
Noteworthy Decision Summary

Decision: A1603334 **Panel:** Guy Riecken **Decision Date:** February 7, 2017

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

In considering whether the worker's permanent disability award should not terminate at age 65, the panel addressed changes made to item #41.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), applicable to all Workers' Compensation Board, operating as WorkSafeBC (Board), decisions made on or after June 1, 2014. In particular, the panel considered whether the changes to item #41.00 of the RSCM II established an absolute requirement for independent verifiable evidence to establish that a worker would retire at an age greater than 65. The panel concluded that similar reasoning as applied in *WCAT-2014-00467* in relation to item #41.00 as it was prior to the changes could be applied to the new policy such that there is a preference for independent verifiable evidence rather than a strict requirement for such evidence, but where such evidence is not available, other relevant information must be considered.

The worker had a long history of work in the oil and gas industry including working as a labourer, a truck driver, and a supervisor. Shortly before he was injured, the worker began employment as a transit bus driver. He was injured when the bus he was driving was struck by another vehicle. In support of his assertion that but for his compensable injuries he would have continued working until age 72, the worker said he had taken the job as a bus driver because it was less physically demanding and closer to his home, which would enable him to continue working past age 65. He said his financial circumstances necessitated working beyond age 65. The worker provided a letter from his wife stating that the worker's retirement plans included working past age 65, and that he had considered the prospect of doing so when he applied for the job as a bus driver. The worker also provided a letter from a friend stating that the worker had discussed with him the need to work past age 70, and a summary he had prepared of a conversation with another employee of the employer in which the employee said the employer did not have a mandatory retirement age, and other employees continued to work past age 65.

The panel found that the worker had not provided the kind of independent verifiable evidence contemplated by item #41.00 of the RSCM II. The panel noted that the changes to item #41.00 included removing the sentence: "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." However, the panel concluded that did not establish a strict requirement for independently verifiable evidence because the policy as amended effective June 1, 2014 stated, following examples of independently verifiable evidence, that it is not a conclusive list of the types of evidence that may be considered, and the Board will consider any other relevant information in determining whether a worker would have worked past age 65.

The panel considered the other information the worker had provided and concluded it was insufficient to support the conclusion that he would have continued working past age 65.

DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

Introduction

- [1] The worker is appealing two review decisions, both dated March 24, 2016, concerning the duration of his permanent partial disability award (award) payments.
- [2] The Workers' Compensation Board (Board)¹ accepted the worker's claim for multiple injuries that resulted from a motor vehicle accident in November 2012 in the course of the worker's employment as a transit bus driver. The Board accepted a number of permanent physical and psychological conditions that resulted from the injuries, and granted the worker an award based on a 100% loss of earnings. A disability awards officer communicated that decision to the worker in a July 31, 2015 letter which advised the worker that the award is payable until the worker reaches age 65. The letter also advised the worker that if he had evidence to submit to support a later retirement date than age 65, the Board could reconsider the decision within 75 days.
- [3] The worker submitted a written statement regarding his intention to work into his late 60s or early 70s along with his RRSP account statement from March 2012. He submitted that the Board should pay his award until a retirement date of age 72. In an August 19, 2015 letter the disability awards officer reviewed the evidence submitted by the worker and concluded that it did not establish the worker would have continued working after age 65, and that the award would end at the standard retirement age of 65 in accordance with section 23.1 of the *Workers Compensation Act* (Act).
- [4] The worker requested reviews of both decisions. In the decisions under appeal (*Review References #R0198879* and *#R0198880*) the review officer confirmed the disability awards officer's decisions.

Issue(s)

- [5] The issue in both appeals is the same, namely whether the worker's permanent disability award payments should continue beyond age 65.

Jurisdiction and Method of Hearing

- [6] Section 239(1) of the Act provides for appeals to the Workers' Compensation Appeal Tribunal (WCAT) of final decisions by review officers regarding compensation matters.
- [7] These are appeals by way of rehearing, in which WCAT considers the record and also has jurisdiction to consider new evidence and to substitute its own decision for the decision under

¹ The Board operates as WorkSafeBC.

appeal. WCAT has inquiry power, including the discretion to seek further evidence, but is not obliged to do so.

