Appeals Commission for Alberta Workers' Compensation

Docket No.: AC0032-24-50
Decision No.: 2024-0425

Decision Summary

[1] The worker is entitled to an unreduced economic loss payment beyond July 1, 2023.

Introduction

[2] The worker disagrees with the Workers' Compensation Board's (WCB) August 31, 2023, decision to reduce his economic loss payment (ELP) at age 65. To decide the appeal, we must determine if there is sufficient and satisfactory evidence to show that the worker intended to work beyond age 65.

Background

[3] On December 6, 2023, the Dispute Resolution and Decision Review Body (DRDRB) confirmed the WCB decision.

[4] The worker filed the *Notice of Appeal* form within the statutory time limit. The respondent and the WCB were notified of the Appeal and provided an opportunity to participate. Neither chose to participate.

Issue

[5] **Is the worker is entitled to an unreduced ELP beyond July 1, 2023?**

Analysis

Legislation and Policy

[6] The *Workers' Compensation Act*, RSA 2000, c W-15 (*WCA*) governs the workers' compensation system in Alberta. The purpose of the workers' compensation system is to provide appropriate compensation to workers who suffer workplace-related injuries and illnesses.

[7] Subsection 13.1(1) of the *WCA* provides the Appeals Commission with exclusive jurisdiction to hear appeals of decisions made by the DRDRB. Pursuant to subsection 13.2(6) of the *WCA*, the Appeals Commission is bound by the WCB policies related to the issue at appeal.

[8] According to Policy 04-04, Part II, Application 4, the purpose of an ELP is to compensate the worker for loss of earnings if the injury results in compensable permanent work restrictions that cause an impairment of earning capacity. A worker's ELP benefits will be adjusted when the worker reaches age 65, unless there is sufficient and satisfactory evidence to show that the worker would have continued to work past that age if the injury had not occurred. Examples of satisfactory independent evidence include confirmation from the worker's accident employer that the worker had planned to continue after age 65 and employment was available. The WCB will also consider any other relevant factors such as the normal retirement age for workers in the same pre-accident occupation.

[9] Full excerpts of the legislation and policy referenced and applied in this decision can be found in the attached appendices. The panel has applied the WCB legislation currently in effect and the applicable policy that was issued and in effect when WCB's adjudicative decisions were made.

Question to be Answered

[10] To decide the appeal, the panel must answer the following question:

[10.1] Is there sufficient and satisfactory evidence, including some independent evidence, to establish that the worker intended to work after age 65 and would have done so but for the compensable accident?

Key Submissions

[11] The representative provided the following submissions:

[11.1] While the initial injury occurred in 2012, it was not the catastrophically disabling and unforeseeable event that ultimately transformed the worker's life. The surgeries in 2018, which led to severe complications and eventually to the amputation, should be regarded as new mechanisms of injury. These surgeries were not a continuation of the 2012 injury but rather de facto new injuries that fundamentally altered the worker's physical capabilities and life trajectory.

[11.2] Treating the amputation in 2021 as merely an extension of the original 2012 injury is a significant oversight. This classification fails to account for the fact that the amputation was not a foreseeable outcome of the original injury but was instead precipitated by a new mechanism of injury - the surgery conducted in 2018. Although the surgery was compensable as it was related to the original injury, it introduced a new set of complications, including sepsis, which ultimately necessitated the amputation.

[11.3] The fact that the worker retained his business assets until September 2020, even after his amputation, further undermines the decision to classify the amputation as a mere extension of the original injury. His retention and maintenance of these assets, coupled with his intent to return to work, make it evident that the worker's retirement was a forced consequence of his medical condition, not a voluntary choice.

[12] What we heard from the worker:

[12.1] The worker agreed with the representative's submission.

Evidence/Findings

[13] We find that there is sufficient and satisfactory evidence, including independent evidence, to establish that the worker intended to work after age 65 and would have done so but for the compensable accident. We rely on the following reporting:

[13.1] An October 24, 2013, WCB letter shows that the worker returned to modified work with the date of accident employer on April 19, 2013.

[13.2] On November 19, 2013, the WCB closed the worker's claim file.

[13.3] We accept the worker's evidence that he started his own trucking business in 2014. He acquired two trucks and maintained the equipment until it became clear he could not resume operations because of the amputation. He disposed of the equipment in 2021.

[13.4] There is no dispute that in 2015, the worker obtained a $220,000 mortgage amortized over 25 years. In their respective decisions, the WCB and DRDRB accepted the mortgage evidence. We accept the mortgage as independent evidence.

[13.5] A September 20, 2016, report shows that the worker began to suffer complications from a failed ankle arthroplasty.

