

# Decision of the Workers' Compensation Appeal Tribunal

**Number: 2004-01881-RB**

**Date: April 16, 2004**

**Panel: Michael Carleton, Vice Chair**

**Subject: Permanent Partial Disability — Sections 6(1) and 23(1) of the *Workers Compensation Act* — Item #26.30 of the *Rehabilitation Services and Claims Manual***

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## Introduction

The worker appeals a June 19, 2002 decision by a disability awards officer (DAO) in which he was advised that despite having a “judged degree of remaining permanent functional impairment [(PFI)],” he was not entitled to an award for permanent partial disability because he had resumed his normal employment. In a June 19, 2002 memo which provided supporting reasons for the decision of the same date, the DAO commented that the worker had been employed in the capacity of a legal secretary at the time she was diagnosed with bilateral carpal tunnel syndrome and, following treatment for that condition, she had returned to work in the same capacity. The DAO concluded that neither the applicable legislation, section 6(1) of the *Workers Compensation Act* (Act), nor Workers' Compensation Board (Board) policy, allowed for an award when there is an ability to return to normal employment.

The worker has not requested an oral hearing, and I do not consider that an oral hearing is necessary to fully and fairly consider the issue under appeal.

Submissions have been received from both the worker's representative and the employer's representative. Subsequent to the establishment of the worker's claim, the firm where the worker was employed changed from a partnership to a self-proprietorship. Since the Board's Assessment Department confirmed the assessment experience rating was not assumed by the self-proprietorship, a determination was made within the Registrar's Office at the Workers' Compensation Appeal Tribunal (WCAT) that the proprietorship is not considered a successor employer, and does not have standing in the appeal. For this reason, the Employers' Advisers were invited to participate. A letter from one of the principals in the proprietorship, in support of the worker's appeal, has been accepted on an evidentiary basis.

## Issue(s)

Is the worker entitled to an award for permanent partial disability under section 23(1) of the Act?

## **Jurisdiction**

This appeal was filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Appeal Division and the Review Board were replaced by WCAT.

As this appeal had not been considered by a Review Board panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002* (Amendment Act), section 38.)

## **Background and Evidence**

The worker initially applied for compensation in March of 1998, after being diagnosed with bilateral carpal tunnel syndrome. She underwent surgery on March 13, 1998 for a left de Quervain's tenosynovitis and left carpal tunnel release. Although the claim was initially denied, the worker's bilateral carpal tunnel syndrome was accepted when a panel of the Review Board provided findings on March 2, 2000.

Following the acceptance of the claim by the Review Board, the worker received wage-loss benefits for the period March 14, 1998 to August 31, 1998.

The worker was assessed for permanent impairment on June 10, 2002. The worker reported severe left wrist pain throughout the evaluation and, at the conclusion of the evaluation, the PFI physician expressed the opinion that the range of motion measurements appeared to be more restricted than would be expected, given the medical information provided.

In his June 19, 2002 memo, the DAO concluded that the evaluation did not provide an acceptable basis on which to determine the nature and degree of the worker's PFI in relation to bilateral wrist carpal tunnel syndrome. The DAO then undertook a review of other evidence on the claim file. The DAO said he paid particular attention to the EMG findings post-surgery, which were done in follow-up on September 16, 1999. At that time the worker's major complaint was pain in the left arm. The DAO said nerve conduction studies were described as showing only minimal slowing across the left carpal tunnel on sensory tests, and no motor slowing. The worker showed mild sensory slowing across the right carpal tunnel and very mild motor slowing.

After considering the evidence as a whole, the DAO concluded there was "some degree of objective findings" that were associated with the worker's subjective complaints. The DAO said the worker's symptoms on the left appeared to be compatible with carpal tunnel syndrome, where the worker underwent surgery. He said on a judgement basis, noting all subjective and objective factors, he would consider an award to the left wrist of 1.25 percent of total. Noting the worker's symptoms on the right were less severe, he said he would consider an award of 0.63 percent, which was 50 percent of the award he would have provided for the left wrist. He would have also provided an enhancement factor of 0.32 percent, for a total award of 2.20 percent.

After analyzing the worker's impairment, the DAO then concluded the worker did not have entitlement to an award for permanent partial disability, as she had been able to return to her normal employment.

## Submissions

The worker's representative provided a May 21, 2003 submission, in which she said the worker had met the threshold test for entitlement to compensation under section 6(1), and wage-loss benefits were paid accordingly. She said there is no requirement under section 6(1) of the Act to re-determine entitlement when applying section 23(1).

