Noteworthy Decision Summary

Decision: WCAT-2014-03091 **Panel**: Herb Morton **Decision Date:** October 23, 2014

Section 23.1 of the Workers Compensation Act – Period of payment for total or partial disability – Retirement age –Age 65 – Policy item #41.00 of the Rehabilitation Services and Claims Manual, Volume II – Practice directive #C5-1 – Duration of benefits – Independently verifiable evidence – Subjective intention

This decision provides a comprehensive summary of the legislative background informing section 23.1 of the *Workers Compensation Act* (Act) and policy item #41.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). The effect of the Act is to establish age 65 as the minimum date to which a worker is entitled to a pension award: in the absence of at least evenly balanced evidence to support a later date, age 65 will be used as a retirement date for the purpose of terminating a worker's total or partial disability benefit payments.

The worker was competitively unemployable following a workplace injury and was granted a full loss of earnings pension payable to age 65. The worker appealed the pension end date established by the Workers' Compensation Board, operating as WorkSafeBC (Board). The Review Division upheld the Board decision, finding that there was insufficient positive evidence to show that the worker would have continued to work past age 65. The worker appealed to WCAT.

The WCAT panel first determined that, though policy item #41.00 was recently amended, the former policy applied to the current appeal. The panel then reviewed the historical and legislative background of section 23.1 of the Act and the former policy item #41.00 of the RSCM II. WCAT found that section 23.1 establishes a minimum date to which a worker will be entitled to a pension award, and evidence is required to establish that a worker would have retired later than at age 65. In the absence of at least evenly balanced evidence that supports a later retirement date, age 65 will be used as the retirement date for the purpose of terminating monthly payments.

WCAT denied the worker's appeal. Though the worker expressed that she could have continued working beyond age 65 in her profession, the panel determined that in the worker's circumstances her mere subjective intention alone was not enough to establish a retirement age beyond age 65. In light of the facts and the evidence as a whole, the worker's evidence regarding her intentions was more in the nature of express hopes and aspirations.

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An amendment was issued for WCAT-2014-03091 and is attached to this document.

WCAT Decision Number: WCAT-2014-03091
WCAT Decision Date: October 23, 2014
Panel: Herb Morton, Vice Chair

Introduction

[1] The worker has appealed the January 30, 2014 decision (*Review Decision #R0164427*), of the Review Division of the Workers' Compensation Board (Board or WCB)[1] to the Workers' Compensation Appeal Tribunal (WCAT). The review officer confirmed a decision by a Board officer dated June 20, 2013, regarding the termination of the worker's pension award at age 65.

[2] By decision dated June 20, 2013, a Board officer granted the worker a full loss of earnings pension award on the basis that she was competitively unemployable. The award was made effective June 4, 2009. It was accepted that the worker was permanently disabled by a major depressive disorder and anxiety disorder resulting from her 2007 work injury. The award was made payable to age 65, following which the worker would receive a lump sum retirement benefit.

[3] The worker is represented by a lawyer. By notice of appeal dated February 6, 2014, the worker requested that her appeal be heard verbally. She submitted that credibility was in issue, that she would give evidence by telephone conference, and that her lawyer would appear at the hearing. On February 24, 2014, a WCAT assessment officer advised that she had granted the worker's request for an oral hearing. On March 4, 2012, the worker's lawyer requested that the hearing be scheduled in Victoria, and noted that the worker would participate by telephone conference. However, in a further letter dated June 2, 2014, the worker's lawyer advised that the worker had requested that the appeal proceed on the basis of written submissions rather than an oral hearing. A WCAT deputy registrar granted the worker's request for a change in hearing method.

[4] The worker provided a written submission on August 1, 2014. The employer is represented by a consultant, who provided a submission on August 27, 2014. The worker provided a rebuttal submission on September 9, 2014. By letter dated September 11, 2014, a WCAT appeal coordinator confirmed that submissions were considered complete.

[1] Operating as WorkSafeBC

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Preliminary Matters

(a) Hearing method

[5] The worker's appeal involves questions of mixed fact, law, and policy. The worker initially requested an oral hearing on the basis that credibility was in issue. However, the worker stated from the outset that she did not intend to appear at the hearing in person (but would provide her evidence by telephone conference). In the circumstances, I consider it appropriate to proceed with the consideration of the worker's appeal on the basis of the written evidence and submissions, as requested by the worker.

(b) Request for suspension

[6] In her submission of August 1, 2014, the worker requests a suspension of her appeal pending the outcome of a petition for judicial review in relation to *WCAT-2012-01908* (which concerned the age 65 retirement policy). Alternatively, the worker requests that the policy of the board of directors of the Board at item #41.00 be referred to the WCAT chair under section 251 of the *Workers Compensation Act* (Act). In the further alternative, the worker has provided submissions in support of her claim that she intended to continue working until age 80.

[7] In *Johnson v. BC (WCB)*, 2011 BCCA 255, the British Columbia Court of Appeal (BCCA) reasoned:

> [47] As counsel for the WCB submits to this Court, where a challenge to a board of directors' policy is made through the *WCA* [*Workers Compensation Act*] internal process, the WCAT appeal and the policy review provide an opportunity for submissions, creation of a full record and issuance of reasons for decision that can be considered on judicial review. Depending on the petitioner's degree of success before the appeal tribunal, the court on judicial review will have at least one, and possibly all of the following: a WCAT appeal panel decision, a WCAT chair determination (s. 251(3)) and a board of directors' determination (s. 251(6)).
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> [48] I agree with counsel for the WCB when he states in his factum:
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> > Whether the [New Interest Policy] is consistent with the *WCA* and its regulations is the epitome of a question that should be fully addressed through internal administrative procedures prior to any judicial consideration. The *WCA* and its regulations are lengthy and complex. Most (if not all) *WCA* interpretive issues will be interwoven with other provisions and policies, and have significant

> consequences for ancillary aspects of the WCB scheme. The provisions and policies in question are laden with historical context and meaning ... .
> [all quotes reproduced as written, except for changes noted]

[8] In *Johnson*, the BCCA found that the petitioner had not exhausted internal remedies, in not expressly raising the issue as to the lawfulness of the impugned policy before WCAT. The BCCA found that the chambers judge erred in proceeding to address an issue of lawfulness of policy in the absence of the reasons of the administrative body.

[9] I interpret the decision in *Johnson* as meaning that where an issue of lawfulness of policy under the Act is raised, it is both appropriate and desirable that this be addressed within the workers' compensation system, pursuant to the processes established under the Act, prior to such issues being raised before the Court on judicial review.

[10] In *WCAT-2012-01908*, which is the subject of the petition for judicial review, the WCAT panel found that policy item #41.00 is not patently unreasonable. The WCAT panel reasoned:

> [39] The worker also says that the policy, which requires independent, verifiable evidence, is not consistent with the Act and is therefore patently unreasonable.
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> [40] Perhaps if the policy only required independent verifiable evidence there might be reason to conclude that it was patently unreasonable. However, it does not. The policy states:
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> > 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. There have been many decisions from this tribunal that extend pensions beyond age 65 in which panels accepted information provided by the worker as the only basis for the decision. In other words, the policy contains an exception where there is no evidence from a source other than the worker.
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> [41] The requirement for independent verifiable evidence was also discussed in *WCAT 2011-01674*.
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> > While the first sentence suggests a requirement that there be verifiable independent evidence, the last sentence indicates that a determination may be made based on the evidence available including that provided by the worker. 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 item #41.00 of RSCM II [*Rehabilitation Services and Claims Manual, Volume II*] provided 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).
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> [42] I agree with this interpretation of the policy. Independent verifiable evidence is preferable but not required. **I do not consider that policy item #41.00 is patently unreasonable or that the direction in the practice directive that decision makers should look at the worker's circumstances at the time of the injury is either. I do not consider that a referral to the tribunal chair under section 251 of the Act is warranted**.
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> [emphasis added]

[11] No date has been set for the hearing of the petition for judicial review.

[12] This is not a situation for which a suspension of this appeal is authorized under sections 246(3), 249, 251, or 252 of the Act. The requirements of section 245 and 250(2) of the Act (that WCAT apply the policy of the board of directors, and that WCAT issue its decisions within certain specified time frames) support the ongoing and timely hearing of the appeal based on any applicable policy. The fact that a policy is being challenged does not affect its validity as an applicable policy prior to a court decision finding otherwise. The decision of the WCAT panel in *WCAT-2012-01908* is not binding on me. I consider it appropriate to proceed with consideration of the worker's appeal, including the issue as to whether the policy at RSCM II item #41.00 is patently unreasonable, rather than suspending the appeal pending the decision of the court in relation to the petition for judicial review.

(c) Request for further investigation by the Board

[13] The employer submits that this matter should be referred back to the Board for a full investigation and consideration of the evidence at a date when the worker is closer to the age of 65. A determination as to the worker's date of retirement should be deferred to a date when the worker is closer to the age of 65 (in 2026).

