Noteworthy Decision Summary

Decision: WCAT-2004-03907-RB **Panel**: Herb Morton **Decision Date:** July 23, 2004

Requirement that Workers' Compensation Board (Board) decisions be communicated - The 75-day time limit on the Board's reconsideration authority in section 96(4) and section 96(5) of the Workers Compensation Act (Act) does not apply if the Board made an internal determination that was not communicated to the parties - Relief of costs under section 39(1)(e) of the Act

A Workers' Compensation Board (Board) case manager responded to the employers' request for relief of costs under section 39(1)(e) of the *Workers Compensation Act* (Act) by advising that the issue had previously been addressed by the Board, pursuant to a notation on an internal Board form. The case manager acknowledged that no decision letter had ever been sent to the employer, but concluded that as the matter had been previously decided by the Board, and more than 75 days had elapsed, sections 96(4) and 96(5) of the Act barred him from reconsidering the prior decision.

Based on the requirements of service in the former section 101 and the current section 221, and the sections of the Act which provide statutory appeal rights, the panel found that an internal determination on the Board's file which was not communicated could not be effective as a decision for the purpose of triggering the 75-day time limit on the Board's reconsideration authority. To find otherwise would violate basic principles of procedural fairness and natural justice. The panel did not consider that the legislature, in placing the 75-day time limit on the Board's reconsideration authority, intended this to apply to situations in which the "decision" had never been communicated so as to deprive the parties of their rights of review or appeal under the Act. If a file memorandum contained a reasoned determination, a cover letter attaching the memorandum and explaining that it contained the Board's decision would clearly constitute a decision. However, that did not occur here. The 75-day time limit on the Board's reconsideration authority did not apply since no decision had previously been communicated.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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Panel: Herb Morton, Vice Chair

Introduction

The employer appeals the October 23, 2003 decision, by the Review Division of the Workers' Compensation Board (Board), to reject the employer's request for review.

By letter of September 2, 2003, a Board case manager responded to the employer's request for relief of claim costs under section 39(1)(e) of the *Workers Compensation Act* (Act). The case manager advised that this issue had been previously addressed by the Board, pursuant to a notation on an internal Board form (the May 13, 2002 initial referral form to the Disability Awards Department). The case manager acknowledged that no decision letter was ever sent to the employer. He concluded, however, that as this matter had been previously decided by the Board, and more than 75 days had elapsed, subsections 96(4) and (5) of the Act barred him from reconsidering the prior decision. The case manager acknowledged in the September 2, 2003 letter that the employer "may feel an injustice has been done, as a decision letter was never forwarded to the accident employer". He suggested the employer might submit a request for an extension of time to appeal the prior decision.

By decision dated October 23, 2003, the review officer rejected the employer's request for review. She advised that for the purposes of sections 96.2(1)(a) and (b) of the Act, no reviewable decision is made where a Board officer simply communicates the statutory time limit on the Board's authority and the fact that the time has elapsed. She further noted that if the employer wished to appeal the prior relief of costs decision, the employer would need to submit a request for an extension of time to appeal to the Workers' Compensation Appeal Tribunal (WCAT) (as involving an unexercised right of appeal to the former Appeal Division of the Board).

The employer appeals the October 23, 2003 decision. The employer notes that the September 2, 2003 letter acknowledged that the employer did not receive a decision letter. The employer points out that the employer could not exercise their right of appeal, if they were never notified of the decision.

The employer is represented by a consultant. The worker was notified of this appeal, but is not participating.

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Issue(s)

Does the 75-day time limit on the Board's reconsideration authority apply, if no decision had previously been communicated? Did the review officer err in rejecting the employer's request for review?

Jurisdiction

Under section 239(1) of the Act, 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 the WCAT.

Law, Policy and Practice

Effective March 3, 2003, pursuant to the changes contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), sections 96(4) and (5) of the Act provide:

> (4) Despite subsection (1), the Board may, on its own initiative, reconsider a decision or order that the Board or an officer or employee of the Board has made under this Part.
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> (5) Despite subsection (4), the Board may not reconsider a decision or order if
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> (a) more than 75 days have elapsed since that decision or order was made,
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> (b) a review has been requested in respect of that decision or order under section 96.2, or
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> (c) an appeal has been filed in respect of that decision or order under section 240.

