S.C.A. 02172

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S.; Macdonald and Matthews, JJ.A.

BETWEEN:

STEPHEN JOSEPH HAYDEN Appellant - and - WORKERS' COMPENSATION APPEAL BOARD Respondent	Linda L. Zambolin for appellant Jonathan Davies for respondent Appeal heard: January 23, 1990 Judgment delivered: March 23, 1990

THE COURT: Appeal allowed without costs; supplementary decision of the Board dated August 24, 1989, set aside, and matter remitted to the Board for a rehearing to review and reconsider the claim in accordance with Sections 20, 36 and 38 of the Workers' Compensation Act and provide reasons for its determination, as per reasons for judgment of Matthews, J.A.; Clarke, C.J.N.S., concurring, and Macdonald, J.A., dissenting

MATTHEWS, J.A.:

This is an appeal by Stephen Joseph Hayden from a supplementary decision of the Workers' Compensation Appeal Board dated August 24, 1989, affirming its decision of January 27, 1988, which awarded him a 20 percent permanent partial disability.

There is no dispute as to the facts. The appellant, a burner mechanic, injured his back on March 29, 1985. He received total temporary disability benefits from the Workers' Compensation Board until January 20, 1986, but was then denied further benefits. On appeal the Appeal Board ordered total temporary disability benefits to be paid from January 26, 1986, to May 1, 1986. The worker then requested a permanent partial disability pension which was denied by the Board. The Appeal Board by decision dated January 27, 1988, awarded the appellant a 20 percent permanent disability pension effective March 10, 1987, the date the appeal was filed. That decision, both in respect to the amount of the award and the effective date, was appealed to this Court, which, by judgment delivered May 10, 1988, reported (1988), 85 N.S.R. (2d) 302, allowed the appeal and awarded the appellant benefits retroactive to May 1, 1986, the date his total temporary disability benefits were terminated, and remitted the compensation award of 20 percent to the Appeal Board for a rehearing.

In rendering its January 27, 1988 decision the Appeal Board relied upon the November 25, 1987, report of Dr. Reardon, which read in part:

> It is my feeling that although we cannot make a specific diagnosis, this man remains considerably disabled. It is not uncommon in cases of chronic back pain to be unable to specify the anatomic location of the source of his pain. This type of patient is classified in my practice as soft tissue incompetence. There is no evidence of any disc disease or of any bony abnormality. Certainly, however, I am impressed by his clinical symptoms. There was nothing to make me think that he was malingering. He did not exhibit any of the non organic signs that are so often seen in untrustworthy patients.
>
> Thus to summarize, I feel that this man is genuine. He has injured his back and it is unlikely that he is ever going to get back into the remunerative work force. I think it will be reasonable if he could be retrained for a more sedentary type of activity as I think that he might be able to partake of something less strenuous. I also feel that he exhibits definite permanent physical impairment as a direct result of his work injury.

Appellant's counsel wrote to the Appeal Board on July 14, 1989, referred to Dr. Reardon's report of November 25, 1987, and enclosed a further report of Dr. Reardon dated May 12, 1989, which in part stated:

> This man had no history of back pain whatsoever until his work related injury of March, 1985, and since that time he has been unable to get back to remunerative work. Indeed it does seem that his condition has worsened if anything. As is the case with most patients with chronic pain there is a functional factor here that is difficult to deal with. Nonetheless, it still stands that the pain that the patient is experiencing is real and genuine and in this case I feel is going to continue

> to keep him from returning to remunerative work. I feel that the 20% assessment of loss of permanent physical function is quite fair and reasonable. His radiographic examination has not revealed any significant abnormalities, although this really doesn't mean anything one way or the other. Nonetheless, I would feel based on his history and the loss of physical function evident on physical examination that a 20% level of permanent physical impairment is in keeping with his presentation.