[14] The worker submits that there is no reason to refer this matter back to the Board. The Board and the Review Division have exhausted their jurisdiction and cannot revisit their

previous decisions. The evidence is before WCAT, which has exclusive jurisdiction to decide this issue with respect to both aspects – the validity of policy and the practice directives, and the extension of the pension beyond age 65.

[15] I agree with the worker's submission on this point. A Board officer has determined the termination date of the worker's pension award, and that decision was confirmed by a review officer. The Board and Review Division have no jurisdiction to reconsider their decisions at this time (see sections 96(5) and 96.5(3) of the Act). The Review Division decision has been appealed to WCAT. WCAT does not have jurisdiction to refer a matter back to the Board in lieu of making a decision on an appeal of a Review Division decision. Even in situations where WCAT requests a report or further determination by the Board under section 246(2)(d) or 246(3) of the Act, the matter comes back to WCAT to complete its decision within the time frames stipulated in section 253 of the Act.

[16] In any event, given that the worker has been found to be permanently unemployable, it does not appear that it would serve any purpose to defer consideration of her appeal. I consider it appropriate to proceed with a decision on the worker's appeal.

Issue(s)

[17] The general issue raised by the worker's appeal is whether her permanent disability award should terminate when she reaches age 65. This concerns the question as to whether, but for the occurrence of her work injury, the worker would have retired by age 65 or would have continued working until a later age.

Jurisdiction

[18] The Review Division decision has been appealed to WCAT under section 239(1) of the Act. WCAT may consider all questions of fact, law, and discretion arising in an appeal, but is not bound by legal precedent (sections 250(1) and 254 of the Act). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors of the Board that is applicable (sections 250(2) and 251 of the Act).

[19] WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal. If the evidence supporting different findings is evenly weighted on an issue respecting the compensation of a worker, WCAT must resolve that issue in a manner that favours the worker (section 250(4) of the Act).

Background and Evidence

[20] The worker was employer as a labour relations specialist for a large food store chain. She had received a promotion to that position on May 7, 2007. She was injured on May 11, 2007, while crossing a street in a crosswalk (and pulling a case behind her), when she was struck by a semi-trailer making a turn.

[21] The worker was born in January 1961. She was injured on May 11, 2007, at age 46. (She will reach 65 years of age in 2026.)

[22] Shortly before this claim, the worker had another claim for a work injury on May 2, 2007. At the time of that injury, she was employed with the same employer as a cashier. She was pulling a buggy with a barrel of water in it down a slope, when the barrel tipped forward and hit her in the head. The employer advised that the worker had been first hired by it on September 20, 1983.

[23] The background to the worker's May 11, 2007 claim was set out in *WCAT-2012-02550* dated September 28, 2012 as including the following:

> [1] On May 11, 2007, the worker, a labour relations specialist, was crossing an intersection on her way to her office when she was struck by a slow moving semi trailer. She was knocked down by the impact and dragged several feet. While she was lying on the road, another large vehicle drove very close to her head.
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> [2] The Workers' Compensation Board (Board) accepted the claim for left wrist undisplaced fracture, left arm and bilateral knee bruises and contusions, and post-traumatic stress disorder (PTSD) on a health care only basis. The worker did not miss any time from work for the injuries she sustained from the motor vehicle accident. However, in September 2008 she went off work for psychological symptoms. She was subsequently diagnosed as having major depressive disorder and anxiety disorder.
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> …
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> [12] The worker did not initially miss time from work as a result of her injuries. In her "timeline of events" document appended to her submission, she explained the reason for this was her concern she would be demoted if she missed work after only being promoted to her position a few days prior to the accident.
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> [13] The worker said that by May 16, 2007 she was experiencing difficulties both physically and psychologically. …
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> [14] On May 23, 2007, the worker was at a distant work location when she received tragic news of her daughter's death. …
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> …
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> [19] The worker advised that she continued to seek medical attention during the following year as a result of the difficulties she continued to experience. Medical records subsequently obtained by the Board indicated the worker saw Dr. Pusztai, a psychiatrist, on June 4, 2009. The worker recounted prior problems with depression over 20 years ago, which was treated with

> antidepressants. The worker said she recovered from her depression; however 2 years ago, she had a series of traumatic events. She reported being hit by a large drum, which hit her on the face and she lost consciousness. Later that week, she got hit by a truck (the compensable incident), which resulted in a significant PTSD symptoms, and then her daughter passed away. Finally, her dog had to be euthanized. The worker developed significant depression, anxiety, and panic attacks, and according to Dr. Pusztai, a gross adjustment disorder. …
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> [footnote deleted]

[24] The WCAT panel found that the worker's diagnosed major depressive disorder and anxiety disorder were compensable consequences of the original injuries accepted on her claim for the May 11, 2007 injury.

[25] By decision dated June 20, 2013, a case manager, Long Term Disability and Occupational Disease Services, granted the worker a full loss of earnings pension award on the basis that she was not competitively employable. The award was effective June 4, 2009. At retirement, her monthly disability benefit would cease and she would be paid a lump sum retirement benefit as provided in section 23.1 of the Act. Her monthly disability award would end in January 2026 when she reached age 65.

[26] The worker requested a review by the Review Division regarding her age of retirement and the termination date for her loss of earnings pension award. The review officer confirmed the June 20, 2013 decision. The review officer reasoned:

> In reviewing the evidence in this case, I note the worker was 46 when she sustained her injury. She says that she intended to build a name for herself in the industry and work her way up to becoming a manager of human resources. She intended to start a human resources consulting business, and work in that business from age 65 to 80. The worker's plan included her getting a relevant degree and I see the worker graduated in 2000 with a Business Administration degree. She submits she planned to prepare a comprehensive business plan closer in time to when she was ready to start her own business. In the meantime, her plan was to develop a good reputation in her field so that her services would appeal to both unions and employers.
>
> I accept that that the worker improved her employability and enhanced her career prospects by obtaining a business degree, and I note that she had just been promoted to the position of Labour Relations Specialist at the time of her injury. I acknowledge the worker's belief that she would continue to work past age 65, on a consulting basis. However, the worker's intention and belief that she would be able to continue to work past age 65 is not enough for me to conclude that it is likely she would have continued to work. I recognize the effort that the worker has put into

her career, and recognize that it is possible that she could have built a successful career in the human resources field, and built a reputation and system of contacts that could have led to her working as a consultant from age 65 to 80. The possibility is not enough though. Consulting and self-employment are notoriously competitive and risky, and are very much based on one's reputation and contacts, built up over years of practice in a chosen field. While the worker had obtained a degree as part of her plan, there were many other elements of her plan that were yet to fall into place before she could possibly become a human resources consultant, and I am not persuaded that she was on her way to putting those elements into place at the time of her injury.

I also note the worker's submission that she planned to work until age 80 because she does not have retirement savings, has limited pension funds and no other assets. She has financial obligations that will last beyond age 65 including post –secondary education for her granddaughter, a mortgage, and significant debt including a student loan. She also submits that she wants to be able to help her children financially. As outlined in Board Practice Directive #C5-1, Duration of Benefits – Age 65, although the worker's mortgage may be considered a motive for working beyond the age of 65, there are other ways to manage financial obligations and most individuals will continue to have some sort of housing cost throughout their life, whether that be in the form of a mortgage or a rent payment. I also appreciate the worker's other financial commitments and desire to help her family; however, her desire to help does not persuade me that it was more than a possibility that she was going to work past age 65.

[27] The review officer found that there was not sufficient positive evidence to establish that it was at least as likely as not that the worker would continue to work past 65. The worker was 46 when she sustained her injury and had 19 years of employment left before she turned 65. The review officer found in this time, much could change, and that there was an insufficient evidentiary foundation to find the worker was going to work past age 65.

Education and Employment Information

[28] In a letter dated November 26, 2013, the worker provided a timeline respecting her education and work history. This included the following:

1979	quit high school in Grade 12
1980	completed General Educational Development (Grade 12 equivalency)
1989	enrolled at university
1990	enrolled in the education program

1994	changed programs, and enrolled in the Business Program
1996	enrolled in the Bachelor of Business Administration program
2000	graduated with a Bachelor of Business Administration degree with concentrations in Human Resources Management and Finance
2001	graduated with a Bachelor of Arts Degree with a major in Economics
2006	became a licensed life insurance agent

[29] The worker states that she was employed with the employer from 1983 to 1986 in one city, and then from 1986 to 2007 in another city. She worked part time after going back to school on a full-time basis in the fall of 1996. By the time she graduated in 2001, she had accumulated $60,000 in debt, drained the voluntary pension plans held by the worker and her husband, and borrowed $8,000 from her parents. The worker advises that in 2002, she injured her shoulder and was not able to work full time as a cashier. In 2002, she volunteered to work with another person to learn about dog training and they formed a limited partnership. She left the company at the beginning of 2005 as this was not her chosen career path. The worker states that she never did draw wages from this company, and the partnership was more of a hobby, but from his experience she gained the confidence to become self-employed.

