Noteworthy Decision Summary

Decision: WCAT-2011-02455 **Decision Date:** September 29, 2011
Panel: Andrew Pendray

Section 23.1 of the Workers Compensation Act – Permanent Disability Award Retirement – Evidence of date of retirement – Evidence of worker's intentions at time of injury.

Section 23.1 of the *Workers Compensation Act* (Act) provides that if a worker is less than 63 years old at the date of a compensable injury, any permanent disability award is payable until the date the worker reaches age 65, or, if the Workers Compensation Board, operating as WorkSafeBC (Board), is satisfied the worker would retire after reaching 65 years of age, the date the worker would retire, as determined by the Board.

Published policy in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II)[1] states the Board requires evidence that is verified by an independent source to confirm the worker's subjective statement regarding his intent to work past age 65. If the worker's statement is not independently verifiable, the Board will make a determination based on the evidence available, including information provided by the worker. The non-binding practice directive #C5-1 states that the circumstances under consideration must be those as they existed at the time of injury.

This decision summarizes previous WCAT decisions regarding the use of evidence regarding retirement that post-dates the compensable injury (including *WCAT-2010-01780*, *WCAT-2010-01327, WCAT-2007-00769* (a noteworthy decision) and *WCAT-2010-01674)*. The panel concluded that the general approach to the consideration of section 23.1 of the Act and policy item #41.00 in the RSCM II regarding a worker's retirement age would appropriately involve a consideration of the worker's intentions at the time of injury as set out in practice directive #C5-1.

In this case, there was essentially no evidence regarding the worker's retirement intentions at the time of his injury, and the worker did not make submissions in that regard. During a February 2006 at the Board meeting the worker said he had only a few years to left to go at the job. The worker accepted a retirement package and retired in May 2009. In his September 2010 submission to the Review Division, the worker said that he was 62 years old and married with two dependent children. The worker submitted he had retired early to take advantage of a government program. He tendered a document prepared by a financial advisor that said one of the scenarios discussed with the worker in 2008 had been working beyond age 70. He also submitted three letters from employers stating the worker would be able to continue working. However, none of the letters provided independent verification of the worker's intentions at the time of injury and did not say the worker had expressed an interest in working past age 65 or that an opportunity was open to the worker.

The panel found that at the time of his injury, it was more likely than not that the worker intended on working until his scheduled retirement date with his injury employer. There was no other evidence upon which the panel could rely indicating that at the time of injury the worker intended to continue working.

[1] The board of directors of the Workers' Compensation Board has enacted a new version of policy item #41.00, applicable to all Board decisions made on or after June 1, 2014. This decision applies the old version of policy item #41.00, in force prior to June 1, 2014.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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WCAT Decision Number: WCAT-2011-02455*
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Panel: Andrew Pendray, Vice Chair

Introduction

[1] The worker appeals a December 24, 2010 decision[2] of the Review Division of the Workers' Compensation Board (Board)[3]. In that decision, a review officer confirmed a May 4, 2010 Board decision which determined that the worker's permanent partial disability award was payable only until the worker became 65 years old. The worker's position on appeal is that he ought to continue to receive his permanent partial disability award subsequent to reaching 65 years of age.

[2] Although invited to do so, the employer is not participating in this appeal.

Issue(s)

[3] Should the worker's permanent partial disability award continue subsequent to the date upon which he reaches 65 years of age?

Jurisdiction and Procedure

[4] This worker appeals pursuant to section 239(1) of the *Workers Compensation Act* (Act), which permits appeals from Review Division decisions to WCAT, subject to the exceptions set out in section 239(2) of the Act.

[5] Subject to section 250(4) of the Act, the standard of proof in an appeal is the balance of probabilities. Section 250(4) provides that in a matter involving the compensation of a worker, if the evidence supporting different findings on an issue is evenly weighted, the issue must be resolved in a manner that favours the worker.

[6] Section 250(2) of the Act requires WCAT to apply published policy of the board of directors of the Board, subject to the provisions of section 251 of the Act. The *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), contains the published policy applicable to this appeal.

