Noteworthy Decision Summary

Decision: WCAT-2004-06808 **Panel**: Susan Polsky Shamash **Decision Date:** December 23, 2004

Difference between Workers' Compensation Board (Board) Reconsiderations and Board implementation of appellate decisions – Resolution 2004/11/16-04 – Sections 96(5) and 246(3) of the Workers Compensation Act

As set out in Resolution 2004/11/16-04, implementing an appellate decision is not a reconsideration by the Workers' Compensation Board (Board) of a Board decision, and thus when implementing such a decision the Board is not constrained by the 75 day time limit set out in section 96(5) of the *Workers Compensation Act* (Act). When there has been an appeal taken and a decision rendered by the appellate body, the Board decision is no longer the final decision on the matter and the Board has no power to reconsider it regardless of the amount of time that has elapsed.

In this case, the Board awarded the worker a "functional impairment" permanent partial disability award under section 23(1) of the Act instead of a "loss of earnings" permanent partial disability award under section 23(3) of the Act (the "Disability Award Decision"). The Board determined that the worker would be capable of returning to his pre-injury earning capacity. On a review requested by the worker, the Workers' Compensation Review Board (Review Board) confirmed the Disability Award Decision but noted that the worker had not yet completed his vocational training and that there was evidence that the worker may yet suffer a loss of earnings when he re-enters the workforce in a different occupation (the "First Review Board Decision"). The worker appealed this decision to the Board Appeal Division but it restricted its decision to the worker's functional impairment percentage.

A few years later, after finishing his training, the worker requested an employability assessment. The Board denied the request. By letter, the Board advised the worker that as more than 75 days had passed since the Disability Award Decision, the Board could not reconsider it, and so an employability assessment would serve no useful purpose (the "Board Letter").

The worker requested a review of the Board Letter and the Review Division of the Board concluded that it was not a decision that it could review, as the Board Letter did not constitute a decision about the worker's entitlement to a loss of earnings pension, but simply informed the worker that the statutory time limit for reconsideration of a previous decision had lapsed.

On appeal, the WCAT panel concluded that the First Review Board Decision was the highest level of decision on the loss of earnings issue, and was thus binding on the Board. The WCAT panel found that the Review Board intended that further assessment would be done once the worker had completed retraining. This was not done, so the Review Board finding was not fully implemented. As the most recent amendments to Board policy have clarified, implementation of an appellate decision is not a reconsideration of the underlying decision (see Resolution 2004/11/16-04). While the Resolution was not yet in effect the WCAT panel stated that it reflected a principle which has always existed and which applies in the circumstances of the appeal.

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The WCAT panel referred the matter back to the Board pursuant to section 246(3) of the Act and suspended proceedings until the Board conducts an employability assessment of the worker to evaluate whether he qualifies for a loss of earnings pension.

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Panel: Susan L. Polsky Shamash, Vice Chair

Introduction

The worker appeals a March 5, 2004 decision of a review officer (*Review Reference #11952*) declining to review an October 14, 2003 letter written by a disability awards adjudicator of the Workers' Compensation Board (Board). The review officer concluded that the October 14, 2003 letter did not contain a decision with respect to the worker's entitlement to a loss of earnings award, but merely advised the worker that the statutory time limit for requesting reconsideration of a prior decision had elapsed. The review officer also concluded that the October 14, 2003 letter did contain a decision regarding the worker's entitlement to an employability assessment but concluded that a review would not be conducted since the only purpose of completing an employability assessment would be for consideration of a loss of earnings pension which the Board was precluded from reconsidering.

The worker is represented by legal counsel. The employer is participating in this appeal and is represented by their disability coordinator. This appeal has been conducted based on a review of the claim file and written submissions filed on behalf of the worker.

Issue(s)

Does the case manager's October 14, 2003 letter contain a reviewable decision with respect to the worker's entitlement to a loss of earnings pension?

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 the Workers' Compensation Appeal Tribunal (WCAT).

Background

There has been significant adjudicative history to this worker's claim which is not relevant to this appeal. There is no dispute about these events, which are well-known to the parties, and I will not summarize them here.

The following events are relevant to this appeal:

- January 24, 2000 - the Appeal Division found that the worker was entitled to a permanent disability award for subjective complaints in accordance with item #39.01 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I). The Appeal Division also concluded that the worker would be at risk of a greater permanent disability if he returned to his pre-injury form of employment as a long-haul truck driver.

- June 13, 2000 – the worker's claim was referred to the Disability Awards Department. The referral memo indicated that a loss of earnings was likely and that an employability assessment had been completed.

- September 29, 2000 - the Board sponsored the worker into a retraining program in the field of computer service technician and Microsoft certified systems engineering from October 2, 2000 to March 31, 2002. The vocational rehabilitation consultant (consultant) said that, from the information the worker provided, long-term earnings from dedicated individuals with this training exceeded his pre-injury wage rate. The consultant felt confident that the worker would do as well as, if not better than previous graduates. He concluded that this vocational plan would replace the worker's wage rate, barring any unforeseen events. (See also memo #36.)

