

Noteworthy Decision Summary

Decision: WCAT-2006-02643
2006

Panel: Daphne Dukelow

Decision Date: June 26,
2006

Reconsideration – New evidence – Substantial evidence – Evidence did not exist at time of appeal – Reconsideration panel does not weigh evidence – Section 256 of the Workers Compensation Act

This was a reconsideration of a prior Workers' Compensation Appeal Tribunal (WCAT) decision on new evidence grounds. New evidence does not have to be factual in order to meet the criteria under section 256 of the *Workers Compensation Act*. A new medical opinion may also be considered if it could not have been obtained prior to the original WCAT decision. New evidence is material if it is relevant to the issue before the original panel. New evidence is substantial if it has weight and supports a different conclusion than that reached by the original panel – it does not need to provide a new diagnosis. The reconsideration panel does not weigh the new evidence.

The worker developed right elbow epicondylitis. The Workers' Compensation Board (Board) denied the worker's claim. The worker requested a review by the Review Division of the Board, which confirmed the Board decision. The worker appealed to WCAT. The original WCAT panel denied the worker's appeal. The worker requested a reconsideration of the WCAT decision.

The reconsideration panel noted the worker had pursued a separate claim for adhesive capsulitis. The worker's second claim was denied by another WCAT panel as there was evidence the worker's adhesive capsulitis resulted from her epicondylitis and the second WCAT panel was bound by the first WCAT decision that the worker's epicondylitis was work-related.

The worker provided two pieces of new evidence – a report by an orthopaedic surgeon and a report from a long-term disability claims review committee consisting of three physicians hired by the worker's disability insurer.

The reconsideration panel concluded the report by the orthopaedic surgeon could have been obtained prior to the original WCAT decision. Thus, this was not new evidence under section 256. However, it was unlikely the worker could have influenced the timing of the disability report that was provided to her several months after the original WCAT decision. The panel further concluded the report was "material" as it related to an issue – causation – that was before the original panel. The report was also "substantial" in that it was the opinion of a panel of three physicians who examined the worker in order to determine whether she was disabled from her regular occupation. Furthermore, it is not necessary that the new evidence offer a new diagnosis. It is only necessary for the evidence to support a different conclusion than that reached by the original panel. Although the employer argued the report was flawed, the panel concluded it is not part of the reconsideration process to weigh the evidence.

The reconsideration application was allowed. The reconsideration panel concluded it was not necessary for the worker to apply for reconsideration of the second WCAT decision dealing with adhesive capsulitis. This was because the new WCAT panel that would consider the worker's claim for epicondylitis would be able to consider whether the adhesive capsulitis was a



compensable consequence of the epicondylitis. The new panel would simply be precluded from considering adhesive capsulitis as a separate compensable condition.

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Panel: Daphne Dukelow, Vice Chair

Introduction

The worker is requesting reconsideration of the June 29, 2005 decision of a panel (original panel) of the Workers' Compensation Appeal Tribunal (WCAT). The June 29, 2005 WCAT decision (*WCAT Decision #2005-03466*) dealt with acceptance of the worker's claim for compensation for right elbow epicondylitis. Counsel for the worker has provided a written submission with attachments in support of the application.

The employer is participating in this application and has provided a written submission.

I am satisfied that this application can be determined fairly without an oral hearing. It involves legal issues and can be determined on the basis of the claim file and the submissions made on behalf of the parties.

Issue(s)

The issue in this application is whether the applicant has new evidence which has become available and which meets the criteria of section 256(3) of the *Workers Compensation Act* (Act) so that the original panel's decision should be reconsidered.

Jurisdiction

This application has been assigned to me by the chair of WCAT as authorized by *WCAT Decision of the Chair #8*, March 3, 2006.

Reconsiderations of decisions of the tribunal, on the grounds of new evidence, are authorized by section 256 of the Act.

The appeal coordinator advised the worker's counsel, in a letter dated February 14, 2006, that a reconsideration application can be made one time only. She also drew counsel's attention to general information, available on WCAT's website and in the information sheet provided to her, concerning the reconsideration process and particularly about applications on the grounds of new evidence or on common law grounds.

