Noteworthy Decision Summary

Decision: WCAT-2008-03461 **Panel:** Jill Callan **Decision Date:** November 20, 2008

Right of review – Decision communicated orally – Right to request a review of later written decision – Items #99.20, #99.21 of the Rehabilitation Services and Claims Manual, Volume II

This decision is noteworthy as it provides an analysis of whether an oral communication of a decision declining to accept a claim precludes a worker or employer from proceeding with a review of a subsequent written decision.

In a February 6, 2008 decision, a review officer informed the worker that a December 18, 2007 letter of an entitlement officer of the Workers' Compensation Board, operating as WorkSafeBC (Board), did not constitute a reviewable decision. In that letter the entitlement officer had informed the worker that the Board's decision not to accept a new claim for a February 2007 injury had been communicated to him in the course of an April 17, 2007 telephone conversation. On appeal to WCAT the issue was whether the oral communication of a Board decision precludes a worker or employer from proceeding with a review of the subsequent written decision.

The panel allowed the appeal, finding that the December 18, 2007 letter constituted a reviewable decision. The panel noted that an April 17, 2007 log entry documented a telephone conversation between the worker and the entitlement officer and indicated that the entitlement officer told the worker that she did not accept that he had sustained a new back injury in February 2007, but the entitlement officer also indicated that a Board officer would review his earlier claims to determine whether they should be reopened for further benefits. The entitlement officer did not send a written decision to the worker. There was nothing in the claim log entry to indicate that the entitlement officer advised the worker of his right to request a review of her decision.

Item #99.20 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), establishes that, where the decision is adverse to the worker, the reasons for the adverse decision are to be set out in a letter to the worker. Item #99.21 of the RSCM II provides that the Board will inform a worker or employer of the rights of review and appeal where an adverse decision is being issued. Having reviewed the policy the panel found that the matter should be returned to the Review Division so that a review of the December 18, 2007 decision could be conducted.

The panel stated that she did not intend that this decision generally resolve the question of whether a written decision is reviewable when a Board officer has previously communicated the decision orally, but was hopeful that this would be clarified following a consultation process to be carried out by the Board's Policy and Research Division.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

WCAT Decision Number: WCAT-2008-03461
WCAT Decision Date: November 20, 2008
Panel: Jill Callan, Chair

Introduction

[1] The worker appeals a February 6, 2008 Review Division decision (*Review Decision #R0088295*). In that decision, a review officer in the registrar's office of the Review Division informed the worker that a December 18, 2007 letter of an entitlement officer of the Workers' Compensation Board, operating as WorkSafeBC (Board), did not constitute a reviewable decision. That letter had informed the worker that the Board's decision not to accept a new claim for a February 2007 injury had been communicated to him in the course of his April 17, 2007 telephone conversation with the entitlement officer.

[2] The review officer concluded that the December 18, 2007 letter did not constitute a decision because the decision declining to accept his claim had been communicated during the April 17, 2007 telephone conversation. The review officer informed the worker of his right to request an extension of time to request a review of the decision communicated during the April 17, 2007 telephone conversation. That right arises under section 96.2(4) of the *Workers Compensation Act* (Act).

[3] On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the worker seeks a finding that the December 18, 2007 letter contains the Board's decision declining to accept the worker's claim.

[4] The worker is represented by the Workers' Advisers Office. In this decision, references to the worker include references to his representative. The employer is participating and is self-represented.

Oral Hearing Request

[5] The worker has requested an oral hearing of the appeal. The WCAT Registry determined that the appeal would proceed through WCAT's "read and review" or written submissions process. However, it is open to me to grant the worker's oral hearing request.

[6] Rule #8.90 of WCAT's *Manual of Rules of Practice and Procedure* provides that WCAT will normally conduct an appeal on a read and review basis where the issues are largely medical, legal, or policy based, and credibility is not an issue. The question of whether the Review Division ought to have conducted a review is a question that can be resolved by a review of the claim file and the submissions and consideration of the

relevant provisions of the Act and the policies of the board of directors of the Board. Accordingly, I find that the worker's appeal can be fully and fairly considered without an oral hearing.

