Noteworthy Decision Summary

Decision: WCAT-2008- 03567 **Panel:** Randy Lane **Decision Date:** November 27, 2008

Requirement to communicate a decision to all parties – Communication of decision triggers running of review period

This decision is noteworthy as it provides an analysis of what triggers the time period for requesting a review where a decision by the Workers' Compensation Board, operating as WorkSafeBC (Board), is communicated to the parties at different times.

The Board issued an October 26, 2007 decision, which advised the worker that her claim had been accepted for a lacerated face and adjustment disorder with mixed anxiety and depressed mood. The decision was sent to the worker, but not copied to the employer. The decision was communicated to the employer in a telephone call of February 5, 2008 and in a letter of February 22, 2008. The employer requested a review of the February 22, 2008 letter. In a decision dated June 5, 2008 a review officer with the Review Division concluded that the February 22, 2008 letter did not contain a new reviewable matter. The employer appealed to WCAT.

The WCAT panel concluded that the February 22, 2008 letter was a reviewable decision. The panel noted that the Board had issued the October 26, 2007 decision to the worker, but did not copy the employer on the letter. There was no communication of the contents of the October 26, 2007 decision to the employer until February 2008.

The panel noted that, for the purposes of requesting a review, the time period would commence for the worker from the date of the October 26, 2007 decision, and for the employer from February 2008. The panel recognized that usually the time limit for requesting a review is the same for all parties as the decision is communicated to all parties at the same time. However, as this was not the circumstances here, the time period for requesting a review was not the same for all parties. The employer's request for review of the February 22, 2008 decision was returned to the Review Division for further consideration.

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-2008-03567
WCAT Decision Date: November 27, 2008
Panel: Randy Lane, Vice Chair

Introduction

[1] The employer has appealed to the Workers' Compensation Appeal (WCAT) from the June 5, 2008 decision of a review officer with the Review Division of the Workers' Compensation Board, operating as WorkSafeBC (Board). The review officer dealt with the worker's request for review of an October 26, 2007 decision and the employer's request for review of a February 22, 2008 letter. The review officer concluded that the February 22, 2008 letter did not contain a new reviewable matter. The employer has appealed that determination to WCAT.

[2] The review officer varied the October 26, 2007 decision as she found that the worker was temporarily disabled after November 4, 2007 as a result of a psychological condition caused by her compensable facial laceration.

[3] The employer's appeal was initiated by a July 7, 2008 notice of appeal which was accompanied by a submission. The worker's representative indicated the worker would be participating in the appeal. Although the employer was provided with an opportunity to make a further submission, no further submission was received by WCAT. The worker's representative provided a September 23, 2008 submission to which the employer provided an October 8, 2008 rebuttal.

[4] The notice of appeal asked that the appeal to be considered via a "Fast track read and review." By letter of August 15, 2008 the parties were advised that the appeal would proceed by way of written submissions. That decision does not bind me if I consider an oral hearing is necessary. I have considered the rule regarding the holding of an oral hearing set out in item #8.90 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) and the other criteria set out in that item. WCAT will normally conduct an appeal on a read and review basis where the issues are largely medical, legal or policy-based, and the appeal does not involve significant issues of credibility. I have reviewed the issues, evidence, and submissions on the worker's file and have concluded that this appeal may be determined without an oral hearing. The issue before me is primarily legal in nature.

Issue(s)

[5] At issue is whether the February 22, 2008 letter is a reviewable decision. If I find it is a reviewable decision, the matter will be returned to the Review Division for further review. Also at issue is the duration of temporary disability associated with the worker's psychological condition.

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Jurisdiction

[6] WCAT has 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 (section 254 of the *Workers Compensation Act* (Act)). It is not bound by legal precedent (subsection 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but, in so doing, it must apply a policy of the board of directors of the Board that is applicable in the case (subsection 250(2) of the Act), save for specific circumstances set out in section 251 of the Act.

[7] This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Background and Evidence

[8] On August 1, 2007 the worker suffered a facial laceration arising out of and in the course of her employment. By decision of August 8, 2007 the worker was advised that her claim had been accepted for a facial laceration. Her employer was provided with a copy of that decision.

