Noteworthy Decision Summary

Decision: WCAT-2006-02121 **Panel**: Inderjeet Hundal, Daphne Dukelow, Jane McFadgen **Decision Date:** May 17, 2006

Reconsideration – Authority of Workers' Compensation Board to reconsider – When is a decision "made" – Does a decision need to be communicated within 75 days to be "made" – Section 96(5) of the Workers Compensation Act

In the absence of specific direction in the *Workers Compensation Act* (Act), or in Workers' Compensation Board (Board) policy, the Board does not have the authority, pursuant to section 96(5) of the Act, to reconsider an original Board decision unless the reconsideration decision is communicated to the affected party(ies) within 75 days. Also, see noteworthy decision *WCAT Decision #2006-02669*.

The worker hit his head at work. Three days later, the worker suffered a sudden loss of vision in his right eye. The Board first accepted the worker's right eye claim as arising out of and in the course of his employment. The Board recorded the original decision in the worker's file and communicated the decision to the worker on the same day. On the 75th day after the original decision was recorded and communicated, the Board purported to reconsider it under section 96(5) of the Act, and disallowed the worker's claim. On that day the Board recorded the reconsideration decision in the worker's file but did not communicate the decision to the worker. On the 77th day after the original decision, the Board issued a letter to the worker advising him that the Board's original decision had been reconsidered and reversed. The worker requested a review of the reconsideration decision on the merits and the review officer upheld the Board's decision. The worker appealed to the Workers' Compensation Appeal Tribunal (WCAT), at which time the issue of the Board's authority to reconsider the original decision first arose.

The three member WCAT panel allowed the appeal on the basis that the Board exceeded its jurisdiction to reconsider the original decision when it failed to communicate the reconsideration decision before the expiry of the 75 day statutory time limit for reconsideration established by section 96(5). The panel found that communication of the reconsideration decision is not simply an administrative task, but is an integral component of the decision-making process involved in a reconsideration. Thus, a decision is not "made" until it is communicated. The panel directed the Board to cancel the reconsideration decision. The panel found that it was not necessary for the purpose of the appeal to address the required method or mechanics of communication of the decision to the affected party(ies).

The panel noted that the time limits set out in the reconsideration, review and appeal provisions of the Act all begin to run from the time the disputed decision is "made". Neither the Act nor Board policy address when a decision is "made", either generally or for the purposes of section 96(5). The panel determined that for the purposes of the review and appeal periods, the principles of procedural fairness and natural justice require that a decision be communicated before the time limits begin to run. Applying the presumption of consistent expression, and considering the legislature's intention to promote finality and certainty in the worker's compensation system, the panel found that in the absence of clear language in the Act or policy, there is no compelling reason to give a different interpretation to when a decision is "made" for the purpose of triggering/concluding the 75 day time limit on the Board's

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reconsideration authority. Decision-makers in the workers' compensation system should adopt a consistent interpretation of "decision" which does not vary depending on the context.

The panel acknowledged that its interpretation does not accord with the restrictive wording in the Board's *Best Practices Information Sheet #5* (effective March 31, 2005) which states that for the purposes of reconsideration a decision is made when it is documented on the claim file. The panel noted that although it may be administratively more convenient for the Board to adopt that interpretation, the practice is not binding on WCAT.

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Panel: Inderjeet Hundal, Vice Chair
Daphne Dukelow, Vice Chair
Jane MacFadgen, Vice Chair

Introduction

The worker struck his head on a cuber knife at work on October 31, 2003. On November 3, 2003 he had a sudden loss of vision in his right eye, which was later diagnosed as a central retinal vein occlusion. On December 10, 2003 the Workers' Compensation Board (Board) accepted the worker's right eye condition as arising out of an injury in the course of his employment on October 31, 2003.

In the February 25, 2004 decision letter under appeal the Board reconsidered its original decision to accept the claim and denied the worker's claim on the basis that his right retinal vein occlusion did not arise out of and in the course of his employment on October 31, 2003. The October 18, 2004 Review Division decision confirmed the Board's decision to deny the claim.

The worker now appeals the Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT). The chair of WCAT appointed a three member panel under section 238(5)(a) of the *Workers Compensation Act* (Act) to hear the worker's appeal. As the panel was not appointed under section 238(6) of the Act, this decision does not constitute a binding decision under section 250(3).

The employer is not participating in this appeal, although it was invited to do so.

In his October 19, 2004 notice of appeal the worker requested that the appeal proceed on the basis of written submissions, and the WCAT registry staff assigned the appeal to be considered on this basis. The worker provided a written submission with the assistance of the constituency office of his Member of the Legislative Assembly (MLA). After submissions were complete, the appeal was referred to a panel for decision.

The worker subsequently retained legal counsel who asked for an oral hearing and the opportunity to provide further written submissions before WCAT rendered its decision. WCAT gave the worker's counsel an opportunity to provide further evidence and submissions on the merits of the appeal, and as well invited his submission on the issue of whether the Board had the authority to reconsider its original decision to accept the claim. Counsel provided further evidence and submissions in correspondence dated October 17, 26 and 28, 2005, and February 28, 2006.

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We have considered afresh the worker's request for an oral hearing in light of the criteria set out in item #8.90 of WCAT's *Manual of Rules of Practice and Procedure*. We are satisfied that the appeal can be determined fairly based on a review of the claim file and written submissions as the appeal does not involve a significant issue of credibility and the underlying non-medical facts are not disputed. The issues under appeal involve essentially medical and legal issues, which can be properly addressed on the basis of written submissions without an oral hearing.

Issue(s)

Did the Board officer have the authority under section 96(4) of the Act to reconsider the prior December 10, 2003 decision to accept the worker's claim for a right eye condition;

If so, did the worker's right central retinal vein occlusion arise out of an injury in the course of his employment on October 31, 2003?

Jurisdiction

This appeal is brought under section 239(1) of the Act, which permits appeals from Review Division findings to WCAT. Section 250 of the Act provides that WCAT must make its decision based on the merits and justice of the case but, in so doing, must apply relevant policies of the board of directors of the Board. Section 254 gives WCAT exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal before it. This is therefore a rehearing by WCAT.

As the worker's injury occurred after June 30, 2002, the current provisions of the Act and the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) apply to the consideration of this appeal.

Background and Evidence

In his November 20, 2003 application for compensation the worker reported an October 31, 2003 injury when his head hit the cuber knife. He described his injuries as "head front right top hit in cuber and problem right eye." He did not work after November 3, the date he reported his injury to the employer.

The employer's report to the Board noted there were "no cuts" when the worker hit his head on the cuber knife.

Dr. Balisky, an ophthalmologist, examined the worker on November 4, 2003. His examination report (dated November 21, 2003) recorded that the worker noticed decreasing vision in his right eye. Dr. Balisky diagnosed a central retinal vein obstruction with engorgement of the retinal veins and intra-retinal haemorrhages. He referred the worker to Dr. Dhanda, a vitreo-retinal specialist.