- [8] WCAT must make its decision on the merits and justice of the case, but in doing so, must apply a policy of the Board's board of directors that is applicable in the case. The applicable policy is found in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).
- [9] The standard of proof is the balance of probabilities, subject to section 250(4) of the Act. Section 250(4) of the Act provides that, if WCAT is hearing an appeal regarding the compensation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the appeal tribunal must resolve that issue in a manner that favors the worker.
- [10] The worker is represented by an adviser from the Workers' Advisers Office. The employer is participating in the appeal and is represented by an adviser from the Employers' Advisers Office.
- [11] In the notice of appeal the worker requested that the appeals proceed in writing, and both representatives provided written submissions.
- [12] Having considered the criteria for determining the appeal method in item #7.5 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) I find that an oral hearing is not necessary, and that the appeals can be properly considered on the basis of the record and the written submissions.

Background and Evidence

- [13] In light of the relatively narrow issue in this appeal I will not summarize all of the details of the extensive claim file.
- [14] Briefly, on November 27, 2012 the worker was 58 years of age and had been working as a transit bus driver for the employer since September 2012. Another vehicle broadsided the bus the worker was driving on the driver's side near the front of the bus. The worker was ejected from the bus through a window and knocked unconscious. He sustained multiple injuries, including a concussion.
- [15] The Board initially accepted a number of physical injuries under the claim. The worker underwent psychiatric and psychological assessments and received diagnoses that included Post Traumatic Stress Disorder (PTSD) and acquired brain injury. The Board decided not to accept PTSD under the claim, determined that his physical injuries had reached a medical plateau in July 2013, and referred the claim to the Board's Disability Awards Department. The Review Division confirmed the Board's decision. In *WCAT-2014-03816* the panel allowed the worker's appeal with respect to the denial of a psychological condition, and accepted that he had suffered mild PTSD as a result of the November 27, 2012 accident and was entitled to compensation for a mental disorder under section 5.1 of the Act.
- [16] In the meantime, in a July 8, 2013 letter the Disability Awards Department wrote to the worker and requested information about whether, before the date of injury, he had intended to work

beyond age 65, and if so, to provide independent verifiable evidence of this intention. The letter provided examples of independent verifiable evidence that were listed in the version of policy item #41.00, "Duration Of Permanent Disability Periodic Payments" in effect at that time.

- [17] The worker responded in a letter dated July 30, 2013 in which he stated that prior to the motor vehicle accident he was in excellent health and "intended to work until I physically was unable."² He also stated that due to economic reasons, he had to work as long as he possibly could. The worker noted that the employer had many employees well over age 65. He had planned to continue working there until "well into [his] seventies." He stated that this was a realistic plan, considering the employer had a driver who had just retired at age 76.
- [18] In July 2014 the Board accepted left shoulder tendinitis, a mild neurocognitive disorder due to a traumatic brain injury, personality change, and an adjustment-like disorder under the claim.
- [19] The Board also determined that the worker's compensable psychological injuries had reached a medical plateau in July 2013, and referred those conditions to the Disability Awards Department. The worker requested a review with respect to the plateau date and the termination of temporary disability (wage loss) benefits. A review officer varied the Board's decision and found that the worker's psychological conditions were not at medical plateau in July 2013 and that he was entitled to wage loss benefits after that date. The employer appealed the decision to WCAT, and in *WCAT-2015-03490* the panel confirmed the review officer's decision.
- [20] In a January 7, 2015 memorandum a vocational rehabilitation consultant (VRC) reviewed the worker's employment prospects. In discussing his vocational background, she noted that the worker had left school to go to work at age 17, and then returned to school in his early 20s to complete his high school diploma. He later took college-level courses in petroleum technology and obtained a class 1 driver's license. He had worked in the oil and gas industry for over 30 years in various labouring, truck driving, and supervisory positions, for which he had obtained various qualifications. The worker had stated that he decided to become a transit bus driver as it would allow him to spend more time at home (compared to his previous employment in the oil and gas industry), and at the time of the November 2012 accident he had been working for the injury employer since September 2012.
- [21] The VRC reviewed the medical history, including the various psychological and neuropsychological assessments on file, as well as the various physical and psychological restrictions and limitations accepted under the claim. She concluded that in light of these, the worker's age, the lack of support available from the employer, and the worker's monothematic employment history, he is competitively unemployable.
- [22] In a February 18, 2015 memorandum the Board's psychological disability awards committee (PDAC) noted the permanent psychological conditions that were accepted under the claim, including mild PTSD, a cognitive disorder and personality changes, rated the worker's impairment due to his compensable psychological conditions at 30% of total disability.
- [23] The worker underwent a permanent function impairment (PFI) evaluation on October 1, 2014 with respect to the following permanent conditions: ORIF medial malleolar fracture, left ankle