[7] On his notice of appeal, the worker requested that his appeal proceed by way of written submissions. Despite this request, I retain the discretion to convene an oral hearing if I consider one necessary. As set out by WCAT's *Manual of Rules of Practice and Procedure* at item #7.5, WCAT will normally conduct an appeal by written submissions

[2] *Review Reference #R0118651*
[3] The Board operates as WorkSafeBC.

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where the issues are largely medical, legal, or policy based and credibility is not an issue. This appeal does not involve a significant issue of credibility or other matters that would be better resolved through an oral hearing. I am satisfied that an oral hearing is not required.

Background and Evidence

[8] I have reviewed all of the evidence and information on file. Much of the worker's claim history has been set out in *WCAT-2008-01868*. The following summary is not intended to be a recitation of all of the evidence and information on file, but rather is intended to provide context for my reasons.

[9] The worker was an equipment operator. He was injured on February 12, 2000, when he stepped down from his machine and twisted his right knee. The Board accepted the worker's claim for a right knee injury on February 29, 2000.

[10] The worker returned to his regular job duties in late April 2000. He continued to undergo medical investigation, however, and a May 26, 2000 MRI examination of his right knee indicated that he had osteoarthritis at the patellofemoral joint and an irregularity of the posterior horn of the medial meniscus, with no definite tear evident. The worker was assessed by an orthopaedic surgeon, Dr. Werry, on June 22, 2000, who indicated that he was of the view that the worker had right knee medial meniscal degeneration. Of note, Dr. Werry indicated at that time that he suspected that the worker's symptoms would gradually subside.

[11] The worker had no further contact with the Board until August 2005, when an orthopaedic surgeon, Dr. Panagiotopoulos, provided a consultation report to the Board recommending a further MRI of the worker's knee. In a December 2005 report, Dr. Panagiotopoulos noted that he had reviewed the new MRI examination of the worker's knee, and that it indicated that there was a medial meniscal tear of the posterior horn, as well as a peri-meniscal cyst arising from the tear. It was determined that surgery would be performed on the worker's right knee.

[12] On February 7, 2006, the Board issued a decision letter in which it determined that the worker's newly diagnosed medial meniscal tear had been accelerated by the February 12, 2000 incident, and was therefore compensable. The worker's claim was reopened in order that he could undergo the surgery proposed by Dr. Panagiotopoulos.

[13] Prior to undergoing surgery, the worker met with a Board nurse advisor, his supervisor, his union representative and the employer's return-to-work coordinator, in order to discuss the worker's work subsequent to surgery. Of note, in a memorandum summarising that meeting, the nurse advisor noted that that the worker had indicated that he only had a few years left to go at his job.

[14] The worker underwent a medial meniscectomy on his right knee, performed by Dr. Panagiotopoulos, on February 24, 2006. In an April 2, 2006 consultation report, Dr. Panagiotopoulos indicated that the worker continued to improve.

[15] On April 25, 2006, the Board determined that the worker was no longer entitled to temporary wage loss benefits as of April 21, 2006, as he was fit to return to his full pre-injury job duties as of the completion of his graduated return to work on that date. The Board further informed the worker that it would consider his entitlement to a permanent partial disability award after he had met with his orthopaedic surgeon on April 26, 2006.

[16] In a June 27, 2006 consultation report, Dr. Panagiotopoulos noted that although the worker did not have a "perfect result," he was doing reasonably well, but would likely have a progression of symptoms in the future due to the arthritic changes in the worker's knee.

[17] In a progress report dated December 8, 2006, Dr. Huang, a family physician, indicated that the worker was "doing better" and had reduced pain and swelling. On examination, the worker's range of motion was noted to be normal, with minimal joint effusion.

[18] The worker returned to Dr. Panagiotopoulos on December 19, 2007, however. At that time, Dr. Panagiotopoulos noted that the worker had mild effusion of the right knee, and that he lacked a few degrees of extension on range of motion testing. Dr. Panagiotopoulos indicated that the worker would ultimately require a total knee replacement at some point in the future.

