

Noteworthy Decision Summary

Decision: WCAT-2005-02376**Panel:** Herb Morton**Decision Date:** May 9, 2005

Authority of Workers' Compensation Board to reconsider a decision on the basis of misrepresentation where decision was appealed – Sections 96(4), 96(5), and 96(7) of the Workers Compensation Act – 75 day time limit on Board reconsiderations – Policy Item #C14-103.01 Rehabilitation Services and Claims Manual, Volume I

- The Workers' Compensation Board (Board) does not have the authority under section 96(7) of the *Workers Compensation Act* (Act) to set aside Board decisions which have been superseded by a subsequent decision of the Workers' Compensation Review Board (Review Board), the former Appeal Division, or the Workers' Compensation Appeal Tribunal (WCAT).
- The 75-day time limit which generally applies to the Board's reconsideration authority under sections 96(4) and (5) of the Act does not apply to decision-making under section 96(7) on the basis of fraud or misrepresentation.

In this case, a worker requested that the Board set aside four previous Board decisions on the basis that the decisions were based on a misrepresentation. Prior to this request, the worker had requested reviews or launched appeals in respect of all four decisions and had received decisions in each case. His later request to the Board for the decisions to be set aside was based on new evidence and the Board's authority under section 96(7) to set aside a previous Board decision if that decision resulted from misrepresentation. The Board denied the worker's request on the basis that a misrepresentation had not been established. The Review Division confirmed the Board's decision on the same basis but, in addition, found that the 75-day time limit for a Board reconsideration set out in section 96(5) had already elapsed. The worker appealed to WCAT.

On appeal, the panel confirmed the Review Division decision but on a different basis. The panel concluded that the Board does not have the jurisdiction under section 96(7) or any other provision of the Act to reconsider a previous Board decision on the basis of misrepresentation where the decision has already been reviewed or appealed and the appellate decision issued.

The panel also noted that, contrary to the Review Division's reasoning, the Board's authority to set aside its own decisions under section 96(7) on the basis of fraud or misrepresentation is not subject to any time limit. The 75-day time limit which generally applies to the Board's reconsideration authority under sections 96(4) and (5) does not apply to decision-making under section 96(7) on the basis of fraud or misrepresentation.

WCAT Decision Number : WCAT-2005-02376
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Panel: Herb Morton, Vice Chair

Introduction

The worker has appealed *Review Decision #20049* dated December 14, 2004. The Review Division confirmed the July 23, 2004 decision by the client services manager.

The worker requested that four decisions by Workers' Compensation Board (Board) officers (dated September 15, 2000, January 22, 2002, May 16, 2001 and October 28, 2003) be set aside on the basis of misrepresentation. His request was based on new evidence, and the Board's authority under section 96(7) of the *Workers Compensation Act* (Act). The July 23, 2004 decision by the client services manager denied the worker's request on the basis that fraud or misrepresentation was not established. The review officer confirmed the July 23, 2004 decision on the basis of the 75 day time limit for reconsideration under subsections 96(4) and (5), and on the basis that fraud or misrepresentation was not established for the purposes of section 96(7) of the Act.

The worker requested an oral hearing. The WCAT Registry advised the worker that his appeal would proceed by way of written submissions. A written submission dated March 17, 2005 has been provided by the workers' adviser, which follows an earlier submission dated August 31, 2004 to the Review Division. I agree that the issues raised in this appeal can be properly considered on the basis of written submissions, without an oral hearing. The employer is not participating, although invited to do so.

Issue(s)

Should the decisions by the Board officers be set aside on the basis of misrepresentation? Does the Board's authority under section 96(7) allow it to set aside or reconsider decisions which have previously been appealed?

Jurisdiction

Under section 239(1) of the Act, a final decision made by a review officer may be appealed to WCAT. WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent (sections 250(1) and 254 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).

Reasons and Findings

Section 96(7) of the Act provides:

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.

The Board's authority to set aside its decisions under section 96(7) on the basis of fraud or misrepresentation is not subject to any time limit. The 75 day time limit which generally applies to the Board's reconsideration authority under subsections 96(4) and (5) does not apply to decision-making under section 96(7) on the basis of fraud or misrepresentation.

An unusual feature of this appeal is that the worker's objections involve matters which were the subject of prior appeals (to the former Workers' Compensation Review Board (Review Board), former Appeal Division and WCAT). This gives rise to the question as to whether a Board decision which has been the subject of an appeal, remains subject to being set aside by the Board under section 96(7).

