WORKERS COMPENSATION
APPEAL TRIBUNAL

CASE ID [personal information]

BETWEEN:

WORKER

APPELLANT

AND:

WORKERS COMPENSATION BOARD
OF PRINCE EDWARD ISLAND

RESPONDENT

DECISION #76

Worker	**Representing Himself**
Stephen Carpenter **Stewart McKelvey Stirling Scales**	**Solicitor representing the** **Workers Compensation Board**
Place and Date of Hearing	**Best Western Charlottetown** **238 Grafton Street** **Charlottetown, P.E.I.** **May 31, 2007**
Date of Decision	**November 15, 2007**

BACKGROUND/FACTS

The pertinent facts up to and including the IRO Decision are as set out in the Factum filed by the Board in this matter. Additional facts are set out in more detail in the summary of the IRO's Decision as follows.

Facts as stated by the Respondent.

1. In a nutshell, the worker complained of injury as a result of a workplace accident that took place [personal information], 1995.

2. He did not seek medical attention until two days later. At that time, he complained of "pain in both knees - back of legs - low back, left buttock, since sitting and bracing his feet against [personal information] to prevent it from moving".

3. On the Worker's Report of Accident, he wrote "pulled muscles both legs". He circled his knees as the "affected areas".

4. He did not lose time from work that year, but continued with his employer.

5. Since that time, he has been seen by numerous doctors including Dr. McCarthy, Rheumatology and Internal Medicine; Dr. Whittey, Chiropractor; Dr. Alexander, Orthopedic Surgeon; Dr. Profitt, Orthopaedic Surgeon; Dr. MacLean, Neurologist; Dr. Hutchings, Neurologist; Dr. Hambly, General Practitioner; Dr. Scott Cameron, General Practitioner; Dr. Moyse, General Practitioner; Dr. Colburn; Dr. Andrew McLeod; Dr. DeMarsh, Board Doctor; and Dr. Wedge, Board Doctor. Dr. Barry Carruthers reviewed the file.

6. No doctor could find anything objectively to account for the symptoms complained of by the worker.

7. An FCE done in [personal information] 1999 indicated that they had no difficulty matching an 8-hour day into a job description with heavy lifting.

8. The worker himself states that through sheer willpower he continues to work.

The IRO Decision

In the thirty-one (31) page IRO Decision of the IRO dated August 30, 2002, the IRO identified the Decision being considered by him as:

> The decision by the Case Manager in the decision letter dated January 19, 2001, and re-affirmed decision letters of October 29,

> 2001, September 27, 2001, and March 5, 2002, which state the worker is not entitled to any additional compensation benefits from his work accident of [personal information], 1995, from this claim.

His Decision is as follows:

> Reconsideration request is **Denied**. The Internal Reconsideration Officer's decision is in agreement with the decision by the Case Manager in the decision letter dated January 19, 2001, and re-affirmed decision letters of October 29, 2001, September 27, 2001, and March 5, 2002. I agree the worker is not entitled to compensation wage loss benefits effective January 19, 2001, and medical aid services effective March 5, 2002. My decision is pursuant to the ***Workers Compensation Act*** for the identified Issues in Dispute.

The IRO identified the issue before him as:

> Whether the worker's loss of income for ongoing back, neck and leg problems is related to his work injury of 1995.

After referring to the pertinent legislation, including but not limited to, sections 6(1) and 17 of the ***Act,*** the IRO set out these sections and the Board's 1994 Policy on Chronic Pain.

> **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.
>
> **Section 17**
> 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] CHRONIC PAIN**
>
> POLICY
>
> 1. The Workers Compensation Board of Prince Edward Island is committed to a preventive case management approach to the problem of chronic pain. We recognize chronic pain as the main factor leading to prolonged recovery in Workers

Compensation Board claimants. We also recognize the devastating consequences of chronic pain; not only for the individual, but for the Workers Compensation Board and society at large. We make note of the fact that the causes of chronic pain include activities of the health profession, the legal profession and as well, the insurance system. We note, in addition, that chronic pain is not a disease entity, but rather a condition or predicament. Chronic pain is, in itself, not medically measurable.

