DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

Summary

[1] This is a referral to the Workers' Compensation Appeal Tribunal (WCAT) chair under section 304(2) of the *Workers Compensation Act* (Act).

[2] Under section 304(1) of the Act, I find that policy item C6-41.00 includes a mandatory criterion precluding a new determination of some workers' retirement intention that is not supported by the Act and the *Workers Compensation Amendment Act, 2020* (Amendment Act). In doing so, I find the policy has the effect of extinguishing or at least fettering the discretion found in section 201(3) of the Act and section 36 of the Amendment Act, such that an outcome is patently unreasonable because a policy, as a form of subordinate legislation, cannot override or contradict the enabling statues without being patently unreasonable.

[3] The worker is appealing the April 11, 2022 Review Division decision (*Review Reference #R0286552)* to the Workers' Compensation Appeal Tribunal (WCAT). The Review Division confirmed a November 5, 2021 Workers' Compensation Board[1] decision that determined the worker was not entitled to the increase in his permanent disability benefit due to him reaching the previously decided age of retirement.

[4] For context, the worker's claim arises from a workplace incident on April 23, 2008 when he fell and injured his left knee. He was 54 years old at the time of the workplace incident. The Board accepted the worker's claim for a left knee medial meniscal tear and eventually determined the worker sustained a permanent aggravation of the pre-existing osteoarthritis in the left knee. The worker was referred to Long Term Disability Services to assess his entitlement to a permanent disability benefit for his accepted left knee conditions.

[5] In the July 6, 2011 decision letter, Long Term Disability Services determined the worker was entitled to a permanent disability benefit equating to 5.60% of total disability for his left knee medial meniscal tear and permanent aggravation of the pre-existing left knee osteoarthritis. The long term disability officer determined the worker's award was payable until he reached 65 years of age.

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[1] Which operates as WorkSafeBC. I will refer to the Workers' Compensation Board as the Board.

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Appeal Tribunal

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[6] The worker sought a review of the July 6, 2011 decision letter to the Review Division but did not provide arguments specific to the duration of his entitlement to his permanent disability benefit. The worker did not seek an appeal of the November 15, 2011 Review Division decision that confirmed the long term disability officer's decision.

[7] The worker's monthly permanent disability benefit ceased on his 65th birthday (January 21, 2019).

[8] In the June 18, 2019 telephone memo, a Board officer captured her discussion with the worker regarding his reopening request. The worker advised that he was experiencing an increase in his left knee pain which was causing his left knee to buckle. He had sought medical attention and was being referred for further investigations and possible surgery.

[9] In the November 22, 2019 decision letter, the Board advised it was reopening the worker's claim and providing wage-loss benefits effective October 24, 2019. The Board officer noted that the worker had continued working as a construction labourer since his workplace incident on April 23, 2008 and was requiring time off of work for further surgery for his increased left knee symptoms. In a subsequent decision letter, dated July 7, 2020, the Board ended the worker's wage-loss benefits on November 13, 2019 as the worker's left knee condition had stabilized. The Board referred the worker's claim to Long Term Disability Services to reassess his entitlement to an increased permanent disability benefit due to his recent surgery and increased functional impairment.

[10] In the November 5, 2021 decision letter, the long term disability officer stated that he was unable to provide the worker with the reassessed and increased permanent disability benefit (equating to 1.83% of total disability) due to the prior July 6, 2011 determination regarding the duration of entitlement to his permanent disability benefit. The long term disability officer referred to policy C6-41.00, noting that the worker did not meet the eligibility for a new determination of the duration of entitlement to a permanent disability benefit as he had reached the previously determined age of 65. The worker was 67 at the date of the November 2021 decision letter.

[11] In the worker's submissions to the Review Division, he argued that the long term disability officer's decision should be viewed as incorrect due to the fact that he has continued to work after he turned 65 years of age and continued to be impaired by his permanent left knee conditions.

[12] In the worker's submissions to WCAT, he continues to challenge the correctness of the long term disability officer's decision and notes that the policy is based solely on his turning 65 years of age and fails to consider his actual circumstances.

