

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

Appellant: **[*] (deceased Worker)**

Participants entitled to respond to this appeal: **Municipal Ready Mix Ltd. (Employer) and
The Workers' Compensation Board of Nova Scotia (Board)**

APPEAL DECISION

Representatives: Eleanor Neal for the Estate of Shane McEachern

Form of Appeal: Written submissions

WCB Claim No.(s): [*]

Date of Decision: September 8, 2008

Decision: The appeal of the April 21, 2008 Board Hearing Officer decision is allowed in part, according to the reasons of Appeal Commissioner Sandy MacIntosh.

CLAIM HISTORY AND APPEAL PROCEEDINGS:

Between 1977 and 1983, the Worker had three back claim accepted by the Board and he was provided with temporary compensation for those injuries.

After a series of appeals, this Tribunal directed that the Board determine whether the Worker was eligible for compensation under the *Chronic Pain Regulations*.

Sadly, the Worker died before the Board determined his eligibility for compensation under the Regulations.

On January 15, 2008, a Board Case Manager wrote the brother of the deceased Worker, (who she identified as being the Executor of his estate on the Board e-file indexes), advising that s. 79 of the *Workers' Compensation Act* prevented payment of compensation where a Worker dies without a surviving spouse or dependent. Therefore, the Board would not be determining eligibility for compensation under the *Chronic Pain Regulations*, as no compensation is payable.

On April 21, 2008, a Board Hearing Officer confirmed the Case Manager's decision.

This appeal addresses the Estate's appeal of the Hearing Officer Decision.

The Estate's representative argues that while s. 79 of the *Workers' Compensation Act* allows the Board to pay compensation to certain persons on the death of a worker, it is not an exhaustive provision - it only gives the Board a discretion to pay compensation to a spouse or dependent. The representative further argues that the Worker was eligible for chronic pain benefits at the time of his death.

ISSUES AND OUTCOMES:

Did the death of the Worker without a spouse or dependent remove the Board's obligation to pay compensation accrued at the time of his death?

No. Where compensation is not paid to a spouse or dependent, it is still payable to the Worker's Estate. The Board will determine what, if any, compensation was accrued under the *Chronic Pain Regulations*.

ANALYSIS:

The interpretation of s. 79 of the *Workers' Compensation Act* was addressed by me in *Decision 2001-901-AD* (April 30, 2002). In *Decision 2001-901-AD*, I wrote:

The Board argues that s. 79 of the *Act* only allows the Board to pay outstanding awards to dependants and caregivers, not to estates. It argues that s. 77(2) of the *Act* only allows a Worker to make his or her compensation payable to a personal representative while they are alive. Section 79 of the *Act* gives the Board a discretion to pay compensation accrued at the time of death of a worker to the worker's dependents or caregivers. Sections 76 through 80 of the *Act* give the Board a broad discretion to re-direct payments of compensation where a worker becomes incapacitated, is placed in an institution, or dies. Section 77(2) of the *Act* reads as follows:

No compensation payable pursuant to this Part shall pass by operation of law, except to a personal representative of the person receiving compensation.

A personal representative is defined in Black's Law Dictionary, seventh edition, as being:

A person who manages the legal affairs of another because of incapacity or death, such as the executor of an estate.

The former Nova Scotia Supreme Court, Appeal Division, quoted the following portion of *Halsbury's Laws of England*, 2nd ed., p. 799 with approval in interpreting the former *Act* at paragraph 7 of *Workers' Compensation Appeal Board v. Penny* (1980), 38 N.S.R. (2d) 623:

The Workmen's Compensation Acts are expressed and are to be construed not in a technical but in a popular sense. The words are to be read in their common and ordinary significance and are not to be strained to bring in or to exclude any particular case.

The Acts are so clearly remedial measures that the courts will be slow to cut down the remedy given, either by reference to the schedule of compensation or by adopting an interpretation which will introduce exceptions not made by the legislature.

Section 9(1) of the *Interpretation Act*, R.S.N.S. 1989, c. 235 provides that

whenever any matter is expressed in the present tense, it will be applied to the circumstances as they arise, so that effect may be given to each enactment, according to its spirit, true intent and meaning.

Professor Ison, in his text *Workers' Compensation in Canada*, 2nd ed., Butterworths, stated at page 114:

Where compensation is due to a worker but is unpaid at the time of his death, some Acts provide that it may be paid by the Board to a spouse or other dependants. Where there is no such provision, or if the provision is not used, the unpaid benefits become part of the worker's estate.

The Legislature has not clearly stated that estates cannot continue claims for benefits accrued at the time of death of a worker. It clearly has given the Board a discretion to pay compensation to a dependant or caregiver where a worker dies. However, where that discretion is not exercised by the Board, the benefits which should have been properly paid to a worker during their lifetime can be pursued by the worker's estate. Section 77(2), while expressed in the present tense, must be applied in the circumstances where it arises. The ordinary meaning of a personal representative includes the executor or other representative of an estate. I do not accept the Board's arguments on this point.

The Board did not appeal *Decision 2001-901-AD*.

The reasoning in *Decision 2001-901-AD* interprets the words of s. 79 in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Workers' Compensation Act*, the object of the *Act*, and the intention of the Legislature. It is a correct interpretation of that provision.

I find that s. 79 does not remove the Board's obligation to pay accrued, but unpaid, compensation on the death of a worker. Instead, it allows payment to a spouse or dependent instead of the Estate of the deceased worker. Where there is no surviving spouse or dependent, or where the Board does not exercise this discretion, then compensation is still payable to the Estate.

I direct the Board to determine whether there was compensation payable to the Worker at the time of his death under the *Chronic Pain Regulations*. If so, then such compensation will be paid to his Estate.

CONCLUSION:

The appeal is allowed in part.

The Board will determine whether there was compensation accrued at time of death of the Worker under the *Chronic Pain Regulations*, and if so, pay the compensation to the Estate of the deceased Worker.

DATED AT HALIFAX, NOVA SCOTIA, THIS 8th DAY OF SEPTEMBER, 2008.

Sandy MacIntosh
Appeal Commissioner