

Decision of the Workers' Compensation Appeal Tribunal

Number: 2004-00638

Date: February 5, 2004

Panel: J. Callan, M. Gelfand, H. Morton

Subject: Refusal to Review — Reconsideration After 75 Days Denied

Introduction

The employer appeals the May 1, 2003 Review Division decision (Request for Review Reference #1249), to reject the employer's request for review. This concerned the March 18, 2003 letter from a case manager, which enclosed a copy of a decision letter dated August 28, 2000. The August 28, 2000 decision denied relief of claim costs under section 39(1)(e) of the *Workers Compensation Act* (Act).

The employer is represented by a consultant. References in this decision to the employer primarily refer to the submissions provided by the employer's representative. The initial decision letter of August 28, 2000 was sent directly to the employer, but subsequent correspondence was with the consultant representing the employer. The worker was notified of this appeal but is not participating.

Issue(s)

Did the review officer err in rejecting the employer's request for review? Does a refusal to provide a decision on an assessment matter constitute a reviewable decision? Did the case manager's letter, which enclosed a copy of a prior decision to deny relief of costs, constitute a reviewable decision?

Jurisdiction

Section 96.2 of the Act provides:

96.2 (1) Subject to subsection (2), a person referred to in section 96.3 may request a review officer to review the following in a specific case:

(a) a Board decision respecting a compensation or rehabilitation matter under Part 1;

(b) a Board decision under Part 1 respecting an assessment or classification matter, a monetary penalty or a payment under section 47 (2), 54 (8) or 73 (1) by an employer to the Board of compensation paid to a worker;

(c) a Board order, a refusal to make a Board order, a variation of a Board order or a cancellation of a Board order respecting an occupational health or safety matter under Part 3.

Section 239(1) of the Act provides:

Subject to subsection (2), a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section, may be appealed to the appeal tribunal.

Section 239(2) lists several categories of decisions which are not appealable to WCAT, which do not apply to this appeal.

Background and Evidence

The worker was employed as a nursing assistant at a hospital. On May 28, 2000, she hurt her right arm and shoulder while assisting a patient.

In a claim log entry dated August 28, 2000, the case manager noted:

This claim is due for review with respect to relief of costs. At this time, there is no evidence to suggest that the claimant's recovery is being delayed or prolonged because of a pre-existing disability, disease or condition. Therefore, relief of costs will not be applied. A letter will be sent to the employer advising of my decision.

By decision letter dated August 28, 2000, the case manager advised the employer that relief of claim costs under section 39(1)(e) of the Act would not be granted. The decision letter stated in part:

After reviewing the information on file, it is my decision that there is insufficient evidence to support the conclusion that the worker had a pre-existing disease, condition or disability.

The August 28, 2000 decision advised the employer that the decision could be appealed to the Appeal Division within 30 days. The employer did not appeal the August 28, 2000 decision.

Wage loss benefits were paid for 569 days (from May 30, 2000 until January 12, 2001, and from April 11, 2001 until March 17, 2002, with two graduated returns to work). The employer advises that an MRI on May 2, 2001 identified a pre-existing shoulder condition with propensity to enhance the disability (type II acromion). The employer further advises that on June 7, 2001 the worker underwent surgery where "significant bone spur formation" was noted.

By letter dated February 26, 2003, the consultant representing the employer wrote to the claims adjudicator, enclosing a direction of authorization from the employer. The consultant stated:

From our records, it is unclear whether decisions pertaining to the application of Sections 39 and 42 of the WCB Act have been established on this claim.

In this regard please advise whether the cost relief provisions of either Section 39(1)(e) or Section 42 may be applicable. If a decision was made at the 13-week point on the claim, please consider the issue with regard to medical evidence received since that time.

In a letter of reply dated March 18, 2003, the case manager advised (reproduced in full):

Thank you for your letter dated February 26, 2003 requesting relief of costs under this claim.

Enclosed for your convenience, is a copy of our decision letter dated August 28, 2000, concerning our review of this claim with respect to a relief of costs.

As you can see from the enclosed, relief of costs was not applied as there is no evidence of any pre-existing disease condition, or disability which might have enhanced this injury or prolonged the period of this worker's disability under this claim.

[reproduced as written]

On March 26, 2003, the employer submitted a request for review. By decision dated May 1, 2003, the review officer rejected the request for review. He explained:

Section 96.2(1)(a) and (b) . . . state that a person may request a review of a "Board decision" respecting a compensation or assessment matter. No decision is made for the purpose of this section where a Board officer simply communicates a previously rendered decision. If you believe the Board has made a new decision, please explain why.

