

CLAIM HISTORY AND APPEAL PROCEEDINGS:

While employed as a certified nursing assistant, the Worker injured her neck and back in five workplace accidents between 1987 and 1992. Although she was provided with some benefits, the Board denied the Worker's request for a permanent impairment award. The Worker appealed to this Tribunal.

On March 8, 2001, the Tribunal issued joint *Decisions 98-123-AD* and *99-1144-AD*, finding that the Worker suffered from chronic pain, as that term was defined in the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended [the "Act"]. The Worker was awarded benefits pursuant to s. 10E of the *Act*. This included a permanent impairment benefit based on a 12.5 percent permanent medical impairment ["PMI"] rating and a 50 percent extended earnings-replacement benefit ["EERB"]. Also pursuant to s. 10E, the Tribunal concluded that appeal number 98-123-AD (the Worker's appeal regarding a PMI award) was null and void.

The Board implemented the Tribunal's decision in May 2001. In a decision dated May 15, 2001, a Board Case Manager determined that no suitable or reasonably available employment was available to the Worker; she was awarded a 50 percent EERB in accordance with s. 10E of the *Act*.

The Worker appealed the Tribunal's decision to the Nova Scotia Court of Appeal, arguing that the finding that she suffered from chronic pain should not preclude her entitlement to other benefits arising from her workplace injuries. In particular, the Worker sought permanent impairment benefits arising from her non-chronic pain conditions.

By Order dated February 4, 2002, the Court of Appeal remitted this matter back to the Tribunal for a determination as to whether the Worker was entitled to any benefits other than chronic pain benefits.

In *Decision 98-123-AD-CA* (September 25, 2002), this Tribunal determined that, in addition to being compensated for chronic pain, the Worker was also entitled to a PMI rating for her back, neck, and left shoulder.

Doctor LeGay performed an independent medical examination on November 15, 2002, to determine the Worker's level of permanent impairment. He recommended that the Worker be awarded 15 percent for her left elbow and shoulder, 10 percent for her lumbar spine, 10 percent for her cervical spine, and 5 percent for her right knee. The Board accepted Dr. LeGay's recommendation and increased the Worker's PMI rating by 40 percent, for a total PMI award of 52.5 percent.

As a result of the 40 percent increase in her PMI rating, the Board reviewed and adjusted

the amount payable to the Worker as an EERB, pursuant to subs. 73(1)(c) of the *Act*. In a decision dated February 5, 2003, a Board Extended Benefits Adjudicator determined that the Worker's loss of earnings was the result of her physical, objective injuries (and not her chronic pain); consequently, the Worker's EERB was not reduced by 50 percent in accordance with s.10E of the *Act*.

In February 2006, the Board commenced its 36 month review of the Worker's EERB, pursuant to subs. 73(1)(a) of the *Act*. As the Worker was at that time (and remains) a member of the Board of Directors of the Workers' Compensation Board of Nova Scotia, a determination was made that her EERB review should not be conducted by the Board in Nova Scotia; rather, the Worker's appeal was forwarded to the Workers' Compensation Board of Prince Edward Island for adjudication.

In a decision dated September 27, 2006, an Extended Benefits Manager of the Workers' Compensation Board of Prince Edward Island determined that the Worker's EERB should be decreased to reflect her current ability to earn income. In reaching this determination, the Extended Benefits Manager concluded that the remuneration received by the Worker in her capacity as a member of the Board of Directors constituted earnings and demonstrated an ability to earn income.

The Extended Benefits Manager also addressed the issue of the Worker's entitlement to benefits under the *Chronic Pain Regulations* and concluded that the Worker was entitled to a 3 percent pain-related impairment ["PRI"] rating for her chronic pain.

The Worker appealed the Extended Benefits Manager's decision. She contests the Board's use of those monies in re-calculating her EERB, on the basis that they neither constitute true income nor establish her ability to earn income. The Worker also seeks a higher PRI rating.

The Chair of the Board of Directors referred this matter directly to the Tribunal pursuant to s. 199(2) of the *Act*. The referral was made on the basis that the appeal raised both important and novel issues of general significance, and that it was more appropriate to have an external Tribunal determine an appeal which involved a current member of the Board of Directors.