² All quotations are reproduced as written unless otherwise noted.

tendinitis/bursitis, and a left shoulder injury. Dr. Preston, disability awards medical advisor, noted measurements of reduced range of motion of the worker's left ankle and left shoulder, and reduced sensation of the left pretibial skin of mild degree in the L4 distribution. He also noted the worker's report of "mental fatigue" and pain in his left shoulder and stiffness in his left ankle.

- [24] In a July 23, 2015 PFI review the disability awards officer relied on Dr. Preston's evaluation in rating the worker's physical impairment at 12.08% (11.08% based on range of motion impairment in the worker's left shoulder and left ankle and foot, and 1% for mild sensory impairment of the L4 nerve). The disability awards officer accepted the PDAC's recommendation of a 30% award for psychological impairment, bringing the overall award under section 23(1) of the Act to 42.08%, effective July 20, 2014.
- [25] The disability awards officer stated in the memorandum that the worker had not provided evidence on which to conclude that his age of retirement would be later than age 65. Accordingly, the award would be payable to age 65, in accordance with section 23.1 of the Act and policy item #41.00.
- [26] In the July 31, 2015 letter the disability awards officer advised the worker of the decision to grant a 100% loss of earnings award under section 23(3) of the Act payable to age 65. As I noted earlier, the letter invited the worker to provide any evidence of a later retirement date within the statutory 75-day reconsideration period.
- [27] The worker responded with an August 12, 2015 letter. He stated that he had a self-directed RRSP. He provided a copy of a statement of his RRSP account dated March 31, 2012. He stated, in part, that he was the sole provider in his household, and that in order for him and his wife to maintain their current lifestyle, he knew he would have to work into his late 60s or early 70s and he had plans of doing so. Living on CPP, Old Age Security, and a small RRSP would not be adequate. As his health was excellent prior to the injury, working was a believable and doable goal. Driving transit bus was a good job for that goal. He stated that the employer had many drivers over age 65. He stated that the cost of living in his region is higher than elsewhere in the province. It was not feasible for him to live there without working beyond age 65. The worker sought a reconsideration of the decision regarding his retirement age, with a change to a more realistic retirement age of 72.
- [28] In the August 19, 2015 decision letter the disability awards officer advised the worker that she had agreed to reconsider the earlier decision based on the new information he provided. She reviewed the submissions and information from the worker, but concluded that it did not amount to a concrete plan that would support a finding that the worker "would have" worked beyond the age of 65.
- [29] With his submissions to the Review Division the worker provided the following documents:
- A letter from the worker's wife dated November 1, 2015 in which she states, in part, the following: the couple's financial plan is self-directed, and involves a self-directed RRSP account, based on her husband's own research; that her husband would have worked past

age 65 driving bus; and, that he considered the opportunity to do so when he applied for the job.

- A letter from C, the owner of a company the worker previously worked for, in which he states that he has never discussed post-65 employment with his employees, and that he has never heard of such a discussion being done by anyone.
- A letter from M, a long-time friend of the worker, dated October 23, 2015 in which M states that over the years he and the worker discussed many times the need to work past age 65, and that the worker intended to work past the age of 70.
- An unsigned summary (by the worker) of a conversation between the worker and S, an employee of the employer, that occurred on October 28, 2015, in which S stated that there are both full-time and fill-in drivers employed by the employer past the age of 65, that the employer does not have a mandatory retirement age, and there is no special plan made for such drivers; they just continue doing the job they were doing subject to annual evaluation by a trainer.

