

### Noteworthy Decision Summary

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**Decision:** WCAT-2007-01927 **Panel:** Susan Polsky Shamash **Decision Date:** June 25, 2007

***Reviewable Decision – Oral and Written Communication of Decision – Policy item #99.20 of the Rehabilitation Services and Claims Manual, Notification of Decisions***

This decision is noteworthy for its analysis of what constitutes a reviewable decision which has been communicated both orally and in writing.

The Review Division of the Workers' Compensation Board (Review Division) refused to review a letter from a disability awards officer (DAO) of the Workers' Compensation Board, operating as WorkSafeBC (Board). The review officer rejected the review on the basis that the letter did not contain a reviewable decision, but simply provided a written explanation of the reasons behind a Board pension decision concerning the continued application of proportionate entitlement to the original permanent functional impairment award which had been previously communicated in writing and explained/clarified orally.

The panel allowed the worker's appeal. She found that the DAO's letter did contain a reviewable decision. The panel found that the previous Board pension decision had not contained a decision on the continued application of proportionate entitlement to the original permanent functional impairment award. The DAO's letter was the first time that this issue had been specifically addressed in any written correspondence. This letter was not a mere clarification or a reconsideration of the previous Board decision. The oral conversation between the DAO and the worker, which took place after the previous Board pension decision and before the DAO's letter, was simply the oral communication of the DAO's subsequent decision.

While oral communications are sufficient for purposes of the 75-day time limit on reconsideration, the DAO's decision letter gave rise to review rights. Although the worker could have requested a review of the orally communicated decision, failure to do so did not bar the worker from requesting a review of the DAO's decision letter since that was the first written correspondence the worker received expressly communicating that decision. The review of the DAO's decision letter entailed full consideration of the merits of the issue. This situation illustrated the profound good sense behind policy item #99.20 of the *Rehabilitation Services and Claims Manual* on Notification of Decisions. This policy requires the Board to provide the worker with written reasons when an adverse decision is made.

**WCAT Decision Number :** WCAT-2007-01927  
**WCAT Decision Date:** June 25, 2007  
**Panel:** Susan L. Polsky Shamash, Vice Chair

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## Introduction

The worker appeals a November 22, 2006 decision of a review officer (*Review Decision #R0071802*) refusing to review a September 15, 2006 letter from a disability awards officer of the Workers' Compensation Board (Board), operating as WorkSafeBC. The review officer rejected the review on the basis that the letter did not contain a reviewable decision, but simply provided the reasons behind a May 25, 2006 decision. These reasons had been orally communicated on June 1, 2006. In the alternative the review officer said that, if the September 15, 2006 letter were a new decision, he would have concluded that it was made without statutory authority and should be cancelled.

The worker is represented by her chiropractor. The employer is not participating in this appeal although they were advised of this right.

This appeal has been decided based on a review of the claim file and written submissions received from the worker's representative.

## Issue(s)

Does the disability awards officer's September 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

As a result of an October 2001 work injury, the worker's claim was accepted for a permanent injury to her low back. In a decision of September 22, 2003 her facet joint disease and mechanical low back pain were not accepted under the claim. On December 23, 2004, the worker was granted a permanent disability award of 6.6%. Her entitlement was apportioned and limited as a result of the facet joint disease.

The worker requested a review of the September 22, 2003 decision. In *Review Reference #R0011703* of May 17, 2004, the Review Division confirmed that decision. In *WCAT-2005-03449*, dated June 29, 2005, the worker's appeal to WCAT was partially allowed on this issue. That WCAT panel found that the worker's facet joint disease was not compensable but her pain complaints, described as mechanical back pain, were the result of her compensable injury. The panel addressed other issues as well, including the worker's entitlement to further wage loss benefits and the date on which the worker's condition plateaued.

In a letter of July 25, 2005, a case manager implemented the WCAT decision. With respect to the chronic pain issue, the case manager simply advised the worker that her file had been updated to reflect this finding and that no further action was required.

The worker requested a review of the July 25, 2005 decision. In a September 20, 2005 letter, in addition to other submissions, the worker's representative argued that the worker's permanent disability award should not have been reduced on the basis that her facet joint disease caused some of her loss of range of motion.