[13] The employer is not participating in this appeal, although invited to do so.

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Issue(s)

[14] Is policy item C6-41.00 so patently unreasonable that it is not capable of being supported by the Act and Amendment Act?

Statutory and Policy Framework

[15] The Amendment Act altered the rules relating to the determination of a worker's retirement age under section 201 of the Act. For the purposes of transition, section 36 of the Amendment Act provided that a determination under the new rules could be made, whether or not one had already been made under the former section of the Act:

> A determination may be made under section 201 (3) of the *Workers Compensation Act*, as added by section 18 of this Act, whether or not a determination has been made under section 201 (1) of that Act before the date section 18 of this Act comes into force.

[16] Section 36 explicitly states that a determination "may" be made for a worker whose retirement age was decided under the old provisions of section 201. It allows the Board to make another decision, closer to age 65, for workers whose retirement age had already been determined under the old section.

[17] Section 18 of the Amendment Act sets out the revisions found in section 201(3) of the Act.

[18] As it is now written, the entirety of section 201 of the Act reads as:

> **Payment period for worker disability compensation**
>
> (1) Subject to subsection (2), periodic payment of compensation under this Division may be paid to an injured worker only as follows:
>
> (a) if the worker is under 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;
>
> (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;

Workers' Compensation
Appeal Tribunal

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(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.

(2) As a restriction on subsection (1), the Board may not make a periodic payment to a worker under this Division if the worker ceases to have the disability for which the periodic payment is to be made.

(3) **A determination made under subsection (1) (a) (ii) as to a date on which a worker would retire after reaching age 65 may be made after a worker has reached age 63, and the Board may, when making the determination, consider the worker's circumstances at the time of that determination.**

[emphasis added; title reproduced as written]

[19] Section 319 of the Act provides that the board of directors of the Board must set and revise as necessary its policies, including policies regarding compensation.

[20] Section 303 (2) of the Act provides that WCAT must make its decision based on the merits and justice of the case, but in doing this it must apply any policies of the board of directors that are applicable in that case.

[21] Pursuant to the authority set out in section 319 of the Act, the Board has created policy item C6-41.00, titled Duration of Permanent Disability Periodic Payments, in the *Rehabilitation Services and Claims Manual, Volume II*, to provide further direction on the interpretation and application of section 201 of the Act and section 36 of the Amendment Act.

[22] Policy item C6-41.00 provides that, in most cases where a worker is under 63 years old at the time of the workplace injury, the decision on the duration of permanent disability benefits is to be made when the worker is age 63.

[23] It also provides that the determination of a worker's retirement date is made only once, unless section 36 of the Amendment Act applies. It reads:

> Under section 36, another determination may be made after the worker has reached age 63 if:
>
> - the worker was under 63 years of age on the date of the injury,
> - a previous determination was made under section 201 (1) before January 1, 2021, and

Workers' Compensation Appeal Tribunal

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- **the worker** has **not reached the age of retirement as previously determined by the Board.**

[emphasis added]

[24] The third bullet is the key section and I find, for the reasons set out below, that it limits the application of the transitionary measure found in section 36 of the Amendment Act, and more broadly, section 201(3) of the Act.

Analysis

[25] The meaning of "patently unreasonable" has been discussed in several decisions of former WCAT chairs and it is not necessary for me to repeat that analysis here other than to note that where a policy is not supportable by a rational interpretation of the Act, the policy will be found to be patently unreasonable[2]. The courts have been consistent in its discussions of the definition of a patently unreasonable policy or regulation requires the application of a high standard[3].

A. Interpreting policy item C6-41.00

[26] The principles of statutory interpretation can be found in such court decision as *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 S.C.R. 27 and the *British Columbia Hydro and Power Authority v. Workers' Compensation Board of British Columbia*, 2014 BCCA 353. Both decisions state that the rules of statutory interpretation require consideration of the provision according to their grammatical and ordinary sense, in their entire context, and in harmony with the scheme and object of the provision in question as well as the Act more generally. This is commonly referred to as the "modern principle" of statutory interpretation.

