

CLAIM HISTORY AND APPEAL PROCEEDINGS:

This is an appeal of a decision of a Hearing Officer of the Board dated June 19, 2007, in which the Hearing Officer determined that the Worker was not entitled to a change in the method of disbursement of her attendant allowance. The Worker appealed this decision to the Workers' Compensation Appeals Tribunal [the "Tribunal"] on June 20, 2007.

This appeal proceeded by way of oral hearing at which the Worker and her common-law spouse testified.

ISSUE AND OUTCOME:

Is the Worker entitled to have her attendant allowance paid directly to her?

Yes. It is reasonable that the Worker's attendant allowance be paid to her and not a personal care agency.

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 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 was injured on June 26, 2003, when she was hit on the shoulder by an industrial hanger. The Worker has gone on to develop symptoms consistent with complex regional pain syndrome. The details of the Worker's injury, as well as details of her ongoing treatment and the course of her injury, are contained in the Board file in numerous decisions, and will not be repeated in this decision.

By way of *Decision 2006-535-AD* (November 27, 2006, NSWCAT), the Worker was awarded an attendant allowance. The Tribunal found that the, "impacts of the Worker's injury on her ability to perform self-care are significant enough to warrant an attendant allowance." Following the Tribunal's decision, the Board took steps to provide the Worker with an attendant allowance. According to a memorandum dated July 23, 2007, addressed to the Worker's Representative, the Board offered the services of a professional personal attendant agency to provide daily self-care to the Worker for up to five hours daily, seven days a week. The memorandum states that a list of local home care service providers had been provided to the Worker. The Board also arranged to pay a monthly stipend to the Worker's spouse to pay him for the care he rendered when the professional caregiver was not present.

The Worker does not want to have her attendant allowance paid to a professional caregiver. She does not want to be looked after by a “stranger”. She wants the attendant allowance paid directly to her, or to her spouse, as he is the one who is currently looking after her and he is the person she wants to continue to look after her.

The Worker’s spouse testified that he and the Worker have been living together for 7-8 years. He has lived with her both before and after her injury. At the time the Worker was injured, he was working at his own home-based kennel business, which involved grooming, boarding, and breeding English Setters. Prior to this business, he had been involved in the construction business. He testified that construction work had taken a toll on his body and his knees gave out. He has had three surgeries on his knees.

The Worker’s spouse testified that after the Worker was hurt, her care became his priority. He was unable to continue with his kennel business. He testified that he would rather take care of the Worker than have continued on with his work, and have someone else look after her. He stated that the Worker needs care day and night. He testified that he takes the Worker for her medical appointments and he takes her for her trips to see the Board’s doctors.

The Worker’s spouse testified that his knees do not affect his caring for the Worker. He stated he is able to care for the Worker but it is stressful for him to do so without compensation, when he is unable to make any money. He testified that he has been on Canada Pension Disability for the past 2 years.

The Worker’s spouse testified that he has a routine for looking after the Worker that works like clockwork. They have a neighbour who is a retired registered nurse, and family members who are available to assist if necessary.

The Worker’s Representative offered by way of unsworn testimony, the evidence that she and the Worker’s spouse had called the numbers on the list of home care providers given by the Board to the Worker. She stated that out of 11 on the list, 5 of them were more than 50 miles away from where the Worker lives. One number was out of service and there was no answer at others.

The Worker’s spouse testified that the Worker’s doctors have never expressed any concern to him regarding the level of care he is able to provide to the Worker.

The Worker’s Representative referred me to a letter from the Worker’s Case Manager dated February 5, 2007. In the letter, it is indicated that, “Because [the Worker’s] condition is so fragile, WC.B. is concerned for her safety, therefore, we will be exercising our rights under s. 103 of the WC.B. Act and have determined that [the Worker’s] personal care be undertaken by a professionally qualified PCW who is employed by a reputable service provider who is on the WC.B. service provider list.”

The Worker's spouse testified that he did not believe that the Case Manager was sincere in her assertion that the Board is concerned for the safety of the Worker, as the Board had originally taken the position that it was not necessary for the Worker to have an attendant at all, necessitating the earlier appeal to the Tribunal.

The Worker's spouse testified that he is continuing to care for the Worker and they have not agreed to accept the services of any of the service providers on the WC.B. list. Despite this, he testified, the Board has not expressed any concern directly to the Worker or her spouse regarding the Worker's safety.

The Worker's Representative referred to a letter that was written by one of the service providers on the Board's list, TLC. Health Services (2005) Inc. [TLC], dated February 14, 2007. In the letter, TLC indicated that the Worker and her spouse would not be satisfied with the services of TLC no matter the level of care and, "may even actively sabotage it." TLC indicated in the letter that the Worker and her spouse were interested only in a caregivers allowance. The Worker's spouse indicated that after being made aware of the letter from TLC, there was no way that he and the Worker would have that agency in their home.

The Worker's spouse testified that the Worker is comfortable with his care and that is what is important to him. He testified that the individual from TLC who would have been looking after the Worker was a male nurse and he did not believe she would have been comfortable with a male nurse regarding some aspects of her personal care. He testified that the Worker does not have any "medical" needs that would necessarily have to be attended to by a nurse.

That the Worker is entitled to an attendant allowance has been determined. According to Board Policy 2.1.6, an attendant allowance may be paid directly to the injured worker, to the worker's spouse or to another attendant.

The Worker's Representative noted that there is no guideline in the policy for when an attendant allowance might be paid to a party other than the injured worker or worker's spouse. The Worker's Representative suggested that perhaps this would be when the worker required a specialized level of care, or was mentally incapable of making decisions regarding her care. This seems reasonable to me. It would also seem to be appropriate where a worker's spouse is incapable of providing the level of care required by a worker.

In the Tribunal's decision granting the attendant allowance, the Appeal Commissioner noted the testimony of the Worker's spouse before him, that he finds it difficult to care for his spouse and that he finds it stressful. He also testified that he has bad knees. The Board referred to this testimony before the Tribunal, in a letter dated February 5, 2007. The Board stated that the Appeal Commissioner's decision might have been different had he not been of the view that the Worker's spouse was unable to care for her. I do not find that this is the case. The Tribunal's previous decision determined that the Worker was entitled

to an attendant allowance. The Appeal Commissioner determined that the Worker needed help with her self-care. I do not interpret the Tribunal's decision as containing a finding that the Worker's spouse was unable to provide that care.

The evidence before me is that the Worker's spouse has been providing her care since her injury despite any knee problems he may have. It may not be easy for him but he is doing it. It does seem to me that the Worker's spouse may have been pre-disposed to reject the services of TLC as I note that the letter from TLC states that during TLC's visit to the home, the Worker's spouse indicated that he had to carry a lot of her weight to assist her and he did not feel the personal care worker from TLC could do this. The Worker maintains that he can do this, despite his bad knees. In any event, I do not see any good reason why, if he can provide the care as he appears able to, a professional agency should be brought in.

There is no evidence in this case that the Worker is making a decision for her care which would be detrimental to her health. There is no medical evidence that the Worker requires specialized care. There is insufficient evidence to warrant a conclusion that the Worker's spouse is physically unable to provide the level of care she needs. There is no evidence that the level of care provided by the Worker's spouse is insufficient. In light of the foregoing, it seems reasonable to consider the Worker's wishes, and her wish is not to have a third party in her home and to have her spouse continue to provide her care. The Tribunal has determined that the Worker is entitled to an attendant allowance. The attendant allowance should be paid to the Worker.

CONCLUSION:

This appeal is allowed. The Worker is entitled to have her attendant allowance paid directly to her.