

Noteworthy Decision Summary

Decision: WCAT-2011-01415 **Panel:** David Newell **Decision Date:** June 6, 2011

Section 6(1) of the Workers Compensation Act – Occupational Disease – Policy item #26.30 of the Rehabilitation Services and Claim Manual Volume II – Disabled from earning full wages at the work at which the worker was employed – Need to change jobs due to the disabling effects of the employment – Permanent partial disability award

This decision is noteworthy for its interpretation and analysis of section 6(1) of the *Workers Compensation Act* and policy item #26.30 of the *Rehabilitation Services and Claims Manual, Volume II*. Specifically, the decision discusses factors relevant in determining whether a worker is precluded from earning full wages at the work in which they were regularly employed, particularly by the need to change jobs to avoid further exacerbation of an occupational disease.

The worker, a nurse and nursing instructor, developed a debilitating latex allergy. After a particularly severe workplace reaction, the worker began working from home. The Workers Compensation Board, operating as WorkSafeBC (Board), accepted the worker's claim for permanent aggravation of a pre-existing latex allergy, but determined that she was not entitled to permanent partial disability benefits. On appeal, the Review Division confirmed the Board decision. The worker further appealed to WCAT.

WCAT allowed the worker's appeal. The panel found that, on the date the worker was disabled by the accepted condition she was permanently disabled from the work at which she was regularly employed. WCAT determined that the nature of the worker's employment had changed when she began working at home because she was no longer able to perform the clinical supervisory and mentorship duties associated with her employment as a nursing instructor. As well, her change of work was not in order to prevent the onset of disability, but to avoid further exacerbation of her potentially fatal permanent condition.

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Introduction

- [1] The Workers' Compensation Board (Board), operating as WorkSafeBC, accepted the worker's claim for permanent aggravation of her pre-existing latex allergy and asthma. In a decision dated December 14, 2009, the Board determined that the worker was not entitled to payment of permanent partial disability (PPD) benefits under her claim. The Review Division confirmed the Board's decision in its decision dated October 14, 2010 (*Review Reference #R0114034*). The worker appealed the Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT).

Issue(s)

- [2] The issue in this appeal is whether the worker is entitled to PPD benefits under her claim.

Jurisdiction

- [3] Section 239(1) of the *Workers Compensation Act* (Act) gives WCAT jurisdiction with respect to an appeal from a final decision of a review officer respecting a compensation matter.
- [4] WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent (section 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but in doing so, must apply policy of the Board that is applicable in the case.
- [5] This appeal proceeded by way of an oral hearing on April 19, 2011. The worker attended the hearing by telephone. The worker's counsel attended the hearing in person. The employer's representative also attended the hearing by telephone.
- [6] All references to policy in this decision, unless otherwise specified, pertain to the Board's *Rehabilitation Services and Claims Manual, Volume II*.

Background and Evidence

- [7] The worker is a nurse. In 2004 she developed an allergy to latex. In a consultation report dated January 7, 2005, Dr. Luciuk, a specialist in clinical immunology, described the worker as having a high degree of reactivity to latex. Dr. Luciuk commented that

some latex sensitive patients “cross-react” to other foods. He suggested that the worker would be better off working in an environment where she had no exposure to latex whatsoever.

- [8] In 2008 and 2009 the worker was employed as a nursing instructor at a university. In 2008 the worker’s job duties included one day per week teaching students in a classroom setting, and several days supervising students in their community placements. In January 2009 the worker was assigned two large classes with two classroom teaching days per week, and she continued to supervise students in clinical settings such as a rehabilitation centre. Additionally, the worker spent part of her time as a curriculum coordinator and was a member of the faculty council, which required her to attend meetings.
- [9] In February 2009 while teaching in a classroom, the worker was exposed to latex and had an anaphylactic reaction requiring emergency intubation and transportation to the hospital. Following that incident, the worker tried a number of different classrooms and meeting rooms but continued to have severe problems with even brief exposures.
- [10] In a conversation with a Board case manager on April 14, 2009, the worker said she was permitted to continue working from home, teaching online; however, she said the course she was teaching was not set up for online teaching. She also said that with 60 students, teaching online was very time consuming.
- [11] On May 4, 2009 the employer’s human resources manager, Ms. N, spoke with the Board case manager. The record of that conversation indicated that the employer was inquiring about the status of the worker’s claim, which had not been accepted at that time, because the new teaching term was about to start and the course the worker was teaching ultimately could not be taught online. Ms. N advised that she might have to place the worker on part-time sick leave but the worker could still perform some work from home. On May 7, 2009, Ms. N informed the Board case manager that the worker was at that time being paid 49% of her regular pay for the work she continued to do from home, and the remaining 51% of the worker’s pay was being made up by sick leave benefits.
- [12] The worker was examined by a Board medical advisor (BMA), Dr. P, on June 25, 2009. Prior to the examination, the worker met with the Board case manager. In a memorandum regarding that meeting, the case manager noted that when she arrived at the Board’s Visiting Specialists Clinic to meet with the worker, the worker was experiencing the early stages of an allergic reaction, which the worker thought was most likely to latex in the floor mats or carpet underlay.
- [13] In her report dated July 9, 2009, Dr. P noted that when the worker arrived for the examination, she was relatively symptom free, but as soon as she entered the building, she began to develop the symptoms of a reaction, including voice loss, shortness of breath and coughing. Dr. P noted that her examination of the worker was brief because

