Noteworthy Decision Summary

Decision: WCAT-2003-01116-AD **Panel**: Jill Callan **Decision Date**: June 25, 2003

Reconsideration on basis of new evidence or common law grounds – Due diligence requirement - Section 96.1 of the Workers Compensation Act

The Appeal Division panel determined that the worker's back injury was not compensable. The worker seeks reconsideration of the Appeal Division decision on the basis of new evidence under the former section 96.1 of the *Workers Compensation Act* and on common law grounds. The evidence is a list of witnesses who the worker submits would have been available to provide statements related to her injury and a "Supervisor's Accident Investigation Report".

The Supervisor's Accident Investigation Report, which existed at the time of the hearing, does not meet the due diligence requirement. Such evidence was obviously germane to the question before the Appeal Division panel and a reasonable appellant would have provided all evidence related to the injury prior to the issuance of the Appeal Division decision. The same analysis would be applicable to the witness statements. The reconsideration process is generally intended for rather extraordinary circumstances. It is not intended to be a vehicle by which appellants can re-argue the appeal and provide evidence that ought to have been provided to the original Appeal Division panel. No error of law going to jurisdiction has been established in respect of the manner in which the panel handled the evidence. Grounds for reconsideration have not been established and the Appeal Division decision stands as final and conclusive.

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This decision has been published in the *Workers' Compensation Reporter*:
19 WCR 163, #2003-01116, Application for Reconsideration

WCAT Decision Number: **WCAT-2003-01116-AD**
WCAT Decision Date: **June 25, 2003**
Panel: **Jill Callan, Chair**

Introduction

The worker, who is unrepresented, seeks reconsideration of *Appeal Division Decision #2002-1370* dated June 3, 2002. The appeal before the Appeal Division panel had been brought by the employer and concerned the issue of whether the worker had sustained a back injury that arose out of and in the course of her employment. The Appeal Division panel had allowed the employer's appeal and determined that the worker's back injury was not compensable.

The worker has sent various letters to the Appeal Division including submissions dated August 21 and November 26, 2002 and January 22, 2003. She has submitted new evidence in the form of a "Supervisor's Accident Investigation Report". She has also indicated that witness statements may be available. In addition, the worker has made a series of arguments as to why the Appeal Division panel ought to have found that her back injury was compensable. Accordingly, I read the worker's submissions as seeking reconsideration on the basis of new evidence and on common law grounds.

The worker's application for reconsideration under section 96.1 of the *Workers Compensation Act* (the Act) was filed to the Appeal Division before March 3, 2003. Effective March 3, 2003, section 96.1 of the Act was repealed, and the Workers' Compensation Review Board (Review Board) and the Appeal Division were replaced by the Workers' Compensation Appeal Tribunal (WCAT). These changes were contained in Bill 63, the *Workers Compensation Amendment Act (No. 2), 2002*. WCAT has jurisdiction to reconsider its decisions and decisions of the Appeal Division on the basis of new evidence pursuant to section 256 of the amended Act. Sections 39(1)(b) and 39(2) of the transitional provisions contained in Part 2 of Bill 63 provide that proceedings for reconsiderations of decisions that were pending before the Appeal Division on March 3, 2003, are continued and must be completed as proceedings before WCAT. This means that WCAT will consider the application on the basis of new evidence under the former section 96.1.

The employer is participating in this application and has provided a submission dated December 23, 2002. The employer takes the position that the worker's reconsideration request should be denied.

Issue(s)

The issue is whether *Appeal Division Decision #2002-1370* should be reconsidered on the basis of new evidence or on common law grounds.

Background

The history that has led to the worker's reconsideration application is as follows:

- On December 14, 1999 the worker completed a report of injury in which she indicated she had injured her back at work on December 8, 1999.
- By letter dated May 12, 2000, an entitlement officer of the Workers' Compensation Board (the "Board") informed the worker that her claim had not been accepted.
- The worker appealed the May 12, 2000 decision to the Review Board.
- By findings dated November 15, 2001, the majority of the Review Board panel allowed the worker's appeal and concluded that she had suffered a compensable back injury.
- The employer appealed the Review Board findings to the Appeal Division.
- In *Decision #2002-1370* the Appeal Division panel concluded that the worker had not sustained a compensable injury. Accordingly, the panel allowed the employer's appeal.

The worker now seeks reconsideration of *Appeal Division Decision #2002-1370*.

The New Evidence

The former section 96.1 of the Act provides:

> (1) Subject to this section and sections 58 to 66, a decision of the appeal division is final and conclusive.
> (2) A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision of the appeal division on the grounds that new evidence has arisen or has been discovered subsequent to the hearing of the matter decided by the appeal division.
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> (3) Where the chief appeal commissioner considers that the evidence referred to in subsection (2)

(a) is substantial and material to the decision, and
(b) did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered,

he or she may direct that

(c) the appeal division reconsider the matter, or
(d) the applicant may make a new claim to the board with respect to the matter.

In the letters she has provided in support of her reconsideration application, the worker has, among other things, listed the witnesses who would have been available to provide statements related to her injury. She has also provided the "Supervisor's Accident Investigation Report" that had been completed on behalf of the employer on December 14, 1999. It states that the worker had experienced pain in her lower back after unloading material from a truck. In the section of the form entitled "direct cause of incident" the supervisor has written "lifting".