This appeal proceeded by way of oral hearing in Stellarton on February 7 and 8, 2007. The Worker testified at the hearing, and her representatives presented submissions on her behalf. Neither the Board nor the Employer attended the hearing.

The Worker's representatives filed written submissions on February 23 and March 14, 2007. The Board filed submissions on March 6, 2007, addressing a jurisdictional issue regarding EERB reviews pursuant to s. 73 of the *Act*. The Board did not file submissions regarding the two substantive issues on appeal. No submissions were received from the Employer

ISSUES AND OUTCOMES:

- 1) Has the Worker's EERB been correctly calculated?

No, the Worker's EERB has not been correctly calculated. The honorarium paid to the Worker in her capacity as a member of the Board of Directors should not have been included as earnings for the purposes of the Worker's 36-month EERB review. The Board is to recalculate the Worker's EERB accordingly.

- 2) Is the Worker entitled to a PRI rating greater than 3 percent?

Yes, the Worker is entitled to a 6 percent PRI rating. She suffers from a "substantial" pain-related impairment.

ANALYSIS:

The legislation applicable to this appeal is the *Act*. In weighing the evidence, I have considered ss. 186 and 187 of the *Act*. Section 186 provides that decisions shall always be based upon the real merits and justice of the case. Section 187 provides that where there is doubt on an issue and the possibilities are evenly balanced, the issue shall be resolved in favour of the worker.

In 2001, the Board determined that the Worker was entitled to an EERB as a result of her neck, back and shoulder injuries.

In a decision dated May 15, 2001, the Board calculated the Worker's EERB on the basis that the nature of her injuries prevented her from returning to the workforce and earning income.

Preliminary Issue

The Worker submits that the Board lacked jurisdiction to review her EERB in February 2006. Her representatives argue that, by not conducting the 36-month review at the proper time, the Board forever lost its jurisdiction to review the Worker's EERB. If I were to accept their submission, the issue regarding the re-calculation of the Worker's EERB raised in this appeal would be moot.

Section 73 addresses the Board's review of EERB determinations. It reads as follows:

73 (1) Subject to subsection (2), the Board may review and adjust its determination of the amount of compensation payable to a worker as an extended earnings-replacement benefit

- (a) once, commencing in the thirty-sixth month after the date

of the initial award of the benefit;

(b) once, commencing in the twenty-fourth month after a review pursuant to clause (a) is completed, if at the time the review pursuant to clause (a) is completed the Board is of the opinion that a further review is necessary;

(c) after a review of the permanent-impairment rating of the worker pursuant to subsection 71(1) results in an adjustment of the permanent-impairment rating of at least ten percentage points according to the schedule established pursuant to Section 34; and

(d) at any time, where the extended earnings-replacement benefit was based on a misrepresentation of fact.

(1) The Board shall not vary the amount of compensation payable as an extended earnings-replacement benefit unless the amount of the variation would be equal to at least ten per cent of the amount of compensation being paid at the time of review.

(2A) Notwithstanding subsections (1) and (2), where a worker's permanent-impairment benefit is adjusted pursuant to Section 71, the Board may adjust the amount of compensation payable as an extended earnings replacement benefit pursuant to this Section so that the adjusted permanent-impairment and extended earnings-replacement benefits total eighty-five per cent of the loss of earnings calculated pursuant to Section 38.

(3) An award of an extended earnings-replacement benefit is final, subject to subsection (1), and shall not be further reviewed or adjusted.

Essentially, s. 73 provides the Board with discretion to review and adjust a Worker's EERB in four circumstances.

Pursuant to subs. 73(1)(c), the Board reviewed the Worker's EERB in February 2003, following the 40 percent increase in her PMI rating. In a decision dated February 5, 2003, the Worker's EERB was adjusted to reflect her increased PMI award.

In February 2006, the Board commenced a 36-month review of the Worker's EERB pursuant to subs. 73(1)(a). It was this review that reduced the Worker's EERB, on the basis that the remuneration she received in her capacity as a member of the Board of Directors constituted income for the purpose of an EERB calculation.