The review officer advised that the rejection of the request for review was appealable to WCAT. He further advised that the employer could apply to WCAT for an extension of time to appeal the August 28, 2000 decision to WCAT.

On May 7, 2003, the employer appealed the Review Division decision of May 1, 2003 to WCAT. By letter of July 2, 2003, the employer argued:

The refusal to conduct a review is wrong because an employer has the right to question the costs utilized in their experience rating and to ask the Board if there are any circumstances under Section 42 (Policy #115.30) where such costs may be relieved. To refuse to provide a reply to that inquiry is contrary to the Board's inquiry mandate and demonstrates blatant disregard for client service.

A submission dated November 20, 2003 has been provided by the employer. The employer argues that the August 28, 2000 decision was of a conditional nature. He points to the August 28, 2000 log entry, which contained the phrase "At this time. . . ." He submits that the conditional nature of the August 28, 2000 decision, and "the natural justice requirement to adjudicate all salient evidence" required a new decision in connection with claim costs subsequent to the August 28, 2000 decision. He submits that the March 18, 2003 letter from the case manager constituted a new decision. In particular, he points to the use of the present tense in the March 18, 2003 letter, which stated:

. . . relief of costs was not applied as there **is** no evidence of any pre-existing disease condition, or disability which might have enhanced this injury or prolonged the period of this worker's disability under this claim.

[emphasis added by employer]

He argues that the use of the present tense in the word "is" demonstrates that the case manager had made a new decision. The employer concludes by requesting that if WCAT finds that the March 18, 2003 letter is indeed a decision, WCAT direct the Review Division to commence a review concerning the merits of applying section 39(1)(e) with respect to the obvious pre-existing condition in this case.

Law and Policy

On March 3, 2003, the Act was amended by the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). Section 96(4) and (5) of the amended Act now provide:

- (4) Despite subsection (1), the Board may, on its own initiative, reconsider a decision or order that the Board or an officer or employee of the Board has made under this Part.
- (5) Despite subsection (4), the Board may not reconsider a decision or order if
 - (a) more than 75 days have elapsed since that decision or order was made,
 - (b) a review has been requested in respect of that decision or order under section 96.2, or
 - (c) an appeal has been filed in respect of that decision or order under section 240.

Accordingly, there is a 75-day time limit on the Board's reconsideration authority (subject to the prior termination of this authority based on the filing of a request for review or appeal).

Section 1 of the Act defines the word "reconsider" as follows:

"reconsider" means to make a new decision in a matter previously decided where the new decision confirms, varies or cancels the previous decision or order;

Item C14-103.01 of the policy in the *Rehabilitation Services and Claims Manual, Volume I*, is entitled *Changing Previous Decisions – Reconsiderations*. This policy provides:

(a) Definition of reconsideration

A reconsideration occurs when the Board considers the matters addressed in a previous decision anew to determine whether the conclusions reached were valid. Where the reconsideration results in the previous decision being varied or cancelled, it constitutes a redetermination of those matters.

(b) The purpose of sections 96(4) and (5)

The Board's authority to reconsider previous decisions and orders is found in section 96(4) and (5) of the *Act*. These provisions result from legislative amendments that came into effect on March 3, 2003. The purpose of these amendments is to promote finality and certainty within the workers' compensation system.

The same amendments establish a right to request a review by a review officer under sections 96.2 to 96.5, where a party disagrees with a decision or order made at the initial decision-making level. It is this review, rather than the application of the Board's reconsideration authority, which is intended to be the dispute resolution mechanism for initial decisions and orders of Board officers.

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.

Rather, the Board's reconsideration authority is intended to provide a quality assurance mechanism for the Board. The Board is given a time-limited opportunity to correct, on its own initiative, any errors it may have made.

Analysis

(a) What was the effect of the August 28, 2000 decision to deny relief of costs?

A preliminary issue arises as to whether the August 28, 2000 decision by the case manager to deny relief of claim costs was of a conditional nature, which was intended to be "time-limited" in its application. Was it limited to the issue as to whether, in terms of the claim costs to the date of the decision, the worker's disability had been prolonged or enhanced by reason of a pre-existing disease, condition, or disability? Such a decision would leave open for future consideration the question as to whether further periods of disability involved prolongation or enhancement on the basis of a pre-existing disease, condition, or disability.

Alternatively, did the August 28, 2000 decision provide a categorical denial as to the existence of any pre-existing disease, condition, or disability? If so, there would be no basis for a later new decision under section 39(1)(e). If there were no pre-existing disease, condition, or disability, the occurrence of further periods of disability would not give rise to a need for further consideration as to whether there had been a prolongation or enhancement by reason

of a pre-existing disease, condition or disability. Any further consideration under this section would necessarily involve a reconsideration of the earlier decision, which would be subject to the 75-day time limit on the Board's reconsideration authority.