[9] On October 3, 2007 the employer submitted a request for review with respect to the August 8, 2007 decision. The employer asked that the claim be terminated two weeks after the incident date. It observed that the claim was still ongoing, possibly to October 22, 2007. On October 18, 2007 the worker filed a notice of participation.

[10] In an October 24, 2007 claim log entry a case manager indicated he accepted the worker sustained an adjustment disorder with mixed anxiety and depressed mood as a result of her August 1, 2007 facial laceration.

[11] By decision of October 26, 2007 the case manager advised the worker that her claim had been accepted for a lacerated face and adjustment disorder with mixed anxiety and depressed mood. He concluded the medical evidence on file established there were no further medical or psychological restrictions or limitations preventing the worker from returning to her pre-injury work. There was no evidence that any permanent functional impairment had resulted from the compensable injury. No temporary disability benefits were payable after November 4, 2007. No referral to the Disability Awards Department was warranted. No referral for consideration of vocational rehabilitation assistance was warranted.

[12] By letter of October 29, 2007 the employer was granted relief of 25% of the costs of the claim effective October 11, 2007 pursuant to paragraph 39(1)(e) of the Act. The case manager noted there was evidence of a pre-existing condition that enhanced the worker's disability accepted under the claim.

[13] On January 24, 2008 the worker submitted a request for review of the October 27, 2007 decision. On February 26, 2008 the employer submitted a notice of participation.

[14] In a February 22, 2008 letter the case manager noted he was providing a decision letter at the employer's request with respect to the payment of temporary disability benefits. He briefly reviewed the claim and noted it had been accepted for a lacerated face and adjustment disorder with mixed anxiety and depressed mood. Temporary disability benefits had been paid to the worker for the period from August 2, 2007 to November 4, 2007. The case manager cited the law and policy relevant to temporary disability benefits. He advised that it was his decision that the worker was entitled to temporary disability benefits from August 2, 2007 to November 4, 2007.

[15] In the final paragraph of his letter, the case manager advised the employer with respect to its ability to request a review:

> If you disagree with my decision, you have the right to request a review by the Review Division. A request for review of this decision must be filed within **90 days** from the date of this decision. The attached pamphlet provides instructions.
>
> [all quotations in this decision are reproduced as written, save for changes noted; emphasis in original]

[16] On February 22, 2008 the employer submitted a request for review of the February 22, 2008 letter. By letter of February 27, 2008 the worker was notified of the employer's request for review, but she did not file a notice of participation.

[17] In her June 5, 2008 decision the review officer provided the following analysis under the heading "Preliminary Matter" in support of her determination that the February 22, 2008 letter did not contain a new reviewable matter:

> The Board advised the worker in the October 26, 2007 decision that wage loss benefits would be concluded effective November 4, 2007. The February 22, 2008 letter advised the employer that wage loss benefits would be concluded November 4, 2007. I find that the February 22, 2008 letter does not contain a new reviewable matter, the Board provided the employer with an explanation of the duration of wage loss paid on the claim and no changes were communicated to the employer. In any event, the Board would have been unable to reconsider the October 26, 2007 decision on February 22, 2008, with respect to the duration of wage loss benefits, as more than 75 days had passed.

[18] The review officer identified three issues for review:

1. Has the worker sufficiently recovered from the compensable injury to return to work, and therefore, whether wage loss benefits should be concluded.
2. Whether the worker should be referred to Disability Awards for a permanent functional impairment.
3. Whether the worker should be referred to Vocational Rehabilitation Services.

[19] In connection with her analysis regarding the conclusion of temporary disability benefits, the review officer determined that "…the issues before me are not with respect to what was accepted on the claim, or whether the worker had any pre-existing condition."

[20] The review officer was unable to conclude that the worker was capable of returning to work on November 4, 2007 on a full-time basis. She found the worker was capable of returning to work on a part-time basis as of February 17, 2008. There was no medical information beyond April 23, 2008 which indicated when a full-time return to work would be appropriate. She left it to the Board to obtain the necessary information to determine temporary disability benefits beyond April 23, 2008. She found there was no medical evidence to suggest the worker sustained a permanent physical functional impairment as a result of her facial laceration; a referral to the Disability Awards Department was not warranted. She made no finding as to whether the worker had a permanent psychological impairment or a permanent disfigurement; the Board had not made decisions with respect to those matters. She confirmed that a referral for consideration of vocational rehabilitation benefits was not necessary at that time.

