

CLAIM HISTORY AND APPEAL PROCEEDINGS:

This is an appeal of a decision of a Hearing Officer of the Board dated February 6, 2007, in which the Hearing Officer determined that the 24 month review of the Worker's extended earnings replacement benefit ["EERB"] was properly conducted. The Worker appealed that decision to the Workers' Compensation Appeals Tribunal [the "Tribunal"] on February 15, 2007. This appeal proceeded by way of oral hearing at which the Worker testified. Submissions were made on his behalf by his Representative.

ISSUE AND OUTCOME:

Did the Board have the authority to conduct the 24 month review of the Worker's EERB and reduce it?

Yes. The Board had the authority to review the Worker's EERB at 24 months and reduce it accordingly.

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 the disputed possibilities are evenly balanced on an issue of compensation, then the issue will be resolved in the Worker's favour.

The Worker has had four operations for hernias as a result of compensable injuries. He testified that he received vocational rehabilitation services from the Board and it was determined that police work was suitable for him. He received on-the-job training with the New Glasgow police department and began work with the Corps of Commissionaires in June of 2000. He has remained in the same job since 2000.

Pursuant to a decision dated December 3, 2001, the Board awarded the Worker a permanent medical impairment ["PMI"] rating of 3% and a partial EERB. The Worker's EERB was reviewed at 36 months, and by way of a decision dated December 7, 2004, his EERB payment was decreased due to a corresponding increase in the Worker's actual wages. The Worker's EERB was reviewed once again at 24 months, and decreased again due to a further increase in the Worker's actual wages.

The Worker testified that his medical condition has not deteriorated since the time of his 36 month review. His Representative asserted that the Worker has established a "consistent earnings pattern", in the words of Board Policy 3.4.2R1.

The Worker's Representative argued that the Board had no authority to conduct the 24

month review of the Worker's EERB and that the Hearing Officer erred in failing to confirm the general guideline requirements of paragraph 3 of Board Policy 3.4.2R1. The Worker's Representative argued that because the Worker's medical condition had not deteriorated and he had a consistent earnings pattern his EERB should not have been reviewed at 24 months. The Worker's Representative has referred me to *Decision 2005-80-AD* (August 15, 2005, NSWCAT) in support of his position.

The Tribunal dealt with the issue raised by this appeal in *Decision 2006-1002-AD* (April 23, 2007, NSWCAT). The Tribunal reviewed both the sections of the *Act* and Policy which deal with reviews of an EERB. Section 73 of the *Act* states as follows:

73 (1) Subject to subsection (2), the Board may review and adjust its determination of the amount of compensation payable to a worker as an extended earnings-replacement benefit

(a) once, commencing in the thirty-sixth month after the date of the initial award of the benefit;

(b) once, commencing in the twenty-fourth month after a review pursuant to clause (a) is completed, if at the time the review pursuant to clause (a) is completed the Board is of the opinion that a further review is necessary;

(c) after a review of the permanent-impairment rating of the worker pursuant to subsection 71(1) results in an adjustment of the permanent-impairment rating of at least ten percentage points according to the schedule established pursuant to Section 34; and

(d) at any time, where the extended earnings-replacement benefit was based on a misrepresentation of fact.

(2) The Board shall not vary the amount of compensation payable as an extended earnings-replacement benefit unless the amount of the variation would be equal to at least ten per cent of the amount of compensation being paid at the time of review.

(2A) Notwithstanding subsections (1) and (2), where a worker's permanent-impairment benefit is adjusted pursuant to Section 71, the Board may adjust the amount of compensation payable as an extended earnings replacement benefit pursuant to this Section so that the adjusted permanent-impairment and extended earnings-replacement benefits total eighty-five per cent of the loss of earnings calculated pursuant to Section 38.

(3) An award of an extended earnings-replacement benefit is final, subject

to subsection (1), and shall not be further reviewed or adjusted.

Board Policy 3.4.2R1 states as follows at paragraph 3:

An EERB may be reviewed 24 months after the 36-month review, if it is determined to be necessary by the Board at the time of the 36 month review. As a general guideline, an EERB will be reviewed a second time if the Worker has not established a consistent earnings pattern during the first 36 months the Worker was in receipt of the EERB or the Worker has shown significant deterioration in his/her compensable condition. The Board may choose not to set another review date if the information on file indicates the Worker's employment pattern, although casual or seasonal, is still an established pattern.

The Tribunal found, in *Decision 2006-1002-AD*, that the discretion granted to the Board by s. 73(2)(b), was broad enough to sanction the 24 month review of the Worker's EERB, regardless of whether or not he had established a consistent earnings pattern, and his medical condition had not deteriorated significantly. The Tribunal found that paragraph 3 of Board Policy 3.4.2R1 sets out general guidelines as to when a 24 month EERB review might be recommended, however, it does not operate to restrict the Board's discretion granted by the *Act*, and prevent it from doing such a review should it consider it necessary.

I have reviewed *Decision 2005-80-AD*. In that case the Tribunal was dealing with a Worker's request for a commutation of his EERB, without having to wait for his 24 month review. The Tribunal determined that because the general guidelines contained in paragraph 3 of Board Policy 3.4.2R1 appeared to be met, the Worker could have commutation of his EERB considered. According to s. 73 of the *Act*, there are only to be two reviews of a Worker's EERB - once at 36 months and, if the Board deems it necessary, again at 24 months following the 36 month review. In the instant case, the Worker's wage loss had clearly decreased since his 36 month review. In *Decision 2005-80-AD*, there was no evidence that the Worker's wage loss had decreased since the time of his 36 month review. The decision to allow the Worker commutation of his pension before the 24 month review was a reasonable exercise of discretion on the part of the Board and Tribunal, having regard to Board Policy.

The Worker will not be subject to a further review beyond 24 months. However, the Board had the discretion at 24 months to review his EERB, and because the purpose of workers' compensation is not to provide the Worker with any sort of inflated income or bonus as a result of a compensable injury, his EERB was reduced appropriately.

CONCLUSION:

This appeal is denied. The 24 month review of the Worker's EERB was conducted appropriately.