[13.6] On March 15, 2018, the worker underwent surgery to repair the failed arthroplasty.

[13.7] In an April 18, 2018, letter the WCB accepted responsibility for a recurrence of the worker's left ankle fracture leading to the need for a revision of a total ankle arthroplasty. The WCB approved wage loss benefits effective March 15, 2018.

[13.8] A December 12, 2019, amputee clinic report shows that the March 15, 2013, surgery was not successful. The report recommends amputation.

[13.9] An October 18, 2021, operative report shows that the worker underwent a left below-the-knee amputation.

[13.10] In a November 2, 2021, letter the WCB accepted the left below knee amputation as a new injury.

[13.11] At the hearing the worker explained that he could not perform his duties with a prosthetic limb. In the absence of evidence to the contrary we accept the worker's evidence as an accurate account of his restrictions.

[14] The evidence shows that the worker recovered from the initial 2012 compensable injury and returned to permanent modified work. In 2015, he obtained a 25-year mortgage while operating his own trucking business fulltime. In 2016, he began to experience complications from a pre-accident arthroplasty that were attributed to the compensable accident. He continued to work until March 2018, when he underwent surgery to repair the arthroplasty. The WCB accepted responsibility for a recurrence of the compensable injury and approved wage loss benefits at this time. The evidence shows that the surgery was not successful, and the worker ultimately required an amputation. The worker maintained his business assets until it was clear that he could not perform the duties with a prosthetic limb. The WCB accepted the amputation as a new injury. We find that the evidence when considered as a whole is sufficient and satisfactory, and includes independent evidence, to establish that the worker intended to work after age 65 and would have done so but for the compensable accident.

[15] The panel acknowledges that the WCB Business Procedures recognize debt incurred before the compensable accident, as an example of independent evidence. The WCB and DRDRB placed significant weight on that wording to dismiss the mortgage because it was not incurred before the original compensable accident. However, the business procedures are not criteria that must be met to be entitled to an unreduced ELP. The WCB Business Procedures list examples of independent evidence to assist decision makers. The list is not exhaustive. More importantly, as noted by the DRDRB, the business procedures are not binding.

[16] We find that the example of debt incurred before a compensable accident does not apply to the worker's situation. He had recovered from the initial injury and had returned to fulltime modified work. The compensable accident was for all intent and purpose, behind him. He was working fulltime, operating his own business, when he obtained the mortgage. The complications with the arthroplasty were new and unforeseen and the amputation was accepted as a new injury.

[17] We also recognize evidence that the worker had stated that he was retired. The representative explained that the statements reflected the worker's reality, not an

intention to retire. The worker was resigned to the fact that he could no longer work because of the amputation. We accept the worker's explanation.

Conclusion

[18] The worker returned to modified work after the 2012 compensable accident. The WCB closed the claim file. The evidence shows that after returning to work, the worker obtained a $220,000 mortgage amortized over 25 years. He was working fulltime operating his own business at that time. The complications resulting in the amputation were unforeseen and the amputation was accepted as a new injury. We find that the evidence, when considered as a whole, is sufficient and satisfactory, and includes independent evidence, to establish that the worker intended to work after age 65 and would have done so but for the compensable accident.

Decision

[19] The worker is entitled to an unreduced economic loss payment beyond July 1, 2023.

[20] The worker's appeal is allowed.

[21] The December 6, 2023, Dispute Resolution and Decision Review Body decision is reversed.

This decision is made with the full agreement of the hearing panel.

Decision signed in Calgary, Alberta on October 9, 2024.

R. Moore
Hearing Chair
(on behalf of the panel)

Hearing Panel:	R. Moore	– Hearing Chair
	C. Fisher	– Commissioner
	M. Amery	– Commissioner

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Appendix A

Legislation – *Workers' Compensation Act*, RSA 2000, c W-15 (*WCA*)

[A1] Section 56(1) of the *WCA*

"**Compensation for disability**

56(1) The Board shall pay periodic compensation

(a) on a monthly basis in the case of permanent disability,

(b) on a bi-weekly basis in the case of temporary disability, or

(c) on a basis other than under clause (a) or (b), if the Board considers it appropriate to do so.

(2) If an accident causes injury to a worker and results in an impairment of earning capacity, the Board shall estimate the impairment of earning capacity resulting from the accident and shall pay periodic compensation to the worker based on the estimated loss of net earnings as determined by the Board in accordance with subsection (3).

(3) Subject to section 68(1), the estimated loss of net earnings shall be based on the difference between

(a) the worker's net earnings at the time of the accident as calculated by the Board based on a period or periods of time prior to the accident or the date of disablement, as the case may be, that, in the Board's opinion, fairly and justly represent the worker's net earnings at that time, and

(b) the greater of the worker's

(i) actual earnings after the accident, and

(ii) estimated earning capacity after the accident, as periodically determined by the Board.

