Noteworthy Decision Summary

Decision: WCAT-2004-04157 **Panel**: Herb Morton **Decision Date:** August 6, 2004

What constitutes a reviewable decision respecting compensation – Review Division has jurisdiction to review a Worker's Compensation Board action under section 15 of the Workers Compensation Act directing payment of compensation to a third party private insurance company

The Workers' Compensation Board (Board) directed the payment of compensation payable to the worker to a private insurance company based upon a signed authorization from the worker. The Review Division of the Board found that the Board's letter was not a decision within the definition of "decision" in the Review Division *Practices and Procedures* manual, and denied the worker's request for review. The worker appealed.

The Winter Report recommended that every adjudicative decision that affects a worker be appealable, but said that for the purposes of that report, an "adjudicative decision" was not intended to include a procedural or administrative decision. The WCAT panel held that the decision was not solely administrative or procedural in nature and thereby immune from review or appeal. In coming to its conclusion, the panel considered the following factors: (a) the legislative protection afforded by section 15 of the *Workers Compensation Act* (Act) against assignment or attachment of compensation, (b) the stipulation in policy #48.10 of the *Rehabilitation Services and Claims Manual* (RSCM) that making a cheque payable to a worker but sending it to a solicitor, as creditor, violates section 15; (c) the need to adopt a uniform interpretation of the word "decision", under section 96.2 of the Act and other sections; (d) the requirement to address this jurisdictional issue on a broad substitutional basis, recognizing that this affects access to both review and appeal bodies; (e) the 75 day limit on the Board's reconsideration authority, and consequent lack of authority of Board management to further review the Board officer's decision; (f) the need to ensure that the "correct" decision is made, given the degree of finality attached to Board decision-making; (g) the benefits of having such decisions subject to review and appeal; (h) the presence of an express policy stipulating that the attachment of money owing to the accident fund is not subject to review, and the absence of any similar policy concerning assignments to insurance companies. Accordingly, the panel found that the letter involved an adjudicative decision with respect to the disposition of the worker's compensation benefits, with respect to whether it was appropriate and lawful under s. 15 to divert these benefits to the insurance company. To the extent that a more restrictive reading of the definition of "decision" in the Review Division policy manual implies that only determinations concerning eligibility, quantum and timing of compensation are subject to review and appeal, it may be that consideration should be given to expanding that definition (i.e. to take into account the need to make determinations with respect to the application of other provisions of the Act respecting compensation apart from the initial determination of entitlement to compensation).

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WCAT Decision Date: August 06, 2004
Panel: Herb Morton, Vice Chair

Introduction

The worker has appealed the Review Division decision dated March 18, 2004 (*Review Decision #9324*). The Review Division denied the worker's request for review, on the basis that the August 14, 2003 letter by the disability awards officer was not a reviewable decision. That letter concerned the Board's action of directing compensation payable to the worker (involving a commutation of his permanent disability award) to a private insurance company based upon a signed authorization from the worker.

The worker requested that this appeal be considered on a "read and review" basis. I agree that the issues raised in this appeal do not require an oral hearing. As no submission was provided on behalf of the worker, this appeal will be considered on the basis of his notice of appeal and the other evidence on file. The employer is no longer registered with the Board.

Issue(s)

The worker's appeal concerns the question as to what constitutes a decision respecting a compensation matter, so as to be reviewable by the Review Division under section 96.2 of the *Workers Compensation Act* (Act). Does the Review Division have authority to review the Board's action in directing payment of compensation to a third party (in the name of the worker)? Did the Review Division err in rejecting the worker'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 WCAT. WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1) of the Act). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors that is applicable (section 250(2) of the Act).

Background

The worker's claim for back complaints was originally accepted as being causally related to his work as an electrician in November 1997. Following a reopening and further investigations, a diagnosis of septic discitis was suggested and the worker's claim was readjudicated. By finding dated November 13, 2002, the Review Board allowed the worker's appeal. The Review Board found the worker's back problems were due to his work as an electrician, rather than involving a non-compensable spontaneous septic discitis.

By letter of March 24, 2003, a private insurance company advised the Board that the worker had been paid $35,000 in long term disability benefits from February 19, 1999 to April 20, 2000. An assignment from the worker, dated September 14, 1998, was enclosed.

By letter dated April 3, 2003, the case manager advised the worker concerning the implementation of the Review Board finding. The case manager advised the worker that he was owed nearly $50,000 in wage loss benefits, for the period February 19, 1999 to April 20, 2000. Of this, $35,000 would be paid to the private insurance company based on the assignment. The remaining $14,967.74 was sent to the worker. The worker did not dispute that decision.

