Noteworthy Decision Summary

Decision: WCAT-2004-03983 **Panel**: Jill Callan **Decision Date:** July 27, 2004

Board's reconsideration power under sections 96(4) and 96(5) of the Workers Compensation Act, and what constitutes a reviewable decision - Where the Workers' Compensation Board (Board) issues a second decision more than 75 days after its first decision to correct an error in its first decision, the second decision is reviewable - The question of whether the Board has the power and authority to correct errors in its decisions after 75 days has passed is an important one that has not been addressed in the Board's policies or practice directives

In June the Workers' Compensation Board (Board) issued a letter informing the worker that he was entitled to a retroactive lump sum payment award of X amount plus monthly payments of Y amount beginning July. In October a second letter informed the worker that the June decision had been erroneous in informing the worker that he would receive a monthly pension of Y amount because the full amount of his pension had been commuted. The Review Division of the Board declined to conduct a review of the second letter on the basis that it was "only a clarification of the original decision of June". The review officer added that she disagreed with the October letter because it amounted to a reconsideration of the first letter after more than 75 days had passed. The worker appealed; the issue was whether the October letter constituted a reviewable decision.

The worker's request for review of the October letter raised a reviewable issue. The question before the Review Division of whether the Board has the power and authority to correct errors in its decisions after 75 days has passed was not addressed in the Board's policies or practice directives, even though it had been raised in a discussion paper by the Board's Policy and Research Division entitled Clarification of the Reconsideration and Reopening Policies. The panel varied the Review Division decision and returned the matter back to that body for adjudication on the merits of the worker's request for review, and added the vice presidents of the Board's Employer Services Division and Policy and Research Division to its distribution list.

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Panel: Jill Callan, Chair

Introduction

The worker appeals a March 26, 2004 decision of the Review Division (*Review Decision #9882*), in which the review officer declined to conduct a review of an October 8, 2003 letter issued by the Workers' Compensation Board (Board).

By decision dated June 11, 2003, a disability awards officer had informed the worker of an increase to his permanent partial disability pension following an assessment of the permanent functional impairment of his left ankle. The decision stated he would receive a retroactive lump sum award of $38,717.80 plus monthly payments of $148.46 per month beginning in July 2003. The October 8, 2003 letter informed the worker that the June 11, 2003 decision had been erroneous in informing the worker that he would receive a monthly pension of $148.46. It essentially explained that the full amount of his increased pension had been commuted and the paragraph concerning the monthly pension had been added to the decision in error.

This appeal was filed under section 239(1) of the *Workers Compensation Act* (Act), which provides that a decision of the Review Division declining to conduct a review is appealable to the Workers' Compensation Appeal Tribunal (WCAT).

Pursuant to item #7.20 of WCAT's *Manual of Rules, Practices and Procedures*, this appeal has been processed as a "fast track read and review".

The worker is represented by his union. The employer is no longer active.

Issue(s)

The issue is whether the October 8, 2003 letter, which informed the worker the Board had previously erred in informing him he would receive a monthly pension, constitutes a decision that is reviewable by the Review Division.

Background

Section 96 (1) of the Act provides that decisions of the Board are "final and conclusive". Section 96 (4) provides:

> 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.

However, section 96 (5) provides "the Board may not reconsider a decision … if (a) more than 75 days had elapsed since that decision … was made".

Sections 96 (4) and (5) came into force on March 3, 2003 as a result of the amendments that flowed from *Workers Compensation Amendment Act (No.2), 2002.*

In the request for review form filed by the worker's representative with the Review Division, she stated she disagreed with the October 8, 2003 letter because it amounted to a reconsideration of the June 11, 2003 decision after more than 75 days had passed. In addition, she referred to *Practice Directive #59,* Reconsiderations, dated March 3, 2003, which states in part (in item #2 of section E):

> In rare circumstances, reconsideration on the Board's 'own initiative' may be warranted. **For example, Board officers may wish to correct clear errors in their decisions**. However, reconsideration cannot take place if any of the following have occurred:
>
> (i) 75 days have passed since the decision was made;
> (i) a review to the Review Division has been requested in respect of the decision; or
> (ii) an appeal to WCAT has been filed in respect of the decision.
>
> [reproduced as written with emphasis added]

In the March 26, 2004 decision, the review officer declined to conduct a review of the October 8, 2003 letter because she concluded that the letter "is only a clarification of the original decision of June 11, 2003". She did not address the argument of the worker's representative that section 96 (5) (a) rendered the Board unable to alter the June 11, 2003 decision.

Submissions and analysis

In the notice of appeal she filed with WCAT on behalf of the worker, the worker's representative again raised the question of whether the Board could change a decision more than 75 days after the decision was issued. She also commented:

> If left to stand, such a finding would mean that workers are expected to appeal decisions with which they agree, just in case the board later "clarifies" (after more than 90 days have passed) that they really meant something other than what was clearly communicated in the earlier decision!

In the March 26, 2004 decision, the review officer referred to the definition of "decision" in the *Review Division Practices and Procedures*, which is as follows:

> A letter or other communication to the person affected that records the determination of a Board officer as to a person's entitlement to a benefit or benefits or a person's liability to perform an obligation or obligations under any section of the *Act* other than one that authorizes the Board to issue orders.

Pursuant to section 96 (1) of the Act, the June 11, 2003 decision was a final and conclusive decision. Although section 96 (4) enables the Board to reconsider its decisions, section 96 (5) places limits on that reconsideration power. It is clear that the Legislature intended to ensure there was an element of finality of Board decisions.

It appears to be well-established that courts and administrative tribunals may correct clerical and typographical errors in their decisions (see, for instance, *Chandler* v. *Alberta Association of Architects* [1989] 2 S.C.R. 848). The central question that was raised by the worker's representative before the Review Division is whether, in light of sections 96 (4) and (5) of the Act, the Board has the power and authority to alter its decisions after 75 days have passed. She notes the provision from *Practice Directive #59*, which I have quoted earlier in this decision, indicates that the 75-day time limit for reconsideration set out in section 96 (5) applies when Board officers "wish to correct clear errors in their decision". She contends that this includes errors such as that contained in the June 11, 2003 decision concerning the monthly pension payment.

I have reviewed the policies of the board of directors and the Board's practice directives to determine whether there is a policy or set of guidelines specifically addressing clarifications and corrections of errors. This very important question does not appear to have been addressed in the policies or practice directives. However, I note it has been raised in the discussion paper issued by the Policy and Research Division entitled *Clarification of the Reconsideration and Reopening Policies* available online at http://www.worksafebc.com/law_and_policy/policy_consultation/assets/pdf/clarification_reconsideration_discussion.pdf. In my view, this question is of fundamental importance to workers and employers and to the Board itself.

One possible approach to my adjudication of the issue raised in this appeal would involve my determining whether the Board has the power to correct errors in its decisions after 75 days have passed and, if so, deciding whether letters communicating changes to earlier Board decisions are reviewable and appealable. However, as these questions appear to be at the very heart of the matter that was before the Review Division, I have determined that it is more appropriate for me to vary the Review Division decision and return this matter to the Review Division for the adjudication of the merits of the review requested by the worker.

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As I believe this appeal raises fundamental questions concerning the Board's power and authority to alter decisions, I have added the vice presidents for the Worker and Employer Services Division and Policy and Research Division to the distribution list.

Conclusion

The March 26, 2004 Review Division decision is varied. I find the worker's request for review of the October 8, 2003 letter raised a reviewable issue. I return this matter to the Review Division for the adjudication of the merits of the worker's request for review.

Jill Callan
Chair

JC/dlh

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