## Noteworthy Decision Summary

**Decision:** WCAT-2005-6063 **Panel**: Herb Morton **Decision Date:** November 14, 2005

***Standing to request review of inspection report – Discriminatory action – Sections 96.2(1)(c) and 96.3(3) of the Workers Compensation Act***

This decision outlines the test for determining whether a party is "directly affected" under section 96.3(3) of the *Workers Compensation Act* (Act) and thus has standing to request a review of an inspection report issued by the Workers' Compensation Board (Board). The party is only required to have a real personal involvement in the matter. It is not necessary for the worker to be employed by the employer at the time the inspection report is issued.

The worker, a kitchen helper, claimed that a faulty slicing machine provided by the employer caused him to develop tendonitis. The worker complained about the machine to the employer and was dismissed from his employment approximately one week later. The worker filed a discriminatory action complaint with the Board. Four days after the worker's dismissal, the Board completed an inspection report of the employer that issued two orders. The worker sought a review of the inspection report by the Review Division of the Board. The review officer found the worker was not "directly affected" by the inspection report under section 96.3(3) of the Act, as he was no longer working for the employer on the date of the inspection report. Thus, he did not have standing to request a review. The worker appealed to the Workers' Compensation Appeal Tribunal.

The panel held that the term "directly affected" in section 96.3(3) must be interpreted somewhat broadly. The panel noted that, although the person most directly affected by a decision is the worker, the less direct effect on the employer's claim costs and experience rating is sufficient to qualify the employer as a person who is "directly affected" under section 96.3(1).

The panel noted there were various ways in which the worker could be affected by the inspection report. The inspection report may have been issued as a result of the worker's complaints. The worker's employment was terminated just four days prior to the issuance of the inspection report. The worker had filed a discriminatory action complaint that was still under investigation by the Board.

The panel concluded that the intent of the legislature in limiting the right to request review to "directly affected" persons was to ensure that only persons with some real personal involvement in a matter are able to request review. Workers who pursue a discriminatory action complaint have a legitimate interest in the occupational health and safety of the former workplace. A worker who has been improperly fired for raising health and safety concerns should not be denied standing in relation to the Board's subsequent decision regarding those concerns.

The review officer's decision was varied. The worker had standing to request reviews of the orders contained in the inspection report.


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## Introduction

The worker has appealed *Review Decision #23967* dated January 14, 2005. The worker sought a review of an inspection report dated April 14, 2004. The review officer found that as the worker was no longer working for the employer on April 14, 2004, he was not "directly affected" by the orders issued on that day. The review officer rejected the worker's request for review, on the basis that the requirements of section 96.3(3) of the *Workers Compensation Act* (Act) were not met.

The worker's completed notice of appeal was received by the Workers' Compensation Appeal Tribunal (WCAT) on February 15, 2005. The worker requested that his appeal be heard by way of a "read and review". The worker describes the remedy which he seeks in this appeal as follows: "My appeal in the Review Division should proceed fully."

I find that the issue raised by the worker's appeal is one which can be appropriately considered on the basis of written submissions without an oral hearing. Written submissions have been provided by the worker, and by the employers' adviser on behalf of the employer.

In his rebuttal submission of August 26, 2005, the worker requested that WCAT obtain additional documents from the employer and disclose these to him. I did not find it necessary to obtain this additional information for the purpose of making my decision. In making this decision, I did not find it necessary to review the worker's claim file, or the Board's file concerning the worker's discriminatory action complaint. The appeals coordination officer did confirm with the Board that the worker's discriminatory action complaint remains under consideration.

## Issue(s)

Did the worker have standing to request review of the April 14, 2004 inspection report? Was the review officer correct in declining to conduct a review, on the basis that the worker's employment had ended a few days earlier?

## 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, 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).

**Preliminary – Timeliness**

The employers' advisor has provided submissions regarding the criteria for obtaining an extension of time to request review. She submits, in effect, that the worker's request for review of the April 14, 2004 decision was out of time, and that no extension of time should be granted. This was not an issue addressed in the January 14, 2005 decision by the review officer, which found the worker had no standing to request review.

The worker's request for review was dated October 29, 2004, and was stamped as received by the Review Division on November 1, 2004. The worker requested reviews of decisions dated April 14, 2004 and July 26, 2004. In view of the review officer's decision that the worker did not have standing to request review of the April 14, 2004 decision, it was not necessary that she address the timeliness of the worker's request for review of the April 14, 2004 decision.

