendency as demonstrated by her wide Q angle, of problems with the patellofemoral joint; and indeed has some symptoms already in her other knee.*"

It is noted that Dr. Steeves did not conclude or diagnose that any predisposition to developing chondromalacia patella had in fact caused or contributed to her suspected chondromalacia patella becoming symptomatic in the right knee.

The IRO then, on the basis of the forgoing, held:

> More significantly, there is medical evidence on the Worker's file that indicates she had a pre-existing condition that would have made her more susceptible to the injury she incurred in 1989. .....
>
> A report from Dr. DeMarsh dated January 3, 1990, also provides medical evidence that the Worker had a pre-existing condition. His report states, "*This young woman has got chondromalacia patella which is worse on the right than the left and which was aggravated by her work.*" A subsequent report from Dr. DeMarsh dated March 6, 1990, states, "*I felt that she had chondromalacial patella of the right knee and possibly slightly in the left knee.*"

The Workers Compensation Board Policy for chronic pain (POL 04-64 - Chronic Pain) states in part:

> "Chronic pain" means pain that:
>
> · Continues beyond the normal healing time for the type of personal injury that precipitated, triggered or otherwise predated the pain; and
>
> · Does not apply to cases of persistent lingering pain due to discernable organic diagnosis or a psychiatric condition.
>
> ·

Citing the existing (further revised) Board Policy, following the ***Martin and Laseur*** case; the IRO held:

> The Worker has a discernable organic diagnosis of chondromalacia patella and in the opinion of Orthopaedic Surgeon, Dr. Steeves, this is a genetic condition and that although it may have been aggravated by, it was not caused by the Worker's employment. Evidence on the Worker's file indicates she has been compensated for this aggravation.

The IRO then concluded:

> Again, as previously noted both Dr. Steeves and Dr. DeMarsh comment on the Worker having the condition of chondromalacia patella which was worse in her right knee than her left knee and that this condition may have been aggravated by her work, but not caused by her work.
>
> Therefore, based on medical evidence on the Worker's file that indicates she had a discernable, pre-existing condition of chondromalacia patella that does not meet the criteria for chronic pain, I have upheld the December 13, 2004, decision of John Bruce.

It was strongly argued by the Worker's Counsel that there is a significant distinction to be made in the use of the words "aggravate" as opposed to "precipitate," in references to the alleged condition of chondromalacia patella in the Worker.

A closer reading of Dr. Steeves report reveals that he does not include the word "aggravate." Dr. Steeves suggests that the "Worker's problem of chondromalacia patella … may have been "precipitated" at work. It was only Dr. DeMarsh who in 1989 used the term "aggravated".

ANALYSIS

The first issue.

Did the Worker suffer an injury arising out of and in the course of her employment?

At the commencement of the hearing in this matter the Respondent conceded that the Worker suffered a workplace injury on or about [personal information], 1989, as the matter is without doubt insofar as the Board was concerned in the months that followed; as it paid the Worker a small sum of money based upon the belief that she "aggravated" an existing condition referred to as chondromalacia patella on the right knee. She was assessed at seven (7%) percent permanent partial disability.

Notwithstanding that the Worker was compensated on the basis of that diagnosis, in the months and years that followed, substantial doubt has been cast upon that diagnosis.

This first issue is not really in dispute insofar the parties to this appeal are concerned, except to the extent that there are different views on how and to what extent, if any, this workplace injury, if in fact there ever was an injury "as diagnosed" relates to the issue of what, if any, chronic pain entitlement(s) the Worker was or is entitled to.

The Second issue:

Does the pre-disposition of such injury detract from the Worker's entitlement to compensation?

The Worker's position includes the argument that one of the reasons for the IRO's decision to deny benefits in this case lies in the belief that the Worker had a pre-existing osteoarthritis condition, **chondromalacia patella**, which may have made her injury more susceptible to injury.

Counsel for the Worker noted the report of Dr. Kass on [personal information], 1989, which indicated that the astroscopy revealed "early" chondromalacia patella.

Counsel also pointed out that the Board's Medical Director, Dr. DeMarsh, who was not a treating physician, concluded from his first examination of the Worker on January 3, 1990, that she had chondromalacia patella in both knees, the right more so than the left.

Counsel also noted that from that first examination, the Board's Medical Advisor provided another report (on March 6, 1990) in which he stated:

> ***"this woman appears to have chondromalacia patella on the right side".***

Reference was made to the seven (7%) percent permanent partial disability payment as recommended by Dr. DeMarsh.