Issue(s)

[7] The issue is whether the entitlement officer's December 18, 2007 letter includes a reviewable decision regarding the worker's claim for a February 2007 injury. If the worker is successful in this appeal, I will return this matter to the Review Division so that they can conduct a review.

Background

[8] The Board has previously accepted the worker's claims for back injuries in 1994, 1999, and 2000. The claim that is the subject of this appeal is for a February 2007 back injury. An April 17, 2007 log entry documents an entitlement officer's review of the circumstances surrounding the worker's claim and apparently documents her telephone conversation with the worker. According to the log entry, the entitlement officer told the worker that she did not accept that he had sustained a new back injury in February 2007. However, she also told him that a Board officer would review his earlier claims to determine whether they should be reopened for further benefits.

[9] The entitlement officer did not send a written decision to the worker. There is nothing in the claim log entry to indicate that the entitlement officer advised the worker of his right to request a review of her decision.

[10] In an October 10, 2007 letter to the Board, the worker's representative requested adjudication of the worker's claim for a February 2007 back injury. He enclosed the worker's description of an incident that occurred in February 2007 when the worker was working as a drywaller and fell. In the note, the worker indicated that he did not tell his employer that he had injured his back because he thought that his employer would consider him to be a liability. He said he told his employer and the Board that his back problems were due to an old injury.

[11] In her October 18, 2007 letter, the entitlement officer treated the October 10, 2007 request as constituting an objection to her April 17, 2007 decision. She noted that, although the authority of Board officers to reconsider decisions is established by section 96(4) of the Act, section 96(5) places a 75-day time limit on that authority. She concluded that, since more that 75 days had elapsed since the April 17, 2007 decision, she was unable to reconsider that decision.

[12] By letter dated October 18, 2007, the worker's representative requested a copy of the April 17, 2007 decision. The entitlement office responded with the December 18, 2007 letter which was the subject of the worker's request for review. In that letter, the

entitlement officer acknowledged that she had erred in not sending the worker a letter confirming her April 17, 2007 decision. She apologized for the error and stated that she had not accepted that the worker had sustained a new injury in February 2007.

[13] The worker filed a request for review of the December 18, 2007 letter. The remedy he sought was acceptance of a claim for the 2007 injury. As stated earlier, in the February 6, 2008 Review Division decision under appeal, the review officer concluded that the December 18, 2007 letter did not contain a reviewable decision because the decision declining to accept the worker's claim for a February 2007 back injury was verbally communicated to him on April 17, 2007.

The Act, Policies, and Practices

[14] The question at the heart of the worker's appeal is whether the verbal communication of a Board decision declining to accept a claim precludes a worker or employer from proceeding with a review of the subsequent written decision. In situations like the one before me in this appeal, this question is relevant to the requirement in section 96.2(3) of the Act that a request for review be filed "within 90 days after the Board's decision … was made". In other cases, it may be relevant to the 75-day limit on the Board's authority to reconsider its decisions set out in section 96(5) of the Act, which prohibits reconsideration of a Board decision if "more than 75 days have elapsed since that decision … was made". The application of sections 96.2(3) and 96(5) requires consideration of the following questions:

- What constitutes a "decision"?
- When has a "decision" been "made"?

[15] Further questions that frequently arise in respect of the statutory time limit for initiating a review relate to the effect of a Board officer failing to inform a worker or employer of the right to request a review of a decision. Is there a denial of procedural fairness in these circumstances? If so, what results flow from that denial?

[16] There is no definition of "decision" in the Act nor is there a provision that provides guidance as to when a decision is considered to have been "made". In addition there is no provision in the Act regarding the communication of compensation decisions.

[17] The glossary of terms contained in Appendix C1 of the Review Division *Practices and Procedures* defines "decision" as:

> 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*.

[18] It is clear from this definition and the Review Division decisions that have applied it that a decision has been made if it has been communicated through a written decision or verbally. Item #B2.1.5 of the Review Division *Practices and Procedures* provides further guidance in stating:

> 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.