Dr. Dhanda's November 5, 2003 examination report referred to an October 31 injury, and diagnosed a right central retinal vein occlusion which was disabling the worker.

Dr. Dhanda's November 11, 2003 letter to Dr. Balisky stated that the worker had noticed a drop off of vision in his eye over the last two to three days, and that he appeared "to relate it to trauma to his head at work on Friday. He did notice a drop-off in vision starting this Monday." Further blood work was ordered to rule out other disorders as the cause of this problem.

Dr. Balisky's December 3, 2003 report of his November 28 examination of the worker set out the following history. The worker had developed a sudden loss of vision on November 3. He hit the top of his head just above the right upper forehead on October 31. He did not report this incident to the first aid attendant. Dr. Balisky noted the worker was now questioning whether this hit on the head had caused the central retinal vein obstruction. Dr. Balisky examined the right upper crown of the worker's head and found no defect in the scalp. He recommended a CT scan to rule out a bony compression syndrome which may have been caused by the hit on the upper crown.

A Board client services representative spoke with the worker by phone on December 8, 2003, and recorded that on the date of injury the dull end of the cuber knife hit the worker in the right eye. The worker checked out his eye and thought it was okay and continued to work. At work on November 3 the worker noticed some blood in his eye so left work, and had not worked since then. When it did not go away he went to a clinic on November 5 as he could not get an appointment with his regular doctor.

The client services representative's December 10, 2003 claim log entry and claim decision memo recorded her decision to accept the worker's claim for an October 31, 2003 injury to the right eye based on the mechanism of injury set out in her December 8 memo. She noted that the employer was not protesting the claim, and that a form letter (25D09) and the first wage loss cheque had been sent to the worker.

The claim summary records that the form letter, dated December 10, 2003, was sent to the worker, the employer, and all health care practitioners. That form letter advises of a claim's acceptance. A file copy of the Board's wage loss payments confirms that on December 10, 2003 the Board issued the worker a cheque for $2020 for the period up to November 30, 2003. His last cheque was issued on December 22, 2003.

A December 10, 2003 report from Dr. Noble, a specialist in haematology, stated that the precise cause of the worker's retinal vein occlusion was unclear. Further testing had ruled out thrombophilia as a possible cause. Dr. Noble noted the worker spontaneously developed this condition around early November. He had had a headache and some malaise for a day or two before this, and he had bumped his head at work a day or two preceding this event.

Other medical reports on file similarly record a history that the worker hit his head on October 31 but did not have any problem with his vision until November 3.

In a December 16, 2003 memo, an entitlement officer asked a Board medical advisor to review the claim file as the reports seemed to indicate that the worker was not struck in the right eye, but on the top of his head just above the right upper forehead.

The Board medical advisor's December 24, 2003 memo stated that central retinal vein occlusion was most often idiopathic or associated with hypertension, diabetes, hyperviscosity syndromes of the blood, and glaucoma. He referred the file to a Board ophthalmology consultant, Dr. M, for an opinion. His memo to Dr. M referred to the history recorded in Dr. Balisky's report, and noted that it appeared that the worker was not struck in the right eye but on the top of his head above the right upper forehead. He requested Dr. M's opinion regarding the likelihood of any relationship between such a blow, which was not reported, and the central retinal vein occlusion.

The entitlement officer spoke with the worker by phone on January 15 and met with him on January 16, 2004. File memos record that she explained to the worker that his claim may have been accepted in error, and that she was waiting for further medical information and an opinion from the Board ophthalmologist before issuing any further benefits. If the claim was considered acceptable, he would be paid further benefits; if not, the claim would be readjudicated and no further benefits would be paid.

The worker clarified that on the date of injury he had reported the injury to his supervisor/foreman (X), who was also the first aid attendant. X had looked at it and told the worker it was not bad, so he continued working. Over the weekend the worker noted pain in his head while doing housework, but thought it was because it was so cold outside. He went to work on Monday, November 3, and when he noted blurry vision he reported to his supervisor again.

On January 15, 2004 the entitlement officer spoke with X, who confirmed that on October 31 at about 2:30 p.m. the worker reported to him that he had hit his head on the cuber knife. X examined him and could see no sign of injury, so told the worker it should be okay. The worker finished his shift at 4 p.m. At about 3 p.m. on Monday, November 3, the worker told X that he was having problems seeing properly. The worker then left work, and had not returned.

In a brief February 10, 2004 file memo, Dr. M wrote that he had dictated his memo. He noted there was a less than 50% possibility that the retinal vein occlusion was caused by the head injury.

The claim log records that on February 13, 2004 the entitlement officer phoned the worker and told him that he would not be paid any further benefits for his eye condition. She referred to Dr. M's February 10 memo that there was less than a 50% possibility that the worker's eye problem was due to his work injury. She could not provide any

further information as Dr. M's memo outlining his opinion and reasons had not yet been typed. She told the worker that after she had reviewed this memo she would write him a decision letter and enclose the appeal pamphlet.

The entitlement officer's February 17, 2004 claim log memo stated that she had met with the worker's wife and repeated Dr. M's message, noting: "I again explained that I could not provide her the reasons why as the memo had not yet been typed/scanned to his file. Once I had a chance to review this, with the reasons, I would then be in a position to make decision and provide him a decision letter if the decision is not to accept the claim. … I advised her I would phone her or her husband as soon as I had done the decision letter."

The claim log records that Dr. M's February 10, 2004 memo was typed and electronically scanned in to the claim file on February 17. In this memo Dr. M noted the sudden development of the worker's central retinal vein occlusion on November 3, 2003. He expressed the following opinion:

> Apparently on October 31st 2003 he received a blunt injury to his right upper forehead while at work. There was no bleeding or loss of consciousness; and he did not report the incident. The question arises as to whether this injury could have in any way precipitated the right central retinal vein occlusion. I am unaware of any causal relationship between minor head trauma and central retinal vein occlusion. I was unable to find any reference to this in a quick literature search.
>
> In summary, it is my opinion that there is considerably less than 50% possibility that the central retinal vein occlusion was caused by the minor head injury.

The claim log records that a Board officer read this memo to the worker's wife when she attended the Board office on February 19, 2004.

The Board medical advisor's February 23, 2004 claim log entry noted that he concurred with Dr. M's opinion that the possibility was less than 50% that the worker's retinal vein occlusion was caused by the head injury that led to this claim.

On February 23, 2004 the entitlement officer sent the client services manager an urgent message requesting permission to reconsider the decision to accept the worker's claim, noting "NEED TO DO TODAY – 75TH DAY." The manager responded on the same day that the reconsideration was approved.
The entitlement officer's February 23, 2004 claim log memo, entitled "Regarding: Decision - Reconsideration of Acceptance of Claim", explained her decision to disallow the claim, based on the opinions of the Board medical advisor and Dr. M. She concluded that the claim had been accepted in error, and she revised the file claims summary to show the claim was disallowed. She also advised a representative from

Human Resources Development Canada (HRDC) that she had reconsidered the decision to accept the worker's claim and would be doing the decision letter for the worker that day.