[19] On March 1, 2007, the Board wrote a decision letter to the worker indicating that it had reviewed his claim for indications of permanent disability (as it had indicated it would in the April 25, 2006 decision letter). In that decision letter, the Board determined that there was no evidence of the worker having a permanent functional impairment as a result of the February 12, 2000 incident.

[20] The worker requested a review of the Board's March 1, 2007 decision, and the Review Division confirmed the Board's decision. The Review Division confirmed the Board's decision in *Review Reference #R079541*.

[21] The worker appealed *Review Reference #R079541* to WCAT. In *WCAT-2008-01868*, dated June 24, 2008, a WCAT vice chair considered whether the worker had suffered a permanent disability to his right knee as a result of the work injury of February 12, 2000. The vice chair confirmed the Board's decision that the worker had not, while noting that the Board had not yet made a decision as to whether or not the worker had experienced an aggravation or acceleration of his medial compartment degenerative changes as a compensable consequence of his work injury. The vice chair noted that if the Board did ultimately accept that condition as a compensable consequence, it may also consider at that point whether that condition constituted a permanent functional impairment.

[22] On September 19, 2008, the Board issued a decision letter in which it accepted that the February 12, 2000 incident caused the worker to experience a permanent aggravation of the pre-existing degenerative condition of the medial compartment of his right knee. That decision letter went on to find that although there was no objective medical evidence that the worker had a permanent functional impairment when he was assessed by Dr. Panagiotopoulos in February 2007, there was evidence that he may have a slight functional impairment as of December 2007. As a result, the worker's claim was referred to the Board's Disability Awards Department.

[23] The worker underwent a permanent functional impairment examination with a Board disability awards medical advisor on March 5, 2009. In the report associated with that examination, the worker is noted to have changed to a new job with the accident employer and was working as a driver on a full time basis, as he had found going up and down ladders in his employment as a ship loader to be difficult. Of note, the examining physician noted in that report that:

> The worker was cooperative and a good historian. **He is concerned that he would like to retire as the job is very hard on his knee.**
>
> [emphasis added]

[24] A Board team assistant noted in a March 9, 2009 memorandum that the worker had telephoned the Board in order to obtain an appointment with his case manager. The worker is reported to have indicated that he would like to discuss the possibility of changing his employment due to problems with his knee.

[25] In a March 10, 2009 file memorandum, a Board case manager noted that the worker was working full time as a driver with the accident employer, and that the worker reported having difficulty with the driving aspect of his job duties.

[26] The employer wrote the Board on March 16, 2009. In that letter, the employer noted the following:

> For your information, today [the worker] completed his pension papers for retirement. His last day at work was Friday, March 13, 2009. His first day of retirement is May 1, 2009.

[27] In an April 6, 2009 file memorandum, a Board vocational rehabilitation consultant indicated that he had spoken with the employer's safety and training assistant, who had informed him that the worker had retired with financial incentives available through his union.

[28] In a telephone memorandum dated July 20, 2009, however, the worker reported that he had been working part time doing mechanical work for approximately two months, but that he had left that position on July 16, 2009.

[29] The worker attended Dr. Panagiotopoulos on October 7, 2009 for follow up regarding his knee pain. Dr. Panagiotopoulos noted that the worker had ceased working, and that although he continued to function at a fairly high level, the only procedure which would assist with his knee pain at that point would be a total knee replacement. Dr. Panagiotopoulos noted that the worker was to go on a trip to India for "at least a couple of months," and that the worker would attend again to discuss whether or not the surgery would be undertaken.

[30] On February 17, 2010, the worker attended Dr. Yorke, a rheumatologist. In his consultation report of that date, Dr. Yorke noted that the surgery that the worker had undergone in 2006 had helped his knee condition for a time, but that the worker had probable osteoarthritis of the right knee joint. Of interest, Dr. Yorke noted that the worker had retired "last year at 61."

