

--SUMMARY--

Decision No. 564/17

27-Apr-2017

J.Noble

- Asthma
- Dependency benefits (death results from an injury)

The Board granted the worker entitlement for occupational asthma, with an accident date in 1997, including a 50% NEL award for the respiratory disorder. The worker died in 2010. The worker's estate appealed a decision of the Appeals Resolution Officer denying survivor benefits.

The worker had a significant impairment from the asthma. The worker died while out of the country but evidence indicated that he was experiencing symptoms of the asthma in the weeks prior to his death. No autopsy was performed but a review of medical evidence indicated that it was quite feasible that the worker died due to the asthma.

The Vice-Chair concluded that the occupational asthma was a significant contributing factor to the worker's death.

The worker's death resulted from his compensable injury. The matter of determination of entitlement to survivor benefits was referred back to the Board. The appeal was allowed in part.

16 Pages

References: Act Citation

- WCA

Other Case Reference

- [w2617s]

Style of Cause:

Neutral Citation: 2017 ONWSIAT 1278



# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

## DECISION NO. 564/17

**BEFORE:** J. Noble: Vice-Chair

**HEARING:** February 23, 2017 at Toronto  
Oral

**DATE OF DECISION:** April 27, 2017

**NEUTRAL CITATION:** 2017 ONWSIAT 1278

**DECISION(S) UNDER APPEAL:** WSIB Appeals Resolution Officer (ARO) decision dated September 11, 2014

**APPEARANCES:**

**For the worker:** Mr. F. Evangelista, paralegal

**For the employer:** Not participating

**Interpreter:** None

Workplace Safety and Insurance  
Appeals Tribunal

505 University Avenue 7<sup>th</sup> Floor  
Toronto ON M5G 2P2

Tribunal d'appel de la sécurité professionnelle  
et de l'assurance contre les accidents du travail

505, avenue University, 7<sup>e</sup> étage  
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## REASONS

### (i) Issues

- [1] The issues to be decided in this appeal are: whether the worker (estate) should have entitlement for the worker's death on October 5, 2010 as being related to the compensable occupational asthma; and whether there should be entitlement for survivors' benefits.

### (ii) Background

- [2] The worker was granted entitlement for occupational asthma in a WSIB Appeals Resolution Officer (ARO) decision dated January 29, 2008. The Board established the accident date of September 25, 1997.

- [3] The worker died on October 5, 2010.

- [4] The worker's estate claimed that the worker's death was related to the compensable occupational asthma, and requested entitlement for survivors' benefits.

- [5] The Case Manager decision dated October 21, 2011 stated that since the cause of death could not be directly related to the compensable condition of occupational asthma, entitlement for the worker's death was denied. The decision dated October 21, 2011 stated:

I am writing to advise you of the decision that has been reached regarding your request for entitlement to survivor benefits, as well as to advise you of an overpayment that has been established.

#### Background

Your late husband was granted entitlement for occupational asthma and depression for which he received a combined non-economic-loss (NEL) award of 75 per cent. Loss of earnings (LOE) was also paid until April 1, 2011.

On May 12, 2011 I received a call from Pina Licata, your husband's representative. She informed me that you were seen at her office on that day to advise that your husband had passed away on October 5, 2010 while in Russia. Although he died at home, no autopsy was performed.

#### Overpayment

When a worker passes away, there is no longer any entitlement to NEL benefits or LOE benefits. Since we did not receive any notification of your husband's passing, benefits were paid beyond his death, from November 1, 2010 until April 1, 2011. As a result of this, an overpayment has been created in the amount of \$12,474.75. This amount has been added to the \$3,631.53 overpayment of which I advised you in my letter of May 26, 2011. Thus, the current outstanding overpayment in this claim is \$16, 106.25.

We will be pursuing recovery of this amount. You may either send us a cheque or money order in this amount, or you may contact us to set up a recovery plan.

#### Survivor Benefits

In order for the Workplace Safety and Insurance Board to consider entitlement to survivor benefits, a worker's death must be directly related to the compensable condition.

At this time I do not have any medical cause of death. You indicated you are trying to obtain medical information from the doctor that treated your husband in late August or early September for breathing difficulties. However, at this time there is no such information.

Therefore, in the absence of any confirmed medical cause of death, I am unable to allow entitlement for survivor benefits.

- [6] The Case Manager reviewed the decision dated October 21, 2011, and in a decision dated December 10, 2013 the Case Manager stated that the decision to deny entitlement for death and survivors' benefits was upheld. The decision dated December 10, 2013 stated:

I am writing to you regarding a review of a previous decision dated October 21, 2011 denying entitlement to Survivor Benefits and wish to advise you of the following:

Further to the decision of October 21, 2011, entitlement to Survivor Benefits was denied due to an absence of medical evidence confirming a cause of death and the relationship to the compensable condition of occupational asthma.

