Decision Summary
2008
Week 24

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Decision No. 763 08 **09-Apr-2008** **M. Kenny - V. Phillips - D. Broadbent**

- Psychotraumatic disability

The worker suffered a back injury in 1984, for which he was granted a 15% pension, increased to 20% in 1990 and to 35% after back surgery in 2002. The worker appealed a decision of the Appeals Resolution Officer denying entitlement for psychological disability.

The worker did not have entitlement for psychological disability from 1984 to 2002. The original injury was minor. He had significant underlying anxiety and depression, as well as problems with substance abuse. However, the worker had entitlement for psychological disability after the surgery in 2002. The back pain and surgery, as well as medication prescribed for pain from the surgery, substantially changed the worker's psychological condition.

The appeal was allowed in part.

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References:

Act Citation
- WCA

Other Case Reference
- [w2408s]

Neutral Citation: 2008 ONWSIAT 960

Decision No. 2936 07 **09-Apr-2008** **A. Patterson - R. Sherwood -**

- Availability for employment (vacation)
- Loss of earnings {LOE} (deemed earnings)
- Loss of earnings {LOE} (employability)

The worker suffered compensable injuries when she slipped and fell on January 17, 2002. The worker appealed a decision of the Appeals Resolution Officer denying full LOE benefits from January 17, 2002 to May 3, 2005.

The employer immediately offered light modified work. However, the worker was incapable of working at that time. The worker was entitled to full LOE benefits until February 15, 2002.

On February 15, the worker went to India to attend her son's wedding. Noting the worker's ability to travel on an aircraft for an extended flight, the worker was, more probably than not, able to perform the light modified work that was offered by the employer. Furthermore, the trip had been planned well in advance of the accident. The worker's loss of earnings from February 15 until her return from India on April 22, 2002, was not related to the compensable accident. She was not entitled to LOE benefits during this period.

From April 23, 2002 until March 2, 2005, the worker was employable but considered herself totally disabled. The modified work with the employer was no longer available. The worker was entitled to partial LOE benefits during this period based on a SEB achievable without training.

By March 2, 2005, medical evidence indicated that the worker's condition had deteriorated and she was no longer competitively employable. The worker was entitled to full LOE benefits from March 2 to the date of surgery on May 3, 2005.

The appeal was allowed in part.

View Full Decision Text 7 Page(s)

References:

Act Citation
- WSIA

Other Case Reference
- [w2408s]
- NOTE: Due to the death of the Employer Member, this decision is a decision of the majority of the hearing panel.

Neutral 2008 ONWSIAT 957

Citation:

Decision No. 543 08 08-Apr-2008 J. Moore

- Experience rating (NEER) (three year window)

The employer appealed a decision of the Appeals Resolution Officer denying retroactive adjustment of the employer's NEER account to reflect SIEF relief granted by the Board.

The worker was injured in April 2002. In July 2003, a Board adjudicator requested an opinion from a Board medical consultant regarding whether there was a pre-existing condition that would warrant granting the employer SIEF relief. The medical consultant responded that the worker had a moderate pre-existing condition. However, the adjudicator did not follow up on the recommendation and made no determination regarding SIEF relief. It was not until 2006 that the Board granted SIEF relief.

Board policy allows for a manual adjustment of an employer's NEER account after closure of the adjustment window in the case of Board error, including a failure to process or act upon a decision. The Board denied the retroactive adjustment in this case because there no error as contemplated by Board policy, in that there was an adjudicative error (the complete lack of adjudication) in this case rather than a failure to process or act upon a decision.

Considering the definition of "process," the Vice-Chair found that the failure to process a decision includes the failure to take steps necessary to complete the making of a decision, which is what happened in this case. An adjudicative error is one in which an adjudicator comes to a particular decision that is subsequently reversed by another adjudicator. In this case, however, the adjudicator never came to a decision and failed to take the steps necessary to make a decision. That constituted a failure to process a decision. Thus, the adjudicator made an error of omission under Board policy that warranted a manual adjustment of the employer's NEER account.

The appeal was allowed.