The entitlement officer created a "Claim Decision" claim log entry, dated February 23, 2004, stating "Claim decision added. Decision is: disallowed." The entitlement officer explained the basis for her conclusion that the claim had been accepted in error in her companion claim log memo of the same date, entitled "Regarding: Decision - Reconsideration of Acceptance of Claim - Disallowed." She stated: "I am therefore disallowing the worker's claim at this time for wage loss and health care benefits" and "I have done a decision letter for the worker and will call his wife to pick it up."

The entitlement officer's February 25, 2004 decision letter cited sections 96(4) and (5) of the Act and advised the worker that she had reconsidered the prior acceptance of his claim for wage loss and health care benefits. The claim was now disallowed. Although the entitlement officer accepted that the worker bumped his head on a cuber knife at work on October 31, 2003, she concluded that his sudden loss of vision on November 3, 2003, diagnosed as a right central vein occlusion, was not related to that incident.

Dr. Dhanda performed vitrectomy surgery on the worker's eye on February 16, 2004. Subsequent medical reports document ongoing disability with respect to the worker's right eye condition.

The October 18, 2004 Review Division decision confirmed the entitlement officer's February 25, 2004 decision. The review officer accepted Dr. M's opinion, and concluded that the worker's right eye injury was not caused by the October 31, 2003 work incident. The review officer stated that the work incident was very minor, as it did not require treatment and did not result in an open wound to the worker's head. There was no evidence which discredited Dr. M's opinion, given that none of the treating physicians was able to establish a link between the October 31 work event and the onset of symptoms on November 3, 2003. The presumption in section 5(4) of the Act did not apply as the evidence did not support that the injury was caused by an accident.

The worker appealed the Review Division decision to WCAT, seeking a reversal of the decision to disallow his claim.

The worker's initial submissions, prepared with assistance from his MLA's office, described that the horizontal lip of the cuber knife hit him in the forehead when he turned to place a block under the cuber saw. He had reported this incident on the date of injury, as the employer representative had subsequently confirmed. A few days later, around November 3, 2003, the worker began to notice a loss of sight in his right eye, which gradually deteriorated to the point of total blindness.

The submission appended two medical journal articles and a court case to support the proposition that a central retinal vein occlusion could follow a trauma. As the worker did not suffer from any of the known medical causes of central retinal vein occlusion, the accident presumption in RSCM II policy #14.10 and the legal principle of *res ipsa loquitur* (a Latin term which means the thing speaks for itself) applied to shift the burden of proof to the Board to establish another cause for the worker's loss of vision other than hitting his head on the cuber knife.

Subsequent submissions from the worker's counsel included income tax data, a letter from the worker's wife and daughter and the worker's affidavit regarding the claim incident, his vision problems which began a few days later, and the hardships he and his family had experienced because of his disability.

The worker's counsel argued that nothing in the Act permitted the Board to treat a "claim log entry memo" as a decision. As the Act did not define "decision", the word should be defined according to the "merits and justice" of the case, consistent with section 250(2) of the Act. Alternatively, WCAT should adopt the Review Division's definition of "decision" in its *Practices and Procedures* manual. Applying this definition, the February 23, 2004 memo was not a decision because it was not "communicated to the person affected." Only the February 25, 2004 letter could be considered a decision as the Board did not contact the worker to communicate the denial of his claim before it issued the February 25 letter.

The submission stated that the February 25, 2004 decision to deny the claim was contrary to section 96(5) of the Act and thus unlawful, as it was made on the 77th day after the decision had been made to accept the claim.

The worker's counsel criticized the fairness and adequacy of the Board's investigations and Dr. M's opinion. He urged WCAT to obtain opinions on causation from the treating physicians and to hold an oral hearing at which these physicians, the Board medical advisor and Dr. M could give evidence and be cross-examined.

WCAT provided additional time for counsel to submit evidence from Drs. Dhanda, Gill and Balisky in response to his October 28, 2005 letters requesting their opinion on the cause of the worker's retinal vein occlusion. No further evidence was submitted.

Counsel submitted that there was a direct temporal relationship between the worker's blunt head trauma at work on October 31 and his loss of vision during his next work shift on November 3, 2003. Given Dr. Noble's opinion that the cause of the worker's retinal vein occlusion was unclear and the absence of evidence of another cause of the occlusion, WCAT must apply section 250(4) of the Act and find that the October 31 work injury materially contributed to his eye condition.

Finally, the submission requested reimbursement of the worker's legal fees, costs and taxes.

Reasons and Findings

Did the Board have the authority to reconsider its December 10, 2003 decision to accept the worker's claim for a right eye injury?

Prior to March 3, 2003, there was no time limit on the Board's ability to reconsider its previous decisions under section 96 of the Act. The *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63) introduced a 75-day time limit on the Board's authority to reconsider a prior decision under Part 1 of the Act, effective March 3, 2003. The current sections 96(4) and (5) which apply in this appeal are set out below:

> (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.
>
> (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,
> >
> > (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.

Section 1 of the Act, as amended by Bill 63, defines "reconsider" as "to make a new decision in a matter previously decided where the new decision confirms, varies or cancels the previous decision or order." The Act does not define "decision", or specify when a decision is made.

As a result of section 245.1 of the Act, which came into effect on December 3, 2004[1] the definitions in section 1 of the *Administrative Tribunals Act*[2] (ATA) apply to WCAT. Section 1 of the ATA defines "decision" as "includes a determination, an order or other decision."

We conclude that the Board's decision to accept the worker's claim was made on December 10, 2003. On that date the Board officer recorded the acceptance of the claim in a claim log entry and claim decision memo, issued the form letter to the worker and employer advising of the claim's acceptance, and issued a cheque to the worker for the initial payment of wage loss benefits.

[1] see B.C. Reg.516/2004
[2] S.B.C. 2004, c.45

The Act does not address how time periods in the Act are to be calculated. Section 25 of the *Interpretation Act*, R.S.B.C. 1996, c.238 therefore applies to the calculation of the 75 days referred to in section 96(5) of the Act. Section 25 provides as follows:

> 25(4) In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days must be excluded.
>
> (5) In the calculation of time not referred to in subsection (4), the first day must be excluded and the last day included.

As section 96(5) uses the expression "more than 75 days", the 75 days are not "clear" days as described in section 25(4). Applying section 25(5) of the *Interpretation Act* to the calculation of the 75 day time period, the day that the original decision was made (December 10, 2003) is excluded, and the 75th day (February 23, 2004) is included.

February 23, 2004 was thus the last day the Board could make a new decision under section 96(4) of the Act with respect to the matters previously decided in its December 10, 2003 decision. Section 96(5) precluded the Board from making a new decision after February 23, 2004, as at that point more than 75 days would have elapsed since the December 10, 2003 decision to accept the claim was made.

