

Noteworthy Decision Summary

Decision: WCAT-2003-01120-AD **Panel:** Jill Callan **Decision Date:** June 25, 2003

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

The Appeal Division concluded that the worker, who had claimed compensation for a left shoulder injury in 1996, had not sustained a compensable injury. The worker seeks reconsideration of the Appeal Division decision under the former section 96.1 of the *Workers Compensation Act* (Act) on the basis of new evidence. The evidence is a statement by the worker's former common law spouse, which was not submitted to the Appeal Division because the worker had expected his representative to call his spouse as a witness, but this did not occur.

The information contained in the witness statement existed at the time of the Appeal Division hearing. The new evidence must therefore meet the due diligence requirement outlined in the former section 96.1(3)(b) of the Act. Given the numerous conflicts in the evidence, the concerns regarding the worker's credibility, and the history of the claim, a reasonable appellant would have marshalled all available evidence that supported the worker's assertion that he had sustained a compensable shoulder injury in 1996 and presented that evidence to the Appeal Division panel. The due diligence requirement has not been met and grounds for reconsideration of the Appeal Division decision have not been established. The Appeal Division decision stands as final and conclusive.

WCAT Decision Number:**WCAT-2003-01120-AD****WCAT Decision Date:****June 25, 2003****Panel:****Jill Callan, Chair**

Introduction

The worker seeks reconsideration of *Appeal Division Decision #98-1499* dated September 21, 1998. The issue before the Appeal Division panel was whether the worker had suffered a compensable shoulder injury on June 17, 1996.

Counsel for the worker, Mr. Murray Lott, has provided evidence in the form of a witness statement dated March 25, 2002, which he submits meets the requirements of the former section 96.1 of the *Workers Compensation Act* (the Act).

The worker's application for reconsideration under section 96.1 of 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 Effective March 3, 2003, section 96.1 of the Act was repealed, and the Workers' Compensation Review Board (Review Board) and the Appeal Division were replaced by the Workers' Compensation Appeal Tribunal (WCAT).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 this application under the former section 96.1.

The employer is participating and is represented by Mr. Gary Catherwood of Fasken Martineau DuMoulin LLP.

Issue(s)

The issue is whether the worker has presented new evidence which warrants the reconsideration of *Appeal Division Decision #98-1499*.

Background

The history of the worker's claim is as follows:

- On August 15, 1996, the worker completed an application for compensation in which he indicated he had injured his left shoulder on June 17, 1996. He attributed the injury to an incident that had occurred while he was taking asphalt off of a gravel truck using a shovel.
- By decision dated September 30, 1996, a claims adjudicator of the Workers' Compensation Board (the Board) informed the worker that his claim had been disallowed.
- The worker appealed the September 30, 1996 decision to the Review Board.
- The Review Board panel issued findings dated February 13, 1998 in which the panel majority allowed the worker's appeal and found that he had sustained an injury that arose out of and in the course of the employment. The dissenting vice chair concluded that the evidence did not support acceptance of the worker's claim.
- The employer appealed the February 13, 1998 Review Board findings to the Appeal Division and the Appeal Division panel held an oral hearing on July 9, 1998.
- In *Decision #98-1499* the Appeal Division panel allowed the employer's appeal and concluded that the worker had not sustained a compensable injury.

The worker now seeks reconsideration of the Appeal Division decision.

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.
- (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 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 *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.

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 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.

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.

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. [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.

On behalf of the worker, Mr. Lott has provided a statement from the worker's former common law spouse, which she signed on March 25, 2002. In her statement, she said that the worker came home from work on June 17, 1996 and told her he had hurt his shoulder at work. She also described the mechanism of injury, which she says the worker had described to her. In addition, she commented on a variety of other matters including various events related to the reporting of the injury by the worker and information concerning witnesses.

By letter dated October 31, 2002, Mr. Lott addressed the requirements of the former section 96.1 and submitted that the statement provided by the worker's common law spouse meets those requirements. He submits that, in considering the due diligence requirement, I must consider the reasons that the evidence was not submitted to the Appeal Division panel. He states that the worker had expected his spouse to be called as a witness at the Appeal Division oral hearing. However, his representative determined that she would not be called as a witness. Mr. Lott characterized the representative's failure to call the worker's spouse as a witness as "negligent". The essence of Mr. Lott's submission is that the worker should not be penalized for his representative's failure to call a key witness and, accordingly, *Decision #98-1499* should be reconsidered.

Mr. Catherwood provided a submission dated January 29, 2003 on behalf of the employer. He contends that the March 25, 2002 statement does not meet the requirements of the former section 96.1. He argues that, given the gap in time between the issuance of the Appeal Division decision and the reconsideration application, it would be inappropriate to grant the reconsideration application. He submits that the statement is not substantial evidence. In terms of the due diligence requirement, he argues that the test in *Appeal Division Decision #91-0724* has not been met.

Although invited to do so, Mr. Lott did not respond to Mr. Catherwood's submission.

It is clear from a review of the claims adjudicator's September 30, 1996 decision and the February 13, 1998 Review Board findings, that there were many conflicts in the evidence and that the worker's credibility was in question. In fact, the Review Board panel noted in their findings that both parties had indicated that credibility was at issue and the panel unanimously confirmed this to be the case. While the panel majority concluded that the worker sustained a compensable injury, they found that the injury did not occur on June 17, 1996. The dissenting vice chair concluded that the incident could not have taken place as described by the worker.

The information contained in the March 25, 2002 witness statement existed at the time of the Appeal Division hearing. Accordingly, the question is whether the due diligence requirement has been met. Given the numerous conflicts in the evidence, the concerns regarding the worker's credibility, and the history of the claim, I find that a reasonable appellant would have marshalled all available evidence that supported the worker's assertion that he had sustained a compensable shoulder injury on June 17, 1996 and presented that evidence to the Appeal Division panel. Accordingly, I find that the due diligence test as described in *Appeal Division Decision #91-0724* has not been met.

On behalf of the worker, Mr. Lott contends that I should consider the circumstances surrounding the failure to call the worker's former common law spouse as a witness at the Appeal Division hearing. In other words, he submits that the due diligence test should not be limited to the objective test of what a reasonable appellant would have done in the circumstances. Instead, he would like me to take into account the reasons why the evidence was not presented at the oral hearing. In my view, this would require a substantial expansion of the test articulated in *Decision #91-0724*.

Given the language in section 96.1(1), it is apparent that the Legislature intended that Appeal Division decisions be final and conclusive decisions. The wording of paragraph 96.1(3)(b) relates to the exercise of due diligence in objective terms and does not include the element of determining the applicant's reasons for not presenting the evidence in question at the time of the hearing. Accordingly, I am not persuaded that the due diligence requirement should be interpreted in the manner suggested by Mr. Lott. I find the due diligence requirement has not been met and that grounds for reconsideration of *Appeal Division Decision #98-1499* have not been established.

Since my conclusion regarding the due diligence test is determinative, it is not necessary for me to consider whether the other requirements in the former section 96.1 have been met.

Conclusion

The new evidence provided on behalf of the worker does not meet the requirements of section 96.1. *Appeal Division Decision #98-1499* stands as final and conclusive.

Jill Callan
Chair

JC/dlh