The worker's representative pointed out that it had been determined in Appeal Division Decisions #2001-2111 and #2001-2112 that it is not necessary for a worker to sustain a loss of earnings in order to be entitled to a pension under section 23(1). That panel provided the following conclusion (at paragraph #88):

In light of the above discussion the purpose of section 23(1) is clear; a worker does not require a loss of earnings in order to be entitled to a pension pursuant to that provision. The documentary evidence from the board does not provide a different interpretation of section 23(1) and we are not aware of another interpretation from the literature or from other sources.

The worker's representative also pointed to Appeal Division Decisions #00-1188 and #00-1189 as being particularly applicable to the circumstances in the claim that is now appealed. In those decisions the panel reached the following conclusion concerning the threshold test for entitlement to compensation:

Section 6(1) can be seen as something of a "gateway" for entitlement to compensation because it provides a threshold test for entitlement to compensation. Put another way, compensation is not defined in section 6(1) and it is very broadly defined in section 1 of the [Act] to mean "includes health care". Where it is defined is in sections such as section 23 or section 16 of the [Act], which deal with pensions and rehabilitation, respectively.

Once a worker has demonstrated entitlement to compensation for an occupational disease under Section 6(1), there is no requirement in the [Act] or anywhere else for the worker to go back through section 6(1) in order to obtain a pension, for example. Once the basic entitlement has been established, a claim for compensation is adjudicated for wage loss, rehabilitation matters, pensions and other kinds of compensation under the [Act]. In this regard we do not see why an application for an occupational disease should be treated any differently than an application for a personal injury (which, incidentally, includes the language at issue in this case in section 5(2)). This analogy to entitlement to personal injury claims is expressly set in section 6(1) of the [Act]. The memo attached to the submission on behalf of the President accepts that the first two periods of temporary disability prior to the worker's retirement in this case satisfy the requirements of section 6(1). In our view there is no further application of section 6(1) once its requirements have been met. The next legal step is to consider what form of compensation is payable and there is no requirement or need to re-determine entitlement pursuant to section 6(1).

The worker's representative also pointed to Appeal Division Decision #2002-0630, as supporting an award under section 23(1), where impairment is present, but the worker is not disabled from earning full wages at the rate at which he or she was employed prior to the injury.

The employer's representative provided a submission dated December 1, 2003. The employer's representative said that the DAO has considered and reasonably interpreted item #26.30 of the *Rehabilitation Services and Claims Manual (RSCM)*. Although the employer's representative acknowledged the several Appeal Division decisions that had been cited by the worker's representative, it was pointed out that section 250(1) of the Amendment Act required WCAT to apply a policy of the Board of Directors that is applicable in that case. The employer's representative maintained that the June 19, 2002 decision by the DAO was not contrary to Board policy or law, and it should therefore be upheld by WCAT.

## **Reasons and Findings**

Section 6(1) of the Act contains an economic test that must be satisfied in most occupational disease cases before any benefits other than health care benefits may be paid. (That economic test is not applicable in the case of claims for silicosis, asbestosis or pneumoconiosis, and claims for hearing loss.) Section 6(1) of the Act states:

Where

- (a) a worker suffers from an occupational disease and is thereby disabled from earning full wages at the work at which the worker was employed or the death of a worker is caused by an occupational disease; and
- (b) the disease is due to the nature of any employment in which the worker was employed, whether under one or more employments,

compensation is payable under this Part as if the disease were a personal injury arising out of and in the course of that employment. A health care benefit may be paid although the worker is not disabled from earning full wages at the work at which he or she was employed.

In the present appeal, the DAO concluded that even though the worker would have been provided with an award for permanent partial disability on a judgement basis, she was not entitled to an award in this case because she had been able to return to her normal employment. In providing his decision, the DAO relied on the wording of section 6(1) of the Act. Although he did not specifically refer to item #26.30 of the *RSCM*, that policy provides guidance concerning the wording in section 6(1), requiring that a worker be "disabled from earning full wages at the work at which the worker was employed," before compensation is payable. Item #26.30 states, in part:

There is no definition of "disability" in the Act. The phrase "disabled from earning full wages at the work at which the worker was employed" refers to the work at which the worker was regularly employed on the date he or she was disabled by the occupational disease. This means that there must be some loss

of earnings from such regular employment as a result of the disabling affects of the disease, and not just an impairment of function. For example, disablement for the purposes of Section 6(1) may result from:

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

The reasons provided for denial of an award for permanent impairment in this case appear to closely parallel the reasons provided by the president of the Board when, pursuant to section 96(4) of the Act, he referred Review Board findings to the Appeal Division in 2000. That referral resulted in Appeal Division Decisions #00-1188 and #00-1189. In that case, the worker had met the requirements under section 6(1) for two periods of temporary disability prior to his retirement. In referring the claim to the Appeal Division, it had been maintained that the worker “must again fulfill the requirements under section 6(1)” before a pension could be paid. The Appeal Division panel that provided Decisions #00-1188 and #00-1189 determined that once the worker had established entitlement to receive temporary wage-loss benefits from the Board under section 6(1), there was no requirement for the worker to have to re-establish his entitlement pursuant to section 6(1) prior to receiving any pension award.