At the hearing, the Worker's representatives argued that the Board erred in concluding that the date of the Worker's 36-month review was in February 2006 (36 months after the

February 2003 decision); rather, they argued that the 36-month review should have commenced 36 months after the initial EERB decision in May 2001. The Worker's representatives argued that the February 2003 EERB decision was not the "initial award" contemplated by s. 73(1); rather, it was simply a "review" of the initial award pursuant to s. 73(1)(c) of the Act. They submit that the 36-month review should have actually been conducted in May 2004.

The Worker's representatives also submit that, by not conducting the 36-month review in May 2004, the Board forever lost its jurisdiction to conduct a 36-month review. As the 24-month review provided for in subs. 73(1)(b) flows from the 36-month review, they further argued that the Board would have no jurisdiction to commence a 24-month review where the 36-month review had not properly been performed.

The Worker's representatives argue that if the Board does not commence a 36-month review within 36 months of the initial EERB determination, then the Board loses its jurisdiction to conduct later EERB reviews pursuant to ss. 73(1)(a) or (b).

In its submissions dated March 6, 2007, the Board argued that the 36-month review in this appeal was performed in the 36th month following the initial EERB determination. The Board argued that it was logical to commence the timing of the 36-month review from the date of the initial award, *as that award was amended in accordance with s. 73(1)(c)*. The Board also argued that circumstances exist where 36-month reviews have been delayed while the Board awaited further information, and that to suggest that such a delay would cause the Board to lose jurisdiction to perform the review could be detrimental to many workers.

In response, the Worker's representatives filed written submissions dated March 14, 2007, and referred to previous decisions of this Tribunal which clearly state that the Board's jurisdiction to review and adjust EERBs is limited to the four circumstances set out in s. 73 of the Act.

Having considered these submissions and evidence, I find that the Board conducted the 36-month review at the appropriate time. In my view, the Board's interpretation of s. 73 of the Act is the proper approach.

The purpose of an EERB review is to ensure that a worker's EERB is based on accurate information. As EERB reviews can only be conducted in limited circumstances, it is important that up-to-date information is used when assessing and calculating a worker's EERB. In this case, the Worker's original EERB was reviewed and adjusted approximately 20 months after the original award, as her PMI award had increased by 40 percent. If I were to accept the Worker's position, then her 36-month review should have been conducted a mere ten months later.

Where an initial EERB award is adjusted prior to the 36-month review contemplated by subs 73(1)(a) of the Act, I find that the 36-month review should run from the date of the

adjustment. In essence, the adjustment of an EERB in such a case reflects a change in circumstances and constitutes an amendment of the initial EERB award. In my view, such an interpretation is logical, especially when viewed in light of the facts presented in this appeal.

The original May 2001 EERB award was made following this Tribunal's finding that the Worker suffered from chronic pain. The Worker appealed the Tribunal's decision to the Court of Appeal, seeking a PMI award for her non-chronic pain injuries. She did not appeal the May 15, 2001 EERB decision. The Board could have waited to implement the Worker's EERB, pending the outcome of her appeal. Had that occurred, the Worker's initial EERB decision would probably have been made in February 2003, and the 36-month review would have been commenced in February 2006. Of course, waiting nearly two years for her EERB would have caused unnecessary hardship to the Worker. It was appropriate for the Board to implement the Worker's EERB in May 2001, based on the 12.5 percent PMI, even though there was a possibility that the Worker would be entitled to a higher EERB, pending the outcome of her appeal. In such circumstances, it is reasonable to consider the s. 73(1)(c) adjustment as having the effect of amending the initial award. Flowing from this, the 36-month review should run from the date of that amended award.

I therefore conclude that the Board had the jurisdiction to commence the Worker's 36-month review in February 2006.

Having reached this determination, I now turn my attention to the substantive issues raised in this appeal.

Was the Worker's EERB properly calculated at the time of the 36-month review?

When considering the Worker's entitlement to an EERB in 2001 and 2003, the Board determined that the Worker's compensable injuries prevented her from returning to the workforce. Accordingly, the Worker was not deemed capable of earning any income, and her EERB was calculated accordingly.

