WCAT Decision Number: WCAT-2004-00096-AD
WCAT Decision Date: **January 12, 2004**
Panel: Sonja Hadley, Vice Chair

Introduction

In *Appeal Division Decision #00-1475*, dated September 20, 2000, a panel of the Appeal Division found that it was more likely, than not, that the worker acquired an allergy to pool chemicals, due to the nature of her employment as a lifeguard and swimming instructor. The Appeal Division accepted her claim as of May 12, 1997. Given that decision, the Board subsequently accepted that the worker had allergic contact dermatitis due to exposure to pool chemicals (memo #8).

In a decision dated January 5, 2001, a Workers' Compensation Board (Board) disability awards officer advised the worker that, although she had been left with an underlying allergy to pools, there was no longer a risk of this type of exposure while she was working. Therefore, the disability awards officer was unable to conclude that she had been left with a permanent functional impairment. The officer noted confirmation from the worker's employer that the worker had been offered, and accepted, another position as a "laborer 2" and, in that position, would not be exposed to any pool chemicals.

The worker appealed that decision to the Workers' Compensation Review Board (Review Board). In findings dated October 21, 2002, the Review Board denied the worker's appeal. The Review Board found that, with the training provided by the Board, it was anticipated that the worker would not suffer from an impairment of earning capacity, as contemplated under section 23(1) of the *Workers Compensation Act* (Act). Therefore, the Review Board found that the worker does not suffer from a permanent functional impairment, as contemplated under section 23(1) of the Act, and denied her appeal.

The worker appeals the Review Board findings of October 21, 2002.

Issue(s)

The issue under appeal is whether the worker's allergy to swimming pool chemicals has left her with an allergic reactivity that has resulted in a permanent disability, as contemplated by section 23(1) of the Act.

Jurisdiction

This appeal was filed with the Appeal Division. On March 3, 2003, the Appeal Division and the Review Board were replaced by the Workers' Compensation Appeal Tribunal

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(WCAT). As this appeal had not been considered by an Appeal Division panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002,* section 39.)

Background and Evidence

The worker, then a 24-year-old lifeguard/swimming instructor, developed an allergic reaction to swimming pool chemicals between May 1997 and September 1997. At the time of her application for compensation in September 1997, the worker was earning $18.24 per hour. Subsequent information from the accident employer shows that for the period May 13, 1996 to May 12, 1997, the worker's earnings were $32,178.88. Her 8-week wage rate was determined to be 75 percent of $599.67 per week.

After her claim was accepted as a result of the Appeal Division decision of September 21, 2000, a claims adjudicator sought a medical opinion as to whether the worker would be at significant risk of developing a permanent functional impairment, were she to continue working in a swimming pool environment where she would be exposed to pool chemicals. A response was received from Dr. Davidson, Board occupational physician, under memo #11 dated October 31, 2000. She stated that reactions in individuals, who are allergic to agents, usually increase and worsen with repeated and ongoing exposure, thus leading to permanent functional impairment. She said the worker should avoid whatever is causing her reactions which, in her case, appears to be swimming pools.

As a result of that medical opinion, the claims adjudicator referred the file to a vocational rehabilitation consultant (VRC), under the preventative mandate set out in item #86.30 of the *Rehabilitation Services and Claims Manual* (RSCM). It was noted that the worker had accepted an alternate position with the accident employer in April 1998 and, at the time of the review in November 2000, worked as part of a grounds crew as a laborer 2. The claims adjudicator noted that that work typically ran from April to October of each year, leaving her unemployed for the balance of the year. The information provided by the accident employer was that the worker last worked at the pool on October 1, 1997. The pay for a laborer 2 was $18.16 per hour, and she averaged 40 hours per week (during the parts of the year that she remained employed).

The VRC agreed to sponsor the worker in a number of training programs; (Level III first aid, Class I driver's licence with air, and Justice Institute training) on the basis that such training would assist the worker to become more employable. The VRC considered that this training would make the worker eligible for the employer's on-call list for Streets and By-law officers. She believed that, with the worker's seniority and the above qualifications, she should be able to work on an almost full-time basis, and would not sustain a loss of earnings.

Under memo #16 dated January 5, 2001, the disability awards officer relied on item #30.50 of the RSCM to conclude that there was no permanent functional impairment to consider. As well, she concluded that the worker was not suffering from any loss of earnings, as she was actually earning more in the new position offered to her by her employer than when she was a lifeguard.

