WCAT Decision Number: WCAT-2012-00903
WCAT Decision Date: March 30, 2012
Panel: Sarwan Boal, Vice Chair

Introduction

[1] The worker was employed as a pizza delivery driver with the accident employer. On December 20, 2006, he sustained an injury to his right wrist when he tripped and fell while at work. He was 57 years old at the time of the injury. The Workers' Compensation Board (Board), operating as WorkSafeBC, initially accepted the worker's claim for a right wrist strain and subsequently for complex regional pain syndrome Type I and chronic pain. Subsequently, the Board determined that the worker was left with a permanent functional impairment as a result of his compensable injury. His permanent functional impairment was assessed to be equal to 12.39% of total disability. In a June 25, 2008 decision letter, a Board disability awards officer granted the worker an award of 12.39% of total disability effective July 30, 2007. The disability awards officer also advised the worker, as follows:

> At retirement your monthly disability benefit ceases and you will be paid a lump sum retirement benefit, as outlined under s.23.1 of the *Act* [*Workers Compensation Act*].
>
> …
>
> Section 23(3.1) of the *Act* provides that only where the combined effects of the occupation at the time of injury and the disability resulting from the injury are so exceptional, will this not be the appropriate compensation. The Claims Adjudicator, Disability Awards is in the process of completing this investigation. When complete you will be advised by written decision.
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> [all quotations in this decision reproduced as written, except for changes noted]

[2] In a separate decision letter, dated October 30, 2008, a claims adjudicator, Disability Awards, advised the worker that he was not entitled to a loss of earnings assessment.

[3] The worker requested a review of the October 30, 2008 decision from the Review Division of the Board. In an April 29, 2009 Review Division decision (*Review Reference #R0100992*), a review officer confirmed the October 30, 2008 decision of the Board. The worker appealed that Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT). In a WCAT decision *WCAT-2009-03307*,

dated December 23, 2009, a WCAT panel found that the worker was entitled to a loss of earnings assessment. As a result of the WCAT decision, the worker was awarded 100% loss of earnings.

[4] In a June 2, 2010 decision letter, a case manager, Long Term Disability and Occupational Disease Services, advised the worker, in part, as follows:

> Section 23.1 of the *Act* states that permanent disability benefits are paid to age 65. Monthly disability awards are payable to the worker only and will cease on June 29, 2014.

[5] The worker requested a review of the June 2, 2010 decision from the Review Division and disputed the Board's conclusion that he would have retired at age 65. In a November 8, 2010 Review Division decision (*Review Reference #R0117784*), a review officer confirmed the Board's June 2, 2010 decision.

[6] The worker appealed the November 8, 2010 Review Division decision to WCAT. In a WCAT decision *WCAT-2011-01353*, dated May 30, 2011, another WCAT panel cancelled the November 8, 2010 Review Division decision. The WCAT panel concluded, "The issue of whether the worker is entitled to his permanent disability award past the age of 65 has been previously decided in a Board decision dated June 25, 2008. As a result, the Review Division or WCAT has no authority to consider the issue." The WCAT panel stated that it remained open to the worker to apply for an extension of time to request a review of the June 25, 2008 decision by the Review Division. Should the Review Division grant his application, the Review Division may wish to consider the evidence presented by the worker to WCAT related to his intended retirement date.

[7] The worker sought an extension of time to request a review by the Review Division and, in a June 24, 2011 Review Division decision (*Review Reference #R0130140*), a review officer allowed the worker's application for an extension of time to file the request for review.

[8] The worker then requested a review of the Board's June 25, 2008 decision and, in a September 15, 2011 Review Division decision (*Review Reference #R0130140*), a review officer confirmed the June 25, 2008 decision letter.

[9] The worker now appeals the September 15, 2011 Review Division decision to WCAT.

[10] An oral hearing was held on March 12, 2012. The worker and the worker's legal counsel attended and participated. The worker's younger brother also attended as a witness on behalf of the worker, and gave testimony under oath. The employer is not participating in this appeal, although invited to do so.

Issue(s)

[11] The issue to be determined in this appeal is whether the worker is entitled to his permanent partial disability pension beyond age 65.

Jurisdiction

[12] This appeal was filed with WCAT under section 239(1) of the *Workers Compensation Act* (Act). Section 239(1) provides that a decision made by a review officer under section 96.2 may be appealed to WCAT, subject to the exceptions set out in section 239(2).

[13] WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (see section 250(1) of the Act). WCAT must make its decision on the merits and justice of the case but, in doing so, must apply a policy of the board of directors of the Board that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal before it (section 254 of the Act). The standard of proof required in this appeal is proof on a balance of probabilities, subject to section 250(4) of the Act. Section 250(4) provides that, where the evidence supporting different findings on an issue respecting the compensability of a worker is evenly weighted, the issue must be resolved in a manner that favours the worker.

