

COMPENSATION PRACTICE AND QUALITY DEPARTMENT

PRACTICE DIRECTIVE # C5-1

DURATION OF BENEFITS – AGE 65

Amended: May 14, 2003, June 1, 2012, April 4, 2013 and January 30, 2015

Effective: October 21, 2002

Objective

This Practice Directive provides guidance on applying provisions in the Workers Compensation Act (the “Act”) and the Rehabilitation Services & Claims Manual, Volume II (“RSCM”) related to the duration of compensation benefits and how the worker’s age at the date of injury, and established retirement plans, may impact the duration of wage loss, vocational rehabilitation and pension benefits. In particular, this Practice Directive describes factors that may be considered in determining whether there is sufficient evidence the worker would have worked past age 65 to determine a later date of retirement for the worker.

Law & Policy

Section 23.1 of the Act places limits on the duration of temporary and permanent disability benefits depending on the worker’s age at the time of injury and evidence of when the worker would have retired if not for the injury.

If a worker continues to be temporarily or permanently disabled at age 65, and was **injured before age 63**, compensation benefits may be paid until the later of:

- (i) the date of the worker’s 65th birthday; or
- (ii) the date the WorkSafeBC officer decides that, based on the evidence, the worker would have retired.

If a worker was **63 years of age or older on the date of injury**, temporary or permanent disability benefits may be paid until the later of:

- (i) two years after the date of the injury; or
- (ii) the date the WorkSafeBC officer decides that, based on the evidence, the worker would have retired.

No matter what the age of the worker, once he or she ceases to have the compensable disability, benefits are of course terminated (section 31.1 of the Act).

RSCM Policy items #35.30, *Duration of Temporary Disability Benefits* and #41.00, *Duration of Permanent Disability Periodic Payments*, also provide guidance with respect to the duration of compensation benefits.

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Adjudicative Guidelines

A. General Adjudicative Principle

The legislation and policy establish that age 65 is an appropriate date to conclude workers' compensation benefits for the vast majority of claims. Workers' compensation benefits are provided to recognize lost income or lost earning capacity as a result of a work-related injury or occupational disease. As a result, in most cases the benefits end when the worker reaches the established retirement age of 65 because the worker has no loss of income or lost earning capacity beyond that date. An exception can be made where WorkSafeBC is satisfied there is sufficient evidence the worker would have continued working past age 65 because in those circumstances, the compensable disability has impacted the worker's earning capacity.

The exception to pay benefits beyond age 65 is not meant to establish a retirement fund for the worker or address the impact that a worker's permanent disability has had on his or her ability to accumulate retirement savings. This impact is recognized by WorkSafeBC setting aside an amount equal to 5% of the worker's permanent disability benefit payments toward the establishment of a retirement benefit. The worker may also contribute a portion of their pension benefits to this fund.¹

It is important to note that a worker's financial situation may result from any number of factors and personal choices.

B. Investigation

Workers' compensation in B.C. operates as an inquiry system. Section 96 of the *Act* obligates WorkSafeBC to both investigate, and adjudicate, claims for compensation.

With respect to a worker's retirement age, Case Managers need to ask injured workers about their retirement plans when the combination of the worker's injury and age means the worker may remain temporarily disabled or entitled to vocational rehabilitation ("VR") benefits² after age 65, or more than two years after the date of injury for workers who are 63 years or older when injured.

¹ See section 23.2 of the *Act* and chapter 18 in the RSCM.

² The rules that apply to duration of wage loss benefits as set out in RSCM Policy item #35.30 apply equally to VR wage loss equivalency benefits.

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Retirement Age affects Temporary Disability and Vocational Rehabilitation Benefits

Where a worker's entitlement to wage loss or VR benefits³ may be affected by the worker's retirement date, the Case Manager gathers evidence on the worker's retirement plans and issues a decision letter on the retirement age that applies to the worker's benefits. Because the investigation process can take some time, the Case Manager should ask the worker about retirement plans as soon as it becomes apparent that a decision on retirement age will be required on the claim. If the worker advises that he or she planned to work past age 65, the worker needs to be given an opportunity to present evidence of his or her plans.

The retirement age chosen by the Case Manager in these circumstances will also apply to any permanent disability benefits to which the worker is entitled. Where the Case Manager is considering a retirement date other than age 65 and a permanent disability is likely, the Case Manager may wish to consult a Manager, Compensation Quality prior to deciding on the retirement date.

For a claim where the worker's wage loss or VR benefits may be affected by the retirement date chosen, the Case Manager should ensure the retirement age decision is made and communicated to the worker well in advance of the date temporary benefits may be affected. The Case Manager sends the worker a decision letter explaining the retirement date chosen and the effect on the worker's entitlement to temporary benefits and any future entitlement to VR and pension benefits. It is important that the Case Manager communicate the retirement age decision in a letter since the worker has a right to request a review of this decision.