[21] In its submission which accompanied the July 7, 2008 notice of appeal the employer indicates it confirmed with the Review Division after it filed a request for review on October 3, 2007 that it was not protesting initial acceptance of the claim but rather the decision to provide the worker with temporary disability benefits beyond August 5, 2007. The employer contends that, at the time of that confirmation with the Review Division which was further confirmed by the Review Division in a February 5, 2008 letter, it had not received a copy of the October 26, 2007 decision advising that the Board had accepted the claim for a lacerated face and adjustment disorder with mixed anxiety and depressed mood.

[22] Because the time limit had expired to request a review of the October 26, 2007 letter which it had not received, the employer asked the Board to issue a decision letter advising that temporary disability benefits had been paid from August 2, 2007 to November 4, 2007. The employer then requested a review of the February 22, 2008 letter based on the belief that the adjustment disorder, anxiety, and depression were

unrelated to the injury. In the disclosure documents, the employer read for the first time the October 26, 2007 decision that the claim had been accepted for an adjustment disorder with mixed anxiety and depressed mood.

[23] The employer notes that the worker requested a review of a decision to end temporary disability benefits effective November 4, 2007, and the employer requested a review of a decision to accept the claim for anything other than a laceration to the face.

[24] The employer's submission contains arguments with respect to items #12.20, #14.00, #14.20, #22.00, and #32.10 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). Those items are relevant to the acceptance of psychological impairment as a sequela of an accepted personal injury and acceptance of a psychological condition as a consequence of a compensable personal injury. The employer asks that the October 26, 2007 decision be upheld with a finding that the worker was able to return to work effective November 4, 2007. It asks that its request for review be adjudicated separately and that its request be adjudicated first, as it was "put into process prior" to the worker's request for review. It requests that the February 22, 2008 letter advising of the acceptance of the claim for adjustment disorder, anxiety, and depression "…should also be accepted as this was the first notification the employer received that the claim had been expanded."

[25] The worker's representative contends the review officer was correct in determining that the February 22, 2008 letter did not contain a new reviewable matter. He notes that the Board issued the October 26, 2007 decision which was followed by the October 29, 2007 decision issued to the employer. He comments that, while the employer asserts it knew nothing of the acceptance of the psychological injury, relief of costs was granted to the employer because of a pre-existing condition which enhanced the worker's disability. He comments that it is hard to conceive of a pre-existing condition which could apply to the purely physical aspect of the worker's facial laceration.

[26] The worker's representative asserts that the employer sought to use the February 22, 2008 letter as a basis for a review of the Board's earlier decision to accept the claim for a psychological injury. He contends that the employer admits it requested the February 22, 2008 letter to overcome the missed time limit associated with requesting a review of the October 26, 2007 decision. The worker's representative asserts that, even if he wished to reconsider the October 26, 2007 decision, the case manager was barred from doing so because of subsection 96(5) of the Act and the 75-day rule associated with reconsiderations.

[27] The worker's representative asserts that acceptance of the claim for a psychological injury is not properly before WCAT. What the employer should have done, and should do, is file a request for review of that aspect of the October 26, 2007 decision and

ask the Review Division for an extension of time. The review process is set up to accommodate late requests for review, and it is through that process the employer must convince the Review Division that it has a legitimate and valid case for time extension. At that point the worker would be in a position to scrutinize the employer's "claimed fact base" and examine whether it was reasonable, given the worker's continued absence from work, the small community in which she lives, the common knowledge that she was having psychological difficulties, and the fact she continued to be on temporary disability benefits. However, the appeal to WCAT is not the place to do that. The employer should not be permitted to sidestep the proper process, especially given its admission that it asked for the February 22, 2008 letter for the explicit purpose of avoiding the time limit requirements. That is an abuse of process, and the employer should not be rewarded for it.

[28] The worker's representative asserts that the Review Division is incorrect in its assertion that the worker chose not to participate in the employer's request for review of the February 22, 2008 letter. He asserts that, despite having "retained counsel" for the review, and the existing review launched by the worker with respect to the October 26, 2007 decision, the Review Division failed to notify the worker's representative that the employer had filed a request or that the Review Division was going to join the two requests for review together. Every notice sent to the representative listed only the worker's review number. Notice of the employer's request was sent to the worker, but she ignored it, "…presuming that she had counsel and was being represented." He contends the Board was obliged to inform him of the employer's request for review. (I note that the worker's representative is not a lawyer; he is not "counsel"; however, aside from that, he was listed as the worker's representative in conjunction with her request for review which was acknowledged by the Review Division before it notified the worker of the employer's request for review.)