- March 14, 2001 – form 22, disability awards claim review - the disability awards adjudicator reviewed the worker's injury and adjudicative history, wage rate, work history, vocational rehabilitation plan and the consultant's conclusions.

- March 15, 2001 – form 24, permanent functional impairment review – the disability awards adjudicator concluded that, given the consultant's September 29, 2000 correspondence, there would be no loss of earnings under this claim.

- March 23, 2001 – the disability awards adjudicator wrote to the worker regarding his entitlement to a permanent disability award as a result of the Appeal Division decision. He included a copy of his March 15, 2001 memo (form 24). The worker was awarded a permanent functional impairment pension of 2% for subjective symptoms. The worker appealed this decision (along with several vocational rehabilitation decisions) to the Review Board.

- July 24, 2002 – the Review Board panel denied all of the appeals and confirmed the Board's decisions. With respect to the loss of earnings aspect of the March 23, 2001 decision, the panel stated:

> While a loss of earnings is not indicated [the worker] has yet to complete his course. The bundle of documents he provided to the panel with respect to industry earnings indicates a loss of earnings may occur.

The worker appealed this decision to the Appeal Division.

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- Meanwhile, the Board continued to assist the worker with his vocational rehabilitation efforts.

- July 30, 2002 – a different consultant wrote to the worker indicating the Board's willingness to assist him with completing the retraining program he had begun. For various reasons the worker was unable to complete the program.

- November 26, 2002 – the consultant advised the worker that he would be entitled to four weeks of job search allowance.

- December 2, 2002 – the worker requested clarification of his vocational rehabilitation entitlement asking if the Board would top-up his pension if he obtained work that paid less than his wage rate.

- January 6, 2003 – the consultant responded outlining further assistance available - relocation assistance, continued job search assistance as well as salary top-up if the worker found a lower-paying position while the consultant determined his maximum earnings potential in the new community. She said that once she gathered labour market information she would complete an employability assessment for the Disability Awards Department "who make a determination on your eligibility for a pension".

- February 17, 2003 – the Appeal Division denied the worker's appeal from the Review Board findings with respect to vocational rehabilitation benefits. Regarding the permanent disability award, the panel characterized the issue before him as concerning the degree of functional impairment related to the worker's subjective pain complaints. Dealing only with that issue, the panel denied that aspect of the appeal as well.

- February 25, 2003 – the consultant wrote to the worker again saying that, as he did not contact her in response to her January 6, 2003 letter, she had closed his file.

- July 17, 2003 – the worker contacted the consultant asking if the assistance offered in her January 6, 2003 letter was still available to him. Because he had moved, the consultant advised him to contact the vocational rehabilitation consultant in his local area. The worker did so.

- July 23, 2003 – the original consultant on this claim wrote to the worker advising that, as more than 75 days had elapsed since the February 25, 2003 decision, no reconsideration was possible. He said that he would refer the worker's request to the case manager to determine if he met the requirements for reopening of his claim file.

- September 25, 2003 – the worker's counsel wrote to the Board requesting completion of an employability assessment in accordance with the consultant's January 6, 2003 commitment.

- September 30, 2003 – the case manager denied reopening of the worker's claim because there had been no significant change in his condition nor had there been a recurrence of his injury.

- October 1, 2003 – the consultant wrote to the worker explaining that, as he did not meet the criteria for reopening, he was not entitled to further vocational rehabilitation benefits.

- October 14, 2003 – the disability awards adjudicator wrote to the worker's counsel outlining the history of the adjudication of the worker's permanent disability award entitlement. She said that the decision that the worker would not sustain a loss of earnings was implicit in the March 23, 2001 letter. Given the changes contained in Bill 63 as of March 3, 2003, reconsiderations of past decisions were not possible after 75 days unless there had been a significant change in the worker's condition or there was evidence of fraud or misrepresentation. She was prevented from reconsidering the previous decision that the award was payable on the basis of the worker's permanent functional impairment only. An employability assessment would serve no purpose as she could not reconsider that decision.

- December 30, 2003 – the worker's counsel requested a review of this decision on the ground that no substantive consideration of the worker's residual employability or earnings had been undertaken, as was clear from both the Review Board and the Appeal Division decisions.

- March 5, 2004 – the Review Division refused to review the October 14, 2003 letter on the ground that it did not contain a reviewable decision with respect to the worker's loss of earnings entitlement. Rather it merely advised the worker that the statutory time limit for requesting a reconsideration of a prior decision had elapsed. There was a reviewable decision denying the request for an employability assessment. However, as the only purpose of an employability assessment would be for a consideration of a loss of earnings award which could not be reconsidered, the Review Division would not review that decision.

Law and Policy

The statutory references set out below came into effect on March 3, 2003 as a result of the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), and therefore apply to the decisions issued by the disability awards adjudicator and review officer.