[14] This is a rehearing by WCAT. WCAT reviews the record from previous proceedings and can hear new evidence. WCAT has inquiry power and the discretion to seek further evidence, although it is not obliged to do so.

[15] WCAT exercises an independent adjudicative function and has full substitutional authority. WCAT may reweigh the evidence and substitute its decision for the appealed decision or order. WCAT may confirm, vary or cancel the appealed decision or order.

Background and Evidence

[16] Prior Review Division and WCAT decisions have outlined the worker's claim history. Given the narrow issue on appeal, I will repeat only the evidence most relevant to the issue and the arguments of the worker.

[17] On February 19, 2010, the Board completed an employability assessment. The worker told a vocational rehabilitation consultant that he wished his pension to be extended to age 80 to 90 years. The worker stated that he would have continued to work until "age 80, 85, or 90 or more to the last day of his healthy life". The worker stated that his grandfather and uncle worked until their late 90s. The worker said that his ancestors had good longevity and all lived until at least their late 80s. The worker said he always wanted to work as long as he could, just as his relatives did. The worker reported that he had depleted all his savings and still had a mortgage.

[18] The worker submitted a March 16, 2010 letter addressed "To Whom it May Concern" from his employer to the prior WCAT panel in support of his appeal. The employer stated that the worker had been employed by their company since 1988. The employer further stated: "Had it not for his injury, he would have been employed by us for as long as he wished to work, even after age 65. He is a hard working, responsible and conscientious and pleasant employee hard to replace. …"

[19] The prior WCAT panel held an oral hearing on April 6, 2011 and briefly recorded the worker's oral testimony. The worker told the panel that he planned to work at the accident employer as long as he could until his health failed. He thought he would work until 80 to 85 years of age. The worker told the panel that he owned two properties and had mortgages on both. After the work injury, he had to take out a line of credit to pay for his mortgages. The information regarding the original copies of the worker's bank statements and lines of credit were provided to the WCAT panel.

[20] The WCAT panel noted that the worker's manager testified on behalf of the worker and told the panel that the worker worked as a delivery driver or when there were no deliveries he would work inside performing various jobs. The worker never discussed his retirement plans with her. The worker's brother also testified in support of the worker and told the panel that he would be age 60 on August 8, 2011 and chose to take an early retirement as he received a pension.

[21] After the prior WCAT oral hearing, the worker submitted an April 19, 2011 letter from Dr. Welsh, the worker's attending physician, who supported the worker's contention that he would work past the age of 65. Dr. Welsh wrote, in part, as follows:

> Based on [the worker's] family history, social history, lifestyle, medical history and current age and condition, I estimate average life expectancy to be 80 years old. Relevant chronic diseases include diabetes, hypertension and hyperlipidemia which are all controlled to target, as well as stage 3 chronic kidney disease….

The September 15, 2011 Review Division Decision

[22] The review officer considered the overall evidence on file, including the worker's oral testimony given at the previous April 6, 2011 WCAT oral hearing. The review officer was unable to conclude that the worker's financial circumstances were such that he likely would have worked beyond age 65.

[23] With respect to the worker's retirement plans, the review officer stated that there was no evidence that the employer had ever had discussions with the worker regarding an intention or plan to continue working beyond age 65 with the employer. The review officer found it significant, given the worker was only eight years away from the standard retirement age at the time of his injury. The review officer noted that the worker had not provided any evidence regarding the normal retirement age of those employed in the

worker's occupation as a delivery person. There was no evidence to support that delivery drivers were likely to continue working after age 65.

[24] With respect to the longevity of people in the worker's family, the review officer stated that there were simply too many different factors or variables at play impacting on each individual with regard to life expectancy or length of working life to be able to conclude that, because the worker had relatives who continued to work beyond age 65, the worker would also have worked beyond age 65.

[25] With respect to the April 19, 2011 letter of Dr. Welsh, the review officer stated that the worker's life expectancy did not support the worker's contention that he would have worked to age "80, 85, or 90 or more".

[26] The review officer denied the worker's request for review.

Submission prior to the current WCAT oral hearing

[27] The worker, through his legal counsel, provided a March 6, 2011 submission to WCAT, which dealt entirely with whether the Board's policy item #41.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) or Practice Directive #C5-1 were patently unreasonable. The worker submitted, in essence, that the WCAT panel should find that the portions of item #41.00 of the RSCM II and Practice Directive #C5-1 cannot be supported by the Act and are therefore patently unreasonable, and this panel should refer the matter to the Chair of WCAT pursuant to section 251 of the Act.

The current WCAT oral hearing (March 12, 2012)

[28] At the oral hearing, the worker provided a copy of a seven-page document from a credit union entitled "Statement of Accounts". This document was received into evidence and marked as exhibit #1.