In 2005, the Worker was appointed to the WCB Board of Directors for a four-year term. In this capacity, she receives an honorarium of \$300.00 for each day that she attends Board of Directors meetings. She is also reimbursed her travel expenses to attend these meetings. Her first cheque included a one-time payment for orientation and training.

The Worker testified that she only receives her honorarium if she attends Board of Directors meetings. Even though she may have prepared for meetings, she is not paid if she is unable to attend. This occurred on one occasion where the Worker prepared for a meeting, traveled to Halifax but fell ill and required treatment at a hospital emergency department. As a consequence, the Worker was unable to attend the meeting and was not compensated for her expenses.

The Worker testified that, although she was pleased to be chosen as a member of the Board of Directors, she had some concerns about accepting the appointment. Foremost among her concerns was the impact, if any, it would have on her EERB.

The Board was acutely aware of this concern. Exhibit 6 filed at the hearing is a July 26, 2005 Memorandum from the then-Chair of the Workers' Compensation Board and the Deputy Minister of the Department of Environment and Labour to the Workplace Safety and Insurance System Stakeholders. The Memorandum pre-dated the Worker's appointment to the Board of Directors. It contained a recommendation that the daily stipend or honorarium paid to directors be increased from \$150.00 to \$300.00. It also included the following statement:

3. Impact on Injured Workers:

There have been concerns raised by injured workers that, if appointed to the WCB, they may be "deemed" to be capable of returning to work. Both the Chair and the Deputy have provided assurances that attendance at meetings is not indicative of capability of returning to work, and have suggested that this be addressed in WCB policy. Under the CPP disability policies, which many injured workers are also subject to, volunteering or attending meetings is not considered an issue and is in fact encouraged. Under CPP rules, a worker can earn up to \$4,100 in any year without affecting their CPP benefits.

The authors noted that, "Revenue Canada would treat per diems in the hands of all board members, including injured workers as income". They also indicated that in two Canadian jurisdictions where there were Board members known to be injured workers (PEI and Ontario), remuneration paid to injured workers would be included in post-accident earnings in PEI, but not in Ontario.

The authors further stated that recipients could direct their honorariums be paid to their Association to ensure that they received no personal benefit. They concluded their discussion on this point with the following statement:

Having said all the above, it is clear that an injured worker who serves on the Board should not have less income than they would have had if they had not agreed to serve on the Board. This may be a consequence if they move from an income consisting entirely of non-taxable WCB benefits to an income that is partly non-taxable remuneration for serving on the Board. The Chair and the Deputy Minister are in agreement that steps should be taken by the Board to prevent this from happening.

Unfortunately for the Worker, it appears that no steps were taken to address this issue.

The Worker acknowledged that she was aware that this matter had not been resolved at the time that she accepted her appointment to the Board of Directors. She testified that

she did not think that her decision to accept an appointment to the Board of Directors would have such an impact on her benefits. She also stated that she would not have accepted the nomination as a director had she known that she could lose the benefits for which she had fought so long and hard.

The Worker further testified that when she attended her first Board meeting, she requested that her payment be withheld until the matter was resolved. This was not done. At the next meeting, she learned that two other board members had directed their payments be made to their organizations. The Worker requested that hers be directed to the Pictou County Injured Workers' Association; however, her request was denied, on the basis that the entire payment process was being reviewed by the Board's accountants.

Exhibit 12 is correspondence from the accounting firm, *Ernst & Young*, dated November 8, 2005, which addresses the issue of source deductions and reporting procedures. It indicates that Employment Insurance premiums should not be deducted from directors' fees; however, Canada Pension Plan premiums should be withheld from the *per diem* and honorarium. Regarding the assignment of director fees to third parties, the chartered accountant noted that although there was no specific statutory provision to allow a deduction from income, the Canada Revenue Agency would "accept an exclusion from income where it can be shown that the director did not receive the income, but had endorsed the income to his/her employer or association".

The Worker testified that she held off cashing all of her *per diem* cheques until after she received her T5 slip.