The wording in the August 28, 2000 claim log entry is suggestive of the former approach, while the wording of the decision letter supports the latter interpretation. Given the conflicting interpretations possible from these documents, we consider it appropriate to view the determination actually provided to the employer in the formal decision letter as constituting the decision. The August 28, 2000 decision letter contained a categorical denial as to the presence of any pre-existing disease, condition or disability. Effective March 3, 2003, the Board's reconsideration authority became subject to a 75-day limit pursuant to section 96(4) and (5).

(b) Was the March 18, 2003 letter a further decision to deny relief of costs?

The employer has presented arguments as to why the March 18, 2003 letter from the case manager should be viewed as a new decision. We find, however, that the March 18, 2003 letter was an informational letter provided in response to the employer's inquiry, to show that the issue had previously been addressed. We are not persuaded that any significance attaches to the use of both the past and present tenses in the third (and final) sentence of that letter. The first sentence of the letter thanked the employer for the inquiry, the second sentence referred to the enclosed August 28, 2000 decision letter, and the third sentence noted: "As you can see from the enclosed. . . ." We read this letter as simply drawing attention to the prior decision, on an informational basis.

(c) Does the employer have a right to reconsideration based on new evidence?

The employer argues that natural justice creates a right to consideration of new evidence. The basis for this argument is not clear. In some general sense, there may be a perception of unfairness or injustice if there is no mechanism for consideration of new evidence. However, this is not a right accorded under the principles of natural justice. The Board previously had a broad discretion under the former section 96(2) of the Act, to "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." However, this was based on the statute, rather than any common law authority. Even if there were common law authority to support a general right to reconsideration, such a common law right would be superseded by a specific statutory provision. The statutory limits on the Board's reconsideration authority under section 96(4) and (5) must prevail.

Apart from the primary avenues of review and appeal, additional avenues for seeking consideration of new evidence (i.e. which concern a previously determined matter) consist of the Board's reopening authority under section 96(2), the authority of the chief review officer to grant an extension of time to request review by the Review Division, the authority of the WCAT chair to grant an extension of time to appeal to WCAT, and the authority to reconsider Review Division or WCAT decisions on the basis of new evidence under section 96.5(1) or section 256 of the Act.

The Act and policy are clear with respect to the limits on the Board's reconsideration authority. One of the grounds for reconsideration, within 75 days, is that new evidence has been provided. The provision of new evidence does not by itself raise a new issue for adjudication, so as to give the Board authority to further address the matter as a new issue.

A request for reconsideration on the basis of new evidence cannot be made simply on the basis that natural justice requires it. The decision-maker must have jurisdiction under the Act to embark on such reconsideration, whether expressly set out in the Act or under common law principles. We are not persuaded that the Board had authority to accede to the employer's request for further consideration of relief of costs.

We further note that section 96(4) of the Act makes no provision for the Board to reconsider "on application." The Board's reconsideration authority is to be exercised on the Board's own initiative. As noted in policy, this situation may be contrasted with the wording of sections 96(2), 96.5(1)(b) and 256, which all provide for the making of decisions on application. As section 96(4) does not contemplate decisions being provided on application, we find that the Board had no obligation to furnish a decision concerning the employer's request for reconsideration. This further reinforces our view that the communication from the Board was strictly informational, considering the fact that the Board was not exercising its authority to reconsider within 75 days (as that time had long expired). The absence from section 96(4) of the phrase "or on application" seems to signify a legislative choice to limit the opportunities for review and appeal of a failure or refusal to embark on such reconsideration.

In the March 11, 2002 *Core Services Review of the Workers' Compensation Board* (accessible at: <http://www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf>), the core reviewer commented, at page 102:

Accordingly, it is my recommendation that a party aggrieved by a decision rendered by an initial decision-maker should have the opportunity to request the WCB to reconsider the matter. **Whether or not the WCB agrees to conduct such a reconsideration should be left within the discretion of the WCB.**

[emphasis added]

The inference from the wording of section 96(4), that the Board's refusal to embark on a reconsideration under this provision would not be reviewable or appealable, is consistent with the recommendation this authority be left within the Board's discretion. We would distinguish this situation from one where the Board in fact exercises its authority to act on its own initiative and provides a new decision on the merits (for example, in considering whether to reopen a claim under section 96(2) of the Act).

