

**Noteworthy Decision Summary**

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**Decision:** WCAT-2005-04371 **Panel:** Anthony Stevens **Decision Date:** August 22, 2005

***Permanent Disability Award – Occupational Noise-induced Hearing Loss – Effective Date of Award – Applicability of Former or Current Provisions of the Workers Compensation Act (Act) - Average Earnings Determination – Section 7 of the Act***

For a hearing loss claim, entitlement to a permanent disability award only arises when the hearing loss is of a pensionable degree under Schedule D of the *Workers Compensation Act* (Act), even if tests showed some hearing loss before that point. If the hearing loss was not of a pensionable degree before June 30, 2002, the current provisions of the Act apply. If there are no earnings at the time of the injury, it is appropriate to use the worker's earnings in the one year prior to her cessation from employment.

In this case, the worker, who was employed in a sawmill over a 30 year period, completed her application for compensation to the Workers' Compensation Board (Board) on December 18, 2003 for hearing loss that was due to her employment in a noisy environment. The Board accepted that her employment with the employer involved exposure to hazardous levels of occupational noise. In May 2002, an audiogram measured hearing loss in both the worker's ears, but short of the level that is compensable. In April 2004, an audiogram measured compensable hearing loss in her right ear. The Board accepted her claim for occupational noise-induced hearing loss, and provided the worker with a 0.3% functional permanent disability award, effective December 18, 2003, calculated on the basis of her earnings in the one year prior to her cessation from employment. The award was confirmed by the Review Division.

The panel held that December 18, 2003, the date at which the worker completed her application, was appropriately fixed as the effective date of the award because there were no tests showing a pensionable hearing loss before that date. Therefore the current provisions of the Act apply. The Board appropriately used the worker's earnings in the one year prior to her cessation from employment with the employer. The panel confirmed the award.

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## Introduction

The worker appeals the December 15, 2004 decision (*Review Decision #19799*) of the Review Division of the Workers' Compensation Board (Board) that was undertaken in relation to her 2003 claim, which was established by the Board for occupational noise-induced hearing loss. The review officer confirmed the Board's previous decision of May 28, 2004, in which a hearing claims officer provided the worker with a 0.3% functional pension, effective December 18, 2003 and calculated with regard to \$2,617.57 net monthly average earnings. In confirming that decision the review officer concluded as follows: that it was the current rather than former provisions that applied to the worker's claim, the effective date of the pension was in accord with relevant Board policy, and the net earnings figure used by the Board was appropriate.

The worker requested an oral hearing; however, that request was declined on a preliminary basis during the registration of her appeal. I have considered that request further, but agree that the worker's appeal can be properly considered without an oral hearing, given that there is no apparent significant factual dispute or issue of credibility involved. As such, I have decided this appeal following a review of the worker's claim file and with regard to the submissions provided by her representative. The respondent employer did not provide submissions in relation to the worker's appeal, although it had been invited to do so.

## Issue(s)

There are four issues in this appeal. They are:

1. Whether consideration of the worker's pension entitlement should be with regard to the former or the current provisions.
2. Whether the effective date of the worker's pension was correct.
3. Whether the worker is entitled to a pension in excess of the 0.3% that has been provided to her by the Board.
4. Whether the average earnings used to calculate the worker's pension were appropriate.

## **Jurisdiction**

This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the *Workers Compensation Act* (Act).

Under section 250 of the Act, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. It must make its decision based on the merits and justice of the case, but in so doing it must apply policies of the board of directors of the Board that apply to the case, except in circumstances as outlined in section 251 of the Act. Section 254 of the Act provides that 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.

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

## **Background and Evidence**

The worker completed her application to the Board on December 18, 2003 to contend that she had hearing loss that was due to her previous employment.

The employer provided information to the Board to indicate that the worker had been a sawmill labourer from July 1973 until the mill closed down in July 2003. The worker advised the Board that she had worked at the mill from 1966, until it was purchased by the employer. The employer noted that the worker had been involved in a number of production-related jobs, although she remained employed as a paper wrapper from 1978 until the mill operations wound down.

Other information on file established that the worker's last employment at the mill was on August 2, 2002. She remained in receipt of disability benefits for an unrelated illness from that date, through to the mill closure and her ultimate retirement.

The Board completed a noise exposure record that had regard to the worker's employment history, and the Board's noise database. That database is information compiled from noise measurements in particular employment settings throughout the province, and as such it represents average levels of occupational noise that can be expected in an individual case. In terms of the worker's claim specifically, the Board accepted that her employment with the employer involved exposure to hazardous levels of occupational noise. In the result, the Board issued a decision on March 2, 2004 to advise the worker that her claim had been accepted for occupational noise-induced hearing loss. In a further decision that was issued on April 22, 2004 the Board advised the worker that her neurosensory hearing loss was consistent with her history of occupational noise exposure.

On file are the results of industrial audiograms that the worker participated in between December 1979 and May 2002. The May 2002 results established that the worker had 23.3 decibels of hearing loss in her left ear and 26.7 decibels of hearing loss in her right ear, measured by pure tone averages at 500, 1000 and 2000 Hertzian waves.

The worker's hearing was also assessed at the Board's Audiology Unit on April 5, 2004. The audiogram on that date indicated that she had 21.7 decibels of hearing loss on the left and 28.3 decibels of hearing loss on the right.

In considering the worker's potential entitlement to a permanent disability award, the Board had regard to the results of the April 5, 2004 audiogram. The hearing claims officer ultimately issued the May 28, 2004 decision to provide the worker with a 0.3% functional disability award, effective the December 18, 2003 date of her application to the Board. Moreover, that award was calculated with regard to the \$2,617.57 net monthly earnings figure that was derived from the \$46,903.14 in employment income that the worker earned in the one year prior to her last employment on August 2, 2002.