2. While it is important that injured workers receive fair financial compensation; the Board also recognize that 'financial rewards' can reinforce or aggravate the problem of chronic pain.

3. In view of all the above, the Board takes the following position on chronic pain. We are committed to an active case management approach. This involves early identification of "high risk claimants" followed by early direct contact with the claimants. We then provide the claimant with early access to a comprehensive package of medical and occupational rehabilitation programs according to their needs. We maintain direct contact with the claimant using a team approach. The claimant is a participant in the team along with a member of the relevant Workers Compensation Board department; as well as other involved parties such as health professionals.

4. The objective of this team approach is to resolve the medical and administrative aspects of the claim and to encourage the claimant to return to their pre-injury employment or the best suitable alternative.

5. The Board does not provide financial compensation for chronic pain as such. We do compensate the injured worker during the recovery period up to the point of a "plateau in medical improvement". Benefits provided after the plateau point will be determined by considering the rate of medical impairment, functional ability, and wage loss.

6. Finally, the Board will, at every opportunity, encourage all concerned parties, including health professionals and the legal profession, to cooperate with us in our efforts to prevent the development of chronic pain.

The IRO conducted a detailed review of a multitude of medical reports from a wide variety of medical experts, many of whom clearly diagnosed chronic pain syndrome, flare-ups of chronic pain and/or referrals to a chronic pain management clinic. (The worker was not interested in the clinic).

He noted the December 18, 2001, opinion of Dr. Carruthers, the Board's Medical Director which indicated that:

> *the worker has reasonably recovered from the incident that initiated this claim and there is absolutely no evidence that he has incurred an ongoing impairment as a result of this injury.*

On the same date (January 18, 2001) that Dr. Carruthers' memorandum to the file was referred to, Dr. Wedge filed a memorandum to the file in which he concluded:

> *I do agree his chronic pain syndrome is likely the result of his work incident and I agree with Dr. MacLean that this should be dealt with as a chronic pain syndrome through the use of medications and counselling, etc.*

The IRO then noted that on March 26, 2001, Dr. Carruthers, in his comment to the file, wrote:

> *The worker has proven himself imminently suitable for appropriate work compatible with having recovered well from injuries sustained under this claim. I, therefore, do not feel an additional Functional Capacity Evaluation serves to assist in comments on this claim. The overall medical evidence would be that this worker has not incurred an ongoing impairment secondary to an injury which initiated this claim in August 1995.*

The IRO quoted, with acceptance, the decision of the Case Manager to the effect that:

> *There is <u>insufficient evidence</u> to substantiate your present symptoms as arising out of your work injury.*

Reference was also made to a subsequent Decision of the Case Manager on September 27, 2001, in which he denied the workers claim for "compensation benefits and specifically the 45 days for the period December 6, 1999, to October 30, 2000," and, reference was also made to a reversal of that decision by the Case Manager on October 29, 2001, in which he allowed the claim for the

45 days of lost wages, due to medical appointments, but, in doing so, made it clear to the worker that no additional benefits or further compensation would be approved for his claim.

The IRO thereafter denied the worker's claim. His Decision states:

> *I find the evidence supports the Case Manager's decision to not approve the worker's claim for additional wage loss benefits effective January 19, 2001, and medical aid services benefits effective March 5, 2002.*

The IRO sufficiently captured the central issue in this case when he stated:

> *The worker has requested the Board to compensate him for those occasions he feels he needs time off from work which, he submits, is due to pain symptoms as a result of an injury from his* [personal information]*, 1995, work accident.*

The IRO then reviewed several medical reports, and in denying the worker's claim in its entirety, he held:

