Noteworthy Decisions
2008
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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. 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. 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