

Noteworthy Decision Summary

Decision: WCAT-2010-01230 **Panel:** H. McDonald **Decision Date:** April 30, 2010

Section 96.3 of the Workers Compensation Act – Persons directly affected by a decision referred to in section 96.2(1)(a) of the Workers Compensation Act - Survivor's benefits to the worker's common-law spouse

This decision considers whether the appellant was a "dependant" of the deceased worker who was "directly affected" by the decision of the Workers' Compensation Board, operating as WorkSafeBC (Board), to award spousal survivor's benefits to the worker's common-law spouse. This determination was necessary to decide whether the appellant had the right under section 96.3 of the *Workers Compensation Act* (Act) to request that the Review Division review the Board's decision to award a spousal survivor's pension to the worker's common law spouse.

The appellant was the mother of a worker who died in a 2009 workplace accident. The appellant appealed a decision dated October 23, 2009 by a review officer which found that the appellant did not have a right under the Act to request a review of a Board decision dated July 7, 2009. The Board decision accepted a claim by "C" for a survivor's pension and awarded a spousal pension for life to him on the basis that he was the spouse of the deceased worker. The appellant alleged that C was not the worker's spouse at the time of the worker's death but rather a roommate paying rent.

The WCAT panel denied the appeal, finding that the appellant was not directly affected financially or legally by the Board's decision to award spousal survivor's benefits to C, and thus did not have a right under section 96.3 of the Act to request a review of the Board's decision. The panel found that the Board's decision did not affect the appellant's right to pursue her own claim for survivor's benefits, nor her claim to status as next-of-kin or legal representative of the worker's estate.

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Panel: Heather McDonald, Vice Chair

Introduction

- [1] The appellant is the mother of a worker who died in a 2009 workplace accident. The appellant is appealing a decision dated October 23, 2009¹ by a review officer in the Registrar's Office of the Review Division, Workers' Compensation Board (Board)². The appellant had requested the Review Division to review an earlier Board decision dated July 7, 2009 which accepted a claim by "C" for a survivor's pension and awarded a spousal pension for life to him on the basis that he was the spouse of the deceased worker.
- [2] The basis of the appellant's request for review was that although C had lived together in the same house with the worker for a little over three years immediately prior to her death, C was not the worker's spouse at the time of the worker's death but rather a roommate paying rent.
- [3] In the October 23, 2009 decision the review officer noted that under section 96.3(1) of the *Workers Compensation Act* (Act) any of the following persons who is "directly affected" by a Board decision respecting compensation may request a review of that decision: (a) a worker; (b) a deceased worker's dependant; (c) an employer. The review officer determined that the appellant was not a person directly affected by the Board's July 7, 2009 decision to award a spousal survivor's pension to C. The review officer said that the Board's July 7, 2009 decision adjudicated C's entitlement to benefits and did not affect any entitlement to benefits that the appellant might have under the Act. The review officer suggested that the appellant might wish to approach the Board to request a separate decision on her entitlement to survivor's benefits under section 17 of the Act.
- [4] Having found that the appellant was not directly affected by the Board's July 7, 2009 decision, the review officer decided that the appellant did not have a right under the Act to request a review of that decision.
- [5] On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the appellant submits that the review officer's decision should be varied to find that the appellant

¹ The review officer's October 23, 2009 is not published on the Board website, likely because it was a decision dealing with a preliminary issue of standing to request a review.

² Operating as WorkSafeBC

does have standing under the Act to request the Review Division to review the Board's July 7, 2009 decision to award a spousal survivor's pension to C.

Issue(s)

- [6] Is the appellant a "dependant" of the deceased worker who is "directly affected" by the Board's July 7, 2009 decision to award spousal survivor's benefits to C? Does the appellant have the right under section 96.3 of the Act to request the Review Division to review the Board's July 7, 2009 decision to award a spousal survivor's pension to C?