Section 1 of the Act defines the term "reconsider":

> **"reconsider"** means to make a new decision in a matter previously decided where the new decision confirms, varies or cancels the previous decision or order;

At the time of the Disability Awards referral memorandum dated May 13, 2002 (treated by the Board as containing its prior decision concerning relief of costs), section 96(6)(a) of the Act provided the employer with a right of appeal from a notice of assessment under section 39:

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(6) An employer who has received notice of

(a) an assessment under section 39 or 40,

(b) a classification, special rate, differential or assessment under section 42, or

(c) a levy under section 73

may, not more than 30 days after receiving the notice or within a longer period the chief appeal commissioner may allow, appeal the assessment, classification, special rate, differential or additional assessment, levy or contribution to the appeal division on the grounds of error of law or fact or contravention of a published policy of the governors.

Section 101 of the former *Workers Compensation Act* provided:

101 Every notice which the board is empowered or required to give to an employer or worker under this Part, or under rules or regulations made under it, must be in writing, and may be served either personally or by mailing it to the address of the person to whom it is given. Where a notice is mailed, service of the notice is deemed to be effected at the time at which the letter containing the notice, and properly addressed, postage prepaid and mailed, would be delivered in the ordinary course of post.

Effective March 3, 2003, section 101 of the Act was repealed (as set out in section 23 of Bill 63) and replaced by section 221. Section 221 of the Act currently provides:

221 (1) A document that must be served on or sent to a person under this Act may be

(a) personally served on the person,

(b) sent by mail to the person's last known address, or

(c) transmitted electronically, by facsimile transmission or otherwise, to the address or number requested by the person.

(2) If a document is sent by mail, the document is deemed to have been received on the 8th day after it was mailed.

(3) If a document is transmitted electronically, the document is deemed to have been received when the person transmitting the document receives an electronic acknowledgement of the transmission.

The *Administrative Tribunals Act*, S.B.C. 2004, c. 45, contains an amendment to section 221. This amendment has not yet been brought into force. (Order in Council No. 646, deposited with the Registrar of Regulations on June 30, 2004, brought part of the *Administrative Tribunals Act* into force, but not the consequential amendments to the *Workers Compensation Act*). Section 174 of the *Administrative Tribunals Act*, if brought into force, will amend section 221 by adding the following subsections:

> (4) If, through absence, accident, illness or other cause beyond the party's control, a party who acts in good faith does not receive the copy until a later date than the date provided under subsection (2) or (3), that subsection does not apply.
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> (5) If a notice or document is not served in accordance with this section, the proceeding is not invalidated if
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> (a) the contents of the notice or document were known by the person to be served within the time allowed for service,
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> (b) the person to be served consents, or
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> (c) the failure to serve does not result in prejudice to the person or any resulting prejudice can be satisfactorily addressed by an adjournment or other means.
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> (6) If the appeal tribunal is of the opinion that because there are so many parties to a proceeding or for any other reason it is impracticable to give notice of a hearing to a party by a method referred to in subsection (1) (a) to (c), the appeal tribunal may give notice of a hearing by public advertisement or otherwise as the appeal tribunal directs.

Policy at item #114.43 of the *Rehabilitation Services and Claims Manual*, *Volume I* (RSCM I) concerns "*Procedure Governing Applications under Section 39(1)(e)*". The policy currently provides:

> The Board has the responsibility to initiate consideration with or without a specific request or application by an employer, and to decide upon the applicability of the subsection on a claim. If a decision is made to apply this subsection, the employer will be notified. If relief has been requested, the employer will be advised if it has been denied. If there is a disagreement with such a decision, the employer may request a review by the Review Division.

Prior to March 3, 2003, the policy at item #114.43 similarly provided:

> The Claims Adjudicator, Disability Awards Officer or Adjudicator in Disability Awards have the responsibility to initiate consideration with or without a specific request or application by an employer, and to decide upon the applicability of the subsection on a claim. If a decision is made to apply this subsection, the employer will be notified. If relief has been requested, the employer will be advised if it has been denied. If there is a disagreement with such a decision, the employer may appeal to the Appeal Division.

By policy resolution dated April 23, 1998, *Decision of the Panel of Administrators #98/04/23-03*, "*Section 39(1)(e)*", 14 W.C.R. 107, the panel of administrators approved a policy directed to bring closure to the application of section 39(1)(e) relief to "historical" claims. That process was aimed at remedying the Board's earlier failure to notify employers of decisions under section 39(1)(e) of the Act.