Prior to your husband's death of October 5, 2010, he was admitted to a hospital in Russia for the period August 14, 2010 to September 3, 2010. This medical information has been translated and submitted to file. As this information pre-dates the date of death, it cannot be presumed your husband's cause of death was directly related to the occupational asthma.

Therefore, noting the above, in the absence of a cause of death and a direct relationship to the compensable condition, entitlement to Survivor Benefits is not in order and the previous decision of October 21, 2011 is confirmed.

- [7] The worker's estate appealed to the Appeals Resolution Officer (ARO).

- [8] The ARO decision under appeal dated September 11, 2014 denied the worker's estate's claim and stated:

The issue upon appeal is whether the worker's death can be considered to be directly related to the compensable condition.

When I assess all of the pertinent information in the claim file, I find that the worker estate is not entitled to death/survivor benefits. I do not find that the worker's death, on October 5, 2010, was causally related to the compensable condition of September 25, 1997. In reaching this conclusion, I had regard for all of the available information, however, found the following details particularly relevant:

- Specialist, Dr. Cooke's report of August 11, 2005 notes that the worker is "very preoccupied with suspected kidney problems, believing that he may have suffered unspecified kidney damage during a prior urinary infection."
- I note in the ARO decision of January 29, 2008 that the worker confirmed (page 6) that he had a history of heart problems. He stated that he was under a lot of stress due to his heart problems.
- Dr. Tarlo, Occupational Disease Specialty Program Asthma Stream specialist of St. Michael's Hospital (SMH), in medical assessment of March 12, 2009 referenced a number of co-existing medical conditions including hypertension, weight gain, depression, and that alcohol and dairy products would exacerbate his symptoms.
- The WSIB Occupational Medicine Consultant, in memo 60, dated March 24, 2009 indicated that the worker had a ASA/NSAID sensitivity, associated ASA/NSAID asthma and chronic sinusitis with polyps which were not compatible with occupational asthma. It was opined that the worker had a major co-existing condition.
- The worker was granted a 75% non-economic loss (NEL) award in March 2010 for a combination of occupational asthma and depression. However it is also important to note that the employer was provided with 90% relief of all costs in

this claim under the Second Injury and Enhancement Fund (SIEF) recognizing that the worker had major co-existing non-compensable conditions.

- According to the claim file records the worker was in Russia, hospitalized there from August 14, 2010 to September 3, 2010. He was seen by a cardiologist, a neurologist, and a pulmonologist. The records note that the worker "relates the acute phase to change of climate (came from Canada ...), poor environmental condition in city Kemerovo, high air humidity, psycho/emotional stress in his life: his mother is in grave condition."
- Dr. Tarlo, in correspondence dated May 14, 2014 noted that the worker's death "may" have been due to asthma, although she emphasized that this cannot be stated with certainty. She opined that lung disease would not be expected to have caused left ventricular hypertrophy, suggesting that left ventricular hypertrophy would not likely have been due to his asthma. The specialist added that the worker had hypertension, which would be a more likely cause for left ventricular hypertrophy.

I acknowledge that the worker estate representative is suggesting that the worker's problems stemmed primarily as a result of his workplace injury and its sequelae. However as evidenced above, I do not find on a balance of probabilities, that the workplace condition was more likely than not to have caused the worker's death. I do not accept that the workplace condition was a causal factor in the worker's death.

Based on the evidence available to me I do not find on the balance of probabilities that the worker's death was reasonably caused by the workplace condition or its sequelae. As such entitlement to death/survivor benefits is denied.

[9] The worker's estate appeals this decision to the Tribunal.

### (iii) Law and policy

[10] Since the worker was injured in September of 1997, the pre-1997 *Workers' Compensation Act* is applicable to this appeal. All statutory references in this decision are to the pre-1997 Act, as amended, unless otherwise stated. The hearing of the appeal commenced after January 1, 1998; therefore, certain provisions of the *Workplace Safety and Insurance Act, 1997* (the "WSIA") also apply to the appeal.

[11] Specifically, sections 4 and 35 of the pre-1997 Act are applicable to this appeal, and provide in part as follows:

**4(1)** Where in any employment, to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the worker and the worker's dependants are entitled to benefits in the manner and to the extent provided under this Act.

**(2)** Where a worker is entitled to compensation for loss of earnings because of an accident, the employer shall pay to or on behalf of the worker the wages and benefits that the worker would have earned for the day or shift on which the injury occurred as though the injury had not occurred.

**(3)** Where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment and, where the accident occurred in the course of the employment unless the contrary is shown, it shall be presumed that it arose out of the employment.