Retirement Age affects only Permanent Disability Benefits

Where the worker's retirement age will only affect the worker's entitlement to permanent disability benefits, the Disability Awards department gathers evidence of the worker's retirement plans. When the officer in Disability Awards determines the worker's entitlement to a permanent disability award, he or she also decides the retirement age that applies to the worker's pension. For these claims, the retirement age decision is communicated by Disability Awards in the decision letter setting out the worker's entitlement to a permanent disability award.

Unless the Case Manager has previously communicated a retirement age decision (see above), Disability Awards needs to make a decision on the retirement age in all cases where the worker is entitled to a permanent disability award. It does not matter what the worker's age was at the time of injury. In cases where the worker is young at the time of injury, the worker may not have retirement plans or be able to provide any objective evidence that he or she would have worked past age 65. The investigation on these claims will necessarily be short. However, the investigation is still conducted and any evidence provided by the worker, including the worker's statement, is considered in reaching a decision on the retirement age.

³ "VR benefits" refer to VR wage loss equivalency, if eligible.

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C. Established Retirement Date and Evidence

Established Retirement Date

Age 65 is the established starting point in adjudicating a worker's retirement age for purposes of workers' compensation benefits, and in most cases, age 65 will also represent the final decision on the matter.

The law and policy explain that a worker may provide sufficient positive evidence to establish that he or she would have worked beyond age 65, in which case the exception can be applied and benefits extended beyond age 65. The standard of proof is on a balance of probabilities as described in RSCM Policy item #97.00.

In each case, the officer adjudicates the worker's retirement age based on all of the available evidence, including the worker's statement.

Evidence

Circumstances at the Time of Injury

In order to select a retirement age beyond age 65, the officer has to be satisfied that the worker had plans to work beyond age 65, as established by the evidence. In adjudicating the retirement age issue, only the circumstances as they existed just prior to, and at the time of injury, are considered. Because the officer is determining whether or not the worker would have worked past age 65 if the injury had not occurred, the scope of investigation is limited to the worker's retirement plans as they existed at the time of injury. The worker's circumstances after the date of injury, including decisions made by the worker that may have impacted his or her financial position, such as buying a house or starting a family, are not taken into account. Similarly, the impact of the injury and its consequences are not considered.

Evidence Specific to the Worker

Only evidence specific to the worker, and his or her employment situation, is considered by the officer when determining the worker's retirement age. For example, media stories, general articles and studies about retirement, and data regarding average life expectancy are not relevant to the retirement age decision. The worker's particular employment circumstances and personal life situation have to demonstrate that it is more likely than not the worker would have both the motive and opportunity to work beyond age 65, and had made plans to do so.

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Objective and Independently Verifiable

Policy establishes a clear preference for evidence that is objective and independently verifiable. 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. Examples of independent verifiable evidence that may support a later retirement date include:

- names of employers the worker intended to work for after age 65, a description of the type of work the worker was going to perform, the expected duration of employment, and confirmation from the identified employer(s) 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 injury),
- an accountant's statement verifying a long-term business plan for self-employed workers (established prior to the date of injury), indicating continuation of work beyond age 65.

Evidence the worker Would have, rather than Could have, worked past Age 65

Motive alone is not sufficient evidence for the exception to the standard retirement date to apply. For example, where the only evidence presented by a worker is that he has a mortgage and will therefore need to work beyond age 65, that is not sufficient evidence to pay benefits beyond age 65. Although the worker's mortgage may be considered a motive for working beyond age 65, there are other ways to manage financial obligations and most individuals will continue to have some sort of housing cost throughout their life, whether that be in the form of a mortgage or a rent payment.

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

Officers may wish to consider factors such as:

- the nature of the worker's occupation, including the worker's qualifications, the likelihood of work being available, to those over age 65, and whether or not the work is physically demanding,
- whether or not mandatory retirement applies to the worker's employment,
- the nature of any pension plan benefits to which the worker will be entitled,
- information from the worker's employer, union, or professional association confirming the normal retirement age for workers in the same pre-injury occupation,

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- any incentive plans the worker's employer offers to employees continuing to work beyond age 65,
- significant financial obligations of the worker, such as a mortgage or other debts, that can only be met by continued employment beyond age 65,
- financial planning activities that suggest a retirement date later than age 65, and
- the worker's health apart from the compensable disability.