[30] In 2005, the worker and her spouse refinanced their house to manage their debt. In 2006, she borrowed a further $8,000 from her parents in the expectation of a buy-out from the employer which did not materialize.

[31] The worker has provided letters from friends and colleagues regarding her work history and plans. One letter is from J, who was hired as a cashier with the employer in 2007. J advised:

> [The worker] and I were both Shop Stewards for several years and always talked about what we wanted to do with our lives post [employment for the employer]. …
>
> [The worker] has a natural ability to mediate, which truly is a gift. It just seemed natural for her to go down the path of labour relations. When she was hired by [the employer] in the Spring of 2007 as a Labour Relations Specialist, [the worker] was on her way to bigger and better things one day … her dream to be a Mediator/Arbitrator. This was a great choice, there was no shortage of work and Mediators/Arbitrators can basically work forever. We see that today with some of the most renowned Mediators/Arbitrators still working. [The worker] wanted to make a name for herself in the world of Labour Relations and one day have the opportunity to meditate and/or arbitrate matters.

[32] A letter dated June 22, 2014 was provided by W. W advised that the worker went back to university as a mature student. W advised:

> Even before graduating from [name] University with two degrees and making the Dean's List, we were talking about our future plans after her graduation [the worker] stated that she wanted to work as long as she could even if she was in a wheel chair, but her mind was clear she would continue to work. … [the worker] had a compelling arguments to work past retirement age and that was that we had put all our eggs in one basket financially and she would have to work longer to recoup lost revenue while she was at school and to repay her student loans. Secondly was that [the worker] always needed to have a full plate whether it was with the children, sports, volunteering, or work [the worker] needed a challenge each and every day. [The worker] also stated once that when she became an arbitrator she could do some travelling in between contracts or she would need internet connections to do some work while travelling. …

[33] W further stated that upon being the successful candidate for the labour relations specialist position, the worker looked online for information regarding a Master's program at the University of Phoenix so as to further her career with the employer and later move on to be an arbitrator. The worker provides the names of some arbitrators who are continuing to work after age 65.

[34] An email dated January 4, 2014 was provided by T, who advised:

> I remember only of the conversation about working as a Labour Relations Specialist, or with a union. And possibly taking on the role of a Arbitrator/Mediator, later on as it interested you. The year would have been prior to May 6, 2006.

[35] A message dated January 15, 2014 was provided by J2, who advised:

> Here's what I recall – When I worked in [name] as an ASM [assistant store manager] (1996–1999) you and I had discussed a future in Human Resources. We were both interested and you let me know you had given serious thought to suspending your [name of employer] career to pursue this interest. I returned to [name] as SM [store manager] (2002-2005) and found that you had reduced your work hours and were pursuing a Business Degree at [name of university]. …

[36] In a letter dated January 27, 2014, the worker advised:

> …it is noteworthy to point out that in the year prior to my injury I did consider a very real obstacle in my plan to work until age 80. That

> obstacle was if I failed at becoming a Human Resources consultant. Fortunately, when my career in Human Resources/Labour Relations was slow to materialize prior to 2007 and I became licenced to sell insurance for a short period of time, I proved to myself that I was adaptable.
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> …
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> I submit that the best evidence of how I intended to proceed with my future lies in my past. I have spent my family's savings to secure my education and career. Not only do I want to work until age 80, it is only logical that I work as long as I am physically able to do so to maximise my return on investment. Had I started my career in my twenties, I would have had forty years to pay down my debt and save for retirement but that was not [the] case with me. I started my career at age 40 and planned to work until I am age 80.

[37] In a letter dated July 23, 2014, the worker advised that she obtained a Bachelor of Business Administration degree with concentrations in Human Resource Management and Finance (graduated 2000) and a Bachelor of Arts degree with a major in Economics (graduated 2001). She stated that she contacted the University of Phoenix in 2002 and 2007 inquiring about a Master of Business Administration degree with a focus on Labour Relations. She stated that she was still working on her goal of becoming a human resources consultant/arbitrator/mediator.

[38] The worker describes her activities as a union steward, and her contacts with other unions. She further states:

> I also have experience in starting up a company in a competitive industry and understand the difficulties associated with finding a niche in the market to minimise risk.
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> Our niche with dog training was to specialize in aggression. …
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> Also, according to Ms. Ann Lee, Administrative Coordinator, Mediate BC Society, many mediators work at it part-time initially while holding down a full-time position elsewhere. This also minimises risk and was exactly how we approached the dog training business. My partner worked full-time while training dogs part-time until we built contacts and a reputation in town and then we opened a facility and she left her full-time job to focus on dog training fulltime. We also diversified the products that we offered to minimise risk. We offered dog training, dog daycare, general merchandise, and dog food. We actually made raw dog food, leather leashes and collars to sell. I planned to use a similar business model in my business as a human resources consultant/ mediator/ arbitrator… .

[39] The worker further advised:

> …I have already been hired as a consultant for [a union local] in the past to compile information in preparation for arbitrations. I was also recruited to be a facilitator representing [the union local] in a joint effort with [the employer] presenting seminars on Health and Safety in our region. I also was instrumental in created new language in our Collective Bargaining Agreement (refer to Letter of Recommendation on file).

[40] The worker also submitted that even if she did not achieve her goal of becoming a human resources consultant/mediator/arbitrator, she would still be able to work with her employer past age 65 as there was no mandatory retirement age. Her position as a labour relations specialist was not physically demanding and she loved her job. Accordingly, remaining with the employer past age 65 would be rewarding especially since she would have worked her way up the wage scale. Another option is that, like her father who saw an opening in the market and started a small business, she could do the same. Accordingly, there was ample opportunity for her to work past age 65.

[41] With respect to finances, the worker advised that she owned her own home but had very little equity in it. She will have a mortgage until well past age 65 with the added costs of general repair and a new roof, new fence, and interior updates. She has no savings and substantial personal debt, as a well as future educational costs for her granddaughter. As well, her husband would like to travel after he retires. Her husband needs to retire soon due to health issues, leaving the financial burden on her shoulders.

[42] In a letter dated March 13, 2013, the worker also noted that her promotion from the position of clerk cashier to labour relations specialist was a significant change in her employment. She explained that she had been employed as a clerk cashier for the employer since September 1983 during which time she completed two Bachelor's degrees. She advised that it took her 12 years to complete two degrees. She further noted:

> After I graduated in June 2001, I actively pursued my career path that I went to school for but I suffered a shoulder injury on September 4, 2002 that prevented me from working full-time hours as a Clerk Cashier and from securing a new position in an occupation related to my field of study. My shoulder injury was initially accepted by WorkSafeBC but was subsequently denied at WCAT [*WCAT-2005-06410-RB*, November 30, 2005]… . Less than two years later, I was promoted to Labour Relations Specialist on May 6, 2007.
>
> During those two years, I pursued my career path and received a letter of recommendation from my employer… . I first applied for a Labour Relations position with [the employer] in November 2005…. I was not successful. However, in March 2007 I applied for my current position and was the successful applicant. I had worked as a Clerk Cashier from

> September 20, 1983 until May 6, 2007, when I started as a Labour Relations Specialist.

Submissions

[43] The worker submits that she has provided more than adequate evidence of her professional background, experiences, plans, and expectations to support her intention to continue working until age 80. There is no evidence to the contrary, and all of the grounds on which the review officer relied are based on speculation and founded on no evidence to support his conclusion. The Act does not require that it is "likely" that the worker would have continued to work past age 65; equality of possibilities is the correct test. It is patently unreasonable to require evidence about future events. There is no way to prove that the worker would have worked beyond age 65 had she not been injured and the Act does not require this. The Act only requires evidence, that is best elicited from the worker, that she had planned or intended to work past age 65.

[44] The worker submits that it is a misinterpretation of the Act to find that age 65 is presumed to be a standard retirement age. That is not true and not what the Act says. The worker further submits:

> A more subtle problem arises from a mis-interpretation of the word "would" that appears in the clause: "…if the Board is satisfied the worker would retire after reaching 65 years of age…". This clause does not require proof by "independent verifiable evidence" that a worker will IN FACT be working beyond age 65, since such evidence is an attempt to forecast the future and is impossible, and it is contrary to law and policy… .
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> The only supportable interpretation of that clause is that a worker must be able to tell WCB about plans, experiences and expectations supporting an *intention* to work after age 65, regardless of the worker's age or the date of the accident.

[45] The worker submits that the Board is bound to accept the worker's statement unless there is evidence to the contrary, which in this case there is not.

