

Noteworthy Decision Summary

Decision: WCAT-2006-01779 **Panel:** Lisa Hirose-Cameron **Decision Date:** April 24, 2006

Jurisdiction of the Review Division of the Workers' Compensation Board – Jurisdiction of Workers' Compensation Board operating as WorkSafeBC to Adjudicate Entitlement Arising out of the Cumulative Effects of Prior Injuries – Sections 5(1) and 99 of the Workers Compensation Act – Plamondon v. British Columbia (Workers' Compensation Board)

The jurisdiction of a review officer is limited to the decisions contained in the Workers Compensation Board operating as WorkSafeBC (Board) decision being reviewed, regardless of the desirability of addressing all possible matters so that parties are not required to cycle through the appellate system. The Board has the jurisdiction under section 5(1) of the *Workers Compensation Act* (Act) to adjudicate entitlement arising out of the cumulative effects of prior injuries. When considering an issue, it is not appropriate to ignore the reasoning of applicable court decisions raised by a party merely because section 99 of the Act provides that court decisions are not binding on the Board.

The worker, a driver, applied to the Board for compensation arising out of a left shoulder injury. The Board denied the claim. Following an unsuccessful WCAT appeal, the worker asked the Board to adjudicate whether his injury was due to the cumulative effects of prior work injuries. The Board characterized the worker's request as a request for reconsideration of the original decision and found that, as 75 days had passed, they did not have the authority to consider the issue. On review, the Review Division of the Board (Review Division) determined that the Board letter was not a reviewable decision as it simply provided information. On appeal, a WCAT panel allowed the appeal and found that the Board letter amounted to a decision that the Board did not have the jurisdiction to adjudicate the issue of cumulative effects and the panel returned the matter to the Review Division for the adjudication of that issue. The subsequent Review Division decision found that the Board erred in the assessment of its jurisdiction as the cumulative effects issue had not been previously adjudicated. However, the review officer purported to confirm the Board decision on the basis that the worker had provided an insufficient basis to justify the Review Division ordering the Board to investigate the worker's claims and make a determination on the merits.

On appeal, the panel found that despite the review officer's purported confirmation, he actually varied the Board's decision by finding that the Board had jurisdiction to adjudicate the issue. As that was the only issue in the Board decision under review, the panel determined that the review officer exceeded his jurisdiction when he considered the merits of the worker's claim. The panel noted that once a decision is varied, it is implicit that the matter is returned back to the Board for it to address the issue.

On the issue of the Board's jurisdiction, the panel determined that the Board did have the jurisdiction to consider whether the worker was entitled to benefits arising out of the cumulative effects of prior injuries and in doing so confirmed the Review Division decision on this issue. First, as the Board had only adjudicated whether the latest workplace injury arose out of the in the course of his employment, the 75 day time limit on reconsideration of Board decisions did not apply. It was therefore a new matter for adjudication. Second, the panel found that it was a new matter that the Board could adjudicate. On this second issue, the panel found persuasive

the reasoning set out by the Supreme Court of British Columbia in *Plamondon v. British Columbia (Workers' Compensation Board)* which stated "it is important to note that there is nothing in Section 5(1) which requires that the personal injury must have been suffered as a result of one particular accident or incident. The scope of the section is broad and in my opinion includes a personal injury which may arise out of the course of employment over a period of time....".

In response to the worker's reliance on the *Plamondon* case, the Board officer had referred to section 99 of the Act which provides that the Board is not bound to follow legal precedent. The panel noted that, while this section indicates the Board is not "bound" to follow legal precedent, this does not mean that cases such as the *Plamondon* case, which are applicable to the matter before them, should not be considered or applied.

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Introduction

The worker appeals a September 12, 2005 Review Division decision confirming a March 5, 2004 decision of the Workers' Compensation Board (Board). In the Board's decision, the Board determined that they did not have jurisdiction to adjudicate the worker's entitlement to compensation as a result of the cumulative effects of prior injuries.

The worker is represented in this appeal. His representative has provided submissions and new evidence in support of this appeal dated October 11, 2005. The employer was invited to participate in the appeal process but has not done so.

