WCAT Decision Number: WCAT-2004-00029-AD
WCAT Decision Date: **January 08, 2004**
Panel: Gail Starr, Vice Chair

Introduction

This is the worker's appeal from December 2, 2002 findings of the Workers' Compensation Review Board (Review Board). The context of the appeal is his 1991 claim for compensation in relation to an October 31, 1991 left foot crush injury.

When the appeal was at the Review Board level, the original subject matter had arisen out of eleven separate decision letters from Workers' Compensation Board (Board) officers. These are all adequately detailed in the Review Board findings and need not be itemized here. Only the one which will be described is at issue in this further appeal.

The Review Board panel which considered the worker's appeal held an oral hearing on October 9, 2002 at which the worker appeared, together with his representative. Oral evidence was given and argument provided. Following that hearing, the Review Board panel issued the cited findings allowing the appeal in part.

This further appeal was originally launched by the worker's representative to the Appeal Division. (He had also pursued the possibility of a revised finding with the Review Board, but this was unsuccessful as described in a January 8, 2003 letter to the representative from the Review Board's registrar.) On March 3, 2003, the Appeal Division and the Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As this appeal had not been considered by an Appeal Division panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002,* section 39.)

Under sections 250(1) and (2) of the *Workers Compensation Act* (Act) (effective March 3, 2003), WCAT may consider all questions of fact and law arising in an appeal, but it is not bound by legal precedent. It must make its decision on the merits and justice of the case. It must apply policies of the Board's board of directors which apply to the case, except in circumstances outlined in section 251 of the Act.

Under section 254 of the Act (effective March 3, 2003), WCAT has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising or required to be determined in an appeal before it. Thus, this appeal is a rehearing.

The sole issue contested in the present appeal arises out of the subject matter of the March 14, 2001 letter which had been appealed to the Review Board. However, the worker's appeal on that issue was not perfected and no submissions were made to the Review Board concerning it, the result being the Review Board denied the appeal on

that issue for lack of prosecution. The representative now brings forward a submission to WCAT on that issue.

Issue(s)

The issue is whether an overpayment of vocational rehabilitation benefits occurred as described in the March 14, 2001 letter from the Board's vocational rehabilitation consultant and, if so, whether it is the result of an administrative error or of a decisional error.

Background and Evidence

In an appeal of such narrow scope, it is not necessary to set out the claim history in any detail except as it relates specifically to the issue in the appeal.

Relevant background for the issue in the appeal is found in the vocational rehabilitation consultant's June 14, 1993 memo #63. That memo was a recommendation for expenditures in support of the worker's vocational rehabilitation activity. It described a slight modification to the previous vocational plan for the worker, although the change was expected to lead ultimately to the same result. The result was conceived to be that the worker would both 1) work at a 13 week training-on-the-job with an existing employer with the desired outcome of achieving journeyman status as a cabinet maker, and 2) also be pursuing a woodworking business in his own home to supplement his earnings from employment. There would be a 100 percent subsidy (paid to the employer) in connection with the training-on-the-job program and a contribution of $15,000.00 to the equipment of the worker's home business. The latter portion of financial support would only be paid on successful completion of the training-on-the-job portion of the plan.

As described in *Appeal Division Decision #00-1839* (accessible on the internet at www.worksafebc.com/appeals), the worker's anticipated home-based cabinet making business was not successful. Further vocational rehabilitation benefits which need not be described here were provided. Appeals involving tugs of war between vocational rehabilitation benefits and loss of earnings pension values resulted in further appeals. Various employment opportunities were avoided or lost. In 1996, the worker's functional impairment assessment was increased and he was awarded a loss of earnings pension dating from June 22, 1992. As he had previously enjoyed a commutation of the pension as earlier awarded, he found it desirable to appeal the loss of earnings matter again to the Review Board. Numerous calculations and recalculations appear on the record. All are abundantly detailed in the voluminous claim file, and all are well-known to the worker and his representative. An appeal in 1997 led to yet another assessment of the worker's employability. Further benefits were negotiated, but wage top-ups were twice refused. Requests for retroactive benefits (the subject matter of *Appeal Division Decision #00-1839*) were refused and those refusals were confirmed in that November 21, 2000 Appeal Division decision.