That same panel concluded there had not been “an error of law or a **contravention of published policy** with the Review Board finding that the worker is entitled [to] and should be paid a pension pursuant to section 23(1) of the [Act].” [emphasis added]

In a later Appeal Division decision (#2002-0630), the following analysis was provided:

(31) I agree with and adopt the analysis with respect to section 6 of the *Act* set out in the following published decisions of the Appeal Division: Decisions #92-0658, 92-0659 and 92-0660 published at 8 *Workers' Compensation Reporter* 145; and Decisions #00-1188 and 00-1189 published at 16 *Workers' Compensation Reporter* 197. These decisions concluded that once a worker had met the threshold criterion for entitlement to compensation under section 6(1) (i.e. disablement from earning full wages at the work in which he was employed), there is no requirement for the worker to meet that test again in order to be considered for permanent partial disability benefits.

(32) I find that the worker satisfied the requirement for entitlement to compensation for his occupational disease in 1993 when he was disabled from earning full wages at the work at which he was employed. There is no requirement that he continue to be disabled from earning full wages at the work at which he was employed on an ongoing basis in order to be assessed for potential pension entitlement due to his occupational disease.

Although I agree with the foregoing analysis, as well as the analyses provided in Appeal Division Decisions #00-1188 and #00-1189, I have had to consider whether the analyses provided in those Appeal Division decisions are consistent with Board policy. Although WCAT may consider all questions of fact and law arising in an appeal, a WCAT panel must make its decision on the merits and justice of the case. In so doing, section 250(1) of the Amendment Act states that the appeal tribunal must apply a policy of the Board of Directors that is applicable in that case.

I am cognizant that the Appeal Division panel that provided Decisions #00-1188 and #00-1189 reached a conclusion that the worker in that case was entitled to be paid a pension pursuant to section 23(1) of the Act, and there was no contravention of published policy, notwithstanding the fact that the worker's pensionable impairment arose from an occupational disease and the worker had taken early retirement. That panel reviewed item #26.30 of the RSCM and noted that the policy "states that a worker is disabled from earning full wages at which he was employed when he was regularly employed on the date he was disabled by the disease." The panel concluded that the worker in that case "was clearly disabled within this meaning in October 1994," although he did not retire until 1995. The panel concluded that since the worker was absent from work in order to recover from the disabling effects of his disease in October 1994, he therefore met the policy requirements in item #26.30 of the RSCM.

In the appeal that is presently before me, the worker has similarly been absent from work in order to recover from the disabling effects of her occupational disease. She has been assessed for permanent impairment, and the DAO determined on a judgement basis, noting all subjective and objective factors, that impairment equal to 2.20 percent of total was present. Following a careful reading of item #26.30, I am unable to conclude that a requirement that a worker has to re-establish entitlement pursuant to section 6(1) prior to receiving a pension award, is consistent with the plain meaning of that policy. I find the worker is entitled to an award under section 23(1). Having considered the reasoning of the DAO concerning the extent of the worker's impairment, I agree with the DAO's conclusions concerning the worker's assessed impairment.

I have considered the submission of the employer's representative concerning the obligation placed on WCAT by section 250(1) of the Amendment Act to apply an applicable policy of the Board of Directors in a particular case. It is still necessary for a WCAT panel to determine if the approach taken by the Board in a particular case conforms to Board policy. A WCAT panel must then make a decision on the appeal that is consistent with an applicable policy, and the merits and justice of the case.

For the reasons I have outlined, the policy in item #26.30 does not require a worker to re-establish entitlement under 6(1) to be considered for an award for permanent disability, once that gateway or threshold has been crossed. In this case, that gateway was crossed once the worker had been in receipt of wage-loss benefits while recovering from "the disabling effects of the disease," as outlined in item #26.30 of the RSCM.

Having concluded that the worker is entitled to an award under section 23(1), and that the DAO has accurately assessed the extent of the worker's impairment, I return the claim to the Board to implement the worker's award for permanent partial disability under section 23(1).

**Conclusion**

I vary the June 19, 2002 DAO's decision. The worker is entitled to an award for permanent partial disability, which is consistent with the assessed degree of impairment determined by the DAO.