The question then arises as to when the Board made the new decision to disallow the worker's claim. Was it the date of the February 23, 2004 "claim decision" log entry on the worker's claim file, the date of the February 25, 2004 decision letter, or some other date? To answer this question we must address whether a decision has to be documented and/or communicated to the affected party(ies) in some form before it can be considered to have been "made" for the purposes of sections 1 and 96(4) and (5) of the Act.

The Act does not specify when a decision is made, either generally or for the purpose of determining the beginning and end points of the 75 day reconsideration period in section 96(5). The Act does not require the Board to send or otherwise communicate either the original decision or the reconsideration decision to the worker or employer.

Although the Act does not impose a general requirement that the Board communicate its decisions to an affected worker/employer, there are provisions which oblige the Board to give notice of specific types of decisions, such as an employer assessment under section 39(6) or a section 189(1) variation or cancellation of an order under Part 3 of the Act.

None of the Board's published policies addresses when a decision is "made", either generally or for the purposes of a reconsideration decision under section 96 of the Act.

The Board's published policy with respect to reconsiderations is found in RSCM II policy #C14-103.01. The policy notes that the Act provides the Board with a very limited time period to reconsider previous decisions or orders. The relevant portions of the policy, in effect at the time of the decisions under appeal, are set out below:

> **(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.
>
> **(b) The purpose of sections 96(4) and (5)**
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> … The purpose of these amendments is to promote finality and certainty within the workers' compensation system.
>
> The same amendments establish a right to request a review by a review officer under sections 96.2 to 96.5, where a party disagrees with a decision or order made at the initial decision-making level. It is this review, rather than the application of the Board's reconsideration authority, which is intended to be the dispute resolution mechanism for initial decisions and orders of Board officers.
>
> It is significant that section 96(4) only authorizes the Board to reconsider a decision or order "on its own initiative." This is to be contrasted with the Board's authority to reopen a matter "on its own initiative, or on application" under section 96(2)….
>
> The use of the words "on own initiative" in section 96(4), with no provision for "on application", and the availability of a review mechanism under sections 96.2 to 96.5, indicate that the Board is not intended to set up a formal application for reconsideration process to resolve disputes that parties may have with decisions or orders.
>
> Rather, the Board's reconsideration authority is intended to provide a quality assurance mechanism for the Board. The Board is given a time-limited opportunity to correct, on its own initiative, any errors it may have made.
>
> **(c) Advice to parties**
>
> Parties to a decision or order will be advised, in writing, at the time the decision or order is made, of the right to request a review of the decision

> or order under section 96.2. A party who approaches the Board to have the decision or order reconsidered will be reminded of the party's right to request a review under section 96.2. If the Board reconsiders a decision or order before the request for review is made, the Board will advise the parties to the decision or order of the reconsidered decision. The reconsidered decision gives rise to a new right to request a review under section 96.2.
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> **(d) Restrictions on reconsideration**
>
> The *Act* places a number of express restrictions on reconsidering previous decisions and orders. It is noted, in this respect, that "reconsider" means the making of the new decision and not merely the starting of the reconsideration process leading to the new decision.
>
> - The Board may not reconsider a decision or order more than 75 days after the decision or order was made.…The 75 day period commences on the date the decision was made (not March 3, 2003 in the case of those decisions made prior to that date).

The policy goes on to outline the grounds for reconsideration, and the authority of various Board officers to reconsider a decision or order. The amendments to policy #C14-103.01, which took effect January 1, 2005, did not materially change the relevant portions of the policy quoted above.

Although policy #C14-103.01 does not expressly address when a decision is "made" for the purpose of calculating when the 75 day time period begins and ends, it requires the Board to communicate the reconsidered decision to the affected party(ies) and to advise them in writing, at the time a decision is made, of the right to request a review of the decision under section 96.2 of the Act.

RSCM II policy #2.20 provides that if a policy requires the Board to notify an employer or worker before making a decision or taking an action, the Board will take all reasonable steps to notify or communicate with that party.

RSCM II policy #99.10 addresses the disclosure of issues prior to the adjudication of decisions. It contemplates that as part of the investigation which precedes a decision to disallow a claim, the adjudicator will have communicated with the worker by telephone, in person or in writing. The policy states, in part:

> Through the medium of these communications the worker is made aware of the nature of the problem and has an opportunity for input and comment. If, however, for some reason an Adjudicator concludes that a claim may not be acceptable, the worker is contacted before a decision is

> reached. The contact provides the worker with an opportunity for input and comment....

RSCM II policy #99.20 addresses the notification of decisions. It states that no reasons are given when a claim is allowed and the employer did not protest the claim. The Board simply sends the cheque. When a decision is made to allow a claim that the employer has protested, the Board will notify the employer of the decision and the reasons, where possible by telephone. A letter explaining the decision and reasons will be sent where the employer cannot be contacted by telephone, or where the employer indicates that it remains dissatisfied with the decision despite the telephone explanation. The letter is sent to the employer, with a copy to the worker.

The policy states that where the Board makes a decision which is adverse to the worker, the reasons for that decision are stated in a letter to the worker. The policy does not, however, specify a time frame in which that must be done.

RSCM ll policy #99.21 provides that the worker will be informed of rights of review and/or appeal in any case where an adverse decision that is reviewable or appealable is made. The employer will be informed of rights of review and/or appeal where a claim that it protested is accepted or where its request for relief of costs or to limit compensation entitlement is denied.

While the above policies seem to make a distinction between the making of a decision and the activity of communicating and explaining that decision to the affected parties and advising them of their appeal rights, the reconsideration process set out in policy #C14-103.01 assumes that a decision letter is issued at the same time a decision is made.

At the time the Board officer issued the February 25, 2004 decision under appeal, *Practice Directive #59: Reconsiderations* (accessible on the Board's website), provided Board officers with guidance on the interpretation and application of the law and policy related to reconsiderations. Practice directives are issued by the Board's administration, rather than by the Board's board of directors. They do not have the status of published policy, and are therefore not binding on WCAT. It is nevertheless appropriate for WCAT to take practice directives into account on issues of interpretation, given the desirability of using common definitions in order to promote consistency and predictability of decision-making in the workers' compensation system.

Practice Directive #59 stated, under the heading "Defining Terms": "The date of a 'decision' normally refers to the date of the decision letter." It went on to provide that if a reconsideration by a Board officer would result in a disallow of a previously allowed claim, the Board officer must have the manager's approval. Where reconsideration was warranted, the Board officer should issue a comprehensive decision letter.

Effective March 31, 2005, Practice Directive #59 was replaced by *Best Practices Information Sheet #5: Reconsiderations* (BPIS #5) (also published on the Board's website). BPIS #5 changed the definition of when a decision is made, as follows:

> For purposes of determining the 75-day period, a decision is made when it is documented on the claim file and the 75-day period commences the following day. Decisions are communicated to the parties in accordance with the requirements of RSCM Policy item #99.20, *Notification of Decisions*.