**(4)** In determining any claim under this Act, the decision shall be made in accordance with the real merits and justice of the case and where it is not practicable to determine an

issue because the evidence for or against the issue is approximately equal in weight, the issue shall be resolved in favour of the claimant.

(5) Where the worker has not been paid the wages and benefits prescribed by subsection (2), the Board shall pay to or on behalf of the worker the wages and benefits prescribed by subsection (2).

(6) Every employer who makes default in paying the wages and benefits prescribed by subsection (2) shall, in addition to any other penalty or liability, pay to the Board a sum equal to the amount of such wages and benefits and payment of such amount may be enforced in the same manner as the payment of an assessment may be enforced.

(7) Where an injury is attributable solely to the serious and wilful misconduct of the worker, no benefits or compensation are payable unless the injury results in death or serious impairment.

**35(1)** Where death results from an injury to a worker, a spouse who survives the worker shall be entitled to,

- (a) compensation payable by way of a lump sum of \$40,000 increased by the addition of \$1,000 for each year of age of the spouse under forty years at the time of the worker's death or reduced by the subtraction of \$1,000 for each year of age of the spouse over forty years at the time of the worker's death, but in no case shall a spouse receive a lump sum payment of more than \$60,000 or less than \$20,000;
- (b) compensation by way of periodic payments in the manner and to the extent provided in this section; and
- (c) the same counselling and vocational assistance as would be provided to a worker under section 52.

(2) The spouse of a deceased worker may apply to the Board within one year after the worker's death for a vocational rehabilitation assessment, and after an assessment the Board shall provide a vocational rehabilitation program to the spouse if the Board considers it appropriate to do so.

(3) Subsections 53(11), (12) and (13) apply with respect to a vocational rehabilitation program provided to a spouse.

(4) Where a deceased worker is survived by a spouse and one or more children, compensation in an amount equal to 90 per cent of the deceased worker's net average earnings at the time of injury shall be payable to the spouse until the youngest child reaches the age of nineteen.

(5) Where the deceased worker is survived by a spouse and no child or children, the spouse shall be entitled to a periodic payment of 40 per cent of the net average earnings of the deceased worker adjusted by the addition of 1 per cent of the net average earnings for each year of age of the spouse over forty years at the time of the worker's death or by the subtraction of 1 per cent of the net average earnings for each year of age of the spouse under forty years at the time of the worker's death, but in no case shall the spouse receive a periodic payment of more than 60 per cent or less than 20 per cent of net average earnings of the deceased worker.

(6) Where there is no spouse entitled to compensation or the spouse dies and the deceased worker,

- (a) is survived by only one dependent child, the dependent child is entitled to compensation equal to 30 per cent of the net average earnings of the deceased worker at the time of injury; or
- (b) is survived by more than one dependent child, the dependent children are entitled as a class to compensation equal to 30 per cent of the net average earnings of the

deceased worker at the time of the injury, plus an additional amount of 10 per cent of the net average earnings of the deceased worker at the time of injury for each additional dependent child over one to a maximum of 90 per cent of the net average earnings.

(7) Where, at the time of the death of the worker, there is no spouse entitled to receive a lump sum payment under clause (1)(a), the worker's dependent child or children shall be entitled to receive in aggregate a total lump sum payment of \$40,000 in addition to the compensation payable under subsection (6).

(8) Where a deceased worker is not survived by a spouse or by a dependent child or children and there are dependants, the dependants are entitled to reasonable compensation proportionate to the loss occasioned to the dependants by the death as determined by the Board, but in no case shall the total compensation exceed 50 per cent of the net average earnings of the deceased worker at the time of injury, and the compensation shall be payable only so long as the worker could have been reasonably expected to continue to support the dependant or dependants if the deceased worker had not suffered injury.

(9) Payment shall be made for the necessary expenses of burial or cremation of a deceased worker, as determined by the Board, which amount shall not be less than \$1,500, and, where owing to the circumstances of the case the body of a worker is transported for a considerable distance for burial or cremation, a further sum, as determined by the Board, shall be paid for the necessary extra expenses so incurred.

(10) Subject to subsection (11), where compensation has been paid under subsection (4) and no child is under the age of nineteen years, the spouse shall be entitled to payment of compensation under subsection (5) as if the worker had died on the day after the day the youngest child then living reached the age of nineteen years.

(11) Where the Board is satisfied that it is advisable for a child or children over the age of nineteen to continue education, the Board shall pay in respect of each such child 10 per cent of the net average earnings of the worker at the time of the injury but the total benefit in respect of the spouse and such children shall not exceed 90 per cent of the net average earnings of the worker at the time of the injury.