[29] The worker's representative also provides submissions with respect to the substantive question of whether the worker's psychological condition was caused by her facial laceration.

[30] In its October 8, 2008 rebuttal the employer indicates it has demonstrated its "integrity to the procedure" by first filing a request for a review within the time limit. The unfortunate part is that the wrong decision date was quoted, as that was the only one available at the time of submission. The employer was contacted in late January or early February 2008 by the Review Division and advised that the wrong decision letter was quoted and that the "January 26 [, 2008] limitation period had expired." The Review Division was to alert the review officer that "…the employer was instructed to re-submit." Contrary to what the worker's representative asserts, the employer did not attempt to abuse the process for the explicit purpose of avoiding the time requirements.

Reasons and Findings

What is a decision?

[31] I consider the review officer's determination that the February 22, 2008 letter did not contain "a new reviewable matter" raises the issue of whether the February 22, 2008 letter was a reviewable decision.

[32] 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.

[33] Several WCAT panels have considered the question of what constitutes a "decision." Many of the initial WCAT decisions concerned the effect of claim log entries. The first noteworthy decision, *WCAT Decision #2006-02121*, involved a claim in which the Board sought to reconsider a decision on the basis of a claim log entry made on the 75th day after the original decision to accept a claim. The WCAT panel determined a decision was not made until it was communicated. As the decision was not communicated until it was made in a letter on the 77th day, the purported reconsideration was without effect.

[34] In a second noteworthy decision, *WCAT Decision #2006-02669*, a panel dealt with a case in which a worker was advised in a decision letter that his claim had been accepted for health care only. Several weeks later a Board officer made a claim log entry indicating that the claim had been filed for information only. The panel found that the claim log entry was not of legal effect because it had not been communicated to the worker. The panel determined that "…a decision is not made until the Board issues a decision via a letter or an oral communication."

[35] In their reasoning the panel in *WCAT Decision #2006-02121* considered the time limits which trigger initiation of review and appeal rights. The panel stated on page 23:

> …there are strong natural justice arguments for importing a communication requirement before a decision is considered "made" so as to trigger the running of the review/appeal period. It is obvious that affected parties cannot exercise their statutory appeal rights if they are not aware of the existence of a decision.

[36] The panel later stated that communication of the decision is not simply an administrative task but is an integral component of the decision-making process.

[37] The panel in *WCAT Decision #2006-02121* concurred with the following comments found in *WCAT Decision #2005-00570* with respect to the importance of developing a common understanding of the term "decision" for all purposes under the Act:

> For example, in considering whether the Board's prior determination constituted a decision to which the 75 day time limit on the Board's reconsideration might apply, it may be helpful to consider whether the prior determination was a reviewable decision. In considering whether a decision is reviewable by the Review Division, it may be helpful to consider whether it was a determination to which the 75 day time limit on the Board's reconsideration authority would apply. Focussing exclusively on a single context in which a term is being used, and not having regard to other contexts under the Act in which the term is used, is likely to lead to error through applying too narrow a focus.

[38] Although not binding upon me, I agree with the comments set out in those decisions. (Other WCAT panels have addressed the question of oral and written communication, and I recommend *WCAT Decision #2007-01927* to the interested reader.)

When was a decision communicated to the employer?

[39] Keeping the above observations in mind, when was a decision communicated to the employer that the claim was accepted for an adjustment disorder with mixed anxiety and depressed mood? An examination of the various letters issued on this claim is instructive.

[40] The Board issued the October 26, 2007 decision addressed to the worker which advised that her claim had been accepted for a lacerated face and adjustment disorder with mixed anxiety and depressed mood. In that decision, the case manager's signature block was followed by the two words "Copy To:." No other recipient is listed.

[41] I note that the case manager's October 29, 2007 letter addressed to the employer also includes the words "Copy To:." No other recipient is listed.

[42] The February 22, 2008 letter issued to the employer does not include the words "Copy To:." There is no suggestion that the worker was sent a copy of that letter.

