

Decision of the Workers' Compensation Appeal Tribunal

Number: 2003-04322

Date: December 24, 2003

Panel: Jill Callan, Chair

Michelle Gelfand, Vice Chair, Quality Assurance

Herb Morton, Sr. Vice Chair & Tribunal Counsel

Subject: Reopening on WCB's Own Initiative or on Application

Background

In a letter of June 17, 2003, a case manager refused to reopen the worker's claim for wage loss and health care benefits. The case manager advised the worker that he could appeal the decision directly to the Workers' Compensation Appeal Tribunal (WCAT), and he did so.

The worker's claim was initially accepted for a back strain of January 25, 2001. The worker was disabled from work for approximately one month. There was no further activity on his claim until May 7, 2003, when his doctor submitted a medical report documenting back symptoms. In early June 2003, the worker asked the Workers' Compensation Board (the Board) to sponsor therapy for his back problem, which he attributed to his 2001 work injury.

The employer is participating in this appeal. Their submission was invited by November 26, 2003. On November 25, 2003, the employers' adviser requested additional time to provide a submission. Pursuant to section 253(7) of the *Workers Compensation Act* (the Act), the chair must extend time for a respondent to provide new evidence or make additional submissions where the appellant has requested a delay to submit new evidence or make additional submissions. As no additional time was requested by the appellant, the appeal liaison advised the employer that no additional time could be provided (pursuant to item #10.10(e) of WCAT's *Manual of Rules, Practices and Procedures* (MRPP)). A brief submission dated December 3, 2003 was subsequently received by WCAT. The appeal liaison advised the employers' adviser that the submission had been marked as excluded and placed in a sealed envelope. By further letter of December 17, 2003, the employers' adviser provided reasons in support of a request that the WCAT panel accept their late submission. We have addressed this request at the conclusion of our decision.

WCAT received a copy of the Board's records on October 6, 2003. Under the 180-day time frame created by section 253(4) of the Act, the due date for WCAT's decision is April 5, 2004 (subject to extension on limited grounds).

Issue(s)

A preliminary issue arises concerning WCAT's jurisdiction to consider this appeal from the case manager's decision, which denied reopening of the worker's claim under section 96(2) of the Act.

Jurisdiction

Section 96(2) of the Act allows the Board to reopen a previously decided matter under certain circumstances, either “on its own initiative, or on application.” If the Board has considered the reopening “on its own initiative,” then the decision is reviewable by the Review Division (section 96.2(1)(a)). If, however, the Board has considered the reopening “on application,” then the decision is appealable directly to WCAT (section 240(2)), and no review may be requested by the Review Division (section 96.2(2)(g)). On a direct appeal to WCAT under section 240(2), WCAT may make one of the following decisions (section 253(2)(a) and (b)):

- (a) the matter that is the subject of the application under section 96 (2) must be reopened;
- (b) the matter that is the subject of the application under section 96 (2) may not be reopened.

Law and Policy

Section 96(2) of the Act provides:

- (2) Despite subsection (1), at any time, **on its own initiative, or on application**, the Board may reopen a matter that has been previously decided by the Board or an officer or employee of the Board under this Part if, since the decision was made in that matter,
 - (a) there has been a significant change in a worker’s medical condition that the Board has previously decided was compensable, or
 - (b) there has been a recurrence of a worker’s injury.

[emphasis added]

The policy of the Board of Directors is set out at C14-102.01 of the *Rehabilitation Services and Claims Manual* (the Manual). This policy is the same in Volumes 1 and 2 of the Manual.

- (e) Right to request a review

Section 96.2(2)(g) of the *Act* provides that no request may be made to a review officer under section 96.2(1) to review a decision to reopen or not to reopen a matter **on an application** for a reopening under section 96(2). Section 240(2) provides that a decision to reopen or not to reopen a matter on an application may be appealed directly to the Workers’ Compensation Appeal Tribunal (“WCAT”).

The effect of these provisions is that the preliminary or threshold question whether the grounds for a reopening **on an application** have been met under section 96(2)(a) and (b) may not be the subject of a review by a review officer. A party who wishes to dispute the Board’s decision in this respect must appeal directly to WCAT.

However, once it is determined that the grounds for a reopening have been met, the Board's decision on the compensation or rehabilitation to be paid or provided as a result of the reopening may be the subject of a request for a review by a review officer under section 96.2(1). The review officer's decision may then be appealed to WCAT under section 239(1).

[emphasis added]

Analysis

The current version of section 96(2) has been in effect since March 3, 2003, and was one of the changes contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). The legislation does not define the term "application." Policy at C14-102.01 of the Manual describes the right of direct appeal to WCAT where there has been an "application" for reopening under section 96(2), without defining what constitutes an "application." The policy is silent with respect to the right to request review by the Review Division where the Board officer's decision is made on the Board's own initiative.

