Noteworthy Decision Summary

Decision: WCAT-2007-00769 **Panel**: Gail Starr **Decision Date:** March 5, 2007

Duration of Permanent Partial Disability Payments – Section 23.1 of the Workers Compensation Act – Item #41.00 of the Rehabilitation Services and Claims Manual, Volume II – Retirement after Age 65

This decision is noteworthy for its discussion of the relevant information used in determining whether a worker would have worked past age 65. Section 23.1 of the *Workers Compensation Act* (Act) provides the Workers' Compensation Board, operating as WorkSafeBC (Board), with the authority to extend permanent disability payments beyond age 65 where the Board is satisfied that the worker would have retired after this age if he had not been injured.

The worker's claim was accepted for chronic pain and a permanent aggravation of pre-existing knee arthritis. He was 65 years of age at the time of his injury. He was provided with a permanent partial disability award. He disputed the length of his permanent partial disability award which was limited to two years after the date of injury.

Policy Item #41.00 (Duration of Permanent Disability Periodic Payments) of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) states that section 23.1 of the Act recognizes that 65 is the standard retirement age for workers. Section 23.1 permits the Board to continue to pay pension benefits where it is satisfied that the worker would have retired after the age of 65 if he had not been injured. The Board requires evidence that is verified by an independent source which confirms the worker's subjective statement regarding his intent to work past age 65. Evidence is also required so that the worker's new retirement date can be established for purposes of concluding permanent disability award payments. If the worker's statement is not independently verifiable, the Board officer will make a determination based on the evidence available, including information provided by the worker.

The panel denied the worker's appeal. Item #41.00 of the RSCM II used the terms retirement and retire as if they mean only one thing. The word and its usage in Canada today refers to a whole range of possible reductions in employment activity. The wording of the policy was not of much help in dealing with various possibilities in that range. However, the worker had applied for Canada Pension retirement benefits and signed an agreement to accept a retirement package with the employer prior to the date of injury. These facts strongly suggested an intention to retire. There was an abundance of evidence concerning what the worker now said he intended. However, the information from the employer was all to the effect that he had accepted a retirement package, and they had no evidence of his intention to work for them after retirement or of the employer's intention of hiring him back after he did retire. The worker had put in place all that was within his power to put in place to secure a retirement income from his various pension plans. Considering all the evidence, the panel found find the worker must be considered retired under the applicable law and policy.

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Introduction

This is the worker's appeal from a June 8, 2006 decision of the Review Division of the Workers' Compensation Board. (The Workers' Compensation Board does business as WorkSafeBC, but it will be referred to in this decision as the Board.) In its *Review Decision #R0060574*, the Review Division confirmed the details of the worker's pension as awarded in a November 23, 2005 letter from a Board disability awards officer. The worker challenged the time period over which the pension awarded to him was to be paid; he sought payment of the pension for more than two years on the basis that he wants to return to work rather than to retire.

The worker brings this further appeal to the Workers' Compensation Appeal Tribunal (WCAT), and the matter has been assigned to me to be dealt with under the authority conferred on WCAT panels by section 239(1) of the *Workers Compensation Act* (Act). Among other provisions of the Act relevant to my authority and jurisdiction, the following should be noted. Under section 254, I am authorized to inquire into, hear and determine all questions of fact, law and discretion which may arise or need to be determined in the appeal. My decision is required to be made on the merits and justice of the case. While not bound by legal precedent, I must apply such policy of the Board's board of directors as is applicable to the case, except in circumstances described in section 251.

An oral hearing was requested in this appeal. That request was granted and the oral hearing was held January 15, 2007. The worker attended to give evidence. He was accompanied by his representative, who made submissions on his behalf. The employer was also represented, and submissions were offered on behalf of the employer as well. I have also reviewed, as requested, the written submissions provided to the Review Division in the appeal below.

Issue(s)

The sole issue contested in this appeal is whether the worker's pension should be paid for a longer period than was set out in the November 23, 2005 letter and confirmed by the Review Division.

Although the disability awards officer had not done so in the original decision, the Review Division considered the worker's eligibility for assessment for a loss of earnings, and found in the negative. I think it is uncontroversial that the Review Division had the

jurisdiction to make that decision. As that issue is not challenged here, it is within my discretion (under WCAT's *Manual of Rules of Practice and Procedure* (MRPP) item #14.30) whether to address it or not. In this case, I find no need to address it, especially as the worker's representative requests that I not do so, on the grounds the matter may evolve more appropriately after other appeals in process are resolved.

