

Decision of the Workers' Compensation Appeal Tribunal

Number: WCAT-2005-04320

Date: August 17, 2005

Panel: Marguerite Mousseau, Vice Chair

Subject: WCAT's Jurisdiction — Interest on Retroactive Vocational Rehabilitation Benefits and Legal Costs

Introduction

On October 8, 2004 the Review Division issued a decision respecting the worker's entitlement to vocational rehabilitation assistance. In this decision, Review Division Decision #17297, dated October 8, 2004, the review officer varied the Workers' Compensation Board's (Board) decision of May 3, 2004. The review officer granted the worker retroactive vocational rehabilitation benefits and directed that the worker be assigned a new vocational rehabilitation consultant (VRC). The review officer denied the worker's representative's request for the payment of legal fees and costs.

The worker's representative submitted a notice of appeal to the Workers' Compensation Appeal Tribunal (WCAT) with respect to Review Division Decision #17297. In the notice of appeal, the representative stated that the only issue on the appeal was the worker's entitlement to costs, including the reimbursement of legal fees.

In a subsequent submission dated January 19, 2005 the representative stated that he intended to raise two issues with WCAT: the issue of costs, as noted in the notice of appeal, and the issue of the worker's entitlement to interest on the retroactive rehabilitation assistance awarded by the Review Division.

The worker's representative requested an oral hearing which was denied on a preliminary basis by a WCAT deputy registrar. Item 8.90 of the *Manual of Rules of Practice and Procedure* (MRPP) provides that WCAT will normally conduct an appeal on a read and review basis where the issues are largely medical, legal, or policy-based, and credibility is not an issue. I have reviewed the issues and have concluded that this appeal may be determined without an oral hearing.

Issue(s)

Does WCAT have jurisdiction to address an appeal respecting legal costs associated with the adjudication of a worker's entitlement to vocational rehabilitation benefits?

Does WCAT have the jurisdiction to address a request for "costs for all unnecessary appeal proceedings until now?"

Does WCAT have the jurisdiction to address a worker's entitlement to interest with respect to a decision on vocational rehabilitation benefits?

If WCAT had jurisdiction to award costs, is the worker entitled to costs?

If WCAT has jurisdiction to address entitlement to interest in this case, is the worker entitled to interest?

Applicable Law

In this case, the worker's injury occurred before June 30, 2002. As a result, the worker's entitlement to compensation is adjudicated under the provisions of the *Workers Compensation Act* (Act) that preceded changes contained in the *Workers Compensation Amendment Act, 2002* (Bill 49). The worker's appeal rights, however, are governed by the Act as amended by the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), which came into force on March 3, 2003 and which established the Review Division and WCAT. WCAT panels are bound by published policies of the Board's Board of Directors pursuant to Bill 63.

The following sections of the Act are relevant to this appeal:

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.

(2) The following decisions made by a review officer may not be appealed to the appeal tribunal:

(b) a decision respecting matters referred to in section 16;

243 (1) A notice of appeal respecting a decision referred to in section 239 must be filed within 30 days after the decision being appealed was made.

Section 16 of the Act provides authority to the Board to make expenditures in order to "aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap." This section provides the statutory basis for vocational rehabilitation assistance.

Section 224(2)(k.3) of the Act and sections 6 and 7 of the *Workers Compensation Act Appeal Regulation* (Regulation) are also relevant. They provide:

224(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:

(k.3) prescribing the circumstances under which the appeal tribunal may order the Board to reimburse the expenses incurred by a party to an appeal under Part 4;

- 6 The appeal tribunal may award costs related to an appeal under Part 4 of the Act to a party only if the appeal tribunal determines that
 - (a) another party caused costs to be incurred without reasonable cause, or caused costs to be wasted through delay, neglect or some other fault,
 - (b) the conduct of another party has been vexatious, frivolous or abusive, or
 - (c) there are exceptional circumstances that make it unjust to deprive the successful party of costs.

- 7 (1) Subject to subsection (2), the appeal tribunal may order the Board to reimburse a party to an appeal under Part 4 of the Act for any of the following kinds of expenses incurred by that party:
 - (a) the expenses associated with attending an oral hearing or otherwise participating in a proceeding, if the party is required by the appeal tribunal to travel to the hearing or other proceeding;
 - (b) the expenses associated with obtaining or producing evidence submitted to the appeal tribunal;
 - (c) the expenses associated with attending an examination required under section 249 (8) of the Act.

- (2) The appeal tribunal may not order the Board to reimburse a party's expenses arising from a person representing the party or the attendance of a representative of the party at a hearing or other proceeding related to the appeal.

Interest on Retroactive Vocational Rehabilitation Assistance

On the question of interest on the retroactive vocational rehabilitation assistance awarded by the review officer, the representative states that the worker sought this remedy at the Review Division but the review officer failed to address it. He states that there has been no adjudication regarding the issue of interest payable on those benefits and requests that WCAT address the issue.

There are two issues which the representative has not addressed with respect to this matter. The first is the basis on which WCAT would have jurisdiction to address the awarding of interest in relation to a matter over which WCAT has no jurisdiction. The second is the statutory or policy basis for awarding interest on retroactive vocational rehabilitation benefits.

Turning to the first issue, under section 239(2)(c) of the Act, Review Division decisions with respect to vocational rehabilitation assistance may not be appealed to WCAT. Since WCAT has no jurisdiction over the merits of the Review Division decision, it would seem to follow that WCAT has no jurisdiction over a matter, such as interest, which is incidental to the matter over which WCAT has no jurisdiction.

