

## CLAIM HISTORY AND APPEAL PROCEEDINGS:

This is an appeal from an August 22, 2007 Hearing Officer decision. The Hearing Officer found that the Appellant was not entitled to an attendant allowance ["AA"] with respect to the personal care she provided to the Deceased Worker.

The Appellant is the eldest daughter of the Deceased Worker. The Deceased Worker was divorced from his spouse.

The Deceased Worker suffered a compensable injury on November 12, 1998, and received various workers' compensation benefits.

Of relevance to this appeal, the Deceased Worker began to live with the Appellant in 1999, and continued to do so until his death on April 5, 2006 due to a non-compensable stroke, except for the period from April 11, 2005 to November 28, 2005 when the Deceased Worker was resident in an assisted care facility.

A February 26, 2007 TST decision is central to this appeal. That decision found that the Deceased Worker was entitled to benefits and services under the *Chronic Pain Regulations*. In addition, the TST decision found that the Deceased Worker experienced a substantial pain-related impairment ["PRI"], which gave rise to a PRI rating of 6 percent. The Deceased Worker was found to be entitled to a retroactive permanent impairment benefit/extended earnings replacement benefit ["PIB/EERB"] award of \$105,350.68, of which \$5,889.32 was forwarded to Nova Scotia Community Services for the cost of the assisted care facility. The remaining \$99,461.36 was paid to the Appellant pursuant to section 79 of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended [the "Act"], because she fell within the wording "... any person who cared for the worker prior to the death of the worker" found in the section. Though not relevant to this appeal, I note that the Appellant divided the award in four equal shares among her siblings.

In March 5, 2007 correspondence to the Board, the Workers' Representative requested a retroactive caregiver allowance - that is, an AA - for the Appellant, independent of the retroactive PIB/EERB. The Workers' Representative cited *Decision 2001-901-AD* (April 30, 2002, NSWCAT) in support of this request.

A May 13, 2007 Assistant Manager decision denied the Appellant's request. The Assistant Manager asserted that the requested AA was not exclusive of the retroactive PIB/EERB paid under section 79 of the *Act*, and that the Appellant had already been provided with the "maximum benefit". The Appellant appealed the Assistant Manager decision by means of a May 29, 2007 Notice of Appeal to Hearing Officer. That appeal led to the August 22, 2007 Hearing Officer decision which forms the subject matter of this appeal.

This appeal was commenced by the Appellant's filing of an August 24, 2007 Notice of Appeal with the Workers' Compensation Appeals Tribunal [the "Tribunal"].

This appeal proceeded by way of oral hearing, held at Stellarton, Nova Scotia, on January 24, 2008. The Workers' Representative attended the hearing. However, the Appellant had recently failed to maintain contact with the Workers' Representative, and the Appellant did not attend the hearing. The Workers' Representative determined that she was in a position to effectively present the case, and the Tribunal decided to proceed with the appeal, particularly given that the Appellant had been provided with notice of the time of the hearing by both the Tribunal and the Workers' Representative (when the Appellant was still in contact with the Workers' Representative). No other participant attended the hearing, or provided additional evidence or submissions directly with the Tribunal in this appeal.

### **ISSUES AND OUTCOMES:**

At issue is whether the Appellant is entitled to a retroactive AA with respect to the care she provided to the Deceased Worker.

The Appellant's appeal is allowed, for the reasons below. The Appellant is entitled to a retroactive AA for the care she provided to the Deceased Worker. This matter is returned to the Board for the determination of an appropriate quantum of the AA.

### **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 this decision.

#### The Law

The provision of an AA is a form of medical aid ["MA"]. Policy 2.1.6 governs the award of an AA. Policy 2.1.6 states:

##### Policy Statement

1. This allowance is usually paid where a worker suffers 100% Permanent Medical Impairment, but in some instances may be payable in other cases where a worker is, either temporarily or permanently, unable to perform necessary personal care as a result of a work injury.

## Guidelines

1. The allowance is approved and paid after direct consultation with the Medical Department. In certain claims, special medical reports may be required.
2. In general, the allowance is based upon the severity of the compensable medical impairment of the worker. Basically, the allowance is to assist claimants regarding mobility, self-care and any "in house" treatment that is required for the compensable condition.
3. The allowance may be paid directly to the injured worker, to the worker's spouse or to another attendant.

As indicated above, an AA is a form of MA. I refer to *Decision 96-653-TAD* (October 27, 1998, NSWCAT), which sets out the test concerning the provision of MA. First, there must be a link between the compensable injury and the need for MA. Second, the provision of the requested MA must be necessary or expedient. Third, there exists an over-riding discretion whether to award the type of MA requested. Moreover, I have directed my attention to Board Policy 2.3.1R, which sets out the general principles governing the award of MA.

## Workers' Representative's Submissions

The Workers' Representative provided thorough and helpful submissions.

The Workers' Representative argued that the Board decision-makers essentially decided not to pay the Appellant the retroactive AA simply because they believed she had received enough money given the retroactive PIB/EERB. However, this approach is erroneous. The two benefits are distinct. The Deceased Worker had a right to receive the PIB/EERB. Had the Deceased Worker survived, he would have been entitled to the full PIB/EERB and it would have been open to him to request an AA; his receipt of a PIB/EERB would not preclude the award of an AA. In fact, a review of the previous Tribunal decisions discloses situations where a worker is receiving a PIB or EERB and is also awarded an AA. Further, an AA can be paid either to a worker or to a family member, for care provided by a family member to an injured worker. An award of an AA is not precluded simply because a family member cares for an injured worker.