Issue(s)

Whether the Board has jurisdiction to adjudicate the worker's entitlement to compensation as a result of the cumulative effects of prior injuries.

Jurisdiction

This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the *Workers Compensation Act* (Act). Section 239(1) of the Act as amended on March 3, 2003 provides that a worker may appeal a decision of a review officer to the WCAT. Under section 250(1) of the Act, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make its decision on the merits and justice of the case, but in so doing, must apply policies of the Board's board of directors that apply to the case.

The worker's representative requests that the worker's appeal be allowed and seeks a finding that the worker's multiple compensable injuries accelerated degenerative changes in his lower back, shoulders and knees. He has provided a report of Dr. Silverthorne dated October 5, 2005 in support of his argument. In the notice of appeal, the requested outcome is noted to be "reopening of claim for wage loss and health care benefits."

In the worker's representative's submissions, he notes that the review officer stated on page 9:

... This decision does not prevent the worker making more specific requests of this nature in relation to one or more past claims for which there are some supporting grounds. Nor does it prevent the worker making other applications recognized by the *Act* or policy in relation to his prior claims, for example that a claim should be reopened under section 96(2) of the *Act* because of a recurrence of a prior injury or the worsening of conditions previously accepted as compensable.

From the submissions provided by the worker's representative, it would appear that the worker's representative has interpreted this to mean that it is open to the worker to make these "other applications" on this appeal. On review of the Review Division decision, I find that the review officer was suggesting that it would be open to the worker to make these "other applications" to the Board directly for initial adjudication.

The *WCAT Manual of Rules of Practice and Procedure*, item #14.30 outlines WCAT's jurisdiction on appeals. It states that the WCAT has jurisdiction to address any issue determined in either the Review Division decision or the Board decision which was under review, subject to the statutory limits on WCAT's jurisdiction. The issues raised by the worker's representative on this appeal of whether the worker's work injuries accelerated degenerative changes in the worker's lower back, shoulders and knees; and whether the worker's claim should be reopened, are not issues which were addressed in either the Review Division decision presently being appealed or the Board decision which was the subject of review. Consequently, I have no jurisdiction on those issues. My jurisdiction is limited to the issue as I have outlined above.

The worker has requested that the appeal be heard by way of oral hearing. The WCAT Registry has made a preliminary decision that the appeal be dealt with on review of the worker's claim file and the submissions. I agree with the Registry. As the issue is one of jurisdiction, I find that the matter can be dealt with fairly without the necessity of an oral hearing.

Background and Evidence

On February 1, 2001, the worker, a driver for a transportation company, applied to the Board for compensation in relation to a left shoulder injury which he alleged occurred on January 13, 2001. The Board denied the worker's claim.

The worker appealed the Board's decision to the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Review Board and the Appeal Division of the Board were replaced by the WCAT. As the appeal had not been considered by a Review Board panel before that date, it was decided as a WCAT appeal. In a decision dated November 17, 2004, the WCAT panel found that the evidence did not support the

likelihood that the worker injured his left shoulder in a workplace incident on January 13, 2001 and confirmed the Board's decision.

Following the WCAT appeal, the worker's representative wrote to the Board, requesting the Board adjudicate whether the worker's injury was due to the "synergistic effects of his various serious injuries over the years." He noted that the worker's claims history dated back to 1964 and suggested that that would be "a valid starting point."

In a letter dated March 5, 2004, the Board officer advised that she reviewed the worker's file and noted that the most recent decision on the worker's file was dated March 7, 2001. She stated that she could not reconsider that decision or other prior decisions as more than 75 days had elapsed. The worker requested a review of this decision. The review officer found no decision had been made by the Board officer; the Board officer was merely communicating the statutory time limit on the Board's authority to reconsider decisions and that time had elapsed. Accordingly, the review was rejected by the Review Division.

The worker appealed successfully to the WCAT. In a decision dated April 15, 2005, the WCAT panel found that the first two paragraphs of the Board officer's letter dated March 5, 2004 constituted a decision "that the Board does not have the jurisdiction to adjudicate the worker's entitlement to compensation as a result of the cumulative effects of prior injuries." The matter was returned to the Review Division for a review of the March 5, 2004 decision.