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References:

Act Citation
- WSIA

Other Case Reference
- [w2408s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Document No. 13-02-07

Reporter Citation
- 85 W.S.I.A.T.R. (online)

Neutral Citation: 2008 ONWSIAT 945

Decision No. 283 08 08-Apr-2008 B. Cook

- Permanent impairment {NEL} (redetermination) (significant deterioration)

The worker suffered a low back injury for which he was granted a 22% NEL award, later increased to 24% and then to 27%. In Decision No. 1170/03, the Tribunal denied entitlement for chronic pain or psychotraumatic disability.

In this decision, the Vice-Chair found no significant deterioration of the worker's organic condition that would warrant further redetermination of the NEL award.

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References:

Act Citation
- WCA

Other Case Reference
- [w2408s]
- CROSS-REFERENCE: Decisions No. 1170/03E, 1170/03, 1170/03R

Neutral Citation: 2008 ONWSIAT 933

Decision No. 412 08 08-Apr-2008 J. Moore

- Class of employer (manufacturing) (machinery)

The employer manufactured a part for use in the manufacture of distillation equipment. The employer appealed a decision of the Appeals Resolution Officer confirming reclassification of the employer from Rate Group 403 for other machinery and equipment operations to Rate Group 411 for industrial machinery operations.

The original assignment to Rate Group 403 was based on the employer manufacturing chemical products machinery, which is included in Rate Group 403. The reclassification was based on an audit which found that

one of the employer's customers was in the petroleum industry.

According to Board policy, an employer's business activity is defined by reference to the nature of the employer's service or the end product provided. There is no reference in that document to defining an employer's business activity by reference to the business activity of the end user.

Looking at the two rate groups, the Vice-Chair found that the activities listed in Rate Group 403 describe industries that manufacture either small machinery or parts and equipment for larger machinery, whereas Rate Group 411 describes the manufacture of heavy industrial machinery. The Vice-Chair was of the view that Rate Group 411 was not intended to include operations that only manufacture parts that may ultimately be used in such equipment. Rather, the intent was to include operations that make large stand-alone machines, including the parts that go into those machines.

In this case, the employer manufactured a part for sale to any number of industries. The fact that one of its customers was in the petroleum refining industry did not make the employer a manufacturer of petroleum refining machinery. The employer was appropriately classified in Rate Group 403. The appeal was allowed.

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References:

Act Citation
- WSIA

Other Case Reference
- [w2408s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Document No. 14-01-01
- TRIBUNAL DECISIONS CONSIDERED: Decision No. 499/00I (2001), 58 W.S.I.A.T.R. 54 consd

Neutral Citation: 2008 ONWSIAT 948

Decision No. 1290 02 08-Apr-2008 E. Smith - D. Jago - F. Jackson

- Mesothelioma
- Exposure (asbestos)
- Presumptions (occupational disease)

The employer manufactured aluminum products. The worker died at age 42 from mesothelioma. The employer appealed a decision of the Appeals

Resolution Officer granted dependency benefits.

Section 134(10) of the pre-1997 Act and Schedule 4 together provide for an irrebuttable presumption that mesothelioma is work-related if a worker was employed in a milling or manufacturing process involving the generation of airborne asbestos fibres.

In Decision No. 1290/02I2, the Panel reviewed in detail the worker's possible exposures and whether they were subject to the presumption. The Panel identified a number of the worker's work processes that might possibly have involved the generation of airborne asbestos fibres. The Panel also identified a number of other possible incidental exposures that would not be subject to the presumption.

In Decision No. 1290/02I2, the Panel decided to obtain the assistance of a Tribunal assessor. In the case of exposures that are subject to the presumption, the Panel asked the assessor to comment on the likelihood that those exposures resulted in the generation of airborne asbestos. In the case of the exposures that were not sufficient to support the application of the presumption, the Panel asked about the significance of the workplace exposures to the worker's mesothelioma

Considering the findings in Decision No. 1290/02I2 and the opinion of the medical assessor, the Panel found that the use of asbestos hand pads resulted in the generation of airborne asbestos. In addition, thermocouples used in the plate and specialty department gave rise to airborne asbestos, although the release may have been minimal and below regulatory levels. However, the presumption does not require any particular level of release of fibres or that the release be above regulatory levels. Furthermore, it was probable that the presence of asbestos in furnace door seals resulted in the generation of airborne asbestos.

