

Noteworthy Decision Summary

Decision: WCAT-2004-04852 **Panel:** Steven Adamson **Decision Date:** September 16, 2004

Workers Compensation Board Reconsideration – Characterization of Request – Characterization of Decisions – Section 96(5) of the Workers Compensation Act

This is a decision of interest involving the characterization of letters from the Workers' Compensation Board (Board) regarding relief of costs, namely whether they were appealable decisions, and the characterization of the employer's request for a new decision, namely whether it was a request for a reconsideration or a request for a determination on something not already determined by the Board.

The worker suffered an injury to his back at work, and the Board accepted the worker's claim for wage loss benefits which lasted for many months. The employer applied for relief of costs, arguing that the worker had a pre-existing condition that enhanced his disability. The Board sent a letter dated December 16, 2002 denying relief of costs. In response to a further request from the employer, referring to new medical evidence of a pre-existing condition, the Board sent a letter dated August 11, 2003, notifying the employer of its right to request a review of the December 16, 2002 decision. The Board sent another letter dated October 16, 2003 stating the last day to reconsider the December 16, 2002 decision was March 3, 2003, and the last day to request a review was March 17, 2003. The Workers' Compensation Review Division (Review Division) found that it had no jurisdiction to review the December 16, 2002 relief of costs decision because it was made before the March 3, 2003 changes to the *Workers Compensation Act* (Act) which created the Review Division. The Review Division also found that the August 11, 2003 letter could not be reviewed because it did not contain any decisions, and the October 16, 2003 letter was not reviewable because it simply communicated statutory time limits.

The panel held that the December 16, 2002 letter was not reviewable by the Review Division and that the Workers' Compensation Appeal Tribunal (WCAT) had the authority to hear the appeal because the employer had a right of appeal to the Appeal Division that was pending but had not yet been exercised before March 3, 2003. He noted that an application for extension of time to appeal that decision to WCAT had been filed. The panel agreed that the August 11, 2003 letter was informational only. The panel also agreed that the October 16, 2003 letter was informational only because the employer's request was for a new decision on a matter previously decided, and the Board correctly informed the employer that the time to reconsider under section 96(5) of the Act had expired.

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Introduction

The employer appeals a January 2 , 2004 decision of a review officer (*Review Decision #9872*) declining to conduct a review of letters from a Workers' Compensation Board (Board) case manager dated December 16, 2002, August 11, 2003 and October 16, 2003. The review officer rejected the review of the December 16, 2002 relief of costs decision on the basis that this decision was made prior to March 3, 2003 and, was therefore, appealable to the former Appeal Division and could not be reviewed by the Review Division. The review officer rejected the review of the August 11, 2003 letter as it did not contain any decisions. The Board's October 16, 2003 letter was found to not be reviewable as it simply communicated a statutory time limit on the Board's authority and the fact that the time limit had elapsed.

This appeal has proceeded on the basis of a review of the claim file and the submissions provided by the employer's representative.

The worker is participating in the employer's appeal and is represented by counsel. Counsel wrote to WCAT indicating the worker took no position in the employer's appeal.

Issue(s)

The issue is whether the case manager's letters dated December 16, 2002, August 11, 2003 and October 16, 2003 constitute decisions that are reviewable by the Review Division.

Jurisdiction

Section 239(1) of the *Workers Compensation Act* (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, may be appealed to Workers' Compensation Appeal Tribunal (WCAT).

Background

The background to this appeal may be summarized as follows:

- The worker is a shop teacher. On October 1, 2002 he was jabbed in the back by a student with the sharpened end of a piece of dowel. As a result, the worker “snapped forward” and stood up at the same time. He immediately felt tightness in his low back.
- The Board accepted the worker’s claim for a low back strain and 118 days of wage loss benefits were provided with the last payment ending March 26, 2003. I note the September 7, 2004 WCAT decision found the worker was entitled to further wage loss benefits until May 29, 2003.
- The case manager sent the employer a December 16, 2002 decision letter denying relief of costs pursuant to section 39(1)(e) of the Act. After setting out the relevant law and policy and noting his review of the file, he found there was no evidence to support the conclusion that the worker had a pre-existing disease, condition or disability that enhanced (prolonged or made greater in extent under the claim) the disability accepted.
- A ten-week review checklist written by the case manager dated December 16, 2002 indicates in section “F” that relief of costs under section 39(1)(e) will not be applied.
- A claim log entry dated December 16, 2002 written by the case manager states as follows:

After reviewing this claim, I concluded that currently, there is no medical evidence that the worker’s recovery has been prolonged due to a pre-existing condition, disability or disease. Therefore, I have decided not to grant relief of costs to the employer under S.39(1)(e).