Law and Policy

[46] Section 23.1 of the Act, as amended effective June 30, 2002, provides, in part:

> 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;

(ii) if the Board is satisfied the worker would retire after reaching 65 years of age, the date the worker would retire, as determined by the Board, and….

[47] At the time of the June 20, 2013 decision by the Board officer, policy at item #41.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) included the following:

> **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.
>
> **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.

[emphasis added]

[48] Policy at item #97.00 provided, in part:

#97.00 EVIDENCE

Under the old English system, which was an adversary system of workers' compensation, there was a burden of proof imposed on the worker, but that is not the correct practice here. The Board must not start with any presumption against the worker, but neither must there be any presumption in the worker's favour. The correct approach is to examine the evidence to see whether it is sufficiently complete and reliable to arrive at a sound conclusion with confidence. If not, the Board should consider what other evidence might be obtained, and must take the initiative in seeking further evidence. After that has been done, if, on weighing the available evidence, there is then a preponderance in favour of one view over the other, that is the conclusion that must be reached. **But 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**.

[emphasis added]

[49] For the purposes of this decision, the 2013 version of item #41.00 is applicable and I need not address subsequent policy developments. It is of interest, however, to note the information regarding the subsequent review of this policy.

[50] In 2012, the board of directors approved the release of a discussion paper for consultation. The discussion paper was entitled: "Determination of Retirement Date for Permanent Disability Awards." That paper included the following analysis:

> Policy requires that a worker provide independent verifiable evidence regarding their retirement plans. Policy includes examples of the types of evidence that may be considered regarding work and retirement plans.
>
> While not included in the list of examples, policy also refers to consideration of a worker's subjective statement regarding his or her intention to work past age 65. Policy provides that the statement must be verified by an independent source. If the worker's statement is not independently verifiable, policy currently states that WorkSafeBC will make a determination based on the evidence available, including information provided by the worker. Given that many workers face challenges with providing meaningful evidence regarding work and retirement plans, the worker's statement of intention may be the only evidence in support of a worker's claim that they would have worked past age 65. These challenges are magnified for young workers, who rarely have turned their mind to retirement before their injury.
>
> A number of Review Division decisions have addressed situations where a younger worker has challenged the requirement to provide independently verifiable evidence regarding retirement plans on the basis that the worker has not yet contemplated a retirement date, given his or her age. Several of these decisions found that there was not enough evidence to support the worker's intention to work past age 65, but the decisions were subsequently overturned by WCAT on appeal. [For example, WCAT Decisions: *2009-00861*, *2009-00328*, *2010-02692*, and *2010-02305*.]
>
> Many of the decisions referenced the policy statement that, where a worker's intention to work past age 65 was not independently verifiable, the determination should be made on the available evidence. It appears that, in some instances, WCAT gives this stand alone policy statement more weight than the requirement of independent verifiable evidence. Further, when applying this statement, some WCAT decisions illustrate a weighing of evidence in favour of the worker's stated intention to retire after age 65.
>
> A recent Noteworthy [*sic*] Decision [*WCAT-2012-00388*] of a three-person WCAT panel considered the issue of what is sufficient independent verifiable evidence in order to establish a worker's intention to work past age 65.
>
> The panel concluded that, while some WCAT decisions apply a strict interpretation of the need for independent verifiable evidence in order to establish a worker's intention to work past age 65, others have taken a broader interpretation of policy. That is, in the absence of independent

verifiable evidence, the decision-maker considers the available evidence, including that of the worker, in determining the worker's intention. The panel concluded that their reading of the policy supports the broader interpretation.

However, as referenced by the WCAT panel in their decision, WorkSafeBC's Practice Directive on this issue states that regard must also be had to the ability/likelihood of the worker actually succeeding in continuation of employment.

For example, a worker may be financially or emotionally committed to continue work past age 65, but find that work is simply not available. Alternatively, a worker may find their retirement plans suddenly vanish due to changing economic conditions.

The Act permits the continuation of permanent disability periodic payments past age 65 where WorkSafeBC is satisfied that the worker would retire after age 65. The Act does not provide for continuation of permanent disability periodic payments past age 65 where WorkSafeBC is satisfied that the worker intended to work past age 65. Accordingly, caution must be taken to ensure that consideration is not limited solely to the worker's intention, but that consideration also be given to other factors that would indicate that the worker would have, had the injury not occurred, worked past age 65.

A recent WCAT decision [*WCAT-2012-01159*] commented on the evidentiary requirements for a determination that a worker would retire after age 65. In the decision, the Vice Chair noted, "The issue is whether this particular worker would have worked beyond age 65. Is there sufficient positive evidence on that matter? That there may be no contrary evidence to dispute her stated intention does not mean her stated intention amounts to sufficient positive evidence." The evidentiary requirement associated with determining whether a worker would have worked past age 65 is different from the evidentiary requirements set out in policy item #97.32. While the threshold discussed in policy item #97.32 relates to a worker's statement about his or her own condition, section 23.1 of the Act requires that WorkSafeBC be satisfied the worker would retire after reaching 65 years of age, as determined by WorkSafeBC. As noted by the Vice Chair above, a worker's stated intention to work past age 65 may not amount to sufficient positive evidence.

Policy may be clarified by deleting the stand alone 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." Instead, policy could provide that, "The issue for the Board to determine is whether there is sufficient positive evidence that it is more likely than not that the worker would have retired after age 65. In

> order to make this determination, the Board considers a worker's statement of intention to retire after age 65 and looks for evidence that is verified by an independent source to support the worker's statement. In the absence of other positive evidence, the worker's stated intention to work past age 65 may not amount to sufficient positive evidence to satisfy the Board that the worker would retire after reaching 65 years of age."

[51] The discussion paper set out various options for comment.

[52] The policy at item #41.00 was subsequently addressed and amended by the board of directors. A March 19, 2014 resolution of the board of directors stated, in part:

> **AND WHEREAS:**
>
> Determination of workers' retirement dates for the purpose of calculating the period of payment for disability awards is an area of increasing disputes, reviews, appeals and overturns and has been identified as an issue requiring policy review;
>
> **AND WHEREAS:**
>
> The Policy, Regulation and Research Division has undertaken stakeholder consultation on this issue and has advised the Board of Directors on the results of the consultation;
>
> **THE BOARD OF DIRECTORS RESOLVES THAT:**
>
> 1. Amendments to policy item #41.00 *Duration of Permanent Disability Periodic Payments* and consequential amendments to policy item #35.30, *Duration of Temporary Disability Benefits*, of the RS&CM, Volume II as set out in Appendix A of this resolution, are approved.
> 2. This resolution is effective June 1, 2014 and applies to all decisions on or after June 1, 2014.
> 3. This resolution constitutes a policy decision of the Board of Directors.

[53] Among other things, the amended policy removed the sentence which provided 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.

[54] The amended policy is not stated to apply to all appellate decisions. Accordingly, it applies to all initial decision-making by the Board regarding disability awards on or after June 1, 2014, and subsequent reviews and appeals stemming from such decisions. The new policy does not apply immediately to reviews and appeals of initial decisions by Board officers issued prior to June 1, 2014. In this case, the initial decision by the

Board officer was made on June 20, 2013, and the review officer's decision was made on January 30, 2014. Accordingly, the former policy at item #41.00 applies in this appeal (the version of item #41.00 which preceded the June 1, 2014 amendment).

Board Practice

[55] Practice directives are issued by the Board's administration. They may provide useful guidance to promote consistent decision-making in accordance with policy. However, they are not policy of the board of directors and are not binding on WCAT.

[56] Practice Directive #C5-1, "Duration of Benefits – Age 65," as amended to April 4, 2013, included the following:

> **C. Established Retirement Date and Evidence**
>
> *Established Retirement Date*
>
> Age 65 is the established starting point in adjudicating a worker's retirement age for purposes of workers' 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 item #97.00.
>
> **In each case, the officer adjudicates the worker's retirement age based on all of the available evidence, including the worker's statement.**
>
> *Evidence*
>
> *…*
>
> ***Evidence the worker Would have, rather than Could have, worked past Age 65***
>
> Motive alone is not sufficient evidence for the exception to the standard retirement date to apply. For example, where the only evidence presented by a worker is that he has a mortgage and will therefore need to work beyond age 65, that is not sufficient evidence to pay benefits beyond age 65. Although the worker's mortgage may be considered a motive for working beyond age 65, there are other ways to manage financial obligations and most individuals will continue to have some sort of housing cost throughout their life, whether that be in the form of a mortgage or a rent payment.
>
> **In adjudicating the worker's retirement age, the officer needs to consider not only what the worker's intention was at the time of injury, but also when the worker would realistically have retired if the**