Jurisdiction and Procedural Matters

- [7] WCAT has jurisdiction to consider this appeal under section 239(1) of the Act as an appeal from a final decision of a review officer declining to conduct a review under section 96.2 of the Act. I have concluded that the appellant has standing to bring an appeal of the review officer's decision because it directly affected her right to review. For the purposes of this decision only, in deciding the appellant's standing to appeal to WCAT, I am prepared to assume that the appellant was a dependant of the deceased worker so that she falls within section 241(1)(b) of the Act as a person directly affected by the review officer's decision. In this regard, I have referred to the definition of "dependant" in section 1 of the Act that includes a parent who satisfies the Board that she had a reasonable expectation of pecuniary benefit from the continuation of the life of the deceased worker.³
- [8] The appellant represented herself in this appeal. Given the narrow appeal issue and my findings I decided that it was not necessary to provide notice of the worker's appeal to the employer or to C and/or to request their participation in the appeal proceedings.
- [9] The appellant requested an appeal process by way of written submission. I agreed that this was an appropriate process and that it was not necessary to convene an oral hearing. I have considered the criteria in Rule #7.5 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) regarding when WCAT may decide to convene an oral hearing. WCAT will normally grant a request for an oral hearing where the appeal involves a significant issue of credibility, where there are significant factual issues in dispute, or other compelling reasons such as where an unrepresented litigant has difficulty communicating in writing. WCAT will normally conduct an appeal by written submissions where the issues are largely medical, legal, or policy based, and credibility is not in issue. In this case the appeal issue involves a matter of legal interpretation of

³ The section 1 definition of "dependant" means "a member of the family of a worker who was wholly or partly dependent on the worker's earnings at the time of the worker's death, or who but for the incapacity due to the accident would have been so dependent, and, except in section 17(3)(a) to (h), (9) and (13), includes a spouse, parent or child who satisfies the Board that he or she had a reasonable expectation of pecuniary benefit from the continuation of the life of the deceased worker.

the Act. The appellant is an articulate person with a good command of the English language and she was able to provide thorough and well-reasoned submissions. Accordingly, an oral hearing was not necessary in this case.

Background and Evidence, Reasons and Findings

- [10] The appellant has provided extensive submissions, including documentary evidence, to support her position that C was not the worker's common-law spouse at the time of her death. Her evidence indicates that the worker and C had ended their common-law relationship some months before the worker's death and that the worker had commenced a new relationship with another man. The evidence indicates that C continued to share a house with the worker but had a separate bedroom and paid rent separately for his share of the house.
- [11] The appellant has also provided evidence and submissions related to the issue of her entitlement to benefits. Specifically, that evidence relates to proving that she had a reasonable expectation of pecuniary benefit from the continuation of the worker's life (in that regard see section 17(3)(i) of the Act and policy item #C8-56.70 of the *Rehabilitation Services and Claims Manual, Volume II*).
- [12] On the issue of standing to review or appeal a Board decision regarding entitlement to survivor's benefits under the Act, there is no provision in the Act or Board policy that expressly addresses this specific issue. Section 241 of the Act gives some guidance in referring to the right of a deceased worker's dependant who is directly affected by a Review Division decision respecting a compensation matter under Part 1 of the Act having the right to appeal the decision to WCAT. Similarly, section 96.3(1)(a) of the Act refers to the right of a deceased worker's dependant who is directly affected by a Board decision respecting a compensation matter under Part 1 of the Act to request the Review Division to review the Board decision. Those provisions indicate that in order to have standing to review or appeal, it is not sufficient for a person to be a dependant of a deceased worker but the person must also establish that he or she is also "directly affected" by the decision.
- [13] My review of the jurisprudence does not reveal any case exactly on point with this one. In *WCAT-2005-05686* (October 26, 2005) the WCAT panel considered the appeal of a father of a young worker who had died in a motor vehicle accident. The Board found that the worker's death was not compensable under the Act because the death had not arisen out of and in the course of the worker's employment. The MRPP was not helpful because its procedural direction (the estate of a deceased worker has standing to initiate or continue an appeal on behalf of a deceased worker) applied to appeals concerning a claim for arrears of compensation up to the date of the worker's death, not

