Noteworthy Decision Summary

Decision: WCAT-2006-01737 **Panel**: Susan Polsky Shamash **Decision Date:** April 20, 2006

WCAT jurisdiction – Findings of fact – Reviewable decision – Sections 96.2 and 96(5) of the Workers Compensation Act – Review Division Practices and Procedures

Findings of fact are not decisions for the purpose of the reconsideration, reopening, review and appeal provisions of the *Workers Compensation Act* (Act). The Workers' Compensation Appeal Tribunal (WCAT) does not have jurisdiction to hear appeals from findings of fact. There is a right to request a review and to appeal any entitlement decisions that flow from findings of fact.

The Workers' Compensation Board (Board) accepted the worker's claim for injuries to his right arm. Fifteen years later the worker reported new symptoms in his right arm. The Board informed the worker that, with one exception, it did not accept the worker's reported limitations in his right arm. The Board advised the worker that this letter was a decision and the worker could request a review by the Review Division of the Board (Review Division). The worker requested a review. The Review Division found that the Board's findings on limitations and restrictions were not reviewable matters as they were not decisions regarding benefit entitlement. The worker appealed to WCAT.

The panel noted that the *Review Division - Practices and Procedures* (RDPP) defines "decision" as the determination of a person's entitlement to a benefit or a liability to perform an obligation under the Act. Although the panel was not bound by the RDPP she found it useful to consider this document in the interests of promoting consistency within the workers' compensation system.

The panel adopted the reasoning expressed in *WCAT Decision #2006-01296*. The panel in that decision noted the lack of a uniform approach within the workers' compensation system to the distinction between reviewable decisions and findings of fact. The panel in *WCAT Decision #2006-01296* concluded that the right to request a review under section 96.2 of the Act is complementary to the restrictions on the Board's ability to reconsider its own decisions under section 96(5) of the Act. Therefore, if a finding of fact is not reviewable under section 96.2, the restrictions in section 96(5) do not apply. The restrictions in section 96(5) only apply to reviewable decisions.

The panel concluded the worker had the right to request a review of any entitlement decisions that flowed from the findings of fact contained in the Board letter.

The worker's appeal was denied.

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Panel: Susan L. Polsky Shamash, Vice Chair

Introduction

The worker appeals a decision of a review officer dated May 26, 2005 (*Review Decision #26679*) refusing to review a letter of January 20, 2005, issued by a case manager of the Workers' Compensation Board (Board). The review officer rejected the review on the basis that the case manager's decision did not affect the worker's benefit entitlement.

The worker is represented by a workers' adviser. The employer is not participating in this appeal although advised of that right.

I am satisfied that I can fairly decide this appeal without an oral hearing. My decision is based on a review of the claim file and written submissions from the workers' adviser. The worker subsequently sent in an unsolicited submission which I exercised my discretion to accept.

Issue(s)

Does the case manager's January 20, 2005 letter contain a reviewable decision?

Background

The following chronology is relevant to this appeal:

- The Board accepted the worker's 1980 claim for right wrist/forearm injuries and neuropraxia of the digital sensory branch of the radial nerve in the right thumb.

- In a letter of January 20, 2005, a case manager informed the worker that, based on a medical opinion available to her, she was not accepting the worker's reported limitations with respect to his right arm. These included adverse reactions to vibration, jostling, heat, sunlight and touch, as well as swelling. The worker said that he virtually could not use his arm at all. The case manager accepted that he had a compensable limitation – no repetitive use of the right hand. In her letter, the case manager said that this was a decision and advised the worker of his right to request a review of it. The worker requested a review.

- In her May 26, 2005 decision, the review officer found that the limitations and restrictions determined by the Board were not reviewable matters as they were not, in and of themselves, decisions regarding benefit entitlement. She stated that

"the disputed findings are best characterized as findings of fact. …[I]t is the Board's determination of the worker's entitlement flowing from the accepted findings of fact that is a reviewable issue."

- In a letter of June 10, 2005, a vocational rehabilitation consultant (consultant) informed the worker of his entitlement to vocational rehabilitation benefits based only on his accepted medical restrictions. The worker requested a review of this decision. On October 12, 2005, his review was denied and the decision of the consultant was confirmed (*Review Decision #31030*). The worker appealed this decision to the Workers' Compensation Appeal Tribunal (WCAT). WCAT has provided the worker a preliminary decision that the Review Division decision is not appealable because WCAT does not have jurisdiction over vocational rehabilitation benefits.

- In a letter of November 24, 2005, a disability awards adjudicator advised the worker of his pension entitlement as a result of a reassessment, including his entitlement to a loss of earnings award. The worker has requested a review of that decision which is pending.

Law and Policy

Section 96.2(1)(a) of the *Workers Compensation Act* (Act) allows parties to request a review of "a Board decision respecting a compensation or rehabilitation matter under Part 1."

Section 239(1) provides a right of appeal to WCAT from "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."

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*.

Although I am not obliged to apply *Review Division - Practices and Procedures*, I find it useful to consider the above definition of "decision", particularly in the interests of promoting consistency within the compensation system.

Submissions and Analysis

The workers' adviser contends that the case manager's statement concerning limitations and restrictions constitutes a decision respecting "a compensation or rehabilitation matter under Part 1" and is therefore reviewable under section 96.2 of the

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Act. She submits that, even within the more restricted definition of reviewable decision relied upon by the Review Division, the statements in dispute are ones "affecting a person's entitlement" and are not merely findings of fact.