In *Review Reference #R0058911* of April 13, 2006, a review officer concluded that the case manager had implicitly decided that the worker was not entitled to a referral to the Disability Awards Department to determine if WCAT's findings impacted her functional impairment award. The review officer allowed the review and found that the worker's claim should be referred back to the Disability Awards Department to determine if its assessment of her permanent functional impairment remained valid in light of the June 29, 2005 WCAT decision.

On April 20, 2006 the case manager referred the worker's claim to the Disability Awards Department. In the May 1, 2006 form 24 (PFI Review), the disability awards officer identified the issue for her to decide as whether the worker's ongoing subjective pain symptoms are disproportionate. She concluded that they were and granted the worker an additional permanent disability award of 2.5% for her ongoing pain complaints. She also concluded that proportionate entitlement would not be applied to the increased award. This memo was enclosed together with the May 25, 2006 letter advising the worker of the decision with respect to the effect of the WCAT decision on her permanent disability award entitlement.

On June 1, 2006 the worker's representative contacted the disability awards officer because, in his view, the worker should be entitled to a permanent disability award representing the full amount of the decreased range of motion in her lumbar spine. The disability awards officer explained to the representative that, as the WCAT panel had concluded that the worker's facet joint disease was non-compensable, apportionment was still appropriate.

On June 6, 2006 the worker's representative wrote to the WCAT vice chair to request clarification of her decision on this point. In a letter of July 4, 2006, a WCAT legal counsel referred the representative to the May 25, 2006 letter which the representative may not have received at the time he wrote and queried whether clarification was still necessary. On August 15, 2006 the worker was sent updated disclosure of her claim file. Prior to that, her representative had received updated disclosure in February 2006.

On September 11, 2006 the representative requested an extension of time to request a review of the May 25, 2006 letter. On September 15, 2006, the disability awards officer issued a supplementary form 24 addressing the representative's request with respect to apportionment. She acknowledged that her decision in this regard was not clearly expressed in her May 1, 2006 form 24. She therefore issued a clarifying memo and decision: the subsequent appeal decisions accepting mechanical low back pain and pain complaints as compensable did not alter the fact that the worker's pre-existing non-compensable facet joint disease impacted the loss of range of motion. The disability awards officer forwarded the September 15, 2006 memo to the worker together with a letter of the same date and concluded that no change would be made to the worker's existing disability award, as it accurately reflected her disability. The disability awards officer referred to her September 15, 2006 letter as a decision and provided review information along with it. In a letter of October 3, 2006 the worker's representative disagreed with the disability awards officer's decision.

In the November 22, 2006 decision which is now before me, a review officer rejected the worker's request for review of the September 15, 2006 letter. He said that the issue which the worker wished to raise was addressed in the implementation decision of May 25, 2006; no new decision was made in the September 15, 2006 letter. Rather, the September 15, 2006 letter provided a written explanation of the reasons behind the May 25, 2006 decision which had been communicated orally during the telephone conversation the representative had with the disability awards officer on June 1, 2006. Although the May 25, 2006 decision ought to have included a written explanation of why proportionate entitlement was continued, the failure to do so did not alter the fact that that decision was made. The review officer went further and said that, even if the September 15, 2006 letter could be considered to be a new decision, it was made without statutory authority because it was issued more than 75 days after the May 25, 2006 decision and was thus outside the Board's time limit for reconsideration.

The review officer observed that the worker had also requested an extension of time to appeal the May 25, 2006 decision. It was the subject of a separate review. In *Review Reference #R0072015* of November 21, 2006, the same review officer denied the worker's application for an extension of time to request a review. Although there was some confusion regarding when the representative filed the request for review, the review officer chose the September 11, 2006 letter for the operative date. This was received 15 days beyond the 90-day time limit to request a review.

The review officer denied the extension of time application because the May 25, 2006 decision letter included information about requesting a review, the representative received an explanation of the decision within one week of its being issued, and the worker had previous experience with the review/appeal system and its time limits. As a result, the review officer could not conclude that special circumstances existed which precluded the worker from filing the request for review within the statutory time limit. The review officer noted that the representative argued that the June 1, 2006 discussion did not clarify the basis of the decision. However, the review officer accepted that the contents of the log entry accurately described what occurred during that telephone conversation including that the representative was advised that the worker could file a request for review within 90 days of the May 25, 2006 decision. He observed that it would have been open to the representative to file the request in a timely manner and to have pursued the required explanations and clarifications from the Board and WCAT later.

The worker appealed the decision to deny her an extension of time to WCAT. On February 22, 2007 the appeal was dismissed because WCAT has no authority to consider an appeal from a decision of the Review Division denying an extension of time for review.