[43] I note that the worker's representative does not contest the employer's submission that it did not become aware of the October 26, 2007 decision letter in a timely manner. The employer's delayed awareness of that decision is consistent with the fact that a review of the October 26, 2007 decision does not establish it was copied to the employer. By letter of October 19, 2007 the Board provided the employer with disclosure of the worker's claim file. A copy of the October 26, 2007 letter would not have been included in the initial disclosure provided to the employer.

[44] The worker's representative implies that the October 29, 2007 relief of costs decision would have alerted the employer to the Board's acceptance of a condition other than a laceration. The October 29, 2007 decision refers to the worker's face striking a piece of angle iron protruding from a truck; it contains no suggestion that the claim was accepted for any condition other than a facial laceration. The reference to a pre-existing condition is not accompanied by any statement as to the nature of that condition. I do not consider that only a psychological condition is capable of being enhanced by a pre-existing disability, such that the employer would have known from the October 29, 2007 decision that a condition other than a facial laceration had been accepted under the claim. For example, a pre-existing neurological condition could be relevant to a laceration. I appreciate there is no suggestion in the October 29, 2007 decision that the worker had a pre-existing physical condition. I also note there is no suggestion in that decision the worker had a pre-existing psychological condition.

[45] As for the worker being off work, and there being common knowledge within a small community of the worker having psychological difficulties, such circumstances fall so very short of amounting to a communication by the Board to the employer that the worker's claim had been accepted for an adjustment disorder with mixed anxiety and depressed mood.

[46] There are no claim log entries which suggest that between October 26, 2007 and the February 5, 2008 conversation the employer had with a review officer the employer was advised by the Board that the worker's claim had been accepted for an adjustment disorder with mixed anxiety and depressed mood. Thus, there was no apparent oral communication of the contents of the October 26, 2007 decision until February 5, 2008. The February 5, 2008 letter from the Review Division refers to the February 5, 2008 telephone conversation and the October 26, 2007 decision.

[47] By letter of February 18, 2008 the Review Division advised the employer of the worker's request for review of the October 26, 2007 decision. The February 18, 2008 letter refers to an enclosed copy of the worker's request for review. There is no suggestion that the February 18, 2008 letter was accompanied by a copy of the October 26, 2007 decision.

[48] By letter of March 10, 2008 the employer was provided with further disclosure of the worker's file. A copy of the October 26, 2007 letter would have been included in that disclosure. By that time, the employer had already received the February 22, 2008 letter and filed a request for review of that letter.

[49] While the worker's representative contends that the employer should ask for an extension of time in which to request a review, I do not consider it is necessary for the employer to do so.

[50] The employer filed a request for review within 90 days of the February 22, 2008 letter which communicated a decision to accept the worker's claim for an anxiety disorder with mixed anxiety and depressed mood. Even if one wanted to argue that the 90-day review period commenced once the employer was apparently advised by the Review Division on February 5, 2008 of the October 26, 2007 decision, its February 22, 2008 request for review was filed well within 90 days following any such advice by the Review Division.

The February 22, 2008 letter is a reviewable decision.

[51] After reviewing the matter, I find that the February 22, 2008 letter was a reviewable decision. That letter involved communication of decisions to the employer. That the October 26, 2007 decision letter involved communication of essentially the same decisions to the worker does not preclude the February 22, 2008 letter from also being a decision.

[52] I appreciate the above analysis means that, for the purposes of the worker requesting a review of the October 26, 2007 decision, the 90-day time period commenced in October 2007. The 90-day time period for the employer did not commence in October 2007. No decision was communicated to the employer at that time. Usually, the time limit for requesting a review is the same for all parties. That would be the case when the decision is communicated to the parties at the same time. Those were not the circumstances in the case before me.

[53] I further appreciate that had the worker wanted the Board to reconsider the October 26, 2007 decision it would not have been possible for the Board to have done so on February 22, 2008 given the terms of subsections 96(4) and paragraph 96(5)(a) of the Act and the passage of 75 days since the October 26, 2007 decision. Further, and more fundamentally, on January 24, 2008 the worker had filed a request for review of the October 26, 2007 decision; the terms of paragraph 96(5)(b) of the Act would have precluded the Board on February 22, 2008 from acting on any request by the worker for reconsideration of the October 26, 2007 letter.