Under section 96.2(4), only the chief review officer (or delegate) has authority to grant an extension of time to request review by the Review Division. An extension of time decision by the chief review officer (or delegate) is not appealable to WCAT (see *Manual of Rules of Practice and Procedure* item #2.41(b), sections 224(2)(j) and 239(2)(a) of the Act, and section 4(b) of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/02). In the event it becomes necessary to address that issue, the timeliness of the worker's request for review may be addressed by the Review Division.

**Background and Evidence**

Some background information is contained in *WCAT Decision #2005-04198* dated August 10, 2005, concerning the worker's claim for compensation for his right wrist tendonitis. The WCAT panel noted in the first paragraph of that decision as follows:

> The worker, now 40 years old, was employed as a kitchen helper in a Japanese restaurant. In an application for compensation to the Workers' Compensation Board (Board) he said he had been injured on March 30, 2004. He said his injury was not severe and was invisible, and the broken slicer was the more significant problem. He said his right wrist had been occasionally painful. He explained that on March 27, 2004 after he had cut beef and pork and was starting to cut cabbage on the meat slicing machine, a handle of the machine broke off suddenly. He had reported this to his supervisor. On March 30, 2004 when the repair had not been completed, he had been told to do the cutting without a handle, but to

cover the repair with a paper towel. He had been concerned that this would make the job slower, but had followed the instruction. He said that, however, he needed to exercise undue stretching of muscles or ligaments on his wrist while engaged with the slicing activity. As a result, his right wrist began to be painful. He said the repair of the handle had not been completed until at least April 10, 2004. When he told his employer how he had suffered a while cutting meat when the handle was broken, his employer told him to go to a doctor. He said he had used the machine without a handle on March 27, 30, and 31. On April 2 he was asked to cut meat and he asked to be exempted because of pain. He was told to go home and return when he was able to work as usual. On April 7, 2004 he had no pain, so he went to work, but did not use the machine. He was told by his employer that day that he would be given notice of dismissal and was advised to find another job. On April 10, 2004 he worked without using the machine and subsequently received notice of dismissal.

The WCAT panel further noted the following background information:

> The case manager noted that he had visited the restaurant to meet with the employer and take photos of the slicing machine. He then outlined the accumulated evidence:
>
> - The worker had worked for approximately one year as a kitchen helper at the restaurant.
> - Job duties included a variety of kitchen and clean up work, part time, approximately four to five hours per day, five days per week.
> - Occasionally, the worker was required to slice cabbage and beef.
> - Two to three cabbages were cut every second day. This required 10 to 15 minutes to complete the task.
> - Beef was sliced once per week, and took 15 to 20 minutes to complete the task.
> - On March 27, 2004 the worker was using the slicing machine when the handle broke off. He had reported this to his employer. There had been no report that an injury occurred.
> - The worker had anticipated that the handle would be repaired while he was off for a two day break.
> - When he returned to work on March 30, 2004 the handle had not been repaired. He had used the slicing machine that day to cut beef, covering the broken stub of the handle with a paper towel or cleaning rag and cupping his hand over the handle.
> - The worker also reported using the machine to cut cabbage on March 31, 2004 and possibly on April 2, 2004 and April 3, 2004.
> - On Saturday, April 3, 2004 the worker had reported to his employer that his wrist was sore and was advised to go to a doctor. He had

seen a doctor on April 5, 2004. The diagnosis was tendonitis, which came on gradually at one to two weeks prior to that visit. The doctor's report suggested that the worker not use the slicer until the pain was gone.

- The worker had reported for work on April 6, 2004 and had been asked to slice meat and had advised that his wrist was too sore.
- The employer had then suggested that the worker take time off until he was able to use the slicing machine.
- The worker saw the doctor on April 6, 2004 and then called his employer to advise that he would need a few weeks off work. He had asked the employer to report his claim to the Board.
- Nonetheless, the worker had returned to work the following day, April 7, 2004. He had reported in a submission to the Board that he felt no pain in his wrists, so he went to work. He had continued to work until April 10, 2004, but was not using the slicing machine.
- **On April 7, 2004 the worker had advised the case manager that his employer had told him he was going to be dismissed for "incompatibility with the company." The employer had provided the worker with a written dismissal notice on April 10, 2004, which was the worker's last day at work.**
- The worker had also advised that he had a second job in a sushi restaurant, working part time starting April 5, 2004, and had worked there on April 8, 9, 12, 13, 14, 15 and 16, and had been off sick on April 17. He told the case manager that the lighter work did not affect his wrist.
- In written submissions and interviews the worker had made it very clear that he attributed his wrist complaints to the use of the slicing machine. He had not reported any difficulties doing any other parts of his job.
- The worker had continued to work for two weeks after the pain started through to April 10, 2004 when he had been dismissed.
- The worker had continued to work at his new job and continued to do so.

