

CLAIM HISTORY AND APPEAL PROCEEDINGS:

The Worker injured her low back on January 24, 1990. The Board accepted her injury as compensable and provided her with various benefits. The Worker also received Canada Pension Plan Disability benefits effective in 1990. In July 1992, the former Workers' Compensation Appeal Board awarded the Worker a seven and one-half percent permanent partial disability pension. The Worker chose to receive this award in the form of a lump sum. The Worker sought increases in the permanent medical impairment ("PMI") rating, and additional wage loss benefits, but the Board denied those requests. On appeal, the Tribunal determined the Worker had chronic pain.

In 2005, the Board reviewed the Worker's claim to see whether she was entitled to benefits and services under the chronic pain regulations. The Board determined that the Worker had a substantial pain-related impairment ("PRI"), warranting a six percent rating. The effective date of the chronic pain award is October 30, 1990.

In July 2005, the Worker applied to the Board for a supplementary benefit. The Board provided the Worker with a supplementary benefit for the current year, and also provided it retroactively to October 1, 2002. The Board denied a supplementary benefit for any time prior to October 1, 2002. The Worker appealed that decision to a Hearing Officer, but her appeal was denied in a February 28, 2006 decision. The Worker appealed the Hearing Officer's decision to the Tribunal.

The Tribunal appeal proceeded by oral hearing. The Worker testified and her representative filed several exhibits, and made oral submissions. I provided four Tribunal decisions to the Worker for comment. The Worker's representative filed post-hearing submissions on June 22, 2006. I forwarded the Tribunal decisions, the Worker's exhibits and post-hearing submissions to the Board for comment, but received none.

ISSUE AND OUTCOME:

Is the Worker entitled to a supplementary benefit prior to October 1, 2002?

Yes, the Worker is entitled to supplementary benefits from February 1, 1996 until October 1, 2002 based on the calculation formula that was in place at the time.

ANALYSIS:

The *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended (the "Act") applies to

this appeal.

Section 187 of the *Act* requires me to give the Worker 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 seeks a supplementary benefit prior to October 1, 2002. Section 227 deals with injuries that occurred prior to March 23, 1990, and s. 227(4) particularly with entitlement to supplementary benefits.

227 (4) Notwithstanding anything contained in this Section, where a worker

(a) was injured before March 23, 1990, and is receiving or is entitled to receive periodic compensation for either permanent partial disability or permanent total disability or is entitled to receive the amended interim earnings loss benefit pursuant to Section 10D as a result of the injury; or

(b) dies before the coming into force of this Part and the workers dependent spouse or invalid child is receiving or is entitled to receive periodic compensation in connection with the workers death,

and the worker or dependent spouse or invalid child

(c) has a personal income below one half the average industrial wage for Nova Scotia as prescribed by regulation; and

(d) meets the conditions the Board prescribes by regulation,

the Board shall pay to the worker or dependent spouse or invalid child the supplement the Board prescribes by regulation in an amount not to exceed one half of the average industrial wage for Nova Scotia as prescribed by regulation. 1994-95, c. 10, s. 227; 1999, c. 1, s. 27; 2002, c. 41, s. 1.

As indicated in (d) above, a worker must meet conditions prescribed by regulation. Sections 28-33 of the Board's General Regulations deal with supplementary benefits. Sections 29 and 30 are most relevant to this appeal.

29 (1) A supplementary benefit shall not be paid unless an applicant

(a) applies in writing to the Board; and

Clause 29(1)(a) replaced: O.I.C. 2002-539, N.S. Reg. 146/2002.

(b) provides the Board with the information required by the Board from time to time for determining eligibility for the supplementary benefit.

Clause 29(1)(b) replaced: O.I.C. 2002-539, N.S. Reg. 146/2002.

Subsection 29(1) amended: O.I.C. 2002-539, N.S. Reg. 146/2002.

(1A) Despite clause (1)(a), an applicant in receipt of a supplementary benefit on October 1, 2002, shall not be required to apply for a supplementary benefit for the benefit year commencing on October 1, 2002.

Subsection 29(1A) added: O.I.C. 2002-539, N.S. Reg. 146/2002.

(2) An applicant who is an injured worker is eligible for a supplementary benefit if the worker

(a) is receiving a CPP/QPP disability pension for the worker's compensable injury; or

(b) would, in the opinion of the Board, be eligible for a CPP/QPP disability pension for the worker's compensable injury but for insufficient contributions or lack of contributions to CPP/QPP.

