

Noteworthy Decision Summary

Decision: WCAT-2007-03165 **Panel:** Marguerite Mousseau **Decision Date:** Oct. 15, 2007

Application of Former or Current Provisions of the Workers Compensation Act (Act) – Permanent Disability Award – Occupational Noise-induced Hearing Loss – Policy items #1.03 and #31.80 of the Rehabilitation Services and Claims Manual, Volumes I and II – Authority to Provide Hearing Aids under section 7(1) of the Act

This decision is noteworthy because it provides an analysis of whether the former or the current provisions of the *Workers Compensation Act* (Act) apply to a permanent disability award (PDA) for occupational noise-induced hearing loss where the first evidence of a compensable degree of hearing loss was in December 2002.

In January 1995 the worker submitted an application to the Workers' Compensation Board, operating as WorkSafeBC (Board), for noise-induced hearing loss. He was told in June 1995 that his hearing loss claim was accepted but that he did not have sufficient hearing loss to receive a PDA. In 2006 the worker was told he had a sufficient level of occupational noise-induced hearing loss to warrant a PDA. The worker disputed the December 2002 effective date of his PDA. He also disputed the use of the current provisions of the Act and policies, as of June 30, 2002, to determine his benefits.

The worker's appeal was denied. The worker argued that the first indication of permanent disability occurred when his claim was accepted and he was granted hearing aids. In the alternative, there was an indication of permanent disability in September 2001 when the worker stopped working although the evidence of a compensable degree of hearing loss was not apparent until December 2002 hearing tests.

The panel found that the worker's claim involved a deterioration of a permanent condition, and not a recurrence of disability. Policy item #1.03 of the *Rehabilitation Services and Claims Manual, Volumes I and II* provided that, where the first indication of permanent disability was on or after June 30, 2002, the award would be adjudicated under the current provisions of the Act. Although this policy referred to injuries and not occupational diseases, section 6(2) of the Act provided a linkage between a personal injury and an occupational disease with respect to establishing the "date of injury". Further, section 7 and Schedule D created a scheme for compensation related to occupational noise-induced hearing loss. The degree of hearing loss required under the Act and Schedule D established what constituted a disability for purposes of compensation. Accordingly, the worker did not have a disability in 1995 even though his hearing loss at that time was permanent.

The worker's hearing loss and the acceptance of his claim in 1995 were not "the first indication of permanent disability." The panel indicated that it did not appear that the Board had the authority to provide health care benefits in the form of hearing aids under section 7(1) of the Act in 1995 in the absence of hearing loss greater than the minimum established by Schedule D. Accordingly, the panel concluded that the provision of hearing aids in 1995 could not be recognized as the first indication of a permanent disability. Although the worker likely had sufficient hearing loss to qualify for a permanent disability award when he stopped working in September 2001, there was no reliable medical evidence of a compensable degree of hearing

loss prior to December 2002. Item #31.80 indicated that the worker's permanent disability award should be effective from the date of the first medical evidence establishing a compensable degree of hearing loss. It would be contrary to this policy to find that the worker's permanent disability award should be based on the law as it read in September 2001 even though the effective date would be in December 2002.

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Introduction

This appeal concerns the worker's entitlement to a permanent disability award for occupational noise-induced hearing loss. In a decision letter dated October 4, 2006, an officer of the Workers' Compensation Board, operating as WorkSafeBC (Board), informed the worker that he was entitled to a permanent disability award for occupational noise-induced hearing loss. The officer stated that the compensable degree of disability was equal to 1.63% of a totally disabled person and the effective date of the award was December 11, 2002. The officer based the worker's entitlement to benefits for his permanent disability impairment on the current law and policy.

In *Review Division Decisions #R0072024 and #R0072027*, dated February 16, 2007, a review officer varied the Board officer's decision. The review officer concluded that the worker's permanent disability award should be based on the worker's full disability which was equal to 1.7%, instead of 1.63%, and varied the Board officer's decision accordingly. The review officer also concluded that December 11, 2002 was the correct date for the start of the worker's permanent disability award and confirmed that the provisions of the *Workers Compensation Act* (Act) and policies that have been in effect as of June 30, 2002 were applicable to determining the worker's entitlement to benefits for his permanent disability.