[31] In a May 4, 2010 decision letter, the Board determined that the worker had a permanent partial disability in the amount of 8.625% of a total disability. Also in that letter, the Board determined that the worker's permanent partial disability first occurred subsequent to June 30, 2002, and that it was the current provisions of the Act that applied to the worker's permanent partial disability award. The Board therefore noted that section 23.1 of the Act applied, and concluded that the worker's permanent partial disability award was payable until the worker reached age 65. It is that decision that is the subject of this appeal.

[32] The worker provided submissions to the Review Division on his review of the Board's May 4, 2010 decision on September 25, 2010. He submitted that he was a 62 year old, and was married with "young twins" who continued to be his dependants. In his submissions, the worker acknowledged that his compensable conditions progressed until they became a permanent disability in December 2007. The worker submitted that his former place of employ had closed permanently in February of 2010, but that prior to that closure he had taken advantage of a Provincial government program, which the worker indicated had the purpose of "trying to transition workers out of the forest sector." The worker indicated that in order to take advantage of the Provincial government program funding, he had been required to retire and commence receiving his pension. The worker submitted that despite retiring from his work in the forestry industry, he had intended to continue his employment elsewhere after receiving the funding from that Provincial government program (although not in the forestry industry).

[33] The worker further submitted that he had met with his financial adviser in 2008 in order to discuss his financial circumstances, and that that meeting had included a discussion about the worker continuing to work past age 65. The worker attached a letter from his financial adviser to his submissions, in which the financial adviser indicated that:

> I met with [the worker] in 2008 to discuss his retirement plans. Based on his net income need, one of the scenarios that we discussed was his plans to work up to or beyond the age of 70.

[34] The worker submitted that:

> [The worker] clearly has every intention of continuing to work after age 65; in fact he intends to work until at the very least age 70.

[35] The worker further attached three letters from former and current employers. Two of those letters, dated September 9, 2010 and September 20, 2010, indicated that the worker was currently employed as a security officer and a school bus driver, both on a part-time basis. The third letter, dated September 16, 2010, indicated that the worker had been employed by that employer as a security guard and school bus driver, but that he had left his job due to pain in his knee in October 2009.

[36] Of note, none of the letters from the three employers provide any indication as to whether the worker had expressed an interest in working past age 65, or whether such an opportunity was open to the worker.

[37] Although the worker did not raise the issue in his submissions, the review officer in *Review Reference #R0118651* noted that given the date of the worker's injury, in considering the worker's permanent partial disability award, it was important to consider whether it was the current provisions of the Act that applied, or those that existed prior to June 30, 2002. The review officer noted policy item #1.03 of the RSCM II, which states that if a worker was injured prior to June 30, 2002, but the first indication that the injury was permanently disabling occurred on or after that date, the current provisions (as set out in the RSCM II) would apply to the worker's permanent disability award.

[38] After considering the evidence, the review officer confirmed the Board's decision that the current provisions applied to the worker's permanent partial disability award, and confirmed the Board's decision as to the amount and duration of the worker's award.

[39] In a June 6, 2011 telephone conversation with a Board case manager, the worker is noted to have indicated that he was retired from his pre-injury job, but that he was working part-time driving a school bus.

Submissions

[40] The worker did not provide any submissions to WCAT. On his notice of appeal form, he indicated that the result that he was seeking from his appeal was that his pension continue past age 65.

Reasons and Findings

[41] At the outset of my reasons, I note that, as the worker's date of injury occurred prior to the significant amendments to the Act that took effect on June 30, 2002, the review officer in *Review Reference #R0118651* considered whether it was the current Act and policy that ought to apply to the worker's permanent functional impairment award or the

Act and policy as it existed prior to June 30, 2002. The review officer reviewed policy item #1.03, "Scope of Volumes I and II in Relation to Benefits for Injured Workers," and determined that it was the current Act and policy that ought to apply to this case, as the first indication that the worker's injury was permanently disabling occurred on or after June 30, 2002. I agree with the review officer's reasons for reaching that conclusion, and adopt them as my own. I find that the first indication that the worker's injury was likely to be permanently disabling occurred in 2007, when, as was noted by Dr. Panagiotopoulos in his December 2007 consultation report, the worker was noted to have ongoing effusion and to be lacking some range of motion in his knee. Those findings differed from Dr. Huang's December 2006 findings in which the worker was noted to have a full range of motion and no effusion in his knee.