(12) Subject to subsections (10), (11) and (14), a monthly payment in respect of a child shall cease when the child attains the age of nineteen years or when the Board is satisfied that it is not advisable for a child over the age of nineteen to continue receiving an education.

(13) Where a child or children is or are entitled to compensation under this section and is or are being maintained by a suitable person who is acting in the role of parent in a manner the Board considers satisfactory, such person while so doing is entitled to receive the same periodic payments of compensation for himself or herself and the child or children as if the person were a spouse of the deceased and in such case the child's or children's part of such payments shall be in lieu of the periodic payments that the child or children would otherwise be entitled to receive and, where there is more than one child and more than one person acting in the role of parent, the Board may in its discretion apportion the payments under this section accordingly and, where this subsection applies, the maximum amount payable under this section shall not exceed 90 per cent of the net average earnings of the deceased worker at the time of injury.

(14) Compensation is payable to an invalid child without regard to the age of the child and shall continue until the child ceases to be an invalid or dies.

(15) In calculating the compensation payable by way of periodic payments under this section, the Board shall have regard to any payments of survivor benefits for death caused by injury that are received under the Canada Pension Plan or the Quebec Pension Plan in respect of the deceased worker.

(16) A person who ceased to be a spouse by reason of living separate and apart from the deceased worker at the time of the worker's death is entitled to compensation under this section as a spouse where the worker was or would have been required had the worker not died to make support, maintenance or alimony payments under a separation agreement or judicial order.

(17) Where there is more than one person entitled to receive periodic or lump sum payments under this section as a spouse and the periodic payments to those persons as provided in this section would in total exceed 90 per cent of the net average earnings of the deceased worker at the time of injury and, or, the lump sum payments to these persons as provided in this section would in total exceed \$60,000, the total periodic payments shall be limited to 90 per cent of the net average earnings and the total lump sum payments shall be limited to \$60,000 and the Board shall apportion payments that are so limited between those entitled in accordance with,

- (a) the relative degrees of financial and emotional dependence on the deceased at the time of death;
- (b) the period of separation, if any, from the deceased at the time of death; and
- (c) the size of the relative entitlements of those so entitled without reference to this subsection.

(18) The amounts payable under this section as periodic payments shall be increased if the worker's death occurred on or before the 30th day of June, 1985 by adding thereto a factor of 5 per cent effective the 1st day of July, 1985, but the total periodic payments after the application of this subsection shall not exceed 90 per cent of the net average earnings of the deceased worker at the time of injury, calculated as if the worker's average earnings were the maximum amount determined under section 38.

[12] Tribunal jurisprudence applies the test of significant contribution to questions of causation. A significant contributing factor is one of considerable effect or importance. It need not be the sole contributing factor. See, for example, *Decision No. 280*.

[13] The standard of proof in workers' compensation proceedings is the balance of probabilities. Pursuant to subsection 124(2) of the WSIA, the benefit of the doubt is resolved in favour of the claimant where it is impracticable to decide an issue because the evidence for and against the issue is approximately equal in weight.

[14] Pursuant to section 126 of the WSIA, the Board stated that the following policy packages, Revision #9, would apply to the subject matter of this appeal: #143 – Survivor Dependents – Date of death as of March 9, 2005; and #300 – Decision Making/Benefit of Doubt/Merits and Justice.

[15] I have considered these policies as necessary in deciding the issues in this appeal.

#### (iv) Analysis

##### (a) Entitlement for the Worker's Death on October 5, 2010

[16] On the issue of whether the worker (estate) should have entitlement for the worker's death on October 5, 2010 as being related to the compensable occupational asthma, I find for the worker (estate).

[17] I find that the weight of the evidence, including the medical evidence, indicates that the worker's compensable occupational asthma likely made a significant contribution to the



worker's death on October 5, 2010. I find therefore that the worker (estate) has entitlement for the worker's death on October 5, 2010 under this claim.

[18] I note at the outset that Tribunal jurisprudence applies the test of significant contribution to questions of causation. A significant contributing factor is one of considerable effect or importance. It need not be the sole contributing factor. See, for example, *Decision No. 280*. I further note that the standard of proof in workers' compensation proceedings is the balance of probabilities. The question to be answered in this appeal is whether on the balance of probabilities, the worker died as a result of a work-related accident or injury, and/or whether the worker's compensable injuries made a significant contribution to the worker's death.

[19] Turning to the instant appeal, the worker's representative submits that the worker's compensable occupational asthma likely made a significant contribution to the worker's death. I find that I agree with these submissions. I have arrived at my conclusions for the following reasons.

[20] First, I find that the worker's permanent impairment with respect to the occupational asthma is a significant impairment.