[27] I have set out the relevant wording of policy item C6-41.00 above, I find the grammatical and ordinary sense of the policy as it relates to a new determination of the duration of a worker's entitlement to their permanent disability benefit is limited to whether the worker meets all three criteria set out. While at first glance, the Board's use of "may" in the policy indicates a permissive or discretionary mechanism for which a worker could seek a new determination, upon a complete reading of the entirety of this section it indicates that such discretion will only be exercised if a worker satisfies all three of the listed criteria.

[28] In addition to a consideration of the wording found in policy, I also find guidance for my interpretation in the Board's Interim Practice Directive #C5-1 (Duration of Benefits – Retirement

[2] See, for example, W*est Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal),* 2018 SCC 22 at paragraphs 28 and 32 and *Glover v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2007 BCSC 1878 at paragraph 56.

[3] See *Pacific Newspaper Group Inc. v. Communications Energy and Paper Workers Union of Canada, Local 2000*, 2014 BCCA 496 at paras 39 and 48; leave to appeal dismissed: [2015] S.C.C.A. No 60.

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Date). While practice directives are issued by the Board to serve as adjudicative aides for decision-makers when applying applicable policy requirements, they can also include supporting business processes and examples of the intent of the policy. Specific to the Board's discussion surrounding the intention and application for new determinations of a retirement date determination it states:

> As set out above, the retirement date determination can only be made once on a claim. However, for claims where the retirement date determination was made prior to January 1, 2021, section 36 of the *Workers Compensation Amendment Act, 2020*, provides WorkSafeBC the discretion to make a new determination on the worker's retirement date, after the worker has reached age 63.
>
> All of the following conditions **must** be met in order for the transitional provision to apply:
>
> - the worker was under the age of 63 at the time of injury,
> - a determination on the worker's retirement date for that claim was made by a WorkSafeBC officer under section 201(1) of the *Act* before January 1, 2021, and
> - the worker has not reached the date of retirement as previously determined on that claim.
>
> [emphasis added]

[29] Reading both the policy and practice directive in conjunction with each other, I find it apparent that the Board's intent is to restrict some worker's abilities to seek a new determination of their retirement intention. I acknowledge that that the first two criteria set out in the policy are properly found in section 201 (1)(a)(ii) of the Act. The issue becomes what is the purpose of the third criterion as such a requirement is not referred to under section 36 Amendment Act or section 201(3) of the Act and restricts the discretion provided under the legislation. In order to resolve the issue, it is necessary to understand the factors considered by the legislature when it amended the Act.

[30] When attempting to understand the context of the legislature's intention for the amendment of section 201 of the Act, guidance can be found in Hansard's transcripts of Minister Bains' speech during the second reading of Bill 23 on June 1, 2021:

> Currently the final determination of whether a worker would retire later than 65 is made at the time of the disability assessment, when the amount of their permanent disability award is determined. This approach is a real challenge, particularly for workers injured at a young age, who may be unable to provide satisfactory evidence that they would retire after age 65.
>
> …

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> This much-needed amendment makes the system fairer for workers. They will be in a better position to provide evidence of their retirement closer to age 65, and it allows for a more equitable determination of when a worker would retire. For some workers, who can show a later retirement date…This can be a significant benefit for the injured worker and their families.

[31] Although the courts have cautioned on placing too great of reliance on Hansard's transcripts in the exercise of finding the intent of the legislature when drafting legislation, courts have recognized that such evidence can play a role in interpreting the background and purpose of the legislative changes[4].

[32] Another source of contextual evidence I find relevant is the report by Paul Petrie in 2018, which was commissioned by the Board. In the report, titled RESTORING THE BALANCE: A Worker-Centred Approach to Workers' Compensation Policy[5], Mr. Petrie considered the duration of permanent disabilities benefits and stated at page 51 that the Board considered amending policy item C6-41.00 "to allow consideration of all relevant evidence regarding the actual impact of the injury on a worker's likely retirement date, including relevant evidence after the date of injury." Mr. Petrie noted that appealing a retirement age decision during the recovery and vocational rehabilitation process, as often happened under the former policy, could impede the worker's recovery and compound frustrations occurring at a critical juncture. From my review, there is nothing in the report that would indicate the necessity to draw a distinction between workers on a basis of whether or not they had reached their deemed retirement age. Minister Bains referenced Mr. Petrie's recommendations as supporting the necessity of the proposed amendments to section 201 of Act.

