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-Chronic pain" injuries ruled equal to other workplace injuries

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he Supreme Court of Canada brought down a landmark decision for workers on October 3, 2003, one that has been 10 years in the works. The entire labour and injured-worker community had been eagerly awaiting this decision ... and the courts have ruled firmly in favour of injured employees and their advocates.

Although this case was started in Nova Scotia, it is important to all of us as it deals with the underlying principles of workers compensation. For more than a decade, reactionary governments across Canada have been dismantling workers compensation ... most recently right here in BC, where the provincial Liberals have launched a devastating attack on injured workers. However, in the midst of all the other attacks on the poor and the disabled, advocates have been struggling to call public attention for those who are trapped in the workers compensation system.

Nova Scotia was one of the first jurisdictions to attack WCB. One of their governments measures to save employers money was to limit compensation for chronic pain to only four weeks. While other injured workers are entitled to compensation for the effects of their injuries and the limitations those injuries impose on their ability to work, those workers suffering from chronic pain were considered dispensable: four weeks of benefits to help them return to work, and they are -off the rolls." They are not considered for permanent disability pensions. There is no other justification for this but simple dollars and cents.

Employers pay for WCB benefits; in exchange, workers gave up the right to sue employers for injuries caused on the job. This means any money saved by cutting off injured workers goes straight back into the employers pockets.

The government of Nova Scotia justified these cuts to WCB by saying that they wanted to stop fraud in the workers system for false chronic pain claims. Two workers, Martin and Laseur, appealed their denial of benefits by arguing that they were being discriminated against under *The Charter of Rights and Freedoms*, section 15 (1). That section of the *Charter* says:

> *15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

The Supreme Court of Canada answered two very important questions in this case:

- Can an administrative tribunal [like the WCB appeal tribunal in this case] apply the *Charter of Rights and Freedoms*?; and
- Would the section of the Nova Scotia *Workers Compensation Act* be illegal for discriminating against injured workers?

The Supreme Court of Canada found that, yes, indeed, not only can an administrative tribunal apply *The Charter of Rights and Freedoms*, *it must do so*. No longer can these tribunals blindly apply unfair policies, saying their job is just to apply the -rules." These tribunals must now apply the law of the land, and refuse to apply anything that violates that law.

This point repeats what the Supreme Court of Canada had stated only two weeks earlier in the *Parry Sound* case (see contract interpretation article) where the rights of tribunals to apply the legislation affecting workers rights was clearly enunciated.

As for the NS *Workers Compensation Act*, the Supreme Court of Canada was clear. By making rules that said workers with chronic pain were treated differently from other injured workers, the *Act* discriminated against them. The government had argued that the proper -comparator group" was other workers suffering chronic pain. The court disagreed, ruling that the proper comparator group is other injured workers. Further, the system cannot use -saving money" as the sole basis for limiting workers rights.

In one of the best quotes in the case, Judge Gonthier said:

> ***I am of the view that this violation [of the rights of workers suffering chronic pain] cannot be justified under s. 1 of the Charter. On the one hand,*** *budgetary considerations in and of themselves cannot justify violating a Charter right . . .* ***The challenged provisions make*** *no attempt whatsoever to determine who is genuinely suffering and needs compensation and who may be abusing the system. They ignore the very real needs of the many workers who are in fact impaired by chronic pain* ***and whose condition is not appropriately remedied by the four-week Functional Restoration Program.***

The court reflected on the origins of the workers compensation system: how it was intended to make a bargain that protected employers while guaranteeing workers certain protections. About that the Supreme Court of Canada said:

> ***In the case at bar, the objectives of the workers compensation scheme are clear . . . the scheme embodies a historical trade-off between employers and workers.*** *While the former are protected by s. 28 of the Act against the possibility of being sued in tort for work-related injuries, the latter are guaranteed a reasonable amount of compensation for such injuries without being subject to the costs, delays and uncertainties of an action before the courts. In order to obtain compensation, employees must establish that their personal injury was caused by an accident arising -out of and in the course of employment*."
>
> *The challenged provisions, however, while maintaining the bar to tort actions, exclude chronic pain from the purview of the general compensation scheme provided for by the Act. Thus, no earning replacement benefits, permanent impairment benefits, retirement annuities, vocational rehabilitation services or medical aid can be provided with respect to chronic pain.* ***Employers are also exempt from the duties to re-employ them and accommodate their disability, which are normally imposed by the Act. Instead, workers injured on or after February 1, 1996, who suffer from chronic pain are entitled to a four-week Functional Restoration Program, after which no further benefits are available. In addition, if a chronic pain claim is not asserted within a year of the accident taking place, no benefit will be provided at all.***

The relevance of this decision for workers in other jurisdictions is immense. Where legislation singles out

certain injured workers ... as for example in BC, where -mental stress" is not covered except in certain limited cases ... we must assess BCs legislation in the context of this new ruling from the Supreme Court and determine whether a constitutional challenge is warranted.

Here in BC, any mental distress caused by the actions of an employer is excluded from coverage under the Act. So, for example, where a worker is wrongly terminated and commits suicide as a result, that workers dependents will no longer be able to claim *Workers Compensation Act* benefits. Or where harassment at work causes a worker an acute depression or anxiety disorder, she cannot even *apply* for coverage.

These kinds of injustices ... the singling out of the powerless, the poor and sick by reactionary governments across Canada ... must be challenged. That is why we have a Charter of Rights: when governments desert their people, at least in some cases it seems like the courts may be willing to defend the rights of those who cannot fight for themselves.

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