[42] I note in passing that in his submissions to the Review Division, the worker submitted that his condition had become permanent in 2007.

Should the worker's permanent partial disability award continue subsequent to the date upon which he reaches 65 years of age?

[43] I deny the worker's appeal. My reasons for this decision follow.

[44] Section 23.1 of the Act provides that:

> 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, …

[45] The policy relating to section 23.1 is set out at policy item #41.00, which provides, in part:

> 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.

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 the Board 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 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

- 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. The Board 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 the Board has established as the worker's retirement date. At the worker's age of retirement, as determined by the Board, periodic payments will conclude even if the worker's permanent disability remains.
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> [emphasis added]

[46] Although not binding on me, the Board has provided practice guidance with respect to policy item #41.00 and section 23.1 of the Act in Practice Directive #C5-1. That practice directive sets out that:

> D. In order to ensure fair and equitable treatment for all workers, Board officers should carefully consider whether the evidence actually supports a worker's contention that he or she would have been working after age 65. **The circumstances under consideration must be those as they existed at the time of injury.** Supportive evidence includes independently verifiable pre-injury indication of a worker's intent to work after age 65. Please see RSCM Vol. II, Policy items #35.30 and #41.00 for additional guidance.
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> E. Furthermore, even if there is evidence that a worker intended to work after age 65, regard must be had to the ability/likelihood of the worker actually succeeding in continuation of employment. For example, consideration may be had whether there are employment opportunities available for those who are 65 years or older in the worker's occupation.
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> [emphasis added]

[47] Previous WCAT panels have considered whether the above noted practice directive sets out an appropriate manner in which to adjudicate the duration of a worker's permanent disability award. Specifically, WCAT panels have considered whether it is the worker's circumstances as they existed at the time of injury that must be considered in applying section 23.1 and policy item #41.00, or whether the worker's intention regarding retirement subsequent to the date of injury may also be considered. While prior WCAT decisions are not binding on me[4], I consider that they may provide useful guidance in the interpretation of Board policy. In *WCAT-2010-01327* the panel noted that:

> I acknowledge the employer's argument in the context of C5-1 that determination of whether the worker would have worked past the age of

[4] Subject to section 250(3) of the Act.

> 65 should be made based on the evidence of the worker's intentions while still working for the pre-injury employer. However, neither the Act nor the Board's policy restricts consideration of independent verification only to information provided by the pre-injury employer. Further, one of the fundamental purposes of the Act, in case of permanent disability and within the limits of the average earnings rate established under section 33 of the Act, is to compensate injured workers for loss of earnings and earning capacity up to the time a worker would retire. **I find that when examining the evidence to determine when the worker would retire, it would be inconsistent with the purpose of the Act to exclude from consideration relevant evidence of any life changes affecting employment that the worker has had to make, because of the effects of the injury.** In this case, the evidence does not reflect any investigation by the disability awards officer to determine whether the worker would retire at age 65.
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> [emphasis added]

[48] In *WCAT-2010-01780*, however, the panel considered the reasoning in *WCAT-2010-01327*, and specifically that panel's conclusion that legislation and policy did not preclude a consideration of circumstances that occurred or developed after the injury in determining whether the worker would have worked past age 65, and that practice directive #C5-1 did not provide any rationale for concluding that it was only the circumstances that existed at the time of the injury that ought to be considered in determining whether a worker would have worked past age 65. The panel in *WCAT-2010-01780* concluded that:

> [124] With respect, I do not consider that any rationale is necessary. The legislation delegates to the board of directors of the Board the task of determining what will be necessary for the Board to be satisfied that a worker would retire after age 65. In the exercise of that authority, the board of directors reasonably interpreted "would retire" as meaning "but for the injury would have retired", and developed policy which sets out 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", all of which are cast in the past tense, and goes on to discuss what should be considered next, once the Board is satisfied that a worker "would have continued to work past age 65 if the injury had not occurred". **The phrases, "intended to work past age 65", and "would have continued to work past age 65 if the injury had not occurred", in particular, "if the injury had not occurred", can only have practical meaning if they refer to a point in time immediately prior to the injury.**
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> …