Based on these exposures, the presumption applied. The employer's appeal was dismissed.

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References:

Act Citation
- WCA 134(1), 134(10)

Other Case Reference
- [w2408s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Document No. 04-04-15
- CROSS-REFERENCE: Decisions No. 1290/02I, 1290/02I2

Neutral Citation: 2008 ONWSIAT 935

Decision No. 1581 06 08-Apr-2008 S. Ryan

- Earnings basis (occupational disease)
- Earnings basis (dependency benefits)
- Loss of earnings {LOE} (retirement)

The worker was a carpenter who was exposed to asbestos during the course of his work from 1957 until he retired in 1987. In August 2003, at age 81, he was diagnosed with mesothelioma. He died in October 2004. The Board granted LOE benefits from August 2003 to October 2004, with benefits based on the earnings of a fully qualified worker at the time of diagnosis. The employer appealed.

Board Operational Policy Manual, Document No. 18-02-02, provides that, for long-latency occupational disease claims, average earnings are based on the greater of annual earnings of a fully qualified worker at the time of diagnosis or the worker's annual earnings in the 12 months prior to the accident. Since the worker had retired and did not have any employment earnings in the 12 months prior to the accident, the Board based benefits on the earnings of a fully qualified worker at the time of diagnosis. The Vice-Chair found that Document No. 18-02-02 did not apply to the facts of this case. It did not deal with retirement or how earnings of a retired worker should be calculated. Accordingly, it was necessary to consider the language and intent of the WSIA.

Section 43 of the WSIA that a worker who has a loss of earnings as a result of an injury is entitled to LOE benefits. For a worker who is over 63 years of age on the date of the injury, LOE benefits are payable for up to two years. The Board paid benefits under this section from the date of the accident, which was the date of diagnosis in August 2003, until the date of the worker's death. The Vice-Chair found that, with the exception of circumstances in which a worker has not withdrawn from the work force despite retirement, s. 43 generally does not provide a basis to compensate injured workers after they have retired. LOE benefits are only available for workers who suffer a loss of earnings as a result of an injury or disease. Workers who are completely retired and have no intention of returning to the work force cannot reasonably be considered to have any loss of earnings resulting from the injury or disease.

The Vice-Chair concluded that the worker was not entitled to LOE benefits.

Spousal benefits are calculated under s. 48. This section does not require that the worker be entitled to loss of earnings benefits. Section 48(3)

was applicable to a surviving spouse with no children. It provides for periodic payments of 40% of the worker's net average earnings. The worker's net average earnings at the time of diagnosis and death was zero. However, the section does provide for a minimum of $15,312.51. The spouse was entiteld to payment of periodic benefits at the statutory minimum.

The appeal was allowed.

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References:

Act Citation
- WSIA 43(1), 48

Other Case Reference
- [w2408s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Documents No. 18-02-02, 20-03-04
- CASES CONSIDERED: Gray v. Ontario (Director, Disability Support Program) (2002), 59 O.R. (3d) 364 (Ont. C.A.) refd to
- CROSS-REFERENCE: Decision No. 1581/06I
- TRIBUNAL DECISIONS CONSIDERED: Decision No. 878/06R (2007), 81 W.S.I.A.T.R. (online) consd; Decision No. 1462/97 (1997), 44 W.S.I.A.T.R. 163 refd to; Decision No. 1698/00 refd to

Reporter Citation
- 85 W.S.I.A.T.R. (online)

Neutral Citation: 2008 ONWSIAT 932

Decision No. 351 94 R 08-Apr-2008 J. Moore

- Reconsideration (clarification of decision)

The Vice-Chair clarified Decision No. 351/94 by stating that, in denying entitlement for non-organic disability, the decision was denying entitlement for psychotraumatic disability. It was still open to the worker to seek entitlement for chronic pain.