> *I find from these facts the worker had a soft tissue strain injury as a result of his work accident, and there was a lack of objective medical evidence of other injuries to support his widespread subjective symptom presentation. (Emphasis added) ... I find from the file record there was extensive medical investigation into the worker's symptom presentation, however there was a lack of findings to support or identify a cause for these symptoms generally, or from his work injury specifically. Dr. DeMarsh was recording the worker's presentation of symptoms and was not recording specific findings in these statements.*

Notwithstanding this, the IRO did refer to other medical opinions in which chronic pain was diagnosed. He states:

> *The* [personal information]*, 1998, medical report by Dr. R. Colborne stated the worker's diagnosis was "moderate chronic pain syndrome." I find Dr. Colborne provided no objective signs/symptoms nor was a cause identified to support the worker's diagnosis was the result of his* [personal information] *1995 soft tissue injury.....*
>
> [personal information]*, 1998, consult by Dr. B. Ling, Orthopedic Surgeon, who stated, "He has been investigated by Dr. Hutchings, Dr. Gregg MacLean in St. John, and also has had an MRI and apparently these have not revealed any specific lesion. He continues to experience muscle fasciculation and dysesthesias in*

his legs and arms. I cannot account for this - it certainly seems that neither the neurologist or the MRI could account for this." ..... *I can only think of referral to a chronic pain management clinic of some sort.*

In his concluding sentence of his Decision the IRO stated:

> *I find from the facts of the file record, the adjudication of the worker's claim has complied with the Board's Chronic Pain Policy.*

Notice and Grounds of Appeal

The Worker's Notice and Grounds of Appeal state:

> I am hereby filing notice to appeal your internal reconsideration decision of August 30, 2002.
>
> Section 6(1). The injury sustained in 1995 while employed with the company was the direct and only cause of continued disability and work impairment.
>
> Section 17. The real merits of my case were not properly adjudicated. I have continuously been examined by medical professionals, therapists, surgeons, physiotherapists since my injury of 1995.
>
> All of these examinations were as a direct result of my workplace injury.
>
> Although my type of injury cannot apparently be physically seen on an MRI or x-ray, this does not indicate it does not exist. My continued work impairment and symptoms as proven by many doctors appointments are an ongoing result of this injury.
>
> The evidence provided by my family physician, who has also been my physician for 20 years prior to my accident, is being ignored or challenged. Prior to 1995, I did not have any record of physical impairment.
>
> Through sheer force of will I can work for several days (8 hour days) - then I am required to take several days off to recover. This has resulted in a very substantial financial loss. This is proven by copies of my CCRA Income Tax filings for 1999, 2000, and 2001

(attached) as well as a table showing my income for 1994 through 1998.

Other Relevant Facts

This case was initially set down for a hearing on March 12, 2004, and re-scheduled to March 26, 2004. By letter to the Appeal Tribunal on March 15, 2004, the Board's Solicitor wrote to the Appeal Tribunal stating:

> *In preparing for this hearing which was originally scheduled for March 12, 2004, as per our telephone call, I noted that my Factum was drafted and filed in December 2002 and a good deal of my Factum dealt with the issue of chronic pain. I am uncertain as to whether or not the worker alleges he has chronic pain, however, the medicals certainly do make reference to chronic pain.*
>
> - *See* [personal information]*, 1998, medical report by Dr. R. Colborne who makes a diagnosis of "moderate chronic pain syndrome".*
> - *See* [personal information]*, 1998, consult by Dr. Holmes who advises of a referral to a "chronic pain management clinic of some sort*
> - *See* [personal information]*, 2000, consult by Dr. Gregg MacLean who thinks his symptoms are "predominantly on a basis of his chronic pain syndrome".*
> - *See* [personal information]*, 2000, medical progress report by Dr. Andrew MacLeod who makes reference to "chronic pain in back, legs".*
> - *See* [personal information]*, 2000, medical progress report by Dr. A. MacLeod who makes reference to "flare of chronic pain, most dominate upper back radiating to neck".*
> - *See* [personal information]*, 2000, memorandum to file by Dr. Richard Wedge "I do agree his chronic pain syndrome was likely the result of a* [personal information] *incident".*
> - *See Progress Report by Dr. Hambly,* [personal information]*, 2001, "Pain in neck - chronic pain syndrome".*

Additionally, the IRO in the penultimate paragraph of his 31 page decision states, "I find from the facts of the file, the adjudication of the worker's claim has complied with the Board's chronic pain policy."