Age of Worker at Time of Injury

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

Definition of Retirement

Retirement is not defined in the *Act* but officers should consider the usual meaning of the word in determining the retirement age to apply to a worker's benefits. Policy provides that a worker is generally considered to be retired when the worker substantially withdraws from the workforce and receives retirement income from one or more retirement-like sources.⁴ A worker who is a viable entity in the workforce with a consistent, active attachment to employment is not considered to be retired. A worker does not have to be employed on a full time basis in order to be considered working. However, an individual who has substantially withdrawn from the workforce and no longer has a consistent attachment to employment, but picks up work on a sporadic basis or generates some income from a hobby is considered to be retired. For example, a worker who previously ran an auto body shop, sells his business and retires. As a hobby, he occasionally purchases lawn mowers, fixes them up and sells them. Although he receives a small amount of payment for his hobby, this individual would

⁴ RSCM Policy item #35.30, *Duration of Temporary Disability Benefits*

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still be considered retired. Leisure, rather than employment, is the predominant feature in his life.

D. Choosing a Retirement Date when Age 65 is not Appropriate

If the officer is satisfied that the worker would have worked past age 65, the worker's benefits will be paid to the date the officer determines the worker would have retired. To decide on the retirement date, the officer considers evidence presented when considering the established retirement age of 65 (see section C above for information on the type of evidence to be considered). The officer can do no better than estimate a retirement date based on the available evidence, keeping in mind factors such as the worker's age, the worker's general health, and the physical demands of the worker's employment. The retirement date should reflect when the worker would likely have continued working until, if not for the compensable injury.

E. Retirement Age Decisions – Can they be changed when related entitlement decisions change?

Once an officer makes a decision on the retirement age that will apply to the worker's compensation benefits, that decision is subject to the reconsideration provisions under section 96(5) of the *Act*. If more than 75 days have elapsed since the retirement age decision was made, it cannot be changed except by way of review or appeal. Related decisions, such as the worker's level of permanent functional impairment, do not open the door to the officer revisiting the retirement age decision.

For example, a worker is granted a functional pension award representing 5% permanent functional impairment and the officer decides the standard retirement age of 65 years will apply to the pension. The worker appeals the level of permanent functional impairment and the Review Division decides the worker's permanent functional impairment is more than 5% and returns the matter to the Board to determine the new quantum. Following an assessment the worker's pension award is increased to reflect 12% permanent functional impairment. The retirement age that applies to the pension was not raised at the review and the worker's 12% functional pension award will end at age 65. The WorkSafeBC officer looking at the worker's level of functional impairment as result of the Review Division decision, does not mean the officer can look at the retirement age decision again. The retirement age determination and the amount of the worker's pension award are separate decisions.

F. Reopenings

There will be cases where a worker presents with a recurrence of temporary disability or an increased permanent functional impairment after his or her recognized retirement date. For example, a worker who was initially entitled to a pension for his knee injury payable until age 65, may call WorkSafeBC when he is 67 years old because he requires surgery for the

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compensable knee injury. The worker is employed at the time of the reopening and will be temporarily disabled from working while he recovers from surgery.

If more than three years have elapsed since the date of injury, section 32 of the *Act* allows WorkSafeBC to calculate the compensation payable as though the date of reopening were the happening of the injury. As such, the previous decision to end compensation benefits at age 65 does not restrict the officer's ability to make a new decision on entitlement to benefits flowing from the reopening over three years. The officer will need to decide on the retirement age that will apply to the worker's new entitlements. Because the worker was working at the time of reopening, he would be entitled to wage loss benefits for the period of his temporary disability up to two years from the date of injury or longer if the officer accepts the worker would not have retired in that two year period. If the worker is left with an increased permanent functional impairment following the reopening, his pension may be reassessed and the new retirement date would apply to the increased pension amount.

If at the time of reopening, less than three years have elapsed since the happening of the injury, there is no authority to revisit the retirement age decision. In cases such as the example above, the retirement date has proven to be incorrect since the worker is still employed at age 67, but there is no ability to change the retirement age since the reconsideration provisions apply and it is only reopening over three years that allow for a recalculation of the compensation payable.

G. Termination of Permanent Disability Awards

If the worker is in receipt of periodic disability benefits and subsequently dies from causes unrelated to the compensable injury, the benefit will cease effective the end of the month in which the death occurred. For example, if a worker is in receipt of a monthly benefit of \$300.00, and dies on June 3, the worker's estate will be entitled to the full \$300.00 for the month of June. The benefit will be terminated as of July 1.

If the worker dies prior to the implementation of the permanent disability award, the award is calculated up to the date of death.

CROSS REFERENCES:

N/A

HISTORY:

Significant amendments were made to this Practice Directive in May 2012 to provide additional guidance, particularly with respect to the general adjudicative principle, the established retirement age of 65, and the investigation process and evidence to consider in deciding on a worker's retirement age. Sections D, E & F were also added in June 2012. On April 4, 2013, minor clarifications were made to Section B to clearly differentiate the role of the Case Manager and the Disability Awards department in retirement age decision-making. In January 2015 the policy definition of "retirement" was added.

APPLICATION:

This Practice Directive was developed to provide guidance on RSCM Policy items #35.30 and #41.00.