Appellant's counsel in that letter of July 14, 1989, continued:

> This above-mentioned report is consistent with Dr. Reardon's report of November 25, 1987 but, it is worth noting that in both reports Dr. Reardon states that it is unlikely that Mr. Hayden will return to the remunerative work force. In his most recent report of May 12, 1989, he states at page 2:
>
> > Nonetheless, it still stands that the pain that the patient is experiencing is real and genuine and in this case I feel is going to continue to keep him from returning to remunerative work.
>
> Dr. Reardon then goes on to assess the Respondent's loss of permanent physical function at 20 percent.
>
> It is submitted, on behalf of the Appellant, that Dr. Reardon's report clearly established that he will never return to the remunerative work force, and has sustained a permanent total disability. Therefore, Section 36 of the Act applies. I would ask that the Board award Mr. Hayden permanent total disability pension on the basis of these findings.

It is unquestionable from the medical reports on record, including those of Dr. Reardon that since the work-related injury of March 29, 1985, the appellant is not a malingerer and, as Dr. Reardon said, "he has been unable to get back to remunerative work".

The Appeal Board in its decision of August 24, 1989, from which this appeal is taken, quoted from Dr. Reardon's report of May 12, 1989, and concluded:

> The Appeal Board has already awarded Mr. Hayden at 20% permanent partial disability re Section 38(1). The Appeal Board has no evidence to support an increase based on this Section as suggested by the Appeal Division of the Supreme Court of Nova Scotia. Therefore, the percentage will remain as already stated in the Appeal Board decision dated January 28th [sic - 27th], 1988. The effective date of the award will be May 1st, 1986.

With deference, this Court did not suggest an increase in the amount of the award based on s. 38(1). The judgment of this Court on this issue is clear:

> The second ground relates to the measure of compensation. The appellant alleges the award of 20% permanent partial disability is unreasonable and inconsistent with the provisions of the Act and the history and nature of his disability.
>
> Because of the Board's failure to give reasons for the selection of its award of 20%, we are unable to determine whether the Appeal Board properly exercised its jurisdiction under s. 38(1) and s. 20 of the Act in the light of the evidence before them. Accordingly, we conclude that this issue should be remitted to the Appeal Board for a rehearing.

The Appeal Board failed to give the required reasons in its decision of January 27, 1988, and gave no helpful reasons in its supplementary decision of August 24, 1989.

Upon receiving the judgment of this Court delivered May 10, 1988, Dr. Reardon's subsequent medical report, and

the further submission from counsel the Appeal Board should have considered the compensation to be awarded the appellant pursuant to the provisions of s. 36 or s. 38 of the Act.

An appeal lies from a decision of the Workers' Compensation Board to the Appeal Board by virtue of s. 159E of the Workers' Compensation Act, R.S.N.S. 1967, c. 343, as amended:

> A person aggrieved by a decision of the Workmen's Compensation Board may appeal to the Appeal Board on the grounds that:
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> (a) the medical opinion upon which compensation was given or refused was erroneous or incomplete; or
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> (b) a greater functional disability exists than that found by the Board; or
>
> (c) a continuance of compensation beyond the period allowed by the Board is required.

The grounds of appeal are:

> THAT the Workers' Compensation Appeal Board erred in law or jurisdiction or both:
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> (a) in failing to consider and interpret subsections 36(1), 36(2) and 36(4) of the Act;
>
> (b) in failing to consider and interpret subsection 38(1) of the Act;
>
> (c) in determining disability based upon physical impairment rather than upon loss of earnings as required by Sections 36 and 38 of the Workers' Compensation Act; and
>
> ...

At the time the appeal was heard the Court asked certain questions of counsel to obtain their views as to

the philosophy of the Act and, in particular, respecting the sections relevant to this appeal. Counsel by written replies have been most helpful.

The Act has been revised from time to time resulting in what is sometimes described as a "scissors-and-paste job". Hence, the language in the Act is not consistent, resulting in some confusion.