[54] One could argue that there is a significant anomaly. The Board was permitted to communicate a decision to the employer in circumstances in which it could not reconsider the same decision issued to the worker. Yet, is it really an anomaly? The terms of paragraphs 96(5)(a) and 96(5)(b) of the Act dealing with reconsideration did not preclude the Board from issuing the February 22, 2008 decision simply because the Board was communicating a decision to the employer for the first time. The Board was not reconsidering a decision previously communicated to the employer.

[55] I do not consider that the employer's request for a decision was an abuse of process, as asserted by the worker's representative. The employer's desire that the Board communicate a decision is not objectionable. That the Review Division may not have

advised the worker's representative of the employer's request for a review of the February 22, 2008 decision does not affect my conclusion that the February 22, 2008 letter was a decision. Any concerns associated with the review process would not affect the legal status of the February 22, 2008 letter as a decision. (I note in passing that the worker had the opportunity to notify her representative of the employer's request for a review. Further, she would have been aware that the Review Division's February 27, 2008 notice letter to her was not copied to her representative.) The worker's representative will have an opportunity to make submissions regarding the employer's request for review when the matter is returned to the Review Division.

Returning the matter to the Review Division.

[56] I have decided to return the matter to the Review Division rather than adjudicate the issue of whether the worker's adjustment disorder with mixed anxiety and depressed mood was due to her facial laceration. It would have been open to me to have adjudicated the issue. The October 26, 2007 decision addressed by the Review Division included a decision on that very issue. Item #14.30 of WCAT's MRPP provides that, where a decision of the Review Division is appealed to WCAT, WCAT has jurisdiction to address any issue determined in either the Review Division decision or the Board decision which was under review. Further, the parties have provided submissions on the substantive issue of whether there is a causal link between the laceration and the worker's adjustment disorder with mixed anxiety and depressed mood.

[57] However, I decline to address the issue of causation as my doing so would involve first and final appellate review of a complex matter. I consider it would be appropriate for the Review Division to address the issue. Further, I note it would have been open to the Review Division to have addressed the issue as part of its June 5, 2008 decision. While the worker did not raise the acceptance of her adjustment disorder with mixed anxiety and depressed mood in her request for review, item #B3.6.2 of the *Review Division Practices and Procedures* provides that the Review Division has the ability to include within the scope of review issues or decisions not specifically covered by the request for review. As the employer was contesting the acceptance of the worker's adjustment disorder with mixed anxiety and depressed mood and the compensability of that condition was addressed in the October 26, 2007 decision under review, the Review Division could have included that issue in its review, regardless of its conclusion as to the reviewability of the February 22, 2008 decision. Given these circumstances, I do not consider that review of the issue by WCAT as part of this proceeding is warranted.

Duration of temporary disability

[58] My conclusion as to the reviewability of the February 22, 2008 decision does not somehow render void the Review Division's conclusion as to the duration of the worker's temporary disability that the review officer reached as part of her review of the October 26, 2007 decision. That decision by the review officer was based on the Board's acceptance of the worker's adjustment disorder and the review officer's assessment of how long the worker was disabled by that condition. The review officer did not address the cause of the condition. My finding that the Review Division will address the issue of causation set out in the February 22, 2008 decision does not affect the review officer's finding as to disability duration due to the psychological condition. There is no justification for me to require the Review Division to consider afresh the review of the October 26, 2007 decision, as seems to be requested by the employer which asks that the requests for review be adjudicated separately. The venue for reviewing the Review Division's decision as to the duration of temporary disability due to the worker's psychological condition is WCAT. Yet, while the employer refers to the requests being adjudicated separately, its notice of appeal indicates it wishes to appeal the Review Division's determinations in both reviews; its accompanying submissions cite some of the evidence regarding assessments of the worker and evidence as to the worker's return to work in mid-February 2008 at part-time employment.

[59] I have considered the issue of duration of disability. The review officer has provided a detailed summary of the evidence. I agree with the review officer's conclusion that the worker remained temporarily totally disabled by her psychological condition beyond November 4, 2007.

