

Decision of the Review Division

Number: 9803
Date: March 30, 2004
Review Officer: Jane Otto
Subject: Correction of Clerical Error Not Reconsideration

The worker requests a review of the decision of the Workers' Compensation Board (the "Board") dated September 2, 2003. The worker has not provided a submission beyond the reasons contained in her request for review. The employer was given notice of the review and is participating. The employer filed a submission with respect to this review.

Section 96(6) of the *Workers Compensation Act* (the "Act") gives a review officer authority to conduct this review.

Issue

The issue on this review is the Board's decision that the worker was overpaid \$2,686.21 as a result of an administrative error. The Board has also determined that the overpayment caused by its administrative error is recoverable.

Background

The worker is a part-time sales associate who is employed at a retail store. The worker's hours fluctuate each week. The worker's claim was accepted for a back strain that occurred at work on March 31, 2003. The Board officer determined that the worker's wage rate should be based on the worker's earnings for the three-month period immediately prior to her injury. The employer reported that during the three-month period prior to the date of injury, the worker earned \$2,346.73 and in the one-year period prior to the date of injury, the worker earned \$10,750.98. Due to a clerical error, the worker's wage loss benefits were calculated on the basis of earnings of \$10,750.98 over a three-month period. The Board determined that an overpayment of \$2,686.21 arose as a result of this clerical error. The worker disputes the amount of the overpayment.

Facts and Evidence

The following are the relevant facts and evidence I have considered in conducting this review:

- The worker's claim was accepted on May 14, 2003, and in a log entry of this date, the Board officer indicated that the worker was considered a regular worker for the purposes of establishing a wage rate. The worker's hours varied each week and the Board officer determined that the worker's wage rate would be based on the worker's earnings in the three-month period prior to her injury.

- An error was made inputting the correct earnings figure. The worker's one year earnings of \$10,750.98 were input as opposed to the worker's three-month earnings of \$2,346.73.
- On June 2, 2003, a review of the worker's claim was undertaken and it was noted that the worker's three-month earnings were reported on the Employer's Report of Injury ("F7") as \$2,346.73, not \$10,750.98. An overpayment of \$2,686.21 was calculated.
- On September 17, 2003, the worker indicated that the three-month earnings figure used to recalculate her wage rate was incorrect. The worker believed that she earned in excess of \$2,346.73 in the three-month period prior to her injury. The Board officer contacted the employer. On October 8, 2003, the employer confirmed that the worker's three-month earnings as recorded on the F7 were correct. The employer indicated that during the three-month period prior to March 31, 2003, the worker missed eight shifts and was not paid for these shifts.

Law and Policy

The Act

The law that applies to this review is found in section 96 of the Act.

Section 96(4) provides that the Board may, on its own initiative, reconsider a decision that the Board or an officer or employee of the Board has made. The ability to reconsider decisions is limited. Section 96(5) states that the Board may not reconsider a decision if more than 75 days have lapsed since the decision was made. Section 96(7) provides for the Board to set aside a decision if the decision resulted from fraud or misrepresentation of the facts or circumstances upon which the decision was based.

Policy

The policy relating to this review is found in the *Rehabilitation Services and Claim Manual* ("RSCM"), Vol. II.

- Policy item #48.41, *When does an Overpayment of Compensation Occur?*, confirms that an overpayment includes any money paid by the Board to a payee as a result of an administrative error, fraud or misrepresentation by the worker, or where the decision was not one within the statutory authority of the Board. Administrative errors are distinguished from "decisional errors." Administrative errors are computer, mechanical, mathematical, or an error in implementing a decision on a claim, as well as similar types of errors. A "decisional error" is a decision regarding entitlement, which is modified or reversed by a later decision, and does not result in an overpayment. Decisional errors include errors of policy and can include a situation where new information is received which initiates a judgment change in the original decision. Decisional errors can also include a situation where information was available but was overlooked. Decisional errors that involve actions outside the statutory authority of the Board, or are due to fraud or misrepresentation, are corrected retroactively to the date of the original decision, and result in an overpayment.

Reasons and Decision

Wage loss benefits were paid to the worker at a rate in excess of the worker's normal earnings. The worker was paid at an incorrect wage rate on the basis of a computer error in inputting her earnings. This error is a clerical one, and is administrative in nature, in accordance with policy item #48.41.

