

Canadian Union of Public Employees

# Guide for CUPE BC Members - Access to WCB Benefits Age 65 and Over

WCB Advocacy Department – BC Regional Office

Tom McKenna, National Representative, WCB Advocacy  
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**INTRODUCTION:**

This Memo reviews the current WCB law, Policy, Practice Directives, and pertinent appeal decisions of the B.C. WCB Review Division ("RD") and the Workers' Compensation Appeal Tribunal ("WCAT") pertaining to age 65 and WCB Compensation.

**BACKGROUND:**

As stated in previous Memos, this is an evolving area of law. The WCB Practice Directives, which are used to guide decision makers on Policy and the Act's implementation, are often at odds with Policy, practices and appeal decisions.

In the WCAT decisions cited below, the Practice Directives enable a worker to both work beyond AND collect, or, receive a WCB WorkSafeBC Disability Award ("pension") past age 65 if they have previously submitted the required independent evidence of an intention to continue working, per the below.

**OVERVIEW:**

Generally, a worker who gets injured between age 63 and 65, will have two (2) years of coverage. If the worker provided a letter to the employer and / or WCB prior to age 63, indicating that they would continue working, a new claim, pension, or existing pension extension may be possible post age 65.

Policy also provides the following list of factors as examples of evidence that may support a worker's statement that he or she intended to work past age 65:

- 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 the intent to employ the worker after the worker reached age 65 and that employment was available;
- information 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; and
- 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.

Here are the current WCB tests for post age 65 WCB benefits and coverage, including Policies 41.00, 35.30, 96.21 (RSCM II), Practice Directive #C5-1, "Duration of Benefits - Age 65" and Section 23.1 of the Act:

- Employee statements about intended retirement dates are not the best source of evidence; the WCB will want other independently verifiable evidence. See Policy 41.00 and Policy 35.30.
- "Independently verifiable evidence" includes some of the following (this is not an exhaustive list):
  - Statements from the employer regarding the employer's availability of work in the future for the employee's current position,
  - The practice of other employees working after 65,
  - Statements by supervisors,
  - What the current Collective Agreement states,
  - What the current pension plan or RRSP plan states.

A 2011 Review Division decision canvassed WCAT decisions that identified factors, other than those set out in policy, which may be considered when determining whether a worker would have retired after age 65.

- Age of the worker. Young workers are less likely to have a specific retirement date in mind. Older workers are more likely to have concrete plans. It is difficult to predict retirement far in advance due to the changing phases of life that interfere with plans;
- Terms of the contract of employment as to the ending of the employment, including whether specific action had to be taken to continue working after age 65. Is there a mandatory retirement age or an incentive plan for workers working beyond age 65;
- Financial obligations of the worker, such as a mortgage or other debts, or financial planning activities suggesting a retirement date after age 65;
- Family commitments of the worker;
- Past and present statements by the worker as to an intention to work or not work after age 65, including whether those intentions were subject to pre-conditions, such as the availability of lighter or part time work;

- Actions taken by the worker to obtain a pension or to enter into a retirement agreement with the employer prior to the date of injury;
- Nature of the occupation, including the worker's qualifications, the likelihood of work being available and whether the work is physically demanding; and
- Other health issues.

There are four (4) categories of evidence (only some of which are independently verifiable) – Employee, Employer, Union and Pension / RRSP Information. Categories (ii) to (iv) are preferred, with an emphasis on (ii):

- (i) Employee – prior written statement(s) to employer, Union and / or co-workers.
- (ii) Employer – availability of work, the practices of other employees or employers in same industry, and the supervisor's statements.
- (iii) Union – the wording of the Collective Agreement.
- (iv) Pension Plan and RRSP documents.

#### **PROBLEMS:**

The tests set out above are difficult to meet for many workers. As a result, many claims and appeals are denied. There are a number of reasons for this, as follows:

- It is hard to obtain independently verifiable evidence of intent to continue working, especially from younger workers.
- Statements of intent to work too far in advance of retirement (10 years) pose problems as there are too many variables and the employer is unable to confirm the availability of future employment.
- Few workers or their advocates know they need to ask for a "Preliminary Determination / Decision," as per Policy 96.21. When this is requested, it may be revisited or evaluated later on, however, these may not be appealable decisions.
- "Findings of Fact" are not appealable.
- "Earnings" are not defined under the Act or Policy. This will be a problem when determining post retirement earnings. Earnings are usually wages, overtime, per diems, salary etc. Pensions, RRSPs, and investments do not qualify as earnings. Therefore, ask for longest earnings period possible.

- WCB Case Managers have immense discretion, especially with regard to the factual foundation of Disability Award department referrals. Disability Awards take years to adjudicate in some cases, so, the factual underpinnings may long be forgotten and not corrected or appealed.