Issue(s)

The issues on this appeal are the effective date of the permanent disability award and which provisions of the Act and policy are applicable when deciding the worker's entitlement to compensation for his permanent disability.

Jurisdiction and Method of Hearing

The Workers' Compensation Appeal Tribunal (WCAT) has jurisdiction to consider this appeal under section 239(1) of the Act as an appeal from a final decision made by a review officer.

The worker is represented by a workers' adviser who has provided a submission in support of the worker's appeal. The worker requested an oral hearing of his appeal so that he could discuss his exposure to noise and the lack of immediate hearing loss changes after his retirement. I have reviewed the issues and the documents on the worker's file and have concluded that this appeal may be fairly addressed without an

oral hearing. The issues primarily involve the interpretation and application of the law and policy to undisputed facts.

There is no employer participating. Because of the nature of occupational noise-induced hearing loss and the manner in which the claim costs are allocated, employers are not usually given notice of a request for review or appeal of decisions involving hearing loss.

Background

The worker submitted an application for compensation for noise-induced hearing loss on January 29, 1995. In the accompanying questionnaire, he said that he had been having problems with his hearing since about 1990 but it became apparent in 1994 that he had to address the problem. By that time he also had significant ringing in his ears. The results of audiometric testing conducted on December 13, 1994 revealed an average hearing loss at 11.6 decibels in the right ear and an average hearing loss at 6.6 decibels in the left ear. In addition, a Board audiologist completed a noise exposure record which indicated that the worker had been exposed to hazardous levels of noise for more than 20 years. Accordingly, in a letter dated June 23, 1995, a Board officer informed the worker that his claim for loss of hearing had been accepted. The Board officer stated that the worker did not have sufficient hearing loss to receive a permanent disability award but the Board would pay for the cost of hearing aids.

On March 8, 2006 (the letter is actually dated March 8, 2008) the worker wrote to the Board asking for assistance. He stated that he had tried to explain to someone in the Hearing Loss Department that his hearing loss was now well above the degree of hearing loss required for a permanent disability award but he had been told that he could not receive an award because he was retired. The worker stated that he had stopped working in September 2001 because of an unrelated disability.

After receiving a report from the worker's physician in June 2006, the Board conducted investigations into whether the worker had further hearing loss and obtained information to update the noise exposure record. The information submitted by the worker states that he worked in building construction until September 2001. The noise exposure record prepared on July 4, 2006 indicates that the worker had been exposed to hazardous levels of occupational noise until he stopped working.

An audiogram dated December 11, 2002 revealed a hearing loss at 33.3 decibels in the right ear and an average hearing loss at 28.3 decibels in the left ear. In a claim log entry dated October 5, 2006, a Board audiologist provided an opinion that the worker's occupational exposure to noise had likely contributed to his loss of hearing. A Board officer, therefore, concluded that the worker was entitled to a permanent disability award effective December 11, 2002 and the worker was informed of this decision in the letter dated October 4, 2006. This letter forms the basis of this appeal.

After this decision was issued, a claim log entry indicates that the worker contacted the Board to dispute the decision. In an entry dated October 10, 2006, the Board officer noted that the worker had called to say that his pension should have been calculated as of September 2001, when he stopped working. The Board officer records that she explained there were no test results to review between 1994 and 2002 to establish whether he had a pensionable degree of hearing loss at an earlier date.

The Board officer also concluded that the current law and policy applied to the worker's entitlement to compensation since the worker's award was based on the test results of December 11, 2002. The question of which law and policy is applicable is significant because it affects the amount and duration of the worker's permanent disability award. Prior to June 30, 2002, a permanent disability award was based on 75% of a worker's gross average earnings, it extended for the lifetime of the worker and it was fully indexed. On June 30, 2002 the Act was amended so that a permanent disability award is payable only until a worker retires, with some exceptions. In addition, the award is based on 90% of a worker's net earnings and it is not fully indexed. If the effective date of the worker's permanent disability award is the date that the worker stopped working in September 2001, the law that was in effect before June 30, 2002 would apply. If, however, the award is made effective from the date of the hearing test results, December 11, 2002, the current law is applicable.