The case manager said:

I have spent considerable time reviewing all of the evidence and as I clearly expressed to you, in our April 29, 2004 meeting, I am satisfied that all of the facts submitted are consistent from both you and the employer. I do not feel that language difficulties have been a factor in collection of evidence.

[emphasis added]

**The April 14, 2004 Inspection Report**

The worker's request for review concerned an inspection report dated April 14, 2004. That report contained two orders. Order No. 1 stated:

> Workers use controlled products for which the Material Safety Data Sheets (MSDS) are over three years old.
>
> This is in contravention of section 5.14(2) of the Occupational Health and Safety Regulation.
>
> Obtain current MSDS for controlled products in the workplace.

Order No. 2 stated:

> Workers MAY receive first aid treatment for injuries received at the workplace, and no record is being made of these injuries.
>
> This is in contravention of section 3.19(1) of the Occupational Health and Safety Regulation.
>
> Maintain a record of all injuries and exposures to contaminants covered by this Regulation that are reported or treated.

**Law and Policy**

Section 96.2(1)(c) provides that a review may be requested in respect of the following:

> a Board order, a refusal to make a Board order, a variation of a Board order or a cancellation of a Board order respecting an occupational health or safety matter under Part 3.

Section 96.2(2)(b) specifies that no review may be requested in relation to:

> a determination, an order, a refusal to make an order or a cancellation of an order under section 153;

These last matters concerning section 153 are appealable directly to WCAT, under section 240(1) and 241(1) of the Act.

Section 96.2(3) sets a 90 day time limit for requesting review. Section 96.3 of the Act defines who may request review. Section 96.3(3) provides:

> Any of the following persons who is directly affected by a decision or order referred to in section 96.2 (1) (c) may request a review of that decision or order:
>
> (a) a worker;
> (b) an employer within the meaning of Part 3;
> (c) an owner as defined in section 106;
> (d) a supplier as defined in section 106;
> (e) a union as defined in section 106;
> (f) a member of a deceased worker's family.

Section 239(4) provides that a decision by a review officer respecting an order under Part 3 of the Act may not be appealed to WCAT, unless the order imposed, or was relied upon to impose, an administrative penalty under section 196(1) of the Act, or was made under section 195 to cancel or suspend a certificate.

**Reasons and Findings**

The April 14, 2004 inspection report contained two orders under the *Occupational Health and Safety Regulation*. Section 96.2(1)(c) provides that a review may be requested in respect of a Board order respecting an occupational health or safety matter under Part 3. Accordingly, the April 14, 2004 inspection report was one for which a review could be requested by the Review Division, provided certain other requirements were met (including standing and timeliness).

The employers' adviser states that the worker was given a two-week notice of termination, with a final work date of April 21, 2004. However, the worker "independently and without advance warning left his employment with the employer." The worker's last day of work was on April 10, 2004.

The worker also made a discriminatory action complaint. A decision has not yet been provided by the Board concerning that complaint, and the details of that matter are not before me. In general, such complaints may involve a situation in which a worker is laid off due to voicing health and safety concerns. A potential remedy in such a case may include an order by the Board that the worker be reinstated. By submission of August 26, 2005, the worker submits:

> . . . I would be "directly affected" if my "discriminatory claim" receives "rein[s]tatement" as a remedy.

The employers' adviser submits:

> . . . the former worker was not [sic] longer "directly affected" by the orders because for this particular person, the "workplace . . . no longer exists". In other words, he would no longer be affected by the orders issued in the

> workplace of his former employer. Furthermore, the evidence clearly shows there would have been little likelihood of his return.

The employers' adviser further cites section B2.6 of the *Review Division Practices and Procedures Manual*. This provides in part:

> **B2.6.2. Prevention reviews**
>
> An employer requesting a review may be requested to provide the names and addresses of the co-chairs of the joint committee at the workplace or the worker health and safety representative, as applicable, and of the union (if any) representing the workers at the workplace. These persons may then be sent a "Notice to Participate". (See Item A2.6 of this Manual.)
>
> A Review Officer may require an employer who is a party to a review respecting a prevention matter to post a notice in a specified form and manner to bring the review to the attention of the employees of the employer. [Section 96.4(4)]. This does not apply where the decision was on a variance request by a worker or the issue arose at a workplace that no longer exists.