> **injury had not occurred. Regard must be had to the actual likelihood of the worker successfully working past age 65.** In other words, exceptions to the standard retirement age are only appropriate where the evidence establishes that the worker would have worked beyond age 65, not that the worker could have worked beyond age 65.
>
> **…**
>
> ***Age of Worker at Time of Injury***
>
> Workers who are young at the time of injury are less likely to have made retirement plans. However, the evidentiary requirement of establishing a clear plan to work past age 65 in order for benefits to continue past that age, is the same for these workers as it is for older workers. The only age distinction provided in the law and policy relates to workers who were 63 years or older on the date of injury. Workers who are young at the time of injury need to present objective evidence that they had plans to work beyond age 65 in order to qualify for an exception to the established retirement age of 65. Financial circumstances, such as mortgage debt or lack of savings, are often put forward as evidence the worker would have worked, out of necessity, beyond age 65. Normally a worker's earnings increase throughout his or her work life, providing an increased capacity to save money and reduce debt as the worker draws nearer to retirement. As a result, a younger worker's financial position at the time of injury may not be very helpful evidence in trying to predict a retirement age. Generally speaking, a worker who is young at the time of injury is less likely to have sufficient evidence of a plan to work past age 65, but that fact is consistent with the basis for the exception. The exception, whereby WorkSafeBC may pay benefits beyond age 65, is meant to address workers who were near retirement when injured and who had specific plans in place to continue working past age 65.
>
> [emphasis added]

Background Materials or Reports

[57] The Board's past policy regarding the termination of pension awards was set out in *Decision No. 22*, "Re the Measurement of Partial Disability," 1 W.C.R. 96, January 1, 1974. That decision established what was known as the "rule of 15ths" in relation to loss of earnings pension awards. Permanent partial disability awards based on impairment of function were payable for life. In *Decision No. 22*, the Board reasoned:

> If compensation is to be kept roughly proportionate to actual loss, the solution should be a sliding scale that will result in disability pension benefits after retirement age being a higher proportion of the wage-loss rate for those who were disabled earlier in life than for those disabled in their later years.

> Of course not everyone retires at 65. Some retire earlier, some later, some never. But it would not be feasible to base the decisions in these cases on evidence (which would often be of a speculative nature) of when the particular individual would have retired but for the disability.
>
> Moreover we do not feel that decisions based on an attempt to determine when a particular claimant would have retired would be likely to result in any higher level of justice than could be achieved by using a standard formula.

[58] *Decision No. 22* provided:

> RESOLVED THAT:
>
> 1. Where the injury occurred at or below the age of 50 years, a pension will be established based on the higher of the two formulae described in Decision No.8, and the pension so established will be payable for life.
> 2. Where the injury occurred at or above the age of 65 years, a pension will be established by the physical impairment method, and that pension will be payable for life.
> 3. Where the injury occurred in the age range of 51 to 64 years, and where a pension calculated by the projected loss of earnings method is payable, the pension so calculated will continue until the age of 65 years. From the age of 65, the pension will be at the rate calculated by the physical impairment method, plus a proportion of the difference between the two methods, according to the following table.
>
> At the age of 65, the pension payable in respect of injury involving the spinal column will be the amount payable under Method 1 in *Decision No. 8*, plus:…

[59] A table was provided setting out a reduction in the amount of pension award by 1/15 for each year beyond age 50 based on the worker's age at the time of injury. Thus, a worker who was age 51 at the time of injury would be eligible to receive 14/15ths of the value of the loss of earnings pension award after age 65, while a worker who was age 64 at the time of injury would be eligible to receive 1/15th of the value of the loss of earnings pension award (above the value of the permanent partial disability award based on impairment of function).

[60] *Appeal Division Decision #94-0659*, "Age 65," 10 W.C.R. 665, of the former Appeal Division of the Board, considered the referral of a Workers' Compensation Review Board finding to grant a loss of earnings pension award to a worker who was 68 years of age at the time of his injury. The Appeal Division panel noted the BCCA decision in *Testa v. British Columbia (Workers' Compensation Board)* (1989), 58 D.L.R. (4th) 676,

which found the Board could not fetter its discretion by blindly following a policy laid down in advance. The Appeal Division panel reasoned at page 674:

> It is a viable interpretation of Section 23(3) to use age 65 as the presumed age of retirement, which will be applied where there is not good evidence to the contrary. However, the policy cannot fetter the Board's ultimate statutory discretion. If there is clear evidence that a worker, who is 65 or older at the date of injury, is suffering a permanent loss of earnings as a consequence of the injury, then Section 23(3) requires the Board to compare that loss of earnings to the worker's entitlement under Section 23(1) and determine which method is "more equitable."
>
> …
>
> Where there is sufficient evidence that a worker would continue working after age 65, then the worker cannot be denied a loss of earnings pension on age alone. The worker may need to show more than an interest in working after age 65, and need convincing evidence of actual plans to work. In this case, the Review Board accepted that the worker would have continued to work, but for the accident. That conclusion was not challenged in any way. If the adjudicator had determined that the worker was about to retire when he was injured, or that he would have retired by the time his temporary wage-loss benefits terminated, then it would have been appropriate to find that he had no loss of earnings and was not entitled to a loss of earnings pension. However, the evidence supports the conclusion that this worker would have continued to work for some period of time before retiring.

[61] The Appeal Division panel found that the Board would need to assess the worker's entitlement under section 23(3). The Board would have to determine when the worker likely would have retired, had he not suffered the compensable injury, and that age would be the age of retirement for the purposes of policy item #40.20.

[62] The January 20, 1999 *Final Report of the Royal Commission on Workers' Compensation in British Columba*, "For the Common Good"[2], included the following analysis and majority recommendation regarding the termination of wage loss and pension benefits (Volume II, Chapter I, "The Adequacy of Benefits," at pages 89 to 90):

> **COMPENSATION FOR LOSS OF RETIREMENT INCOME**
>
> In keeping with the principle that workers' compensation should provide compensation primarily for lost earning capacity resulting from permanent disability, wage-loss benefits should cease upon the worker's anticipated date of retirement, normally on the worker's 65th birthday. At this point, the worker would commence receipt of a retirement income-loss benefits.

[2] Currently accessible at: http://www.qp.gov.bc.ca/rcwc/report.htm

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

The underlying rationale for this approach is that most workers, injured or non-injured, can and should take reasonable measures during their working lives to provide for their retirement income once they cease employment. Since retirement is a normal feature in the lives of all workers, it does not make sense to continue to provide workers' compensation benefits to a worker who would have been retired in the absence of disability as if that worker would have continued to be employed. As such, the intent of the commission's recommendation is to provide compensation for that portion of retirement earnings which the worker lost because of the work-related disability. Combined with other sources of retirement income generated from contributions either before the injury or from the worker's employment following the injury, the total retirement income should very closely approximate that which the worker would have likely received had the disability not arisen.

Workers' compensation boards across Canada that provide such benefits do so in different ways. In Ontario, an amount equal to five percent of the worker's benefit is deposited to an investment fund. Upon reaching age 65, the contributions and returns from the investment of the contributions are annuitized, thereby providing income to the worker until his or her death. This approach is similar to defined contribution pension plans.

An alternative approach in place in Alberta is akin to a defined benefit pension plan. Workers receive an amount based on the size of their wage loss award and the number of years during which the worker received that benefit. The key feature of the Alberta approach is that the worker's ultimate loss-of-retirement income benefit is not subject to the vicissitudes of investment markets. Workers can know, with a high degree of certainty, how much they will receive every month following their 65th birthdays well in advance.

The commission believes that the Alberta approach is preferable. A scheme for the provision of retirement income should be such that compensation for permanent loss of earning capacity ceases upon the date the worker would have retired, and is thereafter replaced with loss of retirement income providing a defined periodic payment calculated by multiplying two percent of the worker's previous monthly loss-of-earnings award times the number of years the pension was received, up to a maximum of 35 years, for the lifetime of the worker.

In the case of permanent total disability, the worker will not have resumed employment and it cannot be known with certainty when the worker would have retired had the disability not arisen. Since 65 is a standard retirement age, it is appropriate to enact a presumption that the worker would have retired upon reaching the 65th birthday. That presumption should be rebuttable in order to avoid injustices to

> **workers who would have retired at a later date. In cases where an adjudicator is satisfied, on the usual standard of proof, that retirement would in fact have occurred at a date later than the worker's 65th birthday, the later date should be used for the replacement of wage-loss benefits with retirement benefits.**
>
> Therefore, the commission recommends that:
>
> 154. the *Workers Compensation Act* be amended such that:
>
> a) **in cases of permanent disability, loss of earnings awards shall:**
>
> **i) cease upon the worker retiring, or attaining the age at which the worker would have retired but for the injury or disease and,**
>
> ii) be replaced thereafter with loss of retirement benefits for the lifetime of the worker;
>
> b) loss of retirement benefits are calculated by multiplying two percent of the worker's loss of earnings benefit by the number of years during which the benefit was received, up to a maximum of 35 years; and
>
> c) **unless the contrary is shown, it shall be presumed that the worker would have retired but for the injury or disease on reaching the age of 65.**
>
> [emphasis added]

[63] This issue was further addressed in the *Core Services Review of the Workers' Compensation Board* (the "Winter Report," Victoria: 2002)[3]. The recommendations in the Winter Report provided the basis for many of the statutory amendments contained in the *Workers Compensation Amendment Act, 2002* (Bill 49), and the *Workers' Compensation Amendment Act (No. 2), 2002* (Bill 63). These changes largely came into effect on June 30, 2002 and March 3, 2003, respectively.