[21] I note in this regard that the worker was granted a Non-Economic Loss (NEL) award of 50 percent in relation to the occupational asthma. I observe that the NEL documentation on file indicates that the worker had significant airflow limitations; airways hyper-responsiveness; immunological impairment due to clinically significant sensitization to Isocyanate; and the result was a NEL award of 50 percent in relation to the respiratory disorder.

[22] Second, I find that the testimony of the worker's widow at the hearing regarding the weeks leading to the worker's death was significant.

[23] I note in this regard that the worker's widow testified that she and the worker left Canada for Russia on May 25, 2010 so that the worker could see his mother who was unwell, and so that they could make arrangements for her to be transferred from her apartment to a care home in Russia. The worker's widow testified that prior to leaving Canada the worker's asthma was severe, but most of the time it was in good control. The worker's widow testified that occasionally he would have a flare, and she believed that stress was a trigger for an asthma flare, as well as cold weather. The worker's widow testified that her husband was also allergic to NSAIDs and aspirin and he was restricted from having these drugs.

[24] The worker's widow testified that once she and the worker were in Russia the worker was under stress because it was taking longer to place his mother in a care home than was anticipated. The worker's widow testified that the worker was using inhalers quite often to control asthma.

[25] The worker's widow testified that she stayed in Russia with the worker from May 25 to August 9, 2010 at which time she left and returned home to Canada to address her own family concerns. The worker's widow testified that the worker stayed in Russia to follow through with paper work that was required in relation to his mother. The worker's widow testified that after she left Russia on August 9, 2010 she spoke to the worker almost every day on the telephone. She stated that she spoke to the worker on October 3<sup>rd</sup>, 2010 and the only day she did not speak to him was on October 4<sup>th</sup>, and then October 5<sup>th</sup> was their anniversary.

[26] The worker's widow testified that she was aware that the worker was in hospital in Russia from August 14, 2010 to September 3, 2010. She stated that he went to the hospital at that time for back pain radiating to his leg and for breathing problems.

[27] The worker's widow testified that she spoke to her husband after he was discharged from hospital and he said that he did get some rest and it was a little easier to breathe, but there was not too much improvement in the asthma. She stated that she could tell on the telephone that he still had asthma symptoms.

[28] The worker's widow testified that her husband was sad and depressed because of his mother's situation, and his mother was placed in a home at the end of September 2010. The worker's widow testified that her husband told her that in September 2010 it was already cold there in Siberia.

[29] The worker's widow testified that after her husband was release from the hospital in early September 2010, she asked her friend "Ms. Sv." who was located in Russia near where the worker was staying, to get the worker some anti-coughing medication and bring it to him. The worker's widow testified that she asked Ms. Sv. to visit her husband, and Ms. Sv. brought the worker an over the counter syrup medication.

[30] The worker's widow testified that she called Ms. Sv. on October 2, 2010 and Ms. Sv. told her that the worker was not well and he was coughing constantly.

[31] The worker's widow testified that she spoke to her husband on October 3, 2010 and that was the last time they spoke. She stated that they spoke about his mother, and then she told the worker to see the doctor if his asthma was not improving and he said that he would.

[32] The worker's widow testified that another friend Ms. T. had keys to the apartment the worker stayed in, and was a trusted friend.

[33] The worker's widow testified that on October 5, 2010 she asked Ms. T. to go to the worker's apartment because she could not reach the worker on the telephone. The worker's widow testified that Ms. T. sent her son to the worker's apartment on October 5, 2010, and Ms. T.'s son was not able to open the inside door because it was latched, however he heard from the door that the television was on.

[34] The worker's widow testified that on October 7 Ms. T. herself went to the apartment and telephoned the worker's widow and advised that the door was locked from the inside. The worker's widow testified that she convinced Ms. T. to open the door, and then over the telephone she convinced the police to force open the door. The worker's widow testified that she was told that they found the worker dead in a chair with his bag of inhalers beside his legs, and the window was open.

[35] The worker's widow testified that she was not aware that the worker had not been inhaling his medication for several days prior to his hospital admission in Russia in August of 2010, as is stated in the hospital Discharge report. The worker's widow testified that the worker used inhalers a lot in her presence when they were in Russia together in 2010, and he used his blue puffer around 2 times per day.

[36] The worker's widow testified that she agreed that the worker had a cold on top of his asthma symptoms in September or October of 2010.

[37] I find that the testimony of the worker's widow indicates that at the time that the worker was discharged from hospital in early September of 2010, the worker was likely having some difficulty with the asthma and breathing, and he had asthma symptoms.

