

DECISION OF THE APPEAL DIVISION

#2002-0207

January 25, 2002

RE: Appeal Division Reference #2002-0207

Panel Appointed:
John Steeves

- (1) This decision arises from the worker's claim for compensation as a result of a back injury while lifting blocks of wood in September 1997. His claim was accepted and wage loss was paid.
- (2) Subsequent decisions of the Workers' Compensation Board (the "Board") were appealed by the worker to the Workers' Compensation Review Board (the "Review Board"). The Review Board finding was appealed to the Appeal Division by the worker but not the employer. The Appeal Division panel allowed the worker's appeal in a decision dated September 5, 2001 (#2001-1735). The panel also concluded that he did not have authority to review an issue raised by the employer but not raised by the worker.
- (3) The employer now requests reconsideration of the previous Appeal Division decision. The grounds relied on are that the previous Appeal Division panel did have authority to consider the issue raised by the employer. The employer also challenges the other parts of the previous Appeal Division decision which related to vocational rehabilitation matters.

Issue(s)

- (4) Did the Appeal Division panel make a jurisdictional error in declining to deal with an issue raised by the employer in submissions? Further, did the Appeal Division panel fall into jurisdictional error by referring the worker to the Vocational Rehabilitation Department for assessment and service?

Background

- (5) The worker was employed as a block piler at a shake and shingle mill. His duties involved lifting heavy blocks of wood and placing them on a conveyor. On September 12, 1997, he suffered a thoracic back strain while lifting a block. The Board accepted his claim for compensation and wage loss was paid.
- (6) During the course of his treatment the worker was referred to a pain clinic in November 1998. He failed to attend the clinic due to an abscessed tooth and his wage loss

benefits were temporarily suspended on the ground that the non-compensable tooth condition was delaying his recovery. This decision was dated November 30, 1998 and it was appealed by the worker to the Review Board. Another decision, April 20, 1999, that the worker did not have any ongoing disability past April 16, 1999 and wage loss would end on that date, was also appealed.

- (7) The worker's appeal regarding suspension of benefits was allowed by the Review Board in a finding dated April 26, 2001. The Review Board determined there was no evidence the worker's non-compensable tooth condition delayed recovery or aggravated the worker's compensable conditions accepted by the Board. The Review Board therefore found the worker was entitled to continuing wage loss benefits during the period they were suspended while the worker was away from the Clinic.
- (8) The Review Board also concluded that the worker was not left with a permanent functional impairment. According to the panel, the worker had accepted that his condition plateaued and there was no evidence to establish the worker was temporarily disabled beyond the point of plateau.

Appeal Division Decision of September 5, 2001 (2001-1735)

- (9) The worker appealed the Review Board finding of April 26, 2001 to the Appeal Division. The worker's Notice of Appeal indicated that he believed the Review Board decision was incorrect and that his ongoing back injury was not dealt with. No further submission was received from the worker in the appeal before the original Appeal Division panel.
- (10) The employer participated in the worker's appeal, but did not file its own appeal in relation to any issue. The employer's submission to the Appeal Division raised an issue concerning the Review Board's decision not to suspend benefits. The employer's representative requested that the Appeal Division reverse that aspect of the Review Board finding. As will be seen, this is an important matter in the application for reconsideration before me.
- (11) The issue identified by the previous Appeal Division panel was whether the worker met the criteria for referral to the Disability Awards Department or the Vocational Rehabilitation Department. The Appeal Division panel's reasons can be summarized as follows:
 - (a) The Appeal Division panel declined to decide the issue of suspension of benefits, as requested by the employer. The Appeal Division panel stated:

. . . The Appeal Division has no authority to review a decision which has not been appealed. I will therefore not be addressing the merits of that decision.

- (b) On the issue as to whether to refer the worker to the Disability Awards Department, the Appeal Division panel concluded there was little evidence of physical impairment. However, the worker's subjective complaints were genuine and they would have to be considered in any assessment by the Disability Awards Department. Evidence on file confirmed that the worker's complaints of pain are consistent with the injury. The conclusion by the Board that these complaints do not result in permanent functional restrictions was not explained. The Appeal Division panel concluded that the worker meets the criteria for referral to the Disability Awards Department.
- (c) Regarding referral to the Vocational Rehabilitation Department, the Appeal Division panel determined that vocational rehabilitation assistance would be of value to the worker. The provision of rehabilitation assistance does not depend on the prior establishment of a permanent disability. All of the evidence supports the conclusion that the worker will experience difficulty in returning to the pre-injury employment because he will experience pain. Further, the worker's pain disorder is recognized as a psychological problem and it appears to be affecting his recovery or re-employment.
- (d) The Appeal Division panel concluded that the worker meets the eligibility criteria for the provision of vocational rehabilitation assistance. He stated,

I also conclude that the worker shall be referred to the Vocational Rehabilitation Department for assessment and service. The referral should take place immediately and the provision of vocational rehabilitation assistance should not be delayed by the existence of any assessment process in the Disability Awards Department or the results of such an assessment.

