Noteworthy Decision Summary

Decision: WCAT-2014-00467 **Decision Date:** February 14, 2014
Panel: David Newell, Cynthia J. Katramadakis, Guy Riecken

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

In considering the worker's argument that his permanent disability award should not terminate when he turns 65, WCAT interpreted policy item #41.00 of the *Rehabilitation Services and Claims Manual, Volume II* to mean that independently verifiable evidence is required to confirm a worker's subjective statement regarding his or her intention to work past age 65 and to establish the worker's later retirement date, but if such evidence is not available, a determination will be made on the available evidence, including the worker's statements.

The worker was in his 40s when the Workers' Compensation Board, operating as WorkSafeBC (Board), determined that he was entitled to a permanent disability award (pension) under section 23 of the *Workers Compensation Act* (Act). The Board informed the worker that according to section 23.1 of the Act, pensions are normally paid until the worker reaches 65 years of age, unless the Board is satisfied that the worker would have retired at some later date. In the same letter, the Board referred the worker to its requirement set out in policy item #41.00 for independent and verifiable evidence of a worker's intention to retire after age 65. The worker claimed that he would not have retired until after age 65 but the Board determined otherwise. In support of his appeal to WCAT, the worker provided some, albeit little, independently verifiable evidence of the kind described in policy item #41.00.

Given the scant independently verifiable evidence in favour of the worker's argument, WCAT focused on the language in policy item #41.00 providing an exception to the general requirement that evidence pertaining to a particular worker's likely retirement age be independent and verifiable. The panel first noted that previous WCAT decisions have given differing interpretations of the extent of the exception. Some WCAT panels have taken a strict approach, denying any extension of payment beyond age 65 in the absence of independent evidence. In other decisions, WCAT has applied a broader approach, considering a worker's statements as well as evidence regarding his or her family and financial circumstances.

The panel found that the broader interpretation – subject to the proviso that independently verifiable evidence must be relied upon if it is available – is the only interpretation which gives meaning to both of two otherwise incompatible statements in the policy: i) the categorical statement that independently verifiable evidence is required and ii) the exception that "if the worker's statement is not independently verifiable, the Board officer will make a determination based on the evidence available, including information provided by the worker". Moreover, the panel noted its interpretation was consistent with the legislative scheme and, unlike the strict approach, avoided possible conflict with sections 99(3) and 250(4) of the Act requiring the Board and WCAT to determine compensation decisions in favour of the worker when the evidence is evenly weighted.

Section 23.1 recognizes age 65 as the standard age of retirement that will apply in most cases, but also recognizes there may be exceptions where payment of benefits beyond age 65 is

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appropriate. In order for the exception to apply, rather than the standard, there must be sufficient positive evidence from which to conclude on the balance of probabilities (subject to section 99(3) and section 250(4) of the Act) that the worker specifically intended to retire at a later date and to determine what that date is. Ultimately, WCAT denied the appeal, concluding that there was not sufficient evidence to establish that the worker would have worked beyond age 65.

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Introduction

[1] This appeal concerns the somewhat vexed question of when a permanently disabled worker may receive a permanent disability pension beyond the age of 65.

[2] The worker was employed as an oiler at a saw mill. In March 2010, he injured his right knee at work. The Workers' Compensation Board (Board)[1] accepted the worker's claim for an aggravation of a pre-existing right knee condition. The Board determined that the worker's injury had stabilized and become permanent in July 2012.

[3] In a decision letter dated December 31, 2012, the Board informed the worker that he was entitled to a permanent partial disability award (pension) of 19.948% of total disability comprising 19.75% for functional impairment, and an age adaptability factor of 0.198%. The effective date of the pension was July 19, 2012, and it would be paid until the worker reached 65 years of age.