In the worker's request for review of the April 5, 2004 decision to the Board's Review Division, her representative provided argument on the following:

- The first industrial audiogram of the worker was in 1978, although she had been exposed to excessive levels of occupational noise since 1966. The worker had exposure to occupational noise prior to September 1, 1975, such that section 7(5) of the Act comes into play. Moreover, to take the 1978 results as a baseline figure would not acknowledge the hearing loss she likely suffered prior to that time, and result in a lower hearing loss figure subsequently than would otherwise be the case.
- The worker's average earnings in the last five years of her employment ought to be reviewed.
- The worker's disability award should be considered with regard to the former rather than the current provisions, given that she had hearing loss in May 2002. In turn, her average earnings should be based on 75% of gross, rather than 90% of net.

In the end, the review officer confirmed the April 5, 2004 decision of the Board, leading to the present appeal to WCAT.

In the appeal before me, the worker's representative referred to her previous submissions.

## Findings and Reasons

I accept that the worker had hearing loss that pre-dated the December 18, 2003 effective date of her award. I also accept that the worker had noise exposure prior to September 1, 1975. However, neither of those conclusions assists the worker in her present appeal, as consideration of appropriate law and policy with respect to claims for occupational noise-induced hearing loss support the decision of the Board.

Section 7(5) of the Act, which has been referred to by the worker's representative, provides (in both the former and current provisions) that compensation under section 7 of the Act is not payable in respect to a period prior to September 1, 1975; but future compensation under this section is payable in respect of loss of hearing sustained by exposure to causes of hearing loss either before or after that date, unless the exposure to causes of hearing loss terminated prior to that date. Section 7(5) of the Act offers no assistance in the worker's claim for a disability award prior to the December 18, 2003 date used by the Board. It instead reflects a change in the Act that took effect September 1, 1975, from which there was a transition in considering occupational noise-induced hearing loss claims as an occupational disease under section 6 of the Act to a dedicated provision for such claims under section 7 of the Act. Considering that the worker continued to be exposed to hazardous occupational noise subsequent to September 1, 1975, it follows that her claim was appropriately considered under section 7 of the Act.

Turning to the matter of whether it is the former or the current provisions of the Act that apply to the worker's claim, item #31.80 of the Board's *Rehabilitation Services and Claims Manual*, in both Volume I and Volume II, provides:

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. In no case will award [I note Volume I uses 'pension' here rather than 'award'] benefits under section 7(3) commence prior to September 1, 1975.

In order to consider that matter further, it is relevant to note that Schedule D of the Act provides for a sliding scale of entitlement for occupational noise-induced hearing loss, with increasing awards based on increased hearing loss. However, Schedule D establishes that there is a threshold that must be met, with entitlement to a disability award only arising for occupational noise-induced hearing loss that is measured as

being 28 decibels or greater. Moreover, that measurement must be based on pure tone averages at 500, 1000 and 2000 Hertzian waves.

As such, although it is established that the worker had hearing loss prior to December 18, 2003, the hearing loss that she suffered from was below the 28 decibel threshold from which pension entitlement would commence. For example, in May 2002 the worker's hearing loss was 23.3 decibels in her left ear and 26.7 decibels in her right ear, with both of those figures being below the 28 decibel threshold for pension entitlement. The first evidence of a compensable degree of hearing loss was through the April 5, 2004 audiogram. However, considering that the worker's application was completed on December 18, 2003, and that date was earlier than the April 5, 2004 audiogram which established a pensionable degree of hearing loss, the commencement date of the worker's pension entitlement would be December 18, 2003.

Moreover, considering that the first indication of permanent disability existed subsequent to the June 30, 2002 transition date, it is the current provisions that apply (see the *Workers Compensation Amendment Act, 2002*). I accept that for a hearing loss claim under section 7 of the Act it is appropriate to conclude that the first indication of permanent disability is when the hearing loss is of a pensionable degree under Schedule D of the Act.

The April 5, 2004 audiogram results establish that the worker only has a pensionable degree of hearing loss in her right ear, with the measured hearing loss in her left ear being below the 28 decibel threshold for pension entitlement. I confirm, given those test results, that the worker's pension entitlement for her occupational noise-induced hearing loss is 0.3% of total, in accordance with Schedule D of the Act.

In terms of the average earnings used to calculate the worker's pension award, I note that the worker quite obviously did not have employment income at the December 18, 2003 effective date of her award. The worker had last worked for the employer on August 2, 2002. Section 33.7 of the Act provides:

If a worker had no earnings at the time of the injury, the Board must determine the amount of average earnings of a worker under section 33.1 from the date of injury in a manner that the Board considers appropriate.

The Board used the worker's earnings in the one year prior to her cessation of employment with the employer. Moreover, the review officer noted that use of the other employment income figures that were submitted in the earlier review would result in a rate below that which had been established by the Board. I conclude that the average earnings figure used by the Board for pension calculation purposes was appropriate, and that the rate of compensation was determined in accordance with the appropriate law and policy.

In summary, I conclude that it is the current provisions that apply, and that the worker is entitled to a 0.3% functional pension in accordance with Schedule D of the Act. I also conclude that the worker's pension award was appropriately made effective December 18, 2003, and was appropriately calculated with regard to the net monthly earnings figure of \$2,617.57 that had been calculated by the Board. I deny the worker's appeal, and confirm the December 15, 2004 decision of the Board's Review Division. No appeal expenses were requested, and no potential appeal expenses are apparent on which to consider potential reimbursement.

**Conclusion**

I confirm the December 15, 2004 decision of the Board's Review Division.

Anthony F. Stevens  
Vice Chair

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