[38] I also find that the testimony of the worker's widow indicates that following the worker's discharge from hospital on September 3, 2010, the worker's widow believed the worker's respiratory symptoms were such that she asked her friend "Ms. Sv." who was located in Russia near where the worker was staying, to get the worker some anti-coughing medication and bring it to him; and the testimony indicates that Ms. Sv. brought the worker an over the counter syrup medication. I find that the testimony of the worker's widow also indicates that when she called Ms. Sv. on October 2, 2010 and Ms. Sv. told her that the worker was not well and he was coughing constantly.

[39] I accept the testimony of the worker's widow, since she appeared as a candid and forthright witness, and since her testimony is in accordance with the preponderance of the evidence on file. I find that this evidence indicates that the worker was likely having respiratory problems in August, September and October of 2010.

[40] Third, I find that the witness statements that are included in the case materials confirm the testimony of the worker's widow, and indicate that prior to the worker's death the worker was likely experiencing respiratory distress.

[41] I note in this regard that in a statement translated from the Russian language dated December 8, 2016, Ms. Sv. stated:

On October 2, 2010 [the worker's widow] called me from [a city in Ontario] and asked me to visit her husband, [the worker] because he coughed heavily and breathed hoarsely during their telephone conversation.

[The worker's widow] asked me to buy him an expectorant drug.

[The worker's widow] warned me that he had bronchial asthma.

I bought "Bronchodilator" drug and brought it to him. When I came to his home, he was pale, breathed and coughed heavily and felt feverish. While I was there, he took the expectorant drug and used inhalers which he had been using continuously.

He thanked me for the drug and care and said that he wanted to lie down and have some rest.

We said goodbye and he closed the door when I left.

[42] We see that Ms. Sv. stated that she saw the worker approximately 3 days prior to his death, and he was unwell, he was coughing heavily and breathing hoarsely, and he was using inhalers and took a "Bronchodilator" drug that she brought to him.

[43] I also note in this regard that in a statement translated from the Russian language dated November 15, 2016, Ms. T. stated:

I ... regularly communicated with [the worker] and his wife [the worker's widow]. We often met during their visit from May to August 16, 2010. [The worker's widow] insistently asked her husband to go to hospital because [the worker] could not control his asthma of many years; he often had to stop when he was walking to use an inhaler (he always had it with him). He always had pronounced shortness of breath and whistling sound during breathing. Having been worried about his condition, I used to ask him "Are you feeling unwell?" He answered that he felt pressure in his chest.

I saw [the worker] on September 28, 2010 on his birthday. On October 3, 2010 I came to see him because he coughed heavily and had shortness of breath during our phone conversation. I advised him to call an ambulance because he had been in hospital before, from August 14 to September 3, 2010.

On October 5, 2010, [the worker] stopped answering my calls. On October 6, 2010, I tried to enter his apartment because I had spare keys, but the door was latched on the inside, and I could hear his TV set. Nobody replied to my knocking. On October 7, 2010, [the worker's widow] requested to call the police. They opened the apartment. [The worker's] body was in an armchair. His rucksack with inhalers was between his legs.

[44] We see that Ms. T. stated that she spoke to the worker by telephone on October 3, 2010, 2 days prior to his death, and he coughed heavily and had shortness of breath. Ms. T. stated that during the time period from May to August 2010, the worker was having difficulty controlling his asthma. Ms. T. also stated that the worker's body was found on October 7, 2010, and she saw that his rucksack with inhalers was between his legs.

[45] I find that the witness statements of Ms. Sv. and Ms. T. that are included in the case materials confirm the testimony of the worker's widow, that the worker was experiencing asthma symptoms in the weeks prior to his death. I further find that the witness statements of Ms. Sv. and Ms. T. indicate that in the days prior to his death the worker was breathing heavily and had shortness of breath.

[46] I place significant weight on these witness statements since it does not seem likely that these individuals would misrepresent the facts; since the statements of these individuals are rather consistent with the testimony of the worker's widow and the other information on file; and since these statements are not contradicted by other evidence that is before me.

[47] Fourth, I find that the hospital admission documentation is significant and indicates that the worker was experiencing respiratory distress prior to his death.

[48] I note in this regard that the Discharge Summary from the City Clinical Hospital in Russia, dated September 3, 2010, translated from the Russian, stated:

Clinical diagnosis

Main: lumbar osteochondrosis, chronic relapse course of disease.

Radiculopathy L5, s1 on the left. Severe pain syndrome.

Concomitant: Bronchial asthma; steroidal-dependent, severe course of disease, moderate acute phase, uncontrollable. Chronic purulent obstructive bronchitis. Pulmonary emphysema....