Practice directives of the Board administration are issued under the authority of the president/chief executive officer of the Board (see item #2.20 of the RSCM I). *Practice Directive #16*, "*Section 39(1)(e) — Relief of Costs*", explains:

> Reporter Decision 271 required that Section 39(1)(e) be considered and the employer advised on all claims where wage loss exceeded 13 weeks (or where a pension was awarded). In fact, employers were rarely notified of the Board's consideration.
>
> In 1995, the Senior Executive Committee decided that commencing January 1, 1994, staff would issue a Section 39(1)(e) decision on all claims where wage loss benefits exceed 13 weeks in duration. In addition, the Committee established a "Historical Relief of Costs Project" to deal with the application of the section on claims where compensation costs were incurred and concluded between March 15, 1978, the effective date of Decision 271, and December 31, 1993….

Practice Directive #29, "*Section 39(1)(e) – Relief of Costs – December 21, 2001*", further explained:

> Claims with wage loss after December 31, 1993 do not fall within the [April 23, 1998] Panel Resolution.
>
> - No application is necessary on these claims. If there is no decision on file, the Board Officer responsible for the claim should consider relief of costs and provide a decision.

- Since the spring of 2000, e-file has been enhanced to require letters on all claims after 13 weeks of wage loss. The system also facilitates sending of cost relief decision letters.

Current practice and procedure provided by the Board administration is contained in *Practice Directive #59*, "*Reconsiderations*", effective March 3, 2003. This states:

> The purpose of the Bill 63 amendments is to promote finality and certainty within the workers' compensation system. Given the limited availability for reconsideration, it is important that all relevant evidence be submitted or obtained expeditiously and that Board officers apply law and policy in well-reasoned decisions in the first instance.

By policy resolution dated June 11, 2002, the panel of administrators approved policy relating to the changes to the Act contained in the *Workers Compensation Amendment Act, 2002* (Bill 49). Item #114.40B of the *Rehabilitation Services and Claims Manual*, *Volume II* (RSCM II), effective September 28, 2002, provided that the minimum time frame prior to consideration being given to relief of costs was reduced from 13 weeks to 10 weeks. *Practice Directive #43*, "*Relief of Costs*", indicates this does not apply to cases which reached 13 weeks of wage loss before September 28, 2002. Following the Bill 63 amendments to the Act, *Practice Directive #62*, "*Relief of Costs*", provided for a changed business process effective July 1, 2003:

> Past practice encouraged decisions on cost relief to be made immediately after 10 weeks of wage loss. Ten weeks may be insufficient time to identify pre-existing problems or their impact. In the past, decisions could be reconsidered if new evidence necessitated such an action. Now, as a result of Bill 63, the decision cannot be reconsidered more than 75 days after the decision. However, if the employer disagrees with a cost relief decision, he/she may apply to the Review Division for review.
>
> The Division is changing the timing of cost relief decisions from 10 weeks to the time of claim closure (10-week minimum) or 6 months, whichever comes first. Six months, for the small percentage of claims that go beyond that point, was selected as optimum because it allows sufficient time for medical information about a pre-existing condition to be assessed but still provides for timely relief to employers and minimizes the need for retroactive calculations for experience rated assessments.

Practice Directive #62 further explains:

> If a decision has not already been made, a decision to deny relief, allow partial relief or allow full relief must be made at claim closure or after 6 months of wage loss, whichever comes first.

> The Case Manager may defer the cost relief decision beyond 6 months but should only do so if the impact of the underlying disease, condition or disability on the compensable injury is not yet clear or major diagnostic procedures have been scheduled which would clarify whether there is in fact an underlying disease, condition or disability.

Analysis

This appeals raises a question as to the effect of the 75-day limit on the Board's reconsideration authority:

- if an issue has not been adjudicated, or,

- if it has been adjudicated, no decision has been communicated.

The worker was injured on May 15, 1998. Wage loss benefits were paid for 899 days between June 1, 1998 and May 19, 2002. There is no indication on file that consideration was given, during the period wage loss benefits were being paid, to whether the employer was eligible for relief of costs under section 39(1)(e) of the Act. The worker's claim was ultimately referred to the Disability Awards Department for assessment of the worker's entitlement to an award for permanent partial disability. The May 13, 2002 referral form contained certain questions, for which a "Yes" or "No" answer is required. In response to the question: "Has Section 39(1)(e) been applied?", the case manager responded "No". That entry has been treated by the Board as constituting its decision on the employer's eligibility for relief of claim costs, which precludes further consideration of this issue by the Board, in light of the 75-day time limit on the Board's reconsideration authority.