The worker requested a review of the Board officer's decision. In support of this review, a letter was submitted from Jason Schmeidge, certified audiologist, dated October 18, 2006. Mr. Schmeidge states that the worker's hearing has averaged a 2.7 decibel hearing decrease in the right ear and a 6.7 decibel hearing decrease in the left ear since 2002. He attributes this to aging. He said that the worker's hearing in 2002, leading up to his birthday on June 30, 2002, would have been very close to the results obtained on December 11, 2002.

In a submission to the Review Division dated November 30, 2006, the worker's representative submitted that the worker's permanent disability award should be made effective September 21, 2001 and adjudicated under the pre-June 30, 2002 legislation for the following reasons:

- the worker's claim is a pre-2002 claim;
- occupational noise-induced hearing loss is a permanent condition from its inception;
- the Board letter of June 23, 1995 recognizes the noise-induced hearing loss as a permanent functional impairment;
- since the Board provided hearing aids to assist the worker in overcoming his permanent functional impairment in 1995, there was evidence of a permanent functional disability prior to June 30, 2002;

- the worker's exposure to noise ended in September 2001, prior to the changes in legislation, and since hearing loss due to exposure to noise does not continue after the exposure has terminated, it can be presumed that the worker's occupational noise-induced hearing loss had plateaued as of the date that he stopped working;
- in the *Cowburn* decision (*Cowburn v. Workers' Compensation Board of British Columbia* (2006 BSCS 722)), the Supreme Court of British Columbia stated that a worker with a permanent disability award prior to June 30, 2002 should have any deterioration in that disability adjudicated under the pre-June 30, 2002 Act;
- the worker in this case had not been provided with a permanent disability award because of his lack of attention to this entitlement and not because he did not have a permanent functional impairment;
- the Board recognized the permanent nature of the worker's disability by providing hearing aids and the only reason that he did not receive a permanent disability award is due to the Board's arbitrary criteria, not because he did not have a real permanent impairment;
- there is no evidence that the worker's hearing loss had resolved and that the loss identified in December 2002 was a recurrence; and
- the opinion by Mr. Schmeidge supports a conclusion that the worker's level of hearing in September 2001 would have been consistent with the results obtained on testing in December 2002.

The same submission was provided to WCAT in support of the worker's appeal, as well as Mr. Schmeidge's letter of October 18, 2006 and an itemized list of documents and statements provided by the worker, which is also on the claim file.

Reasons and Decision

On June 30, 2002 the *Workers Compensation Amendment Act, 2002* (Bill 49) was enacted. As previously noted, these amendments effected significant changes to the provisions for permanent disability awards. It is apparent from a review of these changes that the worker would benefit from having his permanent disability award determined under the Act as it read prior to June 30, 2002. The rules regarding which law is applicable to his claim are set out in the transitional provisions and relevant policies.

Bill 49 included transitional provisions which are found at section 35.1 of the Act. Section 35.1(4) sets out the rule applicable to entitlement to compensation for permanent disabilities as follows:

(4) Subject to subsections (5) to (8), if a worker's permanent disability **first occurs on or after the transition date, as a result of an injury that occurred before the transition date**, this Act, as amended by the *Workers Compensation Amendment Act, 2002*, applies to the permanent disability.

[emphasis added]

Section 35.1(8) provides the rule for compensation for recurrences of disability. It provides:

If a worker has, on or after the transition date, a recurrence of a disability that results from an injury that occurred before the transition date, the Board must determine compensation for the recurrence based on this Act, as amended by the *Workers Compensation Amendment Act, 2002*.

The review officer concluded that the applicable transitional rule was section 35.1(8) and policies related to that rule. The worker's representative submits that it is not lawful to characterize a permanent deterioration in a permanent condition as a recurrence of disability. I agree with the representative that the worker's claim involves a deterioration of a permanent condition; it does not involve a recurrence of disability. A significant deterioration in a condition cannot be characterized as a recurrence of disability. (See *Cowburn v. Workers' Compensation Board of British Columbia (2006 BSCS 722)*.)