A subsequent telephone memo on file dated June 19, 2003 indicates that an enquiry was made with the private insurance company concerning the payment of benefits after April 20, 2000. The telephone memo indicates "Yes, payments made to July 31/01". No information appears to have been provided concerning the further amounts paid by the insurance company, beyond the $35,000 described in the March 24, 2003 letter from the insurance company. It is not apparent why the additional amounts claimed by the insurance company were not described in the March 24, 2003 letter.

The worker was assessed for a permanent partial disability award. By decision dated June 20, 2003, the worker was granted a pension award of 1.90% of total disability. This was commuted and paid in a lump sum of $18,210.95.

By letter dated August 14, 2003, the disability awards officer advised the worker:

> Given the assignment previously received to our file, we honoured our obligation to comply with the directions of the assignment form received. The disbursement of the monies issued by the Board remains a private matter for yourself and the third party involved to resolve.

This appears to indicate that the full value of the worker's pension award was paid to the insurance company, without inquiry as to what amount had been paid to the worker in excess of the $35,000 (which had already been reimbursed).

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The August 14, 2003 letter by the disability awards officer advised the worker that if he disagreed with this decision, he had a right to request review by the Review Division. The worker requested review by the Review Division. By decision dated March 18, 2004, the Review Division rejected the worker's request for review. The review officer noted that the insurance company had been fully reimbursed for the $35,000 relating to the period up to April 20, 2000. The review officer commented:

> While it appears that you were paid by the third party for an additional period of time, I cannot locate any payment details, or confirmation as to the exact period of time you may have received additional payments.

The review officer suggested the worker might wish to take his complaint to the management structure internal to the Board, in order to seek a remedy with respect to this matter. She concluded that the August 14, 2003 letter did not involve a "decision", within the meaning of section 96.1(1)(a) of the Act, based on the definition of the term "decision" contained in the *Review Division – Practices and Procedures*. The review officer advised the worker that:

> . . . the Board's decision to send your pension cheque to a third party is an administrative matter and is not a reviewable decision.

Analysis

In this appeal, the worker states he is asking for a decision that the letter of August 14, 2004 contains a decision or decisions and is subject to a review.

Section 96.2(1)(a) of the Act provides that a party may request a review officer to review "a Board decision respecting a compensation or rehabilitation matter under Part 1" of the Act. The *Review Division – Practices and Procedures* contains the following definition of "decision":

> 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.

The review officer found that the August 14, 2003 letter concerning the payment of the commuted value of the worker's pension to a third party (in the name of the worker) was not a decision within this definition. Accordingly, the circumstances of this case may raise a broader issue as to whether the definition of "decision" in the *Review Division – Practices and Procedures* is sufficiently broad to capture the full scope of decision-making by the Board which might properly be viewed as subject to review and appeal.

The Review Division is a body internal to the Board. In conferring authority on WCAT to hear an appeal from a refusal to review, the legislature implicitly concluded that the external appeal body should have the final say as to what constitutes a reviewable decision (subject to the policy-making authority of the board of directors under the Act, and the authority of the Lieutenant Governor in Council under sections 224(2)(j) and 239(2)(a) to make regulations prescribing classes of decisions respecting the conduct of a review which are not appealable to WCAT). If it were otherwise, the Board would be in the position of determining workers' and employers' rights of access to the external appeal tribunal (WCAT). Accordingly, WCAT has a responsibility to determine this issue, which is raised by the worker's appeal.

Section 15 of the Act provides:

> A sum payable as compensation or by way of commutation of a periodic payment in respect of it is not capable of being assigned, charged or attached, nor must it pass by operation of law except to a personal representative, and a claim must not be set off against it, except for money advanced by way of financial or other social welfare assistance owing to the Province or to a municipality, or for money owing to the accident fund.

Policy at #48.20 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) provides:

> **#48.20 Money Owing in Respect of Benefits Paid by Other Agencies**
> Workers frequently receive benefits from other governmental or nongovernmental agencies while awaiting the adjudication or a review or appeal of their compensation claim. If they eventually receive compensation benefits for the same period, the agency may have a claim against them for reimbursement of the funds advanced by it, but can only claim reimbursement from the Board if it is a Provincial Government agency or a municipality. In the case of health and welfare plans or similar insurance plans, while the *Act* in section 15 does not permit direct refunds to such agencies, the Board may, on receipt of a worker's signed authorization, mail cheques payable to the worker in care of the agency. In those cases where an inquiry is received from an insurance company or other health and welfare plan, the Board officer may provide the requested information as long as a signed consent from the worker is on file identifying both the Workers' Compensation Board and the insurance company. See also policy item #99.80.