[33] In addition to Mr. Petrie's report and recommendations, the Amendment Act was informed by two more studies into the workers' compensation system. In March 2019, the government commissioned a report by Janet Patterson to conduct a targeted review of the workers' compensation system in consultation with the public. In her report dated October 30, 2019 titled New Directions: Report of the WCB Review 2019[6], Ms. Patterson noted her belief that the previous Board policy restricted consideration of a worker's circumstances for determining a retirement age to those that existed at the time of injury was inequitable. She noted at page 216:

> One of the issues that had the strongest input to the Review was about termination of permanent functional impairment (PFI) pensions at age 65 or another presumed age of retirement. We heard from multiple workers that their disability does not end at age 65 or retirement, so why should their disability

[4] See *Rizzo & Rizzo Shoes Ltd. (Re),* supra at paragraph 35.
[5] Report located at http://www.worksafebc.com/en/resources/about-us/reports/restoring-balance-worker-centered-approach. Accessed on February 8, 2023.
[6] Report located at https://www.worksafebc.com/en/resources/law-policy/reports/new-directions-report-wcb-review-2019/report. Accessed on February 8, 2023.

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> award on this date? In old age, they still had the pain and limitations and medical needs but no financial support. This issue was raised not only by workers and worker representatives but also by several employers.
>
> …
>
> This policy is inequitable as it significantly disadvantages some workers, depending on when an injury occurs in a life. This may be reasonable for a traditional worker who is injured near retirement age and has a clear concept and/or plan for retirement. However, many workers are injured years before retirement and have not yet planned retirement. It is an impossible bar for a young worker who is highly unlikely to have considered retirement at all. And even if a person at, for instance, age 25 had formed some general intent about when to retire there are so many events, not taking a compensable injury into account, that would change those plans.
>
> It is also clear that injury changes everything. A compensable injury may reduce earnings and contributions to retirement benefits and not at all compensate for pension contributions or other ancillary benefits. Retirement plans get altered due to compensable injuries for other reasons as well. The Review heard from several workers that had intended to retire but were unable to because due to the financial hardship due to the effects of a compensable injury. This included having to sell assets or losing equity in property or running up credit card debt, with interest, during "gaps" in benefits.
>
> Compensation benefits are intended to compensate for the lost earning capacity resulting from the injury. The earning capacity is not fixed at the date of the injury. The Board regularly examines what the worker is able to earn in a suitable and available job many years after the DOI [date of injury].

[34] The February 2020 report titled Consultation Report on Potential Amendments to the British Columbia *Workers Compensation Act*[7] by Jeff Parr for the Minister of Labour, outlined several recommendations as a result of stakeholder feedback from Ms. Patterson's report. Mr. Parr suggested that "[a] review of a worker's likely retirement age as the worker approaches normal retirement age would lead to more accurate, and consequently more fair decisions about the retirement age for injured workers in receipt of permanent disability awards." It appears that the intent of this recommendation was to have the Board issue its retirement age decision on a claim at an age where much of the population is approaching normal retirement (or at least is contemplating retirement), as making the decision at this point would likely lead to a more accurate decision concerning when a worker would retire.

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[7] Report located at https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/labour/jeff_parr_february_2020_report.pdf. Accessed on February 8, 2023.

