

Decision of the Workers' Compensation Appeal Tribunal

Number: 2004-03138

Date: June 16, 2004

Panel: Michelle Gelfand, Vice Chair

Subject: Review Officer Referred a Decision Back to the Board Pursuant to Section 96(4)(8) with Directions — Under Section 4(d) of the Appeal Regulation, Such Decisions are Not Appealable to WCAT; Any Accompanying Directions are Appealable

Introduction

The worker applies for an extension of the 30-day statutory time period to appeal an October 20, 2003 decision of a review officer (Review Decision #3788). That review resulted from a May 15, 2003 decision of a disability awards officer advising the worker that his compensable permanent disability had increased, but that he would not receive an increased award in view of a prior decision that he had no earned income upon which to establish a wage rate.

The review officer found that the disability awards officer had erred in considering herself bound by the prior wage rate decision. She found that the worker was entitled to an award under section 23(1) of the *Workers Compensation Act* (Act), and varied the May 15, 2003 decision to that extent. She returned the file to the Workers' Compensation Board (Board) with directions as to the manner in which to calculate the worker's wage rate for pension purposes. She noted that the Board may also be required to adjudicate the worker's entitlement to a loss of earnings pension, depending on the worker's wage rate.

The worker is represented by legal counsel. The employer of record is no longer active. The Employers' Advisers Office was given an opportunity to participate in this application, but declined to do so.

Issue(s)

The issue is whether the worker should be granted an extension of time to appeal the review officer's decision of October 20, 2003.

Jurisdiction

The chair of the Workers' Compensation Appeal Tribunal (WCAT) is authorized under section 243(3) of the Act to extend the time to appeal. That authority has been delegated to all members of WCAT.

Section 96.4(8)(b) of the Act gives a review officer the authority to refer a decision or order back to the Board, with or without directions. Section 4(d) of the Workers Compensation Act Appeal Regulation (Regulation) states that decisions as to whether or not to refer a decision back to the Board under section 96.4(8)(b) are not appealable to WCAT.

In this case, although the review officer did not specifically refer to section 96.4(8)(b) in her decision, it is apparent that she varied part of the decision and referred part of it back to the Board, with directions. I have therefore considered whether WCAT has jurisdiction to consider this application, in light of section 4(d) of the Regulation.

The intent of the appeal and review scheme of the Act is to provide parties with a mechanism for disputing Board decisions regarding entitlement or liability under the Act. A referral back to the Board results in further reviewable decisions and is therefore not a final decision. There is therefore no need to provide an appeal mechanism from a decision to refer a matter back to the Board. However, the directions which may be provided by the review officer constitute decisions which are binding on the Board regarding a party's entitlement or liability. Section 4(d) of the Regulation prohibits appeals from "decisions about whether or not to refer a decision back to the board." There is no reference in section 4(d) to appeals from the directions which may or may not accompany the referral. In my view, both on the plain reading of the Regulation and based on the underlying intent of the legislative scheme, the prohibition against appeals from referrals does not apply to those directions. Otherwise, parties would be deprived of their right to appeal decisions regarding their entitlement or liability simply because those decisions are coupled with a referral back to the Board for further adjudication.

In this case, the review officer's directions relate to calculation of wage rate, a matter which is appealable to WCAT, and I therefore find that this application is properly before me. That is, if I were to allow the extension of time, WCAT would have the jurisdiction to address the worker's dispute regarding the proper method for calculation of his wage rate.

Analysis

The worker initiated this appeal on December 16, 2003. Taking into account the statutory 30-day appeal period and 8-day period for mailing, this appeal was filed 19 days late.

Section 243(3) of the Act sets out three requirements for a successful application for extension of time. The chair (or delegate) must conclude that:

- Special circumstances precluded the filing of the appeal on time;
- An injustice would result if the extension were not granted;
- The discretion to grant the extension should be exercised.

The worker explains the delay in appealing on the basis that the review officer's decision did not refer to the 30-day appeal period, and he believed that he had 90 days to appeal. As well, he states that he was out of town from October 2003 to November 20, 2003, but contacted a Board officer on November 24, 2003 following receipt of an implementation letter of November 19, 2003. The worker states that he then waited for but did not receive further information about implementation.

The Review Division cover letter of October 20, 2003 did not contain appeal information. This omission may have been deliberate, based on the review officer's belief that the decision was not appealable as she had referred a matter back to the Board for further investigation and adjudication.

Although the worker has not provided any evidence supporting his contention that he was out of town during the 30-day appeal period, I find that the absence of appeal information in the Review Division cover letter constitutes special circumstances that precluded his timely appeal.

As the wage rate for pension purposes will have ongoing significance to the worker, I find that an injustice would result if the appeal were not allowed to proceed. I therefore find it appropriate to exercise my discretion to grant the extension.

Conclusion

I allow an extension of time to appeal the review officer's October 20, 2003 decision. This appeal will proceed but will be limited to issues arising from the directions provided by the review officer to the Board.