Subsequent to all of the decisions in this case and the Factum filed on behalf of the Workers Compensation Board, the Supreme Court of Canada in October 2003 issued its decision in the ***Martin and Laseur*** *case.*

Since that time the Board is in the process of revising its policy on chronic pain and has been contacting all individuals whose claims have been denied on the basis of chronic pain. They are reviewing all these cases and will be dealing with them under a new policy which, we understand, is currently before the medical society of Prince Edward Island for their comments. (Emphasis Added).

By a copy of this letter, I am asking the Board to review the worker's claim under the new policy. In doing so it may be that there would be no need for the hearing which is now scheduled for March 26.

By letters dated June 9, 2004, and September 27, 2004, the Director of Client Services, [personal information], wrote to the worker with respect to the worker's recent inquiry relating to chronic pain.

[Personal information] wrote:

On [personal information], 2004:

> In response to your inquiry regarding recent developments relating to chronic pain, the purpose of this letter is to provide information regarding the recent Supreme Court of Canada decision on chronic pain.
>
> The Court's decision impacts on any decisions that the Workers Compensation Board of Prince Edward Island has made relative to the chronic pain amendments that were introduced effective July 1, 2002.
>
> However, as the decision on your case was made prior to that date, the Court decision does not apply. Your decision was based on Board policy which was not a subject of that decision. Regardless of that fact, the Board is prepared to review your case to ensure the decision was consistent with the policy in place at that time. (Emphasis added).

On September 27, 2004:

> In follow up to my June 9, 2004, correspondence, I have reviewed your file to determine whether you are entitled to further benefits relating to your pain symptoms.
>
> As I noted in my earlier correspondence, the Supreme Court of Canada decision on chronic pain impacts Workers Compensation Board decisions made after July 1, 2002. The reason for this is that effective July 1, 2002, the Prince Edward Island **Workers Compensation Act** was amended to include language which clearly barred the awarding of compensation for chronic pain.
>
> Up until that time, and during the time decisions were made on your claim, decisions were made based on Workers Compensation Board policy which provided for consideration of the merits of each case and which was worded as follows:

WCB Policy and Practice Subject: CHRONIC PAIN Division: CLAIMS

POLICY

1. *The Workers Compensation Board of Prince Edward Island is committed to a preventive case management approach to the problem of chronic pain. We recognize chronic pain as the main factor leading to prolonged recover in Workers Compensation Board claimants. We also recognize the devastating consequences of chronic pain; not only for the individual, but for the Workers Compensation Board and society at large. We make note of the fact that the causes of chronic pain include activities of the health profession, the legal profession and as well the insurance system. We note, in addition, that chronic pain is not a disease entity, but rather a condition or predicament. Chronic pain is, in itself, not medically measurable.*

2. *While it is important that injured workers receive fair financial compensation; the Board also recognize that 'financial rewards' can reinforce or aggravate the problem of chronic pain.*

3. *In view of all the above, the Board takes the following position on chronic pain. We are committed to an active case management approach. This involves early identification of "high risk claimants" followed by early direct contact with the claimants. We then provide the claimant with early access to a comprehensive package of medical and occupational rehabilitation programs according to their needs. We maintain direct contact with the claimant using a team approach. The claimant is a*

participant in the team along with a member of the relevant Workers Compensation Board department; as well as other involved parties such as health professionals.