of the worker's worsening symptoms. She noted that after going outside the building, the worker's symptoms immediately diminished. Dr. P requested further information and indicated that she was awaiting an opportunity to discuss the matter with the worker's physician. Dr. P noted that the worker appeared to be reacting everywhere she went, not just her workplace.

- [14] The worker's physician, Dr. Hambleton, wrote a medical-legal letter dated June 15, 2009, in which he confirmed his opinion that the worker had an anaphylactic allergy to latex that included inhalation exposures. He said the worker had predictably more severe reactions with each successive exposure, and after her most recent exposure had become so sensitized that she was unable to function any longer in any environment that contains even a trace amount of latex, including on the university campus, in hospital, in the community, or anywhere else.
- [15] On September 9, 2009, Ms. N informed the Board that as of June 13, 2009 the worker was no longer receiving short-term disability benefits, and the employer was paying 100% of the worker's wages.
- [16] On September 10, 2009, the Board issued its decision accepting the worker's claim for aggravation of her pre-existing latex allergy. The decision letter confirmed that as of May 4, 2009 the worker was receiving 49% of her salary working part-time from home and was receiving 51% of her salary in the form of short-term disability benefits.
- [17] Dr. P gave an opinion dated September 11, 2009 in which she responded to a number of questions from the Board case manager. In summary, Dr. P's opinion was:
- The worker's respiratory reactivity was not exclusive to or because of work. In terms of the worker's clinical picture, there was nothing unique about her workplace, as she appeared to be reacting wherever she went.
 - The worker should not work in an environment that contains latex, and was at risk of worsening her respiratory condition and even of fatal asthma if she did.
 - The worker's reactivity appeared to have increased since February 2009, and her (then) present level of reactivity was unlikely to improve significantly over a 12-month period.
 - It was possible that the worker had experienced a permanent aggravation of her pre-existing latex sensitivity or asthma, and was at significant risk to develop a permanent aggravation if she were to return to a work environment that contained latex.
- [18] In a conversation with the Board case manager on September 21, 2009, the worker advised that the employer was giving her work developing online courses, but she did not have the technical training needed for that work, and she was unsure if she would be able to continue doing it. Ms. N confirmed in a telephone conversation with the case manager on the same date that the worker was working at home but was struggling because she did not have the background for the work she was doing.

[19] On September 22, 2009 the worker's claim was accepted for permanent aggravation of her pre-existing latex allergy or asthma, and she was referred to the Disability Awards Department for assessment of a possible PPD award.

[20] A disability awards officer sent a decision letter to the worker on December 14, 2009, the decision giving rise to this appeal, in which she wrote:

It is noted that, upon review of the evidence on your claim, it has been determined that you are able to perform work at which you were employed, however, this work must be done in a latex free environment. Your accepted aggravation does not preclude you from performing your employment activities.

In conclusion, there is no evidence to indicate that you are disabled from earning full wages doing the work at which you were employed. Therefore, no permanent disability award is payable. Should the situation change significantly in the future your file could again be reviewed.

[all quotes reproduced as written]

[21] As noted above, the worker attended the WCAT oral hearing by telephone because on a previous occasion when she attended at the WCAT offices, she had an immediate allergic reaction. At the hearing, the worker described her job duties before February 2009. She confirmed that she spent one or two days per week teaching in a classroom setting, and then met with the students wherever they were placed in community settings, such as nursing homes, and rehabilitation centres. Her job required her to spend 12 hours per week working directly with students in those settings. Additionally, she spent some of her time on curriculum coordination and she attended faculty council meetings.