[29] The following is a brief summary of the worker's oral testimony given under oath.

[30] The worker explained his current financial situation with the help of exhibit #1 and stated that currently he was approximately $300,000.00 in debt. The worker stated that, at the time of the injury, he and his wife owned two houses and both houses carried mortgages. The worker stated that, prior to the compensable injury, his life was good, he was controlling his diabetes with medication, and he did not think of retirement. The worker stated that his working relationship with the accident employer was good, the employer had no problems with his work ethics, and he could have worked with the employer as long as he wanted to work.

[31] I asked the worker at what age he intended to retire, as there were at least three different retirement ages of 80, 85, and 90 years indicated on file. The worker

responded that he never thought of a specific date of retirement as he wanted to continue working as long as his health allowed him to do so.

[32] The worker's brother testified as a witness on behalf of the worker, and stated that the worker never talked to him about retirement before the injury. The worker's brother described his family and stated that everyone in the family basically worked beyond the age of 65. He himself had retired at the age of 61, as he had already worked for 35 years and had a reasonable retirement pension.

[33] The worker, through his legal counsel, submitted that the increase in his current debt load was directly the result of his injury. He had to go through numerous appeals with the Board and pay for his lawyer and other expenses. The worker submitted that the fact he had owned investment properties before his compensable injury should not be held against him. He, like everybody else, wanted to be economically sound and create a cushion for his retirement whenever he wanted to retire. The idea of retirement never entered his mind before the compensable injury. The worker further submitted that his accident employer had no retirement pension plan and there was no restriction to retire at age 65. The worker referred to the letters from his employer and Dr. Welsh. The worker finally indicated that he would have worked at least until the age of 80.

[34] The worker, in the alternative, relied on his March 6, 2011 submission to WCAT, and argued this panel should find that policy item #41.00 of the RSCM II is patently unreasonable and should refer this matter to the WCAT chair, pursuant to section 251 of the Act.

Reasons and Decision

[35] Section 23.1 of the Act deals with periodic payments for total or partial disability. It states:

> Compensation payable under section 22 (1), 23 (1) or (3), 29 (1) or 30 (1) may be paid to a worker, only
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> (a) if the worker is less than 63 years of age on the date of the injury, until the later of the following:
>
> (i) the date the worker reaches 65 years of age;
> (ii) if the Board is satisfied the worker would retire after reaching 65 years of age, the date the worker would retire, as determined by the Board, and
>
> (b) if the worker is 63 years of age or older on the date of the injury, until the later of the following:
>
> (i) 2 years after the date of the injury;

> (ii) if the Board is satisfied that the worker would retire after the date referred to in subparagraph (i), the date the worker would retire, as determined by the Board.

[36] Policy item #41.00 of the RSCM II ("Duration of Permanent Disability Periodic Payments") provides that section 23.1 of the Act recognizes age 65 as the standard retirement age for workers, but also permits the Board to continue to pay benefits where the Board is satisfied that the worker would retire after the age of 65 if the worker had not been injured. The Board requires evidence that is verified by an independent source to confirm that the worker's subjective statement regarding his or her intent to work past age 65. Verifiable evidence is also required to enable a Board officer to establish the worker's new retirement date for the purposes of appropriately concluding permanent disability award payments. The policy provides guidelines in determining, on a balance of probabilities as is described in policy item #97.00 of the RSCM II, what evidence is required from the independent source. Some examples of the required verifiable evidence as set out in policy item #41.00 are, as follows:

- Names of the employer or employers the worker intends to work for after age 65.
- A description of the type of employment the worker was going to perform and the expected duration of the employment.
- Information from the identified employer or employers to confirm that he or she intended to employ the worker after the worker reached age 65 and that employment was available.
- Information provided from the worker's pre-injury employer, union or professional association to confirm the normal retirement age for workers in the same pre-injury occupation.
- Information from the pre-injury employer whether the worker was covered under a pension plan provided by the employer and the terms of that plan.

[37] The policy states that the list of examples provided in the policy is not a conclusive list of the types of evidence that may be considered. Policy item #41.00 of the RSCM II states the Board will consider any other relevant information in determining whether a worker would have worked past age 65 and at what date the worker would have retired.

[38] At the oral hearing, the worker gave evidence that he had no intention to retire at age 65 as there was no mandatory retirement age in his occupation. The worker stated that he loved his job as a pizza delivery person or, when there was no delivery, working inside the restaurant. The worker said that there were other co-workers who were still working as pizza delivery persons past the age of 65. Furthermore, the March 16, 2010 letter from the employer states that the worker would have been employed by them for as long as he wished to work, even after the age of 65, had it not been for his injury. This letter testifies to the worker's enthusiasm and work ethic. [The worker was 57 years old at the time of injury and he testified that the employer had no pension plans for their employees.

