Noteworthy Decisions
2008
Week 25

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Decision No. 2352 06 **15-Apr-2008** **A. Patterson - J. Seguin - D. Besner**

- Dependency benefits (death results from an injury)
- Subsequent incidents (outside work)

In Decision No. 2352/06I, the panel found that the worker's common law spouse could pursue entitlement for survivor benefits in her own name but did not have authority to appeal other issues on behalf of the worker's estate without a Certificate of Appointment of Estate Trustee. The common law spouse did not obtain the certificate. Accordingly, the hearing proceeded only on the issue of survivor benefits for the common law spouse.

The worker suffered neck and shoulder injuries for which he was granted a 35% NEL award. The worker died in 1997 when he was crushed under a tractor that he was driving near a lake adjoining his residential property.

The Panel concluded that the most likely circumstances leading to the worker's death were that the worker was backing up the tractor. He was unable to turn his head due to his compensable neck injury, therefore he raised himself up away from the steering wheel in order to turn his body so that he could look behind him. In doing so, he caught his sleeve on the bucket control, raising the bucket and destabilizing the tractor, resulting in the tractor toppling over and crushing him.

Thus the compensable neck injury was a significant contributing factor, indeed the initiating factor, in the most probable chain of events leading to the worker's death. Accordingly, the common law spouse was entitled to survivor benefits. The appeal was allowed.

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References: Act Citation
- WCA

Other Case Reference
- [w2508s]
- CROSS-REFERENCE: Decision No. 2352/06I (2007), 81 W.S.I.A.T.R. (online)
- NOTE: This decision was released in French with an English translation.

Neutral Citation: 2008 ONWSIAT 1024

Decision No. 2987 07 15-Apr-2008 J. Noble - V. Phillips - F. Jackson

- Earnings basis (recurrences)
- Accident (date) (occupational disease)

The worker suffered an acute attack of asthma on March 24, 2004. The Board granted entitlement with an accident date in 1997. The worker appealed.

The Board found that the worker had entitlement with an accident date in 1997. The Board then granted temporary benefits in 2004 based on the worker's higher recent earnings in 2004, but granted FEL and NEL benefits based on the worker's lower earnings with a previous employer in 1997.

There was evidence of functional abnormality associated with the worker's asthma in 1997. The Board correctly determined that the accident date should be in 1997. The onset in 2004 should be considered as a recurrence. The Board also correctly determined the worker's temporary benefits based higher earnings at the time of the recurrence in 2004 and FEL and NEL benefits based on earnings at the time of the original entitlement in 1997.

The appeal was dismissed.

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References:

Act Citation
- WCA

Other Case Reference
- [w2508s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Documents No. 11-01-04, 11-01-15, 18-06-04

Neutral Citation: 2008 ONWSIAT 1007

Decision No. 459 08 15-Apr-2008 S. Martel

- Interest (pre-1990 accident)

The worker suffered a knee injury in 1989. In 2003, the Board granted the worker a pension retroactive to the date of the accident. The worker appealed a decision of the Appeals Resolution Officer denying payment of interest on the retroactive pension benefits.

The Vice-Chair agreed with Tribunal decisions finding that the claim in Board policy refers to the accident date. Since the claim was established in 1989, and the payment of the pension arose out of a decision of the Claims Adjudicator and not from an appellate decision, the worker would not be entitled to interest unless there were exceptional circumstances. There were no exceptional circumstances in this case.

The worker was not entitled to payment of interest on the pension. The appeal was dismissed.

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References:

Act Citation
- WCA

Other Case Reference
- [w2508s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Document No. 18-01-08
- NOTE: This decision was released in French with an English translation.
- TRIBUNAL DECISIONS CONSIDERED: Decision No. 1094/94 (1996), 39 W.C.A.T.R. 98 consd; Decision No. 24/02 (2003), 65 W.S.I.A.T.R. 43 apld; Decisions No. 495/96 refd to, 810/99 refd to, 1371/01 refd to, 2197/01 refd to, 124/07 consd

Neutral Citation: 2008 ONWSIAT 1022

Decision No. 317 08 14-Apr-2008 A. Patterson

- Future economic loss {FEL} (review) (after sixty months)
- Permanent impairment {NEL} (degree of impairment) (back)

The worker suffered a back injury in 1992, for which he was granted a 33% NEL award. In 2000, a year after the final FEL review, the worker suffered a recurrence. The Board initially denied entitlement for the recurrence, but, in 2005, an Appeals Resolution Officer granted entitlement for the recurrence and for a NEL redetermination. The Board then increased the NEL award from 33% to 34%. The worker now appeals a decision of the ARO confirming the 34% NEL award and denying redetermination of the worker's FEL award.

On the evidence, the Vice-Chair confirmed the 34% NEL award.

A worker is entitled to review of a FEL award if there has been a significant deterioration of the worker's condition that results in a redetermination of the degree of permanent impairment.