Section 96(1) provides that all decisions of the Board are "final and conclusive", subject to sections 239 and 240. Section 239 provides a right of appeal to WCAT from many

Review Division decisions. Section 240 provides a right of appeal directly to WCAT from certain types Board decisions.

Section 96(4) states:

> (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.

Section 96(5) provides:

> (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 "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 RSCM 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.

Analysis

The position of the worker's counsel is that the October 14, 2003 decision is not a refusal to reconsider a decision, but rather is a refusal to make a decision at first instance. In his submission, the Board's determination regarding the worker's entitlement to a permanent functional impairment award did not include any substantive consideration of his residual employability. Rather, the disability awards adjudicator repeated the consultant's preliminary findings. This was a provisional decision subject to a final determination by the consultant on the worker's actual residual employability. In support of this argument he pointed to the January 6, 2003 undertaking as well as the excerpt from the Review Board's July 24, 2002 finding quoted above. He requested that the matter be referred back to the Board to conduct an employability assessment.

The employer's representative submitted that the worker's pension entitlement was determined in March 2001 and was upheld by both the Review Board and the Appeal Division. Since the Appeal Division decision is binding on the Board, section 96(5) prevents the Board from reconsidering the issue of pension entitlement.

In this case, the first question I must consider is whether the March 23, 2001 letter contained a decision with respect to the worker's entitlement to a loss of earnings award. I find that it did. Although, as the worker's counsel has stated, it was not preceded by a formal employability statement, it was a considered decision. In memo #36 and the September 29, 2000 letter, the consultant had outlined the vocational rehabilitation plan and concluded that, as a result, the worker would be capable of returning to his pre-injury earning capacity. The disability awards adjudicator reviewed this conclusion and adopted it when concluding the worker would not suffer a loss of earnings. It would have been preferable for the disability awards adjudicator to include that decision explicitly in his March 23, 2001 letter. However, by enclosing and referring to the form 24, that decision was made and communicated to the worker.

The matter does not end there, however. The 75-day restriction on reconsiderations imposed by section 96(5) does not apply when the decision has been appealed. It applies only to Board decisions. When there has been an appeal taken and a decision rendered by the appellate body, the Board decision is no longer the final decision on the matter and the Board has no power to reconsider it regardless of the amount of time that has elapsed.

In this case, the worker appealed the March 23, 2001 decision to the Review Board. Although it does not appear that he explicitly addressed the loss of earnings question, he certainly did so by challenging the vocational rehabilitation decisions appealed. The panel made a decision on all aspects of the pension decision. Although it is admittedly somewhat confusing, the panel concluded that a loss of earnings was not indicated but the worker had yet to complete his course and that the documents provided to the panel indicated that a "loss of earnings **may** occur" (emphasis added). The worker did not challenge the loss of earnings conclusion in his appeal to the Appeal Division and the panel there only made a decision on the permanent functional impairment aspect of the worker's pension entitlement. The reason is not apparent. It is possible that the worker believed that the Review Board had intended that the matter be revisited once he had completed his retraining program.

The matter was further confused when a new consultant subsequently undertook to conduct an employability assessment in contemplation of a pension award, seemingly without being aware that the pension had already been assessed and awarded. It is not clear whether or not she made this offer in the context of the Review Board finding. It appears to me that the Board continued to provide the worker with vocational rehabilitation benefits without reference to either of the appellate decisions.

Notwithstanding this confusion, the July 24, 2002 Review Board finding is the highest level of decision on the loss of earnings issue on the worker's claim and it is this decision which is binding. The Board has no power to reconsider the issue of the worker's loss of earnings in light of the subsequent appeals. Its power is limited to implementing the Review Board finding. As the most recent amendments to Board policy have clarified, implementation of an appellate decision is not a reconsideration of the underlying decision (see *Resolution 2004/11/16-04*, November 16, 2004). While the policy is not in effect until January 1, 2005 and then will apply to all decisions made on or after that date, it reflects a principle which has always existed and which applies in the circumstances of this appeal.

On the basis of this chronology, I find that the real question is whether the Review Board finding has been fully implemented. Although the wording was not as "crisp" as one might like, I consider that the most reasonable interpretation is that the panel contemplated that a further assessment would be conducted once the worker had completed his retraining program.

No further employability assessment has ever been undertaken since the Review Board finding was issued. I consider that the Review Board finding has not been fully implemented. This is a matter that ought to have been determined by the Board but was not. Pursuant to section 246(3) of the Act, I refer the matter back to the Board and suspend the appeal proceedings until the Board provides WCAT with its determination. The Board is to conduct an employability assessment of the worker to determine whether he is entitled to a loss of earnings award.

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Conclusion

Pursuant to section 246(3) of the Act, I refer the matter back to the Board. Until the Board provides WCAT with its determination, the appeal is suspended. The parties will be given an opportunity to make submissions on the new decision which, pursuant to section 246(4), must be considered in the context of this appeal.

Susan L. Polsky Shamash
Vice Chair

SLPS/hf