4. *The objective of this team approach is to resolve the medical and administrative aspects of the claim and to encourage the claimant to return to their pre-injury employment or the best suitable alternative.*

5. *The Board does not provide financial compensation for chronic pain as such. We <u>do compensate the injured worker</u> during the recovery period up to the point of a <u>'plateau in medical improvement'</u>. Benefits provided after the plateau point will be determined by considering the rate of medical impairment functional ability, and wage loss.*

6. *Finally, the Board will, at every opportunity, encourage all concerned parties, including health professionals and the legal profession, to cooperate with us in our efforts to prevent the development of chronic pain.*

Board Minute Date: 15 November <u>1994</u>, Effective Date: 15 November 1994

I have reviewed your claim in relation to **this** policy and it is clear that following the point where your reached a plateau in medical improvement, you participated in a Functional Capacity Evaluation to determine your functional capabilities, and you participated in the vocational rehabilitation process to determine alternative employment possibilities. It is also clear from the file information that you chose to return to [personal information] work.

I note in particular, that the <u>essence</u> of the Internal Reconsideration decision on <u>your claim</u> relates to the <u>issue of your pain symptoms</u> and their relationship to your accident and outlines in some <u>detail</u> the rationale for <u>supporting the decision</u> to <u>deny further benefits</u> related to those symptoms.

As the Internal Reconsideration decision is considered the final decision of the Board and as I cannot appreciate any new information on your file which would alter previous decision of staff, I am unable to make a different decision at this time.

While reference was made to the Supreme Court of Canada Case (***<u>Martin and Laseur</u>***) involving chronic pain, and the impact that it would have "**on any Decisions that the Board had made relative to the chronic pain "amendments" that were introduced effective July 1, 2002,**" to prohibit the Board from awarding chronic pain compensation and/or benefits, Mr. Bruce notified the worker to the effect that as the August 30, 2002, IRO Decision on his case was made "prior to that date (July 1, 2002), the Board's Decision was based on Board Policy "which was not a subject of that (***<u>Martin and Laseur</u>***) Decision. [Personal information] then confirmed that the worker's case would be reviewed so as to ensure that the Board's Decision was consistent with the policy in place "at that time" (the **old** Chronic Pain Policy).

Consequently, the Director of Client Services did not review the August 30, 2002, IRO Decision in the context of the New Chronic Pain Policy which came into effect on May 13, 2004, notwithstanding that the worker had been advised that the Board "has been contacting all individuals whose claims have been denied on the basis of chronic pain... and it will be dealing with them under a New policy"

The **new** Chronic Pain Policy states:

POLICY NUMBER: POL 04-64

CHRONIC PAIN

DEFINITION:

1. "Acute pain" means pain having a rapid onset, severe symptoms, and a short course.

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.**

3. "Healing time" means the generally expected interval of time for physiological wound repair, following an injury or surgery.

4. "Impairment" means a medically measurable permanent anatomical loss or disfigurement and 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.

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.

6. "Pain management program" means a program approved by the Workers Compensation Board for the purpose of managing chronic pain.

7. "Permanent anatomical loss or disfigurement" means the loss, loss of use, or derangement of any body part, system or function **which results in a loss of opportunity to work at the pre-injury employment due to permanent physical work restriction which can be objectively measured.** This loss has become static or well-established with or without medical treatment and is not likely to change substantially in the next year.

8. “Recurrence” means a return of disabling conditions, supported by objective medical evidence that can be reasonably related to an injury caused by a previous work-related accident. Recurrence of the condition must be medically compatible with the previous injury, and decisions to accept or deny recurrences must rely on medical evidence supporting this relationship.

9. “Return to work” means the act of re-introducing workers to safe and productive employment which eliminates or minimizes earnings loss as soon as medically possible.

10. “Return to work programs” means modified duties, alternate duties or tasks, or ease back, including approved employer initiated ease back programs.