[4] The worker requested a review of the Board's decision regarding the termination date of the pension. He did not dispute the amount or the effective date of the pension. In a decision dated March 11, 2013 (*Review Reference #R0154785*) the Review Division confirmed the Board's decision. The worker now appeals to the Workers' Compensation Appeal Tribunal (WCAT). Under item #3.3.1 of the WCAT *Manual of Rules of Practice and Procedure*, panels have jurisdiction to address any issue raised in either the Review Division decision or the Board decision which was under review, but will generally restrict its decision to the issues raised by the appellant in the notice of appeal. The only issue the worker raised was payment of the pension beyond age 65. In accordance with item #3.3.1 we will restrict our decision to that issue.

Issue(s)

[5] The issue in this appeal is whether the worker is entitled to receive the pension beyond his 65th birthday, and if so, what is the correct termination date for the pension.

[1] Operating as WorkSafeBC

Jurisdiction

[6] 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.

[7] 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 of directors of the Board that is applicable in the case. All references to policy in this decision, unless otherwise specified, pertain to the Board's *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

[8] The chair of WCAT appointed a three-person panel under section 238(5) of the Act, to consider this appeal. The appointment was not made under section 238(6) of the Act; consequently, this decision does not constitute a binding precedent pursuant to section 250(3) of the Act.

[9] The worker initially requested an oral hearing. The WCAT Registry staff made a preliminary decision that the appeal would proceed by way of review of the written information on the worker's claim file and written submissions. We have considered the WCAT *Manual of Rules of Practice and Procedure*, including Rule #7.5, "Appeal Method," and we have reviewed the issues, evidence, and submissions in this appeal. We are satisfied that the worker's appeal does not raise significant factual disputes, and does not involve questions of credibility or other compelling reasons for an oral hearing. Rather, the appeal primarily involves the application of law and policy to evidence and already on file, and the worker's submissions. We find that an oral hearing is not necessary for the full and fair adjudication of this appeal.

[10] The employer was notified of the appeal but did not participate in it.

Background and Evidence

[11] The worker injured his right knee in 2010. He was age 44 at the time. X-rays taken on March 29, 2010 indicated near-complete joint space loss and severe lateral compartment osteoarthritis, which was likely a consequence of a meniscectomy in 1994. The Board ultimately accepted aggravation of that condition under the claim and sponsored a partial right knee replacement surgery.

[12] The Board determined that the worker's compensable condition had stabilized and become permanent as of July 19, 2012. Payment of temporary disability benefits ended on that date, and the worker's claim was referred to the Board's Disability Awards Department for assessment of a permanent functional impairment.

[13] In a letter dated October 25, 2012, the Board advised the worker that under section 23.1 of the Act, his permanent partial disability award would be paid until the date he turned age 65, or a later date if the Board was satisfied that he would have retired at that later date. The letter also explained that under policy #41.00 of the RSCM II, the Board requires independent and verifiable evidence of the worker's intention to retire later than age 65. The worker was invited to provide evidence of the kind set out in policy #41.00.

[14] In a letter dated November 5, 2012, the worker wrote that he "would not be able to retire until the age of sixty seven due to the new government rules about pensions." In the decision letter under appeal, the Board informed the worker that his permanent partial disability award would be paid until he reached age 65.

[15] The worker submitted a copy of a page from the Internet site of Statistics Canada regarding a 2010 study on delayed retirement.[2] The study examined Labour Force Survey data and concluded that "in 2008, an employed 50-year old had an expected additional 16 years at work", which was stated to be approximately 3.5 years longer than workers of the same age in the mid-1990s.

[16] The worker submitted a copy of a March 2011 publication from Sun Life Financial entitled "Sun Life Canadian Unretirement Index Report." The report presented statistics including the average age Canadians expect to retire, both in aggregate and broken down based on their current age. Those statistics, which were based on privately commissioned surveys in 2008, 2009 and 2010, indicated that overall, the people surveyed in 2010 expected to retire at age 67.7, and that within that group, people between the ages of 40 and 49 expected to retire at age 67.