ROC NO letter generated.
- The employer’s representative wrote to the Board on July 24, 2003 noting the relief of costs denial letter in December 2002. The representative stated Dr. Serink’s March 13, 2003 report was significant new evidence of pre-existing degenerative disc disease. The Board was requested to make a further review of its decision regarding relief of costs in light of this new evidence.

- By letter dated August 11, 2003 the Board case manager notified the employer of its right to request a review of the December 16, 2002 (incorrectly dated 2003) relief of costs decision.
- The Board issued another letter dated October 16, 2003, which referred to the December 16, 2002 (incorrectly dated 2003) relief of costs decision letter. It stated the last day to reconsider this decision was March 3, 2003. Further, it was noted the last date to request a review of the decision by the Review Division was March 17, 2003. The case manager stated the Board would not consider a review of the relief of costs decision beyond the review dates noted. As a result, she was unable to reconsider the December 16, 2002 (incorrectly dated 2003) decision. The case manager informed the employer that it could request an extension of time for a review of the relief of costs decision to the Review Division. A November 4, 2003 letter from the case manager corrected the references in the October 16, 2002 letter to a December 16, 2003 letter.
- In a letter dated November 7, 2003 the employer requested a review of the December 16, 2002, August 11, 2003 and October 16, 2003 letters from the Board.
- The Review Division letter dated January 2, 2004 found it could not review the December 16, 2002 relief of costs decision letter as it did not have jurisdiction to conduct reviews of relief of costs decisions made prior to March 3, 2003 per section 96.2(2)(e) of the Act. The review officer found further that the August 11, 2003 letter could not be reviewed as it was a response to the employer's July 24, 2003 letter and does not contain any decisions. Finally, the review officer found the October 16, 2003 letter could not be reviewed as it simply communicated the statutory time limit on the Board's authority and the fact that the time limit had elapsed.

Law and Policy

The statutory references set out below came into effect on March 3, 2003, and therefore apply to the case manager's August 11, 2003 and October 16, 2003 decisions and review officer's January 2, 2004 decision.

Section 96(4) of the Act authorizes the Board to reconsider decisions on its own initiative.

Section 96 (5) of the Act provides:

- (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,
- (b) a review has been requested in respect of that decision or order under section 96.2, or
- (c) an appeal has been filed in respect of that decision or order under section 240.

Section 1 of the Act defines “reconsider” as follows:

"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;

Item #C14-103.01 of the *Rehabilitation Services and Claims Manual, Volume I*, is entitled Changing Previous Decisions – Reconsiderations. This policy provides:

(a) Definition of reconsideration

A reconsideration occurs when the Board considers the matters addressed in a previous decision anew to determine whether the conclusions reached were valid. Where the reconsideration results in the previous decision being varied or cancelled, it constitutes a redetermination of those matters.

Sections 96.2(1)(a) and 96.3(1)(a) of the Act allow parties to request a review of a Board decision respecting a compensation or rehabilitation matter under Part 1 of the Act.

The *Review Division - Practices and Procedures* defines “decision” 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.

Submissions and Analysis

The employer’s January 9, 2004 written submission argued the new medical evidence should not be ignored at the expense of the employer and attached previous letters to the Board requesting a further adjudication of the relief of costs issue.

I have first considered whether the case manager's December 16, 2002 relief of costs decision is reviewable. After reviewing the worker's file and the relevant law and policy I find the December 16, 2002 decision does not contain a reviewable decision. Although this letter certainly contains a decision as contemplated in the *Review Division - Practices and Procedures* definition of "decision", the date of the decision renders it not reviewable by the Review Division. Section 96.2(2)(e) of the Act provides the Review Division with the jurisdiction to review relief of costs decisions. The December 16, 2002 decision, however, occurred prior to changes in the Act creating the Review Division and defining its jurisdiction. Section 2(2) of the *Transitional Review and Appeal Regulation*, B.C. Reg. 322/02 provides, in these circumstances, a party can apply to the WCAT chair pursuant to section 243(3) of the Act, as amended by Bill 63, for an extension of time to appeal. Accordingly, WCAT is authorized to hear an appeal of the December 16, 2002 decision as the right of appeal to the Appeal Division was pending but not yet exercised on the transition date (March 3, 2003). I note the employer's January 9, 2004 written submission requested an extension of time to appeal the December 16, 2002 decision to WCAT and this process is now underway.

I have next considered whether the Board's August 11, 2003 letter contains a reviewable decision. After reviewing the contents of the letter and the employer's request which prompted the letter, I find it does not contain any reviewable decision. The letter provides information concerning the employer's right to request a review of the December 16, 2002 relief of costs decision letter by the Review Division. Although the information provided by the case manager in the letter is incorrect, and the employer actually has an unexercised right of appeal to WCAT, the letter was an informational letter only and did not contain any reviewable decision.