[30] The employer submitted an undated letter from the employer's regional manager of transit to the Review Division setting out the employer's practices with respect to hiring and retaining drivers, including the following information. The employer hires full-time drivers for service hours that it has contracted to provide. The employer also hires part-time drivers to fill in for full-time drivers on days off, sick days, and for holiday relief. The employer also uses part-time drivers to fill some service hours in the schedule because there are not enough full-time drivers. The manager states that the worker would have been hired just as all other part-time drivers and filled in as needed. His file shows that he was hired with no benefits and was paid only for hours worked. He was hired on September 25, 2012. According to the norm, the worker would have been hired with a three-month probation period. He did not complete his three-month probation period before the accident occurred in November 2012. The manager provided a copy of the worker's work schedule for November 2012.

Reasons and Findings

[31] As the worker was 58 years of age on the date of injury, section 23.1(a) of the Act applies to his claim. This section provides that compensation under section 23 may be paid to a worker only until the later of the following:

- (i) the date the worker reaches 65 years of age;
- (ii) if the Board is satisfied the worker would retire after reaching 65 years of age, the date the worker would retire, as determined by the Board.

[32] Policy item #41.00 sets out the applicable policy with respect to the application of section 23.1 of the Act. Unless otherwise indicated, references to policy in this decision pertain to the RSCM II as it read after changes to policy item #41.00 that became effective on June 1, 2014, and which apply to all Board decisions made on or after that date.

[33] The worker's position is that but for his November 2012 injury he would have worked into his seventies and that age 72 should be accepted as his retirement age and the age at which his permanent disability payments end. He relies on his own evidence, the evidence of his wife, his March 2012 RRSP account statement, and the other evidence he has provided. He submits that prior to his injury he intended to work well past age 65, that for financial reasons he needed to do so, that he had changed his occupation to transit bus driver to facilitate that intention, that his employer's practice was to continue employing drivers older than age 65, and that if he had not been injured he would have continued working for the employer as a driver well beyond age 65.

[34] The employer's position is that the worker has not satisfied the requirements of policy item section 23.1 of the Act and policy item #41.00 for the payment of his award beyond age 65.

[35] Policy item #41.00 recognizes that where the Board is satisfied a worker would retire after reaching 65 years of age, section 23.1 of the Act permits the Board to pay benefits to the age at which the worker would retire after the age of 65 if the worker had not been injured. However, the policy states:

...as age 65 is the established retirement age under the Act, the Board requires evidence that is verified by an independent source to confirm the worker would 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.

[36] Policy item #41.00 states that when determining whether a worker would retire after age 65, the circumstances under consideration are those of the individual worker as they existed at the time of injury.

[37] Policy item #41.00 states that:

The issue for the Board to determine is whether there is sufficient positive evidence³ 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.

[footnote added]

[38] The policy provides the following examples of the kinds of independent verifiable evidence that may support a worker's statement that he or she would have worked past age 65, and to what age:

- 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, the expected duration of employment, and information from the

³ I do not consider the reference in policy item #41.00 to the balance of probabilities seeks to impose a standard of proof greater than that found in subsections 99(3) and 250(4) of the Act. See *WCAT-2015-01610* for a more thorough discussion of this matter. I have considered section 250(4) in assessing the evidence in this appeal.

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;

- a statement from a bank or financial institution outlining a financial plan and post age 65 retirement date, established prior to the date of the injury; and
- an accountant's statement verifying a long-term business plan (for self-employed workers) established prior to the date of the injury, indicating continuation of work beyond age 65.

[39] The policy states that where this kind of evidence is available, this would be positive evidence in support of a determination that a worker would have worked until after age 65.

[40] The worker submits that he has provided evidence in the relation to the first bulleted item above, namely the name of an employer the worker planned to work with after the age of 65 (the accident employer). The worker cites the statement from his wife and his submissions to the Review Division in February 2016. He submits that the reason he changed from working in the oil and gas industry to take the bus driver position was to allow him to continue in a less physically demanding job into his 70s or later. He was also becoming tired of working away from home and the demands of his former job.

[41] I find that the worker has not provided independent verifiable evidence of the kind in the first bulleted example cited above. I consider that the first bulleted example is meant to be read as a whole, and is not satisfied simply by naming an employer the worker intended to work for after age 65. A worker's statement of his own intention does not amount to independent verifiable evidence. In my view, the example is more reasonably read as a whole, so that it includes information from the employer the worker intended to work for to confirm that the employer intended to employ the worker after age 65. The worker has not provided such information from the employer. I recognize that such evidence may not be available from the employer, since the employer has stated that the worker's accident would have resulted in a review of his employment status (the employer apparently blamed the worker for the accident). Although the employer's view of the accident is a matter that arose after the worker's injuries, it has apparently resulted in the employer's lack of cooperation in the worker's potential return to work (as cited in the vocational rehabilitation documentation). The worker has not requested that WCAT endeavor to obtain further information from the employer.