[17] The worker submitted a copy of his union pension plan, which states that a worker covered by the plan may elect to begin receiving a pension any time after reaching age 55 but must start receiving a pension no later than December 1 in the year he or she reaches age 71. An "active plan member" who retires before age 60, or an "inactive plan member" who retires before age 65, will receive a reduced pension. An "active plan member" who retires at age 60 or later, or an "inactive plan member" who retires at age 65 or later, will receive 100% of their earned pension. A worker may continue to earn benefits under the plan up to age 71.

[18] Through his representative, the worker stated that he started work for the employer in 1999, and prior to that had not worked for any employer who had a pension plan. The worker's wife works, but does not have a pension plan. The employer does not have a mandatory retirement age, and there are other workers at the worker's place of employment who are older than age 65.

[2] www.statcan.gc.ca/daily-quotidien/111026/dq111026b-eng.htm

Reasons and Findings

[19] The worker's permanent partial disability pension is payable under section 23(1) of the Act. 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
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> (a) if the worker is less than 63 years of age on the date of the injury, until the later of the following:
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> (i) the date the worker reaches 65 years of age;
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> (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,…

[20] The policy relating to section 23.1 is set out at policy #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.
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> 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.
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> 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:
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> - 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
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> 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.

[21] Numerous WCAT panels have considered the circumstances in which the kind of independent, verifiable evidence contemplated by policy #41.00 was not available. Some panels have taken a strict approach, denying any extension of payment beyond age 65 in the absence of independent evidence establishing a worker's intention to work past that age. Other panels have taken a broader approach, considering a worker's statements as well as evidence regarding the worker's family and financial circumstances in order to reach a conclusion about that worker's intentions. Based on our analysis of the policy, set out below, we conclude that the broad approach is correct.

[22] The courts consider policy of the board of directors of the Board to be subordinate legislation[3]; consequently, the principles of statutory interpretation apply to policy #41.00.[4] The leading case on statutory interpretation is *Rizzo & Rizzo Shoes Ltd*. (Re)[5] in which Iacobucci J. applied the so-called "modern principle" described by Professor Driedger in *Construction of Statutes* (2nd Ed 1983) at p. 87 where he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary

[3] *Jozipovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2011 BCSC 329.
[4] Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 5th Ed. (LexisNexis, Markham, 2008).
[5] [1998] 1 S.C.R. 27.

sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[23] What, then, is the grammatical and ordinary sense of the evidentiary requirement in policy #41.00?

[24] Policy #41.00 states that the Board requires evidence that is verified by an independent source to confirm the worker's subjective statement that he or she intends to work past age 65. The policy also states that evidence is required so that the Board can establish the worker's new retirement date. The statement that "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," could be understood to modify or qualify either or both of the preceding sentences, producing the following three possible meanings:

1. Independently verifiable evidence is required to confirm the worker's subjective statement regarding his or her intention to work past age 65, but if such evidence is not available, a determination will be made on the available evidence, including the worker's statement. Additionally, and without exception, independently verifiable evidence is required to establish the worker's later retirement date.
2. Without exception, independently verifiable evidence is required to confirm the worker's subjective statement regarding his or her intention to work past age 65. Additionally, independently verifiable evidence is required to establish the worker's later retirement date, but if such evidence is not available, a determination of the later retirement date will be made on the available evidence, including the worker's statement.
3. Independently verifiable evidence is required to confirm the worker's subjective statement regarding his or her intention to work past age 65 and to establish the worker's later retirement date, but in either case, if such evidence is not available, a determination will be made based on the available evidence, including the worker's statement.

[25] We conclude that the first meaning does not encapsulate the grammatical and ordinary sense of the policy. It produces an absurd result. Any independently verifiable evidence establishing a worker's later retirement date would also be evidence confirming the worker's intention to continue working past age 65. This interpretation would render the exception meaningless.