Background and Evidence

When he suffered a fall on December 23, 2003, this worker, a mechanic, injured his left knee. His claim was accepted for compensation. It was ultimately accepted that he was left with permanent disability in relation to a permanent aggravation of a pre-existing knee arthritis. It was also accepted that he suffered from chronic pain. As a result of the most recent assessment of his residual disability, the worker now receives a pension based on a functional award recognizing 12.30% of total disability. That award includes 2.5% of total in relation to chronic pain and 2.05% of total recognizing an age adaptability factor. The letter which described this pension (November 23, 2005) underlies the present appeal. The only aspect of that letter which the worker still contests in this appeal is the decision that his functional award will, under section 23.1 of the Act, be paid only until two years from his injury date, as he was 65 years of age at the time of the injury.

It will be convenient to reproduce here the principal policy guideline concerning retirement in the context of terminating pensions for compensable injuries. Both the statutory provision in section 23.1 of the Act and the policy guideline are all contained in *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), item #41.00. This would be a useful place to reproduce that policy guideline in full:

> **#41.00 DURATION OF PERMANENT DISABILITY PERIODIC PAYMENTS**
>
> Section 23.1 of the *Act* provides:
>
> Compensation payable under section 22(1), 23(1) or (3), 29(1) or 30(1) may be paid to a worker, only
>
> (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

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(b) if the worker is 63 years of age or older on the date of injury, until the later of the following:

(i) 2 years after the date of 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.

Section 23.1 of the *Act* recognizes age 65 as the standard retirement age for workers. Confirmation of age 65 as the standard retirement age may also be found in the contractual terms of some employer sponsored pension plans and collective agreements. As well, Statistics Canada information lends weight to the general view that, on average, workers retire at or before 65 years of age. (9)

Section 23.1 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 standard of proof under the *Act* is on a balance of probabilities as described in policy item #97.00, Evidence. However, as age 65 is considered to be the standard retirement age, the Board requires evidence that is verified by an independent source to confirm the worker's subjective statement regarding his or her intent to work past age 65. Evidence is also required so that a Board officer can establish the worker's new retirement date for the purposes of concluding permanent disability award payments. If the worker's statement is not independently verifiable, the Board officer will make a determination based on the evidence available, including information provided by the worker.

Examples of the kinds of independent verifiable evidence that may support a worker's statement that he or she intended to work past age 65, and to establish the date of retirement, include the following:

- names of the employer or employers the worker intended to work for after age 65, a description of the type of employment the worker was going to perform, and the expected duration of 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

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> - 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 about whether the worker was covered under a pension plan provided by the employer, and the terms of that plan
>
> This is not a conclusive list of the types of evidence that may be considered. A Board officer 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.
>
> Where the Board is satisfied that a worker would have continued to work past age 65 if the injury had not occurred, permanent disability award periodic payments may continue past that age until the date a Board officer has established as the worker's retirement date. At the worker's age of retirement, as determined by a Board officer, periodic payments will conclude even if the worker's permanent disability remains.

The policy guideline goes on to describe what will happen on the death of a pensioner; that part is irrelevant to this appeal and so will be omitted.

I note here that the worker has been assessed twice for permanent partial disability under this claim. The first occasion was in December 2004, prior to the acceptance of a permanent aggravation under the claim. In the referral to Disability Awards at that time, it was noted that the worker was then already over 65 years of age and that he had retired from the injury employer, but that he did plan to work as a handyman. No further investigation was undertaken on this issue when the functional award of 2.5% was first made. In the November 2005 review of the worker's permanent disability, after acceptance of the permanent aggravation aspect, somewhat fuller information was noted; the employer had now advised the Board that the worker's formal retirement date was February 1, 2004. The review went on to say that this would mean section 23.1 of the Act and the RSCM II item #41.00 applied. The file does not reveal that the worker was himself questioned at this time by a Board officer concerning his retirement or his intentions regarding any further working career.

A review of the claim log shows the worker's representative called the Board on October 25, 2005 and again on November 22, 2005 and November 28, 2005 with questions generally concerning retirement intentions. The worker himself called again January 9, 2006. There are indications the case manager dealt with these issues in relation to wage loss on July 27, 2004 and October 4, 2004, although no clear decision was recorded on any of these occasions so far as Disability Awards is concerned. (No issue concerning wage loss benefits arises in the present appeal.)