[42] I recognize that the worker provided the summary of a conversation he says that he had with S, an employee of the employer who apparently held a supervisor position. This does not amount to information provided by the employer about the employer's intention or willingness to go on employing the worker after age 65. Simply put, this is second hand information from the worker about something told to him by an employee of the employer. In my view, this is not what is meant by the term independent verifiable evidence. In addition, this evidence does not show that the employer had agreed to employ the worker after age 65. The second-hand information from S provided through the worker simply outlines the employer's practice of continuing to employ some drivers after age 65. At the most, this amounts to evidence that employment after age 65 may have been available with the employer, but does not show that the employer intended to employ the worker past age 65.

- [43] The worker has not provided evidence of the kinds described in the second and third bulleted items noted above. I recognize that he provided a copy of an statement of his self-directed RRSP account as it stood approximately eight months before the accident, but the statement is not a financial plan or a retirement plan. Rather, it shows the balance in a particular account on a certain date.
- [44] Policy item #41.00 also provides the following examples of other kinds of independent verifiable evidence that alone may not be determinative of whether a worker would retire after reaching 65 years of age:
- information provided from the worker's pre-injury employer, union or professional association regarding the normal retirement age for workers in the same pre-injury occupation and whether there are incentive plans for workers working beyond age 65;
 - 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;
 - information regarding whether the worker would have the physical capacity to perform the work;
 - financial obligations of the worker, such as a mortgage or other debts;
 - family commitments of the worker; and
 - an outstanding lease on a commercial vehicle (for self-employed workers).
- [45] The worker submits that he has provided evidence of all of the above items, except for outstanding leases, as this is not applicable in the worker's circumstances. Contrary to the worker's submission, I do not accept that he has provided independent verifiable evidence of the kinds set out above in the (second) list of examples. Although he has provided information about those items, the information he has provided does not come from an independent and verifiable source. For example, he has provided his own account of his conversation with S about the employer's practices respecting the employment of drivers after age 65. As I noted earlier, this does not amount to independent information from the employer about its practices with respect to employing workers past age 65.
- [46] The worker has stated that prior to the accident his physical condition would have allowed him to go on working as a driver into his seventies, but he has not provided independent evidence of this, such as medical evidence. He has provided general information about his financial circumstances, such as the fact that he does not pay a mortgage but has other usual living expenses such as vehicle insurance, gas for the vehicles, electricity and gas for the home, property taxes, property taxes, utilities, groceries and clothing. In addition he has stated that he does not have a company pension plan, and planned to start collecting the CPP at age 65 and the Old Age Security (OAS) payments at age 67. He has not provided independent verifiable evidence of these expenses or of the amounts of the CPP and OAS benefits he and his wife could expect to receive at after age 65. His statement that such payments would not be sufficient to allow them to maintain their lifestyle does not amount to independent verifiable evidence of his financial obligations.