Workers' Compensation Appeal Tribunal
150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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[35] While the different recommendations proposed by Mr. Parr, Ms. Patterson, and Mr. Petrie were not all accepted by the legislature when amending section 201 of the Act, I find their illustrations of the challenges by workers when the Board made a determination regarding their retirement intentions informative in understanding the purpose of section 201(3) of the Act. The discussions provided in each report highlights the inherent difficulties and inequalities for workers to provide sufficient evidence to demonstrate their retirement intentions. I acknowledge the examples provided to support the amendments to the Act quoted by Minister Bains and Ms. Patterson were referenced to the challenges most prevalent for "young" workers. However, I do not glean a necessity to create a ceiling in policy for those workers who are on the other age of the continuum. I find it significant that the amendment to section 201(3) of the Act only speaks to a commencement date for the Board to make a new determination. I do not read the section to support the creation of an age barrier and cannot interpret the intent of the amendments to redress only a worker who is in their 20s than a worker who is in their 50s and will require time to determine the impacts of their permanent injuries on their future earning capacity.

[36] Additionally, the limit placed on workers by the third criterion finds no obvious support in the general principles of the workers' compensation system, as described by the Supreme Court of Canada in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, 1997 CanLII 316 (SCC). At paragraph 27, Justice Sopinka set out the following:

a) compensation paid to injured workers without regard to fault;

b) injured workers should enjoy security of payment;

c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and

d) compensation to injured workers provided quickly without court proceedings.

[37] I note that these principles have been expanded to include consideration of the financial viability of the workers' compensation system by the courts in *Downs Construction Ltd. v. Workers' Compensation Appeal Tribunal* 2012 BCCA 392 and *Steadman v. Workers' Compensation Appeal Tribunal,* 2021 BCSC 477.

[38] I have concluded that the best rationale for the Board's purpose in creating the third criterion is the reflection of financial viability and ease of decision-making. I acknowledge that the rationale, which can be referred to as limiting the 'floodgate' of workers' seeking a new determination, has some connection to the legislative purposes. However, the creation of such a policy has resulted in no discretion to allow for consideration of individual circumstances and no discretion to allow decision-makers to come to different conclusions regarding retirement date based on the evidence before them, when such discretion is provided by section 36 of the Amendment Act and section 201(3) of the Act.

Workers' Compensation
Appeal Tribunal

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B. The significance of the third criterion under policy item C6-41.00 for workers

[39] The Board's creation of a third criterion in policy C6-41.00 results in an arbitrary distinction not supported by section 36 of the Amendment Act and section 201(3) of the Act for workers who have past their previously deemed retirement age and those who have not. Those that have not, will be provided the ability to present their evidence close in time to the previously deemed retirement age while those who have past such age are not afforded the same opportunity. This is significant as it precludes a subset of workers who have continued to work past their deemed age of retirement and continue to have their employment impacted by their accepted permanent impairments.

[40] Additionally, the third criterion can result in situations where the Board is precluded from making a new determination about a worker's retirement intention, irrespective of the fact that the worker has provided evidence prior to the deemed retirement age. This can occur either due to the timing of the Board's request or the timeliness of the worker providing their evidence about their retirement intention. If the date of a worker's previously determined retirement age passes in the interim, the Board is precluded from re-determining the issue. The process of requesting evidence from a worker, allowing time for a worker to provide their evidence, and weighing such evidence may be lengthy depending on the circumstances.

[41] I note a prior WCAT panel addressed the timing of evidence sought by the Board for a new determination of a worker's retirement intention after the amendments to section 201(3) of the Act and section 36 of the Amendment Act came into force. In *WCAT Decision A2102232*, the panel cancelled the Board's decision noting that it had requested the worker's evidence and rendered its decision not to extend the worker's entitlement to his permanent disability benefit after his previously determined retirement date. I note that the worker's circumstances were distinguishable from the facts before me, in that the worker had ceased working 13 years prior to his previously determined retirement age.

[42] In WCAT decision (*WCAT Decision A2102604*), the panel applied the same analysis as the panel in *WCAT Decision A2102232.* In *WCAT Decision A2102604,* the panel concluded that the Board's decision to not extend the worker's permanent disability benefit past the previously determined retirement age was moot as to the worker had surpassing the previously determined retirement age by the date of the Board's findings. Like the circumstances in *WCAT Decision A2102232*, I note that the worker's evidence before the panel indicated he had not worked for the six years following his workplace injury, though he had recently found employment after turning 65 years of age.