### **SAMPLE SCENARIOS:**

Here are some sample scenarios with respect to the problems identified above:

1. If a worker has a post 2002/2003 WCB pension (but pre-age 65) and quits / retires at age 65, their pension will usually terminate at age 65 as well.
2. If a worker has a post 2002/2003 pension and indicates, prior to age 65, that they want to keep working and is subsequently injured and obtains a pension prior to age 65 – the pension should continue beyond age 65.
3. If a worker has a post 2002/2003 pension, indicates that they will be working after age 65, then suffers a second injury prior to age 65 for which they obtain a pension, the pension should also continue beyond age 65.
4. If a worker has a post 2002/2003 pension, indicates that they will be working beyond age 65, and then suffers an injury after age 65, they would be eligible to obtain a pension. In other words, while a worker can get a compensation / wage loss after age 65, they can also get a pension starting after age 65 (see **WCAT Decision Number: WCAT-2009-01914**). This is a contested issue and should be appealed where denied by the WCB. The WCB frequently says, "No pensions after the age of 65 regardless of injury date".
5. If a worker has a pre-age 65 pension, and has indicated after the pension was awarded (but prior to age 65) that they wish to continue working, then receives a second pension prior to age 65, the WCB would likely terminate the first pension at age 65 but allow the second pension to continue beyond age 65. Always insist that both pensions continue (in other words, appeal the WCB decision).

Each claim is fact dependent.

### **RECOMMENDED ACTIONS:**

Here are recommendations to CUPE Locals with members who want to work beyond age 65 in addition to the tests set out in page one (1):

1. To further support their intentions, the worker could send a letter from the Union and / or employer stating that the normal retirement age for that occupation is, for example, 70, where this information is known.

2. The worker should send the employer a letter (as per the template) at least two (2) years (or prior to age 63 - important) prior age 65 indicating that they intend to keep working beyond the age of 65. Second, the worker should state what age they want to work to e.g. 70. Third, the worker should state that this age may change to an even later date subject to health, financial, job duties and other considerations. The letter has to be definitive but do not close the door on revisiting the retirement age. It is important to have the employer on side.
3. The worker should copy the letter to the Union and keep a copy for themselves.
4. If the worker is currently in receipt of WCB benefits, they should send a copy of the letter to the WCB e.g. their Case Manager. The letter to the WCB should contain the employer's name, the job(s) they are performing now and will be performing in the future, names of other employers they are working for or may work for in the future, etc.
5. The employer **MUST** be able to certify that employment was available to the proposed age. At least one WCAT decision denied an appeal stating the letter from the worker was insufficient because there was a large gap of time – 25 years – between the letter stating the worker wanted to work to a certain age and whether the employer could predict the worker's physical ability to perform the physical duties associated with his current employment.
6. Too much advance notice may work against a worker because the employer cannot be sure of the employee's ability to keep working (see **WCAT Decision Number: WCAT-2008-02242**). The uncertainty associated with their health and economic status makes any decision in relation to a distant potential retirement date a decision that is usually made when an individual is closer to retirement age and they can more accurately determine their personal circumstances.
7. Workers should be cautious about providing evidence as to the existence of pension plans, RRSPs, the term of the plan, normal retirement dates under the plan, et ceteras, as this may have language that rebuts the intention of the letter. This may not apply to situations where a worker is already in receipt of a pension / Disability Award and is now seeking a new pension / Disability Award for a new injury. They might find that the WCB will terminate the first pension at age 65 and continue the second pension at a later (post 65) date.
8. Workers should always state that Policy 96.21 is patently unreasonable and should the matter be appealed, a request for review under Section 251 (WCAT) will be made (Lawfulness of Policy).
9. Workers should always challenge and correct any errors, omissions, or findings of fact early on in a WCB claim.

10. Workers should ask the WCB Case Manager for a "Preliminary Determination / Decision," as per Policy 96.21.
11. Always appeal any decision that states that benefits will terminate at age 65, especially those involving young workers. Though an appeal to the Review Division and WCAT may fail, an Application for Reconsideration is allowed at any point in the future. This allows the worker to appeal or re-open the claim closer to age 65.