Submissions

- (12) The employer's reconsideration application of September 7, 2001 relied on two main points. First, the Review Board finding was appealed and it is not necessary that the employer also appeal the finding in order for the panel to consider the entire content of the finding. It is also submitted on behalf of the employer that the Appeal Division panel cannot instruct the Vocational Rehabilitation Department to provide "service". By requiring that the Board provide service to the worker the Appeal Division chair is making an original decision as to entitlement and this is beyond his mandate.

- (13) On November 21, 2001 the workers' adviser replied to this submission. On behalf of the worker it is submitted that, regarding the reference to the Vocational Rehabilitation Department, the employer is placing too much emphasis on the word "service" and that the employer is providing a semantic interpretation to the word. With regard to the issue of whether the previous panel had to consider the employer's submission on an issue not raised on appeal, the workers' adviser submits that the appeal commissioner was correct in determining his jurisdiction. If the employer was truly concerned about the decision on suspension of benefits, the employer should have filed an appeal in the appropriate manner.
- (14) The employer's reply submission of November 26, 2001 emphasized the submissions in the previous submission.

Decision and Reasons

- (15) Section 96.1 of the *Act* states that Appeal Division decisions are final and conclusive. However, it also allows for reconsideration if new evidence is provided that meets the requirement of that section. The employer has not raised new evidence as a basis for reconsidering the Appeal Division decision.
- (16) The employer's application for reconsideration is based on the submission that the previous Appeal Division decision contains a jurisdictional error. The availability of these common law grounds for reconsideration has recently been confirmed by the British Columbia Supreme Court in *Atchison v. Workers' Compensation Board* (29 November 2001), 2001 BCSC 1661 (SC) at Paragraph 18.

Jurisdiction of an Appeal Division Panel

- (17) This application raises important issues about the jurisdiction of the Appeal Division when it considers appeals from Review Board findings pursuant to section 91 of the *Act*.
- (18) The foundation for the jurisdiction of the Appeal Division on appeals from Review Board findings is section 96(3) of the *Act*. That provision is as follows:

96(3) On an appeal under section 91(1) the appeal division may reopen, rehear and redetermine any matter that has been dealt with by the review board.

- (19) This has been further developed in policy in Governors' *Decision No. 75, Appeal Division Administration, Practice and Procedure* (1994), 10 WCR 753. The original

panel in this matter refers to this decision in the second paragraph of its decision. *Governors' Decision No. 75*, under the heading "Scope of Proceedings Before the Appeal Division" states:

The role of the Appeal Division is to inquire into the merits of matters properly brought before it.

In appeals commenced under Section 91, the appellant should be required to outline the reasons for the appeal explaining how the Review Board finding is in error.

In appeals commenced under Sections 96(6) and 96(6.1), the appellant should be required to outline the error of law or fact or contravention of the published policy of the governors in the decision under appeal.

The Appeal Division will adopt a procedure that ensures the issues in an appeal are identified during the course of the appeal so that all parties may understand and have an opportunity to respond.

The Appeal Division has the discretion to initiate and to conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it. The Appeal Division has the discretion to determine what evidence it will accept in the course of conducting its proceedings.

- (20) It can be readily seen that the jurisdiction of the Appeal Division when it considers appeals of Review Board findings has some unique features to it. The *Act* authorizes an examination of "any matter dealt with by the review board" and *Governors' Policy* reiterates this by authorizing a "full inquiry into all of the issues arising out of an appeal". This is consistent with the structure of the appeal system as set out in the *Act* since it is the *finding* of the Review Board that is before the Appeal Division and the finding should contain a decision on all issues dealt with by the Review Board.
- (21) The objective of this approach to decision making is clearly to make the appeal system accessible to workers and employers who have little or no legal training. Instead of defining the proceedings through what the court system calls "pleadings" the intent is to allow appeal commissioners to take a broader view of their responsibilities. Rather than create a need for legal representation in every case the system provides appeal commissioners with the discretion to make a full inquiry into appeals that come before them pursuant to section 91 of the *Act*. In a comparative sense this is sometimes referred to as an inquiry system as opposed to an adversarial system.