to an appeal dealing with survivor's benefits.⁴ With respect to appeals of Board decisions that in effect deny survivor's benefits to a person, the panel concluded that in order to have standing to appeal such a decision, that person either must be a dependant of the worker at the time of the worker's death or the person must prove that he or she had a reasonable expectation of pecuniary benefit from the continuation of the worker's life. In the result, the WCAT panel made no decision on the issue of standing in the case but proceeded to adjudicate the merits of the appeal and confirm the Board's decision that the worker's death did not arise out of and in the course of employment. The WCAT panel's comments in that case about standing, however, suggest that it is the person who was denied survivor's benefits by the Board who would have standing to review and appeal such a decision. That person would be "directly affected" by the Board decision denying them benefits. The case does not support the proposition that a third party not mentioned in the Board decision would have standing to review or appeal the decision granting survivor's benefits to another person. The case does not suggest that such a third party was "directly affected" by the Board's decision to award benefits to another person, albeit that the third party was a close relative of the deceased worker.

- [14] See also *WCAT-2005-05959* (November 7, 2005) in which the panel considered the appeal of an adult son of a worker who died in 1955. The Board had found that the worker's death was not the result of compensable workplace injuries sustained in 1937. The appellant brought the appeal on behalf of his deceased mother (the wife of the deceased worker), claiming on her behalf that the Board owed her widow benefits under section 17 of the Act. The appellant also brought the appeal on his own behalf, seeking to establish a claim for benefits owing to him after the worker's death when he, as the worker's minor son, was a dependant of the worker. The WCAT panel decided that the appellant, in seeking to establish claims for dependant's benefits on his own behalf and on behalf of his mother as executor of her estate, was a person "directly affected" by the Review Division decision denying survivor benefits to the mother. Thus the appellant had standing to appeal to WCAT under section 241 of the Act. Again, this case supports the proposition that it is the person (or their legal representative/next of kin) denied survivor's benefits by the Board who has standing under the Act to review or appeal the Board's decision. That person would be "directly affected" by the Board's decision to deny them survivor's benefits. The case does not support the proposition that a third party, whatever their relationship to a deceased worker, has standing to review or appeal a Board decision granting survivor's benefits to another person. The case does not support a conclusion that such a third party was "directly affected" by the Board's decision to award survivor's benefits to another person.

⁴ This is the same situation with Rule #4.6 in the current MRPP, which indicates that the estate of a deceased worker has the right both to initiate an appeal and to continue an appeal on behalf of a deceased worker concerning a claim for compensation up to the date of the worker's death. The Rule does not deal with standing to challenge Board decisions awarding survivors' benefits after a worker's death.

- [15] In *WCAT-2005-06063* (November 14, 2005) the WCAT panel considered the standing of a worker to request a review of a Board inspection report about his former employer's workplace. The employer had terminated the worker's employment after he had complained about a faulty machine. The worker filed a discriminatory action complaint against the employer under section 151 of the Act. The Board's inspection report dealt with the same safety issues the worker had recently raised at the workplace. Although the worker was no longer employed with the employer at the time the inspection report was issued, the WCAT panel concluded that the worker was nevertheless "directly affected" by the inspection report because of his legitimate interest, as evidenced by his discriminatory action complaint against the employer, in the occupational health and safety of his former workplace.
- [16] In *WCAT-2005-06063* the panel indicated that "directly affected" in section 96.3 of the Act should not be interpreted narrowly, although the legislature intended to limit review rights to "directly affected" persons to ensure that only persons with some real personal involvement in a prevention matter are able to pursue review proceedings of Board prevention decisions. Where there is an issue that a worker has been improperly dismissed by an employer for raising health and safety issues, the worker should not be denied standing in relation to the Board's subsequent decision, such as an inspection report, relating to safety issues he had earlier raised.
- [17] My interpretation of *WCAT-2005-06063* is that in the context of Board occupational health and safety decisions under Part 3 of the Act, the scope of persons who may be "directly affected" by such a decision will be broader than just the employer who experiences direct legal and financial consequences from the imposition of an administrative penalty, for example, or from a finding of a health and safety violation that must be rectified. Thus, workers currently employed by the employer or a trade union certified to represent the employer's workers, or an individual worker who has raised specific safety concerns about the employer's workplace, or a member of a deceased worker's family may well fall within the scope of persons "directly affected" by a Board decision involving the occupational health and safety at the employer's workplace. See sections 96.3(3) and 241(3) of the Act. This is to be contrasted with the context of Board compensation decisions under Part 1 of the Act where generally the only parties who may be "directly affected" by such decisions are the worker (or the worker's estate or a deceased worker's dependant) and the employer. See sections 96.3(1) and 241(1) of the Act. The section 1 definition of a worker's "dependant" is much more restrictive than being a member of a worker's family, and thus the legislature envisioned more restrictive rights of review and appeal of Board compensation decisions.
- [18] Section 96.3(3)(f) of the Act provides that a member of a deceased worker's family who is directly affected by a Board decision such as a Board order, a refusal to make a Board order, a variation of a Board order or a cancellation of a Board order respecting an occupational health and safety matter under Part 3 of the Act, may request a review