[26] As between the second and third meanings, the third appears to us to make more sense. We note that independently verifiable evidence and the worker's intent to work past age 65 are linked in the same sentence, but in contrast the next sentence, dealing with the worker's later retirement date, only the word "evidence" is used, without reference to an independently verifiable source. That suggests the exception must apply to the first part. If the exception must apply to the first part, but applying it only to

the first part creates an absurd result, it must be taken to apply to the second part as well. That conclusion is reinforced by the first sentence of the next paragraph in policy #41.00, which introduces "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**…" [emphasis added].

[27] The balance of the modern principle of statutory interpretation requires consideration of the scheme of the legislation, its object, and the intent of the legislature.

[28] The apparent purpose of section 23.1 of the Act is to limit the duration of pensions to age 65 unless the Board is satisfied the worker would have retired at a later date. That the legislature intended that meaning is borne out by reference to the *Core Services Review of the Workers' Compensation Board* by Alan Winter (the Winter Report) leading up to the revision of the Act in 2002 which included section 23.1, and to the debate in the legislature recorded in Hansard.

[29] Mr. Winter noted that payment of pension awards to permanently disabled workers for their lifetime (as required by the Act at that time) resulted in substantial overpayment of compensation, which impacted the long-term viability of the workers' compensation system. Consequently, he recommended that pensions cease upon the worker reaching the standard retirement age of 65, unless the worker could establish that he or she would have retired at a later date. Mr. Winter considered that it was necessary for the presumption of retirement at age 65 to be rebuttable in order to avoid injustice to workers who would have retired at a later date. However, he recommended that in order to have the pension award continue beyond the standard retirement age, more was needed than the subjective belief of the worker that, but for the work-related disability, he or she expected to remain employed beyond age 65.[6]

[30] During debate in the legislature on section 23.1, Graham Bruce, the minister responsible, stated that the proposed changes to the Act implementing recommendations in the Winter Report were intended to address the financial risks faced by the workers' compensation system.[7]

[31] We note that the panel in *WCAT-2010-01780* offered a strong argument in favour of the second meaning. That panel wrote:

> I say this because the categorical statement about the nature of the evidence (independently verifiable) the Board requires to be satisfied that the worker intended to work beyond age 65 would be meaningless if, in fact the Board will be satisfied with evidence that does not meet that test.

[6] Alan Winter, *Core Services Review of the Workers' Compensation Board* (2002), p. 206-208.
[7] British Columbia, Legislative Assembly, Committee of the Whole House, "Workers Compensation Amendment Act, 2002" in *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 8, no. 8 (29 May 2002) at 3697.

[32] That analysis is consistent with the principle that every word in legislative text must be given meaning. However, following the same principle, meaning must be given to the next sentence in policy #41.00, which states that "if the worker's statement is not independently verifiable, the Board officer will make a determination based on the evidence available, including information provided by the worker." That sentence clearly contemplates a determination being made in circumstances where independently verifiable evidence is not available. Both parts can be given meaning if it is recognized that a worker's failure to tender independently verifiable evidence that was available, will not entitle the worker to a determination based on other evidence that is not independently verifiable. A determination will be made on the basis of other evidence that is not independently verifiable only if independently verifiable evidence is not available. In our view, this textual analysis favours the third meaning rather than the second.

[33] Examination of the potential consequences of different interpretations may assist in discerning which interpretations are or are not harmonious with the object of the legislation. As noted by Professor Sullivan[8]:

> Not surprisingly, the courts are interested in knowing what the consequences will be and judging whether they are acceptable. Consequences judged to be good are presumed to be intended and generally are regarded as part of the legislative purpose. Consequences judged to be contrary to accepted norms of justice or reasonableness are labelled absurd and are presumed to have been unintended. If adopting an interpretation would lead to absurdity, the courts may reject that interpretation in favour of a plausible alternative that avoids the absurdity.