BPIS #5 goes on to state that, once the reconsideration is complete, the Board officer will communicate the new decision to the parties in writing, together with notice of their right to request a review of the new decision. It provides:

> RSCM Policy item #C14-103.01 clarifies that reconsideration means the making of the new decision and not the starting of the reconsideration process leading to a new decision. The entire reconsideration process (i.e. making the new decision) must be completed prior to the 75-day period expiring or a review/appeal being initiated. For example, where a Board officer realizes that he/she would like to amend a wage rate set on a claim, but is unable to gather all of the earnings information necessary to make a new wage rate decision within 75 days of the date of the original decision, a reconsideration is not possible. It is not sufficient for Board officers to indicate that they wish to revisit the previous decision. They must be in a position to actually make a new decision within 75 days of the previous decision.

Statutory interpretation in Canada is governed by the "modern principle", which the Supreme Court of Canada described in *R. v. Jarvis,* [2002] 3 S.C.R. 757, at para. 77:

> …one is to seek the intent of Parliament by reading the words of the provision in context and according to their grammatical and ordinary sense, harmoniously with the scheme and the object of the statute.

This approach to statutory interpretation accords with section 8 of the *Interpretation Act*, which provides:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

In considering the legislative intention with respect to the enactment of the 75-day time limit on the Board's authority to reconsider its decisions, we reviewed the debates of the Legislature regarding Bill 63. When the Minister of Skills Development and Labour introduced Bill 63 during its second reading on October 22, 2002 (*Hansard*, Volume 9,

No. 3), he explained that the provisions related to reconsiderations and reopenings had been changed to increase finality. The Minister described the goals of Bill 63 as follows, at pages 3935-6:

> The changes that we are introducing will accomplish three main goals: first, limit the amount of time that it takes to reach a decision; second, improve the quality and consistency of decision-making; and third, end the cyclical nature of the current process.
>
> …
>
> The tribunal's decisions will be final and binding, and the possibility for future reconsideration of the matter by the WCB has been eliminated. This will break the endless cycle of appeals that is perpetrated under the current system. It has been reported by some that this lack of finality has been as difficult to endure as the initial injury. We need to break that cycle and let people get on with their lives. What we are proposing is a fair and balanced system that places a real emphasis on timeliness and quality and consistency of decision-making.

The recommendations in the March 11, 2002 *Core Services Review of the Workers' Compensation Board*[3] (the Winter Report) provided the basis for many of the statutory amendments enacted by Bill 63. We recognize that we must exercise caution in using the core reviewer's report as a basis for interpreting the legislative changes brought into force by Bill 63, as not all of the report's recommendations were adopted by the Legislature. Where a new statutory provision adopts a recommendation in the report, however, the discussion in the report may assist us in understanding the background to the legislative changes.

The Winter Report recommended that the Board's open-ended power to reconsider and change its previous decisions be curtailed significantly, in order to promote finality for workers and employers and to increase financial certainty in the worker's compensation system. The report explained the rationale for imposing a 75-day time limit on the Board's reconsideration authority, at pages 100 - 104:

> Based on the WCB's broad authority to reconsider its previous decisions, most matters can never be considered to be "final". As a result, there is always the potential of significant unknown financial liabilities being placed on the present (and the future) workers' compensation system based on the reconsideration of matters that were adjudicated some time (which may be quite lengthy) in the past.

[3] This report is accessible on the Internet at the website of the Ministry of Labour and Citizens' Services

…

As previously noted, an application for reconsideration is premised on the assertion that the previous decision was wrongly decided. However, it is my opinion that the appeal structure is the appropriate process to be used to challenge an allegedly wrong decision. The purpose of the appellate system is to provide a reasonable opportunity for wrong decisions to be identified and corrected.…

…

Accordingly, it is my recommendation that, subject to the one exception referred to below, the WCB's existing power of reconsideration found in Sections 96(2) and 113(2) should be deleted from the *Act*.…

As noted above, I do believe there should be one exception wherein the WCB should be provided the discretion to exercise the power to reconsider an initial decision. In particular, I have been advised of situations where a party of interest questioned the validity of an initial decision with a WCB Manager within the same Operating Division from which the decision was rendered. In some circumstances, the Manager had agreed to revise the decision in dispute, thereby removing the necessity of the aggrieved party having to proceed through the appeal system.

In my opinion, it is advantageous for a party of interest to have the opportunity to address his/her concerns with the WCB in an informal and timely manner should he/she choose to do so. An acceptable resolution through such an informal process would be beneficial to the aggrieved party, since he/she would presumably be satisfied with the outcome, and to the WCB, which would have avoided the matter being formally appealed.

However, any opportunity for an aggrieved party of interest to seek such an informal reconsideration must be limited in time in order to avoid any delay in the utilization, and finalization, of the appellate process should the matter not be informally resolved.

Accordingly, it is my recommendation that a party aggrieved by a decision rendered by an initial decision-maker should have the opportunity to request the WCB to reconsider the matter. Whether or not the WCB agrees to conduct such a reconsideration should be left within the discretion of the WCB. However, the WCB's authority to reconsider the decision of the initial decision-maker would cease upon the earlier of:

(i) the expiry of 75 days from the date that the decision by the initial decision-maker was communicated, in writing, to the affected parties, or

(ii) the date that the aggrieved party of interest applies for an internal review of the disputed decision.

For the sake of clarity, I want to explain how the WCB's opportunity to conduct this limited reconsideration of an initial decision would interface with the 90 day time period for an affected party to apply for internal review. In the circumstances where the WCB either

(i) refuses to conduct a reconsideration of the initial decision, or

(ii) fails to render its reconsideration decision within 75 days of the date the disputed decision was communicated, in writing, by the initial decision-maker to the affected parties, or

(iii) renders its reconsideration decision confirming the initial decision,

the aggrieved party's application for internal review must be commenced within the 90 day period from the day that the disputed decision of the initial decision-maker was communicated to him/her. In other words, the original 90 day period to commence the application for internal review would not have been delayed or suspended by the aggrieved party's request for reconsideration.

However, if upon reconsideration the WCB makes any revision to the disputed decision, then the 90 day time frame to apply for an internal review would commence from the date that the WCB's reconsideration decision letter was communicated, in writing, to the affected parties.

The Winter Report proposed that the 75 day reconsideration period, the 90 day period to request a review by the Review Division, and the 30 day period to appeal to the appeal tribunal all run from the date the disputed decision was communicated, in writing, to the affected party(ies).

Although Bill 63 incorporated the 75-day time limit on the Board's reconsideration power recommended by the Winter Report, it did not require written communication of the disputed decision before the various statutory time limits began to run. Bill 63 also did not amend section 113(2) to place a parallel 75-day time limit on the Board's authority to reconsider a decision or order related to occupational health and safety under Part 3 of the Act.

