

Decision of the Appeal Division

Number: 2001-1794

Date: September 14, 2001

Panel: John Steeves

**Subject: Whether Previous Appeal Division Decision
Provided Adequate Reasons**

RECONSIDERATION, APPEAL DIVISION (ADEQUACY OF REASONS) (RELIEF OF COSTS) – Reconsideration of Appeal Division decision denying relief of costs – Employer argued that the panel failed to provide sufficient reasons in response to issues raised on behalf of employer – Whether a decision can be set aside because it is too short – Issue better stated as whether the decision provides adequate reasons – A short decision may be adequate – In this case the reasons were clear and intelligible – Application for reconsideration denied.

Decisions: Appeal Division Decision No. 97-0510, 14 *Workers' Compensation Reporter* 55, Appeal Division Decision No. 97-0083, 14 *Workers' Compensation Reporter* 37; *Hebert v. Comstock Canada & Lundrigans Ltd.* (1997), 25 C.C.E.L. (2d) 125 (Man. C.A.); *Sangha v. Dhaliwal* (11 February 1998), Vancouver B952733 (B.C.S.C.)

Reconsideration [reconsideration, app. div.]
Appeal Division Decision No. 2001-1794

17 *Workers' Compensation Reporter* 453

- (1) This is a decision with regards to the employer's application for reconsideration of Appeal Division Decision #00-1448, dated September 18, 2000.

Issue(s)

- (2) The issue in this decision is whether the previous Appeal Division decision of September 18, 2000 contains an error of law going to jurisdiction.

Background

- (3) On July 6, 1995 the worker injured her left knee at work and the Board accepted her claim for compensation.
- (4) The worker commenced a graduated return to work program in August 1995. Then on October 12, 1995 a Board medical advisor stated that the worker stood with a "marked genuvalgum." The doctor was concerned that the worker might have sustained some trauma to her tibial plateau and she seemed to have a protracted length of recovery. Further medical

review of the worker's claim was made and, for example, in memo #7 another Board medical advisor expressed concern about an overly rapid return to full activities which might cause a relapse in the worker's symptoms and delay her eventual recovery.

- (5) A representative of the employer requested relief of costs pursuant to section 39(1)(e) on May 28, 1996. The employer's request was denied in a decision dated June 12, 1996, this was appealed but the appeal was subsequently withdrawn. On October 8, 1999 the employer's representative requested another decision on relief of costs and this was denied in a decision dated January 14, 2000.

Appeal Division Decision of September 18, 2000

- (6) The employer appealed the decision of January 14, 2000 denying relief of costs to the Appeal Division pursuant to section 96(6) of the *Workers Compensation Act* (the "Act").
- (7) In a submission dated September 5, 2000 the employer's representative argued that the medical evidence suggested that the worker's disability was prolonged. A number of reports were relied on by the employer.
- (8) With regards to a medical opinion dated June 30, 1999, which was the basis of the denial of relief of costs, the employer submitted that the opinion contained no reasons for the conclusion that obesity would not be a factor in recovery. Also, the employer submitted that there was no discussion of the reason why the marked genuvalgum as well as the disability with the other knee would not have contributed to the worker's recovery.
- (9) In a decision dated September 18, 2000 the Appeal Division denied the employer's appeal. The reasoning of the panel can be summarized as follows:
- (a) The panel assumed that the obesity, a right knee problem and the genuvalgum were pre-existing conditions.
 - (b) The panel pointed out that section 96(6) of the Act requires that grounds be established. These grounds require an error of law or fact or contravention of policy.
 - (c) The panel accepted that there were concerns that the worker's recovery was protracted but she found it significant that the treating physicians did not indicate that any of the pre-existing conditions advanced by the employer prolonged the worker's recovery under her claim. The June 30, 1999 opinion was prepared after the medical advisor's review of the file and his consideration of the pre-existing conditions raised by the employer. The panel was not persuaded that the case manager erred in accepting this opinion.
 - (d) On this basis the previous panel could find no error of fact or law or contravention of policy and, therefore, there were no grounds for appeal.

