CLAIM HISTORY AND APPEAL PROCEEDINGS:

This is an appeal of a decision of a Hearing Officer of the Board, dated October 12, 2005. The Hearing Officer determined that the Worker's 12.5% permanent medical impairment [PMI] rating, received pursuant to s. 10E of the *Worker's Compensation Act*, S.N.S.1994-95, c.10, as amended [the "*Act*"], was replaced by the 6% pain-related impairment [PRI] rating she received pursuant to the *Chronic Pain Regulations,* [the "*Regulations*"] when her benefits were recalculated pursuant to the *Regulations.* The Worker appealed this decision to the Workers' Compensation Appeals Tribunal [the "Tribunal"], on November 9, 2005.

Written submissions were filed on behalf of the Worker on November 30, 2005, and on behalf of the Board, on January 6, 2006. Rebuttal submissions were filed by the Worker on February 7, 2006. Supplemental submissions were filed by both the Worker and the Board, on February 17, 2006. All submissions were of great assistance to the Panel in determining the issues before it.

On February 27, 2006, the Tribunal referred this appeal to the Chair of the Board pursuant to s. 247 of the *Act,* on the ground that it raised an issue of law and general policy that should be reviewed by the Board of Directors. By way of letter dated November 2, 2006, the Acting Chair of the Board advised that the Board of Directors would not be issuing a policy relating to the issues on appeal. The Participants were given a further opportunity to file submissions, given the length of time that had elapsed since the s. 247 referral, but declined to do so.

ISSUES AND OUTCOMES:

Is s. 12 of the *Regulations* inconsistent with the *Act*?

Yes. Section 12 takes away a benefit provided by the *Act*.

If s. 12 of the *Regulations* is inconsistent with the *Act*, does the regulation-making authority in the *Act*, permit the operation of s. 12?

To the extent that s. 12 provides for the replacement of the Worker's 12.5% PMI with a 6% PRI, it is inoperative.

Is Board Policy 3.3.5 applicable?

The policy is applicable in this case, only to the extent that it is consistent with the *Act*.

This decision contains personal information and may be published. For this reason, I have not referred to the participants by name.

ANALYSIS:

The legislation applicable to this appeal is the *Act*. Section 187 of the *Act* requires that the worker be given the benefit of the doubt, which means that if the disputed possibilities are evenly balanced on an issue of compensation, then the issue will be resolved in the Worker's favour.

The Worker suffered a compensable injury to her back on January 7, 1995. As a result, she was awarded a PMI of 10% effective November 5, 1996. The Worker was determined by the Board to have "chronic pain", as the term is defined in s. 10A of the *Act*. In a decision dated June 6, 2001, she was found eligible for a permanent impairment benefit [PIB] based on a PMI rating of 12.5%, and 50% of an Extended Earnings Replacement Benefit [EERB] pursuant to s. 10E of the *Act*, for chronic pain.

Section 10E states as follows:

> 10E Where a worker
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> (a) was injured on or after March 23, 1990, and before February 1, 1996;
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> (b) has chronic pain that commenced following the injury referred to in clause (a); and
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> (c) as of November 25, 1998, had a claim under appeal
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> (i) for reconsideration,
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> (ii) to a hearing officer,
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> (iii) to the Appeals Tribunal, or
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> (iv) To the Nova Scotia Court of Appeal,
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> or whose appeal period with respect to an appeal referred to in subclauses (i) to (iv) had not expired,
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> the Board shall pay to the worker a permanent-impairment benefit based on a permanent medical impairment award of twenty-five per cent multiplied by fifty per cent, and an extended earnings replacement benefit, if payable pursuant to Sections 37 to 49, multiplied by fifty per cent and any appeal referred to in clause (d) is null and void regardless of the issue or issues on appeal.

The *Regulations* were adopted on July 22, 2004, and made effective April 2, 2004, pursuant to ss. 184 and 184A of the *Act.* They provide eligibility criteria for benefits for chronic pain. They provide for both earnings-replacement benefits and permanent benefits based on a PRI of either 3% or 6%.

