

Decision of the Appeal Division

Number: 92-0981
Date: May 7, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Section 96(2)

By letter of February 25, 1991, the lawyer representing the worker wrote to the former commissioners concerning this worker's claim. He requested reconsideration of the Board's policy with respect to the application of Section 98(3) of the *Workers Compensation Act*. This concerned the suspension of the worker's pension benefits during the period of his incarceration.

Section 98(3) provides:

Where it is found that a worker is confined to jail or prison, the board may cancel, withhold or suspend the payment of compensation for the period it considers advisable. Where compensation is withheld or suspended, the board may pay the compensation or any portion of it to the worker's wife, husband or children, or to a trustee appointed by the board, who shall expend it for the benefit of the worker, the worker's wife, husband or children.

Counsel sought reconsideration of the February 20, 1990 and January 30, 1991 decisions of the Board officer, in which the worker's pension was suspended under this section during the period of his imprisonment. It is submitted that Section 98(3) of the *Workers Compensation Act*, and the Board's action in suspending the worker's pension based on this section, were contrary to Section 15 of the *Canadian Charter of Rights and Freedoms*.

In a letter of reply dated March 5, 1991, the appeals administrator advised as follows:

It is clear . . . that you are seeking a general policy review. I must advise, however, that the Commissioners are presently deferring any general policy reviews pending the bringing into force (on 3 June 1991) of the *Workers Compensation Amendment Act, 1989*. Under the new legislation, general policy matters are to be dealt with by the new Board of Governors.

Counsel subsequently wrote to the Appeal Division on May 30, 1991, requesting further consideration of this matter. I am unable to find, however, that a rehearing had been commenced by the prior commissioners which could be continued by the Appeal Division pursuant to Section 17(2) of the *Workers Compensation Amendment Act, 1989*. I would interpret the appeals administrator's letter as indicating that no reopening of the matter was to be undertaken by the prior commissioners. The reference to policy matters being addressed by the Board of Governors once the legislative changes came into effect does not support the conclusion that a rehearing had been commenced by the prior commissioners which should be continued by the Appeal Division.

In a further letter dated January 21, 1992, counsel acknowledges that the prior commissioners had not considered his application, nor had they decided to reopen the matter under Section 96(2). He advises that the worker's appeal from the Board officer's decisions to suspend his pension is to be considered by the Review Board. He notes that, in the circumstances, he would not object to a decision dismissing the May 30, 1991 application insofar as the Appeal Division is concerned and referring it to be addressed by the Claims Division in accordance with the outcome of the pending Review Board appeals. Counsel notes that his suggestion is based on an assumption that the Appeal Division does not consider that it has the authority to exercise Section 96(2) authority over a decision by a Board officer.

Section 96(2) of the *Act* provides:

. . . the board may at any time at its discretion reopen, rehear and redetermine any matter, except a decision of the appeal division, which has been dealt with by it or by an officer of the board.

Decision Number 1 of the governors (*Workers' Compensation Reporter*, 1991, Vol. 7(1), (*Appeal Division Administration, Practice and Procedure*) specified under item 6.0 at page 10 that:

The Appeal Division shall not exercise the Board's plenary independent power to reopen, rehear and redetermine matters under Section 96(2) of the *Act*.

This was modified by Decision Number 8 of the governors (*Workers' Compensation Reporter*, 1992, Vol. 7(4): p. 171, *Reopening and Reconsideration of Past Commissioners' Decisions*). The Board of Governors approved the following, effective January 6, 1992:

RESOLVED THAT the Appeal Division of the Workers' Compensation Board of British Columbia shall exercise the authority of the Workers' Compensation Board of British Columbia under

Section 96(2) of the *Workers Compensation Act* to reopen, rehear and redetermine any decision made by the former Commissioners prior to June 3, 1991, where the Chief Appeal Commissioner finds that the decision was based upon an error of law or involved or involves an issue under the *Canadian Charter of Rights and Freedoms*;
...

The governors' resolution specifies that the Appeal Division has authority to reopen decisions "made by the former Commissioners," on the basis of an error of law or *Charter* violation. The decision to which the worker is objecting was made by a Board officer, rather than the prior commissioners. The governors' resolution does not contemplate the Appeal Division reviewing decisions by Board officers under Section 96(2) of the *Act*. I would confirm that counsel's assumption as to the limited jurisdiction of the Appeal Division in this regard is correct.

Pursuant to the policy of the governors set out in #108.00 of the *Rehabilitation Services and Claims Manual* (the "*Manual*"), applications for reconsideration of a decision of a claims adjudicator are considered within the Compensation Services Division. #108.12 and #108.40 of the *Manual* provide that one of the grounds for such reconsideration is error of law. Readjudication within the Compensation Services Division is addressed in #108.30 of the *Manual*.

As the worker has appealed the decisions of the Board officer to the Review Board, however, the file will now be forwarded to the Review Board. I note that the Review Board deputy registrar stated in a letter dated January 8, 1992 that the Review Board findings are to be issued on or before July 31, 1992. Counsel is aware of his client's right to bring this matter before the Appeal Division by way of appeal within 30 days of the Review Board findings.

I find that no basis has been established for the Appeal Division to address this application for reconsideration. IT IS, THEREFORE, DENIED.

Editors' note: This decision has been edited for publication.