In order for an Appeal Division decision to be reconsidered on the basis of new evidence, the new evidence must be "substantial and material to the decision" as required by paragraph 96.1(3)(a). I consider that "material" evidence is evidence with obvious relevance to the decision of the Appeal Division panel. I consider that "substantial" evidence is evidence which has weight and supports a conclusion opposite to the conclusion reached by the panel. In addition to being material and substantial, the new evidence must either be evidence that "did not exist at the time of the hearing" or evidence that meets the due diligence requirement outlined in paragraph 96.1(3)(b). In this case, the Supervisor's Accident Report existed at the time of the hearing. Accordingly, I must consider the due diligence requirement.

In *Appeal Division Decision #91-0724* (*Workers' Compensation Reporter* Vol. 7, p. 145), the chief appeal commissioner stated the following in respect of the due diligence requirement (at pages 148 and 149):

> I find, first of all, that the test of "due diligence" applies to the person requesting reconsideration rather than to the decision-maker. The most reasonable interpretation of Section 96.1 is that it constitutes a bar to reconsideration to an applicant, where the basis for their request is that ... the Appeal Division did not consider evidence which the applicant could through the exercise of due diligence have obtained and submitted prior to the making of the impugned decision.
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> The effect of this provision is to place some onus on an appellant for ensuring that the Appeal Division is in possession of the information necessary to the proper consideration of their appeal in the first instance. While the Appeal Division functions on an inquiry basis, and may itself

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> seek out additional information, an appellant should be aware of the ramifications of Section 96.1 if they proceed with their appeal without taking reasonable steps to ensure that the evidence on file is complete.
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> It is important to note, however, that the test of "due diligence" includes a concept of reasonableness as to the nature and scope of the inquiries an appellant is expected to have pursued. The fact that information previously existed and could have been obtained upon inquiry is not conclusive as to whether it could through the exercise of "due diligence" have been discovered. The circumstances of the particular case must also be considered, with regard to the extent of the inquiries which due diligence would have required.
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> The question is not simply whether the appellant could have obtained the particular information if they had made diligent inquiries for the purpose of obtaining it. The requirement of "due diligence" is more properly interpreted as referring to the degree of care which a prudent and reasonable appellant would have exercised in ensuring that the Appeal Division had all relevant information necessary to the proper consideration of their appeal. If, for example, certain information existed, but it was not reasonably foreseeable that it would be germane to the Appeal Division's consideration, "due diligence" would not have required the appellant to search it out. To interpret the requirement of "due diligence" otherwise would be to create an artificial and unrealistic legal barrier to reconsideration which, in my view, was not intended by the statute. The requirements of section 96.1 of the Act must be interpreted in a fair and meaningful fashion, with regard to the realities of the appeal process.
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> [Emphasis added]

I adopt the analysis in *Appeal Division Decision #91-0724*. I note that this analysis may also be of assistance in interpreting section 256(3) of the amended Act.

I find the Supervisor's Accident Investigation Report does not meet the due diligence requirement. Such evidence was obviously germane to the question before the Appeal Division panel and a reasonable appellant would have provided all evidence related to the injury prior to the issuance of the Appeal Division decision. The reconsideration process is generally intended for rather extraordinary circumstances. It is not intended to be a vehicle by which appellants can re-argue the appeal and provide evidence that ought to have been provided to the original Appeal Division panel. While the worker has not provided witness statements, she has stated that they would be available. It seems to me that the same analysis would be applicable to witness statements. That is, a reasonable appellant would have provided the Appeal Division panel with all available evidence relevant to the acceptance of the claim at the time of the appeal to the Appeal Division.

Given that the evidence does not meet the due diligence requirement, I find it unnecessary to determine whether it is substantial and material.

Common Law Grounds

The worker has made numerous comments concerning the evidence relevant to her claim and the manner in which that evidence ought to have been weighed by the Appeal Division panel.

In *Appeal Division Decision #93-0740* (*Workers' Compensation Reporter*, Vol. 10, p. 127), the chief appeal commissioner concluded that the common law grounds for reconsideration of Appeal Division decisions include a clerical mistake or omission, fraud, and "an error of law going to jurisdiction". A denial of natural justice would constitute such an error.

In *Appeal Division Decision #97-0743* (*Workers' Compensation Reporter* Vol. 14, p. 61), which also involved the reconsideration of an Appeal Division decision, the panel stated (at page 79):

> The fact that a decision is problematic, flawed or incomplete in some respects is not by itself a sufficient reason to set it aside. In accordance with Section 96.1 of the Act, Appeal Division decisions are "final and conclusive" subject to Medical Review Panel certificates and new evidence within the meaning of the provision. Taking into account the privative clause in Section 96.1, published Appeal Division Decision No. 93-0740 concluded that a decision must contain an "error of law going to jurisdiction" before it may be set aside. A patently unreasonable interpretation (or application) of a statutory provision would amount to an "error of law going to jurisdiction". A patently unreasonable finding of fact would amount to an "error of law going to jurisdiction".

I agree with this analysis and find that Appeal Division and WCAT decisions must be treated with substantial deference. It appears that a similar approach will apply to reconsideration applications concerning WCAT decisions.

In most cases, an error of law going to jurisdiction will not be established on the basis of the manner in which a panel has handled the evidence. This is the case even if another panel would have reached a different conclusion. However, there are some situations in which the manner in which evidence has been dealt with will constitute an error of law going to jurisdiction. For instance, there may be such an error if important evidence has been disregarded or uncontradicted material evidence has been rejected without explanation. There may also be such an error if a finding of fact on which the decision turns is not supported by any evidence. In this case, I find there was evidence

in support of the panel's findings of fact. I find no error of law going to jurisdiction has been established in respect of the manner in which the panel handled the evidence.

Conclusion

Grounds for reconsideration have not been established. *Appeal Division Decision #2002-1370* stands as final and conclusive.

Jill Callan
Chair

JC/dlh

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