The worker submits that the Board incorrectly calculated the overpayment on her claim and maintains that her normal earnings are higher than those recorded by her employer. In this respect, the worker states that prior to her injury on March 31, 2003, she worked 25 hours a week and earned \$10.00 per hour. The worker submits that her revised wage rate should be higher than the one used by the Board and submits that the resulting overpayment on her claim should be less. The worker provided a year-to-date statement of her earnings from January 1, 2003 to March 15, 2003. This statement confirmed that the worker's hourly rate of pay is \$9.66 and that her year-to-date earnings total \$2,337.08. The worker has not provided any evidence of her earnings from March 16 to 30, 2003.

The worker's hourly rate has been confirmed to be \$9.66. The employer confirmed that the worker's earnings for the three-month period prior to her date of injury total \$2,346.73. The employer indicated that the worker's earnings in this period reflect unpaid time off work.

I accept the employer's evidence. In the absence of confirmation of additional earnings in the three-month period prior to the date of injury under this claim, I conclude that the employer has provided correct information relating to the worker's earnings. The employer provided the worker's earnings on the Employer's Report of Injury and then, at the request of the Board, the employer subsequently confirmed that this amount was correct.

The Board determined that the worker's wage rate should be based on her earnings in the three-month period prior to her injury. The worker's three-month earnings total \$2,346.73. The weekly equivalent of this amount is \$180.27 net, and the daily amount, based on a seven-day week, is \$25.75, net. The worker was paid wage loss benefits on the basis of \$572.01 net per week, or \$81.71 net per day. The worker received 48 days of benefits at a rate of \$81.71 for a total of \$3,922.35 when she was entitled to 48 days at \$25.75, or \$1,236.14. The difference between these amounts is \$2,686.21, which is the amount of the overpayment declared.

As a result of the above, I conclude that the Board correctly determined the overpayment on this claim.

The overpayment resulted from a clerical or administrative error and, as such, it is recoverable. I find that the restrictions on the Board's ability to reconsider a decision, as referenced in section 96 of the Act, do not apply in this case. I find that by inputting an incorrect earnings figure, the Board officer did not make a "decision" within the meaning of the Act. The decision of the Board officer was clear; the worker's wage rate was to be based on the worker's three-month earnings. The wrong amount was input. The Board was provided with both the three-month and one-year earnings figures and simply input the wrong figure. This caused the worker to be overpaid. The Board error that caused the overpayment on the worker's claim did not result from a "decision." The decision to use three-month earnings remains unchanged; however, the overpayment arose from an error in inputting the correct earnings figure, or in implementing the decision to use the worker's three-month earnings, as referenced in policy item #48.41.

I find that the Board did not reconsider a decision when it corrected a clerical error with respect to the worker's earnings. In this case, the Board has the authority to correct its clerical error, without attracting the reconsideration requirements of section 96 of the Act.

The definition of "reconsideration" is provided in section 1 of the Act. It states that:

Reconsideration means to make a new decision in a matter previously decided where the new decision confirms, varies or cancels the previous decision or order.

Bill 63 came into effect on March 3, 2003, and introduced the 75-day time limit for reconsiderations. Practice Directive #59 expanded on the application of the 75-day limit. The directive notes that the date of a "decision" normally refers to the date of the decision letter. The worker was issued a letter dated May 14, 2003 which indicated that the worker's wage rate would be based on her earnings at the time of her injury. The letter goes on to state that, at the time of the worker's injury, her earnings were \$3,583.66 per month. The worker's earnings were clearly a mistake and the letter did not reflect the decision of the Board officer.

In terms of correcting its clerical or typographical errors, item B5.2 in the Review Division's *Practices and Procedures* allows for corrections to be made where a clerical or typographical error has been made and the text of the decision did not correctly reflect the officer's intent. Similarly, item 15.21 of the *Manual of Rules, Practices and Procedures* of the Workers' Compensation Appeal Tribunal ("WCAT") provides that a panel may issue an addendum to correct a clerical or typographical error in a decision where the text of the decision did not correctly reflect the intent of the panel. I find that these situations are analogous to one where a Board officer makes such a mistake and I find that it is reasonable to conclude that it is within the officer's authority, in these situations, to correct such an error providing the original decision remains unchanged.

It is my conclusion that the overpayment was correctly calculated and that the Board had the authority to correct the clerical error that caused the overpayment. As a result, I deny the worker's request.

Conclusion

As a result of this review, I confirm the Board's decision of September 2, 2003.