[64] The Winter Report reasoned as follow, commencing on page 206:

> **E. The Payment of Pension Benefits for the Lifetime of the Worker**
>
> Pursuant to Section 23(1) of the Act, loss of function pension awards are paid for the lifetime of the worker. Pension awards granted pursuant to the loss of earnings method under Section 23(3) are, in varying degrees depending on the age of the worker on the date of his/her injury, similarly paid for the worker's lifetime. In my opinion, the payment of pension awards to permanently disabled workers for their lifetime results in a substantial overpayment of compensation benefits. As a result, such lifetime payments are a significant contributor to the concern raised in the

[3] Currently accessible at: www.labour.gov.bc.ca/wcbreform/ WinterReport-Complete.pdf

WCB Briefing Paper (as previously quoted) with respect to the potential impact the pension reserves (for both loss of earnings and functional awards) have on the long-term viability of the workers' compensation system.

Section #40.20 of the WCB's Claims Manual recognizes that a permanently disabled worker may be less able to accumulate retirement benefits due to his/her compensable disability. As noted on page 18 of the WCB's Briefing Paper:

> The intent of a post-retirement benefit is to provide compensation for that portion of the retirement earnings that the worker has lost due to the work-related disability.

I agree with the above statement concerning the intent of a post-retirement benefit. However, the question to be answered is whether the payment of the full loss of function pension, and some portion, if not all, of the loss of earnings pension, for the lifetime of the worker reasonably accomplishes the objective of providing compensation for the worker's loss. In my opinion, the current system of paying the pension award for the lifetime of the worker does not have any reasonable correlation to the worker's potential loss of accumulated retirement savings.

On a global perspective, it is reasonable to assume that most workers will set aside a portion of their current earnings for their retirement years (above and beyond their CPP [Canada Pension Plan] contributions). Obviously the amount of such savings will vary from one worker to another. Some workers will, unfortunately, be unable to save anything.

In my opinion, it is not reasonable to presume that most healthy workers put away a substantial portion of their current earnings for their retirement years. However, providing a permanent disability pension award for the lifetime of the worker appears to be based on such a presumption. In particular, the loss that a permanent disability is expected to have on the worker's ability to accumulate retirement benefits appears to be equated to the worker's loss of earnings capacity arising from the disability.

For example, consider a 45 year old worker who is earning a gross annual income of $50,000 at the time he/she suffers a severe back injury at work. The WCB subsequently determines that the worker is 100% unemployable as a result of the injury, and awards the worker a full loss of earnings pension. At the time of the injury, the worker's current pension entitlement from the WCB is $37,500.00 (ie: 75% of $50,000). This pension award is payable for the lifetime of the worker.

This lifetime payment of the worker's pension award appears to assume that the worker's loss of earning capacity will be the same during his/her retirement years as it was during his/her pre-retirement years, since the

compensation level paid by the WCB remains the same throughout both. In my opinion, that assumption is unreasonable and must be rectified. The majority of the Royal Commission reached a similar conclusion on page 89 of its *Final Report….*:

I believe it is impracticable and unrealistic to try to assess, on an individual basis, the impact the worker's disability may have had on his/her ability to accumulate retirement benefits. Accordingly, in crafting the post-retirement benefit to be paid to a permanently disabled worker, I have focused on what I perceive to be a fair benefit level for all disabled workers.

In all other Canadian jurisdictions (with the exception of the Northwest Territories/Nunavut), economic loss payments to a disabled worker cease upon the worker's retirement (normally considered to be age 65), and a post-retirement benefit is paid. I have fully reviewed all of these legislative schemes for post-retirement benefits.

Based upon that review, I make the following recommendations:

(i) **Any pension award provided to a disabled worker under the loss of function or loss of earnings method would cease upon the worker attaining the standard retirement age of 65, unless that worker can establish that his/her retirement would in fact have occurred at a date later than at age 65 (in which case the worker's entitlement to the pension award would cease at that later date).**

On this point, I agree with the following comment raised by the majority of the Royal Commission on page 90 of its Final Report….

In Resolution #2000/01/21-03 dated March 16, 2000 (reported at 17 WCR 45), the Panel of Administrators adopted the following as published policy:

> Policy item #40.20 of the Rehabilitation Services and Claims Manual is amended to clarify that the Board considers age 65 to be the standard retirement age. The policy is also amended to clearly state that a projected loss of earnings pension may be awarded or continued in whole past the standard retirement age. In these situations, clear and objective evidence will be required to show that the worker would have continued to work past the standard retirement age if the compensable injury had not occurred.

In my opinion, the "clear and objective evidence" test adopted by the Panel of Administrators is an appropriate standard to determine if the rebuttable presumption, as recommended by the majority of the Royal Commission, has been met. In other words, in order to have the pension award continue beyond the standard retirement age of 65, it will require more than the subjective belief of the worker that,

> **but for the work-related disability, he/she expected to be employed beyond age 65**.
>
> [emphasis added]

[65] At the time of Second Reading of the *Workers Compensation Amendment Act, 2002* (Bill 49), the Minister summarized the purposes of the legislative amendments as follows (at page 3697)[4]:

> **Hon. G. Bruce:** First of all, let's be clear. Anybody receiving a WCB benefit today will continue to receive that same benefit tomorrow, when this legislation is passed.
>
> However, I want to be clear to the hon. member that we're not doing this because it's fun. We're doing this because of two things with respect to the review and the reworking of WCB in the service delivery side of things: to make it more effective and to be there for the people who are in need of it. Also important is the fact that the system is under financial duress. It's virtually at risk. We have a $287 million deficit, and one can't just carry along on that deficit. We'll have a $900 million deficit by the year 2005.
>
> The member knows all too well that the workers compensation system has to be changed. Their government, in fact, undertook a study.... It was very clear that changes have to be made, and we're bringing forward those changes.
>
> I am not hiding anything in respect to saying that benefits will be less for people that find themselves in need of the WCB injury program after the June 30 date. They will be, but more importantly, which I have to make sure as minister responsible, is that the benefit system is there in place for workers in the future and for people already on the system. If I were not to make significant changes, that system would be greatly at risk.

[66] At the time of Second Reading of Bill 49, the legislative debates included the following exchange (at page 3703):

> **J. MacPhail:** This section is dealing with payments for total or partial disability for retirement benefits. The injured workers over the age of 65 will not receive periodic compensation. An injured worker will be able to receive compensation after the age of 65 if the board is satisfied that the worker would not have retired at the age of 65 but later. In that case the worker will receive compensation until the date that the board believes the worker would have worked.

[4] Official Report of Debates of the Legislative Assembly (*Hansard*), 3rd Session, 37th Parliament (2002), vol. 8, no. 8 (29 May 2002).

That's the beginning of it. There are sections on payment for retirement benefits, the handling of money to be paid as a retirement benefit, retirement services and supports.

…

Can the minister explain how this government can then justify taking away millions of dollars from the pockets of older disabled workers by eliminating their pensions after the age of 65?

Hon. G. Bruce: I just want to be clear in our definitions here. Anybody currently receiving a WCB benefit today will receive the same tomorrow, once this legislation is passed, as what they're receiving today.

For a newly injured worker, after June 30, at age 65 the benefits they were receiving up to that part will cease. I've said that very clearly. They will also be awarded a 5 percent lump sum amount — the contribution that WCB will put aside. That same worker can also complement that amount by an additional 5 percent of their own if they so choose. At age 65 there will be a mandatory review of that individual's needs from the standpoint of additional things other than the benefit side. If it's deemed by the board, when that review would take place, that that type of benefit continues to them, it shall continue.

J. MacPhail: There are two different classes of workers in this province as of June 30: those who are injured or made ill on the job before June 30 and those after June 30. Perhaps the minister can explain how workers are to survive financially in retirement if a workplace accident or disease permanently disables them. What are they supposed to do now?

Hon. G. Bruce: This is a wage-loss retirement program. That's what WCB is about. Wages and income usually end at 65. These provisions that we've put in place…. Again, I want to be clear on this. At age 65 there will be a lump sum payment representing 5 percent of the benefits that that individual was receiving up to age 65. They can complement that by an additional 5 percent. They'll also have a mandatory review of their needs over and above the benefit side. Those things that they require will be provided through WCB. Through that process this is what the WCB will be providing.

