

**NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL**

Appellant: **Estate of [\*] (Deceased Worker)**

Participant entitled to  
respond to this appeal: **The Workers' Compensation Board of Nova Scotia (Board)**

---

**APPEAL DECISION**

---

Representative: Dorothy McLean for the surviving spouse

Form of Appeal: Written submission

WCB Claim No.: [\*]

Date of Decision: January 23, 2009

Decision: The appeal of the July 22, 2008 Board Hearing Officer decision is denied, according to the reasons of Appeal Commissioner K. Andrew MacNeil.

**CLAIM HISTORY AND APPEAL PROCEEDINGS:**

This decision addresses an appeal by the surviving spouse of a deceased Worker\* of a Board hearing officer decision dated July 22, 2008. In that decision, the hearing officer determined that the surviving spouse correctly was paid a retroactive sum equaling an adjusted permanent impairment benefit ["PIB"] for the period March 18, 2004 to February 14, 2006.

The deceased Worker had been assessed as having a permanent medical impairment ["PMI"] as a result of a compensable pulmonary disease rated at 26 percent. This award was effective as of March 18, 2004. At the Worker's election, the PIN based on the 26 percent PMI was commuted, and paid as a lump sum.

The Worker died on February 14, 2006. Following the Worker's death, the Board recalculated the Worker's PMI, increasing the rating from 26 percent to 39 percent. The Worker's surviving spouse was paid the sum of \$1,643.89, representing the value of the Worker's PIB, had the Worker received the PIB as a monthly benefit from the original effective date of March 18, 2004 through to his date of death.

The surviving spouse has argued that she should have received the commuted value of the additional 13 percent increment in the Worker's PIB, paid on the same terms as the original commuted payment.

The surviving spouse's representative filed an appeal from the hearing officer decision to this Tribunal, together with written submissions on the merits, received on November 3, 2008. No other statutory participant has filed submissions.

**ISSUE AND OUTCOME:**

Is the Worker's surviving spouse entitled to payment of a commuted PIB, based on the 13 percent increment in the Worker's PMI?

No. Just as the Worker's death has terminated the right to a continued payment of the monthly benefit, so too has his death terminated the basis for a commutation.

---

\* This decision contains personal information and may be published. For this reason, I have not referred to the participants by name.

**ANALYSIS:**

As a preliminary matter, I note that the hearing officer incorrectly interpreted the issue on appeal before him. His decision defends, correctly, the arithmetical calculations made by the Board in determining the value of the retroactive benefit paid to the Worker's surviving spouse. At issue was not the calculation of the amount, but the right to have the 13 percent increment in the PMI-based PIB commuted as of the effective date of the PIB, on the same terms as the earlier commutation of the PIB that had been based on the (incorrect) 26 percent PMI.

In arriving at my decision, I have had recourse to the text by Terrence G. Ison, Workers' Compensation in Canada (2<sup>nd</sup> Edition), Butterworths, 1989. In it, at page 114, paragraph 5.8.3, Professor Ison discusses the effect of a worker's death on the right to a commutation of benefits. He writes:

In some cases, death may extinguish the right to a benefit. Suppose, for example, that a worker with a permanent disability applies for a commutation of his pension. A decision is made to commute the pension, but unknown to the Board, the worker died before the decision was made. Since the death would have terminated the pension entitlement, it has extinguished the basis for a commutation. The dependants or the estate would, therefore, be entitled only to the arrears of pension benefits to the date of death, not to the lump sum that would have been paid to the worker by way of commutation.

The representative of the surviving spouse argues in her submission that, had the Worker in the present appeal still been alive when the PMI had been recalculated from 26 percent to 39 percent, he would surely have sought commutation of the benefit. That is probably the case, particularly given the circumstances in this claim, as he had by the date of commutation been diagnosed with cancer, from which he eventually died. However, as the representative is aware, commutation of a PIB is discretionary under s. 74 of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 as amended ["Act"]. While the Board has adopted Policy 3.9.5 to make more consistent the exercise of its discretion, the policy makes clear that the Board will generally commute a PIB only if the worker's cumulative PMI rating is 30 percent or less.

I concede here that it remains open to the Board to commute a PIB that is in excess of 30 percent in accordance with, and in contemplation of, Policy 3.9.5.

In the present appeal, as the 13 percent increase in the Worker's original 26 percent PMI was for the same injury, effective as of the same date, and resulted (essentially) from an error in calculation, it yielded a cumulative 39 percent PMI rating. It cannot be viewed as separate from the original rating. Even were the Worker still alive, under Policy 3.9.5 he would have no automatic right to a commutation of a 39 percent PIB, although he would have the right to request it.

When viewed in this light, not only should the Board, in accordance with policy, not commute the additional 13 percent increment, in hindsight it should not have commuted the original 26 percent PIB, without a reasoned consideration of the factors set out in the policy. This retrospective view, of course, cannot serve to invalidate the original commutation; that decision was correct on its face. Nevertheless, the analysis does serve as a principled basis to decide not to commute the increment.

Having considered both the opinion of Professor Ison on the termination of entitlement to commutation on the death of a worker, together with a consideration of Board Policy 3.9.5, I find that the Board is correct in its decision not to commute the increment to the Worker's original PIB. The effect of Ison's statement of compensation law, which I accept as accurate, is to find that the right to request commutation died with the Worker. It is not open to the surviving spouse to request, and it is not open to the Board to consider, a commutation of the adjusted PIB.

The appeal is denied.

#### **CONCLUSION:**

The appeal is denied.

As a matter of law, the right to request a commutation of the corrected PIB expired with the Worker. It is not open to the Board to commute the increased benefit.

DATED AT HALIFAX, NOVA SCOTIA, THIS 23<sup>rd</sup> DAY OF JANUARY, 2009.

---

K. Andrew MacNeil  
Appeal Commissioner