

CLAIM HISTORY AND APPEAL PROCEEDINGS:

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

This is an appeal from a January 30, 2007 Hearing Officer decision. The Hearing Officer determined that the Worker's 8.1 percent permanent medical impairment ["PMI"] rating concerning bilateral hearing loss and tinnitus had been correctly determined.

The Worker filed an Occupational Noise-Induced Hearing Loss form dated April 5, 2006 with the Board. The Worker's claim was based on April 3, 2006 audiogram test results.

A November 17, 2006 Benefits Administrator decision awarded the Worker a PMI rating of 8.1 percent with respect to bilateral hearing loss and tinnitus. Given the audiogram test results, the Worker ordinarily would have been entitled to PMI rating of 11 percent. However, in a November 15, 2006 Medical Opinion, the Board Medical Advisor - Dr. Janet Marche - opined that the Worker's PMI rating should be reduced by 27 percent, to reflect that he had worked in Alberta for eight years of his 30-year work history. Hence, the Worker's PMI rating was apportioned downward from 11 percent to 8.1 percent.

The Worker appealed the Benefits Administrator's apportionment of his PMI rating, by means of a November 30, 2006 Notice of Appeal to Hearing Officer. That appeal led to the January 30, 2007 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 January 31, 2007 with the Workers' Compensation Appeals Tribunal [the "Tribunal"]. The Notice of Appeal raised only the issue of the apportionment of the Worker's PMI rating.

This appeal proceeded by way of written submissions. The Workers' Representative filed submissions dated March 5, 2007. In the submissions, the Workers' Representative raised (1) the issue of backdating the Worker's PMI rating, given the presence of screening audiogram test results dating back some time, and (2) the possibility of a section 251 referral to the Hearing Officer, to address the backdating issue. No other participant filed additional evidence or submissions directly with the Tribunal in this appeal.

ISSUES AND OUTCOMES:

At issue is whether the apportionment of the Worker's PMI rating should be reversed. In addition, the March 5, 2007 submissions argued that the Worker's PMI rating should be backdated, and that a referral pursuant to section 251 of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended [the "Act"] would be appropriate to address the backdating issue.

The Worker's appeal is allowed in part. The apportionment of the Worker's PMI rating should be reversed, and the Worker should be awarded benefits based on a full PMI rating of 11 percent. The issue of backdating the PMI rating is not properly before the Tribunal, and consequently could not properly be put before a Hearing Officer in a section 251 referral. In any event, this would not be an appropriate instance to backdate the Worker's PMI rating.

ANALYSIS:

I have reviewed the materials in the Board and Tribunal files. I will set out only those portions of the evidence and submissions most relevant to my reasoning and conclusion.

Apportionment of PMI Rating

One argument raised by the Workers' Representative: There simply is no evidence warranting the apportionment of the Worker's PMI rating based on his employment in Alberta. The Board decision-makers had no evidence concerning the Worker's employment duties in Alberta, no noise studies concerning the level of noise to which the Worker was exposed, and no audiogram test results indicating that he suffered hearing loss while in Alberta. In brief, the evidence did not warrant apportioning the Worker's PMI rating pursuant to section 10(5) of the *Act* and Policy 3.9.11R, paragraph 1.1.

I am in agreement with the Workers' Representative's argument concerning the inadequacy of evidence warranting the apportionment of the Worker's PMI rating, particularly in the light of the requirements of Policy 3.9.11R, paragraph 1.1.

Policy 3.9.11R, paragraph 1.1 states:

Apportionment of benefits under Section 10(5)(a) will be considered only in very obvious cases where there is clear evidence that a "cause other than the injury" has made a material contribution to a worker's permanent impairment or loss of earnings; i.e., there must be clear evidence that such cause has resulted in a greater loss of earnings or permanent impairment subsequent to the compensable injury than would have occurred if the cause other than the injury had not been present.

In the Occupational Noise-Induced Hearing Loss form, the Worker indicates that he worked in Alberta, in the petroleum industry, for eight years between June 1976 and May 1984. The only indication of exposure to noise relates to a position held from April 1980 to May 1984, maintaining oil and gas wells. The Worker indicates that "pump jacks" were running eight hours per day. However, there is no indication as to the degree of noise to which the Worker was exposed. In the March 5, 2007 submissions, the Workers' Representative states that the Worker generally worked in the open air. Further, I note that the earliest audiogram results on file date from 1998, some 14 years after the Worker's return to Nova Scotia from Alberta.