[43] Based on these situations, I find it apparent that precluding a new determination due to the third criterion is of considerable significance to workers, particularly those who have continued to work past their previously determined retirement age, have continued to remain in the workforce, and are still impacted by their permanent condition(s) and associated impairment(s).

Workers' Compensation
Appeal Tribunal
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C. Fettering/extinguishing of discretion

[44] Given the policy's lack of discretion to consider a worker's personal circumstances, I am led to the conclusion that the policy is patently unreasonable due to its fettering or extinguishing of statutory discretion.

[45] The definition of fettering of discretion has been considered by the courts in *Thomatharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198. At page 136, JA Evans cited the following passage from the text titled *Administrative Law in Canada* (Flood and Sossin, 2013):

> Fettering occurs when a guideline or policy, because of its language or practical effect, is in effect mandatory or binding on a decision-maker, or treated as such, thus taking away the discretion that has been granted on him/her.

[46] More recently, a WCAT three-person panel referred an occupational health and safety policy to the WCAT chair in *WCAT Decision A2200622* after finding the policy was patently unreasonable. In doing so, the panel stated:

> The Act is dominant over policy or regulation. The latter are forms of subordinate legislation that take their authority from the Act. Because the Act is dominant, the policy cannot contradict the Act and must always be consistent with it.
>
> …It is well-understood that subordinate legislation such as a binding policy may validly guide a statutory discretion; however, the subordinate legislation cannot extinguish or otherwise improperly fetter that discretion.

[47] I agree with the panel's summary of the deference that is to be given to the dominant legislation and rely on the analysis in coming to my findings.

[48] As set out above, section 201(3) of the Act and section 36 of the Amendment Act authorize the Board to provide a new determination regarding the date on which a worker would retire after reaching age 63 regardless of whether or not a determination had previously been made. Both sections 201(3) of the Act and section 36 of the Amendment Act are discretionary in nature. I find this as both sections state that the Board "may" make such a determination about a worker's retirement intention.

[49] It is my view that the creation of the third criterion has the effect of extinguishing or at least fettering the discretion found in section 201(3) of the Act and section 36 of the Amendment Act given its mandatory wording. Such fettering is particularly important for those workers who have relevant evidence which could be considered by the Board if one were to look at the wording found in the Act and the Amendment Act. Such an outcome is patently unreasonable because a

Workers' Compensation
Appeal Tribunal

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Fax: (604) 664-7898 | wcat.bc.ca

policy, as a form of subordinate legislation, cannot override or contradict the enabling statue without being patently unreasonable.

[50] I have noted the possibility that the Board's limit on who can apply for a new determination of their retirement age in policy may have been intended to address the financial viability of the workers' compensation system. If correct, then I find it necessary to comment the policy could undergo a minor amendment to be consistent with the Act and Amendment Act. It seems to me that that the statutory discretion provided by the legislation could be maintained by the inclusion of the phrase "usually", "generally", or other such language to modify the portion of policy such that it is no longer mandatory and the statutory discretion found in the Act and Amendment Act remains.

Conclusion

[51] I find the third criterion of policy item C6-41.00 is patently unreasonable to the extent that it precludes a subset of workers from being afforded the opportunity of a new determination of their retirement age regardless of their circumstances. I find the policy has the effect of extinguishing or at least fettering the discretion found in section 201(3) of the Act and section 36 of the Amendment Act and such an outcome is patently unreasonable because a policy as a form of subordinate legislation cannot override or contradict the enabling statue without being patently unreasonable.

[52] I consider that policy item C6-41.00 should not be applied to the current appeal and I refer to the chair of the WCAT for further consideration of the policy pursuant to subsection 304(2) of the Act. In accordance with item 8.4.3 of the WCAT *Manual of Rules of Practice and Procedure* (MRPP) the appeal is now suspended. The process for WCAT's actions, notifications, and further submissions is set out at item 10.1 of the MRPP.

Kristina Nelless
Vice Chair

Workers' Compensation
Appeal Tribunal

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