The worker's requests concern the Board's decisions of September 15, 2000, May 16, 2001, January 22, 2002 and October 28, 2003. However, the status of those decisions, and the Board's authority to further address those matters, must be considered in light of the later proceedings involving those decisions:

- The worker appealed the **September 15, 2000** decision to the Review Board, which denied the worker's appeal by finding dated June 10, 2002. The worker further appealed the June 10, 2002 Review Board finding to the Appeal Division. By decision dated January 17, 2003, the Appeal Division denied the worker's appeal (*Appeal Division Decision #2003-0116*).
- The worker also appealed the **May 16, 2001** and **January 22, 2002** decisions to the Review Board. Those appeals were considered by a Review Board panel in an oral hearing on December 9, 2002, together with appeals of decisions dated October 4, 2001 and December 4, 2002. The Review Board issued a finding dated April 3, 2003, pursuant to section 38(3) of the transitional provisions contained in Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). The Review Board finding was appealed under section 41(3) of Bill 63's transitional provisions to WCAT, which issued a decision dated December 17, 2003 (*WCAT Decision #2003-04176*). That WCAT decision is the subject of a current application to WCAT for reconsideration, on the basis of the same evidence addressed in the July 23, 2004 decision of the client services manager. The July 21, 2004 submission by the

workers' adviser in that application for reconsideration is based on the same "new evidence" presented in this appeal.

- The **October 28, 2003** decision by the claims adjudicator, Disability Awards Department, concerned implementation of the April 3, 2003 Review Board finding (which was the subject of *WCAT Decision #2003-04176* dated December 17, 2003). While the October 28, 2003 decision was by a Board officer, it merely gave effect to the Review Board finding that the worker could work as a warehouseman. The worker's objections to the decision that he could work as a warehouseman are, in reality, objections to the Review Board finding and the WCAT decision (which is currently the subject of an application for reconsideration by WCAT).

Underlying the requests of the workers' adviser is an assumption that the Board has authority to disregard the findings or decisions of the appellate bodies, and proceed with further adjudication if fraud or misrepresentation is established in connection with the Board decision which was at the "root" of the later appeal proceedings. While the submissions by the workers' adviser focus only on the decisions by the Board officers, I read these submissions as implicitly asserting that Board officers have authority to reconsider Review Board findings, Appeal Division decisions and WCAT decisions, on the basis of fraud or misrepresentation.

The question as to the extent to which the Board has authority to disregard or reconsider a decision of the external Review Board has a long history (see *Guadagni v. BC (WCB)*, (1989) 35 B.C.L.R. (2d) 363, (1989) 58 D.L.R. (4th) 1, and the *Report and Recommendations to the Minister of Labour and Consumer Services by the Advisory Committee on the Structures of the Workers' Compensation System of British Columbia*, October 31, 1988 (the Munroe Committee Report), 8 WCR 231 (at pages 241-242)). An assertion of authority on the part of the Board to disregard or reconsider decisions of an external appeal body is not one to be made lightly.

I note, in this regard, the decision of the British Columbia Supreme Court in *Thomas v. WCB (BC)*, [2002] B.C.J. No. 1485, 2002 BCSC 866 (accessible at: <http://www.courts.gov.bc.ca/jdb-txt/sc/02/08/2002bcsc0866.htm>). The worker was examined by a Medical Review Panel (MRP), which certified that his compensable injury was the major cause of his disability. The worker requested examination by a MRP in relation to a later decision, and the second MRP certified that the worker's disability was wholly unrelated to his work injury. The worker appealed the Board's implementation decision (to terminate his benefits) to the Review Board. The Review Board found the second MRP certificate should be disregarded as it was merely a second opinion based on the same evidence. The Board refused to implement the Review Board finding (stating it was a nullity, made outside the Review Board's jurisdiction), but did not undertake a section 96(4) president's referral to the Appeal Division. The Court held that as the Board did not avail itself of the "appeal" provisions in the Act, the Review Board finding remained binding on the Board. The Court reasoned:

14 The Workers' Compensation Act scheme provides that decisions of the Review Board must be implemented and adhered to unless overturned on appeal to the Appeal Division on a referral to the Appeal Division by the President of the Board.