A somewhat similar situation arises in connection with the application of section 34 of the Act. Section 34(1) provides:

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> In fixing the amount of a periodic payment of compensation, consideration must be had to payments, allowances or benefits which the worker may receive from the worker's employer during the period of the disability, including a pension, gratuity or other allowance provided wholly at the expense of the employer, and a sum deducted under this section from the compensation otherwise payable may be paid to the employer out of the accident fund.

Section 34 of the Act expressly authorizes the Board to consider the amounts paid to a worker by the employer, including a pension, gratuity or other allowance provided wholly at the expense of the employer, and to deduct an amount from the compensation payable to the worker so that the amount may be paid to the employer. That is, in its effect, similar to what occurred in this case, except that the amount was paid in the name of the worker in the care of the insurance company, rather than being paid to the insurance company in its own name.

Legally, the deduction of benefits from the compensation payable to a worker so that the compensation may be paid directly to the employer under section 34, and the payment of benefits owing to the worker to a third party in the name of the worker, may be viewed as quite different and distinct. In practical terms, however, these two situations seem indistinguishable in terms of their impact on the worker. In both situations, the worker’s compensation benefits are being diverted to a third party (either the employer or an insurance company), in recognition of the amounts advanced to the worker during the period of the worker’s disability. This appears to serve a valuable purpose, in supporting the actions of employers or insurance plans in maintaining income support to workers during periods when the extent of their workers’ compensation entitlement is under investigation or appeal.

Published Appeal Division decisions dealing with the application of section 34 include *#92-1717* (8 WCR 715), *#92-0922* (9 WCR 39), *#95-0165* (11 WCR 13) and *#98-0496* (15 WCR 67). *Appeal Division Decision #92-1717* was the subject of a petition for judicial review (*City of Vancouver* v. *WCB (BC), Cartwright and Templeton*, British Columbia Supreme Court, March 25, 1994 (10 WCR 709).

A prior Appeal Division decision concerning the application of the policy at #48.20 of the former *Rehabilitation Services and Claims Manual* is *#96-0080*, dated January 19, 1996. In that case, the Appeal Division panel found the Board officer acted appropriately in paying the portion of the worker’s benefits required by the assignment to the provincial Crown in accordance with section 15 of the Act, and policy at #48.20 and #48.22. Thus, there is prior precedent for viewing such decisions concerning sections 15 and 34 as ones which were subject to appeal, within the terms of the Act prior to the March 3, 2003 amendments.

Is there any reason to consider that the legislature intended the Review Division to take a more narrow view of its jurisdiction? Are there actions of Board officers which do not

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constitute decisions? Certainly, some provisions of the Act distinguish between acts and decisions. Section 96(1) of the Act provides, in part, that an action may not be brought against the Board or an officer of the Board, in respect of any act, omission or decision that was within the jurisdiction of the Board or that the officer believed was within the jurisdiction of the Board. Similar wording is contained in section 113(1) and (4) of the Act. Thus, not every act or omission need be a decision.

The March 3, 2003 revisions to the Act contained in Bill 63 followed on, and incorporated in large measure, the recommendations contained in the March 11, 2002 *Core Services Review of the Workers' Compensation Board* (the Winter Report, accessible at: http://www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf). In that report, the core reviewer recommended that any adjudicative decision made by an officer of the Board which affects a worker covered by the Act, be the subject matter of an application for internal review. The core reviewer explained (at page 28):

> (For the purposes of this Report, an "adjudicative decision" is not intended to include a procedural or administrative decision made by the WCB Officer acting within the authority provided to him/her by the WCB.) This internal review process would apply equally to an adjudicative decision rendered by a WCB Officer with respect to a claims, prevention/occupational health and safety, or assessment/classification issue.

For the purpose of this decision, I will assume (without so determining), that it is only an adjudicative decision, and not a procedural or administrative decision, which is subject to review or appeal. The review officer's categorization of the August 14, 2003 letter as "administrative" in nature fits with this analytical framework. This gives rise to the question as to what is an adjudicative decision, and what is a procedural or administrative decision.