(e) The panel went on to state that even if grounds for appeal had been established she would not find this as an appropriate case to grant relief of costs. There was insufficient evidence to conclude that the worker's recovery was prolonged by the conditions advanced by the employer. The injury accepted under the claim was a result of a traumatic incident and the accepted condition was a direct result of this incident which was characterized as severe.

(10) The decision of September 18, 2000 is the subject of the reconsideration application before me.

Submission

(11) In a submission dated September 25, 2000 the employer's representative requested reconsideration of the Appeal Division decision of September 18, 2000.

(12) A summary of that submission is as follows:

- (a) The grounds relied on were denial of natural justice, failure to provide reasons and the "irregular exercise of power."
- (b) Natural justice consists of both the right to be heard and the right to a hearing from an unbiased tribunal.
- (c) The previous panel relied upon the medical opinion of June 30, 1999 that there was "no evidence that she had a pre-existing condition in her knee." However, the panel provided no reason for discounting the file evidence that on examination she stood with "marked genuvalgum" (commonly called "knock knee"). Failure to provide reasons also constitutes an error of law.
- (d) The panel also accepted the June 30, 1999 medical opinion that obesity "would not be a factor in recovery from pre-patellar bursitis." The medical advisor provided no grounds for the opinion. The panel stated that policy allows for a "considerable amount of discretion to be exercised by the original decision-maker" but this discretion is not absolute and it is "limited by the right to a hearing from an unbiased tribunal."
- (e) The medical opinion of June 30, 1999 not only failed to provide grounds for the judgments concerning obesity and marked genuvalgum, but specifically failed to address the issue of "a pre-existing right knee problem." The previous panel noted that this condition was included in the employer's submission and found that the June 30, 1999 medical opinion included "consideration of the pre-existing conditions raised by the employer's representative." However, the opinion did not even mention the pre-existing right knee problem. It is submitted that it is an irregular exercise of power to find that the medical opinion, and subsequent decision, included consideration of the right knee problem.

Appeal Division Jurisdiction on an Application for Reconsideration

- (13) Other decisions have decided that the only grounds available to an employer for a reconsideration of a previous Appeal Division decision on non-claim matters are breaches of the rules of natural justice (Decision #93-0166, #93-0182, (9 *Workers' Compensation Reporter* 351)). In another decision, the common law grounds for reconsidering all Appeal Division decisions were articulated more broadly to include clerical mistakes or omissions, fraud, or an error of law going to jurisdiction, including breaches of rules of natural justice (Decision #93-0740, 10 *Workers' Compensation Reporter* 127 at 131).
- (14) Previous Appeal Division decisions have also discussed the substance of a review based on an error of law going to jurisdiction. In Decision #97-0510 (14 *Workers' Compensation Reporter* 55 at 56) the following was said:

A patently unreasonable application (or interpretation) of the *Act* would amount to an "error of law going to jurisdiction." The phrase "patently unreasonable" indicates the degree of magnitude of the error before a decision may be set aside. An application (or interpretation) of a statutory provision is not patently unreasonable simply because there are other possible applications (or interpretations). It is "patently unreasonable," if it is not viable, in light of the legislative text and intent.

The test for setting aside appeal division decision is strict because these decisions are protected by a privative clause. According to Section 96.1 of the *Act*, they are "final and conclusive." To set aside a decision on the basis that there is a preferable application of a statutory provision than the decision's own application of the provision would undermine the finality of appeal division decisions as entrenched in the legislation. So would setting aside a decision on the basis that, although viable, its application of a statutory provision is wrong. In other words, I am not at liberty to set aside a decision simply because I disagree with the panel's conclusion or because the conclusion is wrong.

Decision and Reasons

- (15) It is important to appreciate the extent of my authority on this application for reconsideration. I do not have the authority to re-weigh the evidence before the previous Appeal Division panel, to provide an opportunity to re-argue the issues before that panel and it is not my role to substitute my judgment for the judgment of the previous panel. Section 96.1(1) of the *Act* makes it clear that decisions of the Appeal Division are to be treated as final and conclusive subject only to appeals to medical review panels on medical issues and the authority of the Appeal Division to reconsider its own decisions. Previous decisions of the division have correctly described this as substantial deference to previous Appeal Division decisions.

