

Noteworthy Decision Summary

Decision: WCAT-2007-00798 **Panel:** Susan Polsky Shamash **Decision Date:** March 7, 2007

What constitutes a Reviewable Decision - Definition of "Decision" in Review Division Practices and Procedures - Implementation of a WCAT Decision

This decision is noteworthy as an example of the distinction between an informational letter which is not reviewable and an adjudicative decision which is reviewable in the context of an implementation of a WCAT decision.

The worker's claim was accepted by the Workers' Compensation Board, operating as WorkSafeBC (Board), for cervical, thoracic and lumbar strains as well as a small C4-5 disc herniation and a musculoligamentous injury to the cervical spine. A Board decision terminated the worker's temporary wage loss benefits and referred her claim to the Disability Awards Department. The Board found that although the worker was fit to return to work she remained off work because of a non-compensable inflammatory condition and for preventative reasons. The Board did not accept the worker's depression and would not refer her to a chronic pain program. The worker appealed the Board decision to the Workers' Compensation Review Board. The appeal was transferred to the WCAT. The panel allowed the worker's appeal, in part (Original WCAT Decision). The panel found the worker could not return to her pre-injury occupation even without her non-compensable problems. The depression was compensable but the worker was not entitled to a pain program. The Board would have to determine the acceptable parameters for this reactive depression.

In implementing the Original WCAT Decision the Board referred the worker to a psychologist for an assessment. The Board accepted the worker's depression as being temporary because treatment in the form of counselling had not yet been undertaken. Further decisions regarding the permanency of the worker's depression would be made once counselling was concluded. The worker requested a referral to a chronic pain management program as recommended by the psychologist. The Board denied this request stating the issue had been decided by WCAT. The worker requested a review of this letter by the Review Division of the Board (Review Division). The Review Division rejected the worker's request for a review on the ground that the Board letter was informational only. WCAT had already made a decision regarding a referral to a pain program which the Board could not reconsider. The Board letter did not contain any decisions regarding the worker's entitlement to benefits. The worker appealed the Review Division decision to WCAT.

The panel found the definition of "Decision" set out in the Review Division's *Practices and Procedures* useful and helpful in promoting consistency within the workers' compensation system. The Review Division's *Practices and Procedures* defines a "decision", in part, as a "letter or communication that records the determination of a Board officer as to a person's entitlement to a benefit". The panel determined that the worker's request for a referral to a chronic pain management program concerned the worker's entitlement to that referral, rather than the implementation of the Original WCAT Decision. The Original WCAT Decision regarding the worker's entitlement to a pain program was made in the context of her physical injuries and was made before the full effect of her depression and potential treatment had been investigated. It was arguable that the worker's entitlement to a referral to a chronic pain

management program to treat her depression was a new matter. It was also arguable that the Original WCAT Decision had no effect on this adjudication, except to the extent that it precipitated the inquiry. The panel found that the Board letter was not informational, but a reviewable adjudicative decision about the effect of the Original WCAT Decision on the worker's entitlement to a referral to a chronic pain management program to treat her depression.

WCAT Decision Number :

WCAT-2007-00798

WCAT Decision Date:

March 07, 2007

Panel:Susan L. Polsky Shamash, Vice Chair

Introduction

The worker appeals the May 3, 2006 decision of a review officer of the Review Division that rejected the worker's request for review of a March 15, 2006 letter written by a case manager of the Workers' Compensation Board, operating as WorkSafeBC (Board) (*Review Reference #R0064463*). The review officer declined to conduct the review on the basis that the March 15, 2006 letter was informational and did not contain any decisions regarding the worker's entitlement to benefits.

The worker is represented by her union. The employer is not participating in this appeal although advised of its right to do so.

I am satisfied that I can fairly decide these matters without an oral hearing. My decision below is based on a review of the claim file and the worker's representative's written submission.

Issue(s)

Does the case manager's March 15, 2006 letter contain a reviewable decision?

Jurisdiction

Section 239(1) of the *Workers Compensation Act* (Act) provides that a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review, may be appealed to the Workers' Compensation Appeal Tribunal (WCAT).

Background

The following events are relevant to this appeal:

- The worker suffered a neck and back injury on October 16, 1999. The Board accepted her claim for cervical, thoracic and lumbar strains as well as a small C4-5 disc herniation and a musculoligamentous injury to the cervical spine.
- In a letter of June 12, 2002 the case manager informed the worker that she was fit to return to work from her neck injury but remained off work because of a non-compensable inflammatory condition and for preventative reasons. The

worker's wage loss benefits were terminated as of June 11, 2002 and her claim was referred to the Disability Awards Department. The case manager also said that the worker's depression was not accepted under the claim and that the Board would not refer her to a chronic pain program.