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References:

Act Citation
- WCA

Other Case Reference
- [w2408s]

- CROSS-REFERENCE: Decisions No. 351/94, 351/94A

Neutral Citation: 2008 ONWSIAT 943

Decision No. 817 08 07-Apr-2008 M. Crystal

- Downside risk
- Withdrawal (of appeal)

The worker appealed a decision of the Appeals Resolution Officer denying entitlement for chronic pain.

The worker withdrew the appeal after the Vice-Chair pointed out that she was already receiving a 57% NEL award for organic impairment and that a NEL award for chronic pain would supersede and replace the NEL award for organic impairment.

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References:

Act Citation
- WSIA

Other Case Reference
- [w2408s]

Neutral Citation: 2008 ONWSIAT 920

Decision No. 1991 07 R 07-Apr-2008 T. Mitchinson

- Reconsideration (implementation of decision)

The worker's unhappiness with the length of time it is taking the Board to implement Decision No. 1991/07 did not provide any grounds for reconsideration of the decision.

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References:

Act Citation
- WSIA

Other Case Reference
- [w2408s]
- CROSS-REFERENCE: Decision No. 1991/07

Neutral 2008 ONWSIAT 927

Citation:

Decision No. 694 08 07-Apr-2008 S. Netten

- Accident (occurrence)
- Arising out of employment (common activity)

The Vice-Chair found that the worker suffered a compensable foot injury when she stepped down on the ball of her foot harder than usual while descending stairs at work.

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References: Act Citation
- WSIA

Other Case Reference
- [w2408s]

Neutral Citation: 2008 ONWSIAT 930

Decision No. 142 07 R 07-Apr-2008 J. Dimovski

- Parties (representation) (adequacy) (unrepresented party)
- Reconsideration (consideration of evidence)
- Reconsideration (natural justice)

The worker's application to reconsider Decision No. 142/07 was denied. The hearing panel considered the evidence and came to a reasonable conclusion. The worker was unrepresented at the original hearing but the Tribunal (at the pre-hearing stage) and the Panel (during the hearing) took adequate measures to ensure that the worker had a fair hearing.

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References: Act Citation
- WSIA

Other Case Reference
- [w2408s]
- CROSS-REFERENCE: Decision No. 142/07

Neutral Citation: 2008 ONWSIAT 925

Decision No. 466 06 R 07-Apr-2008 B. Cook

- Reconsideration (new evidence)
- Second Injury and Enhancement Fund {SIEF} (severity of preexisting condition)

In Decision No. 466/06, the Tribunal found that the employer was entitled to 75% SIEF relief. The employer applied for reconsideration of Decision No. 466/06.

There was new evidence from a Board doctor that the worker had a pre-existing condition of major significance. The application to reconsider was granted.

Based on the new evidence, the Vice-Chair increased the SIEF relief to 90%.

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References:

Act Citation
- WSIA

Other Case Reference
- [w2408s]
- CROSS-REFERENCE: Decision No. 466/06

Neutral Citation: 2008 ONWSIAT 928

Decision No. 1055 07 07-Apr-2008 S. Peckover

- Earnings basis (learner)
- Earnings basis (minor)
- Earnings basis (student)

The worker became a paraplegic as a result of an accident in 1990. The Board originally denied entitlement on the basis that the worker was not in the course of employment at the time of the accident. The Appeals Resolution Officer granted entitlement in 2003. The Board then granted temporary benefits until 2003 and then a FEL award. The worker appealed regarding the earnings basis for calculation of benefits.

At the time of the accident, the worker was participating in a federal government program called the Futures Program that was being administered through the local community college. However, the worker was not enrolled in any college program. He had left school with a Grade 9 education. He was 18 years old at the time of the accident and was being paid through the Futures Program while he trained on the job for construction work. In the circumstances, the Vice-Chair concluded that

the worker was a learner rather than a student at the time of the accident.