[19] Therefore, item #B2.1.5 includes a mechanism that addresses the unfairness that could arise if parties to verbal decisions are not informed of the reasons for the decisions.

[20] The Board's Practice Directive #C14-2 (Reconsiderations) also establishes that "[f]or the purposes of determining the 75-day period, a decision is made when it is communicated to the affected party, either verbally or in writing" (see page 1). In this case, it is clear that the review officer considered the verbal communication recorded in the April 17, 2007 log entry to be a communication that constitutes a decision.

[21] The concept that a decision is made when it is communicated verbally to an affected party is at odds with the policies of the board of directors of the Board, which establish certain requirements regarding the communication of decisions. Item #99.20 (Notification of Decisions) of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), establishes that, where the decision is adverse to the worker, the reasons for the adverse decision are to be set out in a letter to the worker. The policy goes on to set out a comprehensive list of guidelines for reasons, which include consideration of the evidence and the applicable provisions of the Act and the policies of the board of directors. The guidelines also state that an explanation of relevant rights of review or appeal should be set out in the decision.

[22] Item #99.21 (Notification of Rights of Review and Appeal) of the RSCM II also provides that the Board will inform a worker or employer of the rights of review and appeal where an adverse decision is being issued. Paragraph C of item #C14-103.01 (Changing Previous Decisions – Reconsiderations) of the RSCM II also states that parties to a decision will be advised in writing of the right of review at the time the decision is made.

[23] Section 99(2) of the Act provides:

> The Board must make its decision based upon the merits and justice of the case, but in so doing the Board must apply a policy of the board of directors that is applicable in that case.

[24] Item #2.20 (Application of the Act and Policies) of the RSCM II notes that Board officers are required to apply the applicable policy, but also makes a distinction between substantive policies, and associated practice components and business processes. Item #2.20 states, in part:

> All substantive and associated practice components in the policies in this Manual are applicable under section 99(2) of the *Act* and must be followed in decision-making. The term "associated practice components" for this purpose refers to the steps outlined in the policies that must be taken to determine the substance of decisions. Without these steps being taken, the substantive decision required by the Act and policies could not be made.
>
> **References to business processes that appear in policies are only applicable under section 99(2) of the *Act* in decision-making to the extent that they are necessary to comply with the rules of natural justice and procedural fairness.** The term "business processes" for this purpose refers to the manner in which the Board conducts its operations. These business processes are not intrinsic to the substantive decisions required by the *Act* and the policies.
>
> If a policy requires the Board to notify an employer, worker, or other workplace party before making a decision or taking an action, the Board is required to notify the party if practicable. "If practicable" for this purpose means that the Board will take all reasonable steps to notify, or communicate with, the party.
>
> [emphasis added]

[25] WCAT is not required to apply the Board's practice directives or the Review Division's *Practices and Procedures* in its decisions. However, WCAT generally considers them because of the importance of consistency in decision-making throughout the workers' compensation system. Section 250(2) of the Act requires WCAT to apply the applicable policy of the board of directors in making a decision.

Proposed Policy Reform

[26] In the *Core Services Review of the Workers' Compensation Board* by A. Winter (British Columbia: Ministry of Skills Development and Labour, 2002), the core reviewer recommended that the 90-day time frame for requesting a review run from the date that the Board officer's decision was communicated in writing. However, the core reviewer's recommendation in this regard was not implemented in the 2002 or 2003 amendments to the Act or in the policies of the board of directors.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

[27] On May 28, 2008, the Policy and Research Division of the Board issued a discussion paper entitled "Notification of Decisions" in order to consult with the workers' compensation community regarding proposed policies on the questions of what constitutes a decision, when a decision is considered to have been made and communicated, and whether Board officers are required to notify parties of rights of review and appeal.

Review Division Extension of Time Decisions

[28] In the decision under appeal, the review officer informed the worker of his right to request an extension of time to request a review of the entitlement officer's April 17, 2007 verbal decision, which was recorded in the claim log. Section 96.2(4) of the Act establishes the requirements that must be met in order for the chief review officer to grant an extension of the 90-day time limit for requesting a review of a Board decision. Among other things, the chief review officer must be satisfied that special circumstances precluded the timely filing of the request for review.