- (22) The degree to which the objectives of the inquiry system have been met has been the subject of some debate and the system has had to develop in the face of changes in the nature of claims. For example, it is generally recognized that workers' compensation claims are becoming more complex, especially in the area of occupational diseases, where there is often a need for expert evidence in areas such as epidemiology and toxicology. In some of these cases there is no question that serious representation on behalf of the parties can provide an important contribution to fully understanding the appeals. This may make for adversarial relationships between the parties and this runs counter to the inquiry system. But it is also true that the adversarial system, at times, provides a useful forum for the critical examination of evidence and issues. For this reason the inquiry system is applied in different ways in different appeals, at the discretion of the panel.
- (23) Other issues that arise with the inquiry system include the risk that experienced parties and experienced representatives will provide only perfunctory submissions with the expectation that appeal commissioners will make all the appropriate inquiries. In the small number of these situations when this occurs it runs the risk of an incomplete appeal being considered and it does not reflect well on the advocacy community as a whole. It is important to understand that an appeal to the Appeal Division is generally the last time in the system when a panel has the broad authority to consider all factual, policy, legal and medical issues. That is the time to ensure that all issues are properly identified and argued. On applications for reconsideration of Appeal Division decisions it is sometimes alleged that the original Appeal Division panel did not conduct a full inquiry of the issues, but this has not generally been successful (see *Decision #2001-1794*, 17 WCR 453, *Paragraph 31*).
- (24) Other relevant aspects of the inquiry system which are of general interest have been discussed in a previous decision of the Appeal Division:
- (31) [The inquiry system] ... is discussed in Item #98.20 of the *Rehabilitation Services and Claims Manual* and it can be summarized by the need to "both investigate and to adjudicate claims for compensation". It is sometimes suggested that the inquiry system places an onus on, for example, the appeal division to make a full inquiry into all aspects of the appeal. While this is generally true there are limits on the appeal division's obligations and there is some obligation on the parties to an appeal to identify issues and present evidence. There are also specific exceptions to the inquiry model such as the due diligence requirement for new evidence which is presented pursuant to section 96.1 of the *Act* for the purposes of an application for reconsideration of a previous appeal division decision (footnote).

(32) ... An inquiry into all the necessary elements of an appeal may require an extensive review of the claim file, submissions and other documents. It may also require, in some limited situations, and at the broad discretion of the panel, further medical or other expert reports. An oral hearing may be necessary. But these are all part of the process of making the decision. When it comes to writing the decision it may be entirely appropriate to discuss briefly the nature of the review conducted by the panel and then write a short decision.

(33) It should also be noted that there is overlap between the inquiry approach and what would be expected from a common law point of view when considering the adequacy of the reasons of a decision. For example, newly obtained evidence from a doctor or as a result of an oral hearing may need a detailed discussion under common law principles as well as the inquiry approach.

(*Decision #2001-1794, supra*)

- (25) In the large majority of appeals the inquiry system operates well and, again, it is the heart of the Appeal Division's jurisdiction.

The Issue of Jurisdiction in this Case

- (26) I take a number of facts to be undisputed before me. First, the employer did not file an appeal of the Review Board finding and the employer sought to make submissions on an issue that was not raised by the worker's appeal. This issue was whether the Review Board panel was correct when it overturned the Board's decision to cut the worker off wage loss for not attending the clinic because of a dental problem.
- (27) It is also clear that the previous Appeal Division panel was alive to the existence of Governor's *Decision No. 75* since that decision is paraphrased in paragraph 45. Section 96(3) is also referred to. The specific purpose of this paragraph was to set out the panel's jurisdiction, which was done accurately. As well, I note that the panel put his mind to whether he should consider the submission made on behalf of the employer on the issue not raised by any notice of appeal. The conclusion of the panel was that he "has no authority to review a decision which has not been appealed".
- (28) Section 96(3) of the *Act* makes it clear that once a Review Board finding is properly before the Appeal Division a panel has the jurisdiction to reopen, rehear and redetermine any matter dealt with by the Review Board. The issue of whether wage loss benefits were properly suspended was clearly dealt with by the Review Board in this case. But the previous Appeal Division panel concluded he did not have authority to consider this issue. *Decision No. 75* of the Governors interprets, correctly in my view,

the authority in section 96(3) to provide the Appeal Division with an express reference discretion to conduct a full inquiry into all of the issues arising out of the appeal. This is a broad, plenary jurisdiction. Against that background, it would be within the Appeal Division panel's jurisdiction to have considered the issue raised by the employer.

