

CLAIM HISTORY AND APPEAL PROCEEDINGS:

This is an appeal from a July 31, 2006 Hearing Officer decision. The Hearing Officer determined that the Worker's extended earnings replacement benefit ["EERB"] had been properly recalculated at the time of the 24 month review.

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

The Worker was employed as a Cook with the Employer. She suffered a number of workplace injuries. For the purposes of this appeal, the most important injury occurred on July 2, 1993, with respect to the Worker's right shoulder.

The Worker was eventually awarded a permanent medical impairment ["PMI"] rating with respect to the compensable injury; the PMI rating is now 10.5 percent.

When the Board initially assessed the Worker for an EERB, the Worker was deemed capable of working as a wholesale trade sales representative, and it was determined that the Worker would experience no earnings loss. However, in *Decision 98-168-AD* (April 4, 2000, NSWCAT), this Tribunal found that the wholesale trade sales representative position was not reasonably available to the Worker. Consequently, the Tribunal returned this matter to the Board, to recalculate the Worker's EERB.

Further to the remittal from the Tribunal, a June 2, 2000 Final Estimated Potential Earnings Ability ["EPEA"] Decision found that a "minimum wage occupation" constituted suitable and reasonably available alternate employment for the Worker. The Worker was deemed capable of earning \$224.00 per week. As a result, the Worker was awarded a partial EERB of \$43.63 per month. The June 2, 2000 EPEA Decision was not appealed.

On May 21, 2003, an Adjudicator, Extended Benefits Unit, rendered an EERB decision on the 36 month review. The Adjudicator continued to deem that a "minimum wage occupation" was suitable and reasonably available to the Worker. When the quantum of the Worker's EERB was calculated, the change in the amount of the EERB was less than 10 percent. Consequently, the partial EERB of \$43.63 per month was continued.

On May 5, 2006, a Case Manager, Extended Benefits Unit, rendered an EERB decision on the 24 month review. The Case Manager continued to deem that a "minimum wage occupation" was suitable and reasonably available to Worker. On this occasion, on recalculation, the Case Manager concluded that no EERB was payable to the Worker. The Worker appealed the Case Manager decision by means of a Notice of Appeal to Hearing Officer dated June 2, 2006. That appeal led to the July 31, 2006 Hearing Officer decision which forms the subject matter of this appeal.

This appeal was commenced by the Worker's filing of a Notice of Appeal dated August 28, 2006 with the Workers' Compensation Appeals Tribunal [the "Tribunal"].

This appeal proceeded by way of oral hearing, held at Sydney, Nova Scotia, on May 9, 2007. This appeal was heard in conjunction with the appeal bearing WCAT No. 2006-582. The Worker attended at the hearing, and provided testimony. The Workers' Representative is a member of an injured workers' group. The Workers' Representative assisted the Worker, and made oral submissions at the hearing. In addition, the Workers' Representative filed Labour Market Information concerning wage information for Cooks in Cape Breton, as well as some calculations relating to her submissions. These two pages of material were marked as Exhibit No. 1.

ISSUES AND OUTCOMES:

At issue is whether the Worker is entitled to an EERB on the 24 month review.

The Worker's appeal is allowed in part, for the reasons set out below. It is not appropriate for the Board to deem a generic "minimum wage occupation" to constitute suitable and reasonably available employment for a worker, at least where there has been no finding of non-cooperation pursuant to a provision such as section 84 or section 113 of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended [the "Act"]. Therefore, this matter is returned to the Board for a redetermination of the Worker's EERB on a 24 month review. It is open to the Board to conduct a suitable and reasonably available analysis with respect to a specific occupation identified by the Board. The Board is to consider whether there has been a failure to appropriately index the Worker's pre-loss of earnings profile, given that the same pre-loss of earnings profile was used for both the 24 month review and the 36 month review.

ANALYSIS:

I have reviewed the materials in the Board and Tribunal files, and the recording of the May 9, 2007 hearing. I will set out only those portions of the evidence and submissions most relevant to my reasoning and conclusion. These reasons presuppose a familiarity with the decisions previously rendered in the administration of this matter.

Worker's Testimony

I will briefly set out the Worker's testimony, as it is not central to the resolution of this appeal. I have also set out some of the Worker's testimony in *Decision 2006-582-AD*, rendered on this same date.

