

CLAIM HISTORY AND APPEAL PROCEEDINGS:

On May 4, 2003, the Worker injured her right shoulder at work. She was then 62 years old. The Board accepted her claim and provided her with a temporary earnings-replacement benefit until May 26, 2005. The Worker then returned to the workforce for about five weeks.

The Board re-opened her claim and provided her with an additional temporary earnings-replacement benefit from August 1, 2005 until October 23, 2006. In 2005, the Worker turned 64 years old. She turned 65 on May 26, 2006.

On October 3, 2006, a Board Adjudicator found that s. 37(9) of the *Workers' Compensation Act* required the Board to end the temporary earnings-replacement benefit when the Worker turned 65. She found that the Board should not attempt to recover an overpayment after May 26, 2006. She found that s. 37(10) did not apply as the Worker's loss of earnings began when she was 62 years old.

On February 15, 2007, a Hearing Officer confirmed the Adjudicator decision.

This decision addresses the Worker's appeal of the Hearing Officer decision. Her representative argues that the Board erred in finding that s. 37(10) did not apply to recurrences after age 63.

ISSUES AND OUTCOMES:

Is a recurrence a "commencement" of a loss of earnings under s. 37(10) of the *Workers' Compensation Act*?

No. The commencement is the initial loss of earnings due to an injury. The Worker's recurrence does not entitle her to earnings-replacement benefits after age 65.

ANALYSIS:

Section 37(9) provides that earnings-replacement benefits are payable until the earlier of a worker turning 65 or when the loss of earnings from an injury has ended.

Section 37(10) contains an exception. It states that when a worker is 63 or older "at the commencement of the worker's loss of earnings", the Board may pay an earnings-replacement benefit for up to 24 months "following the date the loss of earnings

commences.”

In *Thomson v. Nova Scotia Workers' Compensation Appeals Tribunal* (2003), 212 N.S.R. (2d) 81 (C.A.), the Court of Appeal set out a general test for statutory interpretation:

As in any case of statutory interpretation, the Court must strive to give the statute its most appropriate interpretation. The appropriate interpretation is to be arrived at by taking account of the statute's total context having regard to its purpose, the consequences of proposed interpretations and presumptions and special rules of interpretation. The appropriate interpretation is one which is plausible in the sense that it complies with the text of the statute, which is efficacious in the sense that it promotes the legislative purpose and that is acceptable, in the sense that the outcome is reasonable and just. : Ruth Sullivan (ed.) *Driedger on the Construction of Statutes* (3d, 1994) at 131.

According to *The Concise Oxford Dictionary*, tenth edition, revised (2001), “commencement” means “the beginning of something”. The ordinary meaning of the word “commencement” is more consistent with referring to the initial loss of earnings than a recurrence of a loss of earnings.

Section 40(2) of the *Workers' Compensation Act* assists in contrasting between an initial and an additional loss of earnings. Section 40(2) deals with the situation where a loss of earnings ends and there is a related loss of earnings more than twelve months later. It describes the second loss of earnings as the “subsequent” loss of earnings.

New Brunswick's workers' compensation legislation contains the same limit at age 65 and the twenty four month exception for workers 63 or older for earnings-replacement benefits. In *Laronde v. New Brunswick (workplace Health, Safety and Compensation Commission)*, [2007] N.B.J. No. 30, their Court of Appeal discussed the purpose for the age limitations in the context of a *Charter* challenge to the age 65 limitation.

At paragraphs 22 and 23, the Court stated that the object of the workers' compensation legislation at age 65 was to switch from compensation for lost wages to compensating a worker for the loss of pension benefits that would have otherwise accrued but for the injury. It stated that the exception for workers who suffer a loss of earnings at age 63 or later recognises that not everyone retires at age 65.

The purpose of s. 37(10) does not answer whether a recurrence should be considered a commencement of a loss of earnings. Certainly, the general rule is that earnings-replacement benefits end at age 65.

The position of the Worker's representative could lead to absurd results. The Board can suspend earnings-replacement benefits where workers are non-cooperative or when non-compensable events interfere with a vocational rehabilitation program. A worker injured

before age 63 and paid an earnings-replacement benefit could have a temporary suspension of benefits followed by the reinstatement of benefits at age 64. According to the logic behind the representative's position, there would be a new "commencement" of a loss of earnings triggering s. 37(10).

I do not think that it was the intention of the Legislature that subsequent earnings-loss after age 63 would be considered the "commencement" of the loss of earnings triggering a possible 24 months of additional earnings-replacement benefits.

The triggering event for s. 37(10) is a worker, aged 63 years or older, suffering an initial loss of earnings. They can be considered for up to 24 months of earnings-replacement benefit from the date of the initial earnings-loss. Otherwise, earnings-replacement benefit entitlement ends at age 65. Other benefits under the *Workers' Compensation Act* continue, including annuities for workers receiving an extended earnings-replacement benefit when they turn 65.

CONCLUSION:

The appeal is denied. The Worker is not entitled to an additional earnings-replacement benefit in relation to the 2003 injury.