[22] The worker testified that after February 2009 she was no longer able to teach in a classroom or meet with students in their community placement settings. She confirmed that she was permitted to teach online from her home. She said that was not particularly satisfactory as the courses she was teaching were not designed to be presented online, and she had no particular training with respect to online teaching. The worker testified that the courses did not deal with clinical subjects. She said her condition made it impossible to attend the university campus to obtain training.

[23] The worker testified that in addition to teaching at the university, she did contract work as a nurse on an ad hoc basis. She said she was able to earn between \$12,000 and \$30,000 per year in addition to her teaching salary, but was no longer able to do that work. The worker said that being able to work as a nurse was important to her ability to teach student nurses because it kept her up to date with clinical practice.

- [24] At the Review Division, the worker submitted a consultation report from Dr. Luciuk dated February 25, 2010 in which he indicated that the worker had adverse reactions to a variety of inhalants cross reacting to latex. His opinion was that patients with the worker's high degree of reactivity to latex never lose it, and the worker would have to strictly avoid latex.
- [25] The worker also submitted a consultation report from Dr. Ahmed, a specialist in respiratory disorders. His opinion was that the worker had severe latex allergy which caused a marked inflammatory response involving a number of sites, including her airways. This drastically impaired her quality of life because of the resultant inability to mix with the public in most buildings.
- [26] In this appeal the worker submitted a medical-legal report from Dr. Hambleton dated March 30, 2011. Dr. Hambleton noted that the worker had been assessed by Dr. Luciuk and Dr. Ahmed. He stated that the worker's presentation was most consistent with a diagnosis of severe latex allergy and occupational asthma. Dr. Hambleton reviewed the treatments that had been recommended and commented that the worker had complied with all recommendations. His opinion was that, despite treatment, the worker's prognosis was poor, and she would continue to have episodic exacerbations of her condition and would remain at risk of potentially fatal consequences of latex exposure. With respect to ongoing disability, Dr. Hambleton's opinion was that the worker was permanently disabled in that he held no hope that she would achieve any significant degree of improvement and would likely worsen over time. He commented that although the worker was not disabled from all forms of work, she was totally disabled from working as a practicing clinical nurse or as a nurse educator in a clinical or classroom setting.

Reasons and Findings

- [27] Policy #26.30 states:

No compensation other than health care benefits are payable to a worker who suffers from an occupational disease (with the exception of silicosis, asbestosis, or pneumoconiosis and claims for hearing loss to which section 7 of the *Act* apply) unless the worker "is thereby disabled from earning full wages at the work at which he was employed". (3) No compensation is payable in respect of a deceased worker unless his or her death was caused by an occupational disease (also see section 6(11) of the *Act*).

Health care benefits may be paid to a worker who suffers from an occupational disease even though the worker is not thereby disabled from earning full wages at the work at which he or she was employed.

There is no definition of "disability" in the *Act*. The phrase "disabled from earning full wages at the work at which he was employed" refers to the work at which the worker was regularly employed on the date he or she was disabled by the occupational disease. This means that there must be some loss of earnings from such regular employment as a result of the disabling affects of the disease, and not just an impairment of function. For example, disablement for the purposes of section 6(1) may result from:

- an absence from work in order to recover from the disabling affects of the disease;
- an inability to work full hours at such regular employment due to the disabling affects of the disease;
- an absence from work due to a decision of the employer to exclude the worker in order to prevent the infection of others by the disease;
- the need to change jobs due to the disabling affects of the employment.

A worker who must take time off from his or her usual employment to attend medical appointments is not considered disabled by virtue of that fact alone. However, income loss payments may be made to such a worker (see policy item #83.13).

A change of employment or lay-off from work for the purpose of precluding the onset of a disability does not amount to a disability for this purpose.

For time limits with respect to occupational disease claims see policy item #32.55.

- [28] The worker submitted that she accepted permanent aggravation of her latex allergy or asthma disabled her from earning full wages at her employment; therefore, she was entitled to a PPD award, which should be quantified by the Disability Awards Department.
- [29] The employer submitted that the worker was not disabled from earning full wages at her employment because she was able to continue at her employment working from home. The employer did not take issue with the worker's entitlement to healthcare benefits, but said policy #26.30 disentitled her to a PPD award.
- [30] The Review Division did not consider the substantive evidence with respect to whether the worker was disabled from earning her full wages at the work at which she was

employed. Rather, it relied on the Board's September 10, 2009 decision letter. With respect to that decision letter, the Review Division stated:

As the worker did not pursue a review of that decision, it is the decision of record on the issue of whether the worker was disabled from earning her full wages at the work at which she was employed. I am satisfied that it is not open for me to re-consider this issue in this review.