It is evident from section 15 of the Act that the legislature intended to protect the benefits payable to a worker. Accordingly, it seems to me that consideration as to whether compensation should be directed to a third party involves the exercise of a statutory power of decision-making under section 15. On this analysis, the determination as to whether compensation is to be paid to the worker, or to a third party, may also be viewed as a decision respecting a compensation matter, as this requires an adjudication which takes into account section 15 of the Act.

The question may posed as to whether it suffices to make the matter purely procedural or administrative in nature, where the compensation is being paid in the name of the worker. Is this simply a question as to where the worker's compensation should be mailed? The answer to that question appears to be provided by #48.10 (RSCM I), which states:

> The statutory lien provided for solicitors under Section 79 of the *Legal Profession Act* is not applicable to workers' compensation. If the solicitor would have any right to a lien at common law or in equity, that right is abrogated by the terms of Section 15 of the *Workers Compensation Act*. Compensation funds cannot, therefore, be paid to a solicitor acting for a claimant. Nor would it be right for the Board to induce the same result in a more devious way by making the cheque payable to the claimant and sending it in care of the solicitor.

On the basis of the policy at #48.10, it is evident that the fact that the compensation is being issued in the name of the worker is not a complete answer as to whether a proposed diversion to a third party is in compliance with section 15 of the Act.

To decide that the diversion of compensation is merely a procedural or administrative act, which does not involve a decision respecting a compensation matter, would seem to imply that the decision-maker is not required to consider whether the proposed diversion complies with section 15 of the Act. Accordingly, I have some difficulty with applying an interpretation of the phrase "decision respecting a compensation matter" which would treat such actions as being merely procedural or administrative in nature and not involving an adjudicative decision. Viewing the August 14, 2003 letter as a decision respecting a compensation matter gives recognition to section 15 of the Act, by requiring consideration as to whether diversion of compensation in the circumstances of the particular case accords with section 15 and the policy of the board of directors.

Furthermore, the Act contains several provisions to guide Board decision-making. Section 99(2) and (3) provide:

> (2) The Board must make its decision based upon the merits and justice of the case, but in so doing the Board must apply a policy of the board of directors that is applicable in that case.
>
> (3) If the Board is making a decision respecting the compensation or rehabilitation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the Board must resolve that issue in a manner that favours the worker.

Section 96(4) and (5) and (7) 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.
> (5) Despite subsection (4), the Board may not reconsider a decision or order if
> (a) more than 75 days have elapsed since that decision or order was made…

> (7) Despite subsection (1), the Board may at any time set aside any decision or order made by it or by an officer or employee of the Board under this Part if that decision or order resulted from fraud or misrepresentation of the facts or circumstances upon which the decision or order was based.

In interpreting the word "decision" in section 96.2 of the Act, I am reluctant to adopt a different or narrower interpretation than is contemplated by the other uses of the term decision in the Act (unless the context clearly requires this).

While the immediate subject of this appeal concerns the Review Division's jurisdiction, it ultimately concerns a determination of WCAT's jurisdiction. A conclusion that a matter is not reviewable by the Review Division has the consequence that the matter cannot be appealed to WCAT. Accordingly, I do not consider it appropriate to defer to the approach set out in the Review Division decision. I am obliged to determine this issue on a broad substitutional standard of review (as described at page 34 of the Winter Report).

At page 34 of the Winter Report, the core reviewer commented:

> . . . I will be recommending significant restrictions to the ability for a worker or an employer to seek a retroactive "reconsideration" of a previous decision rendered by the WCB/Appeal system. It is therefore imperative that the WCB and the appellate system are provided the widest latitude to ensure that the "correct" decision is made before the matter has been finalized.

In fact, the legislative changes provided by Bill 63 went beyond the recommendations of the core reviewer, in terms of the increased finality of decision-making and the absence of a power of "reinquiry" after 75 days. This makes the reasoning of the core reviewer all the more compelling, as to the importance of providing the review and appeal bodies with the widest latitude to ensure that the "correct" decision is made before the matter has been finalized. Accordingly, to the extent there may be some doubt as to whether the August 14, 1993 letter constitutes a reviewable decision, I would resolve this ambiguity in favour of an interpretation which permits the worker access to the avenues of review and appeal established under the Act.