of that decision. Similarly, section 241(3)(f) provides that a member of a deceased worker's family who is directly affected by a review officer's decision in respect of a Board occupational health and safety matter under Part 3 may appeal the review officer's decision to WCAT. It is important to emphasize that a "member of a deceased worker's family" is a broader reference than a "dependant" of the deceased worker, which limits the relationship to members of the family with a financial dependency on the worker or an expectation of pecuniary benefit from the worker. For example, see *WCAT-2010-00104* (January 13, 2010) in which the parents of a deceased worker appealed a Review Division decision which varied a Board administrative penalty against the employer, resulting in a significant lowering of the penalty. There was no need for the parents to prove financial dependency on their deceased son or an expectation of pecuniary benefit from the continuation of his life.

- [19] See also *WCAT-2009-02179* (August 19, 2009) where the panel did an extensive review of jurisprudence relating to "standing" in the context of a request by a worker to participate in an employer's appeal of a Board administrative penalty of \$75,000 imposed against the employer. The WCAT panel granted the worker standing to participate in the appeal as a worker directly affected by the Board's penalty decision. Like the workers killed in the workplace accident that was the genesis of the administrative penalty, the worker requesting standing was a paramedic employed by the employer. Therefore the WCAT panel found that he had a personal interest in issues relating to the training and supervision of paramedics working for the employer. The panel found that, therefore, the worker's interest was of a different nature than that of a member of the public in the community where the workplace fatality occurred, or a worker of the employer employed in a different job classification (such as a dispatcher or secretary). In that case the panel stated in part as follows:

In determining whether X has standing to appeal or participate as a respondent, we must give meaning to the legislative intent expressed in section 241(3) of the Act that a directly affected worker may appeal a decision of the Review Division. Under section 196 of the Act, an administrative penalty can only be imposed on an employer. There is no authority under the Act to impose an administrative penalty on a worker. This shows a legislative intent to recognize that a worker may be directly affected by a decision to impose a penalty on his or her employer, at least in certain circumstances.

The legislature has also conferred a right of appeal on a member of a deceased worker's family "...who is directly affected by a decision of the review officer in respect of a matter referred to in section 96.2(1)(c)...." Family members of both deceased workers are participating as respondents in this appeal, pursuant to this provision.

We are mindful of the need to interpret the phrase “directly affected” in a fashion which does not deprive the legislature’s decision, to grant rights of appeal to the persons listed in section 241(3), of meaning. In ordinary parlance, a member of a deceased worker’s family is obviously deeply affected by the death of the worker, but is not impacted in any immediate fashion by the Board’s decision regarding, for example, the quantum of any administrative penalty imposed on the employer. However, such family members are given a right of appeal to WCAT. This suggests that, for the purposes of Part 3 of the Act, the phrase “directly affected” must be interpreted somewhat broadly, so as to not deprive this provision of meaning and render the rights of appeal conferred by section 241(3) illusory. This gives rise to a possible inference that the term “directly affected” may, in the context of the Act, refer to a party’s close connection to the proceeding rather than necessarily requiring that the party be subject to a possible change to its legal benefits or obligations.