The review officer concluded that the worker lacked standing to seek review of the April 14, 2004 inspection report. She found that as he had stopped working on April 10, 2004, he was no longer a person "directly affected" by the inspection report.

Section 96.3(1) allows an employer who is "directly affected" by a Board decision respecting a compensation or rehabilitation matter under Part 1 of the Act to request review by the Review Division. Although the person most directly affected by a decision on compensation or rehabilitation is the worker, the less direct effect of the decision on the employer's claim costs and experience rating is sufficient to qualify the employer as a person who is "directly affected". To conclude otherwise would be to negate the right of review granted to the employer in such circumstances. Accordingly, the term "directly affected" must be interpreted somewhat broadly, having regard to the legislative intent in granting a right of appeal to persons other than the most directly affected party.

In this case, the worker's dismissal from his employment followed his expression of health and safety concerns, and his filing of a claim for right wrist tendonitis which he alleged was due to unsafe work conditions. The inspection report of April 14, 2004 may well have been issued as a result of the worker's complaints. The termination of the worker's employment on April 10, 2004 occurred a few days prior to the issuance of the April 14, 2004 inspection report.

Division 6 of Part 3 of the Act is entitled "Prohibition Against Discriminatory Action." The legislature has by sections 150 to 153 of the Act granted certain protections to workers

in voicing health and safety concerns. If an employer were to fire a worker for voicing health and safety concerns, this would be contrary to these provisions. The review officer's position appears to be that such a worker would, by virtue of the severance of their employment connection, lose standing to request review of the Board's response to the health and safety concerns raised by the worker. This would potentially have the effect of rewarding an employer for its improper action in dismissing the worker, contrary to the legislative intent.

Presumably, if the worker were to be successful in pursuing a discriminatory action complaint, and was ordered reinstated in his employment, the worker could then seek an extension of time to request review of the inspection report. This raises a difficult question, as to whether the worker's standing to request review must be dependent on the outcome of the discriminatory action complaint. Alternatively, does the close connection in time between the worker's termination, his discriminatory action complaint, and the Board inspection report, support a conclusion that the worker is directly affected so as to have standing to request review? Inasmuch as a potential remedy to a discriminatory action complaint may include an order for reinstatement, does the fact such a complaint remains outstanding suffice to make the worker a person "directly affected"? In other words, does a worker who is pursuing a discriminatory action complaint have a legitimate interest in the occupational health and safety of his former workplace?

The review officer applied a literal and restrictive interpretation to the phrase "directly affected", in concluding that the worker no longer had standing to request review of the April 14, 2004 inspection report due to his departure from the workplace a few days previously. To my mind, a purposive reading of the Act is required, which takes into account the range of situations which may arise under Division 6 of Part 3 of the Act (sections 150 to 153). The application of a restrictive interpretation of the phrase "directly affected", in the circumstances set out above, would seem inconsistent with the protections the legislature intended to provide. To my mind, the intent of the legislature in limiting the right to request review to "directly affected" persons was to ensure that only persons with some real personal involvement in a matter be able to request review. I find that in the circumstances of this case, the worker had a legitimate interest in the matters addressed in the April 14, 2004 inspection report. It may only have been happenstance that the April 14, 2004 inspection report was issued after, rather than prior to, the worker's departure from the workplace. Inasmuch as the worker's discriminatory action complaint remains under consideration by the Board, I am not persuaded that the April 14, 2004 inspection report involved a "workplace that no longer exists" for the worker.

My reasoning set out above is not framed with reference to the specifics of the worker's case, his relationship with his former employer, or the actions of this particular employer. I have not considered any of these issues on the merits. Rather, my concern in addressing the standing issue is to ensure that an interpretation is not applied which could have the effect of denying standing to a worker who was improperly fired for

raising health and safety concerns, in relation to the Board's subsequent decision regarding those concerns.

As the Board's decision on these concerns is likely interrelated with the worker's discriminatory action complaint, I consider that the worker is a directly affected person. I limit my decision to finding that the worker had standing to request review of the April 14, 2004 inspection report. The worker's appeal is allowed on this narrow issue.

**Conclusion**

The review officer's decision is varied. I find that the worker had standing to request review of the orders contained in the April 14, 2004 inspection report. It remains open to the Review Division to determine whether the worker's request for review was in time, and if not, to consider the worker's request for an extension of time to request review.

Herb Morton
Vice Chair

HM/cda