NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2005-01943 **Panel**: James Sheppard **Decision Date**: April 18, 2005

WCAT Jurisdiction over Hearing Loss Permanent Disability Awards – Rating Schedules – Permanent Disability Evaluation Schedule – Section 7(1) of the Workers Compensation Act (Act) – Section 23(1) and 23(2) of the Act – Section 239(2)(c) of the Act

Schedule D of the *Workers Compensation Act* (Act), entitled "Non-Traumatic Hearing Loss", is not a "rating schedule" compiled under section 23(2) of the Act. Therefore, section 239(2)(c) of the Act does not limit WCAT's jurisdiction to hear appeals from decisions relating to occupational noise-induced hearing loss permanent disability awards where Schedule D of the Act is used to determine the worker's award.

In this case, the Workers' Compensation Board (Board) awarded a worker a 1.7% occupational noise-induced hearing loss permanent disability award under sections 7(1) and 23(1), and Schedule D of the Act. The Review Division confirmed the Board decision. The worker appealed the permanent disability award percentage to WCAT.

The threshold issue on appeal was whether WCAT had the jurisdiction to hear the appeal, given that the range for the award was not greater than 5%. Section 239(2)(c) of the Act states that a decision applying rating schedules compiled under section 23(2) of the Act where the specified percentage of impairment has no range or has a range that does not exceed 5% may not be appealed to WCAT.

The WCAT panel found that Schedule D is not a "rating schedule" compiled under section 23(2) of the Act. The panel read the provisions of section 7 of the Act and the establishment of Schedule D through legislation in 1975 as an indication that Schedule D is not a rating schedule that was compiled under the Board's authority set out in section 23(2). Although Schedule D appears in the Permanent Disability Evaluation Schedule (PDES) (published as Appendix 4 in both volumes of the *Rehabilitation Services and Claims Manual)* there is a reference to section 7 in the header to the Schedule in the PDES. Section 7 provides for the application of Schedule D to occupational noise-induced hearing loss claims.

Since Schedule D is not a "rating schedule" compiled under section 23(2) of the Act, the limit on WCAT's jurisdiction in section 239(2)(c) does not apply. On the merits, the WCAT panel confirmed the Board decision.

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Panel: James Sheppard, Vice Chair

Introduction

A November 6, 2003 decision of the Workers' Compensation Board (Board) granted the worker under section 7 of the *Workers Compensation Act* (Act) a 1.7% total disability pension. The worker was granted a pension of 1.7% for occupational noise-induced hearing loss that affects both his ears. The worker was paid this pension award in a lump sum and a retirement benefit equal to 5% of his disability award.

The worker requested a review of the November 6, 2003 decision by the Board's Review Division. A review officer in *Review Division Decision #13087* dated June 25, 2004 confirmed the November 6, 2003 decision.

The worker has appealed the June 25, 2004 Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT).

Issue(s)

1. Does section 239(2)(c) of the Act preclude me from considering the worker's appeal of the review officer's June 25, 2004 decision concerning the worker's 1.7% occupational noise-induced hearing loss pension award?

2. If I have the jurisdiction to address the worker's 1.7% pension award was the percentage awarded to the worker properly determined? Is the worker entitled to a greater pension award?

3. Do I have the jurisdiction to consider whether there has been a further deterioration of the worker's occupational noise-induced hearing loss that affects both ears based upon an October 29, 2004 audiology report submitted to WCAT by the worker?

Jurisdiction

On appeal WCAT can confirm, vary or cancel an appealed decision (section 253(1) of the Act). WCAT may inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal (sections

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250 and 254 of the Act). WCAT must make its decision based on merits and justice of the case, but in so doing, must apply policy of the Board's board of directors that is applicable in the case.

Procedural Matters

The worker's representative has requested on the notice of appeal a read and review. She was provided with an update of disclosure by the Board of the worker's 2003 electronic claim file up to November 12, 2004.

An audiology report dated October 29, 2004 was faxed to and received by WCAT on November 24, 2004. A copy of this report was faxed to the worker's representative by WCAT.

The worker's representative, in a December 7, 2004 letter, indicated that we should proceed on the basis of the information contained on the claim file.

After reviewing this matter I instructed the WCAT appeal coordination officer to invite submissions from the worker's representative on issues #1 and #3 as noted above. The worker's representative provided a March 30, 2005 written submission.

I agree with the worker's representative that this appeal can be addressed by read and review and without the need for an oral hearing.

Reasons and Decision

Issue 1: Jurisdiction under section 239(2)(c) of the Act

Section 239(2)(c) of the Act states that a decision respecting the application of section 23(1) of rating schedules compiled under section 23(2) of the Act where the specified percentage of impairment has no range or has a range that does not exceed 5% may not be appealed to WCAT.

The worker's representative, in her March 30, 2005 written submission, states after her review of the Act and Board policy she conceded that the panel does not have jurisdiction over the appeal as the specified percentages of impairment outlined in Schedule D did not provide a range greater than 5%.

After examining the wording of section 239(2)(c) of the Act the question arises as to whether Schedule D is a rating schedule that has been compiled under section 23(2) of the Act.

Section 7(1) of the Act states:

> Where a worker suffers loss of hearing of non-traumatic origin, but arising out of and in the course of employment under this Part, this is a greater loss than the minimum set out in Schedule D, the worker is entitled to compensation under this Part.

Section 7(3) of the Act states:

> Where the loss of hearing does not amount to total deafness, and there is no loss of earnings resulting from the loss of hearing, compensation must be calculated as for a lesser percentage of total disability, and, unless otherwise ordered by the Board, must be based on the percentages set out in Schedule D.

Section 23(2) of the Act states:

> The Board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.