Now, this is for people that are injured in the workplace after June 30. The people that are currently receiving WCB benefits as they are today will get the same amount tomorrow.

[emphasis added]

[67] At the time of Third Reading of Bill 49, the minister explained the rationale for the amendments to the Act as follows:

> **Hon. G. Bruce:** You know, I don't take great comfort in this, as the hon. member across the way just mentioned. What we are doing is fixing a system that clearly, on all accounts, is in trouble. **We're attempting to make sure that the benefits for the very people this system was meant to serve are there to be able to be paid to those people who are currently on the WCB system and those in the future who may find themselves injured and in need of a WCB system**.
>
> A couple of very important points in summation here. **First, with respect to the consultation process, we had Mr. Winter and Mr. Hunt, two people that I commissioned to review the work done in respect to the royal commission and to consult with others in the field relative to the changes that needed to be brought about with the WCB.**
>
> …
>
> **The significant change that we're following is that which the royal commission stated. I'd just like to read it into the record one final time. This royal commission ... stated, "In keeping with the principle that workers' compensation should provide compensation primarily for lost earning capacity resulting from permanent disability, wage-loss benefits should cease upon the worker's anticipated date of retirement, normally on the worker's sixty-fifth birthday. At this point the worker would commence receipt of a retirement income loss benefit" — which is in fact what we're putting in place.**
>
> The final point to bring out to everybody on the changes that we are making. I'll state this one final time in respect to the benefit side and the changes that we're bringing about. Any person currently receiving WC [workers' compensation] benefits today will not receive less tomorrow as this legislation is brought in. I want to make sure people understand that.
>
> **The legislation and the changes that we're bringing in are so that this system will be around in the future and will be there to look after the people currently on it**.…
>
> [emphasis added]

Other WCAT Decisions

[68] As noted above, WCAT is not bound by legal precedent (apart from a decision by a "precedent panel" appointed under section 238(6) of the Act). The only precedent panel decision of possible relevance to this appeal is *WCAT-2005-03622-RB*. Based on the reasoning in that decision, I find that the June 1, 2014 amendments to policy at RSCM II item #41.00 do not apply in this case.

[69] However, the reasoning in prior decisions may provide useful guidance. A recent noteworthy[5] WCAT decision dated February 14, 2014, by a three-member (non-precedent) panel, is *WCAT-2014-00467*. That decision considered three possible interpretations of the policy at RSCM II item #41.00 as follows:

> [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.

[5] As set out in item #19.3 of WCAT's *Manual of Rules of Practice and Procedure*, noteworthy decisions may provide significant commentary or interpretive guidance regarding workers' compensation law or policy, comment on important issues related to WCAT procedure, or serve as general examples of the application of provisions of the Act, policies or adjudicative principles. Noteworthy decisions are not binding on WCAT. Although they may be cited and followed by WCAT panels, they are not necessarily intended to be leading decisions.

[70] The WCAT panel considered the grammatical and ordinary sense of the policy wording, as well as the background to the June 30, 2002 amendments to the Act, and concluded that a broad interpretation of the policy, as set out in point #3, was correct. The WCAT panel concluded:

> [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).

[71] *WCAT-2014-00467* further noted:

> [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. [See, for example, *WCAT-2013-01102*, *WCAT-2012-03366*, *WCAT-2012-02510*]. 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 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**.
>
> [emphasis added]

[72] I find persuasive the reasoning provided in the *WCAT-2014-00467* regarding the interpretation of the policy at item #41.00.

[73] Two WCAT decisions illustrate the application of the policy at item #41.00 to the circumstances of particular cases involving workers who, like the worker in this case, were in their 40s at the time of injury.

[74] *WCAT-2011-01674* concluded:

> [72] I accept the guidance provided by the practice directive, that 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. At the time of the worker's injury, she was nearly 42 years of age, 23 years prior the average retirement age of 65 years. Notwithstanding the evidence provided by the worker and her mother regarding her intentions to work into her 70s, I consider that such evidence can only be regarded as being in the nature of hopes and wishes rather than representing concrete plans. I agree with the workers' adviser regarding the practical realities involving young workers, in that there are many factors which are unknowable even ten years into the future and that it is difficult if not impossible for a young worker to formulate realistic and concrete retirement plans in those circumstances.
>
> [73] Upon consideration of all of the foregoing, I am not persuaded that the evidence is at least evenly balanced in favour of concluding that, at the time of her injury on March 17, 2005, the worker would have continued to work past age 65 so that her pension should continue after that date.

[75] *WCAT-2012-00388*, a decision by a three-member panel, reasoned:

> [55] At the time of disablement (date of injury) on October 7, 2005 the worker was 43 years of age (born September 13, 1962). He had 22 years of employment remaining before the standard retirement age of 65. He has indicated that at this time he intended to work until he was 75 years of age. He had a young family (three very young children), no savings, no RRSPs [registered retirement savings plans], and no pension entitlement. As previously indicated

at the time of disablement the worker no longer worked for the last employer and he had taken a "buy out" package in 2004. However, the Board has concluded that the worker could no longer perform the occupation of business machine technician given his compensable psychological conditions.

[56] Given his solid work history and work experience in his previous occupation (over 20 years), the nature of the physical and financial requirements for such work (either as a contractor or as an employee), his evidence that he planned to continue to work in this occupation past age 65, and his circumstances (financial needs and a very young family) as outlined above we conclude he would have likely continued to work in this occupation beyond age 65 up to age 75.

Reasons and Findings

[76] Section 23.1(a)(ii) permits the Board to establish a retirement date later than age 65, "if the Board is satisfied the worker would retire after reaching 65 years of age." In that event, the Board will use "the date the worker would retire, as determined by the Board." The worker submits that the only supportable interpretation of section 23.1(a)(ii) is that a worker must be able to tell WCB about plans, experiences, and expectations supporting an intention to work after age 65, regardless of the worker's age or the date of the accident. The worker seeks a referral of the policy at RSCM II item #41.00 to the WCAT chair under section 251(1) and (2) of the Act, on the basis that the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

[77] Under section 82 of the Act, the board of directors have responsibility for establishing policy under the Act. Board officers, review officers and WCAT members are required to apply these policies, subject to section 251 of the Act. Section 251(a) requires that WCAT show a high degree of deference to the policies of the board of directors. The decision by the legislature to establish a test of patent unreasonableness, in regard to a review by WCAT of a policy, means that WCAT cannot review a policy on a standard of correctness or reasonableness. It will often be the case that a range of policy options are viable under the Act. In that context, it is not for WCAT to second-guess the policy choices of the board of directors. Decisions regarding a choice among various policy options may reasonably include consideration of the practical and financial implications of the policy options for the workers' compensation system, rather than solely questions of legal interpretation. However, the initial question as to whether a policy is viable under the Act is one of legal interpretation.

[78] Policy at RSCM II item #41.00 refers to section 23.1 of the Act as recognizing age 65 as the standard retirement age for workers. As set out above, I have included certain historical information as being of interest and providing some background to the June 30, 2002 changes to the Act. However, the starting point for my consideration in

relation to the worker's appeal must be the wording of section 23.1 and the Act in general.

[79] The Act contains several presumptions, as set out in sections 5(4), 6.1, 6.2(2), 6(11), and 9. The Act also has deeming provisions in sections 6(3) and 221(2), which operates as rebuttable presumptions. It is evident from these latter provisions that the Act need not use the word "presumed" in order to create a presumption. However, section 23.1 does not include a term such as presumed or deemed (notwithstanding an express recommendation by the Royal Commission for such a statutory presumption).

[80] I agree with the reasoning in *WCAT-2014-00467*, which found that it overstates the effect of section 23.1 to refer to this provision as creating a rebuttable presumption that the worker would retire at age 65. Had the legislature intended to create such a presumption, it could have done so expressly as it has done in other sections in the Act.

[81] Based on the wording of section 23.1, I would interpret age 65 as establishing, in effect, a minimum date to which a worker a worker will be entitled to a pension award (as a standard retirement date). This is subject to the Board being satisfied that the worker would retire after reaching 65 years of age. Evidence is not required to establish that a worker would retire at age 65. However, evidence is required to establish that a worker would retire later than age 65. Section 23.1 does not permit the Board to terminate a pension earlier than age 65, even if a worker had established plans to take an early retirement.

[82] To the extent there is ambiguity regarding the effect of section 23.1 of the Act, in terms of the manner in which it was intended to be interpreted and applied, I consider that the recommendations of the Royal Commission, and the Winter Report, are instructive. Those reports were both cited by the Minister in connection with the debates and passage of this provision. The specific recommendation of the core reviewer was that "any pension award provided to a disabled worker under the loss of function or loss of earnings method would cease upon the worker attaining the standard retirement age of 65, unless that worker can establish that his/her retirement would in fact have occurred at a date later than at age 65."