[at paragraphs 59, 60 and 61]

- [20] While I generally agree with the comments made by the panel in *WCAT-2009-02179*, I also point out that in section 241(3) of the Act, standing to appeal a review officer’s occupational health and safety decision is not automatically granted to a member of a deceased worker’s family. Instead the right to participate in the appeal is granted to a member of a deceased worker’s family **who is directly affected** by the review officer’s decision. Therefore it is important to keep in mind that even members of a deceased worker’s family must satisfy the test of being “directly affected” by the decision before entitled to have standing in an appeal of a Board’s occupational health and safety decision. Given the very broad definition of “member of family” in section 1 of the Act, it would be appropriate to give meaning to the additional criterion of being “directly affected” by the decision in question. It should not be assumed that those words are superfluous.
- [21] After considering the evidence and submissions, I have decided that the Review Division was correct to deny the appellant’s request to review the Board’s July 7, 2009 decision to award survivor’s benefits to C. Assuming for the purposes of this decision that the appellant meets the criteria under the Act’s definition of “dependant” to have been a dependant of the deceased worker at the time of her death, section 96.3(1) of the Act poses another requirement for standing to review. That is the requirement that the dependant be “directly affected” by the Board’s decision she seeks to have reviewed by the Review Division.
- [22] I agree with the review officer that the appellant is not directly affected by the Board’s July 7, 2009 decision to award a spousal survivor’s pension to C. The appellant is not competing against C for entitlement to spousal survivor’s benefits because as the mother of the deceased worker she did not fall into the spousal category for benefit

entitlement. Therefore she would not have had status as an interested party or respondent in the initial Board proceedings regarding C's entitlement to spousal benefits.

- [23] Further, as the review officer pointed out, the appellant has a right to make a claim in her own right for survivor's benefits under section 17 of the Act, either as a member of the family of the worker who was wholly or partly dependent on the worker's earnings at the time of the worker's death, or as a parent who satisfies the Board that she had a reasonable expectation of pecuniary benefit from the continuation of the life of the deceased worker. The Board's July 7, 2009 decision does not have any effect on the appellant's separate right to make a claim for survivor's benefits.
- [24] Although the appellant may not be happy with the Board's decision to recognize C as the worker's common-law spouse at the time of the worker's death, in my view this does not constitute being "directly affected" by the Board's compensation decision in the sense contemplated by section 96.3(1) of the Act. There may be many family members who may not agree with a Board decision awarding survivors' benefits to another person, but this does not translate into an entitlement to participate in an appeal of the Board compensation decision. In the context of a Board compensation decision, the rights of review and appeal are available to a deceased worker's "dependant" who is directly affected by the decision. This is in contrast to the context of a Board occupational health and safety decision where the rights of review and appeal are more broadly available to a "member of a deceased worker's family" who is directly affected by the decision, as well as to trade unions and others who would not be entitled to rights of review and appeal with respect to a compensation decision.
- [25] The definition of "dependant" in section 1 of the Act refers to a member of the family of a deceased worker who had at least a partial financial dependency on the worker prior to his/her death or who had a reasonable expectation of pecuniary benefit from the continuation of the worker's life. Thus the rights of review and appeal of Board compensation decisions are given to those family members, directly affected by the decision, who had an economic relationship of dependency or partial dependency on the worker or the reasonable expectation of pecuniary benefit from the continuation of the worker's life. In my view this requirement of an economic relationship between the family member and the worker underscores the fact that for family members of a deceased worker to have rights to review and/or appeal a Board compensation decision involving survivors' benefits, they must be directly affected in a financial or legal way by the Board's decision. In this case the Board's July 7, 2009 decision to award survivor's benefits to C does not directly affect the appellant financially or legally. The Board's July 7, 2009 decision does not affect the appellant's right to pursue her own claim for survivor's benefits, nor does it affect her claim to status as next-of-kin or legal representative of the worker's estate.

Conclusion

- [26] For the foregoing reasons, I deny the appellant's appeal of the Review Division decision letter dated October 23, 2009. I have found that the appellant is not directly affected by the Board's July 7, 2009 decision to award spousal survivor's benefits to C. I have found that the appellant does not have the right under section 96.3 of the Act to request the Review Division to review the Board's July 7, 2009 decision to award a spousal survivor's pension to C.
- [27] There was no request for reimbursement of appeal expenses, none are apparent from the file, and accordingly I make no order in that regard.

Heather McDonald
Vice Chair

HMcD/hb