In a Review Division decision dated September 12, 2005, the review officer stated that he did not agree with the Board's reasons for declining to make a new decision, namely that this was totally precluded by section 96(4) of the Act. He stated that while section 96(4) does preclude the Board from making new decisions in several areas that have been the subject of prior decisions under the worker's claim, these decisions did not deal with all the possible issues raised by the worker's request.

The review officer also concluded that an "insufficient basis" had been provided by the worker that would justify the Review Division to order the Board to investigate the claims and to make a determination on the merits. In support of this conclusion, he cited the following factors:

- The vague nature of the worker's request having regarding to his several medical conditions and all the possible ways in which synergistic effects might occur.
- Most of the worker's injuries are minor, occurred from 1964 to 1974, and were followed by a 10-year gap to 1985 when there are no claims and no reports of continuing medical problems. It appears improbable that such injuries could have had a synergistic effect with later injuries and there is no medical evidence to support such a claim.

- Four injuries since 1989 that might be considered for a synergistic effect all relate to different parts of the body. There no evidence of these injuries causing continuing effects in the same parts of the body as the later injuries. There are also past Board decisions in relation to certain of these claims that they did not cause continuing effects. These decisions would preclude consideration of a synergistic effect.
- There is an absence of specific law or policy that the Board has an obligation to investigate and adjudicate a claim that the worker's current medical problems result from the combined affect of all his past claims in the absence of the worker providing some kind of basic case in support.

[reproduced as written]

The review officer also noted that it was not reasonable to expect the Board to devote time and resources to investigating and determining a speculative claim of this nature in the absence of the worker providing basic grounds to support the claim. He confirmed the Board's decision.

The worker now appeals the review officer's decision dated September 12, 2005.

Reasons and Decision

What Findings Were Made By the Review Officer

In the Board decision under review, the Board officer dealt with the issue of the Board's jurisdiction to adjudicate the worker's request. Under the heading of "Issues" the review officer did not outline an issue, but provided a factual background regarding the Board's decision. In his "Reasons and Decision" under the subheading "Jurisdiction and Applicable Law and Policy" the review officer outlined two other related issues under review in addition to the issue of jurisdiction. He stated on page 3:

... The issue is not so much whether the Board has jurisdiction but whether the Board is required to exercise it and make a decision on the merits in response to the union's request and whether it is appropriate for the Review Division to direct the Board to make a decision....

He stated on page 5:

The issue in this case is not just with whether the Board should make a determination but whether the Board should be required to investigate the worker's request.

The review officer made no definitive finding as to whether the Board is required to exercise its jurisdiction and investigate the worker's request. He did, however, refer to policy item #97.00 of the RSCM II and stated as follows:

... The effect of this policy is that with respect to the normal claims and applications envisaged by the *Act*, the worker must provide some basic information to support his or her request and after the worker has done this, the Board will take over responsibility of investigating the claim.

The review officer also concluded that an "insufficient basis" had been provided by the worker that would justify the Review Division in ordering the Board to investigate the worker's claims and made a determination on the merits.

Did the Review Officer Have Jurisdiction to Make Findings Beyond the Matter of Jurisdiction?

As noted above, the only issue determined by the Board officer in the decision under review was whether the Board had jurisdiction to adjudicate the union's request. This is supported by the April 15, 2005 WCAT decision which found that the first two paragraphs of the March 5, 2004 letter of the Board officer constituted a decision that the Board does not have the jurisdiction to adjudicate the worker's entitlement to compensation as a result of the cumulative effects of prior injuries. In allowing the worker's appeal, the WCAT panel concluded that the "worker is entitled to a review of the Board officer's decision that the Board does not have the jurisdiction to adjudicate the cumulative effects of prior injuries on the worker's left shoulder."

Item #A3.6 of the *Review Division's Practices and Procedures* (RDPP), which can be viewed on the Board's public website, explains that a review officer may become aware of an issue that was not raised in the initial decision under review or review request. In considering whether to deal with this issue as part of the review, the factors considered by the officer will include:

- a) whether it is essential to deal with the new issue in order to resolve the original issue under review, or if not essential, how incidental the new issue is to the original issue,
- b) the difficulty or complexity of the new issue,
- c) whether all the necessary information is available or easily obtainable, and
- d) the views of the parties, if known.