I asked the Workers' Representative whether the care provided by the Appellant to the Deceased Worker would entitle the Appellant to an AA further to Policy 2.1.6. The Workers' Representative pointed to the materials submitted in demonstrating that the Appellant was a caregiver pursuant to section 79 of the *Act*. The Appellant helped the Deceased Worker out of bed, prepared all his meals, drove him to his medical appointments, etcetera. The care provided by the Appellant would entitle her to an AA.

Further, *Decision 2001-901-AD* demonstrates that it is open to an estate to file for a retroactive AA. In fact, in that appeal, a widow sought a retroactive AA for care provided to a deceased worker, who was her husband. The widow died before the claim was resolved, and her daughter continued the appeal on behalf of her parents' estates.

### Reasoning

I allow the Appellant's appeal, to a great extent for the arguments put forward by the Workers' Representative.

In addition to *Decision 2001-901-AD*, I reviewed other Tribunal decisions concerning the award of an AA, including *Decision 2006-717-AD* (February 15, 2007, NSWCAT), *Decision 2007-452-AD* (November 13, 2007, NSWCAT) and the related *Decision 2006-535-AD* (November 27, 2006, NSWCAT), and *Decision 2004-397-AD* (November 30, 2004, NSWCAT).

As a preliminary matter, I find it is open to the Appellant to pursue this appeal. First, no objection has been raised by the Board up to this point to the Appellant filing a claim for an AA. Moreover, the Appellant has already effectively acted as the Deceased Worker's estate's personal representative in the previous posthumous proceedings before the Board. Second, the materials on file indicate the Appellant acted as the Deceased Worker's next-of-kin and primary caregiver during his lifetime (see Dr. Benjamin's November 29, 2006 correspondence), and she would ordinarily be viewed as the most likely personal representative, even independent of past dealings with the Board. In this connection, I refer to the reasoning in *Decision 2001-901-AD* concerning the liberal approach which should be taken to this matter in the workers' compensation context. Third, it has already been accepted that the Appellant was the Deceased Worker's caregiver, and thus the Appellant is "another attendant" per Policy 2.1.6, section 3, who could in any event be the recipient of a direct payment for AA services.

The Hearing Officer appears to have recognized that the retroactive PIB/EERB and the request for retroactive AA involve distinct benefits rooted in different sections of the *Act*, and to have rejected the Assistant Manager's reasoning. However, the Hearing Officer's own reasons for denying the Appellant's claim are somewhat unclear. At one point, she appears to exercise her overriding discretion to deny the retroactive AA (a form of MA), in stating that a request for retroactive AA must be "reasonable". Further, it appears the Hearing Officer may have found that the care provided by the Appellant to the Deceased Worker was not of a nature which fell within Policy 2.1.6.

I reverse the Hearing Officer's decision, for the reasons below.

I do not believe this is an appropriate instance to exercise the overriding discretion to deny MA. First, I note that the PIB/EERB was made retroactive to May 22, 2000, not long after the Appellant began to care for the Deceased Worker. Presumably, if the Deceased

Worker had been paid benefits contemporaneous with his entitlement, it is possible an application for an AA would also have been made contemporaneously with the provision of care. Second, in *Decision 2001-901-AD*, an increase in the amount of an AA was made retroactive to a date eight years previous to the decision. In the present appeal, one is dealing with roughly the same time frame. Third, the Appellant began to care for the Deceased Worker when she was only 19 years old, and thus devoted a good portion of her youth, and time which could otherwise have been used to lay a foundation on which to base the rest of her life, to care for the Deceased Worker. In short, I see no reason to exercise the overriding discretion to deny the award of MA in the form of a retroactive AA.

In addition, the various materials on file indicate that the nature of the care provided by the Appellant to the Deceased Worker would warrant the award of an AA. I refer especially to the affidavit sworn by the Appellant on January 11, 2007, though there are various other materials on file setting out the nature of the care. For example, the Appellant helped to dress the Deceased Worker, transported him to his medical appointments, helped him out of bed and off the couch, prepared all his meals, procured his medication and did his shopping, etcetera. Many of these activities are contemplated by Policy 2.1.6. Moreover, the Board already effectively accepted that the Appellant provided the described services to the Deceased Worker when it paid the retroactive PIB/EERB to her pursuant to section 79 of the *Act*.

In short, I allow the Appellant's appeal, and I reverse the Hearing Officer's denial of a retroactive AA. This matter is remitted to the Board to quantify the benefits payable to the Appellant as an AA.

For the sake of completeness, I note that the Appellant cared for the Deceased Worker for a period of time after he suffered a non-compensable stroke and after he left the assisted care facility. In *Decision 2001-901-AD* and *Decision 2004-397-AD*, the Tribunal found that an increased need for an AA would not be subject to apportionment, even if the need for increased care were due to a non-compensable cause.

#### **CONCLUSION:**

The Appellant's appeal is allowed, for the reasons above. The Appellant is entitled to a retroactive AA for the care she provided to the Deceased Worker. This matter is returned to the Board for the determination of an appropriate quantum of the AA.