- [47] I recognize that the worker has provided the RRSP statement from a few months prior to his accident, which shows that at that point he had just under \$58,000 in his self-directed RRSP account. While this is a form of independent verifiable evidence, it refers only to one of his assets, and does not indicate the nature of the worker's financial obligations. The worker has also provided the statement from his wife that confirms his evidence that he has been sole income earner in the family, but this general statement does not in itself amount to independent evidence of the details of worker's actual financial and family obligations.
- [48] I conclude that the worker has not provided independent verifiable evidence of the kinds set out in either of the list of examples in the policy.
- [49] The parties have different positions on whether independent and verifiable evidence of a worker's intention to retire later than age 65 is required before the Board can decide to pay benefits beyond age 65. The employer points to the statement in policy item #41.00 that because age 65 is the established retirement age under the Act, the Board requires independent and verifiable evidence to support a worker's statement that he or she would have worked past age 65, and to establish the later retirement age. The employer submits that the worker has not provided such evidence and therefore has not satisfied the requirements of policy item #41.00 for the payment of disability award benefits beyond age 65. The essence of the employer's position is that in light of the policy requirement for independent verifiable evidence, such evidence as the workers' own statements about his intention and the statements from others that he has provided are not capable of supporting a conclusion in favour of a post-65 retirement date.
- [50] The worker points to the following statement in policy item #41.00:
- These are not conclusive lists 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.
- [51] The worker's position is that the information he has provided establishes that he would have worked past age 65 and into his early 70s.
- [52] The different positions taken by the parties with respect to what evidence is required to determine a worker would have worked past age 65 highlights a challenge in reconciling the two different statements in policy item #41.00 concerning the evidence needed to satisfy the Board that a worker would retire later than age 65.
- [53] Some WCAT panels have interpreted the current version of policy item #41.00 in a manner that is consistent with the employer's position. For example, the panel in *WCAT-2015-01610* observed that policy item #41.00 stresses the existence of independent verifiable evidence. The panel commented that it appears policy item #41.00 may require the existence of independent verifiable evidence before the Board can find there is sufficient positive evidence that a worker under the age of 65 would retire after the age of 65. While the panel appreciated the policy item refers to examples of independent verifiable evidence, and states that the lists of examples are not conclusive, those lists of examples of such evidence strongly suggested to the panel that

certain types of evidence are necessary before the Board may conclude that there is sufficient positive evidence that a worker under the age of 65 would retire after the age of 65.

- [54] The panel in *WCAT-2015-01610* noted that following statement from the former version of policy item #41.00 is no longer found in the current version of the policy:

If the worker's statement [about his or her intent to work past age 65] is not independently verifiable, the Board will make a determination based on the evidence available, including information provided by the worker.

- [55] The removal of this sentence from policy item #41.00 suggests that independent verifiable evidence is now required and other information provided by the worker, including the worker's own statement about his or her own intent will no longer be sufficient. The panel in *WCAT-2015-01610* suggested that this was a possible interpretation of the current policy.

- [56] On the other hand, the Board's Practice Directive #C5-1, which was amended on January 30, 2015 to provide guidance on the changes to policy item #41.00, states that "[p]olicy establishes a clear preference for evidence that is objective and independently verifiable." The practice directive explains that this is understandable considering the payment of pensions beyond age 65 is intended to be a limited exception to the general rule that permanent disability awards end at age 65. It adds that the exception is meant to address workers who were near retirement when injured and had specific plans in place to continue working past age 65. In my view the practice directive, by referring to a "clear preference," for independent verifiable evidence, and discussing other kinds of evidence, contemplates that other available evidence will be considered.

- [57] I note that the statement in the practice directive that "[p]olicy establishes a clear preference for evidence that is objective and independently verifiable" echoes to some extent the language used by the panels in a number of decisions with respect to the former version of policy item #41.00. In *WCAT-2011-01674* the panel noted that the version of policy item #41.00 then in effect included the following:

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.

- [58] The policy then provided a list of 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. Following the list of examples, the former policy (like the current policy) stated:

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.

[59] In *WCAT-2011-01674*, the panel read section 23.1(a)(ii) as authorizing only a limited exception to the general rule established by section 23.1(a)(i) for the payment of permanent disability awards to age 65. The reference to only a limited exception being allowed under section 23.1 continues in the current practice directive.

[60] The panel in *WCAT-2011-01674* went on to address the two sentences in the former policy that provided on the one hand a requirement for verifiable independent evidence, and on the other allowed that, where a worker's statement is not independently verifiable, a determination may be made based on the available evidence including that provided by the worker. The panel stated:

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 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).

[61] The requirement for independent evidence that could be verified versus the possibility of a determination based on other available evidence (as set out in the former policy) for the purposes of section 23.1 was also considered in *WCAT-2014-00467*, which has been identified by WCAT as a noteworthy decision. In that decision the three-person panel considered three possible interpretations of the former version of policy 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.

[62] The panel in *WCAT-2014-00467* 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 the a broad interpretation of the policy in force at that time, as set out in point #3, was correct. The panel went on to state:

[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.

[63] The panel in *WCAT-2014-00467* then cited the passage quoted above from *WCAT-2011-01674* in which that panel concluded that "verifiable independent evidence is to be preferred," but that the policy also contemplates the situation in which a decision may be made regarding a retirement age later than 65, in which independent verifiable evidence is not available.