The provisions in Bill 63 which establish time limits for reconsideration by the Board (section 96(5)) and by the Review Division (section 96.5(3)), and for filing a request for review to the Review Division (section 96.2(3)) or an appeal to WCAT (sections 243(1) and (2)), are all expressed as beginning when the disputed decision "was made." Section 96(6) sets out a 150 day time limit in which a review officer "must make a decision on a review." None of these provisions specify when a decision is considered to be made. Section 253(3) provides, however, that WCAT's final decision on an appeal must be made in writing with reasons.

We consider that the statements in RSCM II policy #C14-103.01 regarding the purpose of sections 96(4) and (5) largely reflect the discussion in the Winter Report set out above. That is, the purpose of the 75-day time limit on the Board's ability to reconsider its decisions under Part 1 of the Act is to promote finality and certainty in the workers' compensation system. The review/appeal process, rather than the reconsideration process, is intended to be the dispute resolution mechanism with respect to the Board's decisions. The Board retains a limited window of opportunity to change its decisions to correct errors which it becomes aware of through its own investigations or as a result of a request by a worker or employer. Unless a decision results from fraud or misrepresentation, it can only be changed after the 75-day point on the initiative of an aggrieved party via the formal appeal structure, to which strict time limits apply.

The Board's inability to correct decisional errors outside the 75-day period underscores the importance of careful and thorough adjudication at the first instance, as well as the need for expeditious investigation and correction of any apparent mistakes.

After canvassing the general legislative intention behind the enactment of the new reconsideration provisions, we turned to the dictionary definitions of "decision" as part of our consideration of the "grammatical and ordinary sense" of the term as used in the reconsideration provisions.

The *Concise Oxford English Dictionary* (10th edition) definition of "decision" encompasses both the process of deciding as well as the ultimate conclusion:

> *n.* **1** a conclusion or resolution reached after consideration. ► the action or process of deciding. **2** the quality of being decisive; resoluteness.

Black's Law Dictionary (8th edition) defines "decision" as:

> A judicial or agency determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case.

The Dictionary of Canadian Law (3rd edition) similarly defines "decision", in part, as follows:

> 1. A judgment, ruling, order, finding, or determination of a court. 2. "…[O]f a Court or Judge means the judicial opinion, oral or written, pronounced or delivered, upon which the 'judgment or order' is founded and the 'judgment or order' is the embodiment in legal procedure of the result of such decision …" *Fermini v. McGuire* (1984), 42 C.P.C. 189 at 191, 64 N.S.R. (2d) 421, 143 A.P.R. 421 (C.A.)…

These dictionary definitions of "decision" do not assist in pinpointing when an administrative body, such as the Board, makes a decision for the purpose of beginning or ending a statutory time limit. Only some of those definitions contemplate some form of communication of the content of the determination (i.e. the reference to pronouncement or delivery of a decision). As noted earlier, the ATA definition of "decision", which applies to WCAT decisions, makes no reference to communication, although section 253(3) requires that WCAT's final decision on an appeal be made in writing with reasons.

One of the rules of statutory interpretation of particular relevance in this case is the presumption of consistent expression, which applies not only to individual words but also to patterns of expression.

Sullivan and Driedger on the Construction of Statutes (4th edition, 2002) describes this presumption at pages 162-163:

> It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it then makes sense to infer that where a different form of expression is used, a different meaning is intended.

In *Thomson v. Canada (Minister of Agriculture)*[4] Cory J. applied this principle to the interpretation of a word which appeared in various sections of a statute: "The word is used in other provisions of the Act. Unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an Act."

The reconsideration, review and appeal provisions added to the Act by Bill 63 all use the same formulation, to the effect that the relevant time limits run from when the disputed decision "was made." In the absence of clear language in the Act or published policy which would dictate such a result, we see no compelling reason to give a different interpretation to when a decision is "made" for the purpose of triggering/concluding the 75 day time limit on the Board's reconsideration authority and the 23 day limit on the Review Division's reconsideration authority, or triggering the 90-day time limit for a party to request a review.

While the Legislature could easily have made such a distinction between the operation of these statutory time frames, it did not do so. We therefore presume that the Legislature did not intend to create inconsistent schemes for the counting of these time periods for the various reconsideration, review and appeal provisions.

A number of WCAT decisions have addressed when a decision is made for the purpose of the 75-day time limit on the Board's reconsideration authority. All of the referenced decisions are published on WCAT's website.

In *WCAT Decision #2004-03907* (published as a Noteworthy decision), a Board case manager responded to an employer's request for relief of costs by advising that the Board had previously addressed that issue in a notation on an internal Board form. The case manager concluded that as the matter had been previously decided by the Board, and more than 75 days had elapsed, sections 96(4) and (5) of the Act barred him from reconsidering the prior decision, even though the Board had never sent the employer a

[4] [1992] 1 S.C.R. 385

decision letter on this matter. The Review Division rejected the employer's request for review on the basis that the case manager had not issued a reviewable decision, as it was simply an information letter communicating information on the statutory time limit on the Board's reconsideration authority.

The panel in *WCAT Decision #2004-03907* concluded that an internal determination on the Board's file, which was not communicated to the affected party(ies), did not constitute a "decision" for the purpose of triggering the 75-day time limit on the Board's reconsideration authority in sections 96(4) and (5) of the Act. The panel reasoned as follows:

> …To find otherwise would violate basic principles of procedural fairness and natural justice. I do not consider that the legislature, in placing a 75-day time limit on the Board's reconsideration authority, intended this to apply to situations in which the "decision" had never been communicated so as to deprive the parties of their rights of review or appeal under the Act.
>
> Accordingly, I do not consider that section 96(4) and (5) operate so as to limit the Board from reconsidering a matter, where the earlier file determination or "decision" had not been communicated. Where the determination has not been communicated, it may, at least in some circumstances, remain tentative or provisional in nature, and subject to revision. The situation may be different where the affected party chooses to accept a file memorandum, and elects to bring an appeal on the basis that it constitutes a decision. It may be that the affected party could waive their right to service of a decision, for the purpose of exercising a right of appeal. I am not addressing that situation in this decision.

The panel in that case suggested that it would be helpful to have policy clarification concerning the requirement for notification of a decision before the 75-day time limit on the Board's reconsideration authority applied.

A number of subsequent WCAT panels have adopted the rationale in *WCAT Decision #2004-03907*, and similarly concluded that a Board decision which is not communicated is not a decision for the purpose of triggering the 75-day time limit on the Board's authority to reconsider a decision (see, for example, *WCAT Decisions #2004-06708* and *#2005-05996*). The panels in these cases all considered it significant that to adopt the Board's interpretation of "decision" in the context of sections 96(4) and (5) would effectively deprive the affected employer or worker of their appeal rights under the Act as the Board had never informed them of the decision at the time it was documented on the file, or provided them with a formal decision which they could appeal within the relevant statutory time frame.
The panel in *WCAT Decision #2005-05996* acknowledged that this interpretation did not accord with the restrictive wording in BPIS #5 to the effect that a decision is made when

it is documented on the claim file. The panel noted: "Although it may be administratively more convenient, given the reasoning I have adopted from *WCAT-2004-03907*, and my conclusion that sections 96(4) and (5) cannot operate in the face of an uncommunicated decision, this guideline violates basic principles of procedural fairness and natural justice."