[34] Professor Sullivan goes on to say that a common form of absurdity is where persons who are similar are treated differently without an adequate reason for the difference.

[35] In our view, consideration of the potential consequences also favours the third meaning over the second. If the second meaning is accepted, the effect of section 23.1 of the Act would be to treat some groups of workers, such as the self-employed, differently from others, such as salaried workers. In *WCAT-2010-02684*, the panel acknowledged that it would be difficult for a self-employed worker to provide the kind of independently verifiable evidence described in policy #41.00. We can see no adequate reason why self-employed workers should be treated differently from salaried workers, which would be the result if the second meaning was adopted. The third meaning avoids that problem.

[36] Another consequence of the second meaning, that the third meaning avoids, is the possibility of rendering policy #41.00 patently unreasonable. As subordinate legislation,

[8] Sullivan, supra at p. 299

policy must be capable of being supported by the Act, otherwise, it will be considered to be patently unreasonable. Section 99(3) of the Act states:

> If the Board is making a decision respecting the compensation or rehabilitation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the Board must resolve that issue in a manner that favours the worker.

[37] Section 250(4) of the Act is a similar provision that applies to WCAT.

[38] Adopting the second meaning of policy #41.00 would result in an inflexible rule demanding independently verifiable evidence of a worker's intention to retire later than age 65 in every case. In circumstances where independently verifiable evidence was not available, that interpretation would result in a worker being deemed to intend to retire at age 65. If that worker could provide evidence of an intention to retire at a later age that was credible and compelling but not capable of independent verification, and if there was no contrary evidence, then section 99(3) (or section 250(4)) would require a decision in favour of the worker; yet, such a decision would be precluded by policy #41.00. In those circumstances, the second possible meaning of policy #41.00 would not be capable of being supported by the Act. The third meaning of policy #41.00 avoids that conflict and is capable of being supported by the Act.

[39] We conclude that the correct interpretation of policy #41.00 is the third meaning set out above. Independently verifiable evidence is required to confirm the worker's subjective statement regarding his or her intention to work past age 65 and to establish the worker's later retirement date, but in either case, if such evidence is not available, a determination will be made based on the available evidence, including the worker's statement.

[40] The panel in *WCAT-2011-01674* encapsulated the practical application of this interpretation, when he stated:

> ...I interpret the policy as meaning that verifiable independent evidence is to be preferred. Where available, this provides a stronger basis for a decision. I consider, however, that the policy at RSCM II item #41.00 also contemplates the situation in which a decision may be made regarding a retirement date subsequent to age 65, in which verifiable independent evidence is not available. Ultimately, this requires a judgment regarding the weight of the evidence, including that provided by the worker (which includes consideration as to the ability/likelihood of the worker actually succeeding in a continuation of employment after age 65, as set out in the practice directive).

[41] The practice directive the panel in *WCAT-2011-01674* was referring to was Practice Directive #C5-1. Practice Directive #C5-1 has been amended twice since the decision

in *WCAT-2011-01674*. The current version of the practice directive continues to include language similar to the passage referred to above. Practice directives are not policy and are not binding on WCAT; however, they may provide useful guidance in the application of policy. Practice Directive #C5-1 states in part:

> Age 65 is the established starting point in adjudicating a worker's retirement age for purposes of worker's compensation benefits, and in most cases, age 65 will also represent the final decision on the matter.
>
> The law and policy explain that a worker may provide sufficient positive evidence to establish that he or she would have worked beyond age 65, in which case the exception can be applied and benefits extended beyond age 65. The standard of proof is on a balance of probabilities as described in RSCM Policy #97.00.[9]
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> In each case, the officer adjudicates the worker's retirement age based on all of the available evidence, including the worker's statement.

[42] Practice Directive #C5-1 indicates that in selecting a retirement age beyond age 65, the Board will consider only the circumstances as they existed just before and at the time of injury, because the determination is whether or not the worker would have worked past age 65 if the injury had not occurred.

