

Noteworthy Decision Summary

Decision: WCAT-2006-04043 **Panel:** Andrew Waldichuk **Decision Date:** October 27, 2006

Jurisdiction of Workers' Compensation Board operating as WorkSafeBC (Board) to change Board decisions – Decisions by appeal bodies to vary or cancel Board decisions – Effect on unappealed but related decisions – Policy item C14-101.01 of the Rehabilitation Services and Claims Manual, Volume I and II – Best Practices Information Sheet #5 – Vocational rehabilitation decisions – Loss of earnings decisions

This decision is noteworthy as an example of the application of policy item C14-101.01 of the *Rehabilitation Services and Claims Manual* (RSCM) and the Workers' Compensation Board operating as WorkSafeBC (Board), *Best Practice Information Sheet #5* (BPIS). Among other things, these provide that the Board may change a decision that had been made more than 75 days previously and that has not been appealed where an appeal body varies or cancels a different but related decision upon which the decision depended. Here, WCAT confirmed a Board decision that changed an earlier unappealed Board decision relating to a worker's entitlement to a loss of earnings award. WCAT did so on the basis that an earlier WCAT decision varying a Board vocational rehabilitation decision removed the foundation for the Board's original loss of earnings decision.

In this case, a Board vocational rehabilitation consultant (VRC) terminated the worker's vocational rehabilitation benefits because the training that the worker had received would restore his pre-injury earnings. On the basis of this information the Board also decided that the worker was not entitled to a permanent disability award on a loss of earnings basis (First Loss of Earnings Decision). The worker appealed the VRC decision to the former Workers' Compensation Review Board (Review Board). The worker did not appeal the First Loss of Earnings Decision. As the worker's appeal was not heard by March 3, 2003, the date that WCAT replaced the Review Board and Appeal Division of the Board, the appeal was transferred to WCAT. WCAT allowed the appeal and determined that the training that the worker had received would not restore the worker's pre-injury earnings and that he had maximized his earnings in his current employment.

On implementation of WCAT's first decision, a Board VRC determined that further training would not be helpful and recommended that the worker would sustain a partial loss of earnings. The Board subsequently granted the worker a partial loss of earnings award (Second Loss of Earnings Decision). In doing so, the Board determined that it was necessary to reassess the worker's loss of earnings entitlement in order to fully implement the WCAT decision. The employer requested a review of the Second Loss of Earnings Decision on the basis that more than 75 days had elapsed since the First Loss of Earnings Decision and the Board therefore lacked the authority to reconsider the First Loss of Earnings Decision. The Review Division of the Board upheld the Second Loss of Earnings Decision. The employer appealed to WCAT.

On appeal, the employer argued that (1) the Board exceeded its jurisdiction to change its own decisions when it changed its original loss of earnings decision because the Board was not bound by the recommendation of the original VRC decision when it made its original loss of earnings decision and is similarly not bound by any change in that recommendation; and (2) the first WCAT panel's comments regarding whether the worker had maximized his earnings should

not be considered binding because the only issue before WCAT was the worker's entitlement to vocational rehabilitation benefits.

Relying on policy item C14-101.01 of the RSCM and BPIS #5, the panel rejected the first argument on the basis that the information from the first VRC was the factual premise, or foundation, of the First Loss of Earnings Decision and as that information was incorrect the Board had the jurisdiction to change the First Loss of Earnings Decision. The panel found that if it were to conclude otherwise, the First Loss of Earnings Decision would stand, and the worker would be denied a loss of earnings award because of a finding of fact about his earning potential that is contrary to the findings made by the first WCAT panel. The panel rejected the second argument on the basis that the first panel clearly made a finding in respect of the worker's earning capacity, and as WCAT decisions are final and binding, it did not have the jurisdiction to determine whether the first panel lacked the jurisdiction to make the finding that it did.

WCAT Decision Number : WCAT-2006-04043
WCAT Decision Date: October 27, 2006
Panel: Andrew Waldichuk, Vice Chair

Introduction

The worker, a former hospital laundry worker, has an accepted claim with the Workers' Compensation Board, operating as WorkSafeBC (Board), for a left shoulder rotator cuff injury/impingement syndrome that he developed in late 1998.