#### **DRAFTING A LETTER TO THE EMPLOYER AND THE WCB:**

Here are practical tips and advice for advising the employer and / or WCB regarding potential post 65 employment in the form of a letter:

1. Statements or intentions should be in the form of a typed letter (see "Sample Letter" attached).
2. Letters should be sent to the employer, copied to the WCB if they have a pension / claim / etc., and copied to the Union.
3. The letter should begin by stating, for example:  
  
"It is my intention to work until the age of \_\_\_\_\_, although this may change to a later date." Err on the side of caution with the dates e.g. state age 70 versus age 66.
4. The worker's statements in the letter have to be independently verifiable, as proven by:
  - a. Names of the employer or employers that the worker intends to work for after age 65;
  - b. A description of the type of employment the worker is going to perform;
  - c. The expected duration of employment;
  - d. Information from the identified employer(s) confirming they intend to employ the worker after the worker reaches age 65, and that employment was available;
  - e. 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;
  - f. Information from the pre-injury employer about whether the worker is covered under a pension plan or RRSP provided by the employer, and the terms of that plan.

5. The employer must be able to certify that employment was available to the proposed age. A number of WCAT decisions denied appeals as the letter from the worker was insufficient because there was a large gap of time – 25 years – between the letter stating the worker wanted to work to a certain age and whether the employer could predict the worker's physical ability to perform the physical duties associated with his current employment.

Too much advance notice is problematic because the employer cannot be sure of the employee's ability to keep working (see WCAT Decision Number: WCAT-2008-02242). The uncertainty associated with their health and economic status makes any decision in relation to a distant potential retirement date a decision that is usually made when an individual is closer to retirement age and they can more accurately determine their personal circumstances.

#### **RELEVANT WCB APPEAL DECISIONS FROM THE WCAT:**

Here is an important decision on this issue. Please read the excerpts:

**WCAT Decision Number: WCAT-2012-01178**

**Panel: Cynthia J. Katramadakis, Vice Chair**

...[2] In a November 23, 2010 decision, the Workers' Compensation Board<sup>1</sup> (Board), informed the worker of his permanent partial disability award entitlement for his PTSD. The Board granted the worker a functional award totaling 11.3% of total disability, which included 1.3% for an age adaptability factor, effective December 18, 2009. Among other things, the Board also informed the worker that his permanent partial disability award entitlement would cease at age 65.

[3] The worker requested a review of this decision from the Board's Review Division. In Review Reference #R0126110, the review officer confirmed the percentage of the worker's permanent partial disability award and the duration of the award to age 65...

...[39] Section 23.1(a) of the Act states that if a worker is less than 63 years of age on the date of injury, the Board may pay compensation to a worker under section 23 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...

[40] The effect of section 23.1 of the Act is that the worker's permanent disability award is payable until his 65th birthday, unless the Board is satisfied that he would retire after that age. Policy item #41.00 of the RSCM II confirms that age 65 is the standard retirement age for workers, but that the Board may continue to pay benefits after that age if it is satisfied that the worker would have retired later, had he not been injured. Policy further provides a non-exhaustive list 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. The policy states 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.

[41] In addition to the non-exhaustive list of independent verifiable evidence set out in policy item #41.00, the Board has also issued Practice Directive #C5-1, "Duration of Benefits - Age 65" (Practice Directive)2, which includes adjudicative guidelines for Board officers with respect to the application of section 23.1 of the Act. The practice directive states that Board officers should carefully consider whether the evidence actually supports a worker's contention that he or she would have been working after age 65. According to the practice directive, the circumstances under consideration must be those as they existed at the time of injury. Supportive evidence includes independently verifiable pre-injury indications of a worker's intent to work after age 65.

[42] I agree with the statement in the practice directive that the relevant consideration is the worker's intention as it existed prior to the work injury. The worker submitted that he had no plans to retire prior to the PTSD diagnosis by Dr. Bannerman in August 3, 2010. He stated he was only 59 years old and his employer did not have a mandatory retirement age.

[43] The worker did not provide any independently verifiable evidence concerning his retirement plans. The evidence about his retirement is in the form of his own statement. While I acknowledge that the pre-injury employer did not have a mandatory retirement age, this simply speaks to the worker's ability to maintain employment past age 65. It allows for the possibility that if he wanted to continue working then the ability was there for him to do so beyond age 65. The fact that there is no mandatory retirement age, in itself, does not provide independent corroboration of the worker's intention to work past age 65.

[44] I have considered the non-exhaustive list of examples of independent verifiable evidence set out in policy in the circumstances of this worker. At the time of injury, the worker was almost 57 years old, which is 8 years from the standard age of retirement. Therefore, it would generally be less difficult to independently corroborate the worker's intention to continue working beyond age 65 given the proximity to the standard retirement age. Yet, the worker has not provided information although the Board officer attempted to obtain the evidence.

The worker stated he did not wish to disclose his financial information, which is within his right; however, it makes it difficult to then corroborate his statement given that in many cases an individual's retirement plan is closely tied to their financial circumstances.