[39] The worker provided documentary evidence with respect to his significant financial obligations. It is also the worker's evidence that, although he was employed as a pizza delivery driver, there was always work for him inside the restaurant if the delivery work was not available. Given the nature of the worker's occupation, I am satisfied that the worker would have been able to find work in his occupation, specifically with the injury employer.

[40] At the oral hearing, the worker gave his evidence in a straightforward and forthright manner. I found the worker's evidence credible and acceptable. I also note that policy item #97.32 of the RSCM II states that a worker's evidence should not be rejected simply by reference to an assumption that it must be biased. A conclusion against the statement of the worker may be reached if the conclusion rests upon a substantial foundation, such as clinical findings, other medical or non-medical evidence, or a serious weakness demonstrated by questioning the worker. I found no serious weakness in the evidence the worker presented or in his answers to my questions. I accept the worker's evidence given at the oral hearing regarding his financial circumstances, the fact that there is no retirement age in his occupation, and his ability and intention to continue working past age 65.

[41] Finally, I note the policy states that the Board should consider any relevant information in determining if a worker would have continued to work beyond age 65. In the present case, the worker was fully employed and was nearing the age at which a decision on retirement would normally be made. There is no indication on file that the worker was preparing to retire at age 65, and I find his attachment to the job he was doing, combined with his financial obligations, is relevant evidence in support of his statement that he had intended to carry on working.

[42] I acknowledge the review officer's comments that there was no evidence regarding the normal retirement age of other workers working as pizza delivery drivers. However, I note the employer indicated that work would be available to this worker after age 65, and it really is the type of physical work required that is relevant, not how many workers work in this type of work beyond age 65.

[43] With respect to the likely appropriate age that the worker was expected to work, there is a medical letter from Dr. Welsh and the worker's own evidence. Dr. Welsh estimated the average life expectancy of this worker to be 80 years, given the worker's family and social history. Dr. Welsh did not say the worker was physically capable of working as a pizza delivery worker until the age of 80. I do not find there is sufficient evidence on file to conclude the worker would have worked until he was 80 years old. The worker's main job was as a pizza delivery driver working predominantly evening and night shifts. Furthermore, it is the worker's evidence that he would have worked so long as his physical health would have allowed him to do so. For how long this worker would have continued to work as a pizza delivery driver is only an estimate, and, in my view, it is difficult to make such an estimate. I have considered the circumstances of this worker, including his financial obligations at the time of his injury. On balancing the merits and

the justice of the case against the evidentiary requirements set out in the Board policy, I find it is likely the worker would have worked up until the age of 75, at the maximum. This retirement age is based on the nature of the worker's job, his general health condition and his life expectancy. Therefore, I find the worker would have continued to work beyond age 65 and his disability pension should be paid until he turns age 75.

[44] I allow the worker's appeal.

[45] Given my conclusion above, I do not need to address the worker's alternative arguments.

***Note*:**

Excluded Submission

[46] On March 27, 2012, WCAT received an unsolicited letter from the worker's counsel with a request to "…not issue the final appeal decision until the requested information is produced." I have considered the practice directive #14.6 (Unsolicited Post-Hearing Evidence or Submissions) of the WCAT *Manual of Rules of Practice and Procedure* (MRPP). The MRPP practice directive states that WCAT generally will not accept unsolicited post-hearing evidence or written submissions. The worker's counsel, at the oral hearing, made no indication that he would be making a further submission. Therefore, I did not accept the worker's counsel's unsolicited request. Besides, I have reviewed the subject of the worker's counsel's request and I do not find it relevant to my decision. The age demographics of WCAT and WorkSafeBC, and how many of their staff are over age 65 and working, has no bearing on whether the worker (a pizza delivery driver) intended to work past age 65 and, if so, to what new retirement age. This appeal must be decided on its own merits and justice.

Conclusion

[47] I find the worker should continue to receive a disability pension until the age of 75. I allow the worker's appeal, and vary the September 15, 2011 Review Division decision (*Review Reference #R 0130140*).

Expenses

[48] The worker requested reimbursement of the travel expenses he incurred to attend the oral hearing. Item #16.1.2 of the MRPP states that WCAT will generally order reimbursement of certain expenses for a worker's own attendance at an oral hearing if that worker was successful in the appeal. The worker was successful in his appeal.

[49] Item #16.1.2.1 of the MRPP states that oral hearings will normally be held in a location closest to the community where the appellant resides. If a worker requested a location farther away to accommodate a representative, WCAT may limit the amount of travel expenses reimbursed. However, in the present case, the worker attended an oral hearing held closest to his hometown. Therefore, I allow the worker's request, and I order the Board to reimburse the worker for his travel expenses incurred to travel between his hometown and the oral hearing location, in accordance with the MRPP and Board policy.

[50] No other expenses were requested, and none are ordered.

Sarwan Boal
Vice Chair

SB/jy