By decision dated May 9, 2002, a claims adjudicator in the Board's Disability Awards Department (CADA) granted the worker a permanent partial disability (PPD) award of 6.0% of total disability. However, based on the January 30, 2002 decision of a vocational rehabilitation consultant (VRC), which indicated that the worker's vocational rehabilitation assistance would have enabled him to restore his pre-injury earnings, the CADA advised the worker that he had no loss of earnings entitlement.

The worker appealed the VRC's January 30, 2002 decision to the Workers' Compensation Appeal Tribunal (WCAT). A WCAT panel allowed the worker's appeal in a June 20, 2005 decision (see *WCAT Decision #2005-03200-RB*, which is available on WCAT's website at www.wcat.bc.ca). In so doing, the panel found that the vocational rehabilitation assistance provided to the worker would not have enabled him to restore his pre-injury earnings, and the worker had maximized his earnings in the job in which he was currently employed.

In the course of implementing *WCAT Decision #2005-03200-RB*, a VRC recommended that the worker would sustain a partial loss of earnings in his current employment. This resulted in a CADA informing the worker in an August 29, 2005 decision that he was now entitled to an increase in his PPD award because of his loss of earnings.

The employer submitted a request for review of the CADA's August 29, 2005 decision to the Review Division on the basis that it was a reconsideration of the CADA'S May 9, 2002 decision, contrary to section 96(5) of the *Workers Compensation Act* (Act).

On January 24, 2006, a review officer denied the employer's request for review and confirmed the CADA's August 29, 2005 decision.

The employer, through its representative, Ms. Fortin, now appeals the review officer's decision to WCAT.

The worker is participating in the appeal.

The employer did not request an oral hearing. I am satisfied that the issue before me can be properly decided on the information on file.

Ms. Fortin takes the position that WCAT's June 20, 2005 decision did not allow the Board to reconsider its May 9, 2002 decision. WCAT requested a submission from the worker, but none was provided.

Issue(s)

Was the CADA's August 29, 2005 decision a reconsideration and therefore limited by the reconsideration requirements under the Act?

Jurisdiction

This appeal was filed with WCAT under section 239(1) of the Act.

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 a policy of the board of directors of the Board that is applicable in the case. Section 254 of the Act 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.

Background and Evidence

The VRC noted in her January 30, 2002 decision, and the claim log entry underlying her decision, that the worker had secured full-time employment as a technical support specialist after receiving training through a local college. The VRC accepted that this position would result in a short-term loss of earnings for the worker; however, she concluded that he had the potential to restore his pre-injury earnings in the field in which he had been trained. On the basis that Vocational Rehabilitation Services had provided the worker with assistance that would allow him to return to physically suitable employment with long-term earnings capable of restoring his pre-injury earnings, the VRC advised the worker that his vocational rehabilitation assistance had come to an end.

The CADA's May 9, 2002 decision was based on information in his April 22, 2002 memorandum (form 24), where he wrote the following in regard to the worker's loss of earnings entitlement:

Based on the information on file, it appears the worker was unable to return to his pre-injury employment activities due to the restriction he now has in his left shoulder due to injury. However, given the benefit of the vocational rehabilitation assistance provided, the worker has been retrained and has obtained alternate suitable employment.

The Vocational Rehabilitation Consultant has indicated, in the Log Entry dated January 30, 2002, given the benefit of the worker's retraining, that in the long run the worker will be able to maximize his earnings capacity and offset a loss of same.

Upon considering the evidence, including the labour market information that the VRC had relied upon in reaching her January 30, 2002 decision, the panel in *WCAT Decision #2005-03200-RB* found that "the likelihood of the worker replacing his pre-injury earnings over a three to five year period is slim." The panel then went on to discuss the VRC's role in the dual method of pension assessment, as described in Board policy, and made certain findings in deciding to vary the January 30, 2002 decision. Those findings were summarized in the panel's conclusion:

I find that: the January 30, 2002 decision did not adequately take into account the combination of the worker's compensable injury and his other impediments to obtaining work at his pre-injury earnings level; the vocational rehabilitation assistance provided to the worker was not sufficient to enable him to restore his pre-injury earnings either in the short or long terms; and the worker has maximized his earnings in the job in which he is currently employed. The worker's file is referred back to the Board for a determination of his entitlement to further benefits in light of these findings....