I find, first of all, that this entry was ambiguous. A negative response to the question "Has Section 39(1)(e) been applied?" could, in the absence of any evidence to show the contrary, simply mean that the issue had never been considered.

By the time a worker's claim is referred to the Disability Awards Department, it will normally be the case that relief of claim costs under section 39(1)(e) will have been considered by the case manager, and a negative response to this issue will be indicative of a prior decision to the effect that the employer was not eligible for relief of costs associated with the worker's temporary disability under section 39(1)(e) of the Act. However, in the absence of a prior decision, the statement that section 39(1)(e) has not been applied may equally be interpreted as meaning its application had not been considered. In the absence of any evidence of a prior decision concerning section 39(1)(e), this would seem a reasonable interpretation of the entry on the referral form. On the basis of that interpretation, the Board would be free to proceed with an initial adjudication of the employer's eligibility for relief of costs under section 39(1)(e) of the Act.

I consider it useful, however, to proceed to consider the alternative interpretation. If the entry on the referral form was intended as an adjudication of the employer's eligibility for relief of costs, what is the effect of a determination contained in an internal file memo which has not been communicated to the affected party?

In the text *Administrative Law in Canada*, 3rd ed. (Ontario: Butterworths, 2001) at page 83, Sara Blake states:

> Notice of the decision must be given to the parties. Any method that is effective is acceptable. The Ontario [*Statutory Powers Procedure Act* (SPPA)] requires that notice of the decision be mailed to the parties and prescribes an alternative procedure for giving notice by public advertisement. Since adequate notice is considered very important, strict compliance with these provisions is required. The tribunal is not relieved of compliance if the parties happen to learn of a decision by some other means. Notice may be given by an officer of the tribunal. Notice of a decision should be sent concurrently to all parties. If time limits are set for moving against a decision, delay in giving notice beyond the limit may invalidate the decision.

The analysis in Blake is based, in part, on the wording of the Ontario SPPA. Ontario, Alberta and Quebec (and recently British Columbia) have enacted minimum codes of procedure that some tribunals are required to follow. It is necessary to consider whether that analysis applies within the context of the British Columbia Act (prior to the bringing into force of the consequential amendments to the Act contained in the *Administrative Tribunals Act*).

Blake cites the court decision in *Powell* v. *Ontario (Minister of Justice)*, (1980) 118 D.L.R. (3d) 158. In that case, the Ontario High Court of Justice, Divisional Court, heard an application for judicial review. This concerned a decision by the Ontario Municipal Board, involving a zoning variance to allow a physician (Dr. Powell) to use a portion of a duplex in a residential area for use as a physician's office for a small consulting practice. A resident in the affected area, Mrs. Mackenzie, had appeared at the hearing to oppose the physician's application. However, she was not provided with a copy of the Board's decision when the physician's application was approved.

Under the *Ontario Municipal Board Act*, there was a right to petition the Lieutenant-Governor in Council (LGIC, or Cabinet), within 28 days after a decision by the Ontario Municipal Board. The Ontario Municipal Board's decision was filed and entered on March 28, 1979, but Mrs. Mackenzie did not learn of its existence until August 8, 1979. She then filed a petition to the LGIC. The LGIC acted on the petition, directing that the Ontario Municipal Board hold a new public hearing to reconsider the application. The physician filed an application for judicial review of the LGIC's order. This raised issues as to when the 28-day period for filing a petition began to run, and as

to the effect of the decision of the LGIC if the petition were brought after the 28-day period for filing a petition (following the March 28, 1979 decision which was not initially communicated to Mrs. Mackenzie).

The *Ontario Planning Act* did not require the Ontario Municipal Board's decision be provided to interested persons other than the actual applicant for the zoning variation. However, the Ontario *Statutory Powers Procedure Act*, 1971 (Ont.), c. 47 (SPPA), provided in section 18:

> 18. A tribunal shall send by first class mail addressed to the parties to any proceedings who took part in the hearing, at their addresses last known to the tribunal, a copy of its final decision and order, if any, in the proceedings, together with the reasons therefor, where reasons have been given, and each party shall be deemed to have received a copy of the decision or order on the fifth day after the day of mailing unless the party did not, acting in good faith, through absence, accident, illness or other cause beyond his control receive the copy of the decision or order until a later date.