[83] Policy at RSCM II item #41.00 refers to section 23.1 of the Act as recognizing age 65 as the standard retirement age for workers. I consider that the net effect of section 23.1 of the Act is to establish age 65 as a worker's retirement age subject to the Board making a finding on the evidence as to a later retirement age. Accordingly, I consider that the characterization of age 65 in policy as being the standard retirement age for workers is consistent with and viable under the Act. I interpret section 23.1 as meaning that in the absence of evidence (at least evenly balanced) to support a later retirement date, age 65 will be used as the retirement date for the purposes of terminating a worker's monthly payments. Even if a worker has an established plan to retire at age 55 or 60, the age 65 retirement date stands for the purposes of establishing the termination date for the worker's monthly pension payments. I do not consider that the policy is patently

unreasonable in referring to section 23.1 of the Act as recognizing age 65 as the standard retirement age for workers. The policy at RSCM II item #41.00 is consistent with the recommendation of the core reviewer, and not patently unreasonable based on the wording of section 23.1 of the Act.

[84] The policy further refers to the standard of proof under the Act as being on a balance of probabilities. However, that reference is expressly stated as being based on the description contained in item #97.00 regarding evidence. Item #97.00 provides that where 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. That statement is consistent with section 99(3) of the Act, as well as section 250(4) of the Act. Read as a whole, I do not consider that the policy is patently unreasonable in referring to the applicable standard of proof.

[85] Key wording in item #41.00 is as follows:

> 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.**
>
> [emphasis added]

[86] The last sentence in the quotation emphasized above has been interpreted in various WCAT decisions as permitting weight to be given to a worker's subjective intentions even where the worker's statement is not independently verifiable. The policy requires that where 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. That permits the worker's statement as to her subjective intentions to be taken into account and given some weight. I agree with this broad interpretation of the policy.

[87] The June 1, 2014 amendment to the policy removed this last sentence. However, the June 1, 2014 version of the policy is not before me in this decision. I am only addressing the earlier version of the policy, which is applicable to the worker's appeal.

[88] The worker submits that the only supportable interpretation of section 23.1 is that a worker must be able to tell the Board about plans, experiences, and expectations supporting an intention to work after age 65, regardless of the age or the date of the accident.

[89] I agree that section 23.1 supports consideration of the worker's evidence regarding her plans, experiences, and expectations supporting an intention to work after age 65. I do not, consider, however, that the wording of section 23.1 supports a conclusion that the worker's subjective intentions are determinative.

[90] The legislature could have used the phrase "intended to" rather than the term "would," for the purposes of establishing a later retirement date. In that case, section 23.1(a)(ii) might have stated:

> if the Board is satisfied the worker "intended to" retire after reaching 65 years of age, the date the worker "intended to" retire, as determined by the Board.

[91] I consider that if the legislature had intended this question to be determined on the basis of the worker's intentions alone, it would have said so.

[92] I do not consider that the policy at item #41.00 is patently unreasonable under the Act, in providing for consideration of a worker's subjective statement of retirement plans as well as any independently verifiable evidence, without making the worker's subjective intentions determinative.

[93] The Board's non-binding practice directive explains that in adjudicating the worker's retirement age, a Board officer needs to consider not only what the worker's intention was at the time of injury, but also when the worker would realistically have retired if the injury had not occurred. Regard must be had to the actual likelihood of the worker successfully working past age 65. In other words, exceptions to the standard retirement age are only appropriate where the evidence establishes that the worker would have worked beyond age 65, not that the worker could have worked beyond age 65.

[94] I find that this reasoning in the practice directive provides useful guidance concerning the interpretation and application of the term "would retire." A decision regarding a worker's age of retirement thus requires consideration of the worker's subjective intentions, any independently verifiable evidence, and the likelihood that the worker would have in fact retired later than age 65.

[95] Accordingly, independently verifiable evidence, while not an absolute necessity, assists in supporting a positive conclusion on this last question. The more the factors supporting a continuation of employment after age 65 are already in place, the stronger the case for concluding that the worker's employment would continue after age 65.

[96] In this case, the worker was 46 years of age at the time of her injury (19 years before age 65). She primarily worked as a clerk cashier for the same employer since her hiring on September 20, 1983 (apart from continuing her education, selling life insurance in 2006, and being an unpaid principal in a dog training business). Even without an oral hearing, I infer that the worker possesses intelligence, discipline, and a strong work

ethic. I base this finding on the fact the worker was successful in completing university degrees as a mature student.

[97] The worker acknowledges that obtaining her university degrees did not immediately result in the launching of her career as a human resources consultant. She obtained a Bachelor of Business Administration degree with concentrations in Human Resource Management and Finance in 2000, and a Bachelor of Arts degree with a major in Economics in 2001. She indicates that her career in Human Resources/Labour Relations was "slow to materialize." She obtained a licence to sell insurance. She refers to her involvement in a business relating to dog training and related products. She also continued to work as a clerk cashier. She obtained a promotion to the position of labour relations specialist for the same employer on May 7, 2007, only four days prior to her injury.

[98] The worker states that she loved her job. I accept that her statement is sincere. I question, however, the weight that can be given to this evidence, given the shortness of the time the worker was in the position of labour relations specialist. She had only just commenced her employment in that position at the time she was injured. I appreciate that achieving this position represented the fulfillment of a long-term goal for the worker. However, her actual work experience in the position was for less than one week, approximately six years after completing her university degrees. Her actual work experience was primarily as a clerk cashier.

[99] At the time of her injury, the worker was 19 years away from reaching age 65. She indicated that her husband needed to retire soon due to health issues, and wished to travel after retirement. The worker cited this evidence in relation to her need to work for financial reasons. However, the retirement of a spouse can sometimes be a factor which affects a worker's retirement plans.

[100] The clarity and certainty expressed by the worker regarding her employment path is at odds with her actual life experience since completing her university education. While she hoped to immediately proceed with establishing herself in a career in human resources, she in fact did other things for six years (including working as a cashier, having unpaid involvement in a dog training business during the years 2001 to 2005, and selling life insurance in 2006). The worker advises that she took a leave of absence in 2006 from working as a cashier and borrowed additional money from her parents in the expectation of a buy-out from the employer (but this was not offered). The fact that the worker had a strong work ethic, had accumulated debt to pursue her education, and wished to commence her career in human resources, did not result in the worker obtaining employment in the field of human resources during the years following her graduation in 2001 (until she obtained a such a position on May 7, 2007). This history demonstrates the inherent frailties of basing a decision on subjective intentions alone.

[101] Ultimately, I consider that the worker's evidence regarding her intentions was more in the nature of expressing her hopes and aspirations. I agree with the review officer in finding that, given the vagaries of life, much could change. Independently verifiable evidence is lacking as to what the worker would do at and after age 65, in 2026. Evidence regarding the worker's intentions is relevant but is not evidence as to what she would actually do in 2026 and following. Weighing the evidence as a whole, including the evidence with respect to the worker's intentions, I am not persuaded that the evidence is at least evenly balanced that the worker would have continued to work after age 65 but for her injury (whether as an arbitrator/mediator, in her own business, in a salaried position with her accident employer, or otherwise). Accordingly, I am not satisfied that the worker would retire after reaching 65 years of age. I agree with the decision of the review officer, and deny the worker's appeal.

[102] No expenses were requested, and it does not appear from a review of the file that any expenses were incurred related to this appeal. I therefore make no order regarding expenses of this appeal.

Conclusion

[103] I deny the worker's appeal and confirm the January 30, 2014 Review Division decision. The worker's request for a referral of the policy at RSCM II item #41.00 to the WCAT chair under section 251(2) of the Act is denied. The worker's permanent disability award will conclude when she reaches 65 years of age.

Herb Morton
Vice Chair

HM/gw

WCAT Amended Decision Number: WCAT-2014-03091a
WCAT Amended Decision Date: January 15, 2015
Panel: Herb Morton, Vice Chair

Amended Decision

[1] It has come to my attention that my October 23, 2014 decision contains typographical errors. Section 253.1 of the *Workers Compensation Act* (Act) provides that WCAT:

> …may amend a final decision to correct any of the following:
>
> (a) a clerical or typographical error;
>
> (b) an accidental or inadvertent error, omission or other similar mistake;
>
> (c) an arithmetical error made in a computation.

[2] After reviewing the original decision, and based on the authority set out in section 253.1 of the Act, I am amending my decision as follows (changes to paragraphs 20 and 29 marked in bold and underlined):

> [20] The worker was employe**d** as a labour relations specialist for a large food store chain
>
> [29] The worker states that she never did draw wages from this company, and the partnership was more of a hobby, but from **t**his experience she gained the confidence to become self-employed.

[3] The "s" is removed from the word "operates" (paragraph 79):

> [79] The Act also has deeming provisions in sections 6(3) and 221(2), which operate as rebuttable presumptions.

Herb Morton
Vice Chair

HM/gw

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