The Grounds for an Appeal Pursuant to Section 96(6)

- (16) According to the employer's representative I should set aside the previous Appeal Division decision because of the merits of the employer's case. For example, the panel's reliance on the June 30, 1999 opinion that there was no evidence of a pre-existing condition is challenged. Further, it is submitted that she provided no reason for discounting the file evidence that the worker stood with "marked genuvalgum." With respect, this is not a correct analysis of the issues before the previous Appeal Division panel.
- (17) The previous panel's authority derives from section 96(6) of the Act. The Appeal Division, when applying that provision of the Act, is required to determine whether there has been an error of law or fact or contravention of policy. If there is an error or contravention then the Appeal Division is authorized to consider the merits of the appeal. Absent an error or contravention there is no authority to enter into an inquiry as to the merits of the appeal.
- (18) The previous Appeal Division panel denied the employer's appeal because she could not find an error of law or fact or contravention of policy. Put another way, the first issue before the previous panel was to decide whether the grounds under section 96(6) of the Act had been met. She was not determining the merits. The previous panel provided reasons for the finding that there was no error or contravention when she found it significant that the worker's treating physicians did not indicate any prolongation of the worker's recovery as argued by the employer. She considered the June 30, 1999 opinion and she was not persuaded that the case manager erred in accepting that opinion.
- (19) It is this analysis of the previous Appeal Division decision that must be considered when deciding whether the panel provided sufficient reasons in response to the various issues raised on behalf of the employer. There was no obligation on the previous panel to provide reasons on the merits of the employer's relief of cost application because the panel could not find an error of law or fact or contravention of policy in the decision of January 14, 2000. Specifically, the panel was not obliged to provide reasons for "discounting the file evidence that on examination [the worker] stood with 'marked genuvalgum' " because she did not weigh that evidence except in determining the issue of grounds. In fact the previous panel did provide a brief comment on the merits of the employer's appeal. This was not necessary but it provided some additional analysis for the benefit of the employer and its representative.
- (20) With regards to the submissions made to me on the medical issues before the previous panel I do not accept that it is a reviewable error for a panel to rely on the only specific medical opinion on file. Further, it is not an error for a panel to decline to form its own medical opinion on the basis of factual inferences drawn from "file evidence" that the worker had a marked genuvalgum. It is not relied on by the employer's representative but I note the October 1995 statement by a Board doctor that the worker's recovery seemed to be protracted. But this was not in the specific context of a relief of cost consideration while the June 30, 1999 opinion was for that purpose.

The Adequacy or Sufficiency of Reasons

- (21) The submission made on behalf of the employer also raises interesting questions about whether the length of an Appeal Division decision is a relevant consideration on an application for reconsideration of that decision. That is, can a short decision provide adequate reasons for the decision? In the context of a tribunal, such as the Appeal Division, which decides a high volume of appeals within strict time limits for many of its appeals, I consider it valuable to review this issue in some detail.
- (22) As a starting point it is worth noting that a fully reasoned decision typically may include a number of elements. Aside from the necessary introductory sections there may also be a background section, a statement of the issues under appeal, a summary of the submissions made to the panel, a statement about the jurisdiction or authority of the panel, a reference in some form to the relevant provisions of the Act and policy, the decision and reasons or analysis section and perhaps a section which summarizes in a succinct way the remedy. Appeal Division decisions, since late 2000, have included a heading titled "Issue(s)" which is used for research purposes for the division's decisions on the internet as well as to provide some clarity to the decision. A broader discussion of the elements of a "good decision" of the Appeal Division is contained in the "Hallmarks of Quality Decisions" (15 *Workers' Compensation Reporter* 111).
- (23) The interesting and complex issue is what is a sufficient length for a decision? To put the issue more bluntly, what constitutes sufficient reasons and can a decision be set aside because it is too short? Can a decision be patently unreasonable because it is too short?
- (24) These issues have been discussed within administrative law as an issue of natural justice and administrative fairness around the requirement for a tribunal to give reasons for its decisions. The Act does not require the Appeal Division to provide reasons for its decisions although there is established authority in common law for this requirement. As a matter of policy, Decision 75 of the governors (10 *Workers' Compensation Reporter* 753) states that Appeal Division decisions shall be written in "plain language explaining the conclusion reached and the reasons for that conclusion." Section 91(3) of the Act does not require a particular form of decision but it requires many appeals to be decided within strict time limits.
- (25) Reasons, defined narrowly, can be seen as that part of the decision that sets out the basis for the finding or conclusion. However, in administrative law, the term "reasons" is usually taken to mean the entire decision. As a matter of common law a decision is expected to have adequate reasons in this broader sense because it may be necessary to have an adequate discussion of the facts for a decision to comply with the requirements of natural justice and administrative fairness. The latter, broader definition of reasons is used in the following discussion about what constitutes good reasons,