The Board awarded the Worker a 6% PRI and a full EERB, by way of a Case Manager decision dated June 6, 2006. The Case Manager recalculated the Worker's benefits pursuant to the *Regulations,* which provide for a recalculation of benefits for workers who have been entitled to s. 10E benefits for chronic pain.

The relevant sections of the *Regulations* state:

> **9** If a worker's original compensable injury occurred on or after March 23, 1990, and the worker is found to have a pain-related impairment,
>
> (a) the worker's permanent benefit will be calculated in accordance with Sections 34 to 48 of the Act; and
>
> (b) the worker may be eligible to receive and earnings-replacement benefit.
>
> **11** If a worker has been awarded benefits under Section 10E of the Act, the worker is entitled to an individualized assessment and recalculation of benefits in accordance with these regulations.
>
> **12** Subject to Sections 34 to 48 of the Act, if a worker's recalculated award results in a greater combined extended earnings-replacement benefit and permanent-impairment benefit than that awarded under Section 10E of the Act, the Board will pay the worker
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> (a) the recalculated award, from the date the Board determines the worker has a pain-related impairment until the date the benefits awarded under Section 10E commenced; and
>
> (b) the difference between the recalculated award and the benefits awarded under Section 10E of the Act, from the date the worker's benefits awarded under Section 10E of the Act commenced until the coming into force of these regulations; and
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> (c) effective the date these regulations come into force, the recalculated award.

In recalculating the Worker's benefits, the Case Manager took the combined benefit as per s. 10E (50% EERB plus 12.5% PMI) and compared it to the combined benefit under the *Regulations* (100% EERB plus 6% PRI). The Case Manager found that the Worker's award

under the *Regulations* was greater than her s. 10E award and the Board should pay the Worker in the manner prescribed by s. 12. The Case Manager determined that the Worker's recalculated benefit did not include her 12.5% PMI, but that it was replaced by her 6% PRI.

The Workers' Adviser has argued that the Worker's recalculated award should include her 12.5% PMI. He noted that the 12.5% is not expressly taken away by the language of s. 12 of the *Regulations*. The Workers' Adviser submits that replacing the Worker's 12.5% PMI with the Worker's 6% PRI will have no practical effect as long as the Worker continues to receive her full EERB. However, he stresses that after age 65, when her EERB is no longer payable, the Worker's compensation will be less, based on the replacement of her 12.5% PMI with a 6% PRI.

The Workers' Adviser states that s. 10E is still in effect and has not been repealed. It is his position that the *Regulations* cannot take away a benefit provided by the *Act*. He states that if there is conflict between the *Act* and the *Regulations,* the *Act* must prevail. He suggests, however, that the *Regulations* should be interpreted in such a way as to avoid a finding that they conflict with the *Act*. He submits that reading s. 12 so as to include the Worker's 12.5% PMI in her recalculated award would have that effect.

Counsel for the Board states that s. 12 cannot reasonably bear the interpretation put forth by the Workers' Adviser. She points to the fact that s. 12 of the *Regulations* does not state that benefits under the *Regulations* are to be "added to" or "re-combined" with a worker's s. 10E award. She further submits that s. 12 does not conflict with the *Act* but, rather, fits within its scheme and context.

The Panel finds that when s. 12 is given its plain and ordinary meaning, and read within the scheme and context of the *Act,* it does purport to replace the Worker's s. 10E benefits with the benefits for chronic pain provided by the *Regulations.* Given the scheme and context of the *Act,* the Panel finds it unlikely that Cabinet would have intended to give the s. 10E chronic pain sufferers a level of PIB higher than chronic pain sufferers who did not qualify for s. 10E benefits.

The *Regulations* set up a comparison between the combination of the two types of benefits provided by s. 10E, and the combination of the two types of benefits provided by the *Regulations*. They set out a method for bringing the s. 10E population in line with the new scheme of benefits for chronic pain sufferers. If a worker's s. 10E benefits are found to be less than his recalculated award, the worker is "made whole" by paying the difference between the recalculated award and the s. 10E benefits, up to the date the *Regulations* came into force. Clearly, once the worker's s.10 E benefits are found to be less than the recalculated award they are no longer to receive them. They are to be paid what all chronic pain sufferers are entitled to, from the date of the *Regulations*.