### **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...”.

Section 96(5) of the Act provides:

- (5) Despite subsection (4), the Board may not reconsider a decision or order if
  - (a) more than 75 days have elapsed since that decision or order was made,
  - (b) a review has been requested in respect of that decision or order under section 96.2, or
  - (c) an appeal has been filed in respect of that decision or order under section 240.

Section 1 of the Act defines the word “reconsider” as follows:

“reconsider” means to make a new decision in a matter previously decided where the new decision confirms, varies or cancels the previous decision or order;

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*.

## **Analysis**

The worker’s representative’s submission addresses both the worker’s attempt to appeal the November 21, 2006 Review Division decision to deny an extension of time for review of the disability awards officer’s May 25, 2006 decision as well as the worker’s appeal from the November 22, 2006 Review Division decision to refuse to review the September 15, 2006 decision. The issue before me, however, is limited to whether the September 15, 2006 letter contains a reviewable decision and I will only summarize that portion of the submission.

The representative’s submission is that, since the June 29, 2005 WCAT decision, the worker has been attempting to have the issue of the continued application of proportionate entitlement to her original permanent functional impairment award specifically addressed. After the disability awards officer’s May 25, 2006 decision and the June 1, 2006 telephone conversation, the representative requested written clarification from the disability awards officer. As he did not agree with the disability awards officer’s interpretation of the effect of the June 29, 2005 WCAT decision, he also asked WCAT to clarify its decision.

It is the representative’s position that the September 15, 2006 letter contains all of the trappings of a reviewable decision on the issue of the apportionment of the worker’s permanent functional impairment award. The disability awards officer stated that the purpose of the letter was to clarify her May 25, 2006 decision. She enclosed a revised form 24 addressing the apportionment issue and concluded that there would be no change to the worker’s existing disability award. The letter closes with a reference to the worker’s right to request a review of the decision.

The review officer’s refusal to conduct a review of the September 15, 2006 letter is consistent with a series of decisions which establish that, for a decision to be made, it must be communicated to the worker. But that communication can be either orally or in writing. In *WCAT-2006-02121*<sup>1</sup> a three-member non-precedent panel held that a decision is not “made” for the purposes of the reconsideration, review and appeal provisions of the *Act* until it is communicated. The principles of procedural fairness and natural justice require that a decision be communicated for it to be “made”. It is not sufficient that it merely be recorded in the claim file.

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<sup>1</sup> All of the referenced decisions are published on WCAT’s website: [www.wcat.bc.ca](http://www.wcat.bc.ca)

In *WCAT-2006-02121* the three-person panel found that, for the purpose of that appeal, it was not necessary to address the required method or mechanics of communication of the decision to the affected party(ies). However, they recognized that, from an evidentiary perspective, it was clearly preferable that the decision be communicated in the form of a dated decision letter issued by a Board officer, so that there was no ambiguity about the date and content of the decision.

In *WCAT-2006-02669* another panel adopted the reasoning of the three-person panel and concluded that communication could be oral or written. Both this decision and *WCAT-2006-02121* were made in the context of the 75-day time limit on reconsiderations imposed by section 96(5) of the Act. Both panels noted Board policy at item #99.20 of the *Rehabilitation Services and Claims Manual, Volumes I and II* (RSCM) provides that decisions adverse to a worker are to be communicated in writing. However, the panel in *WCAT-2006-02669* did not consider that this policy means that an oral communication of a decision is void.

Subsequent to these decisions, the Board's *Best Practices Information Sheet #5<sup>2</sup>* (BPIS #5) regarding Reconsiderations was amended to require that, for a decision to be "made", it must be communicated, either verbally or in writing. Previously, BPIS #5 provided that a decision was "made" when it was documented on the claim file.

In *WCAT-2007-00640* another panel appeared to disagree with this developing analysis and concluded that, for an adverse decision to be "made", item #99.20 required written communication. A decision communicated orally was not "properly" communicated to the worker. The panel found that it was a denial of natural justice not to inform the worker in writing of the decision and of his right to request review. In that situation the worker had clearly communicated his disagreement with the decision orally to the decision-maker. However, that was not considered to be sufficient to have his disagreement dealt with by the Review Division.