(3) An applicant is eligible for a supplementary benefit until the month after the month in which the applicant attains the age of sixty-five years.

(4) A supplementary benefit is payable as of the first day of the month in which application for the supplementary benefit is made, but shall not be payable earlier than October 1, 2002.

Subsection 29(4) amended: O.I.C. 2002-539, N.S. Reg. 146/2002.

30 (1) Despite subsection 29(4), a supplementary benefit is payable as of any date fixed by the Board that is earlier than the date fixed by subsection 29(4), if an applicant satisfies the criteria in clauses 227(4)(a), (b) and (c) of the Act on the date Section 227 of the Act is proclaimed in force.

Subsection 30(1) amended: O.I.C. 2002-539, N.S. Reg. 146/2002.

(2) A date fixed by the Board pursuant to subsection (1) shall not be earlier than October 1, 2002.

Subsection 30(2) amended: O.I.C. 2002-539, N.S. Reg. 146/2002.

The Representative does not take issue with the calculation of the Worker's supplementary benefit from October 1, 2002 onwards. She says, however, that the Worker should be entitled to a supplementary benefit for the period of time she was eligible prior to October 1, 2002.

The Worker had an injury prior to March 23, 1990; she had income below the threshold; she now has a permanent partial disability pension (from chronic pain) which is being paid

as a periodic benefit; and she has made application in writing.

The latter two requirements only came about in 2005, after the Board assessed the Worker for chronic pain benefits, and awarded her a permanent impairment benefit based on a pain-related impairment, with an effective date back to 1990. The Worker's decision to take this benefit as a periodic payment entitled her to be considered for supplementary benefits.

The Worker's representative says that if the Worker's chronic pain benefits had initially been paid at the time the Board found the chronic pain had developed (October 30, 1990), she would have met the requirements for receipt of supplementary benefits when s. 227 was proclaimed on February 1, 1996.

A review of the legislative history of the supplementary benefit is helpful. Supplementary benefits were introduced to the workers compensation system in late-1995. At that time, the effect of s. 227(4) of the *Act* was to increase a worker's income to the lesser of the amount of a full monthly old age security pension, or by the amount necessary to bring income up to the guaranteed income supplement under the *Old Age Security Act*.

Under the Board's General Regulations at the time, the Board provided a supplementary benefit from the month of application, but could fix an earlier effective date, provided that the eligibility criteria in s. 227 (a), (b), and (c) were met, and provided an application had been made within one year of s. 227 was proclaimed in force. Section 30(2) provided that the Board could not fix an entitlement date earlier than the proclamation date, i.e. February 1, 1996.

In 2002, the manner of calculating the supplementary benefit changed with the passage of Bill 155. Copies of Bill 155 as introduced, and as passed, were provided by the Worker's Representative. She also provided excerpts from Hansard addressing the purpose of Bill 155. Bill 155 changed s. 227 of the *Act* so as to base the amount of the supplementary benefit on half the average industrial wage in Nova Scotia. The Hansard excerpts indicate that the purpose of this change was to increase the income levels for workers who had pre-Hayden injuries.

According to the language of Bill 155, the change was to have effect as of October 1, 2002. The Hansard excerpts explain that the Government hoped to have the Bill passed quickly so that cheques for affected individuals could be issued in time for Christmas that year. The Bill had first and second reading on November 19, 2002, and third reading came on November 28, 2002.

Bill 155 was passed as it was introduced. It said that the change in the manner of calculating the supplementary benefit was to have effect on and after October 1, 2002.

Bill 155 does not explicitly extinguish entitlement to supplementary benefits for the period prior to October 1, 2002. In all the debate leading to the passage of the Bill, there was no

reference to its purpose being in any way related to extinguishing rights to supplementary benefits prior to October 1, 2002. Rather, its purpose was aimed solely at increasing the amount of benefits being provided to a certain category of workers.

Section 227 does not address the timing of the change or effective dates for benefits. Those details are contained in the Board's General Regulations, which were changed following the passage of Bill 155.

Regulation 146/2002 repealed and/or amended sections 29-33 of the Board's General Regulations to give effect to the changes in Bill 155.

Section 28 of the General Regulations was changed to reflect that the method of calculating the supplementary benefit would be based on half the average industrial wage in Nova Scotia. Section 30(2) of the Regulations was changed to indicate that the Board could fix an eligibility date earlier than the month of application, but that the date could not be earlier than October 1, 2002.