POLICY:

1. Generally, a worker who suffers personal injury by accident also experiences acute pain that results directly from the injury. During the early stages, this pain is expected, and is a normal and healthy response to the healing of that injury. In most cases, the worker’s pain will eventually resolve, either spontaneously or with some form of treatment.

Prevention and Identification of Risks

2. The Workers Compensation Board will strive to identify risks, and prevent the development of chronic pain by using timely intervention strategies.

3. To assist in the identification of risks and prevention of chronic pain, the Workers Compensation Board will:

   - ensure the worker receives the appropriate medical treatment in a timely fashion

   - use appropriate criteria and guidelines to identify factors that may be predictors for the development of chronic pain

   - encourage and assist the worker to exercise and continue activities as normally as possible, in an effort to restore functional ability, prevent deconditioning, and return to work in a timely and safe manner

Treatment

4. The Workers Compensation Board recognizes that some workers will develop chronic pain as a complication of the compensable injury. The Workers Compensation Board considers chronic pain to be a treatable condition, and believes the worker can be rehabilitated and return to work. Therefore, the

worker is expected to continue active participation in his or her rehabilitation and return to work plan.

5. When a worker is diagnosed with chronic pain, the Workers Compensation Board will identify and implement appropriate treatment programs for that worker. These programs may consist of the following:

- work conditioning and return to work program
- multidisciplinary pain management; and/or
- other appropriate interventions as determined by the Workers Compensation Board

Entitlement to Temporary Wage Loss Benefits and Medical Aid

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

<u>Chronic Pain as a Complication of a Compensable Injury</u>

Where a worker has a compensable injury and;

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

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.

Chronic Pain in the Absence of a Compensable Injury

Where a worker files a claim for chronic pain without a history of a previous compensable injury, the Workers Compensation Board will adjudicate the claim using the same principles used to adjudicate any other claim.

Where the Workers Compensation Board determines based on the evidence, there was no compensable injury, the chronic pain is a non-compensable condition.

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.

8. To determine entitlement to continued wage loss benefits, the Workers Compensation Board uses:

   - evidence of the worker's current functional ability, activity level, and earning capacity, to determine if there is evidence of a restriction

- evidence gained during treatment and return to work initiatives, including the results of medical and functional assessments, to determine if there is evidence the worker participated with full effort

- consideration of whether there is a relationship between a pre-existing condition and the chronic pain pursuant to the Workers Compensation Board policy, POL04-09, “Pre-existing Conditions”

- consideration of a worker’s loss of earning capacity pursuant to the Workers Compensation Board policy, POL04-68, “Estimating Earning Capacity” in situations where the injury and residual chronic pain result in a permanent work restriction or reduced functional capacity that affects the worker’s earnings

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.

Impairment Assessment

10. The Workers Compensation Board will refer a worker with chronic pain for an impairment assessment when the Workers Compensation Board determines all of the following criteria have been met:

    - the chronic pain is a complication of the original compensable injury
    - there is a decreased functional capacity as a result of the compensable injury; and
    - the appropriate treatment and programs for the chronic pain have been provided.

HISTORY:

May 4, 2004 - Amended to reflect the spirit of the **Martin and Laseur vs Nova Scotia (Workers Compensation Board)** decision from the Supreme Court of Canada. In essence, the policy was amended to ensure workers who **develop** chronic pain as a complication of a compensable injury have the same access to

> the workers compensation system as other injured workers. **The amendments to this policy became effective May 13, 2004.**
>
> September 26, 2002 - Replaces Policy and Practice "Chronic Pain" dated November 15, 1994.

This Policy appears to provide a mechanism for the Board in dealing only with those persons who, on or after (but not before) May 13, 2004, "develop" Chronic Pain. It is silent, with respect to those situations/cases in which chronic pain existed and the ***Act*** was either silent on chronic pain or prohibited any compensation for benefits of any kind where claimants suffer chronic pain.