The review officer will also advise the parties of any new issue he or she proposes to deal with.

Item #B4.4 of the RDPP provides that one of the aims of the changes to the Act that created the review system is to promote greater finality of decision making. Therefore, a review officer who considers that a decision should be changed will in most cases make the new decision.

There is, however, no statutory authority which allows the review officer to decide new issues. Subsection 96.2(1) of the Act provides that review officers deal with requests for reviews of decisions. Accordingly, the review officer's jurisdiction is limited to the decisions contained in the Board's decision being reviewed, regardless of the desirability of addressing all possible matters so that worker's dependants and employers are not required to cycle through the appellate system.

Section 96.4(8) of the Act also provides that the review officer may make a decision

- a) confirming, varying or cancelling the decision or order under review, **or**
- b) referring the decision or order under review back to the Board, with or without directions.

[bold emphasis added]

There is no option to confirm, vary or cancel, in addition to referring the matter back to the Board with or without directions. Although the review officer found that he "confirmed" the Board's decision, I find that he more properly varied the Board's decision by finding that the Board had jurisdiction to adjudicate the worker's entitlement raised by the worker's request. Once a decision is varied, it is implicit that the matter is returned back to the Board to address the issue. I find that it was unnecessary for the review officer to determine whether the Board is required to exercise its jurisdiction and investigate the worker's claim and whether it is appropriate for the Review Division to direct the Board to make a decision, given that the Board had not made a decision refusing to adjudicate the union's request.

From the foregoing, I find that the review officer exceeded his jurisdiction in addressing issues other than that of jurisdiction. Accordingly, I cancel those determinations and findings, specifically on page 6:

...I consider that there is no reasonable basis for suggesting these injuries had a synergistic effect with later injuries that the Board should investigate, and the unions's submissions provide no information to the contrary....

I also cancel on page 8:

...I find that that insufficient basis has been provided by the worker that would justify the Review Division in ordering the Board to investigate the worker's claims and make a determination on the merits....

I also cancel the determinations and findings outlined in the "material factors," outlined on the bottom of page 8 and the top of page 9, relied on by the review officer in concluding as he did.

Even if the review officer had jurisdiction on the other issues, the review officer has indicated that the worker's request was too vague and that there was no medical evidence to support the cumulative effect of prior injuries. As provided in the submissions to the WCAT, the worker's representative has now outlined his request in more specific terms. He has also provided a new medical report dated December 2, 2005 of Dr. Silverthorne which provides some medical evidence to support the worker's request. As a result, the reasons of the review officer on these other issues would need to be reassessed.

I am aware that the WCAT may refer a matter back to the Board for determination under subsection 246(3) of the Act and suspend the appeal. WCAT then has jurisdiction to deal with the whole matter, including the Board's further determination. Subsection 246(3) is applicable when the WCAT "considers there to be a matter that should have been determined but that was not determined by the Board." I find that this is not a case where the Board "should" have decided whether it was or was not going to adjudicate the issue requested by the worker's representative given that the Board officer determined she had no jurisdiction to adjudicate the issue.

Does the Board Have Jurisdiction to Adjudicate the Worker's Entitlement to Compensation as a Result of the Cumulative Effects of Prior Injuries?

In determining whether the Board has jurisdiction, it must first be determined whether the issue requested by the worker's representative is an issue that has never been adjudicated or whether it is an issue that has been previously decided. If it falls into the latter category, in adjudicating the issue, the Board would be reconsidering a Board decision and the law and policy related to reconsiderations would apply.

In the Board decision under review, the Board officer concluded that the issue was not within her jurisdiction pursuant to section 96(4) of the Act which provides that a 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.

Therefore, although not explicitly stated, the Board officer determined that the issue requested was one that had been previously decided. I disagree. In a letter dated March 7, 2001, the Board officer was unable to conclude there was a specific incident on January 13, 2001 and denied the worker's claim. I find that the Board has only determined the compensability of the worker's shoulder as it related to that date pursuant to section 5(1) of the Act. The Board has not addressed the compensability under section 5(1) on an aggravated basis or on a cumulative effects basis.