Under the former wording of the Regulation, the Board could not fix a date earlier than the date s. 227 was proclaimed in force, i.e. February 1, 1996.

The Board has interpreted this Regulation change as prohibiting it from fixing an eligibility date earlier than October 1, 2002, even where the eligibility requirements of the former Regulation had been met.

The Worker says that the change in the legislation was only intended to increase the amount of money being paid to workers injured pre-Hayden. The Worker says that it was not intended to take away entitlement to a supplementary benefit prior to October 1, 2002, but only intended to change the method of calculating that benefit on that date.

The Tribunal has dealt with requests for retroactive supplementary benefits in the past.

Decision 2001-317-AD (April 30, 2002, NSWCAT) dealt with a worker who was initially denied a permanent medical impairment award in 1992 with respect to a pre-Hayden injury. She successfully appealed, but it was not resolved until 2000. She applied for and received supplementary benefits in 2000, but not for the years before.

The Tribunal found that the parts of Policy 3.8.1R2 and s. 30(2) of the Board's General Regulations that limit the availability of retroactive supplementary benefits did not violate the *Act* because s. 227 does not address the retroactive payment of supplementary benefits.

This case dealt with s. 227 as it read prior to the amendments that are at issue in the present appeal. One of the conditions for receiving retroactive benefits was that an application must have been filed within one year of the date s. 227 was proclaimed in force. The Worker had not done this as her claim was still in appeals, and until that was

resolved in her favour, she would be ineligible for supplementary benefits. In that case, the Tribunal used s. 190 of the *Act* to extend the time limit for applying for retroactive benefits, and the worker had her supplementary benefits provided retroactively to the date s. 227 was proclaimed, i.e. February 1, 1996.

Decision 2003-313-AD (August 29, 2003, NSWCAT) followed *Decision 2001-317*, but applied the reasoning to Policy 3.8.1R3, and the change in the legislation to limit retroactive benefits to no earlier than October 1, 2002. The Tribunal accepted that the Policies and Regulations governing supplementary benefits did not violate the *Act*, and that the Tribunal was bound by those provisions. The Tribunal found that it had no discretion to direct payment of supplementary benefits prior to October 1, 2002.

Decision 2005-185-AD (June 28, 2005, NSWCAT) also limited the provision of retroactive supplementary benefits to October 1, 2002 on the basis of s. 30(2) of the Regulations and Policy 3.8.1R4. In that case, the Worker applied for a supplementary benefit in 2004, and the Board had limited benefits to the month of application in 2004. On appeal, the Tribunal found that the only impediment to retroactive benefits was the date of application, and that the worker should have benefits back to October 1, 2002. The Worker met the necessary criteria for a supplementary benefit earlier than October 1, 2002, but because of the date of application, the Tribunal felt bound by the temporal restriction on retroactive benefits contained in the Board's General Regulations.

Decision 2005-250-AD (September 30, 2005, NSWCAT) carved out an exception to the prohibition against paying retroactive benefits prior to October 1, 2002. In that case, the worker claimed to have made written requests to the Board for supplementary benefits prior to the change in the Regulation in 2002. The Worker otherwise met all the requirements for receiving a supplementary benefit. The Tribunal found that if the worker had, in fact, made a written application prior to the changed Regulation, then he would not be subject to the limitation of those benefits to no earlier than October 1, 2002. The matter was returned to the Board to address the question of whether the requests the worker had made met the requirements of a written application for supplementary benefits.

In the present case, the Worker's Representative argues that s. 190 should be applied in this case as it was in *Decision 2001-313* above. She says that the only reason the Worker had not applied for supplementary benefits prior to the change in the Regulation was because of unconstitutional legislation that denied the Worker compensation for chronic pain. The legislation was struck down in 2003. The Worker was awarded compensation for her chronic pain in 2005, and she made an application for supplementary benefits the same year. The Worker's Representative argues that it would be unfair not to extend time limits for applying for supplementary benefits in these circumstances.

The Court of Appeal dealt with the breadth of s. 190 in *Thermo Dynamics Ltd. V. Nova Scotia* (Workers' Compensation Appeals Tribunal), 2005 NSCA 150. In that case, a company had been over-assessed based on an incorrect industry classification for many

years. It complained first in 1998, but the Board did not perform an audit until 2004. It validated the company's complaint, and re-classified it in a different category with a lower assessment premium. The Board refunded to the company an amount representing the over-assessed premiums, but limited the extent of retroactive refund to one year prior to the year of correction. The limit on retroactive refunds was based on the specific language of s. 122 of the *Act*. On appeal, the Tribunal also limited the refund to one year based on s. 122.