Characteristic course of the disease. According to the patient, vertebrogenic history for many years, acute phases once or twice a year. Current acute phase – gradual, since several days ago. Starting yesterday, pain radiates to the left leg/foot. Numbness in left tow. Today was unable to get up because of pains. Accompanied by relatives, came to the admission department. Life history. Bronchial asthma since 1997 (choking attacks, coughing attacks with mucus purulent sputum, heavy feeling in chest, heart pounding, pastous feet, feeling fear, fatigue, problem sleeping). Uses Ventolin and symbicort all the time. Relates the acute phase to change of climate (came from Canada where he was a permanent resident), poor environmental condition in city Kemerovo, high air humidity, psycho/emotional stress in his life; his mother is in grave condition. Hasn't inhaled anti-asthmatic medications for several days.

[49] We see that according to the Discharge Summary from the City Clinical Hospital in Russia, the main problem for which the worker was admitted to hospital was disabling back pain. I interpret this report to mean, however, that the worker also had a diagnosis of bronchial asthma that was in a moderate acute phase, and was described as uncontrollable.

[50] I also note that the Discharge report indicated that the worker was to be seen by a pulmonologist as an out-patient, and was to continue taking inhaled corticoids.

[51] I find that this evidence indicates that at the time of the worker's discharge from hospital on September 3, 2010, one month prior to his death, his bronchial asthma was considered to be symptomatic and in a moderate acute phase, and was described as uncontrollable. In my view this evidence indicates that it is likely that the worker's bronchial asthma condition was a contributing factor in the worker's death.

[52] I note that the death certificate indicates that the cause of death could not be determined, and the evidence also indicates that there was no autopsy. The Certificate of Death regarding the worker that is included in the case materials, translated from the original Russian and dated October 8, 2010, stated that the worker died in Russia; the date of death was October 5, 2010; and stated:

Reason of death: The reason of death was not determined due to the body putrid changes.

[53] Fifth, I find that the evidence that was provided to the Tribunal by the worker's representative, in the form of an Emergency ambulance call record dated October 4, 2010, is significant in the circumstances of this case.

[54] I note in this respect that the Emergency Certificate dated October 4, 2010 stated:

Preliminary diagnosis: Intrinsic bronchial asthma, periodical attacks. Associated illness: Acute respiratory viral infection. Essential hypertension....

Administered medical aid: Examination, Aminophylline 2.4%, 10.0, intravenously; Prednisolone 30 mg intravenously; out-patient treatment at local hospital was recommended.

The patient was left at home.

Date of issue: October 4, 2010.

[55] We see that the Emergency ambulance call record dated October 4, 2010 stated that the worker's preliminary diagnosis was bronchial asthma and an associated acute respiratory viral infection. I interpret this evidence to mean that the day prior to the worker's death, the worker was visited by ambulance workers for the condition of respiratory distress. I also interpret this evidence to mean that the worker's bronchial asthma was a significant factor in the worker's respiratory distress. Given that the worker died the following day, I find that it is reasonable to conclude that the worker's compensable asthma condition made a significant contribution to the worker's death.

[56] I note that this significant evidence was apparently not available at the time of the ARO decision under appeal dated September 11, 2014.

[57] Sixth, I place significant weight on the medical opinion of Dr. Susan Tarlo, respirology, dated May 14, 2014.

[58] I note in this regard that the worker had been seen and assessed by Dr. Tarlo previously, and according to the information on file she last saw him in 2009.

[59] In her report dated May 14, 2014, Dr. Tarlo stated:

I am sorry to learn from you that [the worker] passed away in October 2010 while visiting Russia. As you are aware I last saw him for assessment at the request of the WSIB in March 2009. At that time he had findings of poorly controlled asthma. Without his medications he had severe airway limitation, but following a bronchodilator had a very marked improvement with mild airflow limitation after the bronchodilator. Therefore he had findings of very labile asthma. At that time he was seen here, his asthma was not well controlled, and I had strongly advised that he be followed by a respirologist for his asthma. Unfortunately I do not have any information as to whether he did seek further attention from a respirologist for his asthma. I understand from your letter that a Russian hospital report indicates that he was treated between August 14 and September 3 2010 with a moderate uncontrollable exacerbation of his asthma at that time. Therefore it is quite feasible that his death may have been due to asthma, although this cannot be stated with certainty. You questioned whether the hospital reports indicating left ventricular hypertrophy would have been due to his asthma. This is not likely since lung disease would not be expected to cause left ventricular hypertrophy but could cause right ventricular hypertrophy. There was an indication that he had hypertension, which would be a more likely cause for left ventricular hypertrophy. He also previously had atrial fibrillation, which is not likely to have been related to his asthma and there was no indication in the information provided that he had a recurrence of this.

As noted in your letter, an autopsy was not performed and would more clearly identify the cause of death. From the information provided, it would appear quite feasible that [the worker] died due to asthma.