Subsequent to that decision, and after completing further training sponsored by the Board, the worker was offered and accepted a full-time permanent job with the accident employer, doing a mixture of road paving, labouring, and driving. Her evidence at the Review Board hearing was that this position paid one pay-grade less than that of a lifeguard.

It is submitted on this appeal that, in this case, there is an actual loss of body function when the worker comes into contact with any of her "trigger chemicals", whether in her work environment or at home. Reference is made to past Review Board and Appeal Division determinations that there does not have to be a loss of earning capacity, in order for there to be an award under section 23(1) of the Act. It is noted that the worker's exposure to various chemicals has affected her life in a significant manner, to the point where she cannot enjoy some recreational activities with her own son. Cleaning her home, or having dental work done, also presents problems. It is stated that if she lost her job with the employer, she would be at a serious disadvantage, compared to others, in her ability to secure suitable long-term employment.

The accident employer has participated in this appeal. It is submitted that the worker does not suffer from a permanent functional impairment that could be considered for an award under section 23(1) and 23(3) of the Act. The employer notes that the vocational rehabilitation assistance provided by the Board resulted in the worker obtaining a full-time year-round position of Equipment Operator 2 in the transportation division. It is stated that the wages of Equipment Operator 2 are equal to the highest level of lifeguard that the employer employs. It is stated that, in the transportation division, there is possibility for advancement and, in all likelihood, the worker could advance to exceed her pre-injury earnings. Further, it is stated that her driver training certification also makes her employable in any transportation-based industry, should she choose to work for another employer. It is submitted that there is no permanent disability resulting from the injury, and no impairment of earning capacity because of the injury following vocational rehabilitation.

In response, it is noted that the worker has had to use three non-prescription medications to keep things under control, as she has remained very sensitive to various chemical agents. It is submitted that this supports the position that the worker has a permanent residual disability. Although it is acknowledged that the worker has received the necessary skills and certification necessary to achieve her pre-injury earning capacity, she continues to have to be placed in jobs where she is not

susceptible to chemical exposure and is very limited in what she can do for the employer. It is stated that the worker's current wage rate, as an Equipment Operator 2, is $20.54 an hour. Although it is possible that the worker could advance to exceed pre-injury earnings, it is stated that such a possibility is not reflective of long-term earning capacity, and that there does not have to be a loss of earning capacity, in order for the worker to be eligible for an award. With respect to employment with another employer, it is stated that it would be speculative to find that the worker would be employable in any transportation-based industry. It is stated that, even if she managed to secure some type of employment within the transportation industry, it would more than likely be non-union and pay considerably less than the accident employer, with limited benefits, if any. Again, it is submitted that the worker would be at a serious disadvantage when compared to others, due to her "accepted permanent disability".

Law and Policy

Section 250(2) of the Act provides that I must make my decision based on the merits and justice of the case but, in doing so, I must apply a policy of the board of directors of the Board that is applicable in this case.

Section 23(1) of the Act provides that, where permanent partial disability results from the injury, the impairment of earning capacity must be estimated from the nature and degree of injury. Section 23(3) of the Act provides for a method of assessment that the Board terms the projected loss of earnings method. The published policy of the Board, concerning the assessment of permanent partial disability awards, is primarily contained in Chapter 6 of the RSCM, Volume 1.

"Disability" is not defined in the Act, and its meaning is not clearly defined in the Board's published policy. Item #103.82 of the RSCM notes:

> Disability is a word that can and does have many meanings, depending on the context in which it is used. In some contexts disability might refer simply to a physical or psychological impairment. In another context disability might refer simply to an economic impairment, for example impaired earning capacity. In most cases disability refers to the interaction between physical or psychological impairment, and external requirements, the most relevant in the workers' compensation context being the physical and mental requirements of a worker's occupation.

Section 6 of the Act provides that compensation is provided only where a worker suffers from an occupational disease due to the nature of his or her employment, and "is thereby disabled from earning full wages at the work at which the worker was employed". Where both of these conditions are met, section 6 provides that compensation is payable under Part 1 of the Act, as if the disease was a personal injury arising out of and in the course of the worker's employment.