The court found that Mrs. Mackenzie, as an interested person, was a party entitled to receive a copy of the decision for the purposes of section 18 of the SPPA (based on her active participation in the hearing before the Ontario Municipal Board). The court found that in failing to provide Mrs. Mackenzie with a copy of its decision, the Ontario Municipal Board had failed to comply with the requirements for service of a decision set out in section 18 of the SPPA. The court noted:

> We therefore have the situation of Mrs. Mackenzie receiving the notice which she was required to receive after the time in which she was able to petition the Cabinet had expired. It would be manifestly unjust in these circumstances to deprive her of any further participation in the proceedings. The Ontario Municipal Board ought not to be allowed to totally frustrate the right of a party to petition the Cabinet by delaying the giving of the required notice.

The court concluded that the decision of the Ontario Municipal Board, standing alone, was not invalid, but the Municipal Board's failure to follow the required procedures precluded Mrs. Mackenzie from exercising her possible remedies (i.e., to file a petition within 28 days). The court found that the appropriate remedy was to quash the decision of the Ontario Municipal Board, to declare the subsequent decision by the LGIC a nullity, and to remit the matter back to the Ontario Municipal Board to make a fresh decision before a differently constituted panel, with notice of the hearing to all interested parties.

The court found that it would be manifestly unfair, were a party to be deprived of the right to bring an appeal within the statutory time frame for doing so by virtue of the tribunal's failure to provide them with the decision in a timely manner. In that case, the court found the appropriate remedy was to quash the original decision and declare it a nullity. An alternative remedy might have been to consider that the decision was not effective as a decision until the requirement for service was satisfied. In either event, the party could not be deprived of their right of appeal based on a decision which had not been communicated to them until after the appeal period had expired.

I consider that the analysis in the court decision is instructive, with respect to the effect of the former section 101 of the Act, and the current section 221, concerning the requirements for service of a decision, in combination with the various provisions in the Act providing statutory time frames for filing an appeal. The former section 101 provided that every notice which the Board was empowered or required to give to an employer or worker under Part 1 must be in writing, and may be served either personally or by mailing it to the address of the person to whom it is given. In this context, I read the term "may" as providing the Board with the discretion to choose between the options of serving the notice personally or mailing it to the person, rather than meaning that service was discretionary.

Section 8 of the *Interpretation Act* provides:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

While a literal interpretation of subsections 96(4) and (5), read in isolation, would lead to a conclusion that the Board cannot reconsider any matter which had been previously addressed by the Board more than 75 days earlier, I consider that these provisions must be read in the context of the Act as a whole. A purposive interpretation of subsections 96(4) and (5) is required, which takes into effect the requirement for service of a decision and the statutory time periods for appealing a decision. I find, based on the requirements for service contained in the former section 101, and the current section 221, and the sections of the Act which provide statutory appeal rights, that an internal determination on the Board's file which was not communicated cannot be effective as a decision for the purpose of triggering the 75-day time limit on the Board's reconsideration authority. To find otherwise would violate basic principles of procedural fairness and natural justice. I do not consider that the legislature, in placing a 75-day time limit on the Board's reconsideration authority, intended this to apply to situations in which the "decision" had never been communicated so as to deprive the parties of their rights of review or appeal under the Act.

Accordingly, I do not consider that section 96(4) and (5) operate so as to limit the Board from reconsidering a matter, where the earlier file determination or "decision" had not

been communicated. Where the determination has not been communicated, it may, at least in some circumstances, remain tentative or provisional in nature, and subject to revision. The situation may be different where the affected party chooses to accept a file memorandum, and elects to bring an appeal on the basis that it constitutes a decision. It may be that the affected party could waive their right to service of a decision, for the purpose of exercising a right of appeal. I am not addressing that situation in this decision.

I have noted that item #114.43 of the RSCM I and RSCM II does not appear to require that a decision letter be provided to an employer where the employer did not request relief of claim costs and relief is not being granted. It seems strange that item #114.43 has not been amended, given that the panel of administrators found it necessary to approve a major undertaking (the historical project, as outlined in the April 23, 1998 panel of administrators' resolution) aimed at remedying this deficiency for previous years (i.e., with respect to the lack of decision letters to notify employers concerning the denial of relief of costs, where the employer had not requested relief). The April 23, 1998 resolution by the panel of administrators noted that, in 1993, the Board affirmed it would automatically apply section 39(1)(e) to all appropriate cases. *Practice Directive #16* states that the Senior Executive Committee decided that, commencing January 1, 1994, staff would issue a section 39(1)(e) decision on all claims where wage loss benefits exceed 13 weeks in duration.

