

Noteworthy Decision Summary

Decision: WCAT-2004-00999 **Panel:** J. Callan **Decision Date:** February 26, 2004

Jurisdiction of WCAT – Sections 96.2(1) and 239 of the Workers Compensation Act – Vocational rehabilitation letter

This appeal raises a question concerning the jurisdiction of WCAT. The Review Division declined to review a letter about vocational rehabilitation benefits. Section 239(1) of the *Workers Compensation Act* provides that a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section, may be appealed to WCAT. Section 239(2)(b), however, provides that a decision respecting matters referred to in section 16 (vocational rehabilitation) may not be appealed to WCAT.

In this case, the central issue is whether the request for review raised a reviewable issue. If the review officer's decision is characterized as a decision concerning vocational rehabilitation benefits, pursuant to section 239(2)(b) it would not be appealable to WCAT. However, if, pursuant to section 239(1), it is characterized as limited to the narrow question of whether the review officer correctly declined to conduct a review, WCAT would have jurisdiction over the appeal. The panel concluded that the purpose of section 239(2)(b) was to restrict WCAT from substituting its judgment on the merits of a vocational rehabilitation matter. Accordingly, WCAT was not prevented from considering a decision declining to conduct a review because this did not address the merits of the vocational rehabilitation issue. The finding of the Review Division was confirmed on the basis that the letter was merely informational.

WCAT Decision Number: WCAT-2004-00999
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Panel: Jill Callan, Chair

Introduction

The worker appeals the July 30, 2003 decision of the Review Division (Request for Review Reference #6032), which informed him that the review officer had declined to conduct a review of the January 28, 2003 letter of a vocational rehabilitation consultant of the Workers' Compensation Board (the Board). This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the *Workers Compensation Act* (the Act).

The employer has filed a notice of participation. However, although invited to do so, the employer has not provided a submission concerning the worker's appeal.

Issue(s)

The issue is whether the January 28, 2003 letter contains a decision that is reviewable by the Review Division.

Jurisdiction

This appeal raises a question concerning the jurisdiction of WCAT because the January 28, 2003 letter was written by a vocational rehabilitation consultant and the subject of the letter is vocational rehabilitation benefits.

The Review Division's jurisdiction to review a Board decision concerning a compensation matter arises under section 96.2(1) of the Act. Section 239(1) of the Act provides:

Subject to subsection (2), a final decision made by a review officer in a review under section 96.2, **including a decision declining to conduct a review under that section**, may be appealed to [WCAT].

[emphasis added]

Section 239(2)(a) states "a decision in a prescribed class of decisions respecting the conduct of a review" may not be appealed to WCAT. Section 4 of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/02 provides, in part:

For the purposes of section 239(2) (a) of the Act, the following are classes of decisions that may not be appealed to [WCAT]:

...

(e) decisions respecting the conduct of a review if the review is in respect of any matter that is not appealable to [WCAT] under section 239 (2) (b) to (e) of the Act.

Section 239(2)(b) provides “a decision respecting matters referred to in section 16” may not be appealed to WCAT.

I do not find that the review officer’s July 30, 2003 decision can be categorized as a decision regarding the conduct of a review. *The Concise Oxford Dictionary*, 9th ed. defines “conduct” as including “the action or manner of directing or managing”. Accordingly, I view the conduct of a review to refer to the manner in which the review has been processed. In this case, the central issue is whether the request for review raised a reviewable issue. The manner in which the review was processed does not arise as an issue.

However, it appears that there are two possible interpretations of the Act applicable to the decision that is before me because it concerns a request for a review of a letter regarding vocational rehabilitation benefits. If the review officer’s decision is characterized as a decision concerning vocational rehabilitation benefits, pursuant to section 239(2)(b) it would not be appealable to WCAT. However, if, pursuant to section 239(1), it is characterized as limited to the narrow question of whether the review officer correctly declined to conduct a review, WCAT would have jurisdiction over the appeal.

The exclusion of appeals concerning vocational rehabilitation benefits from the jurisdiction of WCAT arises out of recommendations at pages 217 and 218 of the *Core Services Review of the Workers’ Compensation Board* by A. Winter (British Columbia: Ministry of Skills Development and Labour, 2002). The core reviewer noted a decision concerning vocational rehabilitation benefits is discretionary but it can be overturned on appeal on the basis of differing judgement, even when the decision was made in good faith and involved the application of the relevant policies. He recommended that decisions concerning vocational rehabilitation benefits not be appealable to WCAT. Based on the core reviewer’s discussion of this issue, I view the purpose of section 239(2)(b) as restricting WCAT from substituting its judgement on the merits of a vocational rehabilitation matter. Accordingly, I do not interpret section 239(2)(b) as preventing WCAT from considering an appeal of a decision declining to conduct a review on the basis that the debate concerning whether there is a reviewable issue arises out of a letter concerning vocational rehabilitation.