*WCAT-2007-00640* illustrates the difficulty inherent in concluding that oral communication is sufficient for a decision to be "made". If oral communication is sufficient, then arguably oral communication of disagreement ought to trigger the review process. Section 96.2(3) of the Act provides that a request for review must be "filed" within 90 days after the decision was "made". The Review Division requires that a request for review be in writing. Arguably a request for review could be "filed" orally. Section 243(1) of the Act contains the same wording with respect to appealing a Review Division decision to WCAT. However, WCAT has developed a process that enables telephone notification of an intent to appeal followed by written perfection of that notice. Two different appellate bodies have thus developed different processes, both in lawful compliance with parallel statutory requirements.

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<sup>2</sup> BPIS#5 is published on the Board's website.

In *WCAT-2007-01017* the same panel that decided *WCAT-2007-00640* found that, where a worker was orally informed of a decision, he could request a review of the oral decision (and in that case, since he was out of time, he would also need to apply for an extension of time to request a review). Alternatively, he could request that the Board communicate the decision to him in writing following which he could request a review.

The several decisions discussed above addressed two different scenarios: written documentation of a decision on a claim file without any form of communication, and written documentation of a decision on a claim file followed by oral communication only.

Neither of those scenarios describes the circumstances of the appeal before me. Here the worker was provided a written decision on May 25, 2006 that purported to implement the June 29, 2005 WCAT decision with respect to the worker's pension entitlement. I do not agree with the review officer that the May 25, 2006 letter contained a decision with respect to the continued application of proportionate entitlement simply because it confirmed all other aspects of the worker's permanent functional impairment award. I come to this conclusion because, in that letter, the disability awards officer referred specifically to the April 13, 2006 Review Division decision, saying that the worker's claim file had been referred back to determine if she was entitled to an award for chronic pain. The accompanying form 24 shows that the disability awards officer only addressed the worker's entitlement to an increased award for chronic pain and whether proportionate entitlement would be applied to that portion of the award. In my view, any reference to the worker's award for the permanent functional impairment in her back was in the nature of a recitation of the background facts and adjudicative history of the worker's claim. There was not just a lack of a written explanation for such a decision; there was no decision made or communicated in the May 25, 2006 letter on that question. The only decision communicated to the worker in that letter was with respect to her entitlement to an award for chronic pain.

It was not until the June 1, 2006 telephone conversation that the disability awards officer communicated her interpretation of the WCAT decision with respect to the continued application of proportionate entitlement to the worker's permanent functional impairment award. Whether or not she had come to that conclusion earlier cannot be established on the evidence, that is, the form 24 and the May 25, 2006 letter. Following that telephone conversation, the disability awards officer documented it in the claim file. But the worker could not have known of that documentation until she received updated disclosure the following August. The worker's representative indicated the worker's disagreement with that interpretation by writing to WCAT seeking clarification of its June 29, 2005 decision. If that June 1, 2006 oral communication clarified the May 25, 2006 decision such that it ought to have been interpreted as also deciding the proportionate entitlement matter, then arguably the representative's June 6, 2006 letter ought to have been taken as a request for review of that decision.



The worker was subsequently provided with that decision in writing in the September 15, 2006 letter. The question for me to decide is whether the September 15, 2006 letter is a reviewable decision on that question or whether, as the review officer has found, simply a written explanation of a decision previously communicated in writing and explained/clarified orally.

It is clear from the claim file that the worker has been trying to address the question of the continued application of proportionate entitlement to her permanent functional impairment award since at least September 20, 2005. That is when her representative raised the matter in his written submission to the Review Division in support of the review of the July 25, 2005 decision implementing the WCAT decision. The matter has not been specifically addressed in any written correspondence prior to the September 15, 2006 letter.

Of course, given what has transpired subsequently (that is, the Review Division decision to deny an extension of time to request a review), it would have been preferable for the worker to have requested a review of the May 25, 2006 decision in a timely manner simply to preserve her remedy. However, because of my conclusion that the May 25, 2006 letter did not communicate a decision regarding proportionate entitlement, in my view it is arguable that the Review Division (and also WCAT) would not have had jurisdiction to make a decision on that question in any event. Thus, the remedy the worker is seeking may not have been preserved by requesting that review.