Schedule B of the Act lists "neurosensory hearing loss" as an occupational disease. Item #31.00 of the *Rehabilitation Services and Claims Manual, Volume I and II* (RSCM I and RSCM II) both indicated that where hearing loss has developed gradually over time as a result of exposure to occupational noise, it is treated as an occupational disease. However, the provisions of section 6 do not apply unless the worker ceased to be exposed to causes of hearing loss prior to September 1, 1975. In all other cases Section 7 of the Act applies. The facts in this case indicate that section 7 of the Act would apply and not section 6.

Item #31.40 of the RSCM I and II both state that workers who develop non-traumatic noise-induced hearing loss are assessed for a permanent disability award under section 23 of the Act. Schedule D appears in item #31.40 of both the RSCM I and RSCM II with reference to the provisions of section 7(3) of the Act. Schedule D also appears in the permanent disability evaluation schedule (PDES) published as Appendix 4 in both the RSCM I and RSCM II. Item #39.10 of the RSCM I and II both state that section 23(1) awards may be made with reference to the PDES. The PDES is referred to as a rating schedule of percentage of disability for specific injuries or mutilations. There is a reference in the header for Schedule D to section 7 as it appears in the PDES in both the RSCM I and RSCM II.

The part of Schedule D which relates to hearing loss of 68 decibels (dBA) or more in the ear least affected was brought into force on September 1, 1975 (*Decision No. 137* in Volume 2 of the *Workers' Compensation Reporter Series* (WCR) at page 143). The

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remainder of Schedule D was brought into force on December 1, 1975 (*Decision No. 164* 2 WCR 230). I also note that section 7(3.1) of the Act gives the Board the authority to make regulations to amend Schedule D in respect of the ranges of hearing loss, the percentage of disability and the methods or frequencies to be used to measure hearing loss.

The word "compiled" as it appears in section 23(2) of the Act is not defined by the Act. The word "compiled" is not defined by the *Interpretation Act* (RSBC 1996, chapter 238). *The Concise Oxford Dictionary* (Tenth Edition) defines the word "compiled" to mean produce (a collection) by assembling material from other sources.

I read the provisions of section 7 of the Act and the establishment through legislation of Schedule D in 1975 as an indication that Schedule D is not a rating schedule that was compiled under the Board's authority set out in section 23(2). Although Schedule D appears in the PDES there is reference in the header to section 7 which provides for the application of Schedule D to occupational noise-induced hearing loss claims.

I find that section 239(2)(c) of the Act does not preclude me from hearing the worker's appeal of the June 25, 2004 Review Division decision concerning the worker's 1.7% occupational noise-induced hearing loss pension. The schedule (Schedule D) used to determine the worker's hearing loss pension entitlement was not a rating schedule compiled under section 23(2) of the Act.

Issue 2: Occupational Noise-Induced Hearing Loss Pension Award

I agree with the review officer that the law as it read on and after June 30, 2002 applies in this case. Item #31.80 (Commencement of Permanent Disability Periodic Payments Under Sections 6 and 7) states that where compensation is being awarded under section 7 but not in respect of any loss of earnings or impairment of earning capacity, then, subject to section 55, permanent disability awards shall be calculated to commence as of the earlier of either the date of application or the date of first medical evidence that is sufficiently valid and reliable for the Board to establish a compensable degree of hearing loss under Schedule D of the Act. Where the date of application is used as the commencement date, subsequent testing must support a compensable degree of hearing loss as of the date of application.

The Board made the effective date (disablement date) of the worker's pension May 14, 2003 which is the date of the worker's signed Hearing Loss and Employment Questionnaire. The worker subsequently underwent testing on September 29, 2003. The September 29, 2003 audiogram recorded a right ear 31.67 dBA pure tone average hearing loss and a left ear 33.3 dBA pure tone average hearing loss. The Board's occupational audiologist, in her September 29, 2003 claim log entry recommended taking the September 29, 2003 audiogram as an indication of the extent of the worker's occupational noise-induced hearing loss within British Columbia. She did indicate that any future deterioration in hearing would have a low probability of resulting from

continuing occupational noise exposure. It would have a high probability of being due to a combination of presbycusis and middle ear pathology.

The Board calculated the worker's pension award with reference to Schedule D. The review officer applied Schedule D and found no information or evidence whatsoever to support a position that the worker was entitled to a greater than 1.7% of total disability award. I agree with the review officer's decision based upon the reasons he has given in his June 25, 2004 decision and my review of the evidence as outlined above.

Issue 3: Further Deterioration in the Worker's Hearing Loss

As previously mentioned WCAT received a further audiogram taken on October 29, 2004. The issue is whether I have the authority to determine in this appeal whether the worker has suffered a further deterioration in his hearing loss in both ears because of his exposure to occupational noise.

The worker's representative, in her March 30, 2005 written submission, states that I do not have the jurisdiction to address this issue in this appeal. I would agree that I do not have the authority to determine this issue in this appeal. This is an issue the worker will have to address with the Board.

Conclusion

The worker's appeal is denied. I confirm the June 25, 2004 Review Division decision.

I find that section 239(2)(c) of the Act does not preclude me from considering the worker's appeal of the June 25, 2004 Review Division decision. I find that Schedule D is not a rating schedule compiled under section 23(2) of the Act.

I find that the Board properly determined the worker's pension entitlement for his occupational noise-induced hearing loss at 1.7% of total disability.

I find that I do not have the authority in this appeal to address the issue of whether the worker has suffered a further deterioration in hearing loss in both ears as a result of his exposure to occupational noise. The worker will have to address this issue with the Board.

No expenses have been requested and none are ordered.

James Sheppard
Vice Chair

JS/pm