

CLAIM HISTORY AND APPEAL PROCEEDINGS:

This is an appeal of a decision of a Hearing Officer of the Board dated May 30, 2006, in which the Hearing Officer determined that the Worker was not entitled to supplementary benefits prior to the benefit year, October 1, 2004 to September 30, 2005. The Worker appealed this decision to the Workers' Compensation Appeals Tribunal [the "Tribunal"] on June 26, 2006. This appeal proceeded by way of oral hearing at which the Worker testified.

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, 2004, provided he met the income criterion for those years, and filed the appropriate tax forms with Revenue Canada. Benefits from February 1, 1996 until October 1, 2002 are to be based on the calculation formula that was in place at the time for supplementary benefits.

ANALYSIS:

The legislation applicable to this appeal is the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended [the "Act"]. Section 187 of the Act requires me to give the worker the benefit of the doubt, which means that if 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, 2004. The Worker was injured on June 16, 1989 while employed as an electrician in the mine. He sustained a head injury and was assessed as having a 2% Permanent Medical Impairment ["PMI"] as a result of his injury. As a result of a Hearing Officer reconsideration decision dated April 3, 2006, the Worker was awarded benefits under the *Chronic Pain Regulations*, specifically, a 6% Pain Related Impairment ["PRI"]. The effective date of the Worker's PRI is May 15, 1990, which is the date his temporary total benefits were terminated.

On January 19, 2005, the Worker contacted the Board to apply for supplementary benefits. The Worker was found entitled to supplementary benefits for the benefit years October 1, 2004-September 30, 2005 and October 1, 2005-September 30, 2006. By way of Hearing Officer decision dated May 30, 2006, the Worker was found not entitled to a supplementary benefit prior to October 1, 2004. The Hearing Officer found that the Worker had not filed income tax returns for the years 2001 and 2002, and therefore the supplementary benefit

for the benefit years corresponding to those income tax returns (October 1, 2002 - September 30, 2003 and October 1, 2003-September 30, 2004 respectively) could not be calculated. The Hearing Officer further found, that the Worker could not be considered for supplementary benefits retroactive to 1996. Her decision was based on Section 30(2) of the Board's General Regulations dealing with supplementary benefits, which prohibited payment of supplementary benefits earlier than October 1, 2002.

Section 227 of the *Act* applies to the Worker's claim. Section 227 deals with injuries that occurred prior to March 23, 1990, and s. 227(4) deals particularly with entitlement to supplementary benefits. Subsection 227(4) states as follows:

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.

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

and the worker or dependent 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 the average industrial wage for Nova Scotia as prescribed by regulation. 1994-95, c. 10, s. 227; 1989, c. 1, s. 27; 2002, c. 41, s. 1.

According to ss.227(4)(d) a worker must meet the conditions the Board prescribes by regulation. Sections 28-33 of the Board's General Regulations deal with supplementary benefits. Sections 29 and 30 are the most relevant to this appeal and state as follows:

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

(a) applied 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 of 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

These sections were considered by the Tribunal in *Decision 2006-194-AD* (July 31, 2006, NSWCAT). In that case, the Worker had an injury prior to March 23, 1990; she had income below the threshold; and she had a Permanent Partial Disability Pension from chronic pain

which was being paid as a periodic benefit. She had made application in writing. The Tribunal found that if the Worker's chronic pain benefits had been initially paid at the time the Board found the chronic pain had developed, which was October 30, 1990, she would have met the requirements for supplementary benefits when s. 227 was proclaimed on February 1, 1996.

The Tribunal noted that the amendments to the legislation did not extinguish the rights to a supplementary benefit that existed prior to 2002. Although the Board had interpreted the new rule as prohibiting the fixing of an eligibility date earlier than October 1, 2002, the Tribunal applied s.190 to relieve the time limitation on retroactive benefits in s.30(2) of the General Regulations.

The argument before the Tribunal in *Decision 2006-194-AD* was similar to the argument before me on this appeal. The Worker's Representative argued that since the Worker had not been awarded benefits under the *Chronic Pain Regulations* until 2005, it would have been impossible to apply for supplementary benefits prior to that date. It was also argued that it was unjust for the Board to deny benefits before October 1, 2002 because of a delay in awarding compensation for chronic pain, which was based on legislative provisions that were eventually determined to be unconstitutional. The Tribunal in *Decision 2006-194-AD* accepted the Workers' Representative's arguments and I accept the reasoning of the Appeal Commissioner in *Decision 2006-194-AD* as it applies to the case before me.

In the present case, the Worker was injured before March 23, 1990. The Worker has been awarded a 6% PRI effective May 15, 1990 which he has chosen to take in the form of periodic payments. The Worker's decision to take this benefit in periodic payments entitled him to be considered for supplementary benefits. According to the documentation on file, the Worker is receiving a CPP disability pension for his compensable injury.

As stated above, I agree with the reasoning in *Decision 2006-194-AD*, and find that the Worker could be paid supplementary benefits retroactive to February 1, 1996, the date that the *Act* came in to force. The Board has determined that the Worker is entitled to supplementary benefits commencing on October 1, 2004. The Board has been satisfied, presumably, that the Worker met the conditions for entitlement including the form of application.

I find that the Board is not prohibited from paying the Worker supplementary benefits retroactive to February 1, 1996. I have no wage income information before me regarding whether the Worker's personal income was below one half the average industrial wage for Nova Scotia for the years 1996-2004, however, for the years the Board is satisfied that this condition was met, the Worker should be paid the corresponding supplementary benefit. As in *Decision 2006-194-AD*, I would stipulate that benefits paid up until October 1, 2002, be in the form provided before the Regulations changed.

The Hearing Officer in her decision May 30, 2006, noted that the Worker had not filed income tax return for the years 2001 and 2002, and therefore a supplementary benefit for those corresponding tax years could not be calculated. According to an undated Claims Telephone Counter Inquiry which appears to document a inquiry made by the Worker, his income tax for 2001 and 2002 has been concluded. The Board employee responding in the reply section of the Inquiry states that the Revenue Canada form was being sent that day for his signature and return to Revenue Canada. Once received, his claim would be further reviewed. The Board should follow up on this issue when determining the Worker's entitlement to supplementary benefits from February 1, 1996.

CONCLUSION:

This appeal is allowed. Provided the Worker's personal income was below one half the average industrial wage for Nova Scotia at the time for which he is applying for supplementary benefits, he should be entitled to supplementary benefits effective February 1, 1996.