[64] In light of the changes to the wording of policy item #41.00 that came into effect on June 1, 2014 it may be arguable that the current practice directive, in stating that the policy establishes "a clear preference" (rather than an absolute requirement) for independent verifiable evidence, is inconsistent with the policy. In particular, the removal from policy of the sentence that stated 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," suggests that independent verifiable evidence is not merely to be preferred as the practice directive says, but is required.

[65] However, in my view that interpretation of the current policy would still not account for or give meaning to the statement that remains in policy that the lists of examples of independent verifiable evidence are not conclusive, and that 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.”

- [66] In light of the fact that the foregoing sentence remains in the current version, I consider that similar reasoning to that employed by the panel in *WCAT-2014-00467* with respect to the former policy can be applied to the current policy. While there may be different possible interpretations of the current policy, in my view, considering the grammatical and ordinary sense of the current policy as a whole, a reasonable interpretation is a broad one which recognizes a policy preference for independent evidence to verify a worker’s stated intention, but where such evidence is not available, requires the consideration of any other relevant information.
- [67] Accordingly, I do not regard the practice directive as inconsistent with the policy on the basis that it recognizes a clear preference for independent verifiable evidence rather than a strict requirement for such evidence. While the practice directive is not binding policy, it provides useful guidance on the application of policy item #41.00.
- [68] In addition, in spite of the changes to the policy and to the practice directive, I consider the following statement by the panel in *WCAT-2011-01674*⁴, with respect to adjudication when independent verifiable evidence is not available, to be useful:
- 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).
- [69] Turning to the “other relevant information” that has been provided, the issue is whether there is sufficient positive evidence that it is as likely as not that, at the time of his injuries, the worker would retire later than age 65, and if so, at what date.
- [70] While the worker has not provided independent verifiable evidence of the kinds set out in the lists of examples, he and the employer have provided some information that is relevant to the matters identified in those examples.
- [71] The worker has provided some information about his family situation and his finances. Information in the claim file indicates that he had one child, an adult son. There is no indication that at the time of his injuries that he had any obligations with respect to the support of his son. I accept that at the time of his injuries the worker was the sole income earner for him and his wife.
- [72] The information provided by the worker and the employer is that he does not have a company pension from the employer or from previous employment. I accept as fact that, aside from the question of any employment income, the income available to him when he reaches age 65 would be from his CPP and OAS benefits, and from his RRSP savings.
- [73] The worker has not provided detailed information about the amount of CPP and OAS benefits he and his wife expect to receive. He does not have a mortgage, and has not referred to paying

⁴ Prior WCAT decisions are not binding but may provide useful analysis.

rent. At the same time, while listing the kinds of household expenses that he and his wife have, he has simply listed what would be considered typical expenses such as insurance, car and home fuels, clothing and groceries. He has not provided detailed information about the expenses that would support his submission that he would need to go on working past age 65. The kinds of very general financial information the worker has provided does not amount to persuasive evidence that his financial obligations would have motivated him to defer retirement beyond age 65.

- [74] The worker has stated that he was physically healthy prior to the accident and would have been capable of continuing to work past age 65. While he has not provided or referred to specific medical evidence that verifies the state of his health prior to the accident, the available medical information in the record does not indicate that the worker had a medical condition that would have made it unlikely he could continue working as a transit driver past age 65. The absence of such a condition is not in itself evidence that the worker would have worked past age 65. At the same time, the medical record does not provide any reason to reject the worker's submission that at the time of the accident he was physically capable of continuing to work as a driver beyond age 65. I accept that but for the accident the worker would have been physically capable of continuing to work as a transit driver past age 65.
- [75] With respect to the opportunity to go on working past age 65, the worker has stated that at the time of his accident there were drivers working for the employer who were older than 65, and that that the employer did not have a mandatory retirement policy. The worker has attempted to support his statement with his account of a conversation with S, an employee of the employer. I do not consider his account of that conversation, in itself, can be given much weight. This is because it is in the form of an undated and unsigned statement (which I accept is the worker's own account of the conversation) and is second hand evidence instead of a direct statement from S.
- [76] Nonetheless, the employer had the worker's July 30, 2015 statement, the worker's account of the conversation with S, and the worker's submission to the Review Division, when the employer provided a statement about its practices with respect to hiring and employing drivers. Neither in its manager's statement nor in its submissions did the employer dispute the worker's assertions that the employer does not have a mandatory retirement policy and that at the time of accident there were drivers employed who were older than age 65, including one who had worked well into his seventies. While the manager's statement about the employer's employment practices for its drivers does not amount to express confirmation that it employs drivers who are older than age 65, I consider it reasonable to infer that if the information provided by the worker in that regard was incorrect, the employer would have pointed this out in its evidence or submissions. In the absence of contrary evidence from the employer, I accept as fact that the employer does not have a mandatory retirement policy for drivers and that at the time of worker's accident it was continuing to employ some drivers who were older than 65.
- [77] I accept, therefore, that at the time of injury it was possible that the worker could have continued to work as a transit bus driver for the accident employer beyond the age of 65 in the sense that he was physically able and there was no policy of the employer to prevent this and there were other drivers older than 65. Accordingly, a theoretical opportunity to go on working for the employer existed.