Although there is not any clear connection between the two documents, I note that it was only approximately two and one-half months after the above noted Appeal Division decision that the March 14, 2001 letter which is here appealed was issued. That letter informed the worker that an overpayment of vocational rehabilitation benefits calculated as $10,962.52 was being declared. The letter indicated that some details of the overpayment were attached to it, showing dates and amounts owing. It also indicated that further information would be forthcoming from another vocational rehabilitation consultant. (Because of the physical state of the record following the Board's decision to "bulk scan" this claim file into a rather chaotic electronic form, it is not now possible to know what was in fact enclosed with the March 14, 2001 letter.) While the file does not contain a copy of the letter predicted to be issued by a named vocational rehabilitation consultant, there is an April 27, 2001 letter from yet another vocational rehabilitation consultant which appears to meet the description of what was to be forthcoming. In an attempt to avoid still more confusion, I note that the April 27, 2001 explanatory letter was itself re-issued June 8, 2001, marked "**CORRECTED FOR JULY 1997 RE-PAYMENT**."

It can be determined from the file, fortunately, that both the April 27, 2001 letter and its June 8, 2001 re-issue were accompanied by "overpayment calculation sheets." These spreadsheets and other documented calculations are on the file and have been disclosed at least once to the worker and his representative. Although the representative insists that no reason appears for the declaration of overpayment, the letters and their attachment belie that fact, as the letters and supporting documentation were plainly sent. (Although copies of the letters do not appear to have been sent to the worker's representative at the time of issue, file disclosure records show that they have been included in material since disclosed directly to the representative.)

Law and Policy

Published policy respecting overpayments is largely contained in the *Rehabilitation Services and Claims Manual, Volume 1* (RSCM) at item #48.40 and following. Item #48.41 provides as follows:

> An overpayment is any money paid out by the Board to a payee as a result of an administrative error, fraud or misrepresentation by the worker, or where the decision was not one within the statutory authority of the Board. Administrative errors are computer, mechanical, mathematical, or an error in implementing a decision on a claim, and similar types of errors. They do not include decisions made regarding entitlement. An overpayment may also be incurred by a doctor, qualified practitioner, or an institution following the incorrect payment of a health care benefit account by the Board.

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A decision regarding entitlement which is modified or reversed by a later decision does not result in an overpayment. These are referred to as "Decisional Errors" and include errors of policy. They include situations where new information is later received which initiates a judgment change in the original decision. They can also include situations where information was available but overlooked, or a missed wage rate change.

Decisional errors involving actions outside the statutory authority of the Board or due to fraud or misrepresentation are corrected retroactively to the date of the original decision, and result in an overpayment.

Decision and Reasons

As recently as his July 3, 2003 written submission, the worker's representative still maintains that the decision appealed "does not make any sense" and there is insufficient information to know "what the alleged overpayment" arose from. I think the above background sketch itself disposes of this argument. The Board has disclosed in painstaking detail the way in which the calculations were initially incorrect. Although it has taken the Board some time to establish these figures (including re-issue on June 8, 2001, with corrections, of the April 27, 2001 letter), I am unable to find any deficiency in its disclosure of the derivation of the figure representing the demonstrated overpayment. The argument of the representative that it is unjust to demand overpayment where it has not been demonstrated, clearly fails, as the spreadsheets and accompanying documents clearly show how and when every dollar and cent was overpaid.

It has also been contended on behalf of the worker that, if there was an overpayment, it was a "decisional error" rather than an "administrative error." This argument fails to perceive that the portion of the policy set out above describing decisional errors indicates that decisional errors are decisions regarding **entitlement**. It is clear from the text of the April 27, 2001 and the June 8, 2001 re-issue that the errors the Board discovered in its review were not errors in decisions regarding entitlement. They were arithmetic errors which, unfortunately, it took the Board some time to discover and correct. Nevertheless, as in my discussion of the first issue, that has last been done; it has been done in clear detail, showing where the arithmetical errors were made. On the second branch of the representative's argument, therefore, the appeal must also fail.

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Conclusion

For the reasons indicated, the worker's appeal is denied and the decision upheld in the Review Board findings of December 2, 2002 is again confirmed. No costs or expenses were requested and none are awarded.

Gail Starr
Vice Chair

GS/gl

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