I consider that the review officer misdirected himself as to the applicable law and policy. The correct transitional rule is section 35.1(4) of the Act. The Board officer who made the original decision also appears to have applied section 35.1(4) of the Act on the understanding that the worker's permanent disability with respect to loss of hearing first occurred on December 11, 2002, when his hearing tests revealed a compensable degree of hearing loss. The Board did not treat the deterioration in hearing loss as a recurrence.

The policies that provide guidance on the application of section 35.1 are found in policy item #1.03 of the *Rehabilitation and Services Claims Manual, Volumes I and II* (RSCM I and RSCM II). Policy item #1.03(b)3 addresses section 35.1(4) of the Act. It states:

3. Subject to rule 4 respecting recurrences, if an injury occurred before June 30, 2002, but **the first indication that it is permanently disabling occurs on or after June 30, 2002, the current provisions apply to the permanent disability award** with two modifications:

- (i) 75% of average earnings (former provisions) is used for calculating the award rather than 90% of average net earnings (current provisions); and
- (ii) no deduction is made for disability benefits under the Canada Pension Plan (former provisions).

Under this rule, for an injury that occurred before June 30, 2002, **where the first indication of permanent disability also occurs before June 30, 2002, the permanent disability award will be adjudicated under the former provisions. Where the first indication of permanent disability is on or after June 30, 2002, the award will be adjudicated under the current provisions,** using the modified formula described in (i) and (ii) above. The determination of when permanent disability first occurs will be based on available medical evidence.

An example of when this rule applies is where a worker, injured before June 30, 2002, shows no signs of permanent disability before that date. However, on or after June 30, 2002, the worker has surgery, which first causes permanent disability. The permanent disability award will be adjudicated under the current provisions, using the modified formula.

This policy refers to injuries but does not mention occupational diseases. However, section 6(2) provides a linkage between a personal injury and an occupational disease with respect to establishing a “date of injury” for occupational diseases. It states: “The date of disablement must be treated as the occurrence of the injury.” Accordingly, one can determine the “date of injury” for occupational diseases based on the date of disability, for the purposes of these transitional rules.

The representative submits that the first indication of permanent disability occurred when the worker’s claim was accepted and he was granted hearing aids. In the alternative, he submits that the Board should recognize that there was an indication of permanent disability as of September 2001 when the worker stopped working, given the evidence of a compensable degree of hearing loss which was apparent in the December 11, 2002 hearing tests.

Occupational noise-induced hearing loss, however, is compensated under its own statutory regimen; it is not compensated on the same basis as either a personal injury or an occupational disease and it does not use the terms “date of injury” or “date of disablement.” In addition, due to the nature of noise-induced hearing loss it is more difficult to determine a precise date as the “date of injury” or “date of disablement” for

the hearing loss. This poses some difficulties when it comes to applying the transitional rules in the Act and the policies.

In order to understand the basis for hearing loss provisions and to determine whether the acceptance of the claim in 1995 could reasonably be viewed as the first indication of permanent disability, I have reviewed the history of the provisions dealing with occupational hearing loss. This history indicates that a special regime for compensation for hearing loss was established because of the unique nature of this condition and the way in which it affects earning capacity.

Prior to 1952 hearing loss that developed as a result of exposure to noise over time was compensated as an accident. In 1952 Chief Justice Sloan recommended that occupational deafness be recognized as an occupational disease.¹ He noted that the Board was paying compensation for disabling occupational hearing loss on the basis that it was an accident but few workers or employers were aware of this potential entitlement. He recommended that this type of hearing loss be added to the Schedule of Industrial Diseases since the medical evidence indicated that this type of hearing loss was a disease, not an injury. In addition, he felt that both workers and employers would become aware that this type of hearing loss was a compensable condition if it was added to the Schedule.

In 1954 the Act was amended to add “occupational deafness” as an occupational disease in Appendix B to the Act. The occupation or process described next to it in the Appendix was “any industry involving prolonged and continuous exposure to excessive noise.” There were no provisions specific to hearing loss and entitlement to compensation was based on the same requirement as any other occupational disease.