In *WCAT Decision #2005-04638*, the panel considered an appeal which raised the issue of whether more than 75 days had elapsed when the Board reconsidered a prior decision. The Board officer had verbally advised the worker within the 75-day period that he had reconsidered his earlier decision and was now denying the claim; the date of the decision letter confirming the new decision was outside the 75-day time frame.

The vice chair rejected the argument that a reconsideration decision must be in writing, noting that neither sections 96(4) or (5) nor RSCM II policy #C14-103.01 imposed such a requirement. She also noted that Practice Directive #59 was not binding on WCAT, and in any event it had now been changed to state that the date of a decision is the date that it is entered in the claim file. She wrote:

> The time line that is triggered for a right to a review or an appeal is separate and different from the timeline in which the Board may reconsider a decision.
>
> I have also considered item #99.20 of the RSCM II, entitled "Notification of Decision." It also indicates that not all decisions need to be in writing. It further states that, where a decision is made adverse to a worker, the **reasons** [emphasis mine] are stated in a letter to a worker. It does not indicate that an adverse decision that is not communicated in writing is void.
>
> In this case, the Board officer did communicate his reconsidered decision to the worker. He did so over the telephone on May 12, 2004. I find that he told her that her claim was denied and her benefits terminated on May 12, 2004. Therefore, the Board officer was within the 75-day time limit, and his decision is valid.
>
> [reproduced as written]

In *WCAT Decision #2004-05849*, the panel concluded that the Board exceeded its jurisdiction in making a reconsideration decision outside the 75-day period. The panel treated the decision letter, rather than the claim log decision memo (which was made within the 75 day period) as the reconsideration decision.

In a different context, *WCAT Decision #2004-01842* (published as a Noteworthy decision) addressed the issue of what constituted an initial adjudication for the purpose of interpreting the effective date of a resolution of the Board's former panel of administrators. The resolution stated that the new policy on chronic pain applied to all

claims that were "currently awaiting an initial adjudication." The Board first dealt with the worker's entitlement to compensation for chronic pain in an April 2002 memo, but did not issue the decision letter regarding the worker's entitlement until January 2003. The panel explained its conclusion that the decision letter constituted the "initial adjudication", as follows:

> …Although for purposes of registering appeals, WCAT may take jurisdiction over memos or other forms of correspondence on a worker's claim file, I interpret the phrase "initial adjudication" to mean the formal communication of a decision to the worker. Although there were telephone communications between the worker and Board officers subsequent to the April 2002 memo, the subject matter of these communications concerned the worker's long-term employability, rather than his specific entitlement to compensation for subjective, chronic pain. The worker was only informed in January 2003 of that entitlement. The January 2003 decision can be characterized as a decision adverse to the worker's interest, therefore requiring notification of the reasons supporting the decision and the worker's right to appeal such a decision. In reaching this conclusion, I note the provisions of item #99.20 of the RSCM I.

We have found that analysis useful because, in a system of administrative decision-making, the concepts of adjudication and decision are closely related.

The Review Division's *Practices and Procedures* manual (accessible on the Board's website) contemplates that a determination which is communicated other than in writing, can constitute a reviewable decision. Effective February 2, 2004 the Review Division amended the manual's definition of "decision" to include 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…." (We note that the worker's counsel quoted the earlier version of the definition.) Manual item B2.1.5, entitled "Decisions not communicated in writing", similarly provides:

> A decision is reviewable whether communicated in writing or orally. However, if a review of an oral decision is requested, the Review Division must satisfy itself that a decision was in fact made. If so satisfied, the Review Division may request written reasons from the Division that made the decision.

The *Practices and Procedures* manual is a document which the Review Division has developed to guide its internal administration of reviews. As such, we do not accord it deference on the matter of statutory interpretation of terms which are used in the Act and the Board's published policy. We have, however, canvassed the Review Division's definition of decision as part of our general consideration of the range of viable meanings of that term as it is used in sections 1 and 96(4) and (5) of the Act, again with

a view to promoting consistency of decision-making within the workers' compensation system.

We conclude that there is ambiguity in the Act with respect to when a decision is made. Counsel has argued that section 250(2) applies to the interpretation of section 96(5), and that the merits and justice of the case warrant a conclusion that the Board's decision was made on February 25, 2004 when the entitlement officer wrote the decision letter. We do not accept that argument. The interpretation of law and policy should not vary depending on the outcome for a particular worker.

The panel in *WCAT Decision #2005-04638* stated that the time line that is triggered for a right to a review or an appeal is separate and different from the timeline in which the Board may reconsider a decision. Other WCAT decisions cited above concluded that the 75-day reconsideration period starts at the same time as the time period to initiate a review or an appeal; both require a decision that is communicated.

We recognize that different considerations may apply to the timeline that is triggered for an affected party's right to review or appeal, as distinct from the timeline which governs the Board's jurisdiction to reconsider one of its own decisions. In the former case, there are strong natural justice arguments for importing a communication requirement before a decision is considered "made" so as to trigger the running of the review/appeal period. It is obvious that affected parties cannot exercise their statutory appeal rights if they are not aware of the existence of a decision. This rationale underlies the conclusion in the WCAT decisions cited above that the 75-day reconsideration period is not triggered until the decision is communicated to the affected party.

An argument could be made that, for the purposes of the Board's statutory authority to reconsider its decision, a decision could be considered to have been made within the 75-day period when it is documented in the claim file (as set out in BPIS #5), even though the appeal period related to that decision would only begin to run when the decision is communicated in a decision letter. Adopting such an approach to the Board's reconsideration authority would not affect a party's substantive appeal rights. Even though the reconsideration decision letter in this case was issued two days after the claim log entry recording that decision, the worker did not lose two days from the 90-day period in which to seek a review of that decision. The 90-day period is counted from the date of the decision letter, not the claim log entry.