An increase of a worker's NEL rating by a mere percentage point is not necessarily indication of a significant deterioration of the worker's condition. However, in the circumstances, the Vice-Chair was satisfied that the recurrence in 2000 caused a significant deterioration of the worker's condition. Accordingly, he was entitled to review of his FEL award.

The appeal was allowed in part.

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References:

Act Citation
- WCA

Other Case Reference
- [w2508s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Document No. 18-04-14
- TRIBUNAL DECISIONS CONSIDERED: 549/07 refd to

Neutral Citation: 2008 ONWSIAT 998

Decision No. 305 08 R 11-Apr-2008 M. Crystal

- Reconsideration (procedural error) (opportunity to make submissions)
- Reconsideration (standard of proof)

In Decision No. 305/08, the Vice-Chair found that the worker was entitled to an extension of the time to appeal. The employer applied for reconsideration of Decision No. 305/08.

The cover page of the case materials indicated, in error, that the employer was not participating. In fact, the employer had provided written submissions. Those submissions were not considered at the original hearing. The failure to consider those submissions was an error. However, the issue on an application for reconsideration is not whether there was a significant error but whether the error, if corrected, would probably have changed the result of the original decision.

The Vice-Chair now considered the employer's submissions and found that they would not have changed the original result, which was based mainly on the need to consider the issues for which the time extension was requested in order to consider other related issues for which the appeal was in time.

The application to reconsider was denied.

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References:

Act Citation
- WSIA

Other Case Reference
- [w2508s]
- CROSS-REFERENCE: Decision No. 305/08

Neutral Citation: 2008 ONWSIAT 984

Decision No. 607 08 11-Apr-2008 S. Martel - M. Christie - A. Grande

- Assessment of employers (retroactivity)
- Registration of employers

As a result of an information sharing program with the Canada Revenue Agency, the Board became aware that the employer was not reporting to the Board. In 2005, the Board advised the employer that it had to register. The Board assessed the employer retroactively to 2002. The employer appealed regarding the retroactivity date.

The employer had been in business since 1973 under a different name, and in its current existence since the mid-1980s. Section 75 of the WSIA requires an employer to register within 10 days of becoming a Schedule 1 or 2 employer. There is no set period of retroactivity in Board policy for failure to register. The Board could have assessed the employer retroactively for several years prior to 2002. Under the information sharing agreement with the CRA, the Board does not impose penalties and generally assesses premiums from 2002. That date was appropriate

in this case.

The Board has a voluntary registration policy under which it essentially provides amnesty for employers who register voluntarily. That policy did not apply in this case because the employer was identified as a result of the information sharing program.

The appeal was dismissed.

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References:

Act Citation
- WSIA 75, 81

Other Case Reference
- [w2508s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Document No. 14-02-06
- TRIBUNAL DECISIONS CONSIDERED: Decision No. 131/87 (1989), 10 W.C.A.T.R. 51 consd; Decision No. 1564/07 (2007), 83 W.S.I.A.T.R. (online) consd

Neutral Citation: 2008 ONWSIAT 971

Decision No. 531 08 11-Apr-2008 S. Martel - E. Tracey - D. Broadbent

- Assessment of employers (retroactivity)
- Detrimental reliance
- Assessment of employers (assessable percentage) (labour percentage)

As a result of an audit in 2002, the Board decided that the employer had to report the full amount of payments made to drywall installers, tapers and insulators as insurable earnings. The Board made the reassessment retroactive to January 1, 2000. The employer appealed.

The employer had only be reporting two-thirds of the amounts paid to the subcontractors, relying on Board Operational Policy Manual, Document No. 08-04-04, regarding percentages for payments to subcontractors who purchase their own materials but do not keep a record of expenses for materials. Under new Board policy in 2004, only materials that qualified as major building materials could be deducted. However, Document No. 08-04-04, which was applicable during the period in question, did not define “materials.” The Panel was satisfied that the term “materials” in Document No. 08-04-04 could be interpreted as including more than just major building materials.

However, even when records of expenses are not kept for materials supplied by the subcontractors, the percentage deduction for the materials component of a contract should bear some resemblance to reality before an employer can apply the percentage table in the policy. A blanket one-third deduction did not accurately reflect the non-labour portion of the contracts in this case. Not every trade worker provided material and others provided very little in the way of materials.

The Panel concluded that the employer was not entitled to report only two-thirds of the payments to the subcontractors. However, there was a great deal of ambiguity surrounding this issue and the employer reasonably, though incorrectly, relied on the percentage tables found in the Board policy. In the circumstances, the reassessment should be effective only from January 1, 2002.

The appeal was allowed in part.

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References:

Act Citation
- WSIA

Other Case Reference
- [w2508s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Documents No. 08-04-04, 14-02-10
- TRIBUNAL DECISIONS CONSIDERED: 1425/06 consd

Neutral Citation: 2008 ONWSIAT 974