The earnings basis calculation for the worker's FEL award depended on whether he was a student or a learner. As a student, his FEL award would be based on the average industrial wage for Ontario for the year of the accident. As a learner, it would be based on entry-level wages of a worker in that industry. When dealing with retroactive benefits, the Board could have granted the FEL award retroactive to 1991 or proceeded as it did by granting temporary benefits followed by the FEL award in 2003. The Vice-Chair confirmed the FEL award as granted by the Board.

Section 26 of the pre-1997 Act provides for review of temporary benefits for a worker who was under 21 on the date of the accident. Under that provision, the Vice-Chair found that the worker was entitled to an increase in the earnings basis for temporary benefits over the years as the worker would have gained more experience. However, that provision did not apply to FEL benefits.

The appeal was allowed in part.

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References:

Act Citation
- WCA 25, 26, 43

Other Case Reference
- [w2408s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Documents No. 18-04-10, 18-04-14
- TRIBUNAL DECISIONS CONSIDERED: Decision No. 649/92 (1993), 28 W.C.A.T.R. 108 refd to; Decision No. 199/96I (1996), 38 W.C.A.T.R. 221 refd to; Decision No. 1777/00 (2000), 55 W.S.I.A.T.R. 188 consd; Decision No. 1176/00 consd

Neutral Citation: 2008 ONWSIAT 921

Decision No. 3189 00 R 04-Apr-2008 L. Gehrke

- Reconsideration (consideration of evidence)

The worker's application to reconsider Decision No. 3189/00 was denied. The Vice-Chair considered the evidence and came to a reasonable conclusion.

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References: Act Citation
- WCA

Other Case Reference
- [w2408s]
- CROSS-REFERENCE: Decisions No. 620/96, 3189/00E, 3189/00ER, 3189/00I, 3189/00

Neutral Citation: 2008 ONWSIAT 907

Decision No. 1809 03 R2 04-Apr-2008 **S. Ryan**

- Permanent impairment {NEL}
- Reconsideration

In accordance with Decision No. 1809/03R, the Vice-Chair reheard the worker's appeal regarding permanent elbow impairment.

On the evidence, the worker had entitlement for a permanent left elbow impairment but not for permanent right elbow impairment.

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References: Act Citation
- WSIA

Other Case Reference
- [w2408s]
- CROSS-REFERENCE: Decisions No. 1809/03, 1809/03R

Neutral Citation: 2008 ONWSIAT 914

Decision No. 1220 07 R 04-Apr-2008 **M. Crystal**

- Reconsideration (clarification of decision)

The Vice-Chair clarified that Decision No. 1220/07 concerned entitlement for full FEL benefits and that the number of hours worked was not an issue. Through oversight or typographical, the original decision stated that the worker worked 25 hours per week. In fact, the worker worked 20 hours per week.

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References: Act Citation
- WCA

Other Case Reference
- [w2408s]
- CROSS-REFERENCE: Decisions No. 3310/00E, 3310/00, 1220/07

Neutral Citation: 2008 ONWSIAT 905

Decision No. 2324 05 04-Apr-2008 J. Lang

- Earnings basis (recurrences)
- Transportation industry (owner/operator)
- Board Directives and Guidelines (earnings basis) (non-permanent or irregular employment)
- Earnings basis (dependent contractor)

The worker was the owner operator of a truck. He suffered a compensable accident in June 2000. The claim was recognized on the basis that the worker was a dependent contractor. He received short-term benefits on the basis of his earnings in the four-week period prior to the accident. He returned to work in September 2000. He suffered a recurrence in March 2003, but after the recurrence he was unable to return to work as a truck driver. The short-term benefits were again based on his earnings in the four weeks prior to the original accident. His long-term benefits were based on his earnings during the two years prior to the original accident, resulting in a substantial reduction of benefit payments. The worker appealed a decision of the Appeals Resolution Officer regarding calculation of long-term benefits.

It would have been unfair to continue to pay benefits in the long-term using the short-term earnings basis. The Board acted reasonably in deciding to recalculate the worker's long-term benefits.