> [126] Again, with respect, I disagree with this view. The purpose of the workers' compensation system is to restore lost earning capacity, and it is designed to ensure that workers will not suffer significant losses of earning as a result of compensable injuries or diseases. Thus, workers' financial well-being should not appreciably change as a result of an injury, and though "life changes affecting employment" might be required in adaptation to an injury, such life changes will not, at least if the system works as it was designed to do, so impact pre-retirement earnings or savings that a worker would have to work appreciably longer than he or she otherwise would have.
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> [emphasis added]

[49] I agree with the reasoning set out in *WCAT-2010-01780*, and adopt it as my own. I find further support for this view in the reasoning of the panel in *WCAT-2011-01674*, with which I also agree. In that case, the worker had argued that the Board ought to defer a decision on the issue of when she intended to retire, given her relatively young age (she was 41 at the time of injury). The panel in *WCAT-2011-01674* indicated in its reasons that:

> [64] It is not apparent to me that the actual wording of section 23.1 of the Act necessarily requires that it is the worker's retirement intentions at the time of the injury which is relevant. I accept, however, that such an approach is generally appropriate. The more time which elapses subsequent to the worker's injury before a decision is made, the more difficult it may be to collect evidence regarding the worker's intentions at the time of his injury. Accordingly, I consider that it would be inconsistent with section 23.1 of the Act to defer a decision regarding the worker's likely retirement age as proposed by the workers' adviser.
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> [65] While I appreciate the argument by the workers' adviser regarding the difficulties faced by a young worker in providing evidence regarding any retirement plans, I do not consider that this involves any unfairness. Having regard to the reasoning provided in the Winter Report [the March 2002 "Core Services Review of the Workers' Compensation Board"], which provided the basis for the 2002 statutory amendments which included section 23.1 and 23.2, it is evident that it was contemplated that age 65 would be used as the presumed date of retirement for most workers. Accordingly, the establishment of a reserve to provide retirement benefits under sections 23.2, 23.3 and 23.4 of the Act was intended to provide appropriate compensation in most cases. Having regard to the legislative background, I read section 23.1(a)(ii) as having authorized only a limited exception to the general rule established by section 23.1(a)(i). The fact that young workers may not be able

> to provide evidence meeting the requirements of section 23.1(a)(ii) is consistent with the fact that this was only intended to be a limited exception.
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> [footnote deleted]

[50] After considering the above, I find that the general approach to a consideration of the section 23.1 and policy item #41.00 regarding a worker's retirement age would appropriately involve a consideration of the worker's intentions at the time of injury as set out in practice directive #C5-1.

[51] The worker in this case has provided evidence which he submits shows that he intended to work past the age of 65, and that he in fact intends to do so and to work until the age of 70. I have considered the evidence provided by the worker in the form of the letters from his employers and financial adviser, as well as his submissions, which I have accepted as being the worker's evidence. Even in light of that evidence, I consider that I must deny the worker's appeal, as I do not find that that evidence is sufficient to conclude that, at the time of injury, the worker intended to retire after age 65.

[52] I note that at the time of injury, February 12, 2000, the worker was only 52 years old. He was, therefore, a significant number of years removed from reaching the presumed retirement age of 65. However, by the time that the worker was scheduled to undergo arthroscopic surgery for his compensable knee condition in February 2006, the worker was noted to have expressed, in a February 22, 2006 meeting attended by a Board nurse advisor, his supervisor, his union representative and the employer's return-to-work coordinator, that he had a fear of losing his job while he was off as he only had a few years left to go. The fact that the worker only had a few years "left to go" was, in my view, confirmed by the fact that the worker completed his retirement papers in March 2009 and ceased working on March 13, 2009. The worker officially was considered by the employer to be retired as of April 30, 2009.