The workers' adviser says that the worker is concerned that, if he is unable to pursue a review of these decisions when they are first communicated to him, he may lose his right to review later decisions which rely on these findings. She points to the fact that the January 20, 2005 letter included information that it was a decision and the worker's right to request a review of it.

The worker's submission addressed the merits of his dispute. As the question before me is a very narrow jurisdictional one, I did not find it useful.

The adviser's submission is virtually identical to that of another adviser submitted to WCAT on another appeal. That appeal was from a virtually identical decision of the same review officer issued on the same date. That appeal was addressed by another vice chair in *WCAT-2006-01296*. I agree with her decision and adopt her reasoning:

> The adviser has raised a difficult issue, and one which can be satisfactorily resolved only if a uniform approach is adopted throughout the compensation system. As she has correctly pointed out, there has been a systemic lack of consistency on this issue. This inconsistency is due, in part, to legislative changes which took effect on March 3, 2003, and which included new limitations on the Board's reconsideration authority.
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> The interplay between the review and appeal provisions, on the one hand, and the Board's reconsideration authority, on the other hand, is well explained in *Review Decision #28687*. In that case, a worker sought a review of a finding regarding the impact of her compensable conditions on her fitness to work. The review officer characterized that finding as a "finding of fact", as opposed to a decision regarding entitlement, and concluded that the finding was not reviewable. He pointed out that conducting a review in those circumstances could be pointless, as the finding may never have an impact on the claim, and could preclude the Board from changing the finding in the future based on new information or discovery of an error. With respect to the relationship between the reconsideration and review provisions set out in sections 96(5) and section 96.2 of the Act, respectively, he stated as follows:
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> > The fact that a Board officer has previously made a finding of fact does not preclude that finding from being later changed. Section 96(5) of the *Act* imposes restrictions on reconsidering prior decisions, for example that no reconsideration can take place after a lapse of 75 days. However, this section must be interpreted in a consistent fashion with the provisions for

> requesting a review under section 96.2. The review provisions are intended to be complementary to the reconsideration sections. The *Act* envisages that, where the restrictions on reconsideration apply, there will still be a right to request a review or an extension of time to request of review, and visa versa. Therefore, if a simple finding of fact is not reviewable under section 96.2, the restrictions in section 96(5) also do not apply to that finding. The restrictions in section 96(5) only apply to reviewable decisions.

I agree with the above reasoning and find that it is applicable to the findings of fact before me regarding limitations and restrictions. From a literal perspective, virtually every finding made on a claim could be characterized as a final decision regarding a compensation or rehabilitation matter, and therefore reviewable under section 96.2(1)(a) of the Act. However, taking into account the current legislative scheme, and the fact that there are often no immediate consequences to a worker arising from conclusions about limitations and restrictions, I find that this type of finding is not "final" but rather subject to change, and not a "decision … under Part 1" as it does not confer or deny entitlement. In my view, it is preferable to regard such findings as the potential bases for later reviewable decisions, thereby allowing the Board to retain the flexibility to change or correct the findings. The alternative approach would result in parties being compelled to request a review of a conclusion before it has any impact on entitlement.

In the context of the appeal before me, the worker's claim was referred to the Disability Awards and Rehabilitation Services Departments for further adjudication after the January 20, 2005 letter was issued. The worker was later offered further vocational rehabilitation benefits involving Board sponsorship of specific programs. The Board issued a reviewable decision regarding those plans specifically stating that the conclusions regarding the worker's vocational rehabilitation entitlement were based only on the accepted medical restrictions. The worker had an opportunity to, and did, address the question of his medical restrictions and their impact on his vocational rehabilitation benefit entitlement in his review at the Review Division. The accepted medical restrictions were also included in the employability assessment, which was adopted by the disability awards adjudicator in his November 24, 2005 decision. The worker will have an opportunity to address the conclusion regarding his medical restrictions as they affect his pension entitlement in the context of the review of that decision.

Based on my review of the claim file, the factual findings set out in the January 20, 2005 case manager's letter did have an impact on both the rehabilitation assistance offered to the worker and the assessment of his pension. The worker has (or had) the right to dispute any findings regarding his compensable limitations in the context of those

reviews which are the appropriate forums. They are the entitlement decisions which flowed from the factual findings.

I recognize the potential for unfairness to workers and employers unless a consistent approach is adopted at all levels on this and other similar issues involving the distinction between reviewable decisions and findings of fact. To that end I note that, in a recent Continuing Legal Education course on workers' compensation, a senior compensation advisor in the Board's Regulatory Practices Division presented a paper on section 96 issues. He said:

> Findings of fact are not decisions for the purpose of the reconsideration, reopening, review and appeal provisions of the Act. Findings of fact are generally determined in the course of making entitlement decisions. Examples include determinations on a worker's fitness to return to work and a worker's medical restrictions and physical limitations. Entitlement decisions that flow from such factual findings are decisions for purposes of reconsideration, reopening, review and appeal provisions and have the associated rights and restrictions, but the factual findings themselves are not.

Conclusion

I deny the worker's appeal and confirm the review officer's May 26, 2005 decision declining to review the case manager's letter of January 20, 2005.

Susan L. Polsky Shamash
Vice Chair

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