Notwithstanding the foregoing, the Board's position, as set out to the Appeal Tribunal, in its letter, dated March 15, 2004, clearly addressed the worker's issue in this particular case, in that it confirmed the Board's position to deal with "all those individuals whose claims have been denied on the basis of chronic pain ... and will be dealing with them under a new policy".

From a review of the IRO Decision, its eminently clear that this same message/position of the Board may not have gotten through to the IRO in this particular case.

THE STANDARD OF REVIEW

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 ***Act***. 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.

Accordingly, the standard of review to be applied in this case is "correctness".

ANALYSIS

The New Chronic Pain Policy, in place at the date of [personal information] June 9, 2004, and September 27, 2004, letters to the worker, became effective May 13, 2004. While the formal authorization, Board Minutes of November 15, 1994, indicates that the effective date of the New Amendment was November 15, 2004, the actual policy, under the caption "History," reads as follows:

> **HISTORY:**
>
> May 4, 2004 - Amended to reflect the spirit of the Martin and Laseur vs Nova Scotia (Workers Compensation Board) decision from the Supreme Court of Canada. In essence, the policy was amended to ensure workers who develop chronic pain as a complication of a compensable injury have the same access to the workers compensation system as other injured workers. **The amendments to this policy became effective May 13, 2004.**
>
> September 26, 2002 - Replaces Policy and Practice "Chronic Pain" dated November 15, 1994.

Consequently, in our opinion, any Chronic Pain Policy and/or Legislation that was in place, especially after the ***Martin and Laseur*** Case, that acted as a deterrent or a bar to the Board awarding wage loss compensation and/or Medical Aid to an injured worker, should not have been used as the basis of a denial to wage loss and/or Medical Aid, once the wage loss and entitlement to Medical Aid has reasonably been established by the worker.

Section 17 of the ***Act*** states:

> 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, 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 it 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 Workers' 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. Workers' 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.*

At the Hearing in this matter the worker noted that a review of his file indicates that he had no serious pre-injury work accidents - only a few minor incidents. A review of the Appeal Record indicates this to be the case.

He claims that he had suffered an injury for which he was not adequately compensated for, in terms of both Wage Loss and Medical Aid Benefits; he now claims compensation for both.

The Board's Position

The Board, at the hearing in this matter conceded that the worker suffers from chronic pain as a result of the work duties that gave rise to this claim.

The Board also conceded that the Director of Client Services erred in not applying the new Chronic Pain Policy.

However, the Board pointed out that the 1999 Functional Capacity Evaluation recommended that:

> There is no difficulty in matching an 8 hour work day onto (the worker's) profile with a job description of heavy physical demands.

In that [personal information], 1999, report the diagnosis is stated as "Chronic Pain".

On June 3, 1999, the then Director of Client Services, who would have had access to all of the worker's medical records, conducted interviews with the worker. In a memo to Jean Tremere, he wrote:

> I had a long conversation with the worker today regarding his current situation. As you know there are many complicating factors going on with his case, in that there is very minimal findings from an objective medical point of view. There is also the issue of his self-employment [personal information] business and his inability to provide us with records depicting his actual loss earnings due to his injury.

> I mentioned that one of the things I use to do when I adjudicated claims, was to establish a 50 percent rate of pay to self employed workers to allow them to obtain necessary rest and/or treatment over a fixed period of time, usually between 6 and 8 weeks. There is a fair amount of the "honour system" involved in this, in that the worker must utilize that time for proper rest and/or treatment. He expressed some interest in this and I indicated to him that I would inform you that I was approving this, if indeed that is one option which may assist both you and him in coming to some sort of mutual agreement with respect to benefits.

Apparently, this advice from an experienced claims adjudicator in recommending some measure of wage loss benefits to the worker, was acted upon on October 29, 2001, when the Board reversed an earlier September 27, 2001, Decision denying the worker's wage loss benefits for 45 days of lost wages due to medical appointments between [personal information] 1999 to [personal information] 2000.