The review officer suggested the worker might wish to take his complaint to the management structure internal to the Board, in order to seek a remedy with respect to this matter. However, the Review Division is in a better position to address the worker's concerns than Board management. Due to the 75 day time limit on the Board's reconsideration authority, the opportunity for WCB management to correct any errors is strictly limited in time. In the event that any deficiency was identified in the decision-making process, it would be open to the Review Division to refer the decision back to the Board, with or without directions, under section 96.4(8)(b) of the Act. On the basis of such a referral, the Board would have authority to further address the matter,

notwithstanding the lapse of more than 75 days since the decision under review was issued. Alternatively, the Review Division could confirm, vary or cancel the decision. This is a factor which supports taking a broad approach in determining the jurisdiction of the review and appeal bodies under the Act.

I have also considered whether subjecting the August 14, 2003 letter to review or appeal serves any useful purpose, in terms of whether the review or appeal bodies would be in a position to grant a remedy if any error were found in the decision. Even if an immediate remedy could not be provided in a particular case, decisions by the review or appeal bodies could provide useful guidance to the workers' compensation system over the long term. The possibility of review or appeal may have a salutary effect on the quality of documentation or reasoning provided for a decision. If an error were identified in the decision, the Board might well be in a stronger position than the individual worker to request redress from the insurance company. As well, the availability of review or appeal enhances accountability in the workers' compensation system, in that a worker or employer has the opportunity to express their concerns and have these addressed (in regards to whether the actions taken were in accordance with the Act and policy). Even where the review or appeal confirms the original decision, the availability of this further review or appeal may assist the affected parties in accepting that the decision was properly arrived at under the Act.

The decision of the review officer hinged largely on the definition of decision contained in the *Review Division – Practices and Procedures*. With respect to that definition, I consider that the August 14, 2003 letter may be viewed as a letter to an affected worker, which recorded the determination of a Board officer as to the worker's entitlement to a benefit. I read this as encompassing both the determination as to the amount of compensation payable to the worker, and the question as to whether this compensation would in fact be payable to the worker or to a third party (i.e. by making the cheque payable to the worker but sending it to a third party). Thus, the August 14, 2003 letter may be viewed as a decision, on a liberal interpretation of the definition of decision contained in the *Review Division – Practices and Procedures*. To the extent that a more restrictive reading of that definition implies that only determinations concerning eligibility, quantum and timing of compensation are subject to review and appeal, it may be that consideration should be given to expanding this definition (i.e. to take into account the need to make determinations with respect to the application of other provisions of the Act respecting compensation apart from the initial determination of entitlement to compensation).

Similar issues may arise in connection with section 98 of the Act, although I need not address that provision in my decision. With respect to the recovery of overpayments by the Board, and the manner of recovery, policy at #48.46 (RSCM I) provides that no request for review by the Review Division may be made on the question of whether the Board should recover the overpayment or not, and on the manner of recovery. However, there is no similar policy prohibiting review of a decision to divert compensation to a third party.

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For all of the reasons set out above, I am not persuaded that the August 14, 2003 letter was solely administrative or procedural in nature (and not an adjudicative decision), and thereby immune from scrutiny under the review and appeal structures provided under the Act. Factors in this decision included:

(a) the legislative protection afforded by section 15 against assignment or attachment of compensation;

(b) the stipulation in #48.10 that making the cheque payable to a worker but sending it to a solicitor (as a creditor) would violate section 15;

(c) the need to adopt a uniform interpretation of the word "decision", under section 96.2 and other sections of the Act;

(d) the requirement to address this jurisdictional issue on a broad substitutional basis, recognizing that this affects access to both the internal review and external appeal bodies;

(e) the 75 day time limit on the Board's reconsideration authority, and consequent lack of authority of Board management to further review the Board officer's decision;

(f) the need to ensure that the "correct" decision is made, given the degree of finality attached to Board decision-making;

(g) the benefits of having such decisions subject to review and appeal;

(h) the presence of an express policy stipulating that the attachment of money owing to the accident fund is not subject to review, and the absence of any similar policy concerning assignments to insurance companies.

Accordingly, I find that the August 15, 2003 letter involved an adjudicative decision with respect to the disposition of the worker's compensation benefits, with respect to whether it was appropriate and lawful under section 15 of the Act to divert these benefits to the insurance company. The August 15, 2003 letter was not simply an information letter, or a letter concerning a procedural or administrative matter. The worker's appeal is allowed.

Conclusion

I find that the letter of August 14, 2004 contained a decision respecting a compensation matter, and is subject to review. The March 18, 2004 Review Division decision, which rejected the worker's request for review, is varied. The request for review is returned to the Review Division for consideration.

Herb Morton
Vice Chair

HM/dc