[31] The Review Division went on to state:

Based on the Board's September 10, 2009 decision that the worker was not disabled from earning her full wages at work as a result of her compensable condition, I find that the economic test has not been met and the worker does not meet the requirements for payment of compensation for permanent disability under sections 6 and 23 of the *Act*.

[32] I disagree with the Review Division's interpretation of both the substance and the significance of the Board's September 10, 2009 decision letter. I do not agree the September 10, 2009 decision precludes the worker's entitlement to permanent disability benefits for two reasons.

[33] The first reason is that contrary to the Review Division's conclusion, the decision letter does not include a determination that the worker was not disabled from earning her full wages at the work at which she was employed. The decision letter specifically applied policy #13.40 and concluded that wage loss benefits were not payable because the worker's time loss was "for preventative reasons." In my view, that was an incorrect application of policy #13.40, but that does not alter the fact that policy #13.40 was the basis for the decision, not policy #26.30. Application of policy #13.40 did not require a determination that the worker was not disabled from earning full income at her employment, and no such determination was made.

[34] The second reason is that the September 10, 2009 decision letter concerned the worker's entitlement to wage loss benefits. Entitlement to wage loss benefits is determined under different policies than entitlement to permanent disability benefits; consequently, policies that are specifically applicable to the former may not be applicable to the latter. Policy #33.00 provides that wage loss benefits are payable where an injury or disease resulting from employment causes a period of temporary disability from work. They cease when the worker recovers or the condition becomes a permanent one. Policy #36.00 provides that permanent disability awards are made when a worker fails to completely recover from a work-related injury or occupational disease, but is left with a permanent residual disability. They commence at the point when the worker's temporary disability ceases and the condition stabilizes. Policy #13.40 applies to wage loss benefits. Notably, policy #13.40 specifically

contemplates the possibility that a worker who remains off work or changes employment to prevent an aggravation of an occupational disease which has stabilized may be entitled to a permanent disability award. Policy #13.40 states, in part:

Wage loss benefits are not payable to a worker who remains off work or who changes employment to prevent a reoccurrence of a personal injury or occupational disease that has resolved, or to prevent an aggravation, activation, or acceleration of a personal injury or occupational disease which has stabilized or plateaued. However, vocational rehabilitation assistance may be provided to a worker in this situation. **Where the worker is left with a permanent impairment, the worker may be entitled to a permanent disability award.**

[emphasis added]

- [35] It appears that the Review Division purported to apply the penultimate paragraph of policy #26.30 to the Board's finding with respect to policy #13.40, that the worker's absence from work was for "preventative purposes," to reach the conclusion that the worker was not disabled for the purposes of section 6 of the Act. As noted above, policy #13.40 applies to wage loss benefits, not to permanent disability awards. I do not think the Board's September 10, 2009 finding of fact that the worker's absence from work was for "preventative reasons" is binding with respect to the application of policy #26.30 in consideration of entitlement to a permanent disability award.
- [36] Policy #26.30 reflects section 6(1) of the Act. Under section 6(1) of the Act, a worker who suffers from an occupational disease and is thereby disabled from earning full wages at the work at which he or she was employed is entitled to compensation. The factual determination that must be made in this case is whether the worker was disabled by the permanent aggravation of her latex allergy from earning full wages at the work at which she was employed. For the reasons that follow, I conclude that she was.
- [37] Policy #26.30 makes it clear that the phrase "disabled from earning full wages at the work at which he was employed" refers to the work at which the worker was regularly employed on the date he or she was disabled by the occupational disease. There is no dispute that on that date, the worker was employed as a nurse instructor. The employer submits that the worker can still work as a nurse instructor she just cannot do that in a classroom or a clinical setting. I do not think that argument takes sufficient account of the specifics of what the worker's employment as a nurse instructor required.
- [38] The evidence establishes that the worker's employment as a nurse instructor required her to teach in a classroom one or two days per week. It might be argued that online teaching is an adequate substitute for being present in a classroom. In my view, that is a debatable point, but it is not necessary for me to reach a conclusion on that point, because the evidence also establishes that the worker's employment also involved visiting various facilities to meet with students in their community placements and it is

clear that she can no longer do those things. Dr. Hambleton's opinion, based on his first-hand experience with the worker and on the opinions of Dr. Luciuk and Dr. Ahmed, was that the worker could not work in either a clinical or classroom setting. Indeed, Dr. Hambleton warned of potentially fatal consequences of latex exposure.