Consequently, notwithstanding that the policy on Chronic Pain in place at that time, stated that: "**The Board does <u>not provide financial compensation</u> for chronic pain as such",** the worker was actually paid some wage loss benefits long before the ***<u>Martin and Laseur</u>*** case and the new Chronic Pain Policy that was developed and implemented thereafter; and, after the repeal of the amendment to the ***<u>Act</u>*** that prohibited awarding any compensation to an injured worker who suffered from chronic pain.

While the Board's Solicitor agreed that the matter should be referred back to the Board for review he indicated that on any wage loss issue there must be proof of actual wage loss. We accept that position.

Section 6(2) states:

> *Where a worker is injured in an accident, wage loss benefits are payable for his or her loss of earnings capacity <u>resulting form the accident</u> in respect of any working day after the day of the accident.*

Reference was made to several Income Tax Returns filed, especially from 1994 to and including 1999.

In addition, he noted the extensive list of pre-conditions to be met according to the new policy before any wage loss benefits can be awarded.

Finally, the Board took the position that since the worker returned to work there was in fact no loss of income.

With respect to the Medical Aid component of this claim, the Board's Solicitor properly pointed out, the discretion that the Board has in providing Medical Aid to an injured worker.

Section 18 of the ***Act*** states:

> 18.(1) The Board **may** provide any worker entitled to compensation under this Part with medical aid;
>
> 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.

The Board's Solicitor conceded that the Board is not adverse to reviewing this part of the worker's claim pursuant to the current (new) Board Policy on Medical Aid.

While the Appeal Record indicates a reluctance and/or unwillingness on the part of the worker to participate in a pain management program, he indicated at the hearing that he would be willing to participate if he could be convinced that it would be beneficial. We understand from his comments that the threshold to be met by the Board in convincing him to participate is not high.

CONCLUSION

Applying the test of correctness, we find that the IRO was wrong in upholding the Decision of the Case Manager in all of the circumstances. This Appeal is therefore allowed.

Accordingly, this matter is referred back to the Board which shall conduct a comprehensive review of the worker's file, with a view to providing such full and fair compensation, as provided for in the ***Act*** and current Board Policy to which the worker is reasonably entitled, insofar as all and any Wage Loss and Medical Aid benefit are concerned.

In its deliberations, we would expect that the Board would apply the Benefit of Doubt provisions of Section 17 of the ***Act***, apply the principles as set out by the Court of Appeal in the ***Blanchard*** and ***MacLeod*** cases, and, exercise its discretion pursuant to Section 18 of the ***Act*** in a manner that represents the spirit and intention of the ***Act***, in supporting the worker in his effort to deal with this disabling chronic pain condition that has plagued him for more than a decade.

In this regard, it appears to us that this worker most likely comes within the definition of "Permanent Anatomical loss" as defined in the current Chronic Pain Policy, in that he indeed may have, over the last ten (10) years suffered a loss (the inability to continue working) of opportunity at the pre-injury employment, due to some permanent physical work restrictions which can be objectively measured.

The worker shall participate in all and any OT and FCE and other examinations/assessments as may reasonably be required by the Board to determine the full extent to which the initial workplace injury has had on, not only his income, but also to determine what Medical Aid and the extent of the Medical Aid that the worker is entitled to, in order to cope with his ongoing

chronic pain. To this end, the Board shall provide all of the benefits to which the worker is reasonably entitled to, pursuant to the ***Act*** and the current new policy on Chronic Pain.

Dated this 15th day of November, 2007

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ALLEN J. MacPHEE, Q.C. Chair of the Appeal Tribunal	MIKE DesROCHES Panel Member

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HARVEY MacKINNON
Panel Member

WORKERS COMPENSATION BOARD
APPEAL TRIBUNAL

BETWEEN:

WORKER

APPELLANT

AND:

WORKERS COMPENSATION BOARD
OF PRINCE EDWARD ISLAND

RESPONDENT

DECISION #76