Standard of Review

Section 256 of the Act provides, in part, as follows:

(2) A party to a completed appeal may apply to the chair for reconsideration of the decision in that appeal if new evidence has become available or been discovered.

(3) On receipt of an application under subsection (2), the chair may refer the decision to the appeal tribunal for reconsideration if the chair is satisfied that the evidence referred to in the application

(a) is substantial and material to the decision, and

(b) did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

(4) Each party to a completed appeal may apply for reconsideration of a decision under this section on one occasion only.

Background

The worker applied for compensation in 2004 for right elbow and shoulder problems which she attributed to work activities. The worker's claim for right elbow epicondylitis was denied. The worker sought a review of the Workers' Compensation Board (Board) decision. The Review Division confirmed the case manager's decision. The worker appealed to WCAT. In the June 29, 2005 decision, the original panel of WCAT denied the worker's appeal.

The original WCAT panel mentioned in his decision that the worker's adhesive capsulitis condition should be considered as a new claim. The worker pursued a separate 2005 claim for this condition. It was denied and she sought a review of that decision. The Review Division issued a decision dated July 30, 2005 confirming the Board's decision.

The worker appealed the July 30, 2005 Review Division decision to WCAT. WCAT has denied the worker's appeal in a decision dated January 11, 2006, *WCAT Decision #2006-00267*. In that decision, the panel noted that the decision under consideration by me was subject of a reconsideration application. The panel concluded that he was bound by the findings in the decision before me—that the worker's epicondylitis was not due to the nature of her employment. He noted that the evidence before him was that the worker's adhesive capsulitis resulted from her epicondylitis condition. He noted that the worker had evidence obtained since the decision before me. The evidence referred to is the same as I will be referring to in this decision.

Counsel for the worker has provided a written submission and also provided evidence which was not before the original panel who made the June 29, 2005 WCAT decision. The two items are a letter dated November 18, 2005 from Dr. Yu, orthopaedic surgeon and an August 22, 2005 report from a long-term disability claims review committee. The employer's representative has provided a submission in response.

Reasons

In order to allow an application for reconsideration of the original panel's June 29, 2005 decision, I must be satisfied that the evidence provided by counsel for the worker meets the criteria set out in section 256 of the Act.

The report of the disability insurance committee was prepared by three physicians, one an orthopaedic surgeon, one a public health specialist, and the third a general practitioner. All three physicians were present at an examination of and history-taking from the worker on August 22, 2005. The committee's report was written that same day and a copy provided to the worker with a covering letter dated September 14, 2005. As can be seen the committee examined the worker after the WCAT decision was made. The worker and her counsel would have had little if any control over the process which led to this report and the timing of the report. The report goes to the very issue before the panel—work causation. The employer's representative submits that the report is based primarily on the worker's own history of events leading to it. This is generally true of medical evidence obtained from physicians other than those employed by the Board. The employer's representative submits that the report is merely opinion on the same issue which had been decided. While it is opinion evidence and it may be based partly on the history given by the worker, it is the opinion of three physicians independent of the worker and the workers' compensation system.

I agree with the employer representative's argument that an opinion which could have been obtained as part of the process leading to the original decision would not constitute new evidence. This argument applies to the opinion of Dr. Yu but I do not find it applies to the report of the committee. In the case of Dr. Yu's letter of November 18, 2005, this is a letter stated to be in response to the Review Division decision of January 8, 2005. It reiterates Dr. Yu's consultation report after his January 5, 2005 examination of the worker. His opinion on causation could have been obtained on the basis of that examination and provided to the original panel prior to the June 29, 2005 decision, which was an appeal from a November 10, 2004 Review Division decision. I find that Dr. Yu's November 18, 2005 is evidence which could have been obtained prior to the June 29, 2005 decision of the original panel with reasonable diligence.