- (29) I view this as a jurisdictional issue in the sense of being one which determines the scope of the panel's authority or one which relates to access to the Appeal Division (*Decision #97-0050*, 14 WCR 23 at 23-24, 35). Specifically, the panel wrongly concluded that there is no authority to review a decision that has not been appealed.
- (30) The effect of this is to make a decision about the scope of the panel's authority and to make a decision about access to the Appeal Division. For this reason the standard of review I apply to the situation before me is correctness. That is, the panel must be correct in determining its jurisdiction. On such issues it is not appropriate or necessary to give substantial deference to the previous panel's decision;

A wrong interpretation or application of a "jurisdictional" provision (such as a provision that defines the scope of a tribunal's powers or a provision that relates to access to a tribunal) is an "error of law going to jurisdiction"; a tribunal must be right when it interprets or applies a "jurisdictional" provision (*Decision 97-0050*, *supra*).

- (31) This is a different standard than the standard based on an error of law going to jurisdiction that has been developed and applied in other decisions (*Decision #93-0740*, 10 WCR 127 at 131).
- (32) Applying the standard of correctness, I conclude that it was an error to decide, as did the previous panel, that he did not have the authority to review one of the matters dealt with by the Review Board unless it was specifically appealed. That approach to the Appeal Division's jurisdiction is not supported by the *Act* or policy, as discussed above.
- (33) Equally clear is that the Appeal Division panel was not *required* to decide that issue simply because it was argued by a party who did not appeal the issue. Section 96(3) states the Appeal Division "may" reopen etc. any matter that has been dealt with by the Review Board. This is a discretion rather than a duty and the discretion is stated expressly in *Decision No. 75*; a panel may consider the matter and make a reasoned determination as to whether the issue requires resolution. The issue is how the discretion to consider all issues that were dealt with by the Review Board is to be exercised in the circumstances of the specific appeal. The difficulty in the present case is that it does not appear that the Appeal Division panel was alive to the fact that it had a discretion to exercise regarding the issues on the appeal. Instead, the panel concluded it could not consider the issue raised by the employer in the absence of a

specific appeal from the employer. It appears the previous panel misapprehended its jurisdiction in relation to the appeal before it.

- (34) I view this as an important matter and more than a technical defect. As above, the objective of the broad and unique jurisdiction given to the Appeal Division is to facilitate the participation of unrepresented workers and employers as well as inexperienced representatives. To take a narrow view of this jurisdiction is to place obstacles in the way of appeal commissioners when they are attempting to make an inquiry about all issues arising from an appeal.
- (35) I appreciate there may be a perception of unfairness when a party is entitled to argue issues that were not appealed. However, again, whether a panel will decide the issue raised is a matter of discretion to be decided by the panel in an individual appeal. Moreover, I conclude that any perception of unfairness is more than offset by the clear intent to give appeal commissioners the authority to make broad inquiries as a means to facilitate the participation of unrepresented parties and inexperienced representatives. An example that makes the point is a situation where a panel identifies an issue that has not been raised by any party to an appeal. It does not matter whether this issue assists or prejudices the appellant or the respondent. What matters is the ability of a panel to consider the issue in the context of its broad discretion and despite the fact it was not specifically raised by the parties.
- (36) This situation was discussed in broad terms in a previous decision of the Appeal Division:
- The discretion to inquire into "all of the issues arising out of an appeal" entails a broad jurisdiction to fashion appropriate remedies. The Appeal Division has the power to consider the set of issues that were explicitly or implicitly "present" at the root of the claims adjudicator's decision. In selecting the issues on which it will focus, the Appeal Division's ultimate concern must be a determination of the issues essential to findings consistent with the merits and justice of the case. Obviously there must be proper regard to all competing interests and to ensuring that the parties are fully aware of the matters under consideration (*Decision #92-0634*, 8 WCR 151 at 156).
- (37) Some practical considerations follow from this analysis. If a panel, on its own, identifies an issue that is significant to an appeal then natural justice requires that this issue be disclosed to the parties and submissions be invited. See, for example, *Decision #97-0835/0841*, 14 WCR 83 at 90. The inquiry authority given to the Appeal Division does not mean that a panel can decide an issue without the participation of the parties to the appeal even though the issue was identified without that participation.