Finally, I have considered whether the Board's October 16, 2003 letter contains any decisions reviewable by the Review Division. The October 16, 2003 letter noted the employer's July 24, 2003 letter sought a further consideration of the initial relief of costs decision dated December 16, 2002. The Board's response was that the statutory deadline for reconsidering the initial decision had passed. I note the Board's reconsideration authority (section 96(5) of the Act) is limited. As a result it is important that the scope of Board decisions be very clear. In *WCAT Decision #2004-00638, (20 Workers' Compensation Reporter 59)* http://www.worksafebc.com/publications/wc_reporter/volume_20/assets/pdf/20_1.pdf the panel considered the following in analyzing the effect of a relief of costs decision:

A preliminary issue arises as to whether the August 28, 2000 decision by the case manager to deny relief of claim costs was of a conditional nature, which was intended to be "time-limited" in its application. Was it limited to the issue as to whether, in terms of the claim costs to the date of the decision, the worker's disability had been prolonged or enhanced by reason of a pre-existing disease, condition or disability? Such a decision would leave open for future consideration the question as to whether

further periods of disability involved prolongation or enhancement on the basis of a pre-existing disease, condition or disability.

Alternatively, did the August 28, 2000 decision provide a categorical denial as to the existence of any pre-existing disease, condition or disability? If so, there would be no basis for a later new decision under section 39(1)(e). If there were no pre-existing disease, condition or disability, the occurrence of further periods of disability would not give rise to a need for further consideration as to whether there had been a prolongation or enhancement by reason of a pre-existing disease, condition or disability. Any further consideration under this section would necessarily involve a reconsideration of the earlier decision, which would be subject to the 75 day time limit on the Board's reconsideration authority.

In this reported case, the panel characterized the relief of costs decision as a categorical denial as to the existence of a pre-existing disease, condition or disability.

In the case at hand, the December 16, 2002 decision letter stated there was no evidence of a pre-existing disease, condition or disability that enhanced the disability accepted under the claim. I find this statement is ambiguous and could be taken to mean that no pre-existing disease, condition or disability exists, or one exists that has not, to the date of decision, enhanced the worker's compensable disability. A review of the claim log entry made by the case manager on December 16, 2002 provides some assistance in clarifying the scope the relief of costs decision. Here, the case manager stated that "currently" there was no evidence that the worker's recovery was prolonged by a pre-existing disease, condition or disability. I note in *Decision #WCAT-2004-04020*, available at: <http://www.wcat.bc.ca/research/decisions/pdf/2004/07/2004-04020.pdf>, the panel found the use of the term "currently" in the initial relief of costs decision indicated that relief of costs was denied for the period up to the date of decision only. The letter was viewed in conjunction with claim log entries, which did not include any categorical denial of relief of costs. In the matter before this panel, the wording of the decision letter is ambiguous and is not a categorical denial of relief of costs. However, the term "currently" appears in the claim log entry of the same date. For reasons somewhat similar to those provided in *Decision #WCAT-2004-04020*, I find the use of the term currently in the December 16, 2002 claim log entry indicates the December 16, 2002 decision letter was limited in scope to the period prior to the date of the decision.

The employer's July 24, 2003 letter to the Board made reference to the relief of costs decision letter and sought a "...further consideration of the decision to deny section 39(1)(e)..." relief of costs. In the last paragraph of the letter the employer sought a "...decision regarding the application, or otherwise, of section 39(1)(e) relief to the claim in light of the new evidence." Based on the statutory definition of "reconsider", along with Board policy relating to that term, I find that the request for adjudication of new evidence in this case is, in fact, a request for reconsideration of the December 16,

2002 decision. The employer's request was for a new decision in a matter previously decided. Although it is possible to interpret the request for a decision regarding the application of section 39(1)(e) in light of the new evidence as a request for adjudication of relief costs applicability after December 16, 2002, which would be a request for a decision on a previously undecided issue, I find the thrust of the employer's request was for a reconsideration of the initial relief of costs decision.

The Board's authority to consider new evidence or otherwise reconsider the December 16, 2002 decision is subject to the statutory 75-day time limit on the Board's reconsideration authority. As a result, the case manager's October 16, 2003 letter correctly informed the employer that a prior section 39(1)(e) decision had made and no further action was contemplated (that is, no reconsideration of the May 26, 2003 decision would be made). I find that the October 16, 2003 letter is informational only, and does not contain a reviewable decision within the meaning of the Act or Review Division policy. I find the review officer was correct in declining to conduct the review.

Although the question of the employer's entitlement to relief of costs pursuant to section 39(1)(e) of the Act for the period after December 16, 2002 is not before me, I note the employer is free to ask the Board for an initial adjudication of the applicability of section 39(1)(e) relief of costs after December 16, 2002.

Conclusion

I deny the employer's appeal. The January 2, 2004 Review Division decision, which rejected the employer's request for review, is confirmed.

Steven Adamson
Vice Chair

SA/lc