15 The Review Board decision has not been referred or appealed, and time within which either a referral or appeal must be made has long passed.

...

19 The Workers' Compensation Board holds that it is not bound to implement the decision of the Review Board as the Workers' Compensation Board believes the Review Boards' order is a nullity, having been made beyond their jurisdiction, or in the alternative the Review Board decision gives rise to an operational conflict with the second MRP decision and the Appeal Division decision on the mandate of the second MRP.

20 The Board's position is that Mr. Thomas knew, or ought to have known, that he was risking all of his entitlement by requesting a second MRP.

21 By refusing to follow the Review Board decision, the Board has forced Mr. Thomas to commence legal action.

22 As the Board had no legal recourse, having missed all appeal limitations, this was a way for them to come before the court and attempt to have the Review Board order set aside.

23 The forcing of Mr. Thomas to seek a court ordered remedy for the implementing of the Review Board order is contrary to the Act's fundamental purpose of compensating workers without court proceedings. (See the Supreme Court of Canada in *Pasiechnuk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, referred with approval to the decision of Montgomery J., in *Medwid v. Ontario* (1988), 48 D.L.R. (4th) 272 (O.H.C.)).

24 I disagree with the respondent's position, as the Workers' Compensation Board did not object to the jurisdiction of the Review Board at the time of the hearing, nor did they avail themselves of the appeal provisions contained in the statute.

25 The Review Board order is and remains binding on the Board.

Policy at item C14-103.01 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) describes certain restrictions on the Board's reconsideration authority under section 96(4) of the Act. The policy states:

There are, in addition, a number of implicit restrictions on reconsidering previous decisions and orders. The Board is not authorized to reconsider decisions or findings of the following bodies:

- the former Appeal Division, which existed prior to March 3, 2003;
- the former Commissioners, who existed prior to June 3, 1991;
- the boards of review and the Workers' Compensation Review Board, which existed prior to March 3, 2003; and
- the Board of Review, which existed prior to January 1, 1974.

Section 256 of the *Act* provides for the Workers' Compensation Appeal Tribunal to reconsider its own decisions and decisions of the former Appeal Division under certain limited conditions. The Legislature therefore "turned its mind" to the extent that former appellate decisions should be reconsidered and legislated its intent.

The policy indicates these restrictions are implicit to the Board's reconsideration authority under section 96(4). That section 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.

Apart from stipulating the grounds of fraud or misrepresentation in section 96(7), the wording of subsections 96(4) and 96(7) is substantially the same in respect of the scope of the Board's decisions which are subject to being reconsidered or being set aside. Subsection 96(4) refers to "a decision or order that the Board or an officer or employee of the Board has made under this Part", and subsection 96(7) refers to "any decision or order made by it or by an officer or employee of the Board under this Part". Given the similarity of these wordings, and the fact that both subsections must be read in the context of the Act as a whole, I consider that the policy concerning the restrictions on the Board's reconsideration authority under section 96(4) of the Act must also apply to the Board's authority to set aside a decision under section 96(7) of the basis of fraud or

misrepresentation. While not expressly stated in the policy at RSCM I item C14-104.01, I find that the same restrictions are necessarily implicit to the Board's authority to set aside a decision under section 96(7).

Thus, the workers' adviser is ascribing a jurisdiction to the Board, which the Board by policy states it does not have. I find that the policy which acknowledges that the Board's reconsideration authority does not extend to decisions of the Review Board, Appeal Division and WCAT (the appeal bodies which have made decisions relevant to this application) is consistent with the Act. The Act must be read as a whole, in this regard, so as to take into account the legal effect of decisions rendered by appellate bodies.

Section 253.1(5) of the Act (as amended by the *Administrative Tribunals Act* effective December 3, 2004), sets out certain limitations on WCAT's authority to amend a final decision, and provides:

This section must not be construed as limiting the appeal tribunal's ability, on request of a party, to reopen an appeal in order to cure a jurisdictional defect.

Authority to remedy a jurisdictional defect in respect of a WCAT decision rests with WCAT. The use of the phrase "on request of a party" suggests that the legislature did not wish to have challenges to the validity of appellate decisions coming from the Board. No mechanism was provided in the legislation for the Board to challenge a WCAT decision.