A VRC met with the worker on July 13, 2005 to review the June 20, 2005 WCAT decision and to discuss its implementation. As set out in her July 15, 2005 employability assessment update, the VRC considered the provision of further vocational rehabilitation assistance and determined that it would likely not be beneficial to the worker given his employment situation. Upon noting the WCAT panel's finding that the worker was maximizing his earnings in his current job, the VRC stated that she agreed with this based on a review of his transferable skills and abilities, employment history, current wages, and labour market information, and in consideration of his compensable injury and residual function. Accordingly, the VRC recommended that the worker would sustain a partial loss of earnings.

The CADA who rendered the August 29, 2005 decision indicated in her July 27, 2005 memorandum (form 25) that she had decided to increase the worker's PPD award in accordance with the VRC's direction in her employability assessment update. As the CADA noted, the VRC's direction was in keeping with the finding in *WCAT Decision #2005-03200-RB* that the worker was maximizing his post-injury earning potential in his current job.

As outlined in her August 29, 2005 decision, the CADA referred to the WCAT panel's finding that the worker had maximized his earnings in his current employment as part of

her explanation to the worker on how she determined his entitlement to a partial loss of earnings award.

The review officer recognized the invalidity of the CADA's May 9, 2002 decision owing to the finding that the panel in *WCAT Decision #2005-03200-RB* had made about the worker's ability to maximize his earnings. She then found that the Board was "required to reassess the worker's loss of earnings entitlement in order to fully implement the WCAT decision."

Reasons and Findings

WCAT panels are bound by the published policies of the Board pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). For the purposes of this decision it is not necessary to specify which volume of the *Rehabilitation Services and Claims Manual* (RSCM) applies as the relevant policy is the same in both volumes. For convenience, I will refer to items as they are numbered in RSCM, *Volume I* (RSCM I).

Sections 96(4) and 96(5) of the Act state that 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, provided that no more than 75 days have elapsed since that decision or order was made; a review has not been requested in respect of that decision or order; or an appeal has not been filed in respect of that decision or order.

I have reviewed Ms. Fortin's October 19, 2005 submission to the Review Division, where she argues that the CADA's August 29, 2005 decision was a reconsideration of the worker's pension entitlement, as conveyed in the May 9, 2002 decision, contrary to section 96(5) of the Act. Recognizing how the role of a VRC in the dual method of pension assessment is limited to making a recommendation about a worker's loss of earnings, and noting that the worker did not appeal the CADA's May 9, 2002 decision, Ms. Fortin also submits:

The Disability Awards Officer was not bound by the advice of the Vocational Rehabilitation Consultant with respect to a loss of earnings at the time the initial decision was made and is not now bound by a change in that prior vocational rehabilitation recommendation. The WCAT's jurisdiction was limited to the confines of the Vocational Rehabilitation Consultants decision and did not extend to the issue of loss of earnings. The June 20, 2005 decision is not binding on the Disability Awards officer to the extent of reconsidering the prior Disability Awards pension decision.

[reproduced as written]

Ms. Fortin's submission to WCAT reads, in part, as follows:

...It remains the employer's position the jurisdiction of the Vice Chair under WCAT decision 2005-03200-RB was limited to the scope of Vocational Rehabilitation entitlement issues as conveyed in the VRC decision before her. The Disability Awards officer was not bound by the VRC's decisions or recommendations when determining the separate issue of a pension award – a decision with separate rights of appeal.

The Vice Chair did not have jurisdiction to make a finding on a Disability Awards matter. While she did offer her belief the worker had maximized his earnings in the job in which he was employed, as this matter was not before her, it may only be categorized as a superfluous comment without any binding effect on the DAO.

I am bound by *WCAT Decision #2005-03200-RB*, in accordance with section 255 of the Act. Thus, I do not have jurisdiction to determine whether the panel in *WCAT Decision #2005-03200-RB* exceeded its jurisdiction by considering the worker's earning potential. It is evident that the panel made a finding, as confirmed in its conclusion, that the worker had maximized his earnings in his current job.