Section 7(1) provided for compensation for occupational disease. It stated:

7. (1) Where

(a) a workman suffers from an industrial disease and is thereby disabled from earning full wages at the work at which he was employed or the death of a workman is caused by an industrial disease; and

(b) the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of disablement, whether under one or more employments, compensation is payable under this Part as if the disease were a personal injury arising out of and in the course of that employment. Medical aid may be paid although the workman is not disabled from earning full wages at the work at which he was employed.

¹ Report of the Commissioner The Hon. Gordon McG. Sloan, Chief Justice of British Columbia relating to The Workmen's Compensation Act and Board, published in 1952, at page 37.

In his report of 1966 Mr. Justice Tysoe identified some of the problems with this approach to compensation for hearing loss². He noted that very few workers had received compensation for occupational deafness since it had been added to Appendix B and he considered that this was more than likely because workers were seldom disabled from earning full wages at their work as a result of deafness. He noted that occupational noise-induced hearing loss has elements of a personal injury and elements of an occupational disease but compensation for both (other than health care) was premised on the worker being disabled from earning full wages. Typically, this requirement precluded compensation for occupational noise-induced hearing loss. At pages 237 and 238 of his report, he stated:

I think the time has come to at least question the propriety of regarding damage to the organ of hearing by noise resulting in deafness as disease. But to treat industrial deafness as a personal injury does not of itself provide a complete answer to the problem with which I am faced, for as I read subsection (2) of section 7 of the Act, there is no entitlement to compensation (other than medical aid) unless the injury disables the workman from earning full wages at the work at which he was employed for longer than three days.

Some Unions advanced the proposition that there should be compensation for what they called "social loss of hearing," by which I think they meant the loss of the social pleasures that in ordinary cases flows from deafness. I must reject this. I think it is the wrong approach. Workmen's compensation is not intended to compensate for that sort of thing and, in my opinion, should not be enlarged to do so. I think the wisest thing to do is to stay in step with the existing principles of the scheme.

It will be noted by reference to section 44 of this Report, headed "Permanent Partial Disability--Loss of Function--Loss of Wages," that, in the case of personal injury, the compensation of the disability does not depend on loss of earnings in the particular work in which the man is employed. The disability may not disable in that particular type of work, but it may in another. It will be appreciated that deafness could also be disabling in another class of work, even assuming that it is not in the work in which it is contracted.

The evidence before me indicates that few men who have become deafened through noise in employment lose any wages in their then employment as a result. This is because the defect in hearing does not

² British Columbia, Commission of Inquiry, Workmen's Compensation Act: Report of the Commissioner, the Honourable Mr. Justice Charles W. Tysoe (Victoria: A. Sutton, Printer to the Queen, 1966).

make it necessary for them to take time off and because they are just as well able to do their then job with a hearing loss as without it. It appears that in most cases the deterioration in hearing is progressive. Be this as it may, the workman who has suffered permanent damage to his eyes which affects his vision, the workman who has suffered permanent damage to his hand, and the workman who has suffered permanent damage to his ears so that his hearing is affected have alike been injured and suffered loss of bodily function in industry. I am firmly convinced that deafness is as much a disability as loss of vision or a mangled hand.

The question that keeps recurring in my mind is this: Why should a man who suffers some comparatively trivial injury which does not actually affect his earning capacity receive a pension for that injury and a man who is made deaf receive nothing? Or, put in another way, why should a loss of earnings be presumed in the first example but not in the second? The key to the right to compensation in cases of personal injury is, of course, disablement from earning full wages at the work at which the workman was employed for a period longer than three days. This key is available to the first man but rarely is it available to the second. The reason for this is twofold. Firstly, deafness is rarely a handicap in the type of work which produces it. Secondly, the workman will not usually become conscious of his affliction until it has reached such a serious stage that it will be difficult for him, because of his age and defect of hearing, to obtain employment in some other type of work, and so he accepts what appears to him to be the inevitable and continues in the very employment that has caused his disability.