We find that the March 18, 2003 letter was simply an information letter, and that a copy of the August 28, 2000 decision was provided as a courtesy to the employer. No new decision was provided. Nor was it within the Board's authority to revisit the merits of the August 28, 2000 decision. Given the absence of any new decision contained in the March 18, 2003 letter, we are in agreement with the May 1, 2003 decision by the review officer declining to conduct a review.

(d) Request for Relief of Costs for Experience Rating Purposes under Section 42 and #115.30 – Absence of Specific Decisional Response

By letter of July 2, 2003, the employer submits they had the right to ask the Board if there were any circumstances under section 42 (policy #115.30) where relief of costs might be granted for experience rating purposes. The employer argues that a refusal to provide a reply is contrary to the Board's inquiry mandate and demonstrates blatant disregard for the employer.

WCAT has jurisdiction to hear an appeal from a "final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section." This requires consideration of section 96.2(b), which provides that an employer may request a review officer to review the following in a specific case: "a Board decision under Part 1 respecting an assessment or classification matter."

Section 96.2(a) and (b) do not expressly grant a right to request review of a failure or refusal by the Board to make a decision concerning a compensation, rehabilitation, or assessment matter (or the other matters covered in (b)). This may be contrasted with section 96.2(c), which creates a right of review for:

a Board order, **a refusal to make a Board order**, a variation of a Board order or a cancellation of a Board order respecting an occupational health or safety matter under Part 3.

[emphasis added]

Other provisions in the Act creating a right of review or appeal with respect to a refusal to make an order, or to decline to conduct a review, include the following:

Section 239(1)

Subject to subsection (2), a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section, may be appealed to the appeal tribunal.

Section 240(1)

A determination, an order, a refusal to make an order or a cancellation of an order made under section 153 may be appealed to the appeal tribunal.

A contrary inference might be drawn from section 96.2(2), which enumerates matters for which no review may be requested. This includes matters for which a direct right of appeal to WCAT is provided (including under (b) "a determination, an order, a refusal to make an order or a cancellation of an order under section 153"). There is no provision expressly limiting the Review Division's authority to review the Board's failure to make a decision on a compensation, rehabilitation, or assessment matter.

However, having regard to both the express reference in section 96.2(c), which creates a right of review for a refusal to make a Board order respecting an occupational health or safety matter under Part 3 of the Act, and the other provisions (section 239(1) and section 240(1) of

the Act) creating a right of appeal to WCAT from a refusal to make an order under section 153 or a decision to decline to conduct a review, we find the absence of comparable language in section 96.2(a) and (b) significant.

One of the maxims of statutory interpretation is *expressio unius est exclusio alterius* (to express one thing is to exclude another). In *Sullivan and Driedger on the Construction of Statutes*, 4th ed. by R. Sullivan (Ontario: Butterworths, 2002), the author comments at pages 186–187):

An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.

Two common ways in which an expectation of express reference may arise involve a failure to mention comparable items, and a failure to follow an established pattern. With respect to the first, Professor Sullivan notes (at page 187):

When a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned.

With respect to the second, Professor Sullivan explains (at page 189):

... consistent expression is a basic convention of legislative drafting. As much as possible, drafters strive for uniform and consistent expression, so that once a pattern of words has been devised to express a particular purpose or meaning, it is presumed that the pattern is used for this purpose or meaning each time the occasion arises. This convention naturally creates expectations that may form the basis for an implied exclusion argument.

This maxim of statutory interpretation is one which must be applied with caution, as it may be rebutted or outweighed by other indicators of legislative intent.

To summarize, the legislature has granted express rights of review or appeal with respect to the following situations:

- a refusal to make a Board order respecting an occupational health or safety matter under Part 3;
- a refusal to make an order under section 153; and,
- a Review Division decision declining to conduct a review under section 96.2.

The legislature has provided a right of review concerning “a Board decision,” “in a specific case,” “respecting an assessment or classification matter.” All three elements must be present. By logical inference, as set out above, the legislature did not intend to provide a right of review by the Review Division under section 96.2(b), with respect to the Board’s failure to make a decision concerning an assessment matter. The practical impact of these provisions is to allow the Board discretion in assigning resources to various tasks and determining when and if decision letters are required.

We are not satisfied that the March 18, 2003 letter constituted a new “Board decision under Part 1 respecting an assessment or classification matter.” Nor do we consider that the failure to provide a decision constitutes a reviewable decision under section 96.2(b) of the Act. Accordingly, we find no error in the May 1, 2003 decision by the review officer. The employer’s appeal is denied.

Conclusion

The May 1, 2003 decision by the review officer, which declined to conduct a review of the March 18, 2003 letter (furnishing a copy of a prior decision to deny relief of claim costs under section 39(1)(e)), is confirmed.