Counsel pointed out that while Dr. DeMarsh saw the Worker a year later on March 1, 1990, and diagnosed her as having "mild" chondromalacia patella, in the right knee, he was of the view that the condition had been "aggravated" as a result of her work duties.

Counsel took strong exception to that, because Dr. DeMarsh had reviewed the medical report of Dr. Steeves which noted that while he thought that her problem was essentially that of chondromalacia patella … "this may have been 'precipitated' (brought on prematurely) at work."

Dr. Steeves report states:

> Ross, **think** her problem is essentially that of chonromalacia patella as mentioned by Dr. Vello Kass. **Although this may have been precipitated** at work, she does have a genetic tendency as demonstrated by her wide Q angle, of problems with the patellofemoral joint; and indeed she **has some symptoms already** in her **other** knee. If she feels her symptoms are significant enough, and she is not responding to anti-inflammatories then a serious program of isometric quadricep exercises from physiotherapy, then a lateral retinacular release could be combined with a repeat arthroscopy, and in most situations that will relieve her symptoms. If this is not satisfactory, then a **formal patellar realignment**

> **procedure would have** to be undertaken. At the present moment, I do not feel that she is a surgical candidate but should her disability increase in severity, then this could be reviewed again. I have not scheduled her, however, for any specific follow up.

The significance of this report, in our opinion, is as follows:

(i.) Dr. Steeves did not make or confirm a diagnosis of chondromalacia patella in the right knee or the left.

(ii.) He speculates that the Worker's problem is essentially that of chondromalacia patella.

(iii.) He suggests that if the Worker has this condition it may have been precipitated at work, "she does have a genetic tendency" (wide Q angle).

(iv.) He suggests that this genetic tendency of having problems with her patellofemoral joint has caused him to conclude that the Worker "has some symptoms in her other knee."

(v.) One would expect that if this genetic tendency was causing or exposing symptoms in the right knee, Dr. Steeves would certainly have noted that fact; and, in that case any speculation as to the right knee chondromalacia patella would have been elevated to a confirmation of that condition.

Counsel for the Worker also noted that there were absolutely no symptoms with the Worker's right knee prior to the [personal information], 1989, injury.

Counsel for the Worker also pointed out that (based upon Dr. Steeves' report), establishing that if there was a tendency to develop chondromalacia patella of the right knee; then, it was the work duties on [personal information], 1989, that prematurely brought on the chondromalacia patella. In that case the Worker should be compensated according to the **Act** for an injury arising out of and in the course of her employment and in particular wage loss benefits - as was the case in WCAT's Decision #37 which she referred to.

In that case, the Appeal Tribunal considered the matter of aggravation of an inherent condition in the Worker:

> The essential question is whether the work activities cause the disease to become symptomatic?

Even if the Worker had a predisposition to develop chondromalacia patella or if it in fact had been present in its early stages or more advanced, so goes the Worker's argument, she was asymptomatic before [personal information], 1989; and, if her condition was aggravated by the work duties, or if her work duties precipitated the injury and resulting pain, she has suffered an injury and/or impairment and is entitled to compensation.

Counsel for the Worker noted in her outline of the Worker's duties, she fits the "alternate description," if in fact she has chondromalacia patella, for that condition, which is "[personal information] **knee**".

Counsel for the Worker argued that, in this case, the thin skull doctrine applies; and, the Board must take the Worker as it finds her.

In Decision #37, this Tribunal ruled that the thin skull doctrine applies to Workers Compensation cases.

The Respondent's Position

As set out in its factum, the Board noted that the Worker had been employed as a "[personal information]" on [personal information], 1989. After climbing up and down a ladder, [personal information], she was diagnosed on that date by her family physician with a stiff right knee - hurt at work.

The Respondent also noted the various diagnoses of Dr. Kass (early) chondromalacia patella, Dr. Wedge - chondromalacia patella in both of the Worker's knees; and the report of Dr. Wedge to the effect that the chondromalacia patella in the right knee had been "aggravated" by her work duties.

In addition the Respondent noted the conclusion of Dr. Steeves on the issue of whether or not the Worker was suffering from chondromalacia patella which "may have precipitated at work; and, the possible genetic predisposition in developing chondromalacia patella, with some symptoms already in her other knee".
The Respondent also noted that as of March 1, 1991, that there was no increase in the Worker's disablement level (assessed a year earlier at seven (7%) percent).