The Worker testified that she performed all the physiotherapy and return to work activities directed by the Board. However, she had difficulty performing some of the activities, and

she did not “get any better” symptom-wise. The Worker also indicated that she had difficulty sleeping, which impacted on her ability to take part in a return to work or ease back program.

The Worker has not worked since the July 2, 1993 compensable incident. She has little strength in her right arm, and cannot keep her arm up. The injury was to her dominant arm. The Worker received Canada Pension Plan disability benefits approximately three years after the compensable incident. The Canada Pension Plan benefits were backdated to November 1993.

Workers’ Representative’s Submissions

The Workers’ Representative argued that it was inappropriate to deem the Worker capable of working in a “minimum wage occupation”; rather, a specific occupation should be identified. In addition, 50 percent of the Worker’s Canada Pension Plan disability benefits should be subtracted from the deemed post-injury earnings, as opposed to being added to the deemed post-injury earnings. Moreover, in calculating the Worker’s EERB, her pre-accident earnings profile should be based on what she could earn today in the home area as a Cook, not on what she earned in 1993. In the same vein, it is inappropriate to increase the amount of the Worker’s deemed post-injury earnings to reflect the contemporary minimum wage, without crediting the Worker for what she could earn as a Cook if she were able to work today. The Workers’ Representative argued that the Worker should be awarded full EERB, backdated to the original determination of the Worker’s EERB entitlement.

Reasoning

It was inappropriate for the Board to deem the Worker capable of earning minimum wage, by finding that a generic “minimum wage occupation” was suitable and reasonably available to the Worker. If the Board wishes to deem a worker capable of earning income in suitable and reasonably available alternate employment, it is necessary for the Board to identify a specific occupation with respect to which a suitable and reasonably available analysis can be conducted. This precise situation was addressed in *Decision 2000-26-AD-RTH* (March 22, 2002, NSWCAT). Therefore, I reverse the Hearing Officer’s finding that the Worker can earn the minimum wage in a “minimum wage occupation”. This matter is returned to the Board for a redetermination of the Worker’s EERB on the 24 month review. It will be open to the Board to identify specific occupations, to assess whether those occupations constitute suitable and reasonably available alternate employment for the Worker.

For the sake of completeness, I note it is open to the Board to deem a worker capable of earning income, when a worker has been non-cooperative pursuant to provisions such as sections 84 and 113 of the *Act*. See also, for example, *Decision 2001-56-AD* (June 25, 2001, NSWCAT) and *Decision 2001-226-AD* (July 20, 2001, NSWCAT). However, in the present appeal, there has been no explicit finding of non-cooperation pursuant to - for

example - section 84 of the *Act*.

I further note an apparent error in calculating the Worker's EERB on the 24 month review. The indexed pre-loss of earnings profile on the 24 month review is identical to that used in the 36 month review. Therefore, it appears that the Board neglected to index the Worker's pre-loss of earnings profile, to take account of inflation, etcetera.

With respect to the Workers' Representative's arguments concerning the inclusion of 50 percent of Canada Pension Plan disability benefits, I refer to *Decision 2004-126-AD* (February 15, 2005, NSWCAT), which found that both deemed earnings and 50 percent of Canada Pension Plan disability benefits can be included in post-injury earnings.

Further, I briefly note that a worker's pre-loss of earnings profile is generally based on that worker's actual earnings history, indexed to the cost of living over time. It is only with respect to relatively unusual situations, such as young workers or learners, that the Board deems a pre-loss of earnings profile other than the actual earnings history.

In any event, it will be open to the Workers' Representative to make representations to the Board concerning the calculation of the Worker's EERB.

CONCLUSION:

The Worker's appeal is allowed in part, for the above reasons. It is not appropriate for the Board to deem a generic "minimum wage occupation" to constitute suitable and reasonably available employment for a worker, at least where there has been no finding of non-cooperation pursuant to a provision such as section 84 or section 113 of the *Act*. Therefore, this matter is returned to the Board for a redetermination of the Worker's EERB on a 24 month review. It is open to the Board to conduct a suitable and reasonably available analysis with respect to a specific occupation identified by the Board. The Board is to consider whether there has been a failure to appropriately index the Worker's pre-loss of earnings profile, given that the same pre-loss of earnings profile was used for both the 24 month review and the 36 month review.