[43] Practice Directive #C5-1 states that only evidence specific to the worker, and his or her employment situation is considered. The worker's particular employment circumstances and personal life situation have to demonstrate that it is more likely than not the worker would have both the motive and opportunity to work beyond age 65, and had made plans to do so. The practice directive states that motive alone is not sufficient evidence for the exception to apply. For example, where the only evidence presented is that the worker has a mortgage and will therefore need to work beyond age 65, that is not sufficient evidence for the exception to apply. While the financial obligation may be considered a motive for working past age 65, there are other ways to manage financial obligations, and most individuals will continue to have some sort of housing cost throughout their lives.

[44] Practice Directive #C5-1 considers the situation of young workers, noting that they are less likely to have made retirement plans. The practice directive states that financial circumstances such as mortgage debt or lack of savings are often put forward as evidence the worker would have continued working past age 65 out of necessity. However, the likelihood of change in a young worker's income and financial circumstances over their working life means that a younger worker's financial situation

[9] Policy #97.00 provides that if, on weighing the available evidence, there is a preponderance in favour of one view over the other, that is the conclusion that must be reached. However, if it appears upon the weighing of the evidence that the disputed possibilities are evenly balanced then the rule comes into play which requires that the issue be resolved in accordance with that possibility which is favourable to the worker.

at the time of injury may not be very helpful evidence in trying to predict retirement age. A young worker is less likely to be able to provide sufficient evidence of a plan to work beyond age 65, but that is consistent with the basis for the exception, which is meant to address workers who were near retirement when injured and who had specific plans in place to continue working past age 65.

[45] Turning to the evidence in this case, we find that there is some, albeit little, independently verifiable evidence of the kind described in policy #41.00.

[46] The worker's union has provided evidence that the worker is covered by a pension plan. The terms of that pension plan do not require a worker to retire before age 71. That provides some support for the assertion that age 65 is not the normal retirement age in the worker's occupation. However, we note that the pension plan does appear to acknowledge age 65 as something of a norm for retirement insofar as pension benefits are reduced if a worker elects to take a pension before age 65.

[47] The worker's union stated that there are others in the worker's place of employment who continued to work past age 65. The worker submitted that was further evidence that age 65 was not the normal retirement age in his occupation. In our view, such anecdotal evidence is quite insufficient to establish a different norm for retirement age; moreover, it says nothing about the worker's personal intentions or capability.

[48] The worker submitted that since he had not begun accumulating pensionable time until 1999, he would continue to earn pension credits past age 65, and would, consequently, have an incentive to work longer.

[49] In our view, such independently verifiable evidence as there is provides support for the conclusion that it would be possible for the worker to continue working past age 65, and possibly financially beneficial for him to do so. It may also provide support for the conclusion that, if the worker did plan to work past age 65, he would be unlikely to work past age 71. The evidence is not inconsistent with a plan to retire later than age 65, but it does not provide positive evidence confirming that the worker had such a plan.

[50] We have considered the evidence the worker submitted with respect to recent changes in legislation regarding mandatory retirement, eligibility for Old Age Security (OAS) benefits, and calculation of Canada Pension Plan (CPP) benefits.

[51] The worker submitted that as a result of changes to the rules governing eligibility for OAS he would not be eligible to receive OAS until he is 67 years of age. He also submitted that as a result of changes to the rules governing calculation of CPP benefits, he would receive 8.4% more in CPP benefits if he retired at age 67, than if he retired at age 65. The Review Division commented that the rule changes had not been made at the time the worker was injured so "it would be difficult to conclude that the worker formed a pre injury intention to work longer, based on 'rules' that did not yet exist." The worker submitted that although the changes with respect to OAS and CPP came after

the worker was injured, mandatory retirement at age 65 was eliminated in British Columbia in 2008, before the worker was injured.