The Respondent then noted Dr. Profitt's [personal information], 1992, diagnosis of chronic pain syndrome; and noted the substantial number of diagnostic tests from 1992-1999 that showed no objective medical evidence of injury to the right knee.

It is noted that there had been acceptance of the Worker's claim for benefits, in any event, and payment made to her for a permanent partial impairment.

It is noted as well that Counsel for the Worker saw those tests (all normal - some diagnosing

chondromalacia patella) as indicators of the Worker's condition as diagnosed by her treating physician Dr. Profitt, as chronic pain syndrome or sympathetic dystrophy of her leg.

Following the Worker's condition forward to 1999, the Board's Medical Director diagnosed the Worker as having:

> Mild osteoarthritis of the patella. This degree of chondromalacia patella is a benign impairment, does not lead to progressive arthritis and should be treated without any surgical intervention and aggressive/progressive return to full and unrestricted activities.

It is noted that about one year later, in commenting on an MRI, taken on the [personal information], 2000, which showed the Worker's right knee as normal, Dr. Muzumdar indicated that:

> **The previous diagnosis of osteochondritis dessicans and minuscule lesion of the posterior horn should be discarded**

while he indicated that he did not have a specific diagnosis for the Worker's chronic knee pain.

It is at this point that the Worker's Counsel suggests that, the chrondomalacia patella, having been ruled out (some eleven (11) years after the pain became so pronounced in the Worker's right knee that she saw her family physician on the same day as she first experienced the significant pain)- is strongly suggestive of the Worker's chronic pain syndrome persisting; and, by all accounts becoming progressively worse.

The Respondent's position, at this point is that the Worker's ongoing symptoms have not arisen from anything that occurred out of and in the course of her employment; that she has been diagnosed with chrondomalacia patella; that the cause of this has been determined to be genetic; that this diagnosed condition pre-existed her work injury which caused an aggravation to her existing condition for which she received the seven (7%) percent permanent partial disability.

Does the Worker's predisposition detract from the Worker's entitlement to compensation?
In answering this question, we are of the opinion that the evidence, that the Worker in fact had a predisposition to a right knee injury is suspect; and, on the balance of probability, does not lead us to reasonably conclude that any genetic predisposition to a right knee injury has been made out in this case.

As indicated earlier, it is not our understanding from a reading of the Dr. Steeves report that he reached such a conclusion especially with respect to the Worker's right knee.

Some eleven years after the Worker's initial complaint of her stiff right knee while working, and in [personal information], 2000, there is not a single clear diagnosis showing objective medical evidence of a 1989 specific injury to the knee notwithstanding several MRI's and a bone scan with follow-up medical reports from medical experts in their area of practice.

On the other hand, the cautious and conservative diagnosis of Dr. Davidson, and the Worker's practising and examining physician, Dr. Profitt, consistently diagnosed the Worker's chronic pain and its progressive worsening to the point where it resulted in her being functionally disabled in 2000 which continued up to at least the date of the IRO hearing in this matter.

In Dr. Profitt's [personal information], 2000, report he states:

> She has been diagnosed with chondromalacia patella but her degree of symptoms and where she describes symptoms are not totally typical of this entity and **I feel she has essentially a chronic pain syndrome** involving her leg or, if you will, call this a variant of reflex sympathetic dystrophy.....
>
> At this late stage it is unlikely that a bone scan will be of much value … **Regardless of the diagnosis, i.e. chronic pain or a chondromalacia patella**, there is certainly no surgical indications here and ongoing management will be conservative measures and support. I have told the Worker she has the hurting type pain but not damaging pain and to try to be as active as symptoms will allow.

In his report three months following, in [personal information], 2000, he stated:

> She has gone on to have chronic pain and seemingly progressive pain in her right leg which is more diffuse. The pain is present even when she rests .....
>
> she is fitting into a variant of chronic pain syndrome and is <u>functionally disabled</u>;

Prior to Dr. Muzumdar's [personal information], 2000, report, the Board's Chief Executive Officer in an inter-office memo to the Chairman of the Board as early as March 27, 1998, wrote:

> **<u>chronic pain by definition</u> is pain for which there is <u>no known cause.</u>**

On December 17, 2001, [personal information], the case manager for client services, in denying a request for medical aid (footwear) to assist in dealing with the effects of the 1989 workplace injury wrote:

> As the medical evidence in the file now indicates there is no ongoing functional limitations with your knee **other than chronic pain**, I will not be in a position to authorize footwear under this claim.