A study of the Act leads to the conclusion that a worker is to be compensated when he or she has lost in whole or in part capacity to earn by reason of personal injury caused by an accident arising out of and in the course of employment in an industry to which the Act applies.

This is but a re-statement of the words of MacKeigan, C.J.N.S., in Hawker Siddeley Canada Limited v. Berry (1977), 21 N.S.R. (2d) 41 at p. 45 when referring to s. 7(1) of the Act:

> The Act makes it clear that the only disability for which compensation is paid is one which diminishes the earning capacity of the workman concerned. The condition resulting from an injury must, for full compensation to be given, totally disable the workman 'from earning full wages at the work at which he was employed' (s. 7(1)). Compensable disability is thus a relative concept and occurs if injury has affected the particular workman's capacity to work at his particular job.

Both counsel refer to this quotation in their initial factums. The respondent agreed "with the Appellant's contention that compensation must be determined in reference to the claimant's

reduced ability to earn a wage." The respondent, however, further says, "that issue is to be determined from the evidence of medical fact before the Appeal Board". I will return to that contention.

In determining the amount of compensation payable to a worker there first must be a determination whether there has been an injury which results in disability or impairment. That is accomplished from reports received from medical doctors who have examined the worker. Here Dr. Reardon reported that there was such disability which he assessed as "a 20% level of permanent physical impairment".

There is no question but that the disability of physical impairment suffered by the appellant is one which diminished his earning capacity and met the other criteria: it was caused by an accident arising out of and in the course of employment in an industry to which the Act applies.

The next step is for the Board to determine whether the disability suffered by the worker is temporary or permanent, and if the latter whether it is partial or total. In respect to the appellant, it is agreed that his disability is permanent.

The provisions of s. 38 of the Act must be considered and applied when determining the compensation payable a worker

who has suffered permanent partial disability. That section reads in part:

> 38 (1) Where permanent partial disability results from the injury the compensation shall be a weekly payment of seventy-five per cent of the difference between the average weekly earnings of the workman before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident, and such compensation shall be payable during the lifetime of the workman.
>
> (2) Notwithstanding the provisions of subsection (1), where the amount which the workman was earning before the accident has not been diminished the Board may pay compensation in any case where such workman has suffered a permanent injury which, in the opinion of the Board, is capable of impairing his earning capacity.
>
> (3) In estimating such impairment of earning capacity the Board shall give due regard to the nature and degree of the injury and the workman's fitness to continue the employment in which he was injured or to adapt himself to some other suitable occupation.
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> (4) From the first day of May, 1960, the amount of compensation payable to a workman under this Section shall be a weekly payment of seventy-five per cent of the difference between his average weekly earnings before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident whether the accident occurred before or after the first day of April, 1959.
>
> ...

When the disability suffered is permanent and total, reference must be had to s. 36:

> 36. (1) Where permanent total disability results from the injury the amount of compensation shall be a weekly payment during the life of the workman equal to seventy-five per cent of his average weekly earnings during the previous twelve months if he

> has been so long employed, but if he has not been so long employed, then for any less period during which he has been in the employment of his employer; but regardless of when the injury occurred, the compensation payable under this Section shall not be less than two hundred and twenty-five dollars per month.
>
> ...

Chief Justice McKinnon in his Report - Workmen's Compensation Commission, December 18, 1958 at p. 9 said:

> The Act contains formulae for determining the amounts to be paid. Attempts are made to relate the extent of disability to the wage earning capacity of the injured workman....

He wrote at p. 59:

> We dare not overlook the fundamental principles upon which Workmen's Compensation has been founded. The employer is not expected to be an absolute insurer. If that were so, then the price for industry to bear would be too great. But industry is required to reasonably reimburse the injured workman for losses done to his future earning capacity and in addition to supply him with medical aid during the course of his disability caused by accident.

He continued at p. 62:

> The reason for computing earnings is an attempt to fairly approximate the earning capacity of the injured workman. His injury is a disability which will fetter in whole or in part his future earning capacity.