Policy items #40.10 and #40.12 of the RSCM I describe the significance of the evidence that the VRC may provide with respect to a worker's employability and earning potential in relation to the CADA's decision on any loss of earnings entitlement that a worker may have under section 23(3) of the Act, without imposing any requirement on the CADA to accept the VRC's input.

As shown in his form 24, the CADA who rendered the May 9, 2002 decision clearly relied on the VRC's recommendations about the worker's employability and earning potential, which were outlined in her January 30, 2002 claim log entry and decision. I accept that the information from the VRC was the factual premise, or foundation, of the CADA's decision to deny the worker a loss of earnings award.

Like the review officer, I rely on the policy in item #C14-101.01 of the RSCM I, as it has read since January 1, 2005, which addresses the implementation of Review Division and WCAT decisions. I find that it applies in this case since it was in effect at the time of the CADA's August 29, 2005 decision. It provides the following:

On a review or on an appeal, the Review Division and the WCAT may make a decision that confirms, varies or cancels the decision under review or appeal. The Review Division and WCAT decisions are final and must be complied with by the Board.

Varying or canceling a decision may make invalid other decisions that are dependant upon or result from the decision under review or appeal.

The reconsideration and reopening requirements under section 96 do not limit changes to previous decisions that are required in order to fully implement decisions of the Review Division or the WCAT.

It is noteworthy that this policy item recognizes how a WCAT decision may have implications for Board decisions beyond the decision that was under appeal. The policy suggests, however, that there must be an obvious nexus between the decision that was under appeal and any decision that may be affected by the outcome of the WCAT appeal.

This was recognized by the panel in *WCAT Decision #2006-00023-RB* (January 4, 2006), which noted that policy item #C14-101.01 of the RSCM I had been mentioned in the Board's *Best Practices Information Sheet #5*¹ (issued on March 31, 2005 and amended on August 11, 2006). It states, in part, at page 4:

Where the RD [Review Division] or WCAT varies or cancels a decision, other WCB decisions that depend on, or result from, the decision may also be invalidated. The reconsideration and reopening provisions do not apply to constrain the Board officer's ability to fully implement the RD or WCAT decision.

In the course of finding that the worker's employability assessment was flawed, the panel in *WCAT Decision #2006-00023-RB* indicated that the Board may want to revisit the worker's loss of earnings pension, since it was, in part, dependent on the findings in the employability assessment.

I infer from the CADA's August 29, 2005 decision, specifically her reliance on the WCAT panel's finding that the worker had maximized his earnings in his current employment, that she had made a determination that the CADA's May 9, 2002 decision was now invalid because of the outcome of the WCAT appeal.

I find that the CADA rendered her August 29, 2005 decision in accordance with policy item #C14-101.01 of the RSCM I. If I were to conclude otherwise, the CADA's May 9, 2002 decision would stand, and the worker would be denied a loss of earnings award because of a finding of fact about his earning potential that is contrary to the panel's finding in *WCAT Decision #2005-03200-RB*.

I agree with the review officer's analysis of this matter. Applying the policy in item #C14-101.01 of the RSCM I, I find that she properly decided that the CADA's August 29, 2005 decision was not a reconsideration and therefore not limited by the reconsideration requirements under section 96 of the Act, since the CADA's May 9,

¹ *Best Practices Information Sheets* are found on the Board's website at www.worksafebc.com. They provide guidance to Board officers on a variety of matters, including Board policy.

2002 decision was premised on the VRC's January 30, 2002 decision, which has since been varied by WCAT.

Item #14.30 of WCAT's *Manual of Rules of Practice and Procedure* states that WCAT will generally restrict its decision to the issues raised by the appellant in the notice of appeal and the appellant's submissions to WCAT.

Given that neither the notice of appeal nor Ms. Fortin's submission to WCAT addresses the merits of the CADA's August 29, 2005, which the review officer briefly considered in her decision, I make no findings in this regard. I deny the employer's appeal.

Conclusion

I confirm the Review Division's January 24, 2006 decision. I find that the CADA's August 29, 2005 decision was not a reconsideration and therefore not limited by the reconsideration requirements under section 96 of the Act.

No expenses were requested, and it does not appear from a review of the file that any expenses were incurred in relation to this appeal. Accordingly, I make no order regarding expenses.

Andrew Waldichuk
Vice Chair

AW/ec