Item #30.50 of the RSCM provides, in part, that a worker with contact dermatitis may be granted a disability award, if their symptoms do not entirely resolve and he or she is left with a permanent disability. However, a permanent disability pension is not payable simply because a worker, as a result of his or her work, has developed a susceptibility to react to a certain substance that causes periods of temporary impairment upon exposure to the particular substance, but otherwise causes no complaints. The payment of temporary benefits and permanent disability pensions are subject to the same general principles as set out in policy item #29.20, concerning asthma or a reaction of the respiratory tract to a substance with irritating or inflammatory properties.

Item #29.20 of the RSCM provides, in part, that no award for permanent impairment can be made where a worker's symptoms resolve, and they are left with an underlying allergy or sensitivity. This is so, even if the worker is precluded from a limited number of occupations because of a remaining allergy or sensitivity. A disability award can be granted if the symptoms do not resolve, and the worker is left with a permanent impairment of the respiratory system.

Reasons and Findings

It is submitted, on this appeal, that past Review Board and Appeal Division determinations have said that there does not have to be a loss of earning capacity in order for there to be a pension award. No specific Appeal Division or Review Board decisions are cited. The analysis of previous Appeal Division panels, for example, *Appeal Division Decision #92-0193* (8 W.C.R. 75) and *Appeal Division Decision #93-0661* (10 W.C.R. 87) have found that an actual loss of earnings is not required before a worker may be entitled to an award under section 23(1) of the Act. As noted in *Appeal Division Decision #92-0193*, Justice Tysoe has stated that the functional award is an effort to state in terms of percentages and, on the average, the extent to which the particular disability would impair the worker's ability to earn. An individual worker's actual loss of earnings is not a relevant consideration in making this determination.

As noted in *Appeal Division Decision #2003-0377*, the Board's policies concerning underlying sensitivities, where symptoms may or may not exist, has been an area of considerable controversy over the years. *Appeal Division Decision #00-1770* considered a request for a pension assessment from a worker with bilateral hand contact dermatitis. The panel concluded that deliberate policy choices underlie the Board's policy with respect to work-related allergies or sensitivities. The panel noted that section 6 of the Act provides some support for the principles expressed in policy items #29.20 and #30.50, in that compensation is provided only where a worker suffers from an "occupational disease" due to the nature of his employment *and* "is thereby disabled from earning full wages at the work at which the worker was employed". Where both of these conditions are met, section 6 provides that compensation is payable under Part 1 of the Act, as if the disease was a personal injury arising out of and in the course of the worker's employment. The impugned policies rely on the

distinction between a worker who exhibits symptoms of asthma or contact dermatitis, and one who is simply at risk for those symptoms. The nature of the process by which a disease is determined to be an occupational disease allows that distinction to exist. The "allergy" or "hypersensitivity" underlying the worker's propensity to develop symptoms of asthma or contact dermatitis is not recognized as an occupational disease, either pursuant to Schedule B or by designation pursuant to section 1 of the Act. Thus, the panel in Decision #00-1770 considered there was some legislative support for the policy distinction.

As noted above, I must apply a policy of the board of directors of the Board that is applicable in this case. In this case, policy items #30.50 and #29.20 are applicable to the issue to be decided on this appeal.

In this case, the worker has an underlying sensitivity which will produce an actual loss of body function when she comes into contact with any of the "trigger chemicals", whether in her work environment or at home. However, this loss of body function is not permanent. It only occurs on a temporary basis upon such exposure. Policy item #30.50 of the RSCM provides that a permanent disability pension is not payable in such circumstances. Dr. Davison has recognized that if the worker had repeated and ongoing exposure, this may lead to permanent functional impairment. On that basis, she recommended the worker avoid swimming pools. However, after receiving Board support to undertake further training, the worker obtained alternate employment with the accident employer where she can avoid swimming pools and has not suffered a loss of earnings.

Although an actual loss of earnings is not required before a worker may be entitled to an award under section 23(1) of the Act, applying item #30.50 of the RSCM to the facts of this case, I find that the worker's underlying allergic reactivity has not resulted in a permanent disability.

Conclusion

I deny the worker's appeal on the issue of whether her allergy to swimming pool chemicals has left her with an allergic reactivity that has resulted in a permanent disability, as contemplated by section 23(1) of the Act. I confirm the Review Board findings of October 22, 2002.

Sonja Hadley
Vice Chair

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