[60] We see that Dr. Tarlo is of the opinion that it is quite feasible that the worker died due to asthma, however she notes that in the absence of an autopsy report it is not possible to state the cause of death with certainty. I interpret Dr. Tarlo's report to mean that it is more probable than not that the worker died due to asthma. I place significant weight on Dr. Tarlo's opinion since as a specialist in respirology, Dr. Tarlo is qualified to provide an opinion in this case; since Dr. Tarlo saw and examined the worker previously and was therefore aware of the nature and degree of the worker's occupational asthma; and since Dr. Tarlo's reporting is set out in a clear and convincing manner. I accept Dr. Tarlo's opinion, and I am aware of no medical opinion on file from a specialist that is to the contrary.

[61] I further note that Dr. Tarlo did not have the benefit of reviewing the Emergency ambulance call record from Russia dated October 4, 2010, because it was not available at the time her report was provided in 2014. As I have discussed above, this ambulance call report indicated that the day prior to the worker's death, the worker was visited by ambulance worker's for the condition of respiratory distress; and the ambulance report stated that the worker's preliminary diagnosis was bronchial asthma and an associated acute respiratory viral infection. In my view, this report supports and corroborates Dr. Tarlo's opinion.

[62] I find, therefore, that the weight of the evidence - including the testimony of the worker's widow and the witness statements regarding the worker's health in the days leading to the worker's death; the reporting from the Russian hospital; the Russian ambulance call report dated October 4, 2010; and the reporting from Dr. Tarlo - indicates on the balance of probabilities that the worker's compensable occupational asthma likely made a significant contribution to the worker's death.

[63] In summary, the worker (estate) has entitlement for the worker's death on October 5, 2010 as being related to the compensable occupational asthma.

[64] Based on all of the foregoing, this aspect of the appeal is allowed.

**(b) Entitlement for Survivors' Benefits**

[65] On the issue of whether there should be entitlement for survivors' benefits, I find that this matter should be remitted to the Board for adjudication.

[66] I note that in this decision I have concluded that the worker (estate) should have entitlement for the worker's death on October 5, 2010 as being related to the compensable occupational asthma. I find that it would be most appropriate to return the issue of entitlement for survivors' benefits back to the Board for adjudication, pending the Board gathering the required evidence concerning the determination of this issue.

[67] I note in this regard that pursuant to section 35 of the pre-1997 Act, where death results from a compensable injury to a worker, a spouse who survives the worker has entitlement for certain benefits under the Act.

[68] I also note in this regard that section 1(1) of the pre-1997 Act provides a definition of spouse, as follows:

spouse" means either of a man and woman who, at the time of death of the one who was the worker, were cohabiting and,

(a) were married to each other, or

(b) were not married to each other and,

(i) had cohabited for at least one year,

(ii) were together the parents of a child, or

(iii) had together entered into a cohabitation agreement under section 53 of the *Family Law Act*; ("conjoint")

[69] Section 35 of the pre-1997 Act also refers to dependent children and other potential dependents.

[70] In the instant case, I observe that the Board did not provide a determination concerning the correct identify of the worker's spouse within the meaning of the pre-1997 Act. The Board, rather, concluded that the worker's death did not result from the compensable injury. There is therefore no final decision of the Board on this issue that takes into account the evidence concerning the appropriate recipient of survivor's benefits.

[71] I further observe that during the hearing that occurred on February 23, 2017, I heard no evidence concerning the marital status of the witness and the worker, nor did the worker's representative make submissions with respect to the issue of survivors' benefits. The worker's representative, rather, made thorough and well organized submissions concerning the issue of whether the worker's death resulted from the compensable injury.

[72] My review of the case materials also indicates that the late worker apparently made no Will, and there is apparently no marriage certificate on file.

[73] In the circumstances, and especially noting that the Board has not made a decision with respect to the specific issue of survivor's benefits, I find that the most appropriate and prudent

course is to refer the matter of whether there should be entitlement for survivors' benefits back to the Board for initial adjudication. The determination made in this decision that the worker's death on October 5, 2010 likely resulted from the compensable occupational asthma will be material and relevant to the Board's determination concerning survivors' benefits.

[74] The Board's determination regarding survivors' benefits will be subject to the usual rights of appeal.

[75] In summary, the issue of whether there should be entitlement for survivors' benefits is returned to the Board for adjudication.



**DISPOSITION**

[76] The appeal is allowed in part.

[77] The worker (estate) has entitlement for the worker's death on October 5, 2010 as being related to the compensable occupational asthma.

[78] The issue of whether there is entitlement for survivors' benefits is returned to the Board for adjudication.

[79] The nature and duration of benefits flowing from this decision will be returned to the WSIB for further adjudication, subject to the usual rights of appeal.

DATED: April 27, 2017

SIGNED: J. Noble