In the June 21, 2001, letter to the Worker's solicitor (at that time) the case manager wrote:

> The Worker was awarded a 7% permanent partial disability award as a result of her right knee injury of 1989. **This has been diagnosed as chronic patellofemoral pain syndrome**. However, all testing done on the Worker's knee as well as various scopes have shown no structural damage, such as meniscual tears. **There is no medical indications of any ongoing process in the Worker's right knee. *Chronic pain in and of itself is not a compensable condition.*** Therefore, the Worker has no eligibility for consideration of an increase to her permanent partial disability award.
>
> Her lawyer had asked me to forward a copy of the Worker's signed acceptance of the lump sum payment. Unfortunately, I am unable to locate this on the file.....
>
> She would have been entitled to at least this amount at the time, her acceptance of this cheque would not necessarily mean she agreed this should be the final payment.

The Chronic Pain Policy that was in place at that time was stated as follows:

POLICY NUMBER: POL 04-64

CHRONIC PAIN

2. "Chronic pain" means pain that"
   - **continues beyond the normal healing** time **for the type of personal injury** that precipitated, **triggered** or otherwise **predated the pain**; and
   - **does not apply to cases** of persistent **lingering pain** due to **discernable organic diagnosis** or a psychiatric **condition**.

5. "**Objective medical evidence**" means evidence presented through a **physical** examination **including** diagnostic tests of a worker and reported by the treating or family physician.

On [personal information], 2002, a report from Dr. Ian G. Beauprie, after ruling out some suggested diagnoses, concluded:

> **Assessment**
>
> I don't think the clinical picture represents a normal form of RSD or CRPS. It sounds rather like a **chronic knee pain**, which has gradually become generalized and now involves a very minor degree of sympathetic features producing thermal asymmetry.

In his August 1, 2002, medical note to the file, after denying a referral to the pain clinic, Dr. Carruthers wrote:

> this Worker has a very minor long standing problem with pain in her right knee.....
>
> This Worker had the full benefit of treatment to this area. In point of fact, no specialists have been able to appreciate any significant knee pathology compatible with her degree of distress. **There is also no objective evidence of impairment from which the Worker has actually received a 7% disability.**

This conclusion, it is noted, pre-dated the Supreme Court of Canada case of ***Martin and Laseur*** in October 2003. In short, the 7% payment, could not be made on the basis of chronic pain according to existing Board Policy and practice in 1990.

Any decision involving the 1994 policy on chronic pain (i.e., the Board does not provide compensation for chronic pain **as such**) is suspect to say the least.

At the time of the IRO Decision, there was no "discernable organic diagnosis." At best there may have been some suspicions by some physicians.

The initial diagnosis of Dr. Profitt, Dr. Davidson, and the conclusion of Dr. Carruthers in August 1, 2000, clearly indicates that: (1) The Worker suffered chronic pain from the date of her 1989 complaint of right knee pain; (2) She suffered a compensable injury in 1989; (3) She received some compensation relating to that injury on the basis of a minor permanent medical impairment - which in hindsight was not the appropriate method of payment, if all of the medical information which negates a non-organic injury occurred in 1989 had been properly assessed. However, there was some, albeit questionable, medical evidence available at the time that the Worker received her small permanent partial impairment award.

Section 17 states:

> Notwithstanding anything in this Act, on any application for compensation the decision shall be made in accordance with the real merits and justice of the case and where it is not practicable to determine an issue because the evidence for or against the issue is approximately equal in weight, the issue shall be resolved in favour of the claimant. 1994, c.67, s.17.

In the **Blanchard** case, Mr. Justice Mitchell, speaking for the P.E.I. Court of Appeal held:

> *On any application for compensation an applicant is entitled to the benefit of the doubt, which means that is not necessary for the applicant to adduce conclusive proof of his right to the compensation applied for, but the Board is entitled to draw and shall draw from all circumstances of the case, the evidence and medical opinions, all reasonable inferences in*

> *favour of the applicant (emphasis added).*

In the **MacLeod** case, Mr. Justice Mitchell, speaking again for the Court of Appeal held:

> *Accordingly, the Worker's Compensation Act should be interpreted liberally so as to provide compensation for work-related injuries to as many as can reasonably be seen to fall within its purview. Worker's Compensation Appeal Board v. Penney (1980), 38 N.S.R. (2d) 623; 69 A.P.R. 623 (S.C. App. Div.). A worker, such as the appellant, should therefore be given compensation benefits if his case can reasonably be brought within the scope of the legislation.*

A fair reading of the numerous medical reports on this file clearly indicates that any predisposition that the Worker may have had to either develop chondromalacia patella and/or chronic pain syndrome in her right knee is not clearly borne out in this case. Even if any such predisposition to develop chondromalacia patella and/or its subsequent development resulting in dehabilitating chronic pain in the Worker can be made out in this case; that does, in and of itself, disentitle her to compensation and/or medical aid for chronic pain.

ISSUE

Is the Worker's chronic pain symptom compensable? That depends!

At the outset, there is no real issue as to the existence of chronic pain in this case. The numerous reports from the Worker's family physician, Dr. Davidson, Dr. Cameron, her treating medical specialists, Dr. Profitt, Dr. Beauprie, and, the Board's Medical Director, Dr. Carruthers, the Chief Executive Officer of the Board, and the Case Manager, to name but a few, clearly recognize the existence of chronic pain in the Worker's right knee. In this regard, we accept the Worker's position, that in the case of conflicting medical evidence on the existence of chronic pain, the opinions of her treating physicians/specialists over that of non-treating physicians/specialists in accordance with Board policy 04-30 should be considered in, deciding any issue involving chronic pain.

Is it compensable?

A review of the **Act** in 1989, when there was strong evidence that the Worker was suffering from chronic pain indicates that the **Act** did not have a specific provision for the entitlement to chronic pain benefits of any description, be they for lost wages, and/or medical aid or otherwise.

The current legislation makes no specific reference to the term "chronic pain".

The 1974 **Act** did not contain any chronic pain provision. Nor did it include the term "impairment". The 1988 **Act** contains the term "impairment" as does the current updated version of the **Act**.

There was a policy on chronic pain as early as 1994, and, while it did not contain a definition of

"impairment," that policy on the one hand stated that "the Board does not provide financial compensation for chronic pain as such."

It also states that benefits provided after the plateau point will be determined by considering the **rate of medical impairment, functional ability, and wage loss**.

Impairment is defined in the current **Act** as:

> *(n) "**impairment**" means a medically measurable permanent anatomical loss or disfigurement and includes, amputation, loss of vision, loss of hearing; impaired nerve function, scarring causing disfigurement, joint ankylosis, or joint fusion from surgery;*

The definition of "impairment" in the current Policy 04-57 is slightly different and is as follows:

POLICY NUMBER: POL 04-57

IMPAIRMENT

1. "Impairment" means a medically measurable permanent "anatomical loss or disfigurement" **that includes, but is not limited to**, amputation, loss of vision, loss of hearing, impaired nerve function, scarring causing disfigurement, joint ankylosis, or joint fusion from surgery.

As a matter of interest only, in 2000 a proposed amendment to the **Act** included a definition of chronic pain.

The proposed amendment Section 1.1(e.1) was as follows:

> *(e.1) "chronic pain" means pain*
> *(i) that continues beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise predated the pain, or*
> *(ii) that is disproportionate to the type of personal injury that precipitated, triggered or otherwise predated the pain, and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed.*

Section 56 (17) states:

> *The Appeal Tribunal shall be bound by and shall fully implement the policies of the*

Board and the Appeal Tribunal, its chairperson and members are prohibited from enacting or attempting to enact or implement policies with respect to anything within the scope of this Part.

WEIGHING THE EVIDENCE

BOARD POLICY: Pol 04-30: Weighing of Evidence

Policy:

1. In determining entitlement, the Workers Compensation Board requires **evidence** that:

   · any injury has occurred;
   · the injury was caused by an accident arising out of and in the course of employment;
   · the diagnosed condition is compatible with the history provided; and
   · medical treatment was sought or wages were lost as a result of the injury.

2. The Workers Compensation Board will examine the evidence to see whether it is sufficiently complete and reliable to allow a decision to be made with confidence.

3. The standard of proof for decisions made under the Act is the balance of probabilities - - a degree of proof which is more probable than not.

4. Decision makers must assess and weigh all relevant evidence. Conflicting evidence must be weighed to determine whether it weighs more toward one possibility than another. Where the evidence weighs more in one direction then that shall determine the issue.