We concur with the following statements in *WCAT Decision #2005-00570* with respect to the importance of developing a common understanding of the term "decision" for all purposes under the Act:

> WCAT has jurisdiction to consider whether a decision constitutes a reviewable decision.…I do not consider that WCAT is obliged to follow, or show deference to, the Review Division's practice and procedure guidelines regarding the meaning of the term "decision." At the same time, I would acknowledge the value of different parts of the workers' compensation system applying common definitions or interpretations, to promote consistency in decision-making over the long term. I consider it appropriate, therefore, to take the Review Division definition of the term decision into account in my decision.
>
> However, I would also note a caution in applying the Review Division's practice and procedure guidelines. These guidelines cannot be used to remove or limit substantive appeal rights under the Act. To the extent the definition can be read restrictively, so as to limit access to review or appeal, or liberally so as to permit access to review or appeal, an interpretation should be applied which supports access to review and appeal….
>
> All the participants in the workers' compensation system are dealing with new statutory provisions, and some period of development is required in developing a common understanding as to how these terms may best be interpreted and applied. It is useful, in this regard, to reflect on the value of developing a common understanding of the term "decision" for all purposes under the Act. Decision-makers should utilize a common definition of the term decision which does not vary depending on the context (subject to the applicability of some specific statutory provision requiring separate consideration).
>
> For example, in considering whether the Board's prior determination constituted a decision to which the 75 day time limit on the Board's reconsideration might apply, it may be helpful to consider whether the prior determination was a reviewable decision. In considering whether a decision is reviewable by the Review Division, it may be helpful to consider whether it was a determination to which the 75 day time limit on the Board's reconsideration authority would apply. Focussing exclusively on a single context in which a term is being used, and not having regard to other contexts under the Act in which the term is used, is likely to lead to error through applying too narrow a focus.
>
> It is not helpful to recite the Review Division's definition of the term "decision" as the justification for a refusal to review, without meaningful

> explanation as to how or why this definition means that no decision has been made. It seems to me that the definition may provide useful guidance on points such as whether the determination must be contained in a formal decision letter, or may be contained in some other written or oral form, as well as dealing with a requirement that the determination be communicated to the person affected in order for it to be effective.

We agree that, absent a specific statutory provision which mandates different interpretations, decision-makers in the workers' compensation system should adopt a consistent interpretation of "decision" which does not vary depending on the context. Certainty about the decision date is critical in a statutory scheme in which a decision triggers stringent time limits for reconsiderations as well as reviews and appeals. It is clear that the principles of procedural fairness and natural justice require that a decision must be communicated before the statutory review and appeal periods start to run.

We do not accept the Board's interpretation in BPIS #5 that, for the purpose of determining the 75-day reconsideration period, a decision is made when it is documented in the claim file. While we acknowledge it would be administratively more convenient for the Board to use the date of the claim log entry or other internal file note as the date of the decision, such an approach would result in inconsistent schemes for counting the time periods for the reconsideration, review and appeal provisions in the Act. We also note that such an approach runs counter to transparency in administrative decision-making.

In the absence of specific direction in the Act or the Board's published policy on this matter, we find that a reconsideration decision is not "made" for the purpose of the 75-day time limit in section 96(5) until the final decision resulting from the reconsideration process has been recorded in the file and communicated in some form to the affected party(ies). At that point the decision-making function is complete and the new decision has been "made", whether that decision simply confirms, varies or reverses the prior decision. In our view the communication of the decision is not simply an administrative task, but is an integral component of the decision-making process involved in a reconsideration under sections 96(4) and (5).

We conclude that our interpretation of when a decision is made in the context of the reconsideration provisions best fits with the legislative intention of promoting finality and certainty in the workers' compensation system, in that it gives the same interpretation to the same words which the Legislature has used to establish the statutory time limits for reconsideration, review and appeal.

We recognize that our decision may have implications with respect to the Board's current processes for recording and communicating decisions. RSCM II policy #99.20, for example, provides that in some cases the Board simply sends a cheque when it allows a claim that an employer has not protested. Most of the Board's existing procedures, including the computer-generated form letters, pre-dated the

introduction of the 75-day time limit on the Board's reconsideration authority. The Board may wish to review those processes in light of our conclusion that a decision must be communicated before it is considered "made" for the purposes of the new reconsideration provisions.

Because it has not been necessary to our decision, we have not addressed the method or mechanics of communication of the decision to the interested party(ies), although we recognize that from an evidentiary perspective it is clearly preferable that the decision be communicated in the form of a dated decision letter issued by a Board officer, so that there is no ambiguity about the date and content of the decision.

Given our conclusion that a reconsideration decision is made for the purposes of sections 96(4) and (5) when it is communicated to the affected party, we now turn to the issue of when the Board communicated its new decision to the worker.

We conclude, on the evidence before us, that the Board officer's decision to disallow the claim was first communicated to the worker in the entitlement officer's February 25, 2004 decision letter under appeal, outside the 75-day time limit established by section 96(5).

Although the Board officer's February 13, 2004 claim log indicates that she advised the worker by telephone that he would not be paid any further benefits under the claim, her subsequent file memos indicate that she had not yet made a final decision on this matter. The February 17, 2004 claim log memo states that the Board officer told the worker's wife that she (the officer) needed to review the memo from Dr. M before she would be in a position to make a decision and provide the worker with a decision letter in the event she decided not to accept the claim. This indicates that a decision to disallow the claim had not yet been made. The fact that the entitlement officer waited until February 23, 2004 to seek her manager's approval to reconsider and disallow the worker's claim reinforces our conclusion that she did not make a final decision prior to February 23, 2004. The file does not indicate that the Board officer verbally advised the worker of this decision on February 23, or otherwise communicated the reconsidered decision until she issued the February 25, 2004 decision letter under appeal.

We accordingly find that the Board did not have the legal authority to reconsider its earlier December 10, 2003 decision to accept the claim when it made its new decision on February 25, 2004. The February 25, 2004 decision was made outside the 75-day statutory time limit established by section 96(5), and is therefore void. We accordingly allow the worker's appeal and vary the Review Division decision. We direct the Board to cancel the February 25, 2004 decision.

Given this finding, we do not need to deal with the merits of the worker's appeal with respect to the February 25, 2004 decision.

The final matter is counsel's request that WCAT reimburse the worker's legal fees, costs and taxes associated with this appeal. Section 7(2) of the *Workers Compensation Act Appeal Regulation, B.C. Reg. 321/02,* prohibits WCAT from ordering the Board to reimburse a party's expenses arising from a person representing the party. We therefore deny the worker's request for reimbursement of expenses related to his representation by counsel in this appeal. "Legal costs" are not reimbursable as expenses. No other expenses which would qualify for reimbursement under section 7 are apparent from our review of the file.

Section 6 of the *Appeal Regulation* empowers WCAT to order one party to pay "costs related to an appeal" by another party. As there is no employer participating in this appeal, the criteria in sections 6(a) or 6(b) are not met. We also conclude that there are not exceptional circumstances in this case that would make it unjust to deprive the successful party of costs, as contemplated by section 6(c) of the Regulation. Legal costs are therefore not reimbursable under this section.

Conclusion

We allow the worker's appeal and vary the Review Division decision of October 18, 2004. We find that the Board exceeded its jurisdiction when it issued the February 25, 2004 reconsideration decision, as the decision was made outside the 75-day statutory time limit established by section 96(5). We therefore direct the Board to cancel the February 25, 2004 decision.

We deny the worker's request for reimbursement of his legal fees, costs and taxes associated with this appeal.

Inderjeet Hundal
Vice Chair

Daphne Dukelow
Vice Chair

Jane MacFadgen
Vice Chair

/pm

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