Exhibit 11 is correspondence to the Worker from the Acting Chair of the Workers' Compensation Board dated October 31, 2006. The Acting Chair indicated that he understood from discussions with the Worker that it was her intention to donate her Board member *per diems* to her non-profit third party organization. He advised the Worker to inform the Board's Internal Appeals division of this decision immediately, and he indicated that he expected that her EERB would not be decreased, and the question of her capacity to return to work would no longer be an issue.

The Worker testified that she never submitted a request to donate her *per diems* to her organization in writing. She stated that, by this time, it was no longer worth it to her - she would have to advise the Canada Revenue Agency about all of the payments to a third party. Furthermore, it was a matter of principle: she would still be doing all of the work, but the distinction would be that she was not receiving remuneration directly. In her mind, whether or not she actually received the monies did nothing to change her belief that these funds neither constituted earnings for EERB purposes, nor demonstrated an ability on her part to earn income.

The Worker also testified that, if her honorarium is treated as income for the purposes of her EERB, she may not complete her term, as she would still be receiving these monies at the time of her 24-month EERB review.

The Worker's representatives argued that the monies received by the Worker as an honorarium for attendance at WCB Board of Directors meetings do not constitute earnings for the purpose of determining post-accident earnings when calculating an EERB.

In the alternative, they argue that the calculation was incorrect, as the income attributed to the Worker (\$12,7500.00) included travel reimbursement and other expenses, with no allowance for usual statutory deductions. It is further submitted that the PEI Extended Benefits Manager also made a calculation error with respect to the CPP disability adjustment, insofar as it relates to the Worker's CPP survivor pension following the death of her husband in 2006.

Section 38 of the *Act* provides that a worker's loss of earnings is the difference between the worker's pre-injury net average weekly earnings and the net average weekly amount that the worker is earning (or is capable of earning in suitable or reasonably available employment) after the injury. Included in the calculation is 50 percent of any periodic CPP benefits that the worker is receiving or entitled to receive.

Section 39 states that a worker's net average earnings are the worker's gross average earnings less probable deductions for income tax, CPP premiums, employment insurance premiums, and any other type of deduction the Board may prescribe by regulation.

Section 42 of the *Act* provides that a worker's gross average earnings are the worker's regular salary or wages and any other type or amount of income that the Board may prescribe by regulation.

Board Policies 3.1.1R2 and 3.4.1R1 are also applicable. Paragraph 4 of Policy 3.4.1R1 provides that a worker's post-loss of earnings includes the following:

- i) earnings from employment;
- ii) earnings that the Board estimates the worker is capable of earning in suitable and reasonably available employment; and
- iii) 50% of Canada Pension Plan (CPP) or Quebec Pension Plan (QPP) disability benefits

Pursuant to paragraph 3 of Policy 3.1.1R2, a worker's "regular salary or wages" includes the following:

- a) regular overtime,
- b) commissions,
- c) bonuses,
- d) vacation pay,
- e) a profit sharing arrangement with the worker's employer,

- f) tips and gratuities,
- g) taxable benefits, if reportable on a worker's T4 slip, and
- h) other types of employment income allowable on the "Employment Income" and "Other Employment Income" lines of an individual tax return.

The Worker's representatives argue that the legislation is clear and unambiguous: when calculating an EERB, gross average earnings must be based upon the worker's regular salary or wages. Net weekly earnings are the worker's gross average earnings, less probable deductions for income tax payable, CPP premiums, employment insurance premiums, and any other deduction prescribed by regulation.

The Worker's representatives acknowledge that Board Policy 3.1.1R2 states that other types of income allowable on the "employment income" or "other employment income" lines of an individual tax form are to be included as part of a Worker's regular salary or wages.

Exhibit 13, the Worker's T4A slip from the taxation year 2005, includes the amount of \$4,350.00 in box 28 and is identified as "other income". Exhibit 14 is a T4 slip for the taxation year 2005. In it, box 14 contains the amount of \$2,550.00 and is identified as "employment income - line 101". In her September 27, 2006 decision, the PEI Extended Benefits Manager referred to these amounts (as well as additional income of \$5,850.00 referenced in July 5, 2006 correspondence from the Board's Executive Corporate Secretary) and concluded that the Worker had earned \$12,750.00 during her first year as a member of the Board of Directors. She concluded that the Worker had "demonstrated a current ability to earn", and recalculated the Worker's EERB using those figures.