It appears that the Board and the Appeal Board merely apply the percentage of "physical impairment" as found by the medical doctor as determinative of the award under s. 36 or 38 of the Act. That is what respondent's counsel meant when he said, as mentioned earlier, that while accepting

that compensation must be determined in reference to the claimant's reduced abiltiy to earn a wage, "that issue is to be determined from the evidence of medical fact before the Appeal Board".

In his report of May 12, 1989, Dr. Reardon used the words "the 20% assessment of loss of permanent physical function" and "a 20% level of permanent physical impairment" as having the same meaning. In so doing, he was, in my opinion, determining the nature and degree of the injury but was not attempting to relate that 20% loss to the worker's capacity to earn: witness the fact that he said in his report of November 25, 1987, "it is unlikely that he is ever going to get back into the remunerative work force". He was not, nor should he, encroach upon that which is the duty of the Board and the Appeal Board: based upon the medical evidence and considering the applicable provisions of the Act to determine compensation based upon the worker's diminished ability to earn a wage. In my view, that which governs the compensation award is not the percentage of physical impairment stated by a medical doctor. It is for that reason that Chief Justice Clarke in the judgment of this Court delivered May 10, 1988, concerning this appellant referred to the requirement that the Appeal Board properly exercise its jurisdiction under s. 38(1) and s. 20 of the Act. A reading of ss. 36 and 38 in the context of what I perceive as the philosophy

of the Act reveals that compensation is to be determined by the Board and Appeal Board on the basis of the loss of earnings occasioned by an injury which resulted in the disability. It follows that it is not sufficient for the Board or Appeal Board to merely apply a degree of "physical impairment" as found by the medical doctor, as it did here when determining the award.

In my opinion, that the words "injury" and "disability" used in the Act relate to an economic concept, loss of earnings or earning capacity which must be determined by the Board or Appeal Board after there has been a determination of an injury which has resulted in physical impairment.

The Act does not refer to the level of physical impairment as the means of determining the amount of compensation to be awarded. The Act relates disability to wage loss or impairment of earning capacity not only where there is permanent disability, but also where the disability is temporary. See for example, in addition to the sections previously quoted:

> 7 (1) Where, in any industry to which this Part applies personal injury by accident arising out of and in the course of employment is caused to a workman, compensation as hereinafter provided shall be paid to such workman, or his dependents, as the case may be, except where the injury:
>
> (a) does not disable the workman for a period of at least three days from earning full wages

at the work at which he was employed; provided however that where a personal injury by accident results in a permanent partial disability to the workman, the Board may pay compensation notwithstanding that such personal injury does not disable the workman for a period of three days from earning full wages at the work at which he was employed, the amount of such compensation to be in the discretion of the Board; or

(b) is attributable solely to the serious and wilful misconduct of the workman, unless the injury results in death or serious and permanent disablement.

(2) Where the personal injury by accident results in injury or disease due in part to the employment and in part due to causes other than the employment or where the personal injury aggravates, activates or accelerates a disease or condition existing prior to the injury, compensation shall be payable for such proportion of the disability and disablement as may be reasonably be attributed to the personal injury sustained.

32 Where temporary total disability results from the injury the compensation shall be a weekly payment of seventy-five per cent of the workman's average weekly earnings during the previous twelve months, if he has been so long employed, but if he has not been so long employed, then for any less period during which he has been in the employment of his employer.

33 Where temporary partial disability results from the injury the compensation shall be a weekly payment of seventy-five per cent of the difference between the average weekly earnings of the workman before the accident, and the average amount which he is earning or is able to earn in some suitable employment or business after the accident, and such compensation shall be payable only so long as the disability lasts.

41 Where the impairment of the earning capacity of the workman does not exceed ten per cent of

> his earning capacity then instead of such weekly payment the Board shall, unless in the opinion of the Board it would not be to the advantage of the workman to do so, direct that such lump sum as the Board may deem to be equivalent shall be paid to the workman.

