

WORKERS COMPENSATION APPEAL TRIBUNAL

BETWEEN:

**[PERSONAL INFORMATION]
CASE ID # [PERSONAL INFORMATION]**

APPELLANT

AND:

**WORKERS COMPENSATION BOARD OF
PRINCE EDWARD ISLAND**

RESPONDENT

DECISION #256

Appellant

David MacDonald, Representative for the
Worker

Respondent

Stephen Carpenter, Solicitor representing the
Workers Compensation Board

Place and Date of Hearing

June 20, 2017
Loyalist Lakeview Resort
195 Heather Moyse Drive,
Summerside, Prince Edward Island

Date of Decision

November 16, 2017

1. This is an appeal arising from a decision of the Internal Reconsideration Officer (the "IRO") of the Workers Compensation Board (the "Board"), IR# [PERSONAL INFORMATION], dated February 27, 2017, which determined that the Worker's claim for Worker's Compensation Benefits was statute barred by the expiry of a limitation period.

FACTS AND EVIDENCE

2. On October 13, 2016, the Worker filed both a Form 6 - Worker's Report and Hearing Loss Questionnaire claiming hearing loss in his right ear. The Worker noted in his Hearing Loss Questionnaire that he first noticed hearing problems "approx 5 + 6 years".
3. The Appeal Record indicates that on December 15, 2010, the Worker was assessed for hearing loss. Specifically, the Appeal Record contains an audiogram dated December 15, 2010 which noted that the Worker was suffering from "mild to mod SNHL", in other words, mild to moderate sensorineural hearing loss. The Appeal Record also includes a letter of same date of Dr. W. Salamoun indicating that the Worker was assessed for a "sudden right-sided sensorineural hearing loss" which the Worker suffered "almost three years ago", that testing had indicated a slight improvement in the Worker's hearing from a test conducted in December of 2009, and that the Worker's hearing was presently stable. Dr. Salamoun notes that he suggested the Worker investigate obtaining a hearing aid.
4. A subsequent letter from Dr. Salamoun dated December 9, 2011 indicates that the Worker suffered a sudden right-sided sensorineural hearing loss in 2007 and that the Worker's hearing had remained stable since then.
5. The Appeal Record does not indicate whether or not the sudden hearing loss occurred after a specific event.
6. The Board issued a decision letter to the Worker dated November 10, 2016, finding that the Worker had not filed his claim with the Board within six months from the date of accident pursuant to Board Policy POL-90, such that the Worker's claim was statute barred.
7. The Worker subsequently requested reconsideration, which reconsideration was denied by the Board's IRO by letter dated February 27, 2017. In support of his request for reconsideration, the Worker included a letter dated January 8, 2017 in which he indicated as follows:

"While I was employed at [Employer], we started receiving annual hearing tests around 2010 approx., it was here that I was made aware of hearing loss starting in my right ear. There wasn't any mention of a possible Workers Comp claim and I never gave it any thought either

because when I went to see Dr. Solomoun [sic], he originally told [sic] that a hearing aid would not work and so that was another fact in not having a claim filed. Then after a few years went by, my hearing on that side is getting worse, Dr. Solomoun changed his mind and suggested that maybe a hearing [sic] would help me but I was getting by as it was."

8. By Notice of Appeal dated March 14, 2017, the Worker appealed the IRO's decision of February 27, 2017 to the Worker's Compensation Appeal Tribunal (WCAT).

ISSUE

9. The issue in this matter was whether the IRO was correct in deciding that the Worker's hearing loss claim was filed outside the six (6) month limitation period.

LAW, ANALYSIS AND DECISION

10. WCAT reviews the IRO's decision on a standard of correctness. In applying the standard of correctness, WCAT undertakes its own analysis of the issue and then determines whether the IRO decided the issue correctly.

11. Section 59(4) of the *Workers' Compensation Act* provides as follows:

"59(4) Compensation is not payable unless the claim for compensation is made within six months from the happening of the accident or, in case of death, within six months from the time of death." [Emphasis added]

12. Subsection 1(1)(a) of the *Workers' Compensation Act* provides as follows:

"1(1) In this Act

(a) "accident" means, subject to subsection (1.1) a chance event occasioned by a physical or natural cause, and includes

(i) a wilful and intentional act that is not the act of the worker,

(ii) any

(a) event arising out of, and in the course of, employment, or

(b) thing that is done and the doing of which arises out of, and in the course of, employment, and

(iii) *an occupational disease,*

and as a result of which a worker is injured."

13. Further, subsection 84(1.1) of the *Workers' Compensation Act* provides as follows:

"84(1.1) *If a worker suffers from an occupational disease referred to in subsection (1), the worker is deemed, for the purposes of this Act and the regulations, to have contracted the disease, and to have had an accident in respect of that disease, on the earlier of*

(a) *the date the worker suffers a loss of earning capacity as a result of the occupational disease; and*

(b) *the date the worker is diagnosed with the occupational disease."*

14. Board Policy POL-90 deals specifically with noise induced hearing loss and provides in part as follows:

"3. *The date of accident is the date on which the incident occurred, unless otherwise specified in this policy.*

4. *The date of accident for noise induced hearing loss will be the earlier of:*

the date a loss of earnings has occurred as a result of hearing loss;

the date the worker sought medical attention for symptoms of noise induced hearing loss and a clear link is documented between the symptoms and the noise exposure in the workplace or industry; or

the date of an audiogram, completed by a health care provider authorized by the Worker's Compensation Board to provide this service, showing evidence of noise induced hearing loss."

15. The Worker argues that Section 4 of Board Policy POL-90 contravenes the *Worker's Compensation Act* because it unfairly restricts the definition of "accident" contained at subsection 1(a) of the *Worker's Compensation Act*, such that WCAT should not apply Board Policy POL-90.

16. The Worker argues that his date of accident should be found to be April 20, 2016, the date that a "*qualified employee of Connect Hearing first advised [the Worker] that a hearing aid (a medical aid) would be required to address his [noise induced hearing loss],*" and that this is the first date on which the Worker could have requested compensation for a medical aid.

17. The Worker has not shown that Board Policy POL-90 restricts the definition of "accident" provided by the *Workers' Compensation Act*. WCAT believes that section 4 of Board Policy POL-90 provides guidance on the application of subsection 84(1.1) of the *Workers' Compensation Act*. In any event, subsection 56(17) of the *Workers' Compensation Act* provides that WCAT is "bound by and shall fully implement the policies of the Board ...". Accordingly, WCAT believes that it is appropriate to apply Section 4 of Board Policy POL-90.
18. Further, the Worker's claim to a date of accident on April 20, 2016 is not factually supported, as the Appeal Record establishes to the satisfaction of WCAT that the Worker was advised by Dr. Salamoun to investigate a hearing aid on December 15, 2010, and that the Worker was first made aware of noise induced hearing loss in his right ear by no later than December of 2010.
19. WCAT finds that since the Worker was made aware of his noise induced right ear hearing loss by no later than December of 2010, the Worker's date of accident was no later than December of 2010, and that the Worker filed his claim for compensation well past the six month limitation period provided by section 59(4) of the *Workers' Compensation Act*.
20. Accordingly, WCAT denies the Worker's appeal and finds that the IRO correctly decided that the Worker was statute barred from pursuing his claim.

Dated this 16th day of November, 2017.

John L. Ramsay, Q.C., Vice-Chair
Workers Compensation Appeal Tribunal

Concurred:

Donald Cudmore, Employer Representative

Elizabeth (Libba) Mobbs, Worker Representative