The Court of Appeal overturned the Tribunal's decision in this respect. It said that s. 190 of the *Act* provided a broad discretion to the Board "to extend any time limit prescribed by Part 1 or the regulations, at any time, if in the opinion of the Board an injustice would otherwise result." This section was noted to be subject only to s. 83, which had no bearing on that case. Section 83 is also irrelevant to the present case.

The limitation period in s. 122 was in respect of monies that rightly belonged to the company, and which the Board had wrongly over-assessed. The Court of Appeal rejected the reasoning that the one year limitation helped maintain a stable accident fund, and indicated that it did not overcome the inequity of the Board keeping these funds. The Court of Appeal said that the limitation period in s. 122 was within the breadth of relief under s. 190, but left the decision of whether the discretion should be exercised to the Board.

The present case is somewhat similar in that the Board is denying entitlement to supplementary benefits to this Worker, who would have qualified as of February 1, 1996, but for the Board's denial of benefits for chronic pain based on unconstitutional legislation. There is unfairness and inequity in the Board's position.

In this case, it is not the length of time that a refund of premiums could go back, but the duration of benefits. The supplementary benefit in its current formulation has only existed since October 1, 2002. It would be beyond my jurisdiction to award a supplementary benefit *in its current form* prior to that date. That would be creating another inequity, as no other workers have that level of benefit prior to October 1, 2002.

I find that I can, however, extend the supplementary benefit to the Worker for the period from October 1, 1996 until October 1, 2002, but in the form that was previously provided for before Bill 155 was passed and the Regulations changed in 2002.

In so ordering benefits, I accept the Worker's Representatives argument, based on the language of Bill 155 and excerpts from Hansard addressing its purpose, that the change in 2002 was not to extinguish entitlement to supplementary benefits prior to October 1, 2002, but to increase the level of those benefits from that point forward.

I find no barrier in law to such an order of retroactive benefits. I read s. 30(2) of the Board's General Regulations to apply the time restriction only supplementary benefits in that form, i.e. based on half the average industrial wage in Nova Scotia. That Regulation,

and the Bill on which it was based was never intended to extinguish rights that existed prior to October 1, 2002.

The *Interpretation Act*, R.S.N.S. 1989, c. 235 supports such an interpretation as well. Section 23 pertains to the effect of a repeal or repeal and substitution of legislation. It states,

Effect of repeal or repeal and substitution

23 (1) Where an enactment is repealed, the repeal does not

(b) affect the previous operation of the enactment so repealed or anything duly done or suffered under it;

(c) affect a right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment;

In *Driedger on the Construction of Statutes*, 3rd ed. by Ruth Sullivan, (Toronto: Butterworths Canada Ltd., 1994), at p. 526, the author addresses survival of repealed law. She cites an excerpt from s. 43 of the Federal Interpretation Act, which is virtually identical to s. 23 of the Nova Scotia law cited above. After paraphrasing the section, the author concludes,

In short, the repealed law continues to apply to pre-repeal facts for most purposes as if it were still good law.

The author draws a distinction between the operation and application of legislation. The time period in which the legislation is applied does not necessarily correspond to its period of operation. The author says,

In the case of survival, legislation is applied after it has ceased to operate to facts that occurred in whole or in part while it was binding law.

This analysis supports that entitlement may continue to exist for workers who meet all the criteria for the supplementary benefit program as it existed prior to October 1, 2002. Whether one terms that a vested right, or an accruing right, the idea is the same. The Government may extinguish rights if it wishes. It must however, do so in the clearest of terms. That clarity is not present here.

While the number of workers who were eligible, but have yet to apply for supplementary benefits will necessarily be small, the right to those benefits was not extinguished by the change in the *Act* and Regulation in 2002.

The Tribunal decision *2005-250-AD*, cited above, acknowledged that such rights continued to exist, provided the criteria had been met prior to the change in the Regulation. In the

present case, the Worker only met all the criteria for supplementary benefits in 2005, but because of the back-dating of her pain-related impairment, and the delay in obtaining those benefits based on unconstitutional legislation, she could not have perfected her application for those benefits until 2005. To deny her benefits prior to October 1, 2002 because she did not apply before the Regulation was repealed would be manifestly unfair in the circumstances.

CONCLUSION:

The Worker's appeal is allowed. She is entitled to supplementary benefits from February 1, 1996 until October 1, 2002, based on the calculation formula that was in place at the time.