- The worker appealed this decision to the (then) Workers' Compensation Review Board (Review Board). On March 3, 2003 both the Review Board and the Appeal Division were replaced by WCAT. As the worker's appeal had not yet been considered by the Review Board, it was transferred to WCAT.
- In a November 29, 2004 decision, a WCAT panel partially allowed the worker's appeal (*WCAT-2004-06252-RB*). The panel concluded that the worker could not return to work at her pre-injury occupation even without her non-compensable problems. The panel also found that the worker's depression was causally related to her compensable injury, saying that it was not clear how long the worker required treatment or medication, but that there was no indication that it was chronic. The Board would have to determine what, if any, limits were applicable, that is, what were the acceptable parameters for the reactive depression. Finally, the panel decided that the worker was not entitled to a pain program. The panel accepted the Board medical advisor's opinion that there was no evidence of chronic pain disorder or regional pain disorder associated with the compensable injury and, thus, the compensable injury did not, by itself, warrant a pain program.
- To implement the WCAT decision, the Board referred the worker to a psychologist for an assessment. In his June 10, 2005 report the psychologist concluded that the worker was clinically depressed to a high-moderate level, that her depression appeared to have been directly caused by her work injury, that it was chronic and at a clinical treatment level. He noted that no concerted treatment efforts appeared to have been undertaken in the previous 3 ½ years, partly because of the worker's reluctance to take psychotropic medications, and partly because her depression had not reached a high level of severity. He diagnosed Dysthymic Disorder – late onset, caused by three factors: her loss of physical functions following the work injury; her consequent loss of purpose and self-esteem; and chronic pain. The psychologist said that interventions to help lower the worker's depression would be necessary to increase her ability to return to work. He recommended psychotherapy and a chronic pain management program in view of the important part that pain and fear of pain played in her thought processes.
- In a letter of October 4, 2005 the case manager implemented the WCAT decision. The case manager said that the worker's claim was accepted for a temporary depression which could not be viewed as permanent because treatment in the form of counselling had not yet been undertaken. The case manager said that the Board's psychologist had confirmed that, with proper treatment, the worker's depression would probably resolve. Although the worker was reluctant to pursue treatment, the case manager said that the Board would pay for its cost and that

further decisions regarding the permanency of her condition would be made once counselling was concluded.

- Following receipt of disclosure, on March 10, 2006 the worker's union representative wrote to the case manager asking that the worker be referred to a chronic pain management program for treatment of her depression as recommended by the psychologist in his June 10, 2005 report.
- On March 15, 2006 the case manager responded saying that this issue had been previously decided by WCAT in its November 29, 2004 decision where the panel had found the worker not entitled to a pain program. The worker requested a review of this letter.
- On May 3, 2006 a review officer in the Registrar's Office rejected the worker's request for review on the ground that the case manager's March 15, 2006 letter was informational only. It advised the worker that WCAT had already made a decision regarding a referral to a pain program which the case manager could not reconsider. It did not contain any decisions regarding the worker's entitlement to benefits under her claim. The worker appealed this decision to WCAT.

Law and Policy

Section 96.2(1)(a) of the Act provides a right to request a review of a "Board decision respecting a compensation or rehabilitation matter under Part 1."

Section 239(1) provides a right of appeal to WCAT from a "final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section."

The *Review Division - Practices and Procedures* defines "Decision" as follows:

A letter or other communication to the person affected that records the determination of a Board officer as to a person's entitlement to a benefit or benefits or a person's liability to perform an obligation or obligations under any section of the *Act*.

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

Analysis

In support of her appeal from the May 3, 2006 Review Division decision, in a September 28, 2006 submission, the worker's representative argued that the March 15, 2006 letter was not merely an information letter. The November 29, 2004 WCAT decision dealt with the issue of the worker's entitlement to a pain program solely with respect to her physical injury. The representative submitted that the psychologist's June 9, 2005 report was new evidence which warranted revisiting the worker's entitlement to a pain program. The case manager did not acknowledge or recognize this new medical evidence and her refusal to adjudicate the issue on that basis is reviewable. The Review Division's rejection of the review perpetuates this error.

The WCAT decision regarding the worker's entitlement to a pain program was made in the context of her physical injuries, as her representative has argued, and was made before the full effect of her depression and potential treatment had been investigated. Indeed, that is the very investigation and adjudication implementation of the WCAT decision required.

The October 4, 2005 letter implemented the WCAT decision with respect to the worker's depression and its treatment in the form of counselling, among other issues. It did not refer to the psychologist's recommendation regarding a chronic pain management program for treatment of the depression. The representative's March 10, 2006 inquiry concerned the worker's entitlement to that referral, rather than the implementation of the WCAT decision. It is arguable that this is a new matter for adjudication, that is, the worker's entitlement to treatment for her depression at a chronic pain management program, as recommended by the psychologist. It is also arguable that the WCAT decision has no effect on this adjudication, except to the extent that it precipitated the inquiry.

It is not for me to anticipate what the arguments on a review of the March 15, 2006 letter might be nor what the response of a review officer might be. That would have me conducting the very review the Review Division has refused to provide. However, these are the types of questions that need to be determined on a review of the March 15, 2006 decision.

I find that the March 15, 2006 letter is not an information letter but, rather, an adjudicative decision about the effect of the November 29, 2004 WCAT decision concerning the worker's entitlement to a pain program on the worker's request for a referral to a chronic pain management program for treatment of her depression as recommended by the psychologist. This is a decision affecting the worker, or concerning the worker's entitlement to a benefit. I find that the worker is entitled to a review of the March 15, 2006 decision on that basis.

Conclusion

I allow the worker's appeal and vary the May 3, 2006 Review Division decision. The March 15, 2006 letter constituted a reviewable decision. The matter is returned to the Review Division to complete its review.

Susan L. Polsky Shamash
Vice Chair

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