

Noteworthy Decision Summary

Decision: WCAT-2008-03676 **Panel:** Randy Lane **Decision Date:** December 5, 2008

Summary dismissal - Section 31(1) (g) of the Administrative Tribunals Act – Substance of application appropriately dealt with in another proceeding

This decision is noteworthy as it provides an analysis of WCAT's jurisdiction to summarily dismiss an appeal under section 31(1) (g) of the *Administrative Tribunals Act* (ATA) where the substance of the application has been appropriately dealt with in another proceeding.

The worker had an injury that arose out of and in the course of employment. By decision of March 13, 2008 the worker was advised by the Workers' Compensation Board, operating as WorkSafeBC (Board), that temporary disability wage loss benefits would conclude effective March 4, 2008. By letter of April 8, 2008 a case manager noted the worker had received a Review Division decision which required further investigation by the Board, and advised that any short-term disability benefits payable from the date of the Review Division decision would be paid once all necessary information had been gathered. By letter of April 17, 2008 the case manager who issued the March 13, 2008 decision indicated he was unable to reconsider the "decisions" of March 13, 2008 and April 8, 2008. He advised that the April 8, 2008 letter did not contain a decision; instead, it informed the worker of practice and procedure regarding Review Division decisions. The case manager found there was no new evidence in the March 31, 2008 documents from the orthopaedic surgeon that would lead him to alter his March 13, 2008 decision. In a decision dated July 22, 2008, a review officer determined that the Board's April 17, 2008 letter was not a reviewable decision; therefore, the Review Division would not undertake a review. The worker appealed the July 22, 2008 decision to WCAT. By decision of October 14, 2008 a review officer confirmed the March 13, 2008 decision.

The worker's appeal is dismissed. Section 31(1) (g) of the ATA provides that a tribunal may dismiss all or part of an application if the tribunal determines that the substance of the application has been appropriately dealt with in another proceeding. The WCAT panel found that the substance of the worker's appeal had been properly dealt with in another proceeding. The October 14, 2008 decision of the Review Division dealt with the matter that is, in substance, raised by the worker's appeal from the July 22, 2008 decision of the Review Division.

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Panel: Randy Lane, Vice Chair

Introduction

- [1] The worker has appealed to the Workers' Compensation Appeal Tribunal (WCAT) from the July 22, 2008 decision of a review officer with the Review Division of the Workers' Compensation Board, operating as WorkSafeBC (Board). The review officer determined that the Board's April 17, 2008 letter was not a reviewable decision; therefore, the Review Division would not undertake a review.
- [2] The appeal was initiated by an August 21, 2008 notice of appeal completed by a workers' adviser. The worker's employer was notified of the appeal, but it did not indicate it wished to participate. By letter of November 7, 2008 the worker and the workers' adviser were provided with a copy of my November 6, 2008 memorandum which queried whether the appeal should be dismissed. While they were given until November 28, 2008 to provide a response to that memorandum, no response was received. By letter of December 4, 2008 they were advised that the matter would be remitted to the panel.
- [3] The notice of appeal asked that the appeal be considered via a "Fast track read and review" of the evidence and submissions. 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* 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)

- [4] At issue is whether the worker's appeal should be dismissed under the *Administrative Tribunals Act* (ATA).

Jurisdiction

- [5] This appeal was filed under section 239(1) of the *Workers Compensation Act* (Act) which provides that a decision of the Review Division declining to conduct a review is appealable to WCAT.

- [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 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] A brief review of the file is required to put the issues raised by the appeal in context.
- [9] By decision of June 19, 2007 the worker was advised that his temporary disability wage loss benefits would conclude effective June 24, 2007.
- [10] By decision of November 2, 2007 the worker was advised his permanent partial disability was equal to 8.76% of total disability. An accompanying document advised that the worker was not eligible for a loss of earnings assessment given it was not impossible for him to return to his pre-injury occupation.
- [11] By decision of February 19, 2008 the worker was advised his claim would be reopened for temporary disability wage loss benefits effective February 4, 2008. He had experienced a significant change in the nature of his condition as a result of surgery on February 4, 2008.
- [12] By decision of March 13, 2008 the worker was advised temporary disability wage loss benefits would conclude effective March 4, 2008. He had recovered from the effects of his compensable surgery for which his claim had been reopened. He had recovered to his pre-surgery status.
- [13] By decision of April 8, 2008 a review officer varied the Board's November 2, 2007 decision. While the review officer confirmed the percentage of disability, she determined the worker was unable to return to his pre-injury job. Further investigation by the Board was required to establish whether the worker retained the ability to perform another job within his pre-injury occupation or a similar occupation.
- [14] By letter of April 8, 2008 a case manager noted the worker had received the April 8, 2008 Review Division decision. She advised that any short-term disability benefits payable from the date of the Review Division decision would be paid once all necessary

information had been gathered. The Act required the Board to defer the payment of any compensation applicable to the time-period before the Review Division decision for a period of 40 days following the Review Division decision.

