



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 844/06

BEFORE:

Vice Chair: A. V. G. Silipo

HEARING:

April 26, 2006 at Toronto
Oral

DATE OF DECISION:

August 17, 2006

NEUTRAL CITATION:

2006 ONWSIAT 1824

DECISION(S) UNDER APPEAL: WSIB ARO decision dated October 26, 2004

APPEARANCES:

For the worker:

Mr. Gary Majesky, Consultant

For the employer:

Not participating

Interpreter:

N/A

**Workplace Safety and Insurance
Appeals Tribunal**

505 University Avenue 7th Floor
Toronto ON M5G 2P2

**Tribunal d'appel de la sécurité professionnelle
et de l'assurance contre les accidents du travail**

505, avenue University, 7^e étage
Toronto ON M5G 2P2

REASONS

(i) Introduction

- [1] The worker appeals the decision of Appeals Resolution Officer Ms. J. Buhler (the ARO), dated October 26, 2004. That decision, rendered without an oral hearing, concluded that the Board could recover excess benefits paid to the worker due to an adjustment in her non economic loss (NEL) benefits.
- [2] The accident employer had indicated that it intended to participate in the appeal. However, its representative did not attend the hearing. Tribunal staff contacted the representative who advised that the accident employer had ceased operations in March 2006.
- [3] The worker was present but did not testify given the nature of the issue before the Tribunal.

(ii) Background

- [4] On August 23, 1999 the worker injured her low back in a compensable injury. The Board granted her full loss of earnings (LOE) benefits from August 30, 1999 to February 28, 2000 and then from June 22, 2000 to October 7, 2002 and partial LOE benefits from October 7, 2002 to January 20, 2003.
- [5] In December 2002 the Board granted the worker a 28% NEL award for the organic permanent impairment in her low back. In August 2003 the Board granted the worker entitlement to benefits for CPD. After a NEL assessment, in February 2004 the Board adjusted the worker's NEL benefits from 28% to 15%. The Board commuted the worker's 15% NEL award and paid her a lump sum.
- [6] The worker objected to the reduced benefits. Her representative requested entitlement to benefits for psychotraumatic disability as well the reinstatement of the 28% organic NEL award. On March 5, 2004 a Claims Adjudicator overturned the Board decision which granted the worker entitlement to benefits for CPD, reinstated the worker's organic 28% NEL award and granted her entitlement to benefits for psychotraumatic disability.
- [7] Since the Board had paid out the 15% NEL benefit in a lump sum on June 15, 2004 a Claims Adjudicator advised the worker that there was an overpayment of \$8391.22. The Claims Adjudicator arranged with the worker to recover the overpayment by deferring payment of the increased NEL benefits until the Board had recovered the lump sum which it had paid her.
- [8] The worker objected. She relied on Board policy 18-01-04 and claimed that the Board should not recover the overpayment since it resulted from the Board overturning a previous decision. Both the Claims Adjudicator and the ARO denied the worker's objection, concluding that the overpayment was not a benefit-related debt. The worker appeals to the Tribunal.

(iii) Analysis and Conclusions

- [9] On January 1, 1998, *the Workplace Safety and Insurance Act, 1997* (WSIA) took effect and applies in this appeal. Pursuant to sections 112 and 126 of WSIA, the Appeals Tribunal is

required to apply any applicable Board policy when making decisions. The Board has identified certain policies applicable to this appeal and I have considered them as necessary.

- [10] The Board paid the worker's 28% organic NEL award from April 19, 2002 to February 1, 2004 in monthly payments of \$110.20. In February 2004 the Board replaced the 28% organic NEL with a 15% CPD NEL award for the same period as the organic NEL benefits. The monthly payment of the 15% NEL benefits would have been \$59.04. However, the Board paid the 15% NEL award in a lump sum. The commuted value of that 15% award was \$10,432.13 plus accrued interest. The Board recovered the difference in the two NEL amounts. It reduced the lump sum payment to \$8391.22 by deducting from the commuted value the sum of \$2457.22 which it had paid the worker from April 19, 2002 to February 1, 2004 (\$110.20 per month plus accrued interest). Then, effective March 1, 2004 the Board reinstated the 28% organic NEL award. The worker was again entitled to monthly payments of \$110.20. However, the Board reasoned that since it had paid her the equivalent of \$59.04 per month through the lump sum payment, it should only pay her the difference of \$51.16 per month effective March 1, 2004 until it had recovered the \$8391.22 paid as a lump sum.
- [11] The worker claims that the Board should not offset the NEL benefits by the commuted amount of \$8391.22. Her representative submits that the sum constitutes a benefit-related debt which the Board is not entitled to recover. Mr. Majesky relies on the Board policy set out in *Operational Policy Manual (OPM)* Document Number 18-01-04 entitled "The Recovery of Benefit Related Debts" which states:

Policy

The WSIB pursues full recovery of a benefit-related debt resulting from:

- ...
- administrative error when the debtor was aware or should reasonably have been aware of the error.

The WSIB does not pursue recovery of a benefit-related debt if:

- The debt is a result of a previous entitlement decision overturned due to a reconsideration or appeal
- The debt is a result of an administrative error and the debtor could not have reasonably be aware of the error

...

Recovery action not pursued

The WSIB does not pursue recovery in the following 4 situations.

- [12] The ARO categorized the changes in the worker's benefits as an adjustment to the worker's NEL award given for the same area of entitlement rather than a benefit-related debt. There is no doubt that the two decision changes were adjustments to the worker's NEL award since they related to entitlement arising from the same compensable injury. However, there is also no doubt that each of those decisions constitutes a reconsideration of previous decisions which resulted in a benefit-related debt. Therefore, by its own policy the Board should not recover the overpayment which resulted. That conclusion may appear to unfairly favour the worker since she will receive double

compensation for a period but it is an eventuality that the Board must have foreseen when it established the policy.

- [13] Nevertheless, having established that premise, I also find that the amount of the benefit-related debt is not \$8391.22 as the worker claims. That is because, as the policy also notes, there was an administrative error that the worker knew or should have known about at the time of the second NEL decision.
- [14] As noted, there are two instances where the Board's decisions resulted in overpayments. The first is when the Board changed the worker's 28% organic NEL to 15%. The Board recovered that overpayment by reducing the worker's lump sum payment by \$2457.82. The second is when the Board changed the 15% NEL back to the original 28%. The Board purported to recover that overpayment by only paying the worker monthly payments equivalent to the 13% difference in the two NEL amounts until it recovered the \$8391.22 lump sum.
- [15] In this case, the commutation of the worker's NEL benefits created a larger debt. Had that not happened, in February 2002 the Board would have reduced the worker's NEL benefits from 28% to 15% and would not have been able to recover the benefit-related debt for the difference between the two NEL amounts paid for the period April 1999 to February 2002 pursuant to the same Board policy. Then, when the Board re-established the worker's 28% NEL, one month later, it would have simply increased her NEL benefits back to the original amount.
- [16] As her representative has stressed throughout the life of this file, the worker was seeking entitlement for both organic and non-organic NEL benefits from the outset. Therefore, the worker was not satisfied with the Board's decisions either at the time of the initial NEL award or certainly when the Board reduced the award in February 2002. At that time, the worker either requested or accepted the Board's offer of a commutation of the 15% NEL (the information in the file is not clear on that point) with the reduction noted. In either case, since the worker was continuing to pursue her objections to the Board's decisions, she knew or should have known that any future changes in those decisions which favoured her claim would have created a greater overpayment than if she had not opted for a commutation. As a result, the worker is entitled to the benefits which flow from the Board policy but should not also reap the further benefits of the larger overpayment which results from the commutation. That is especially appropriate in this case since the Board reversed its negative decision of February 2002 only one month later, in March 2002. Therefore, in this case the amount of overpayment that the Board should forego shall not be the commuted amount of \$8391.22 but shall be the amount that the worker would have been entitled to if there had been no commutation. That amount is \$2457.22, being the difference between the 28% NEL and the 15% NEL for the period of April 1999 to February 2002.

DISPOSITION

- [17] The appeal is allowed in part.
- [18] The Board's decisions regarding the worker's NEL benefits resulted in a benefit-related debt of \$2457.22 which the Board shall not recover pursuant to its policy on "The Recovery of Benefit Related Debts" set out in *OPM* Document Number 18-01-04.

DATED: August 17, 2006

SIGNED: A. V. G. Silipo