I contrast this with the report of the committee associated with the disability insurer. It is highly unlikely that the worker or her counsel could have influenced the timing of obtaining this report. It was provided to the worker several months after the original panel's WCAT decision. I accept that it is evidence which did not exist at the time of the

original WCAT decision within the meaning of section 256 of the Act. I also consider that it is “substantial” and “material” to the decision. It is material in that it is relevant to the issue before the original panel. It is substantial in that it is the opinion of a panel of three physicians who examined the worker in order to determine whether the worker was disabled from her regular occupation. In doing so, they expressed their opinion as to work causation. The employer’s representative asks that I reject this evidence as being flawed in certain respects. I do not consider it part of the reconsideration process to actually weigh the evidence other than to determine that it is “substantial.” It is not essential to a finding that a piece of evidence is “substantial” that it offer a different diagnosis as the employer’s representative seems to suggest in his submission.

In *WCAT Decision #2003-01116* dated June 25, 2003 (“Application for Reconsideration”), 19 W.C.R. 163, accessible at: <http://www.worksafebc.com/publications>), the WCAT chair discussed the requirements of the former section 96.1 of the Act as follows:

In order for an Appeal Division decision to be reconsidered on the basis of new evidence, the new evidence must be “substantial and material to the decision” as required by paragraph 96.1(3)(a). I consider that “material” evidence is evidence with obvious relevance to the decision of the Appeal Division panel. I consider that “substantial” evidence is evidence which has weight and supports a conclusion opposite to the conclusion reached by the panel.

Although this decision refers to a former provision of the Act, the wording of this portion of section 256 is identical to the former provision. I find that the report of the committee is substantial in the sense used in this reported decision. It tends to support a conclusion opposite to that of the original panel.

The worker has applied for reconsideration of the June 29, 2005 WCAT decision on the ground of new evidence. She is entitled to do this only once by virtue of section 256(4) of the Act. She may not apply for reconsideration of the June 29, 2005 decision again.

As I noted above, after the June 29, 2005 WCAT decision, the worker pursued a separate 2005 compensation claim for adhesive capsulitis. The worker’s 2005 claim was not accepted. The worker pursued her review and appeal rights. Ultimately, in a WCAT decision dated January 23, 2006, another panel of WCAT found that he was bound by the June 29, 2005 WCAT decision’s finding that the worker’s epicondylitis was not due to the nature of her work. Given that the medical evidence on the 2005 claim indicated that the adhesive capsulitis was a consequence of the epicondylitis, and the June 29, 2005 WCAT decision had found that epicondylitis was not compensable, the effect of the June 29, 2005 WCAT decision was to preclude a finding that adhesive capsulitis, appearing as a consequence of epicondylitis, was compensable.

The panel who wrote the January 23, 2006 WCAT decision noted that the worker had provided him with evidence which was not before the panel who made the June 29, 2005 WCAT decision. He also noted that the June 29, 2005 WCAT decision was subject of a reconsideration application.

The outcome of the reconsideration of the June 29, 2005 WCAT decision may have a bearing on the outcome of the January 23, 2006 WCAT decision. The new WCAT panel who reconsiders the June 29, 2005 WCAT decision should be cognizant of this interrelationship.

I considered whether the applicant should be invited to apply for reconsideration of the January 23, 2006 decision because of the relationship between the two decisions. I decided this was not necessary for the following reasons. I do not consider that the January 23, 2006 WCAT decision precludes another adjudicator from considering adhesive capsulitis under the worker's 2004 claim if the panel who reconsiders the June 29, 2005 WCAT decision determines that the worker's 2004 claim should be accepted for epicondylitis. The January 23, 2006 WCAT decision was dealing with adhesive capsulitis as a separate claim and was precluded by the June 29, 2005 WCAT decision from considering it as a consequence of what had been determined to be non-compensable epicondylitis. If the new WCAT panel who reconsiders the June 29, 2005 WCAT decision determines that the worker's 2004 claim is not accepted, that would end the matter.

Conclusion

I allow the worker's application for reconsideration. The June 29, 2005 decision will be reconsidered by another panel of WCAT taking into account the new evidence submitted. This application was considered on the ground of new evidence and the worker cannot make another application on this ground concerning the June 29, 2005 WCAT decision.

Daphne Dukelow
Vice Chair

DD/gw