The Worker's representatives submit that, when determining a worker's post-accident earnings, the Tribunal has the jurisdiction to assess whether the amount included as employment income at box 14 of a T4 slip actually constitutes earnings from employment. In support of this position, they rely upon Tribunal *Decision 2002-273-AD* (September 13, 2002), in which the Tribunal excluded income reported as "employment income" on a Worker's tax return where it was determined that the income was not actually earnings from employment, but was financial assistance received for tuition plus room and board as a result of participation in a training program.

I agree that I have the jurisdiction to assess whether the amount reported as "employment income" on the Worker's income tax return actually constitutes earnings from employment. In reaching this conclusion, I agree with my colleague's finding in *Decision 2002-273-AD* that the mere fact that "other income" is reported in an income tax return does not conclusively mean that it constitutes income for the purpose of determining post-accident earnings for EERB calculations.

My jurisdiction is further supported by a document entitled "*Summary of 36-Month Review Process*", which the Board provided to the PEI Extended Benefits Adjudicator prior to the Worker's claim being adjudicated. This document provides that the purpose of the 36 and

24-month EERB reviews is “to establish a current/updated evaluation that best reflects the client’s earning potential from that point **forward** for the remaining life of the EERB”. Of particular relevance are the following statements:

Specifically, the review process to evaluate current capacity going forward uses a combination of objective information (most heavily weighted) together with any subjective information about circumstances surrounding any employment and/or earnings

...If there is evidence of additional income, **further investigation is required to understand the nature of that income and whether it should be considered sustainable future income. This assessment is the more subjective aspect of the review process.** (emphasis added)

The Worker’s representatives argue that the Board never intended for honoraria received by Board of Directors to be considered employment income for the purpose of EERB calculations. I agree.

Support for this position is found in the July 26, 2005 memorandum from the then-Chair of the Workers’ Compensation Board and the Deputy Minister of the Department of Environment and Labour (Exhibit 6). They provide a clear statement that, “an injured worker who serves on the Board should not have less income than they would have had if they had not agreed to serve on the Board”.

If the honorarium constitutes “employment income”, the Worker’s EERB will be reduced, and she will have less income than had she not accepted the appointment. The July 26, 2005 memorandum suggested that the Board should find a way to deal with this situation. Thus far, it has not done so.

I find that the honorarium paid to the Worker in her capacity as a member of the Board of Directors neither constitutes “earnings” nor demonstrates an ability to earn income for the purposes of an EERB calculation. To conclude otherwise would result in an unjust conclusion without regard for the real merits and justice of this case.

The medical evidence clearly establishes that the Worker is unable to return to the workforce. Although the honorarium is reported as income to the Canada Revenue Agency, I find that when one looks behind the veil of “other employment income”, the honorarium should not be considered as income for the purpose of an EERB calculation - it is not sustainable future income. The Worker was appointed for a four-year term. There is no certainty of re-appointment. To say that her ability to attend Board meetings demonstrates an ability to earn income ignores the abundance of medical evidence on file to the contrary. The Worker is not going to be able to secure employment once her tenure on the Board is complete. To deem her capable of earning comparable income would be unjust, based on all of the evidence. The honorarium paid to the Worker in her capacity as a member of the Board of Directors should not have been included as earnings for the

purposes of the Worker's 36-month EERB review.

Is the Worker entitled to a PRI rating greater than 3 percent?

Pursuant to s. 7 of the *Chronic Pain Regulations*, workers with chronic pain may be awarded a 3 percent PRI for a "slight" impairment, or a 6 percent PRI for a "substantial" impairment.

Board Policy 3.3.5 provides that a worker's PRI will be assessed using a modified approach to chapter 18 of the American Medical Association's Guides to the Evaluation of Permanent Impairment [the "AMA Guides"]. A PRI assessment tool (which includes a Client Information Questionnaire) is to be utilized when assessing the level of impairment, and then a Board Medical Advisor makes a clinical judgment as to the recommended PRI rating.