[29] Assuming a decision is made when it is verbally communicated to a party and documented in a claim log (even though there is no verbal communication of the right to request a review), the question that arises is whether the lack of information about the right to request a review constitutes special circumstances for the purposes of section 96.2(4). The Review Division has considered this issue in deciding various extension of time applications, including *Review Decision #R0089956* dated April 3, 2008 and *Review Decision #R0092198* dated June 16, 2008.

[30] In the June 16, 2008 decision, a review officer considered a situation in which the worker had left a Board officer a voicemail message indicating that she expected to return to work the following week. The next day, the Board officer made a claim log entry terminating the worker's temporary disability benefits. However, the Board officer did not speak to the worker and the worker was not advised of her right to request a review.

[31] In considering the extension of time application, the review officer noted that there are some situations in which the requirement of establishing special circumstances will not have been met even if the applicant was not notified of the right to request a review. However, generally the lack of notice of this right will constitute special circumstances within the meaning of section 96.2(4) of the Act. In both Review Division decisions, the extension of time to appeal was granted. A discussion of the situations in which special circumstances will not be viewed as having been established is set out on page 3 of the June 16, 2008 decision.

Analysis

[32] The worker submits that the December 18, 2007 letter is a reviewable decision because it constitutes the first written communication of the entitlement officer's decision to deny the worker's claim for a February 2007 injury.

[33] In their July 11, 2008 submission, the employer does not address the question of whether the review officer correctly declined to conduct a review. Instead, the employer's submission is focussed on the merits of the worker's claim. The employer takes the position that the worker should not be allowed to establish a claim for a February 2007 injury because he did not report that injury in a timely manner. However, the matter that I must decide under this appeal is restricted to the question of whether the December 18, 2007 letter is a decision that is reviewable by the Review Division.

[34] The ideal circumstances are those in which Board officers meet the requirements of item #99.20 of RSCM II when making compensation decisions. In those cases, the decisions are reasoned, written decisions that include information about the right of review or, in the limited circumstances (see section 240(2) of the Act), the right to appeal the Board decision to WCAT.

[35] While less ideal, I agree that it is viable for Board officers to communicate decisions verbally provided that those decisions are also documented in a claim log. However, this approach can be problematic. For example, if the decision is verbally communicated to the worker and employer on different dates, confusion may arise regarding the statutory time frames for reconsidering the decision and requesting a review of the decision. In addition, it appears that Board officers do not always inform workers and employers of their rights of review and appeal when compensation decisions are communicated verbally.

[36] Several WCAT decisions state that the failure to advise a party of the right to request a review of a Board decision results in a denial of procedural fairness (see, for instance, *WCAT Decision #2006-00640*). However, in *Review Decision #R0063020/R0063022,* which has been designated a significant Review Division decision, the review officer concluded that the failure to meet the requirements of item #99.20 of RSCM II does not constitue "a violation of the rules of natural justice or procedural fairness" (at page 3). For ease of reference, I will refer to that decision as the significant Review Division decision.

[37] Whether or not the failure to inform a party of review rights would be considered by the courts to be a denial of procedural fairness, there is no doubt that the fairness of the process is enhanced when Board officers inform parties of their rights. In this case, the entitlement officer was very frank in recognizing that she had erred in not providing a written decision in April 2007. Had she done so, it is likely that the Review Division

would have by now decided whether the worker sustained a compensable injury in February 2007. Instead, the review and appeal system has been engaged in the technical question of whether the December 18, 2007 letter constitutes a reviewable decision.

[38] Many WCAT decisions have grappled with the rather challenging question of whether the written decision is reviewable when there has been previous verbal communication of the decision. It is apparent that the Review Division and WCAT have been guided by different principles and considerations in deciding this question. The variety of possible approaches is illustrated by contrasting the significant Review Division decision with, for example, *WCAT Decision #2007-01927*, dated June 25, 2007.