Decision #271 provided that, effective March 15, 1978, decisions would be made under section 39(1)(e) without a request from an employer, and decision letters would be issued. In 1984, *Decision #271* was modified (by what is now item #114.43, RSCM I and RSCM II) to provide that employers would be given notice of a decision, only if relief was granted or the employer had requested relief. In the April 23, 1998 resolution, the panel of administrators noted that between 1978 and 1993, the Board did not consider the application of section 39(1)(e) or did not inform employers that a decision had been made about a claim which concerned them. It appears, therefore, that the April 23, 1998 resolution only addressed the period up to December 31, 1993, as, effective January 1, 1994, the Board had committed to issuing section 39(1)(e) decision letters on all claims where wage loss benefits exceed 13 weeks in duration. It is evident that the April 23, 1998 policy resolution was aimed at curing the problems caused by the failure to comply with the requirement in *Decision #271* to issue decision letters, as well as the 1984 modification to remove the requirement for decision letters where relief of costs was denied and the employer had not requested relief. Accordingly, the retention of item #114.43 in RSCM I and II appears to be contrary to the purpose and intent of the April 23, 1998 policy resolution. I do not consider, however, that the wording of item #114.43 affects my conclusion as to the requirement that the employer be notified of the Board's decision. Currently, Board practice, rather than policy, requires that a decision be issued to the employer, but it would seem preferable that this requirement be contained in policy.

Finally, I have considered whether the September 2, 2003 decision by the case manager might be viewed as constituting a communication of the Board's decision to deny relief of claim costs, thereby providing a reviewable decision with respect to the merits of the decision to deny relief of costs. The employer had not received disclosure of the claim file prior to the September 2, 2003 decision.

If a file memorandum contained a reasoned determination, a cover letter attaching the file memorandum and explaining that it contained the Board's decision (as well as providing information on review or appeal rights) would clearly constitute a decision. In the circumstances of the present case, however, the September 2, 2003 letter did not communicate the prior determination as constituting a new decision. Rather, the September 2, 2003 letter explained that the appeal period had expired. If the employer wished to treat the September 2, 2003 letter as communicating the Board's decision to deny relief of costs, it may be that it would constitute a reviewable decision concerning the merits of the decision to deny relief of costs. That would provide an alternative basis on which the Review Division would have jurisdiction to address the employer's request for review. In view of my earlier analysis in this decision, I need not rely on this alternative approach.

The issue in this appeal to WCAT concerns whether there was a reviewable decision before the Review Division. A prior WCAT decision (*WCAT Decision #2004-03344*, June 23, 2004) found, in the context of a refusal to reconsider due to the 75-day time limit on the Board's authority, that a reviewable decision arises if there is an issue concerning:

- whether time remains in the 75-day period, or

- whether there was a prior decision on point, so as to start the running of the 75-day time limit on the Board's reconsideration authority.

There are three reasons as to why the September 2, 2003 decision may be viewed as a reviewable decision concerning whether the 75-day time limit applies to limit the Board's authority to address the employer's request for relief of claim costs:

- Firstly, the negative response to the question "Has Section 39(1)(e) been applied?" in the May 13, 2002 file memorandum could, in the absence of any evidence to show the contrary, simply mean that the issue had not been previously considered, rather than meaning that the issue had previously been decided;

- Secondly, in order for a decision to be effective, there must be notice to or service on the affected party, so that the party has the opportunity to seek review or appeal within the statutory time frame provided for this (and this had not occurred prior to September 2, 2003); and,

- Thirdly, it is possible the September 2, 2003 decision could itself be viewed as constituting the Board's initial decision to deny relief of costs (although not articulated as such).

For the various reasons set out above, I find that the September 2, 2003 letter was a reviewable decision. It was not simply an information letter communicating information about the 75-day time limit on the Board's reconsideration authority. Accordingly, I allow the employer's appeal, and return this matter to the Review Division for review. I limit my decision to determining that the employer's request for review concerned a decision within the jurisdiction of the Review Division to review. It remains open to the Review Division to determine its jurisdiction in considering the employer's request for review.

Clarification of item #114.43 of the RSCM I and RSCM II may be helpful, for the reasons outlined above. Policy clarification may also be helpful concerning the requirement for notification of a decision, before the 75-day time limit on the Board's reconsideration authority will apply.

Conclusion

The October 23, 2003 Review Division decision, which rejected the employer's request for review, is varied. The request for review is returned to the Review Division for consideration on the merits.

Herb Morton
Vice Chair

HM/jy