8. Medical evidence:

   Medical evidence and medical opinion provided by a **treating** physician or chiropractor will be used in determining the validity of a claim:

   Where there is conflicting medical evidence presented on a claim, the evidence must be analyzed objectively, keeping the following criteria:

   · the expertise of the individual providing the opinion;
   · the correctness of the facts

Since the **Act** has no provisions relating to chronic pain as such, the Worker must look therefore to the policy on chronic pain for any entitlements to benefits or compensation.

Impairment

The Worker has made an arguable case for an "impairment" award claiming that she has suffered a permanent total disability, an impairment under the **Act**.

We see the impairment as one induced by or resulting from the Worker's chronic pain that gained in intensity from pain that partly disabled her in 1990 to the point where, ten (10) years later, she was functionally disabled.

There is no doubt that, in the opinion of Dr. Profitt (as of [personal information], 2000), she was functionally disabled. Prior to her 1989 reported injury she had no physical work limitations.

It appears that she also suffered a permanent anatomical loss as defined in the Board Policy on "Impairment" in that she has a loss of use "of a body part which results in a loss of opportunity to work at her pre-injury employment due to permanent physical work restrictions which can be objectively measured" - applying the American Medical Association (AMA) guidelines in assessing the degree of medical impairment.

It is noted that in his March 16, 1990, addendum to the file, Dr. DeMarsh, recommended that the 7% Permanent Partial Disability, he used to help the Worker with her "re-training".

On March 27, 1990, while the rehabilitation counselor advised the Worker that any future "rehabilitation costs" would have to be borne out of that settlement. He also confirmed that:

> If your condition was to deteriorate in the future, you would be compensated for the percentage of increase.

On one hand the permanent partial disability payment appears to have been a form of wage loss and/or "pension." On the other hand, a retraining allowance that could be reviewed. Under the current legislation it appears to fall within the **Act** (Section 18) and board policy on medical aid.

It is understandable, therefore, that in reliance upon that commitment, the Worker is claiming something approaching the difference possibly, as much as 93%, unless the Board disregards the opinion of her treating medical specialist, Dr. Profitt who a year later confirmed that she was functionally disabled.

In the March 27, 1990, letter to the Worker she was directed by her rehabilitation counsellor to:

> **contact your doctor and call the Board for a review of your file if any problems develop with your injury.**

We have noted that paragraph 7 of the policy on **impairment** states:

> Workers who have received a pension as a result of an accident that

> occurred prior to January 1, 1995, are not eligible for either a review of the pension or consideration of an impairment award.

The definition of "Pension" in that policy is as follows:

> "Pension" means an award based on a medically assessed disability awarded by the Workers Compensation Board prior to January 1, 1995, and paid in recognition of a permanent partial or total disability.

At first glance these provisions would appear to constitute a bar, driven by Board Policy, to the receipt of any further compensation when the Worker's entitlement to some relief has been made out.

Clearly, at the time the Worker received the 7% PPD award it was identified as a source of funds to "retrain" for other employment.

We note, however, that the applicable statutory provision at the time of the payment states:

Section 44 - 1988 **Act**

> 44(2) Where the impairment of the earning capacity of the worker does not exceed ten per cent of his earning capacity then instead of such weekly or other periodical payment, the board shall, unless in the opinion of the board it would not be to the advantage of the worker to do so, direct that such lump sum as the board may deem to be equivalent shall be paid to the worker.

It appears that the PPD award was a "pension," although the **Act** did not have a definition of pension when the sum was paid to the Worker. In any event, it could be said that it constituted "an impairment award" pursuant to Section 44(2). That said, the current policy on impairment awards excludes the Worker from any further impairment award.

Section 49:

> *(1) The Board may determine that a worker has suffered an impairment as the result of an accident.*
>
> *(2) Where the Board determines that a worker referred to in subsection (1) has suffered an impairment,*
>
> *(a) the Board shall pay to the worker a lump sum impairment award calculated in accordance with the regulations; and*
> *(b) where the worker suffers a change in his or her medical condition,* ***the worker may apply to the Board to review the degree of impairment.***

(6) (b) clause 2(a) does not apply to a worker who suffered an impairment as a result of an accident that occurred ***prior to January 1, 1995****. 2001,c, 20,s.16.*

We note as of [personal information], 2000, the Worker's treating specialist had conclusively diagnosed her as having chronic pain to the point where she was, at that time, functionally disabled. However, the statutory bar, Section 49(6)(b), to making a further impairment award became law the following year.