Essentially, impairments are rated by assessing the following five factors:

1. Pain severity;
2. Impact on activities of daily life;
3. Psychological impact;
4. Medication use; and
5. Degree of pain behaviour

The PRI assessment tool indicates that a "slight" PRI is appropriate where pain is mildly or moderately aggravated by activity, a worker has minimal or moderate difficulty performing functional abilities due to the pain and is able to perform them with reasonable modifications. Medication is taken daily or as needed, and the worker has minimal or moderate difficulty performing various activities of daily living, including walking, standing, lifting, and household chores. These functions are able to be performed with reasonable modifications. There is minor interference with sleep patterns, and sleep aids are occasionally required. There is a minimal or moderate impact on the worker's cognitive abilities due to pain, and the worker's emotional state is occasionally affected by the pain. A 3 percent PRI is appropriate where the Worker can tolerate pain, but where there is some marked handicap in the performance of activity.

A "substantial" PRI is appropriate where the pain is severely aggravated by activity, a worker has extreme difficulty performing functional activities and is only able to perform them with substantial modifications or assistance. Regular maintenance dosages of prescription medication are used to control pain, and there is major sleep interference which requires the regular use of sleep aids. The worker's cognitive ability is greatly impacted, such that the worker has extreme difficulty performing these types of activities or is unable to perform them at all. The worker's emotional state is frequently affected by pain, and there is extreme difficulty performing activities of daily living. Such activities can only be performed with substantial modifications or assistance.

The Worker has not worked since her 1992 injury.

A March 29, 1996 Hearing Officer's decision contains a summary of the Worker's testimony as to what impact her injuries had on her daily life. The Worker was very active prior to her injuries. She cared for horses, walked her dog, was a volunteer brownie leader, and regularly performed household chores and yard work. Following her injuries, this all changed. She experienced difficulty performing many household activities. She often dropped dishes because of reduced grip strength. She began to use a cane, and her standing, walking and sitting tolerances were greatly reduced. Her sleep was also affected. She generally slept for no more than 11/2 hours at a time. She took several pain medications, including Demerol.

Other witness testimony in 1996 indicated that the Worker stopped gardening after her injuries and aggravated her condition whenever she tried to performed housework. Once an outgoing individual, the Worker started to shy away from people and tended to socialize only with other injured workers.

The Worker's 1996 testimony is consistent with her testimony before me and the information contained in her Client Information Questionnaire.

A Board Medical Advisor expressed an opinion on April 4, 1996, that the Worker had a "probable well-entrenched chronic pain syndrome".

On May 28, 1996, another Board Medical Advisor stated that the Worker suffered from a "very severe chronic pain syndrome".

Doctor LeGay, an orthopaedic surgeon and Certified Independent Medical Evaluator, assessed the Worker on November 15, 2002. The information contained in his 27-page report dated November 17, 2002 is consistent with the Worker's testimony and the other medical evidence on file.

Doctor LeGay indicated that the Worker had suffered five workplace injuries between 1987 and 1992, and that surgery had been performed on the Worker's ulnar nerve in 1997 in relation to the 1987 injury.

Doctor LeGay noted that the Worker considered her lumbar spine to be her "major problem at this time". She complained of intermittent lower back pain and numbness radiating down her right leg into her foot. Standing and sitting for long periods of time exacerbated her pain. She did not use sleeping medication, but required extra pillows to support her neck.

The Worker also complained of neck pain radiating into her left shoulder, with intermittent numbness into her arm. She used heat and massage to help control her pain. She advised Dr. LeGay that she had limited range of motion and experienced discomfort when reaching above shoulder height. Pain curtailed her ability to perform many activities.

Doctor LeGay noted that the Worker had been treated by many specialists, all of whom had expressed the opinion that the subjective findings did not match the objective findings. Doctor LeGay's diagnoses of the Worker's condition included mechanical back pain with reduced range of motion, posture-related facet neck pain with no evidence of radiculopathy or herniation, rotator cuff tendonitis, ulnar neuropathy, and patellofemoral arthritis.