In requesting that the Board adjudicate the issue of the worker's entitlement to compensation as a result of the cumulative effects of prior injuries, the worker's representative relied on a decision of the Supreme Court of British Columbia, *Plamondon v. British Columbia (Workers' Compensation Board)* [1988] B.C.J. No. 33 (*Plamondon* case). In that decision, the worker applied to the Board for compensation for a back condition. In 1969, the worker underwent a non-compensable spinal fusion operation on the lumbar area of his back which left him with a disability. In 1975, the worker suffered an injury to his lumbar back in a workplace incident. The Board found it to be compensable as it was superimposed on the worker's pre-existing back disability. It was recommended by the rehabilitation physician that the worker refrain from heavy work because of his 1969 spinal fusion. In 1976, the worker went to work performing heavier work than that recommended for his back. His back became sore but he continued to work. On February 7, 1977, the worker left work half way through his shift. The worker remained disabled following this date. He applied to the Board for compensation for his disability.

The Board refused the worker's claim. The Board officer found there was no new evidence to warrant a reconsideration of the 1975 claim and that he was unable to relate the worker's symptoms to his work activity of February 7, 1977. These decisions were upheld by the appellate bodies: the board of review and the commissioners of the Board. The worker applied for judicial review of the decision by the commissioners of the Board denying the worker's claim for compensation.

The court determined that the Board and the appellate bodies erred in focusing on the narrow issue of whether the worker suffered an injury at work on February 7, 1977, pursuant to section 5(1) of the Act. Justice Shaw found that the adjudication should have addressed whether the work he carried out from July of 1976 through to February 7, 1977 caused personal injury superimposed on his pre-existing spinal fusion disability. The court indicated that there was "failure to embark upon the proper inquiry which the circumstances of this case called for."

The court specifically noted that the broad scope of section 5(1) of the Act:

It is important to note that there is nothing in Section 5(1) which requires that the personal injury must have been suffered as a result of one particular accident or incident. The scope of the section is broad and in

my opinion includes a personal injury which may arise out of the course of employment over a period of time....

In response to the worker's representative's reliance on the *Plamondon* case, the Board officer referred to section 99 of the Act which provides that the Board is not bound to follow legal precedent and its decision must be given according to the merits and justice of the case. While this section indicates the Board is not "bound" to follow legal precedent, this does not mean that cases, such as the *Plamondon* case, which are applicable to the matter before them, should not be considered or applied. In my view, where the case is applicable and the reasoning is determined to be persuasive, it should be considered in the decision making process.

I find that the facts of the present case are similar to the *Plamondon* case and that the reasoning outlined in the *Plamondon* case to be persuasive. As noted by Justice Shaw, the scope of section 5(1) of the Act is broad and may include injuries which have arisen out of the employment over a period of time. I find the worker's entitlement to compensation as a result of the cumulative effects of the prior injuries constitutes a new issue for adjudication and is not a reconsideration of a previous Board decision.

Section 96(1) gives the Board exclusive jurisdiction to decide all matters of fact and law arising under Part 1 of the Act. As the issue raised by the worker's representative falls within this category and has not been previously decided, I find that the Board has jurisdiction to determine the worker's entitlement to compensation as a result of the cumulative effects of prior injuries.

I allow the worker's appeal.

I note that the worker has provided a new medical report which provides some evidence in support of his request and has provided a more specific request for adjudication. I recommend that this, in addition to my findings above, be considered by the Board in addressing the issue now sent back before them.

Conclusion

I confirm the review officer's decision on this issue of jurisdiction. I cancel the review officer's findings related to whether the Board is required to exercise its jurisdiction and whether it is appropriate for the Review Division to direct the Board to adjudicate the issue.

No expenses were requested, however a report of Dr. Silverthorne dated December 2, 2005 was submitted. I am satisfied that it was reasonable in the circumstances of this appeal for the worker to have obtained this report. I direct the Board to reimburse the worker for expenses (if any) related to Dr. Silverthorne's report, according to the Board's schedule of fees upon receipt of a bill from the worker or his representative.

Lisa Hirose-Cameron
Vice Chair

LH/hb