[45] Several WCAT decisions describe some of the other kinds of verifiable evidence, and statements by a worker, which might support a worker's intention to retire after the age of 65. Some of those decisions include: WCAT-2009-00861; WCAT-2009-00150; WCAT-2006-02589; WCAT-2006-04378; and, WCAT-2009-00328. Those decisions note the following kinds of evidence, which might be relevant:

- Evidence of the worker's work history, showing a strong work ethic and a willingness and ability to adapt to job market conditions;
- Evidence of the worker's financial circumstances showing a need to go on working past age 65, including a lack of retirement savings, pension plan, or other available assets; or financial obligations that will continue past age 65, such as supporting a family, or paying a mortgage or other significant debt;
- Evidence that the worker has returned to work in spite of disability because of some combination of a work ethic and financial need; and,
- Evidence of a practice in the worker's industry or occupation for workers to continue working past age 65.

[46] While I acknowledge that I am not bound to follow previous WCAT decisions, except for a decision of a precedent panel appointed by the chair of WCAT under section 238(6) of the Act, I find that these decisions provide useful analysis that is helpful in considering the present appeal.

[47] In the circumstances of this particular case, I am not satisfied that knowledge of the employer's absence of a mandatory retirement age is sufficient to establish the worker's intention as it was prior to the work injury. While I note the worker advised a Board vocational rehabilitation consultant that he was still employable and had no intention of applying for long-term disability benefits through his employer, I also note that he indicated he was not prepared to return to work with any other employer and that the Board had to pay him benefits for the remaining time to bridge him to retirement as he did not want to use his vacation and other benefits to do so himself. The worker had not returned to work. I find that when even considering other forms of verifiable evidence there is insufficient positive evidence before me to conclude that it is more likely than not the worker had intended prior to his injury to work past age 65. Accordingly, I find the worker's permanent partial disability award is payable to age 65...

While the average age of CUPE members being in the mid 40's, WCB coverage at or after age 65 is increasingly becoming a concern. What happens to workers when they are 65 or over and get injured while working? Are they still covered by WCB? Will they get a pension (disability award)? When does coverage begin or end?

As a general guideline, a worker who gets injured between age 63 and 65 will have two (2) years of WCB coverage. If the worker provided a letter to the employer and / or WCB prior to age 63 (and the injury), indicating that they would continue working, a new claim, pension or existing pension extension may be possible post age 65.

WCB (RSCM II) Policy provides the following non-exhaustive list of factors as examples of evidence that may support a worker's statement that they intended to work past age 65:

- 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 the intent to employ the worker after the worker reached age 65 and that employment was available;
- information 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; and
- 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.

Here are the current WCB tests for post age 65 WCB benefits and coverage, including Policies 41.00, 35.30, 96.21 (RSCM II), Practice Directive #C5-1, "Duration of Benefits - Age 65" and Section 23.1 of the Act:

- Employee statements about intended retirement dates are not the best source of evidence; the WCB will want other independently verifiable evidence. See Policy 41.00 and Policy 35.30.
- "Independently verifiable evidence" includes some of the following (this is not an exhaustive list):
  - Statements from the employer regarding the employer's availability of work in the future for the employee's current position,
  - The practice of other employees working after 65,
  - Statements by supervisors,

- What the current Collective Agreement states,
- What the current pension plan or RRSP plan states.

To assist members, CUPE has created a number of Guides and template letters. These have been provided to CUPE Locals and are available upon request.

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G - Representatives MCKENNA, TM WCB GUIDES, Jan 9 13 TM Access to WCB Benefits Age 65 & Over - A Guide for CUPE BC Members (Revised).docx

## SAMPLE LETTER

(Date)

(Insert Employer's Address)

"Dear (Insert Employer Name):

**Re: Notice of Continuation of Employment Past Age 65**

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Please be advised that it is my intention to continue to work until the age of (Insert age) in the job / occupation of (Insert job title) or any other similar job / occupation as may be adjusted and otherwise modified (as required) through Classification and Job Evaluation processes, accommodation, training, or provisions of the Collective Agreement, etc. This is anticipated to be in a (State if it will be full time or part time) capacity.

Here is my current job title and description of job duties, as per the attached Job Description / Classification Specification:

(Insert title and job duties here, along with a copy of the Job Description / Classification Specification.)

I understand that there is no "standard" age of retirement for persons within my job / occupation. If you have contrary information, please advise me immediately. Please confirm if employment in my job / occupation is anticipated to be available. If not, please indicate why and what other employment will be available.

Please advise me what provisions of the Collective Agreement, pension plan / RRSP, Extended Benefits / EHB plan (Plan Document, Plan Brochure, etc), Employment Insurance and Canada Pension Plan may be affected and in what way. May I please have this in writing and copied to my Union?

Should you have any questions, please do not hesitate to contact me at (Insert address and telephone number).

Yours truly,

(Insert Name)

c: (Insert Local Union President)"