- (38) Also from a practical point of view, appeal commissioners deal with large numbers of decisions in the context of a statutory requirement to make a decision within 90 days from the commencement of most appeals. The *Act* and policy must be complied with and the nature of the decision making requires that the complete file is usually reviewed. This review may bring issues that have not been raised by the parties to the attention of a panel. However, it is not necessary or realistic to expect that all possible issues in every appeal are given the highest level of scrutiny. The reality of decision making in a busy environment like the Appeal Division is that the panel focuses on the issues expressly raised by the appeal. If there are obvious reasons to consider other issues, then questions of notice to the parties may arise with respect to those issues. Apart from notice, a panel in these circumstances may decide that the issue identified by the panel is not of any consequence to the decision that has to be made. As discussed in *Decision #97-0835/0841* (page 90), *supra*, notice is not required for every issue that develops in the course of making a decision. But in some circumstances the consequential issue may be of a fundamentally different character than the issue addressed by the parties. The panel will determine whether notice to the parties is required in these circumstances, bearing in mind the principles of natural justice.
- (39) A variation on this is the case before me. Assuming the previous Appeal Division panel correctly identified it had a discretion to exercise when the employer raised an issue that was not appealed, the next step would be to consider whether submissions should be requested to discuss that issue. If submissions are sought presumably the worker would have opposed the employer's attempt to argue that issue, the employer would have asserted its right to argue the issue and the panel would then make a decision on the matter. A relevant consideration for the panel may be the fact that the party seeking to raise the issue did not file its own appeal of the Review Board findings. Another option is that the panel considering the appeal might defer its decision in order to permit the employer the opportunity to make an application for an extension of time to appeal.
- (40) The specific approach which will govern the exercise of the discretion discussed above in individual cases is complex and it will have to be developed in those cases. The point is not to create a "maze of technical complexities" (*Decision #92-0634*, *supra*, 156) but to facilitate an appeal system that is accessible and effective. As in the past, Appeal Division panels cannot be a replacement for serious and responsible submissions by parties or their representatives.
- (41) Finally, I trust it is obvious that these complications can be avoided entirely if all parties appeal the issues they want to argue.
- (42) In conclusion on this point, the original Appeal Division panel made a jurisdictional error in concluding that it had no authority to consider the issue raised in the employer's submissions. I therefore set aside that aspect of the Appeal Division decision in paragraph #78.

- (43) The appeal on this issue will be referred to an appeal officer who will obtain submissions on two matters. The first is whether the discretion I have discussed above should be exercised so that the employer is permitted in this case to argue an issue that has not been raised on appeal. This is the issue of whether the Review Board panel was correct when it overturned the Board's decision to cut the worker off wage loss for not attending the clinic because of a dental problem. The second issue that should be discussed in the same submission is, assuming the employer can argue the issue of entitlement to wage loss, the merits of that issue. I emphasize that requiring submissions to deal with these two issues is done to facilitate an early decision and it is not to be taken that either issue has been predetermined. That aspect of the appeal will then be assigned to a new panel for a decision. If the employer wishes to request an extension of time to appeal the Review Board finding of April 26, 2001 that should be done as soon as possible.

Vocational Rehabilitation Issues

- (44) Regarding the remedy provided by the Appeal Division panel for vocational rehabilitation, I do not see merit in the employer's submission that the original Appeal Division panel has provided an inappropriate remedy or a remedy which it had no authority to provide. The Appeal Division panel simply directed that this matter should be forwarded to the Vocational Rehabilitation Department to provide an assessment and services appropriate to this worker. The Appeal Division panel does not specify what the results of that assessment will be or whether any specific services are to be provided. The decision on its face leaves it open to the Vocational Rehabilitation Department to make its assessment as to the relevant services to provide. I do not see the Appeal Division panel as having made an original decision and his decision is final and conclusive on this issue.
- (45) Having said that, I accept that the language used by the previous panel is not language that is found in policy. It is presumed that "service" is provided to workers and employers and, if not, there is the appeal system or other avenues to address the problem. Similarly, it is reasonable to expect that rehabilitation be provided "immediately" but that is not something the Appeal Division has control over. Despite the mandatory language used by the panel I take it to be a request that the worker's situation be given priority. Requests such as this are sometimes made by Appeal Division panels although reasons are given.
- (46) As a final matter, I note that the previous Appeal Division decision has paragraph numbering commencing with paragraph #44 rather than #1. This is an unfortunate typographical error, but not one that gives rise to any reviewable error.

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- (47) The employer's application for reconsideration of *Decision #2001-1735* is allowed to the extent described above.

John Steeves
Appeal Commissioner

JS/ps