[53] I consider this situation to have some similarities to that in *WCAT-2007-00769*[5]. In that case, the panel noted that although the worker had expressed in his evidence that he had no intention of ever retiring, the evidence before the panel indicated that the worker did in fact have an intention to retire, "in at least some senses of the word." The worker had applied for benefits from the Canada Pension Plan upon turning 65, although that had occurred prior to his injury. The worker also had accepted a retirement package from his employer in December 2003, just ten days prior to his experiencing his compensable injury. However, subsequent to "retiring" from his unionized position, the worker undertook new employment elsewhere. The panel found that those facts strongly suggested that the worker had an intention to retire at the time of his injury. The panel noted that the law and policy did not appear to address the range of possibilities that were open to a worker who elected to retire from one occupation,

[5] Identified by WCAT as a "Noteworthy" decision.

accept the appropriate pension benefits owed to him, but would continue working substantially full time in another capacity. The panel concluded, however, that:

> 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.
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> 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.
>
> 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.
>
> [emphasis added]

[54] There is essentially no evidence in this case as to what the worker's retirement intentions were at the time of injury. The worker has not in fact made any submissions in that regard. However, the information that does exist in this case indicates that, just as in *WCAT-2007-00769,* the worker had accepted a retirement package. As noted above, this is consistent with the worker's comments February 2006 that he had only a "few years" left at his job.

[55] I note that the worker has submitted that he retired early in order to take advantage of a Provincial government program. The worker's evidence in this regard does not necessarily support a conclusion that he intended, particularly at the time of injury, to work past age 65. In my view, the same can be said with respect to the letter from the worker's financial adviser. In that letter, the financial adviser indicated that "one of" the scenarios that he had discussed with the worker involved plans in which the worker would work up to or beyond the age of 70. I do not consider that evidence to be of the type that is required by policy in order to determine that the worker's intention at the time of injury was to work to age 70, let alone past age 65. The financial adviser indicated only that the worker working up to age 70 was "one of" the scenarios discussed. I take from that comment that other scenarios were discussed. While there is no evidence as to what those scenarios were, I find that I am unable to take from the financial adviser's comments that it was the worker's "intention" to work past age 65.

[56] I also do not consider the letters that the worker provided in his submissions to the Review Division provide any independent verification for the worker's statement that he intended to work past age 65. I note that in each of those three letters, while the employers indicate that the worker would be able to continue working, there is nothing contained within those letters indicating what the employer's standard retirement age is, or how the worker's age may affect his ability to complete his job duties. Finally, all of those employers appear to have employed the worker only since 2009. In short, none of those letters provide any independent verification as to what the worker's intentions were at the time of injury.

[57] I am left with the worker's statement from his submissions to the Review Division, in which he indicated that he intends to work past age 65 and in fact to work to at the very least to age 70. The worker has not, in my view, made any submissions indicating that he had such an intention at the time of injury in February 2000. From my review of the information closer in time to the date of injury, including particularly his comments at the February 22, 2006 meeting, I find that it is more likely than not that, at the time of injury, the worker intended on working until his scheduled retirement date with his time-of-accident employer. There is simply no other evidence before me upon which I could rely as indicating that it was likely that at the time of injury the worker intended to continue working beyond that date.

[58] I am not persuaded that the evidence is at least evenly balanced in favour of concluding that, at the time of his injury in February 2000, the worker would have continued to work past age 65 such that his permanent disability award should continue subsequent to that date. I agree with the decision of the review officer, and deny the worker's appeal.

Conclusion

[59] I confirm *Review Reference #R0118651*. I find that there is insufficient evidence to conclude that the worker intended, at the time of his injury, to work past age 65. Pursuant to section 23.1 of the Act, the worker's permanent partial disability award will therefore cease upon his reaching 65 years of age.

[60] The worker has not requested reimbursement for appeal expenses and none are apparent. I consequently make no order regarding expenses of this appeal.

Andrew Pendray
Vice Chair

AP/gw

[*] This decision has been edited to correct minor typographical errors.