Mr. Justice Tysoe went on to observe that deciding at what stage a worker should receive an award for occupational noise-induced hearing loss was a complex issue. A Board physician had stated that noticeable hearing loss or impairment appeared to start at about 20 to 30 decibels, although he did not state whether that was across all frequencies or just in certain frequencies. Mr. Justice Tysoe noted that there were questions of what degree of hearing loss should be compensated and whether it should be in the speech range or over the whole of the range. Ultimately, he considered that the question was too complex for him to make recommendations in this area other than recommending that a committee be established to investigate this matter in detail.

In 1974 the current statutory regime for compensation for occupational noise-induced hearing loss was enacted as section 7A of the *Workmen's Compensation Act*.³ Section 7A established the compensation scheme that is currently found in section 7 of the Act.

³ Workmen's Compensation Amendment Act 1974, Statutes of British Columbia, Chapter 101

Section 7(1) of the Act provides:

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

Schedule D provides that, hearing loss between 0 and 27 decibels (at the specified frequencies) is equal to “0” percentage disability. Hearing loss between 28 and 32 decibels results in a specified percentage of disability. The percentage of disability provides the basis for a permanent disability award.

This provision recognizes the unique characteristics of hearing loss that were discussed in the Tysoe report in that entitlement to compensation is not premised on disability from work. However, there is a requirement for a minimum amount of hearing loss before compensation may be paid. This is consistent with Mr. Justice Tysoe’s comments that compensation for noise-induced hearing loss should be consistent with the principles applicable to personal injury and occupational disease. I take this to mean that he considered that compensation should be paid when there was hearing loss that was sufficient to cause impairment or disability, recognizing that this would have to be determined by something other than the worker’s inability to work at his or her usual employment.

Returning to the representative’s submission that the worker has had a permanent disability since 1995 based on the Board’s acceptance of his claim for hearing loss and the provisions of hearing aids, I do not find that to be the case. Section 7 does not authorize the Board to provide compensation (in any form) unless a worker has an occupational noise-induced hearing loss that is greater than the amount set out in Schedule D. I am satisfied that the degree of hearing loss required under the Act and Schedule D is intended to establish the degree of hearing loss that constitutes a disability for the purposes of compensation under the Act. Accordingly, the worker did not have a disability in 1995 and it was not known at that time that he would have further deterioration in his hearing to the point where it would become a disability recognized under the Act. Although the changes in 1995 were permanent, they did not constitute a permanent disability. Returning to the policy at item #1.03(b)3, it states that the applicable law and policy is based on “the first indication of permanent disability.” I am satisfied that the worker’s hearing loss and the acceptance of his claim in 1995 were not “the first indication of permanent disability.”

In addressing the representative’s alternative submission that the provision of hearing aids in 1995 was evidence of permanent impairment, which would result in the application of the pre-June 2002 rules, I have considered the basis on which the Board provided the hearing aids. It seems most likely that hearing aids were provided because the worker had a degree of hearing loss that was medically recognized as

an impairment. However, as I have noted it was not a sufficient degree of hearing loss to constitute a disability under the Act.

In this regard, I note that it is not clear that there is authority to provide health care benefits such as hearing aids if the threshold test for entitlement to compensation in section 7(1) has not been met. Under section 7(1) the threshold for “compensation” for non-traumatic hearing loss is hearing loss that is greater than the minimum established by Schedule D.

Compensation is defined in section 1 of the Act as follows:

“compensation” includes health care

Section 1 defines health care as follows:

“**health care**”, when used in Part 1, includes the things which the Board under this Act is empowered to provide for injured workers;
[emphasis in original]

Health care is more specifically defined in section 21 of the Act, which describes the types of treatments that may be provided as health care. It includes “care or treatment, transportation, medicines, crutches and apparatus, including artificial members, that it may consider reasonably necessary at the time of the injury, and thereafter during the disability to cure and relieve from the effects of the injury or alleviate those effects.” Section 21 is the section which enables the Board to provide treatments such as hearing aids. Accordingly, it does not appear that there is authority to provide health care in the form of hearing aids under section 7(1) of the Act.