I find there is a significant distinction between an appeal from a Review Division decision dealing with the merits of a vocational rehabilitation issue and a decision regarding the narrower question of whether a letter issued by a Board officer raises a

reviewable issue concerning vocational rehabilitation benefits. In the former case, section 239(2)(b) provides the decision is not appealable to WCAT. However, in the latter case, which is the situation arising out of the appeal before me, the Review Division decision is limited to the question of whether the review officer correctly declined to conduct the review. The merits of the matter, which concern vocational rehabilitation benefits, do not come into play. In fact, the review officer declined to consider the merits on the basis that the worker's request for review did not raise a reviewable issue. I find WCAT's jurisdiction to consider the worker's appeal under section 239(1) is not negated by section 239(2)(b).

Neither party to this appeal has raised the question of whether WCAT has jurisdiction over the appeal. Accordingly, I have considered whether natural justice required me to provide the parties with notice of this issue and seek their submissions. The worker has brought the appeal under the expedited fast track process set out in item #7.20 of the *WCAT Manual of Rules, Practices and Procedures*, which enables appellants to request a decision within a 120-day time frame (as opposed to the statutory 180-day time frame) if the appellant has not requested an oral hearing and has provided all evidence and submissions with the notice of appeal. In spite of my desire to meet the 120-day time frame, if I felt there was a natural justice concern, I would delay my decision to address that concern. However, in this case, it is clear that the worker's position is that WCAT has jurisdiction over the appeal as that position is inherent in the worker bringing an appeal of the Review Division decision. In terms of the employer's position, given my conclusion on the merits of this matter, the employer is not prejudiced by the fact that I have proceeded with the appeal.

Analysis

The worker sustained a compensable back injury in November 1995. Following an appeal to a Medical Review Panel, his claim was ultimately accepted for a disc protrusion. The Board assessed the worker's permanent functional impairment at 14.94% of total and granted the worker a permanent partial disability pension on a loss of earnings basis.

By decision dated September 26, 2002, a vocational rehabilitation consultant reviewed the vocational rehabilitation assistance the Board had provided to the worker and informed him of his further eligibility for vocational rehabilitation benefits. The benefits the worker had received included sponsorship of a training on the job program as a bench level repair person, the purchase of equipment to assist him with that program, and job search assistance. In the decision, the vocational rehabilitation consultant informed the worker that the Board would extend his job search allowance for a further 12-week period from September 16 to December 8, 2002.

The decision noted (at page 3) that the equipment the Board had purchased for the worker's use was being stored while he pursued other employment opportunities. It went on to state:

In the event you are unable to secure another training on the job program or an employment position, the equipment will be disposed of by way of cost transfer to another client that may be able to use it or alternatively at auction.

The decision also stated (at page 5):

Upon conclusion of your approved job search period, no further vocational rehabilitation assistance will be extended as Vocational Rehabilitation Services will have fulfilled its mandate in providing you with rehabilitation to qualify you for suitable employment other than the following:

- TOJ funding (should you locate an employer in the future) and,
- if required, relocation assistance to access the position.

The vocational rehabilitation consultant concluded the letter by informing the worker that the decision could be appealed within 90 days from its date and an appeal pamphlet was enclosed.

The worker did not appeal the September 26, 2002 decision within the statutory time frame for appealing. However, he recently sought an extension of time from the Review Division to apply for a review of the September 26, 2002 decision. In Request for Review Reference #926 dated November 21, 2003, the chief review officer denied the worker's request for an extension of time.

In the January 28, 2003 letter, which the worker sought to have reviewed by the Review Division, the vocational rehabilitation consultant stated, in part:

This letter is to confirm our conversation earlier this morning where I advised that benefits from Vocational Rehabilitation Services have now been brought to a close.

As set out in my previous correspondence dated September 26, 2002, you were offered a final 12 week extension of job search assistance. The final payment for the 12 weeks of job search assistance that was offered to you has now been authorized.

The vocational rehabilitation consultant informed the worker the equipment the Board had purchased for his use would be shipped back to the Board if he did not secure employment that would involve use of the equipment by June 30, 2003.

The vocational rehabilitation consultant completed the January 28, 2003 letter by stating:

. . . Please be advised that should you locate an employer interested in considering you for long term permanent employment, a work assessment, short training on the job program and relocation assistance may be available to you.

Please do not hesitate to contact me should you locate an employer interested in any of these return to work programs.

In his submissions, which were provided with his notice of appeal, the worker argues that he should receive further vocational rehabilitation assistance because he is not employed. He would like to be involved in a program that would lead to employment suitable to him given the extent of his disability. He has not specifically addressed the question of whether the January 28, 2003 letter is reviewable by the Review Division.

I characterize the January 28, 2003 letter as an informational letter. It confirmed the worker had received the final payment for the 12 weeks of job search assistance that had been provided to him pursuant to the September 26, 2002 decision and that the worker would have to return the equipment if he was not engaged in work requiring its use. Accordingly, I agree with the analysis set out by the review officer in the July 30, 2003 decision, which informed the worker that the January 28, 2003 letter was not reviewable by the Review Division.

Conclusion

I confirm the July 30, 2003 Review Division decision. I find the January 28, 2003 letter does not constitute a decision reviewable by the Review Division.

Jill Callan
Chair

JC/dlh