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Following further representations on the worker's behalf, claim log entries for December 14 and 15, 2005 show a number of attempts to obtain further details from the employer concerning the worker's status. Ultimately, on January 12, 2006, the case manager requested from the employer a copy of the worker's signed statement to accept retirement. Several claim log entries in early 2006 show the worker and his representative maintaining that the reason he was not working was that he was disabled in relation to the January 2006 surgery to his knee, not because he had no intention to return to work, even though officially retired. A December 23, 2003 letter from the employer to the worker, together with a copy of a November 27, 2003 document describing his retiring allowance, has been added to the file. These indicate the worker's last day of active employment would be December 31, 2003. The document was signed by the worker December 12, 2003.

There is a further March 7, 2006 letter from the case manager to the worker which outlined a decision to deny wage loss benefits following the worker's January 16, 2006 surgery on the basis that he was retired and not working at that time, and therefore not sustaining any wage loss.

At the oral hearing, the worker testified that he had been a millwright since 1967, a journeyman since 1972; he had been with the injury employer for about four years. It is his evidence that jobs were being eliminated in the plant where he worked. He accepted the early retirement package, as the alternative would have been to be laid off due to his low seniority. He applied for Canada Pension retirement benefits prior to accepting the retirement package from the injury employer. At the time of his injury, December 23, 2003, he was working on the last job to which he would be assigned under his employment.

It is the worker's evidence that he did not intend to withdraw from the workforce. For a time after accepting the retirement package, he was unable to return to work because of his knee condition. There was also a period during which he was disabled by a low back condition. He intended to work, and this was the reason he pursued so vigorously a medical solution for his knee condition. It took some time for him to convince his orthopaedic surgeon to request Board approval for further surgery. Ultimately, however, this was undertaken, with Board approval, on January 16, 2006. Unlike the previous surgery, this one helped him very much, and he was then ready to return to work. He did this, with his doctor's approval, in June 2006.

The worker further testified that he has always planned to continue working. He is emphatic (and I found him quite believable) that he enjoys working. He also states that he needs the income. There is a high demand for his trade, and he has been working since being cleared to return to work. He has not accepted a full-time position, as he hopes to be rehired by the injury employer on a contract basis. He would prefer to work for that employer, as he finds the work particularly interesting there. He is on call there and elsewhere and he maintains that he can work "pretty much whenever I want." He maintains that the employer commonly rehires workers after downsizing such as

resulted in his retirement package. To this point, still hopeful of obtaining work with the injury employer, he has been accepting only casual work with other employers. He has worked about 36 days since resuming work in June 2006. He spent some time, while relatives were visiting, not pursuing work opportunities. He maintains he is "still on the books" with the injury employer. His union indicates that his expectation of being dispatched by the union is reasonable; he is, in fact, at the top of the list and will be the next machinist dispatched.

The worker maintains that he never intends to retire. He restates that he enjoys working and teaching younger people. He states his father worked to age 75, and he perceives a similar future for himself.

In submissions on the worker's behalf, his representative argues that the worker likes to work, wants to work and needs to work. Otherwise, he does not have enough income to live on. It is submitted he has been clear in his evidence throughout that he wanted to continue working. It is pointed out that he pursued the second surgery on his knee for the reason that he wanted to get back to work and was unable to do a lot of the climbing and walking, standing and squatting required of him as a millwright or machinist. His choice to accept short-term work while waiting for something more substantial from the injury employer is said to be reasonable.

It is argued on behalf of the employer that there is little conclusive evidence one way or the other as to the worker's intentions. However, the employer has not supported the worker's position. It was stated in submissions to the Review Division that the employer did not have any evidence that supported the worker's contention he was going to continue to work. His action in applying for his pension entitlement with the injury employer indicates a desire to retire from that employer. The provisions of law and policy would require this worker's award to be calculated to two years after the date of injury.

In rebuttal, the worker's representative briefly restated the arguments presented. She conceded it is difficult, under the applicable policy, to pick a date on which this worker might reasonably be expected to retire, but she stated a deeming of age 75, as that date would be acceptable.

Decision and Reasons

With some regret, I have come to the conclusion that the worker's appeal cannot be allowed.