Reasons should be just that, the explanation for the important decisions which the agency made. Good reasons do at least two things:

1. They explain how the agency reached the decision it did. To do this, as a minimum, the reasons should set out the facts, law and reasoning which formed the basis for the decision reached.
2. They show that due regard was had to the balance of the evidence and arguments advanced by the parties. This serves to avoid claims that the agency failed to consider some relevant evidence or argument which should have been considered.

Macauley & Sprague, *Practice before Administrative Tribunals*, (2001) page 22-74

- (26) A British decision has pointed out that a decision might be “perfectly right” but it could be open to challenge if the person against whom it was made is not told why the decision was made. In a discussion of a statutory requirement for tribunals to provide reasons the court also stated that reasons must be proper, adequate, intelligible and they have to deal with the substantial points that have been raised in the case (*Re Poyser and Mills’ Arbitration* [1964] 2 Q.B. 467 at 477–78). A Canadian administrative law text is to the same effect,

Where reasons are required by law, a decision-maker must give reasons that not only contain no misstatement of the law or other legal error, but are adequate. For example, they must be “sufficiently clear, precise and intelligible” to enable the individual to know why the tribunal decided as it did. That is, the reasons must set out the chain of reasoning and the findings of fact on which the decision is based in such a way as to serve the purposes for which the reasons requirement was imposed. Thus, courts have assessed the adequacy of the reasons by asking whether, for example, the losing party was able to understand why the case was lost and to assess whether there were grounds to challenge the decision, whether the reasons enabled the reviewing body to test the validity of the decision or to show curial deference, and whether the reasons made it clear that the party’s representations were considered, and due weight was given to the important individual interests affected by the decision.

Brown & Evans, *Judicial Review of Administrative Action in Canada*, (1998) 12:5310

- (27) Within this discussion of the broad nature of reasons and their importance lies the sub-issue of the “adequacy” or “sufficiency” or length of a decision or reasons. The subject has been considered at some length in the literature. The following quotes provide a good summary of the prevailing views,

Whether reasons are regarded as adequate will be determined in light of all the circumstances. Neither the form nor the length of the reasons is determinative. Thus, reasons that have been characterized as “terse and perfunctory,” brief, skimpy, short, “manifest[ing] some deficiencies” and even “lamentably sparse,” have nonetheless been held to be adequate in the circumstances. Moreover, written reasons need not be given simultaneously with an oral decision.

Brown & Evans, *supra*, page 12-66

Earlier in this chapter I referred to the “transcript” form of reasons in which every detail of the proceeding is carefully recorded in chronological order, every piece of evidence noted, every argument canvassed, and every comment, ruling, and conclusion of the decision-maker is dutifully set out. Frankly, if at all possible, I believe these types of decisions should be avoided. I recognize, however, that in proceedings where no form of record or tape recording, or transcript is kept these type of decisions may be necessary to serve as that record. Often, where an agency fails to maintain some sort of record of the proceedings, the reasons are the only way to ensure that important details of the proceeding are recorded. However, these types of reasons take a long time to write, are usually tedious to read, and sometimes end in obscuring the important with mountains of ancillary detail.