The Worker testified at the hearing that her pain is no better today than it was in 1996. She uses back and knee braces and a cane. She will require a total knee replacement in the future. When she travels to Halifax to attend Board meetings, she has to add two travel days to her schedule. She arrives one day prior to the meeting so that she can recover from the drive. She also remains an extra night after the meeting so that she can rest prior to driving home. She cannot sit for the duration of the meeting, and she is permitted to move around during the meeting to relieve her symptoms.

The Worker also testified that she sees her doctor monthly and uses anti-inflammatory medication. She has been prescribed narcotics in the past but did not like how they made her feel. Given her nursing background, she is reluctant to use medication to which she might become addicted. She sees her doctor monthly, but questions the need to do so, as there is nothing that can be done to help her. She knows what is wrong with her and sees no need to waste her doctor's time just to enable him to chart her complaints of pain.

The Worker prepared a Client Information Questionnaire on July 5, 2006. She also spoke to the PEI Extended Benefits Manager on September 7, 2006, and a summary of their conversation is on file. The information contained in both documents is relatively consistent.

A PEI Medical Advisor provided an opinion dated September 19, 2006, that the Worker suffered from a "slight" impairment and was entitled to a 3 percent PRI rating.

The Worker seeks a 6 percent PRI rating, the highest available award under the Chronic Pain Regulations. I have considered the Worker's request in light of the five applicable factors.

The PEI Medical Advisor indicated that he was unable to score the Worker's pain on the information available to him. A review of the client's Questionnaire indicates that it does not include a section asking the Worker to rate her pain. However, other information on file suggests that the Worker's pain is always present and prevents her from performing many activities, including working. She rates her pain as being in the "substantial" range. It is moderately aggravated by activity. If she over-exerts herself one day, she "pays for it" over the next three to four days. In addition to anti-inflammatory medication, she uses heat and water therapy to control her symptoms. I find that the Worker's pain severity is more consistent with a "substantial" rating.

Regarding activities of daily living, the evidence also suggests that there has been a "substantial" impact. Although she can generally prepare her own meals, the Worker has

difficulty with tasks involving manual dexterity, such as peeling potatoes. She cannot perform heavy chores such as vacuuming or washing windows and walls. She frequently drops things with her left hand, and she has installed “easy to grasp” knobs and drawers in her kitchen. Her ability to exercise is greatly curtailed. She can move around her house but cannot go for long walks. She finds it difficult to climb stairs. She can perform her own personal care but has difficulty pulling on her socks. The Worker’s sleep is affected by her pain. Her recreational activities have also been markedly affected. She can no longer tolerate paint, ride horses or participate in dog shows. She misses these activities. I find that the impact of the Worker’s pain on her activities of daily living is “substantial”.

No significant psychological problems have been identified. The Worker tries to keep her mind active and says that “mind-wise”, she believes that she is “doing ok”. Her emotional state is occasionally affected by her pain, as she has had to make many adaptations to her lifestyle. I find that the psychological aspect of the Worker’s pain constitutes a “slight” impairment.

The Worker’s use of medication also constitutes a “slight” impairment. She has tried several forms of medication since her last injury, but none has provided complete pain relief. She has tried to avoid prescribed narcotics due to fear of addiction. She has been taking regular maintenance dosages of Naprosyn since 1992. She reported that she does not use anti-inflammatory medication every day.

Finally, I find that there is insufficient evidence on file for me to reach any conclusions regarding pain magnification.

Having considered all of these factors, I find that the Worker is entitled to a “substantial” PRI rating. Two of the relevant factors place her in the “substantial” range, and two place her in the “slight” range. There is insufficient evidence for me to reach any conclusions regarding the fifth factor. When these results are viewed in their entirety and in light of s. 187 of the *Act*, I find that the Worker’s pain should be characterized as “substantial”. She is entitled to a 6 percent PRI rating.

CONCLUSION:

The appeal is allowed. The honorarium paid to the Worker in her capacity as a member of the Board of Directors should not have been included as earnings for the purposes of the Worker’s 36-month EERB review. The Board is to recalculate the Worker’s EERB accordingly. The Worker is also entitled to a 6 percent PRI rating for her chronic pain.