This Court considered the same issue as here in John Allen North v. Workers' Compensation Appeal Board, S.C.A. 02131, judgment delivered December 4, 1989:

> The Appeal Board did not give reasons why it simply applied the percentage of physical impairment of the appellant as determined by Dr. Reardon to the award for permanent partial disability. The Board must supply reasons for its decision. See s. 159L(5) of the Act and the case law explaining the duties and responsibilities of the Appeal Board in respect to the provisions of that section, including:
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> Himmelman v. Workers' Compensation Appeal Board (1986), 71 N.S.R. (2d) 405 (N.S.A.D.);
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> Corkum v. Workers' Compensation Appeal Board (N.S.) (1987), 78 N.S.R. (2d) 10;
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> Harnish v. Workers' Compensation Appeal Board (N.S.) (1988), 85 N.S.R. (2d) 318;
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> Gravel v. Workers' Compensation Appeal Board (N.S.) (1988), 86 N.S.R. (2d) 69;
>
> Hoelke v. Workers' Compensation Appeal Board (N.S.) (1989), 91 N.S.R. (2d) 164;
>
> Martin v. Workers' Compensation Appeal Board (N.S.) (1988), 85 N.S.R. (2d) 320; and
>
> MacLeod v. Workers' Compensation Appeal Board, S.C.A. 02095, unreported judgment delivered June 6, 1989 (N.S.A.D.).
>
> There is no indication from the decision of the Appeal Board that it considered the provisions of s. 38 of the Act as it is required to do upon finding that the appellant suffered permanent partial disability. With respect, if it did consider those

> provisions, it did not apply them. The basic issue in this appeal has been previously settled by this Court. Jones, J.A., in Stevens v. Workers' Compensation Appeal Board (N.S.) (1987), 76 N.S.R. (2d) 342, when considering the then similar provision of the Act, commented at p. 346:
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> > Again there is no indication in the decision that the Appeal Board considered or applied this provision in making its decision. Having found a temporary partial disability the Appeal Board was required to apply this Section having regard to the evidence. Whether s. 32 of the Act applies would depend on the finding by the Appeal Board. The Appeal Board must give the benefit of the doubt to the worker.

The Act should be liberally interpreted. See, Lewis v. Nisbet and Auld Ltd., [1934] S.C.R. 333; Workers' Compensation Appeal Board v. Penny (1980), 38 N.S.R. (2d) 623; Stevens v. Workers' Compensation Appeal Board (1987), 76 N.S.R. (2d) 342, among others.

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

out of the course of employment. The compensation to be awarded under s. 38(1) is the difference between loss of wages before and after injury and s. 38(2) and (3) by estimating impairment of earning capacity. By s. 38(1) the basis is "shall", whereas by s. 38(2) it "may" be computed in the manner set out. See, North v. Workers' Compensation Appeal Board, supra.

In my opinion, it logically follows that the words "functional disability" as used in s. 159E(b) should be interpreted as disability related to the worker's ability to function in the work place: that is, a disability which impairs the worker's earning capacity. The words "functional disability" are only found in that subsection.

The Oxford English Dictionary defines "functional" as "Of or pertaining to some function or office". Funk and Wagnells, Desk Standard Dictionary defines "function" as "One's appropriate or assigned business, duty, part, or office"; and "functional" as "Pertaining to a function". Webster's definition is similar.

Respondent's counsel has informed us respecting the application of s. 38(1) of the Act:

> It is the practice of the Workers' Compensation Appeal Board to make a finding of a percentage level of physical disability. This is based on

> section 159E(b) which establishes as one of the grounds of appeal the fact that a a greater degree of functional disability exists than that percentage degree found by the Board. When the Workers' Compensation Appeal Board make a finding of the percentage degree of functional disability it remits that finding to the Workers' Compensation Board for the re-calculation of compensation. The Workers' Compensation Board, where there is a finding of percentage of permanent partial disability applies the following formula:
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> Comp = % Physical Impairment x (75% of average weekly earnings).
>
> The mathematical result of this formula is equivalent of the following calculation:
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> Comp = 75% (average weekly earnings - % of physical impairment of potential average weekly earning).