I find that the September 15, 2006 letter is the first written communication to the worker of the decision regarding the continued application of proportionate entitlement to her permanent functional impairment award and is thus reviewable. I do not agree with the disability awards officer that she was merely providing clarification of the decision previously communicated in her May 25, 2006 letter for the reasons previously stated – the May 25, 2006 letter did not contain the impugned decision. Nor do I agree with the review officer that the September 15, 2006 letter was not a new decision but rather was a written explanation of the reasons behind the May 25, 2006 decision that had been orally communicated on June 1, 2006 also for the reasons previously stated – the June 1, 2006 conversation was the oral communication of the decision which was provided in written form in the September 15, 2006 letter.

This conundrum gives rise to a very puzzling question. Although, as the panel in *WCAT-2006-02669* found, simply communicating a decision orally does not void the decision, how, as a practical matter, does a party request a review of it? This is especially problematic if there is no written documentation. Fortunately, I do not need to decide that question since that is not the specific situation before me on this appeal. I raise the question, however, since that is the logical end point of this perspective. As the three-person panel observed in *WCAT-2006-02121*, from an evidentiary perspective, documentation in a decision letter is clearly preferable so that there is no

ambiguity about the date and content of the decision. I would argue that documentation in some form is absolutely necessary. This accords with the direction in BPIS #5 to also provide a letter in accordance with Board policy in item #99.20. While oral communication is sufficient for purposes of the 75-day time limit on reconsideration, the decision letter gives rise to review rights.

The Review Division has also sought to address this situation in their *Practices and Procedures* document in items A1, B1.1 and B2.1.5. Applicants are directed to obtain written reasons for a decision before requesting a review. Where the applicant requests a review of an oral decision, the Review Division must satisfy itself that a decision was made and may request written reasons from the Board.

In circumstances such as these, I find that the appellant had three choices – request a review of the June 1, 2006 oral communication, request a review of the claim file documentation of that oral communication when she received updated disclosure in August 2006, or request a review of the September 15, 2006 decision letter that expressly communicated the impugned decision in writing.

The first choice is ill advised if there is no written documentation on the claim file of the decision or, where documented, if the appellant is not aware of the documentation. The obvious evidentiary questions regarding the date and the content of the decision arise. The second choice is better but the same evidentiary questions arise. Additionally, time limitation questions arise, i.e. what is the operative date for the running of the time limit? When the decision was orally communicated? When it was documented if that took place on a different date than the oral communication? When the fact of documentation became known to the appellant?

The third choice, in my view, is to be preferred because the evidentiary and time limitation problems are all addressed.

I find that the worker could have requested a review of the June 1, 2006 oral communication of the disability awards officer's decision with respect to the continued application of proportionate entitlement. Her request for review likely would have been accepted by the Review Division and registered since there was written documentation confirming that decision on her claim file. But, failing to request a review of that oral communication does not bar the worker from requesting a review of the September 15, 2006 decision letter since that was the first written correspondence the worker received expressly communicating that decision.

The situation that has arisen in this appeal illustrates the profound good sense behind policy #99.20 of the RSCM – Notification of Decisions. It requires Board decision-makers to provide written reasons to a worker when an adverse decision is made. It also provides guidelines for writing those letters which include clearly

specifying the matter being adjudicated, outlining the evidence considered, explaining how it was weighed, referring to relevant law and policy and explaining what the decision means in terms of the non-payment of benefits. Clearly the May 25, 2006 letter did not meet these expectations with respect to the proportionate entitlement issue while the September 15, 2006 letter squarely did. That is also why, in my view, the September 15, 2006 letter is the written decision on this matter.

As I have found that the September 15, 2006 letter is reviewable, I turn now to the review officer's alternative conclusion: if the September 15, 2006 letter is a decision, it amounted to a reconsideration of the May 25, 2006 decision and was issued beyond the 75-day time limit for reconsiderations. Thus it was made without statutory authority and should be cancelled. Given my conclusions that the May 25, 2006 letter did not contain a decision regarding the continued application of proportionate entitlement to the worker's permanent functional impairment award, that that decision was communicated orally on June 1, 2006, and the September 15, 2006 letter was the written communication of that decision, I find that the September 15, 2006 letter is not a reconsideration of the May 25, 2006 decision. The review of the September 15, 2006 letter entails full consideration of the merits of that issue.

### **Conclusion**

I allow the worker's appeal and vary the review officer's November 22, 2006 decision declining to review the disability awards officer's decision of September 15, 2006 or, alternatively, cancelling the decision of September 15, 2006. The matter is referred back to the Review Division to carry out the review on the merits.

Susan L. Polsky Shamash  
Vice Chair

SLPS/lc