- [39] The employer noted Dr. P's opinion that the worker's reactivity was not exclusive to or because of work because there was nothing unique about the workplace in terms of the worker's clinical picture, as she seemed to react wherever she went. The employer submitted that Dr. P's opinion indicated that it was medically unreasonable to conclude that the worker's condition was solely related to the worker's workplace. Therefore, the employer submitted, it was unlikely that the worker's complaints in 2011 were work related. That submission is not relevant to the issue in this appeal. The Board has accepted that the worker suffered a permanent aggravation of her pre-existing condition. That decision was not appealed. In other respects, Dr. P's opinion appears to coincide with Dr. Hambleton's in that she stated the worker's condition was unlikely to improve and that the worker was at significant risk if she were to return to a work environment that contained latex.
- [40] Policy #26.30 gives as an example of disablement for the purposes of section 6(1) of the Act, the need to change jobs due to the disabling effects of the employment. The worker testified that the online courses she was developing and teaching were substantially different from what she did before February 2009. In particular, she was no longer involved in supervising and mentoring students in clinical settings. The worker was assigned to developing online courses. The worker testified that she had no training in that field. Ms. N acknowledged in a conversation with the Board case manager that the worker did not have the background or training for developing online courses. For the worker, trained as a nurse, there is a material difference between developing online course materials and teaching nursing in a combination of classroom and clinical settings.
- [41] Policy #26.30 states that a change of employment for the purpose of precluding the onset of a disability does not amount to a disability for this purpose. The Review Division decision under appeal appeared to suggest that if the worker had changed her employment, she did so for the purpose of precluding the onset of a disability. As noted above, the Review Division considered itself bound by the Board's September 10, 2009 decision and did not analyse the substance of the evidence; however, I consider it appropriate to deal with this point. The medical evidence makes it clear that in February 2009 the worker developed a permanent aggravation of her pre-existing latex allergy and asthma. The onset of disability occurred at that time. The requirement that the worker change her employment to work from home was not to preclude the onset of disability. It was too late for that. She changed to avoid further exacerbation of her permanent condition which, as Dr. Hambleton commented, could be fatal.

- [42] I find that the worker was permanently disabled from the work at which the she was regularly employed on the date she was disabled by the accepted condition.
- [43] The employer's submissions focussed on the question of whether the worker was disabled from the work at which she was employed. However, I must consider the whole question arising from section 6(1) of the Act and policy #26.30, which is whether the worker was disabled from earning full wages from the work at which she was regularly employed on the date she was disabled.
- [44] The evidence indicates that for a period of time the worker was receiving slightly less than half her wages from the employer, with the remainder of her income coming as short-term disability benefits. Section 6(1) refers to earned wages. In my view, short-term disability benefits are not earned wages. I find that for the period of time the worker received short-term disability benefits, she was disabled from earning full wages from her employment. After June 13, 2009, the worker was receiving her full wages from the employer. It might be argued that since the worker was earning full wages from June 13, 2009, she cannot be said to be disabled from earning full wages, and is therefore precluded from receiving a PPD award. The authors of *Workers' Compensation in British Columbia*¹ (McDonald, H. and Mousseau, M., 2009), state at paragraph 6.60 that it is only necessary that a worker meet the requirement of being disabled from earning full wages once. I agree with that interpretation of policy #26.30. If a worker has received temporary disability benefits for an occupational disease at some point, that is sufficient to establish eligibility for compensation at a later date. Although the worker did not receive temporary disability benefits from the Board, the short-term disability benefits she received were equivalent. I find that for at least a period of time the worker was disabled from earning full wages from the work at which she was regularly employed on the date at which she became disabled. Accordingly, I conclude that the worker met the requirement of section 6(1) of the Act and is entitled to a PPD award.

Conclusion

- [45] I allow the worker's appeal and vary the Review Division decision dated October 14, 2010 (*Review Reference #R0114034*) to conclude that the worker is entitled to a PPD award. The Board will determine the amount of the PPD award to which the worker is entitled.

¹ McDonald, H. and Mousseau, M. *Workers' Compensation in British Columbia*, 2009, LexisNexis Canada.

Expenses

- [46] The worker requested reimbursement for the expense of obtaining Dr. Hambleton's medical-legal report dated March 30, 2011. It was reasonable for the worker to obtain Dr. Hambleton's report, which was helpful in the appeal. Accordingly, I order the Board to reimburse the worker for the cost of obtaining Dr. Hambleton's report up to the maximum amount in the Board's schedule of fees.

David Newell
Vice Chair

DN/cv