[60] I find that the evidence establishes the worker was temporarily totally disabled until at least January 21, 2008 when Ms. F noted the worker had no work restrictions and considered the worker's limitations had resolved to a degree they were unlikely to interfere with a successful return to work. The review officer noted that a nurse advisor did not get involved in a return-to-work plan owing to the termination of temporary disability benefits as of November 4, 2007. Further, she commented that the January 21, 2008 report did not comment on whether the return-to-work would involve part-time or full-time work.

[61] The January 21, 2008 report noted the worker had been discussing return-to-work plans with her employer and was considering returning to work after a dental operation in early February 2008. Ms. F's February 18, 2008 report noted that the worker would start a graduated return-to-work on February 18, 2008 with her doctor's approval which would culminate in full hours worked as of the third week. Ms. F observed that the employer had accommodated the worker's request for a late shift. I note the employer has submitted to WCAT it could have accommodated the worker before her February 17, 2008 return to work.

[62] The review officer concluded that the worker was temporarily totally disabled until February 16, 2008 and temporarily partially disabled thereafter. She noted that, in an April 23, 2008 report, Dr. B reported the worker had returned to work and was working six and three-quarter hours per day. She found that the worker was initially capable of returning to work on a part-time basis. She commented that there was no medical information beyond April 23, 2008 which indicated when a full-time return-to-work would be appropriate. She left it to the Board to obtain the necessary medical information to determine temporary disability benefits beyond April 23, 2008.

[63] While I am satisfied the evidence supports a conclusion that the worker was temporarily totally disabled until at least January 21, 2008, I find it would have been appropriate for the review officer to have left it to the Board to investigate and assess disability after January 21, 2008 in light of such matters as the issue of possible dental surgery and an apparent delay in commencing a return-to-work. I appreciate that the Review Division may not wish to confine its determinations to simple 'yes' or 'no' conclusions as to whether workers remained temporarily disabled beyond dates set by the Board. There is much merit in the Review Division rendering decisions as to the minimum durations of the additional periods of disability of those workers. However, I consider that such decisions should be tempered by considerations for the need to conduct further investigations which may be more easily performed by the Board's initial decision-makers.

[64] I vary the review officer's decision. I find temporary total disability up to January 21, 2008 and leave it to the Board to obtain necessary information to determine temporary disability beyond January 21, 2008. My decision does not preclude the Board from reaching a conclusion similar to that reached by the Review Division.

[65] The Review Division's varying of the October 26, 2007 decision regarding the duration of the worker's temporary disability (and my varying of the Review Division's decision) was predicated on the basis that the issue of whether the worker's claim had been properly accepted for an adjustment disorder with mixed anxiety and depression was not part of the decision. The Review Division will now deal with that issue of causation.

[66] One might wonder how the Review Division would harmonize its decisions if a review officer were to find that the worker's adjustment disorder with mixed anxiety and depression was not due to her facial laceration or how the Board would harmonize them as part of any implementation decision. Those issues are not before me for determination, but I do not consider that the Review Division's June 5, 2008 decision would preclude the Review Division from addressing the issue of causation raised by the employer's request for review. There have been numerous cases in the workers' compensation system in which an initial review/appeal has concerned duration of benefits and further reviews/appeals on the same claim have examined whether a

condition that had been accepted on the claim should have been accepted. That often occurs in cases where an extension of time in which to request a review or file an appeal has been granted.

[67] In such cases, an earlier finding of duration of disability would not preclude an assessment of the cause of the condition previously associated with that disability. If the Review Division were to find that the worker's psychological condition was not due to her facial laceration, it would fall to the Board to implement that decision. It could do so by relieving the employer of any costs associated with the disability associated with the psychological condition. My varying of the Review Division decision as to duration of disability associated with the psychological condition would not preclude the Board from implementing a Review Division decision as to causation.

Conclusion

[68] I partially allow the employer's appeal. The February 22, 2008 letter was a reviewable decision. I vary that aspect of the review officer's June 5, 2008 decision. The employer's request for review of the February 22, 2008 decision is returned to the Review Division for further consideration. I vary that aspect of the review officer's decision dealing with the duration of the worker's temporary disability related to her psychological condition. I find the evidence supports a conclusion that the worker remained temporarily totally disabled until at least January 21, 2008. Whether the worker was temporarily disabled after that date may be addressed by the Board.

[69] There has been no request for reimbursement of appeal expenses. Therefore, I make no order in that regard.

Randy Lane
Vice Chair

RL/jy