In *WCAT Decision #2005-00070* dated January 10, 2005, the WCAT chair reasoned as follows:

Counsel also argues that the Board and the Review Division erred in applying the current sections 96(4) and 96(5) of the Act, which place a 75-day time limit on reconsiderations by the Board, to the worker's request for a further decision. She notes the worker submitted the request for a further decision to the Board prior to March 3, 2003 and, accordingly she contends, the Board ought to have provided the new decision under the former section 96(2) of the Act (which was in place prior to March 3, 2003). The former 96(2) stated:

Notwithstanding subsection (1), the board may at any time at its discretion reopen, rehear and redetermine any matter, except a decision of the appeal division, which has been dealt with by it or by an officer of the board.

Counsel submits:

In general, there is a presumption at law against retroactivity in the absence of clear legislative intent. The Union takes the position that the rights of the worker crystallized on the date that the application for reconsideration was filed with the Board.

I do not find it necessary to address this argument in this decision. Even if I was to accept that the former section 96(2) is applicable to all requests for reconsideration filed with the Board prior to March 3, 2003, I would not find that the worker would be assisted with his argument in this case. I find the Board did not have the authority to reconsider the October 1, 1999 decision because it was superseded by the March 13, 2002 Review Board findings.

The former section 90 of the Act provided for an appeal of the October 1, 1999 decision to the Review Board. The former section 91(1) enabled the worker to appeal the Review Board findings to the Appeal Division within a statutory time frame. The worker did not appeal within the statutory time frame and, in *Appeal Division Decision #2002-2200*, the Appeal Division panel denied the worker's application for the extension of time. The Review Board findings superseded the October 1, 1999 decision and constitute the final decision on whether the hernia ought to be accepted under the claim.

My conclusion in this regard is supported by the judgment of Madame Justice Smith in *Yee v. WCB (BC)* [2000] B.C.J. No. 1482, 2000 BCSC 1099 (available online at <http://www.courts.gov.bc.ca/jdb-txt/sc/00/10/s00-1099.htm>). In that judgment, the court quoted with approval a decision of the Appeal Division which stated that a certificate of a Medical Review Panel superseded a prior Appeal Division decision in respect of the matters certified by the Medical Review Panel. The same principle applies in the case before me.

Accordingly, I find the outcome in the Review Division decision is correct but my reasons are significantly different from those of the review officer. The review officer concluded the decision regarding acceptance of the hernia under the claim could not be reconsidered because more than 75 days had elapsed since the decision was made. However, in my view, the Board did not have the authority to reconsider the October 1, 1999 decision regarding acceptance of the hernia under the claim because that decision was superseded by the March 13, 2002 Review Board findings.

I agree with the analysis expressed by the WCAT chair in *WCAT Decision #2005-00070*. Where a decision by a Board officer has been the subject of appeal to the Review Board, it is superseded by the Review Board finding. Any further consideration of the issues addressed in the Review Board finding must be by a body with authority to do so. Under the former appeal structures, further avenues included reconsideration by the Review Board, appeals to the Appeal Division or MRP, or a referral by the president to the Appeal Division under section 96(4) of the Act. Under the current appeal structures (and transitional provisions), a Review Board finding is appealable to WCAT. A WCAT decision is final and conclusive under section 255 of the Act, subject to an application to WCAT for reconsideration under section 256 or on the basis of the common law grounds of an error of law going to jurisdiction, including a breach of natural justice. The worker is in fact pursuing applications for reconsideration of *WCAT Decision #2003-04176* on both the common law and new evidence grounds. These applications remain under consideration, and are not addressed in this decision. If the worker's application for reconsideration is successful, that would likely impact the decisions which he seeks to have set aside in this appeal.

The Review Division found that grounds were not established to set aside the four decisions. However, for all of the reasons set out above, I find that the Board did not have authority to consider setting aside the decisions. Three of the decisions had been superseded by subsequent appellate decisions, and the objections to the fourth decision were, in substance, objections to the Review Board finding which was being implemented by the Board officer. In view of my conclusion on this basis, I need not consider the new evidence provided by the workers' adviser for the purposes of this decision. Accordingly, the worker's appeal is denied.

Conclusion

The Review Division decision is confirmed. The worker's request that the Board set aside four decisions under section 96(7) remains denied. The Board has no authority under section 96(7) to set aside a Board decision which has been superseded by a subsequent decision of the Review Board, Appeal Division or WCAT.

Herb Morton
Vice Chair

HM/dc