[39] In the significant Review Division decision, the review officer was dealing with a case that is somewhat similar to the one before me. A Board officer had verbally communicated that the the Board would not be reimbursing the worker for mileage and parking for attending an occupational rehabilitation program. Subsequently, the worker requested a review of a letter that informed him that the verbal decision could not be reconsidered by the Board.

[40] In the section of the significant Review Division decision entitled "Workers' Compensation System", the review officer considered the context within which the verbal decision had been made and the board of directors' policies had been developed. He stated, in part (at pages 3 and 4):

> The huge volume of Board decisions makes it impracticable to provide formal written decisions in every case. These decisions include hundreds of thousands of routine, daily decisions to pay temporary disability benefits and health care accounts. Though these decisions may in most cases be in favour of and not likely to be objected to by workers, an employer could well object to any one of these payments. For practical reasons, Board policy and practice only require written decisions when the Board has grounds for believing an objection is likely, as provided for under Policy #99.20.
>
> The policy does not explicitly deal with the situation where the Board has no grounds for believing that a person objects to a decision at the time the decision is made, but subsequently advises that he or she does object and requests a decision letter. Normally, there will be no problem in practice if the request is received within a reasonable time after the decision, particularly if it is still within the time allowed for reconsideration or requesting review. The situation becomes less clear if a long delay occurs, such as the lapse of over a year in this case.

> A major underlying concern of the 2003 legislative amendments that lead to the enactment of sections 96(4) and (5) and the provisions providing for requests for review was the need for finality in decision making. …
>
> A difficulty with allowing persons a right to request a formal decision letter after a long lapse of time is that it may significantly undermine finality in decision making.
>
> It suggests that that all the millions of decisions that the Board has made in the past that were not communicated in a formal decision can be challenged at any time in the future simply by someone demanding a formal letter, thus creating a new right to request a review. This is the case even though for the great majority of those decisions the Board will have had no reason for believing at the time the decision was made that a written decision was required. …

[41] Accordingly, the significant Review Division decision identifies many practical considerations that arise due to the extensive volume of day-to-day decisions that are made by the Board, most of which attract no contraversy whatsoever. The vast majority of those types of decisions are not appealed to WCAT.

[42] In *WCAT Decision #2007-01927,* the panel was dealing with a situation that was more complicated than the situation in this case. However, the circumstances were similar to this case to the extent that the panel had to decide whether a disability awards officer's September 15, 2006 letter was a reviewable decision even though the decision had been verbally communicated on June 1, 2006. The WCAT panel's analysis included the following:

> 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 quesitons 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 the 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.

[43] In the circumstances before me in this appeal, the worker could have requested a review of the April 17, 2007 verbal decision and the Review Division could have requested reasons for that decision from the entitlement officer. However, I also find that it is viable to conclude that the December 18, 2007 written decision constitutes a reviewable decision. The latter approach more consistent with item #99.20 than the former approach. On that basis, for the purposes of this case, I find the December 18, 2007 letter is a decision reviewable by the Review Division.

[44] I find that this matter should be returned to the Review Division so that a review of the December 18, 2007 decision can be conducted. I do not intend that this decision will generally resolve the question of whether a written decision is reviewable when a Board officer has previously communicated the decision verbally. I am hopeful that this question will be clarified through the consultation process that the Board's board of directors has directed the Policy and Research Division to conduct. I am concerned about the lack of consistency between the Review Division and WCAT in their approach to these difficult issues. There is no doubt that this inconsistency has impeded workers' and employers' access to the review and appeal system. I recognize that questions about the jurisdiction of the Review Division and WCAT are largely questions for determination by those two bodies. However, this is clearly an area in which policy reform will be of assistance to the workers' compensation system as a whole.

Conclusion

[45] I allow the appeal and vary the February 6, 2008 Review Division decision. I find that the December 18, 2007 letter constitutes a reviewable decision regarding the worker's claim for a February 2007 decision. Accordingly, I return this matter to the Review Division in order that the review of this decision can be conducted.

Jill Callan
Chair

JC/ec/gw