Section 49 (6)(b) states:

> **Clause 2(a) does not apply to a worker who suffered an impairment as a result of an accident that occurred prior to January 1, 1995. 2001, c.20,s.16**.

Notwithstanding the assurances offered by the rehabilitation counsellor, it now appears that both the **Act** and existing policy, if our interpretation of same is correct, prevent an "impairment award" being made in this case at this time.

CONCLUSION

Notwithstanding the foregoing, the Worker has clearly made out her case for some chronic pain entitlements. We are of the view that the IRO, in denying any chronic pain entitlement(s), in all of the circumstances, and especially in light of the considerable medical evidence establishing chronic pain as a result of her initial workplace injury, was wrong and/or incorrect.

From the analysis of the numerous medical opinions with respect to the second issue in this case, we find that the chronic pain complained of in this case clearly meets the criterion as set out in the definition of chronic pain in the chronic pain policy. Our reasons for arriving at this conclusion are: (1.) The bulk of the medical opinions in the file point to a diagnosis in the Worker's right knee that does not involve any clear objective medical evidence of chondromalacia patella. (2.) The Worker's treating physicians continually, for the most part, never accepted the diagnosis of chondromalacia patella from other non-treating and/or non-examining physicians. (3.) The Board's Medical Director, Dr. Carruthers, offered an opinion that differed substantially with Dr. DeMarsh's early diagnosis of chondromalacia patella in 1990.

We accept the Worker's contention that she does not have persistent lingering pain "due to a discernable organic diagnosis." The facts are strongly supportive of her contention that the chronic pain that she has endured over the years since the date of her workplace injury has a reasonable causal connection to her 1989 workplace injury. There is no other reasonable medical explanation for its existence.

Even if she was predisposed to develop chronic pain; then, if the work activities on the day in

question caused her asymptomatic condition to become symptomatic, she is nevertheless entitled to be compensated for her injuries to the extent that the current legislation and Board Policy provides for same.

Accordingly, the claim is allowed because the Worker suffered chronic pain as a result of her 1989 workplace injury. This chronic pain is compensable.

The matter is therefore referred back to the Board for an assessment of all of the benefits to which the Worker may be entitled pursuant to the Act, Board Policy, including any wage loss and medical aid benefits to which she may be entitled, keeping in mind the commitment and assurance made to the Worker by the rehabilitation counsellor on March 27, 1990.

With respect to the three possible scenarios related to the diagnosis of chronic pain and entitlement to compensation benefits, pursuant to the current policy on chronic pain, we note that there was a compensable injury in 1989 and some small compensation paid to the Worker.

We note, the worsening of the chronic pain condition in the years up to the date of the IRO hearing to the point where the Worker was clearly functionally disabled.

In addition, we note that while the Worker did try a return to gainful employment after 1989, her chronic pain condition became so pronounced that, effectively she cannot return to work, despite any return to work interventions and/or initiatives which, as appears from the Appeal Record, were rather limited.

From our reading of the Board Policy, this should entitle the Worker to Medical Aid, and possibly Temporary Wage Loss Benefits had the Board accepted her claim for chronic pain benefits before she was assessed as being functionally disabled in May 2000.

It also appears that the Worker meets the Board Policy criterion for Extended Wage Loss Benefits given our ruling that she suffers from chronic pain in this case and is entitled to Chronic Pain Benefits according to the **Act** and Board Policy notwithstanding that the **Act** does not define or refer to chronic pain as such.

While this Tribunal is bound to follow Board Policy, it has a duty to determine if an injured Worker is entitled to compensation in appropriate cases. This duty or responsibility requires that we review the case on the general issue as to whether or not the Worker suffered a workplace injury entitling her to compensation.

Having said that, what these entitlements consists of will be determined by the current policy on chronic pain which is binding on this Tribunal.

Accordingly, that matter rests with the Board on that matter.

Dated this 12th day of April 2007.

ALLEN J. MacPHEE, Q.C.
Chair of the Appeal Tribunal

ELIZABETH MOBBS
Panel Member

SCOTT DAWSON
Panel Member

WORKERS' COMPENSATION BOARD
APPEAL TRIBUNAL

BETWEEN:

WORKER

APPELLANT

AND:

WORKERS' COMPENSATION BOARD
OF PRINCE EDWARD ISLAND

RESPONDENT

DECISION # 66