It will be convenient to recap some of the chronology of documented events. Although the exact date of his application for Canada Pension benefits is not part of the record and I do not recall it being stated at the oral hearing, it was stated that the worker had applied for those benefits when he was 65 years of age and before he was injured on December 23, 2003. (His 66th birthday was on January 24, 2004.) He indicated at the

oral hearing that he began receiving those benefits about three months after he applied. The retirement date which is material to the retirement package the worker accepted from the employer was February 1, 2004. The worker signed that agreement December 12, 2003, again, this was prior to his December 23, 2003 injury. I do not know when the worker began to receive his union pension, but he indicated at the oral hearing he is now receiving that, as well.

Setting aside the injury for a moment, these facts of the worker's applications and arrangements of his financial affairs, strongly suggest an intention to retire in at least some senses of the word.

One of the difficulties of deciding this appeal arises out of the wording of the policy (and of section 23.1 of the Act. Both use the terms "retirement" and "retire" as if they meant only one thing. In my understanding of the word and its usage in Canada today, it is a term which can refer to a whole range of possible reductions in employment activity. Dictionaries are not much help and, as I have indicated, the wording of the policy is not much help either in dealing with various possibilities in that range.

In the kind of changing economy, and in the changing demographics of the workforce we are now experiencing, I note that, not so long ago, if a person was described as "retired," it would be taken to mean that that person had severed her or his relationship with the employer (and this was likely at the end of a working career with only one employer) and was no longer engaged in the workforce in any manner at all. The norm, almost to the exclusion of other possibilities, was to take this step at age 65. Now, however, as the circumstances of this worker indicate, it is possible (and not uncommon) to terminate "employment" with an employer at almost any age and then take up work, either for that employer or for others, on a different contractual basis. If such a person is old enough to be eligible for pension benefits (perhaps from multiple sources in today's economy), it is not uncommon to start collecting those benefits while still (after a necessary interruption) working substantially full time. Whether such a person is retired is sometimes little more than a state of mind.

And that is the difficulty here, for the law and policy does not address the range of possibilities in which this worker has made a number of choices. He states that he never intends to retire. Yet he has accepted a retirement package from his most recent full-time employer. He has applied for and received pension benefits from his union scheme and from the Canada Pension Plan. And, at age 69, he is still working. It seems harsh to deny him the benefit of his pension under the claim, when that pension is awarded under a statutory scheme intended to compensate working people for disability sustained in their work. However, I reluctantly conclude that that is what the law and policy require on the facts of this appeal.

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I have reviewed all the WCAT decisions which have had to apply section 23.1 of the Act and RSCM II item #41.00. I have also, of course, reviewed the evidentiary requirements in RSCM II item #41.00 (in the bulleted subparagraphs set out above), and I find that most of them militate against the worker's position in this appeal. There is abundant evidence concerning what the worker now says he intended. However, the information from the employer is all to the effect that he had accepted a retirement package, and that they had no evidence of his intention to work for them after retirement or of the employer's intention of hiring him back after he did retire. Additionally, as I have reviewed above, the worker had put in place, it would seem, all that was within his power to put in place to secure a retirement income from his various pension plans. Considering all the evidence, I find this worker – sincere though I believe his statements about intentions to be – must be considered retired (and he is indisputably over age 65) under the applicable law and policy.

(It is of interest, however, to note that, of the prior WCAT decisions considering this matter, the one which is most similar to the facts of the present appeal is *WCAT Decision #2005-01639* (a "noteworthy decision" dated March 31, 2005). The notable similarity on the facts is that the worker in that previous decision planned never to retire and his representative argued that this evidence would support awarding him a pension for life. The panel in that decision did not rule out the theoretical possibility that a pension could, on the right facts, be awarded for life; however, the panel did point out that the policy guideline sets out "very specific limitations and it is inherent in the law and policy that workers retire at some point." And I would record my agreement with that reasoning and clarify that the worker's appeal here does not fail solely because he says his intention to continue working is indefinite.)

Conclusion

For the reasons indicated, the worker's appeal is denied and *Review Decision #R0060574* is confirmed. The worker requested his expenses of attending the oral hearing but, as MRPP item #13.22 makes an award of these expenses conditional on success in the appeal, I will not award any expenses.

Gail Starr
Vice Chair

GS/gl

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