That the Worker's 12.5% PMI was not intended to continue is brought home by the

language of s. 12(c), and the very existence of s. 13 which specifically provides that where the combination of the two types of benefits provided by s. 10E is greater than the combination of the two types of benefits benefits provided by the *Regulations*, he will continue to receive s. 10E benefits.

The Panel finds that the Worker's 12.5% PMI award is taken away by a plain and ordinary reading of s.12 of the *Regulations*. The Panel is, however, unable to give effect to this result, given its finding set out below that the Board lacked the necessary authority to enact a regulation with this effect.

The Board's regulation-making authority comes from s. 184 of the *Act*, the relevant sections of which state as follows:

> **184 (1)** The Board may, with the approval of the Governor in Council, make any regulation
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> (a) authorized pursuant to this Part; and
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> (b) that, in the opinion of the Board, is required to properly carry out the provisions of this Part.
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> **(2)** Without restricting the generality of subsection (1), the Board, with the approval of the Governor in Council, may make regulations
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> (a) prescribing any time limit not prescribed in this Part that the Board considers necessary for the efficient operation of the Board;
>
> (b) defining or further defining any word or expression not otherwise defined in this Part.
>
> **(3)** Notwithstanding subsection (1), the Governor in Council may make any regulation that may be made by the Board

Also relevant to the issues before the Panel are the following provisions of the *Act*:

> **10(7)** The Board may, by regulation, include any type or class of personal injury or occupational disease on terms or conditions, including rates, types and durations of compensation other than those specified in this Part, that the Board may prescribe.
>
> **10H (1)** The Governor in Council may make regulations to implement the benefits referred to in Sections 10D to 10G.

The regulation-making power in the *Act*, as broad as it may be, cannot extend to an authority to make regulations that would remove benefits already specifically provided for by the *Act*. The principle that statutes are paramount over regulations supports this.

The Panel is unable to accept Board Counsel's argument that the effective removal of the Worker's 12.5% PMI, after the age of 65, is a measure respecting only "rates, types and durations of compensation". There is a difference between the complete removal of a benefit provided by statute, and, as Board Counsel submits, a regulation to "flesh out statutory benefits" or "add specifics to the statutory benefits". The removal of the benefit of the Worker's 12. 5% PMI after age 65 is seen by the Panel as more than the "expansion or refinement of benefits", as was the nature of the provision considered in *Nova Scotia (Workers' Compensation Board) v. Nova Scotia(Workers' Compensation Appeals Tribunal),* 2004 CarswellNS 258. It is not sanctioned by the regulation-making authority given by the *Act*.

Given the Panel's findings above regarding s.12 of the *Regulations*, and its inconsistency with the *Act*, the Panel declines to apply Policy 3.3.5 to the extent that it, too, would result in the replacement of the Worker's 12.5% PMI with a 6% PRI. Section 183(5A) of the *Act* provides that only Board Policies consistent with the *Act* are binding on the Tribunal.

The Panel finds that the Worker's compensation should include a 12.5% PMI award effective January 1, 1999, that being the effective date of the Worker's s. 10E benefits, as stipulated by s. 10I of the *Act*.

The *Act* is a statutory scheme that provides for benefits (compensation) paid to qualified, injured workers. While the *Regulations*, in attempting to substitute a lesser award (6% PRI) for a higher award (12.5% PMI) would diminish or replace a statutory award, the same *Regulations*, in substituting a full EERB for a 50% EERB, augment a statutory award, leaving the original award intact. The Panel finds that, while the former is beyond the scope of a regulation and inoperative, the latter is permissible under accepted legal principles .

The fact that the Worker's 12.5% PMI continues will have no practical effect on the dollar amount she receives from the Board, until she is no longer entitled to the payment of an EERB. This is because the increase in the Worker's PIB would be matched by a corresponding decrease in her EERB. As the Workers' Adviser has submitted, the Worker's current total monthly benefit will not change, but the PIB component will increase to reflect the 12.5% PMI, effective on or after January 1, 1999.

CONCLUSION:

This appeal is allowed in part. The Worker's recalculated award includes a PIB based on a 12.5% PMI. It does not include a 6% PRI.