The policy does not address those decisions under section 96(2) which would not be appealable to WCAT, but which would instead be reviewable by the Review Division. The policy may be read as implicitly endorsing a very broad approach to the term "application." It remains necessary, however, to give some meaning to the phrase in section 96(2), "on its own initiative."

Policy at #C14-103.01, which deals with the Board's reconsideration authority, draws attention to the significance of the Board's authority to act on its own initiative or on application. The policy states, in relation to sections 96(4) and (5) of the Act:

It is significant that section 96(4) only authorizes the Board to reconsider a decision or order "on its own initiative". This is to be contrasted with the Board's authority to reopen a matter "on its own initiative, or on application" under section 96(2). It is also to be contrasted with section 96.5 and section 256, which authorize a review officer and the appeal tribunal, respectively, to reconsider decisions on application in certain circumstances.

The use of the words "on own initiative" in section 96(4), with no provision for "on application", and the availability of a review mechanism under sections 96.2 to 96.5, indicate that the Board is not intended to set up a formal application for reconsideration process to resolve disputes that parties may have with decisions or orders.

In the present case, the case manager advised the worker that he could appeal the June 17, 2003 decision to WCAT. The Board implicitly interpreted the worker's request for further benefits as a reopening "application," for which a right of appeal would exist directly to WCAT as described in policy at C14-102.01.

In this case, the "application" consisted of a medical report submitted by the worker's doctor, and a telephone request by the worker for sponsorship of therapy for his back.

Board Practice Directive #58, Reopenings, as amended on July 1, 2003, states:

A reopening request will be considered “on application” only where a formal reopening request has been made by a worker or employer. That is, the application must include a request for a “reopening” and must refer to at least one of the criteria listed under s. 96(2).

Practice Directive #58 also lists situations in which the Board’s decision under section 96(2) will not be considered as being “on application”:

- there has been a general request to “reopen” a claim by a worker, where the worker is simply asking for more benefits without being particular as to the basis by which such benefits might be provided;
- a “reopening” request raises multiple issues (e.g., also includes a request for reconsideration and questions benefit levels);
- the request is made by someone other than the worker, employer or their representative;
- a reopening is being considered as a result of routine medical reports received from a worker’s doctor; or,
- the Board has otherwise made a decision to reopen on its “own initiative.”

Review Division Decision No. 2523 (19 *Workers’ Compensation Reporter* 419) of October 2, 2003 similarly addressed this issue and concluded that a general request for benefits did not constitute an application within the meaning of section 96(2). The review officer concluded that, in order to be considered an “application,” the worker must refer specifically to section 96(2) or must use language substantially similar to that section. The review officer provided the following reasons in support of this interpretation:

The worker must specifically refer to section 96(2) or uses [sic] language substantially similar to that section.

This conclusion may seem technical but is the one that best fits the intent of the system and the general way in which the Board adjudicates claims. Pursuant to section 96(1) of the Act, the Board operates an inquiry as opposed to an adversary system of adjudication. This means that the Board normally takes the initiative to inquire, determine and pay any benefits to which a worker is entitled. One of the advantages of this is that workers or other persons involved in the system should not need trained representatives or expert knowledge but should be able to rely on the Board to take whatever action is necessary on a claim.

It is often difficult in practice to distinguish the reopening of decisions from reconsiderations of decisions or decisions on issues that have not yet been decided, and in the case of reopenings, to identify if an “application” was made. Different evidence and submissions at different points in the adjudication, review and appeal processes can cause different characterizations of the same matter. Since the jurisdiction of the Review Division and WCAT depends on

that characterization, it is important to have a clear definition of these terms. This definition needs to recognize the Board's normal role of taking the initiative. Limiting the "application" to situations where the worker specifically refers to section 96(2) or uses substantially the same language should meet these purposes. There is no prejudice to the worker or employer in establishing this definition of "application". Any decision of the Review Division on a reopening issue is appealable to WCAT.

Neither Practice Directive #58 nor Review Division Decision No. 2523 constitutes policy of the Board of Directors within the meaning of section 82 of the Act. WCAT must apply policy, as set out in section 250(2) and section 251 of the Act. If there was a conflict between policy and Board practice (or a decision by the Board or Review Division in a particular case), the policy would prevail. In this case, however, the policy is silent on the meaning to be given to the phrases "on application" and "on its own initiative." Accordingly, this is an interpretive issue which must be addressed by WCAT in order to determine whether the worker's appeal is properly before WCAT. This is also an issue on which further policy guidance from the Board of Directors might be useful, for the purpose of providing direction to the workers' compensation system for the benefit of future cases.

In the case before us, the worker's request to the Board would not be considered an "application" within the definitions of that term contained in Review Division Decision No. 2523 and Practice Directive #58. The worker did not specify any of the section 96(2) grounds for reopening, but made a general request to reopen his claim.

It would be reasonable to accept the case manager's characterization of the worker's request as an "application" for reopening within the meaning of section 96(2), particularly as the June 17, 2003 decision letter pre-dated the clarification of that term contained in both the practice directive and the Review Division decision. If we were to view the worker's request as an "application," WCAT would proceed to decide the merits of the appeal, and the panel's decision on the reopening issue would be final.