[52] We acknowledge that mandatory retirement at age 65 was eliminated in British Columbia in 2008. However, the legislative changes that eliminated mandatory retirement were not related to changes in eligibility for OAS benefits or calculation of CPP benefits. We agree that those changes, which came after the worker was injured, cannot have formed part of a retirement plan made at or before the date of the worker's injury. Absent a connection to the changes to OAS and CPP benefits, the elimination of mandatory retirement neither helps nor hinders the worker's position. There is no evidence before us that the worker faced mandatory retirement at age 65, regardless of legislative changes.

[53] Regardless of whether specific changes to OAS and CPP rules could have informed the worker's plans prior to being injured, we have considered whether, in general, the worker's interest in maximizing pension benefits by working beyond age 65 supports a conclusion that he had formed an intention to do so. We conclude that although it is consistent with such an intention it neither supports nor refutes the existence of a specific intention to work past age 65. We note that although the worker thought he might have to work longer, he did not say he had a specific plan to work past age 65. Although practice directives are not binding, we note the statement in Practice Directive #C5-1 that motive alone is not sufficient evidence for the exception to apply. Additionally, the worker was approximately 21 years away from retirement when he was injured. At 44 years of age the worker might not be considered a "young worker," but there is still potential for significant change in his financial circumstances, which means such evidence is not particularly helpful in predicting retirement age.

[54] The statistical evidence the worker submitted is not helpful. It says nothing about the worker or his retirement plans. At most it is offered in support of an argument that the assumption that age 65 is the normal retirement age is no longer valid. However, that is an argument that can only be addressed through amendments to the Act and/or policy. We are bound by section 23.1 of the Act, and we are required by section 250(2) of the Act to apply policy #41.00, which is applicable in this case. We must apply the Act and policy as they are written, not as they might be amended in the future.

[55] Some WCAT panels have suggested that taken together, section 23.1 of the Act and policy #41.00 create a rebuttable presumption that the worker would retire at age 65.[10] We think that overstates the effect of section 23.1. Had the legislature intended to create such a presumption, we believe they would have done so expressly, as they did in sections 5(4), 6(3), and 221(2) of the Act. Rather, section 23.1 recognizes age 65 as the standard age of retirement that will apply in most cases, but also recognizes there may be exceptions where payment of benefits beyond age 65 is appropriate. In order for the exception to apply, rather than the standard, there must be sufficient positive

[10] See, for example, *WCAT-2013-01102*, *WCAT-2012-03366*, *WCAT-2012-02510.*

evidence from which to conclude on the balance of probabilities (subject to section 99(3) and section 250(4) of the Act) that the worker specifically intended to retire at a later date and to determine what that date is.

[56] In summary, we have the worker's statement that changes to government pension eligibility rules made it necessary for him to continue working until age 67. In view of the timing of the changes to OAS and CPP eligibility, that statement does not support a conclusion that prior to and at the date of injury the worker intended to work past age 65. We have evidence of a union pension plan that provides for reduced pension benefits for workers retiring before age 60 or 65, and the possibility of earning increased pension benefits by continuing to work up to age 71. We have anecdotal evidence that an unknown number of others employed by the employer have continued to work past age 65. We conclude that there is not sufficient positive evidence to establish that the worker would have worked beyond age 65 or to determine a later retirement date. Accordingly, pursuant to section 23.1 of the Act, the worker is not entitled to receive permanent disability pension payments beyond the date on which he turns age 65.

Conclusion

[57] We deny the worker's appeal, and confirm the Review Division decision dated March 11, 2013 (*Review Reference #R0154785*). The worker is not entitled to receive permanent disability pension payments beyond the date on which he turns age 65.

Expenses

[58] The worker did not request reimbursement of any expenses incurred in relation to this appeal. Accordingly, we make no order in that regard.

David Newell
Vice Chair

Cynthia J. Katramadakis
Vice Chair

Guy Riecken
Vice Chair

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