The Board decision-makers apportioned the Worker's PMI rating and related permanent impairment benefit ["PIB"] on the basis of the Board Medical Advisor's November 15, 2006 Medical Opinion. That Medical Opinion was based solely on the fact that the Worker had been employed in Alberta for eight of his 30 years in the work force; there was no medical evidence, or serious evidence concerning occupational history, warranting this apportionment.

Given the paucity of facts concerning the Worker's exposure to noise in Alberta and/or the impact of his Alberta work experiences on his hearing, the present situation is manifestly not one where it is "very obvious" based on "clear evidence" that the Worker's employment activities in Alberta contributed to the development of occupational noise-induced hearing loss or tinnitus. There is no factual basis to justify apportioning the Worker's PMI rating, and therefore I reverse the Hearing Officer's apportionment of the Worker's PMI rating. The Worker is entitled to a PIB based on the full 11 percent PMI rating.

Backdating the PMI Rating

The Worker's PMI rating/PIB was made effective April 3, 2006, the date of the audiogram test results upon which his award of permanent benefits is based. I deny the Worker's appeal (1) insofar as it relates to an attempt to backdate his PMI rating/PIB to a date earlier than April 3, 2006, and (2) with respect to the suggestion to refer this matter to the Hearing Officer for reconsideration per section 251 of the *Act*.

First, the issue of backdating the Worker's PMI rating/PIB is not properly before the Tribunal. The Tribunal's jurisdiction is limited to matters which were before the Hearing Officer. In turn, the Notice of Appeal to Hearing Officer defines the matters which are before the Hearing Officer. If a Notice of Appeal to Hearing Officer does not raise an issue, that issue is not before the Hearing Officer even if the Notice of Appeal to Hearing Officer was prepared by an unrepresented worker. See, for example, *Decision 2003-520-AD* (November 28, 2003, NSWCAT) and *Decision 2002-656-AD* (January 27, 2003, NSWCAT). The Worker did not raise the issue of backdating his PMI rating/PIB to a date earlier than April 3, 2006 in his Notice of Appeal to Hearing Officer; consequently, that issue was not before the Hearing Officer and is not before the Tribunal. Further, the backdating issue was not raised in the January 31, 2007 Notice of Appeal to this Tribunal, but was raised for the first time in the Workers' Representative's submissions. Given that the backdating issue is not before the Tribunal, it would also not be before the Hearing Officer even if there were a referral to the Hearing Officer pursuant to section 251 of the *Act*.

Second, the Worker's PIB has been commuted, per the Benefits Administrator's December 14, 2006 correspondence to the Worker. In instances where a PIB is commuted and paid as a lump sum, the backdating of that PIB can operate to a worker's disadvantage, in that the backdated PIB may be less than a non-backdated PIB. See the discussion in *Decision 2006-439-AD* (October 23, 2006, NSWCAT).

Third, the Occupational Noise-Induced Hearing Loss form suggests that the Worker had first noticed the tinnitus five years prior to completing the form. Further, there are audiogram test results from May 2000 which suggest the Worker could have filed a claim respecting occupational disease, at least relating to medical aid, as of May 2000. Consequently, any principled attempt to backdate the PMI rating/PIB could conceivably give rise to limitations issues per section 83 of the *Act*.

Fourth, it may be that the screening audiograms filed by the Employer are not technically satisfactory for the Board's purposes, to award a PMI rating.

In brief, I refuse to address the backdating issue because it is not properly before me. Even if it were properly before me, I would not backdate the Worker's PMI rating/PIB for the other reasons set out above.

CONCLUSION:

The Worker's appeal is allowed in part, for the above reasons. The apportionment of the Worker's PMI rating/PIB is reversed, and the Worker is awarded a PIB based on the full PMI rating of 11 percent. The issue of backdating the PMI rating/PIB is not properly before the Tribunal, and consequently could not properly be put before the Hearing Officer in a section 251 referral. In any event, this would not be an appropriate instance to backdate the Worker's PMI rating/PIB.