(4) The Board may estimate earning capacity referred to in subsection (3)(b)(ii) only after the Board has demonstrated it has made every reasonable effort to support the worker in the worker's search for suitable employment.

(5) Compensation shall be paid in accordance with subsection (1) for as long as the impairment of earning capacity lasts.

(6) If the period or periods of time prior to the accident referred to in subsection (3)(a) are, in the Board's opinion, insufficient to allow the Board to calculate the worker's net earnings, the Board may pay periodic compensation based on another amount as determined by the Board subject to the maximum payable under subsection (18).

. . .

(10) The amount of the periodic payment of compensation is

(a) in the case of permanent total disability and temporary total disability, 90% of the worker's net earnings, and

(b) in the case of permanent partial disability and temporary partial disability, a proportionate part of 90% of the worker's net earnings based on the Board's estimate of the impairment of earning capacity from the nature and degree of disability.

(11) Compensation for permanent total disability and permanent partial disability is payable to the worker during the worker's lifetime and must not be less than

(a) in the case of permanent total disability, $1640.90 per month, and

(b) in the case of permanent partial disability, a proportionate part of $1640.90 per month based on the Board's estimate of the impairment of earning capacity from the nature and degree of disability.

(12) Compensation for temporary total disability and temporary partial disability is payable to the worker only as long as the disability lasts, and compensation for temporary total disability must be

(a) where the worker's bi-weekly net earnings are greater than the sum referred to in subsection (11)(a), the greater of

(i) the sum referred to in subsection (11)(a), and

(ii) the bi-weekly equivalent of the amount that the worker would have received under subsection (10) had the worker been permanently totally disabled,

and

(b) where the worker's bi-weekly net earnings are equal to or less than the sum referred to in subsection (11)(a), 100% of those bi-weekly net earnings."

[A2] Section 60.1(1) of the *WCA*

"**Retirement benefit**

60.1(1) For the purposes of this section, 'worker's retirement date' means the later of

(a) the date the worker reaches the age of 65 years,

(b) 5 years following the date of the accident, and

(c) another date, if the Board is satisfied that the worker would have retired at a later date than provided for in clauses (a) and (b)."

Appendix B

Workers' Compensation Board Policy

[B1] Policy 04-04, Part II, Application 4, Economic Loss Payment, Question 9, 10, 11 and 15 states:

"**9.** ***Why is the ELP adjusted at retirement age?***

At retirement, the impact on earning capacity is reduced as wages are replaced by pension/retirement income. The ELP is adjusted to reflect the changed earning capacity by using a formula similar to that used for standard retirement pensions.

Age 65 is commonly considered to be normal retirement age, and the ELP will be adjusted when the worker reaches age 65 unless there is sufficient and satisfactory evidence to show that the worker would have continued to work past that age if the injury had not occurred.

10. ***What is considered sufficient and satisfactory evidence that a worker would have continued to work past age 65?***

As with any adjudicative issue, the decision will be made on the balance of probabilities. Workers are not required to provide absolute proof, however, there must be some independent evidence that the worker intended to work after age 65, and would have done so if not for the compensable injury.

Examples of satisfactory independent evidence include:

- confirmation from the worker's accident employer, union, or other independent employment source that the worker had planned to continue after age 65 and employment was available
- continued employment post-age 65 at the same level and earnings as pre-age 65 [for example, a 51 year-old worker with compensable permanent work restrictions returns to work with reduced earning capacity and is paid an ELP. The worker continues to work at that level (same type of work, same hours) until age 69]
- continued employment post-age 65 at reduced earnings, when it is clear that the further reduction is due to a deterioration of the compensable work restrictions, rather than a personal choice of semi-retirement.

WCB will also consider any other relevant factors such as the normal retirement age for workers in the same pre-accident occupation.

11. ***Will WCB adjust the ELP earlier than age 65 if a worker chooses early retirement?***

WCB will not apply retirement to ELP until the worker reaches age 65, as the injury may have been a factor in the worker's decision to retire or to not pursue other employment. However, if the worker would have been expected to have significant increases in earnings if he or she had continued in the workforce, WCB may review and adjust the worker's ELP, based on the estimated earning capacity (see Questions 4 and 6 in this Application, and Application 1, Question 4).

. . .

15. ***When is this policy application effective?***

This policy application (Application 4 – Economic Loss Payment – Dates of Accident from January 1, 1995, to December 31, 2017, inclusive) is effective January 1, 2018, except when noted otherwise in a specific policy section(s)."