To my knowledge this is the first occasion that the Appeal Board has informed this Court of such practice. We have questioned the Appeal Board's counsel on numerous occasions as to the Appeal Board's method of calculating awards, without success. In many of our judgments, including the one delivered in this same proceeding on May 10, 1988, we have commented upon the Board's failure to give reasons for its selection of the award, and for emphasis I again set it out:

> The second ground relates to the measure of compensation. The appellant alleges the award of 20% permanent partial disability is unreasonable and inconsistent with the provisions of the Act and the history and nature of his disability.
>
> Because of the Board's failure to give reasons for the selection of its award of 20%, we are unable

> to determine whether the Appeal Board properly exercised its jurisdiction under s. 38(1) and s. 20 of the Act in the light of the evidence before them. Accordingly, we conclude that this issue should be remitted to the Appeal Board for a rehearing.

The Board has not seen fit to enlighten us or the workers respecting its application of s. 38 until now. If the Board has been applying such a formula it has kept the information to itself.

With respect, such a formula is only applicable if the determination of "physical impairment" is in accordance with the provisions of s. 38 reflecting the worker's impairment of earning capacity. As mentioned, it is not enough to simply apply the measurement of the examining physician. The further estimate must be made respecting the impairment of earning capacity. The one may not equate the other. Indeed, in some cases, there may be a total impairment of earning capacity with a relatively smaller degree of physical impairment as determined by the medical doctor. Here, Dr. Reardon alluded to that fact when he said in his report of November 25, 1987: "...it is unlikely that he is ever going to get back into the remunerative work force"; a proposition he continued in his report of May 12, 1989. There although Dr. Reardon assessed the loss of permanent physical function at twenty percent he also said: "This man had no history of back pain whatsoever until his work related injury of March, 1985,

and since that time he has been unable to get back to remunerative work. Indeed it does seem that his condition has worsened if anything....Nonetheless, it still stands that the pain that the patient is experiencing is real and genuine and in this case I feel is going to continue to keep him from returning to remunerative work...." Should that be the result determined by the Appeal Board, then the Appeal Board must consider whether the appellant should receive an award pursuant to the provisions of s. 36 of the Act.

On such determination the worker must be granted the benefit of doubt:

> 20 Notwithstanding anything in this Act, on any application for compensation an applicant shall be entitled to the benefit of the doubt, which shall mean that it shall not be necessary for the applicant to adduce conclusive proof of his right to the compensation applied for, but that the Board shall be entitled to draw and shall draw from all the circumstances of the case, the evidence and medical opinions, all reasonable inferences in favour of the applicant.

This Court has said on other occasions that it is an error in jurisdiction on the part of the Appeal Board to fail to consider all of the relevant provisions of the Act that bear upon the determination to be made by the Appeal Board. See, among others, Himmelman and Gravel, supra.

In the respondent's supplementary factum we are informed that the respondent has been requested to make submissions on behalf of the Board. I am of the opinion

that these should not be accepted [see Triege v. Workers' Compensation Appeal Board (1976), 72 D.L.R. (3d) 246], particularly at this stage.

In consequence, I would allow the appeal without costs and remit the matter to the Appeal Board for a rehearing to review and reconsider the claim in accordance with ss. 20, 36 and 38 of the Act and provide reasons for its determination.

Kenneth N. Hamilton
J.A.

Concurred in -

Clarke, C.J.N.S.

MACDONALD, J.A.: (dissenting)

I have read the reasons for judgment prepared by Mr. Justice Matthews. I understand his position to be that permanent partial disability benefits under s. 38(1) of the Workers' Compensation Act, R.S.N.S., 1967, c. 343 (the Act), should be calculated solely on the basis of actual loss of earnings without any reference to the degree of physical impairment resulting from the compensable injury. With respect, I do not agree.