- [15] By letter of April 16, 2008 a workers' adviser asked the Board to reconsider its decisions of March 13, 2008 and April 8, 2008. The workers' adviser provided copies of two March 31, 2008 documents prepared by an orthopaedic surgeon.
- [16] By letter of April 17, 2008 the case manager who issued the March 13, 2008 decision indicated he was unable to reconsider the "decisions" of March 13, 2008 and April 8, 2008. He advised that the April 8, 2008 letter did not contain a decision; instead, it informed the worker of practice and procedure regarding Review Division decisions. As there was no reviewable decision in the April 8, 2008 letter, there could be no reconsideration. He noted that the April 8, 2008 Review Division decision had been referred to the Disability Awards Department. The case manager found there was no new evidence in the March 31, 2008 documents from the orthopaedic surgeon that would lead him to alter his March 13, 2008 decision.
- [17] By letter of April 18, 2008 the workers' adviser wrote to a client services manager in hopes of obtaining a decision that the case manager was entitled to reconsider his March 13, 2008 decision and that the new evidence provided by the orthopaedic surgeon justified the reinstatement of temporary disability benefits retroactively to the date of their March 4, 2008 termination. It does not appear from a review of the file that the Board responded to the April 18, 2008 letter.
- [18] The worker requested reviews of the March 13, 2008 and April 17, 2008 decisions.
- [19] By decision of July 22, 2008 a review officer advised that the Review Division would not conduct a review of the April 17, 2008 letter. She provided the following reasons in support of her conclusion that the April 17, 2008 letter did not contain any reviewable new entitlement decisions:

I have determined that the April 17, 2008 letter does not contain any new entitlement decisions. The letter sets out the reasons why the Board Officer determined that he was unable to reconsider the March 13, 2008 decision and the April 8, 2008 Board letter. I agree with the Board Officer that the April 8, 2008 letter is an information letter which would not be subject to the legislative reconsideration provisions. The March 13, 2008 decision letter could have been reconsidered as the legislation allows a Board Officer to reconsider a decision within 75 days of the date of the original decision. However in this case, the Board Officer determined that the consultation report submitted did not provide any new evidence which

would cause him to change the March 13, 2008 decision. As the April 17, 2008 Board letter does not contain any entitlement decisions, the Request for Review will not proceed.

[reproduced as written]

- [20] In addition, the review officer noted the worker had requested a review of the March 13, 2008 decision. She advised that, as part of that review, the worker and his representative would have an opportunity to address their concerns regarding the March 13, 2008 decision.
- [21] In the August 21, 2008 notice of appeal filed with respect to the July 22, 2008 decision, the workers' adviser submits that the Board's April 8, 2008 letter determined that the commencement date for payments (if the Review Division decision required payment) would be the date of the Review Division decision and not prior to the date of the Review Division decision. She contends that the April 17, 2008 letter again denied benefits that were also denied on March 13, 2008. She submits that a review of the April 17, 2008 letter should have been joined with the review of the March 13, 2008 decision. As a remedy, she asks that the matter be referred to the Review Division and that the Review Division be ordered to make decisions on the merits of the two decisions.
- [22] By decision of October 14, 2008 a review officer confirmed several Board decisions. In particular, she confirmed the March 13, 2008 decision. The October 14, 2008 decision has been appealed to WCAT.

Reasons and Findings

- [23] In my review of this matter on a preliminary basis, I considered it appeared that any appeal of the July 22, 2008 decision of the Review Division might be moot. It should be kept in mind that the usual remedy associated with allowing an appeal from a Review Division decision denying a request for review is a referral of the matter to the Review Division to be dealt with on its merits.
- [24] In the case before me, the issue of whether the worker is entitled to temporary disability wage loss benefits beyond March 4, 2008 had been dealt with by the Review Division in its October 14, 2008 decision. Thus, even if I were to consider that the Review Division had erred in its July 22, 2008 decision, returning the matter to the Review Division (so that the April 17, 2008 letter could be reviewed) would not advance the worker's request for a review of the issue of whether he was entitled to temporary disability benefits beyond March 4, 2008. The October 14, 2008 Review Division's decision had already dealt with that matter.

- [25] In my November 6, 2008 memorandum which was sent to the worker and the workers' adviser, I reviewed the history of the claim and referred to paragraph 31(1)(g) of the *Administrative Tribunals Act*. That paragraph provides that a tribunal may dismiss all or part of an application if the tribunal determines that the substance of the application has been appropriately dealt with in another proceeding. I indicated that paragraph might have application to the matter before me. Subsection 31(2) of the *Administrative Tribunals Act* provides that the tribunal must give the applicant an opportunity to make written submissions. An opportunity to make written submissions was given to the worker and the worker's adviser, and no submissions were received.
- [26] After having considered the matter, I find that the worker's appeal should be dismissed on the basis that the substance of his application has been properly dealt with in another proceeding. As noted above, the October 14, 2008 decision of the Review Division has dealt with the matter that is, in substance, raised by the worker's appeal from the July 22, 2008 decision of the Review Division. It is not necessary for me to review whether the Board's April 17, 2008 letter is a reviewable decision.

Conclusion

- [27] The worker's appeal is dismissed on the basis that the substance of his application has been properly dealt with in another proceeding.
- [28] There has been no request for reimbursement of appeal expenses. Therefore, I make no order in that regard.

Randy Lane
Vice Chair

RL/jy