- [78] However, as a practical matter this would have been subject to the employer continuing to make employment as a transit driver available to the worker, aside from the issue of the worker's age. As the employer has stated, the worker was hired as a part-time driver who drove "fill-in" shifts and some full-time shifts as needed, and his employment began with a three-month probation period. At the time of his accident the worker had not completed his probation and had not yet become a full-time permanent employee. The worker's evidence and submissions do not contradict this. In my view, at the time of the accident the worker's employment as a transit driver with the employer was not so well-established that it can be said that worker had a reasonable expectation of continued employment beyond age 65. Rather, the worker's statement of his intention appears to be based on a wish to be able to go on driving for the employer indefinitely, and until age 72. In light of the fact that the worker had only been recently hired by the employer, was still on probation, was still only being those shifts that became available, I consider that the worker's submission about his long-term employment prospects with the employer past the age of 65 involves considerable speculation. I find that there is insufficient persuasive evidence that it is as likely as not that his employment with the employer would have continued past age 65.
- [79] The worker has not identified other employers who would have worked for past age 65, and the evidence does not identify other employers who would have employed the worker after age 65.
- [80] I recognize that the worker changed his occupation when he was 58 years old and shortly before the accident. He has said that this was so he would not have to spend as much time away from home, and so he could start doing a job that he would be able to continue after he was 65 years old. Such a change at age 58 is certainly consistent with an intention to go on working, but is not necessarily an indicator of a plan to work past age 65. It could be seen as indicator of planning with respect to a retirement date later than age 65, but I do not consider this in itself to be a strong indication of such a plan.
- [81] Consistent with the policy directive, in my view section 23.1 of the Act and policy item #41.00 contemplate that the payment of permanent disability awards beyond age 65 will occur in limited situations. As noted in the practice directive, evidence of motivation, opportunity, planning, and ability may all support a finding of an intention to go on working past age 65, in order to find that a worker would have done so. However, there must be sufficient positive evidence to support a conclusion that the worker "would" have done so. Evidence that establishes only that he "could" have worked past age 65 is not sufficient.
- [82] In this case I do not find that the evidence that the worker would have worked past age 65 to be persuasive. I find that the evidence provided by the worker indicates a lack of specific planning about retirement before he was injured. While there is evidence of the discussion with his wife and a longstanding friend about working past age 65, evidence he would have been physically able to work past age 65, and evidence that his employer in practice employed some drivers who were older than 65, the Act requires me to determine whether the worker "would" retire at some age later than 65. The available evidence concerning the worker's family and financial obligations does not persuade me that he would have been motivated to go on working past age 65. The fact that the worker had been only recently hired by the employer, was on probation at the time of accident, and was still working fill-in shifts (and only some full-time shifts) is not persuasive evidence that continued employment with the employer after age 65 would have been available to him.

[83] Having considered the evidence as a whole I find there is insufficient positive evidence to persuade me that it is as likely as not that the worker would work past age 65.

Conclusion

[84] The worker's appeals are denied. I confirm the two review decisions dated March 24, 2016.

[85] The worker did not request reimbursement of any expenses related to this appeal, and accordingly, there is no order respecting reimbursement.

Guy Riecken
Vice Chair