Macauley & Sprague, *supra*, page 22-74

- (28) Thus, the length of a decision depends on the circumstances of the appeal before the panel making the decision. The important point is that a decision must explain to the people affected by the decision not just the result but the reasoning used to reach that result. A decision’s result can be “right” but the decision may not be “correct” or it may even be “patently unreasonable” if adequate reasons are not given. But a lengthy decision could be reviewable on this basis so it is important to bear in mind that length is not the determining factor. The adequacy of a decision’s reasons is not determined by a counting exercise. And, it is worth noting that making a decision unduly long is not necessarily a way to protect it from review. The Manitoba Court of Appeal set aside a previous decision that totaled 36 pages of which 29 pages were “tedious and unhelpful.” Overall the decision was “insufficiently clear and valid” and the reasons were “sorely lacking in guidance or assistance” to permit the court to assess their worth from a legal point of view (*Hebert v. Comstock Canada & Lundrigans Ltd* (1997), 25 C.C.E.L (2d) 125).
- (29) To ensure a decision has adequate reasons it may be important that it contain a statement of the issues, a review of the relevant facts and an application of the law and policy to the facts. Relevancy is a key concept in determining adequacy of reasons because it assists in the task of determining what is necessary to decide and, equally important, what is not necessary to decide.
- (30) If there is a single and straightforward issue on an appeal then the law, policy and facts can be straightforward and briefly stated. But if there are multiple issues, perhaps overlapping issues, the decision becomes more complex and there is a need for more discussion of the law, policy and facts. In some cases a short decision, even one or two pages, will be sufficient while other cases will have to be lengthy. In some decisions the identification and analysis of the issues are controversial and it will be important to spend some time deciding them. In other appeals the issues will not be in dispute but there will be conflicts about the facts or the appropriate policy. Nor does the kind of appeal mean a certain length is required; some applications for reconsideration can be decided in a very short decision while some summary decisions on preliminary matters (such as extension of time appeals) will have to be long.

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- (31) For the Appeal Division and other parts of the workers' compensation system there is the added consideration of the requirements of the inquiry system. This 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 decision¹.
- (32) It could perhaps be argued that the inquiry approach requires the Appeal Division to draft decisions that are longer than they might be if no inquiry approach was taken. On this reasoning, a decision must be lengthy in order to demonstrate that the panel completed a full inquiry. In my view this is not a correct application of the inquiry model. It applies to the decision making *process* and, in particular to the review conducted by the panel, rather than the decision itself. 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.
- (34) A related matter is whether the inquiry model to decision making permits an Appeal Division panel simply to state its agreement with the reasoning and conclusions contained in the decision being appealed or even adopt those conclusions. That is, is it sufficient for an Appeal Division panel to say they agree with the conclusions of a Board officer or a Review Board panel (bearing in mind the different standards of review for an appeal of a Review Board finding pursuant to sections 91 and 96(3) and other appeals pursuant to section 96(6) of the Act)?
- (35) In my view there is nothing in the inquiry approach that prevents the Appeal Division from deciding to agree with the reasoning of the decision being appealed. If, for example, the employer cost relief officer's decision does not contain an error of law or fact or a contravention of policy there is no legal requirement and little need to repeat all the evidence or articulate

¹ That requirement places an onus on an applicant for reconsideration to demonstrate that evidence relied on for the purposes of the reconsideration application did not exist at the time of the decision that is the subject of the reconsideration application. Alternatively, if the evidence did exist at the time of the decision that is the subject of the reconsideration application, it has to be demonstrated that the evidence was not discovered and could not have been discovered through the exercise of due diligence.

independent reasons. Logically, to hold otherwise, would mean that Appeal Division panels would have to do one of two things. First, they would have to demonstrate that they had gone through the same decision making process. If the employer cost relief officer's decision withstands the threshold test in section 96 of the Act there seems little reason to repeat it. The second option for Appeal Division panels would be to develop an alternate set of reasons for the decision, ostensibly to demonstrate that an independent inquiry was done. This seems artificial, unnecessary and it could possibly lead to multiple interpretations of, for example, Board policy. The same approach would apply to Appeal Division decisions on appeals of Review Board findings pursuant to section 91 of the Act. If the decision or finding being appealed to the Appeal Division is fundamentally sound then it would be adequate to state that conclusion. Of course, the ability to agree with the decision being appealed is not the same as undue deference to that decision which then leads to a failure to properly inquire into the merits and justice of a specific appeal.