In calculating long-term benefits, the Board used amounts from the worker's income tax returns for taxable income and net commission income. The worker submitted that the Board should have applied principles in Operational Policy Manual, Document No. 08-04-04. That policy contains special rules for determining assessable payroll for owner operators of heavy trucks. The Board attributes two-thirds of contract fees as vehicle expenses and one-third as gross earnings for the owner operator.

The Vice-Chair noted that Document No. 08-04-04 was developed for assessment purposes and that it must be applied with caution to non-

assessment issues. However, the policy gave a clear view of how the Board views earnings of owner operators of heavy trucks. The Vice-Chair found it reasonable to extend the policy to the calculation of a worker's earnings basis in this case.

The worker referred to Decision No. 1520/97, in which benefits were based on WSIB premiums paid rather than the formula in Document No. 08-04-04. The Vice-Chair distinguished that decision, as it was a case of personal coverage rather than a dependent contractor.

The appeal was allowed in part.

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References:

Act Citation
- WSIA 56(3), 56(6)

Other Case Reference
- [w2408s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Documents No. 08-04-04, 18-02-04, 18-02-06
- CROSS-REFERENCE: Decision No. 2324/05E
- TRIBUNAL DECISIONS CONSIDERED: Decision No. 113/97 (1997), 41 W.C.A.T.R. 274 consd; Decision No. 1520/97 (1999), 51 W.S.I.A.T.R. 48 distd; Decision No. 1157/02 (2003), 64 W.S.I.A.T.R. 146 consd

Reporter Citation
- 85 W.S.I.A.T.R. (online)

Neutral Citation: 2008 ONWSIAT 903

Decision No. 714 08 I 03-Apr-2008 E. Smith

- Consequences of injury
- Earnings basis (concurrent employment)

The worker fractured her wrist in a fall on October 23, 2000, while working for the accident employer. The worker appealed a decision of the Appeals Resolution Officer regarding the earnings basis for calculation of benefits. The worker also appealed denial of entitlement for low back, hip and left leg, and deep venous thrombosis.

In addition to worker for the accident employer, the worker also worked for another employer on weekends. In addition, the worker worked the

night shift for a third employer, until she was laid off due to a shortage of work on October 6, 2000. The Board based the worker's benefits on her earnings from the two employers for whom the worker was working at the time of the accident. The worker submitted that the earnings from the third employer should also be included.

The Vice-Chair noted that the worker was not a member of a union and did not have any recall rights. There were no benefit provisions that remained in effect after she stopped working. There was no evidence of any seasonal pattern of employment. The worker did not receive her record of employment from this employer until November 2000, but her employment was terminated prior to the compensable accident. Therefore, the Board's policy on concurrent employment applies only to the accident employer and the weekend employer. The Board correctly based benefits on earnings from those two employers only.

On the evidence, the worker did not suffer a back injury in the accident.

The hearing regarding hip and leg injury and deep venous thrombosis was adjourned to obtain additional medical evidence from a Tribunal medical assessor.

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References:

Act Citation
- WSIA 53(1)

Other Case Reference
- [w2408s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Documents No. 18-02-04, 18-02-05

Neutral Citation: 2008 ONWSIAT 891

Decision No. 488 08 03-Apr-2008 R. Nairn

- Assessment of employers (retroactivity)
- Board Directives and Guidelines (employer assessment) (retroactivity)
- Registration of employers

The Board became aware in 2005 that the employer, which had operating with employees since 1999, had not registered with the Board. The Board assessed the employer retroactively to 2002. The employer appealed, claiming that assessment should have been retroactive only to 2003.

The general rule in Board policy is that premium adjustments are

retroactive for two years. However, failure to register is considered by the Board to be a debt owed for prior premiums, which does not involve an adjustment of premiums. Where there is a lack of full disclosure, the policy allows for adjustments for up to five years.

The Board could have made the registration retroactive for five years. It exercised its discretion to make it retroactive only to 2002. This was a reasonable exercise of the Board's discretion. The appeal was dismissed.

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References:

Act Citation
- WSIA

Other Case Reference
- [w2408s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Document No. 14-02-06
- TRIBUNAL DECISIONS CONSIDERED: 1358/02 consd

Neutral Citation: 2008 ONWSIAT 897