

**CLAIM HISTORY AND APPEAL PROCEEDINGS:**

I will set out only those portions of the claim history and appeal proceedings most relevant to this appeal.

This is an appeal from an April 28, 2006 Hearing Officer decision, which determined that the Board would not recover an overpayment of benefits to the Worker pursuant to section 220 of the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended [the "Act"], and Policy 10.2.1R.

The Worker suffered a compensable injury in February 2002.

The Worker's original long-term rate (\$363.40) was improperly calculated; it was used to calculate the Worker's temporary earnings replacement benefits ["TERB"] from August 20, 2002 onwards.

A September 20, 2005 extended earnings replacement benefit ["EERB"] decision utilized the original long-term rate in calculating the Worker's permanent benefits. In particular, the Worker's permanent impairment benefit ["PIB"] was calculated as \$38.74, in addition to an EERB of \$1,574.61, for a total monthly benefit of \$1,613.35.

The Employer appealed the amount of the Worker's combined PIB/EERB. As a result of the Employer's appeal, the Board concluded that the Worker's long-term rate had been improperly determined. The long-term rate ought to have been \$261.96, as opposed to \$363.40. As a result, the Worker's combined PIB/EERB was reduced to \$1,173.81 per month.

Upon realizing the error in establishing the long-term rate, the Board calculated that the Worker had received a total overpayment of benefits of \$16,940.48, accrued over the span of 167 weeks. The Board did not act to recover this overpayment from the Worker. The Employer requested that the overpayment be recovered.

In a January 3, 2006 decision dedicated to the recovery of overpayment issue, a Case Manager decided not to recover the overpayment. The Employer appealed that decision by means of a January 11, 2006 Notice of Appeal to Hearing Officer, which contains extensive written submissions concerning Policy 10.2.1R and the facts of the appeal. That appeal led to the April 28, 2006 Hearing Officer decision which forms the subject matter of this appeal.

This appeal was commenced when the Employer filed a "Notice of Appeal to Hearing Officer" form with the Tribunal, that form being dated May 18, 2006. The Tribunal treated the "Notice of Appeal to Hearing Officer" form as a valid Notice of Appeal.

This appeal proceeded by way of written submissions. The Workers' Representative filed submissions dated September 25, 2006. The Employer indicated on September 11, 2006 that it would rely on its previous submissions to the Board and to the Tribunal. The Board did not take part in this hearing.

**ISSUE AND OUTCOME:**

At issue is whether the overpayment of benefits to the Worker should be recovered.

The Employer's appeal is denied. The overpayment ought not be recovered, in the light of the criteria found in Policy 10.2.1R.

**ANALYSIS:**

The determination whether to recover an overpayment is governed by the criteria set out in s. 2 of Policy 10.2.1R. That section states:

2. The following criteria will be used by the Board when determining whether or not the overpayment will be recovered.
  - 2.1 Legal - The overpayment recovery must be in accordance with the law.
  - 2.2 Reasonableness - If, in the opinion of the Board, the workers should have reasonably known that the payment was in excess of what was owed to him/her, the overpayment should be recovered.
  - 2.3 Time - If, in the opinion of the Board, the discovery of the overpayment exceeds a reasonable time, the overpayment should not be recovered. For the purposes of this Policy, a reasonable time is defined as three years.
  - 2.4 Cost - If the amount of the overpayment is less than \$50.00, the overpayment should not be recovered.
  - 2.5 Fraud - If it is determined by the Board that the overpayment resulted from fraud or misrepresentation, the overpayment will be recovered notwithstanding any other provisions.

The five criteria above are to be assessed globally, and not conjunctively. See *Decision 2001-450-AD* (November 15, 2001, NSWCAT).

In assessing the facts of this appeal, the Board has concluded that the overpayment resulted from its mistake. The Board has also noted that the Worker could not reasonably have realized the payment was in excess of that which was owed to her

(see the criterion in 2.2). The overpayment accrued over a period of 167 weeks, though much of the TERB was paid as a lump sum further to *Decision 2004-081-AD* (June 27, 2004, NSWCAT). Therefore, in terms of accrual, at least 11 weeks of period of the overpayment accrued beyond three years at the time the overpayment was discovered (see the criterion in 2.3), though in terms of actual payment it was discovered within three years. There is no indication that the Worker engaged in fraud (see the criterion in 2.5). The cost of the overpayment does exceed \$50.00 (see the criterion in 2.4).

I am in general agreement with the reasoning, and with the conclusions, of the Case Manager and the Hearing Officer.

The Employer argues that the Worker's payment was made as a lump sum. This can be significant, as this Tribunal has found that recovery of an overpayment concerning TERB is appropriate where there has been a retroactive payment of CPP disability benefits, which is a lump sum payment. See, for example, *Decision 2001-450-AD*, *Decision 2001-830-AD* (March 12, 2002, NSWCAT) and *Decision 2006-406-AD* (July 31, 2006, NSWCAT). However, in this appeal, even if a large portion of the Worker's TERB were paid as a lump sum, the Worker was not aware of the error in calculating her long-term rate. Thus, the Worker did not have advance knowledge that recovery of overpayment would be required, as do workers who receive retroactive CPP disability benefits.

I have noted the Employer's submissions, concerning the general impact on the workers' compensation system of the Board's decision not to recover the overpayment. In this particular appeal, I find that the prejudicial impact of a recovery of overpayment on this specific Worker (who is blameless) outweighs the possible prejudice to the system as a whole. In connection with my reasoning, I also refer to Policy 9.6.6, which states that the amount of the overpayment will not impact on the Employer's claim costs; consequently, there is no specific prejudicial impact on the Employer flowing from the non-recovery. The Employer disagrees with the general policy of not recovering overpayments; however, that is a question of Board policy which is beyond the purview of the Tribunal in this appeal.

In the light of all the factors, and assessing the criteria in Policy 10.2.1R globally, I find that the overpayment of benefits to the Worker should not be recovered.

**CONCLUSION:**

The Employer's appeal is denied. There will be no recovery of the overpayment.