I note that section 6(1) of the Act, which provides for compensation for occupational disease, also establishes a threshold for entitlement to compensation. Under section 6(1) of the Act, compensation is payable for an occupational disease that is due to the nature of the employment if the worker is “thereby disabled from earning full wages at the work at which the worker was employed.” Section 6(1), however, also specifically provides that, where this threshold test for compensation has not been met, “a health care benefit may be paid.”

Section 7(1) does not provide for a health care benefit where the worker does not have the necessary degree of hearing loss. That the Act specifically provides for the payment of a health care benefit when a worker suffers an occupational disease but does not meet the threshold test for compensation suggests that, if it was intended that a health care benefit be provided when a worker had a hearing loss that was less than the minimum set out in Schedule D, provision would have been made for that in section 7(1). In that regard, section 7(1) of the Act parallels section 5(1) of the Act in that there is no provision for entitlement to health care if the threshold test for entitlement to compensation, the existence of “a personal injury,” has not been met.

Section 7 of the Act does not authorize the provision of hearing aids unless the worker has the minimum hearing loss in Schedule D, or, in other words, unless the worker has a disability as defined by Schedule D. Accordingly, I have concluded that the provision of hearing aids cannot be recognized as the first indication of a permanent disability.

In the alternative, the representative submits that the worker's permanent disability award should be effective as of September 2001, when the worker was last exposed to hazardous levels of noise. Although the first hearing tests that revealed a permanent disability were not conducted until December 2002, he submits that these indicate the existence of a permanent disability in September 2001. He bases this on the knowledge that there is no further occupational hearing loss once the exposure to hazardous noise has terminated. In addition, since the tests were conducted so soon after the worker stopped working there would likely not have been any significant change in his hearing before those tests were conducted.

I am not satisfied that this approach is consistent with the Act and policies, although I am mindful that occupational noise-induced hearing loss is a unique occupational disease with some clearly defined characteristics. I have considered that one of these characteristics is that the compensable hearing loss does not progress once the exposure to noise has terminated. In addition, occupational noise-induced hearing loss develops over many years; it does not progress rapidly. And, in this case, the hearing tests that identified a permanent disability were conducted within a relatively short period of time after the worker had stopped working. All of this indicates that the worker likely did have sufficient hearing loss to qualify for a permanent disability award when he stopped working in September 2001. However, there was no reliable medical evidence of a compensable degree of hearing loss prior to December 11, 2002.

Given the absence of medical reports of a compensable hearing loss prior to December 11, 2002, I find that it would be counter to the policies to apply the Act and policies as they read prior to June 30, 2002 to determine the worker's entitlement to a permanent disability award. This is because there is a policy which specifically states the date that is to be used as the effective date of a permanent disability award for noise-induced hearing loss. Item #31.80 of the RSCM I and RSCM II states:

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 benefits under section 7(3) commence prior to September 1, 1975.

Under this policy, the worker's permanent disability award is to be made effective as of December 11, 2002, which is the date of the first medical evidence establishing a compensable degree of hearing loss. It would be contradictory to this policy to find that the worker's permanent disability award is to be based on the law as it read on September 2001 even though the effective date of the worker's permanent disability award is December 11, 2002.

In summary, I find that hearing tests that revealed a hearing loss, which was accepted as occupational noise-induced hearing loss in 1995, do not constitute the first indication of permanent disability. I also find that the provision of hearing aids in 1995 does not constitute the first indication of permanent disability. The hearing test results of December 11, 2002 constitute the first valid and reliable medical evidence of a permanent disability. Given the requirement in policy item #31.80 that the date of the first valid medical evidence be used as the effective date of the permanent disability award, I find that it would be inconsistent with the Act and the policies to apply the law that was in effect in September 2001 to a permanent disability award that is effective as of December 11, 2002.

Conclusion

I find that the effective date of the worker's permanent disability award is December 11, 2002, the date of the hearing tests that revealed a compensable degree of hearing loss. I also find that the applicable law is the law that was in effect as of December 11, 2002. I confirm *Review Division Decisions #R0072024 and #R0072027*, dated February 16, 2007.

Marguerite Mousseau
Vice Chair

MM/gw