Section 38(1) of the Act reads as follows:

> 38 (1) Where permanent partial disability results from the injury the compensation shall be a weekly payment of seventy-five per cent of the difference between the average weekly earnings of the worker before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident, and such compensation shall be payable during the lifetime of the worker.

I concede that when read literally this section is capable of the interpretation that loss of wages is the only criteria for awarding compensation for permanent partial disability. That, however, is not the way the section has been interpreted and applied by the Workers' Compensation Board of this province for over 50 years.

The approach has been that compensation benefits under the Act, as in most other provinces of Canada, are based on the physical impairment method rather than on such methods as actual loss of earnings or lump sum payments without reference to the degree of physical impairment caused by the compensable

injury - see: Workers' Compensation in Canada, 2nd ed., Butterworths, 1989, by Professor Ison.

Counsel for the respondent stated that in practice, in a case like the present, the Appeal Board makes a finding as to the percentage level of physical disability. This approach is based on s. 159E(b) of the Act which provides that one of the grounds of appeal is that a greater degree of functional disability exists than that found by the Board. Counsel for the respondent went on to state that:

> "When the Workers' Compensation Appeal Board makes a finding of the percentage degree of functional disability it remits that finding to the Workers' Compensation Board for re-calculation of compensation. The Workers' Compensation Board, where there is a finding of percentage of permanent partial disability applies the following formula:
>
> Comp = % Physical Impairment x (75% of average weekly earnings).
>
> The mathematical result of this formula is equivalent to the following calculation:
>
> Comp = 75% (average weekly earnings - % of physical impairment of potential average weekly earnings).
>
> This latter calculation is the calculation which the Board is called upon to make by Section 38(1) of the **Act** if the assumption is made that earnings from some suitable employment are equivalent to earnings reduced as a result of physical disability."

Functional disability is obviously treated by the Board and Appeal Board as relating to physical rather than economic disability. From an overview of the Act it is my opinion that such interpretation is not patently unreasonable. As an example, s. 7(2) of the Act clearly treats "disability"

as having a physical rather than an economic connotation. That section refers to "personal injury that aggravates, activates or accelerates a disease or disability existing prior to the injury ...". Again s. 139 of the Act provides that the following, amongst other matters, shall be deemed to be questions of fact:

> 139 (b) the existence and degree of disability by reason of any injury;
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> (c) the permanence of disability by reason of any injury;
>
> (d) the degree of diminution of earning capacity by reason of any injury;
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> . . .

The most relevant of the foregoing subsections for the purpose of this case is s. 139(d) which, in effect, authorizes and indeed, in effect, directs the Board to decide what degree the earning capacity of the worker has been diminished by the injury. It clearly imports the physical impairment concept into the assessment of the diminution of earning capacity.

Section 23(1) of the Workers' Compensation Act of British Columbia (R.S.B.C., 1979, c. 437) states:

> 23. (1) Where permanent partial disability results from the injury, the impairment of earning capacity shall be estimated from the nature and degree of the injury, and the compensation shall be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and shall be payable during the lifetime of the worker or in another manner the board determines.

In Professor Ison's text, the author gives the

following example of how permanent partial disability benefits are calculated under s. 23(1) of the British Columbia Act (p. 96):

"Use of the physical impairment method might be illustrated by a sample case. Assume that in March 1988, a worker in British Columbia suffered an injury resulting in total immobility of the right knee. The calculation of a disability award might appear as follows:

	per year	% of total disability
Average earnings before injury	$45,000	
Statutory ceiling applicable at date of injury (in this case the statutory ceiling will become the wage rate on the claim)	41,300	
Compensation for total disability, 75% of wage rate	30,975	
Immobility of knee joint, scheduled rate		25%
Enhancement factor due to old war injury that limits movement of left hip		5%
		30%
Age adjustment, 5% of 30%		1.5%
Estimated physical impairment		31.5%

Pension - 31.5% of $30,975.00 = $9,757.12 per year payable as $813.09 monthly (1988 dollars). This monthly amount is stablized by half-yearly adjustments according to the consumer price index."