- (36) A final matter is whether a reconsideration application will be allowed solely on the grounds that the decision is too short. This might be the grounds advanced for the application but the issue is more accurately described as whether the decision provides adequate reasons. Sometimes a short decision will be adequate. This point was made in Decision #97-0083 (*14 Workers' Compensation Reporter 37*);

An appeal division panel need not acknowledge and address in its decision every point raised by an appellant or an affected party to an appeal. The failure to acknowledge and address every point raised will certainly not constitute a breach of the rules of natural justice.

- (37) In my view, where there is an opportunity to write a short and clear decision this should be done. The authorities support this approach and there are also policy reasons for doing it. There are finite resources in all tribunals and the task is to allocate resources to decision making in a way that is proportionate to the complexity of appeals. Writing shorter decisions when they are appropriate assists in obtaining clarity in decision making and it ensures that valuable resources can be assigned to the more complex appeals. Every appeal is important to the Appeal Division but not all appeals require the same allocation of resources.
- (38) Others have pointed out that it can take more time to write a short decision than a long one (assuming both are adequate) and this statement captures the difficulty in writing concise decisions. Thoroughly understanding an appeal, applying relevancy, getting the right mix between general conclusions and specific ones, and actually writing a timely decision requires skill and experience. These aspects of decision making should not be underestimated. Nonetheless, also being concise in the sense of providing clarity is an important value for decision makers because it makes decisions more easily understood by the community affected by those decisions.
- (39) I am satisfied that the decision of the previous Appeal Division panel was entirely adequate to the circumstances of the case. It was brief but it addressed the substance of the appeal before the panel and it acknowledged the position put forward on behalf of the employer.

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- (40) There was a level of generality applied by the previous panel inasmuch as she gave weight to the lack of evidence from the worker's physicians that the worker's condition had been prolonged. In general this is not necessarily an error and it is certainly not an error in this case when the panel preferred a medical opinion in the absence of any contrary opinion. Panels should not blindly accept a single medical opinion without making a judgment as to its weight. But in this case the panel discussed the medical opinion on file, noted the lack of any contrary opinions from other doctors and decided to give some weight to that opinion.
- (41) It is clear from the file that the specific concerns of the employer's representative were before the Board and the medical advisor (see Memo 9, for example). The fact that the previous Appeal Division panel accepted the general statement in the June 30, 1999 as adequately dealing with these concerns – even though they were not specifically mentioned in the opinion – does not amount to an error of law going to jurisdiction or any error. "The absence of a reference to an item of evidence or an issue of fact does not mean that that bit of evidence or that issue was ignored. Far from it." (*Sangha v. Dhaliwal*, B.C.S.C., Vancouver Registry No. B952733, February 11, 1998). The employer submits that the previous panel should be held to a very high standard of specificity but this is not supported by the authorities or the particular facts of this case. I accept that the employer disagrees with the previous panel's conclusion but that does not mean the decision and reasons were inadequate. In short, the previous panel's reasons were clear, precise, intelligible and they communicated how the panel made its decision.

Other Matters

- (42) Much of the employer's submission to me is essentially a re-arguing of the issues that were before the previous Appeal Division panel and the Board itself. It is not for me to redetermine those issues on this application for reconsideration. I note that the previous panel had some concerns about the adequacy of reasons for one of the Board's decisions so there is some merit to the employer's submission. However, the panel also found her concern was cured by a subsequent decision and this cannot be described as a patently unreasonable conclusion. Finally, there are very broad allegations of bias made on behalf of the employer but these are not fully argued and, in any event, they are without merit.
- (43) For all of these reasons the employer's application for reconsideration is denied.

Editors' Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.