On the other hand, WCAT could adopt the current interpretations set out above and conclude that the worker's reopening request was not an "application." In that case, WCAT would not have the jurisdiction to consider this appeal, and would refer it back to the Review Division. The resulting Review Division decision would be appealable to WCAT within 30 days.

We consider that there is merit to the reasoning expressed in Practice Directive No. 58 and Review Division Decision No. 2523. The adoption of a narrow interpretation of the term "application," gives rise to a more liberal approach by the Review Division to its jurisdiction. That more liberal approach has several advantages:

- it permits a broader consideration of the complex and interrelated issues which often arise in connection with reopening decisions under section 96(2);
- it reduces the amount of "procedural" complexity in having some issues under review by the Review Division while the reopening decision is under appeal to WCAT at the same time; and,

- it supports the potential for resolution of issues at a lower level in the review and appeal structures.

Currently, “reopening” appeals to WCAT may need to be suspended under section 252 of the Act pending the outcome of related reviews by the Review Division (as described in item 5.55 of the MRPP).

After considering the alternative approaches, we would (subject to any new policy) accept the reasoning quoted above from the October 2, 2003 Review Division Decision (No. 2523) as the basis for determining whether the Review Division or WCAT is the appropriate body for addressing objections to decisions made under section 96(2) of the Act. However, we also consider it important to acknowledge that:

- both interpretations of “application” are reasonable and tenable;
- appellants have relied upon the advice they received from the Board that the reopening decision was appealable directly to WCAT;
- appellants will be subject to further delay if their appeal is now referred to the Review Division;
- some appellants would prefer to have access to the two levels of review and appeal, while others would prefer to obtain a final decision at an early date; and,
- the October 2, 2003 Review Division decision provided the first clear direction to parties of the broad approach to jurisdiction which would be taken by the Review Division with respect to the review of decisions under section 96(2) of the Act.

Bearing in mind these factors, and noting that the June 17, 2003 decision by the case manager was issued before the October 2, 2003 decision of the Review Division, we consider that there would be merit in allowing the appellant the opportunity to make an election. The appellant will be given the opportunity to choose whether:

- a) to continue his appeal to WCAT, in which case the WCAT decision will be final, or,
- b) to request that his appeal be transferred to the Review Division, as a request for review of the case manager’s June 17, 2003 decision. If the worker or employer is not satisfied with the outcome of that review, the Review Division decision could be appealed to WCAT within 30 days.

While this is a somewhat unusual approach to a jurisdictional issue, we believe that it acknowledges the initial lack of a clear definition as to what would constitute an “application” for the purposes of section 96(2), and the developments in the Board’s approach as described above. In these particular circumstances, we consider this approach to be appropriate as being consistent with the terms of the Act and as best protecting the rights and interests of the appellant who simply followed the Board’s advice in launching this appeal.

A copy of this decision will be provided to WCAT's Registry to guide the handling of other appeals to WCAT from reopening decisions made before October 2, 2003, which have not yet been decided. The reasoning set out above concerns the situation where the Board officer's decision letter stated that the decision was appealable to WCAT (thereby implicitly indicating that the decision was being provided "on application"). The opportunity to make an election to proceed with a review by the Review Division or an appeal to WCAT only applies if the decision provided under section 96(2) could be characterized as being provided on the Board's own initiative. If the worker specifically referred to section 96(2) or used language substantially similar to that section, the reopening decision would properly be viewed as having been provided "on application" and the appeal would clearly be within WCAT's jurisdiction.

A copy of this decision will also be forwarded to the Board's Policy Bureau, for consideration of possible policy development concerning the meaning of the phrase "on its own initiative, or on application." We will not suspend consideration of this appeal pending the prospect of possible policy clarification. However, if policy clarification is provided before this matter is decided, consideration would have to be given to the effect of any new policy (including any express provisions as to the effective date of the policy).

Item 10.10 of the MRPP concludes by noting that a WCAT panel has the discretion to receive a late submission, upon consideration of the reasons as to why it could not be provided earlier, and the impact of the delay on the 180-day period for deciding the appeal. Having regard to the shortness of the employer's delay, and the fact that additional input must be invited from the worker in any event, we have decided to exercise our discretion to accept the employer's late submission. This will be disclosed to the worker by the appeal liaison, when she writes to the worker to request his election. The appeal liaison will invite the worker to provide any rebuttal, at the same time as he provides his election.

Conclusion

For the above reasons, we will not at this time address the merits of the Board's decision to deny reopening of the worker's claim. We will allow the worker time to advise the WCAT Registry whether he wishes to proceed with this appeal, or whether he wishes WCAT to refer the matter to the Review Division (for a review of the June 17, 2003 decision by the case manager to deny reopening under section 96(2) of the Act). The appeal liaison will also provide the worker with a copy of the December 3, 2003 submission from the employers' adviser and invite his rebuttal.