The foregoing formula is similar to that employed by the Nova Scotia Workers' Compensation Board in assessing permanent partial disability benefits under 38(1) of the Act.

Section 23(1) of the British Columbia Act, unlike s. 38 of the Nova Scotia Act, specifically states that "the impairment of earning capacity shall be estimated from the nature and degree of the injury ...". Although such provision is lacking in s. 38 of the Act, s. 139(d) states that the "degree of diminution of earning capacity by reason of any injury" is a question of fact for the Board to determine. The degree of physical impairment is, therefore, a vital consideration in determining to what extent the worker's earning capacity has been diminished. In my opinion, therefore, when s. 38(1) is considered, not in isolation, but rather in light of all the other provisions of the Act, the Board's interpretation and application of it is not a patently unreasonable one. The Workers' Compensation Board is not an insurer and, therefore, determining the impairment of earning capacity by reference to the nature and degree of the compensable injury is, in my opinion, consistent with the scheme of the legislation.

In other words, the Board's approach over the last 50 years of tying the impairment of earning capacity to the degree of physical impairment in determining the amount of permanent partial disability benefits under s. 38 of the Act is an interpretation that the legislation can bear. If this were not so then the Board would never have to consider the degree of physical impairment.

The Board's method of calculating permanent partial disability benefits over the past half century is one that has been accepted by employers and employees alike. To impose

upon the Board an entirely new method or approach to the assessment of compensation is, in my opinion, a matter for the legislature and not for the courts. It must be remembered that compensation is paid out of an accident fund created by assessments imposed upon employers. To drastically change the basis upon which compensation is paid might well have disastrous effects financially on some employers.

It is not disputed that what the worker is compensated for is the reduction in his earning ability caused by the injury. In my opinion, the extent of the injury must be taken into account in determining the amount of compensation. This, as I have said before, is the practice that has been followed by the Board since 1938 and I say again is one that is not patently unreasonable.

The facts of the present case are set out in detail in the reasons for judgment of Mr. Justice Matthews and do not call for a restatement by me. Suffice it to say that the Workers' Compensation Board rejected the appellant's claim for a permanent partial disability pension. He appealed this decision of the Board to the Appeal Board. The only issue before the Appeal Board appears to have been that Mr. Hayden had sustained a greater functional disability than that found by the Board. The Appeal Board dealt with that issue and accepted the report of Dr. G. P. Reardon, the appellant's physician, that the latter had a 20% level of permanent physical impairment. The reasons of the Appeal Board are obvious, namely, they accepted the medical evidence put forth on behalf of the

worker. The next step in the process would be to determine the amount of compensation payable by way of a permanent partial disability pension. In making that determination under s. 38(1) of the Act there would have to be a finding whether Mr. Hayden was gainfully employed and, if not, whether he was able to earn income in some other suitable employment and, if so, the amount thereof. There does not appear to have been any evidence touching these matters before the Appeal Board. The Appeal Board consequently, in my opinion, did not err in not applying s. 38(1) because there was no factual basis upon which it could do so. The practice as I understand it is that the matter would be sent back to the Board for a determination of the amount of the appellant's partial permanent disability pension.

In my opinion, s. 20 of the Act, which provides that the applicant for compensation shall receive the benefit of the doubt, has no application here. The Appeal Board did give the benefit of the doubt to the worker by accepting in its entirety the report of his doctor. Likewise, I am of the view that s. 36 of the Act, dealing as it does with permanent total disability benefits, also has no application. The appellant never claimed to be permanently totally disabled.

In result, it is my opinion that the Appeal Board did not err either as alleged or otherwise. I would, therefore, dismiss the appeal without costs.

J.A.