If I am wrong on that, however, I would find no statutory or policy basis for awarding interest on retroactive vocational rehabilitation benefits. This issue was canvassed at some length in Appeal Division Decision #2001-0972 (17 *Workers' Compensation Reporter* 4, page 547). In that case, the panel determined that there was no statutory entitlement to interest on retroactive benefits except in the limited situations expressly addressed in the Act. The panel concluded that the governing body of the Board has the authority to establish policies regarding the payment of interest with respect to other benefits and situations (not provided for in the Act). The policy at item #50.00, however, provided for the payment of interest only with respect to the wage loss and pension benefits. The policy did not provide for the payment of interest on rehabilitation benefits. Accordingly, in the absence of circumstances which would allow for deviation from the policy, the worker was not entitled to interest on vocational rehabilitation. I agree with the reasoning in that decision.

Since that decision was issued, item #50.00 has been amended. However, the policy still does not provide for the payment of interest on vocational rehabilitation benefits. In addition, the amendments enacted on March 3, 2003 provide that WCAT must apply an applicable policy. Pursuant to section 251(1) of the Act WCAT may refuse to apply a policy of the Board of Directors only if the policy is patently unreasonable. Section 251(2) established the procedure that the WCAT panel must follow in that event. The representative has made no argument that the policy at item #50.00 is patently unreasonable.

In conclusion, even if WCAT has the jurisdiction to address the question of interest on a vocational rehabilitation matter, which I believe it does not, there is no authority under the Act or the policies to grant interest on an award of retroactive vocational rehabilitation assistance.

Legal Costs/Expenses

On the question of costs, the representative submits that the VRC assigned to assist the worker repeatedly disregarded appellate decisions and frustrated any reasonable attempt to provide appropriate or adequate rehabilitative services to the worker. The VRC's conduct was "flagrant and abusive, and should expose the Board to appropriate sanctions." He states that the worker is seeking legal costs or fees "with respect to his having to unnecessarily appeal illegal (or at least, patently unreasonable) decisions."

The representative goes on to make an argument that the review officer had the jurisdiction to award legal fees and costs pursuant to section 100 of the Act and item #100.70 of the *Rehabilitation Services and Claims Manual*, Volume II. He submits that the review officer's failure to do so is a "failure of jurisdiction."

The representative then goes on to say that "[The worker] is not seeking legal fees and costs for this specific appeal; he is seeking his legal fees and costs for having to undertake several unnecessary appeals when faced with repeated illegal (or at least, patently unreasonable) decisions by a Board Officer." He notes that section 6(c) of the Regulation provides that WCAT may award costs where there are exceptional circumstances and he submits there are exceptional circumstances "which make it unjust to deprive [the worker] of his costs for all unnecessary appeal proceedings until now." The representative referred to several WCAT decisions in which panels had considered the jurisdiction of WCAT to consider legal fees

under section 100 of the Act and under section 6(c) of the Regulation. He submits that the “strongest ground for the granting of legal fees and costs arises from the Board’s flagrant abuse of its powers and consequentially of this worker’s rights, not once but several times.”

The gist of the representative’s argument with respect to legal costs appears to be that the Board should be ordered to pay the worker’s legal costs as a penalty for improper dealings with the worker. The representative has cited no statutory provision or policy enabling WCAT to make such an award.

As previously noted, section 239 of the Act establishes the classes of decisions that may be appealed to WCAT. Only certain final decisions of a review officer may be appealed to WCAT. In this regard, I note that the representative initiated the appeal with regard to legal costs by submitting a notice of appeal of Review Division Decision #17297. In his submission, however, he states that the appeal with respect to legal costs is far broader and apparently does not even include the decision respecting costs made in Review Division Decision #17297.

WCAT has no jurisdiction beyond that established by statute. This includes the jurisdiction established under section 239 of the Act and several other sections which have no relevance to this appeal. The full extent of WCAT’s jurisdiction as established by the Act is set out under item 2.00 of the MRPP. Furthermore, under section 253(1) of the Act, WCAT is empowered to “confirm, vary or cancel the appealed decision or order.” There is no general authority to make orders or give directions outside of the context of a decision which is properly before WCAT. Section 6 of the Regulation must be read within the context of the Act under which the Regulation was promulgated. Given the clear limitations on the authority of WCAT to make orders or give directions, I do not consider that section 6 of the Regulation may be read so as to extend that power and enable WCAT to make an order for costs or expenses unrelated to an appeal that is before the WCAT panel.

There is no authority to address issues of legal costs related to decisions and appeals that have not been directly addressed in the decisions that form the basis of an appeal. In this case, that is the Board decision of May 3, 2004 and Review Division Decision #17297. These decisions both deal with vocational rehabilitation assistance. Under section 239(2)(c) of the Act, Review Division decisions with respect to vocational rehabilitation assistance may not be appealed to WCAT.

In Decision #2004-06308, a WCAT panel addressed the analogous issue of legal costs in relation to a pension commutation decision. In that case the worker’s representative appealed a Review Division decision denying legal costs. The substantive decision before the Review Division had been the commutation of the worker’s pension.

The panel in Decision #2004-06308 reasoned as follows:

Section 239(2)(a) further provides:

- (2) The following decisions made by a review officer may not be appealed to the appeal tribunal:
 - (a) a decision in a prescribed class of decisions respecting the conduct of a review;

Section 224(2)(j) of the Act provides that the Lieutenant Governor in Council may make regulations as follows:

- (j) prescribing any decisions or orders under this Act or the regulations that may be appealed to the appeal tribunal under Part 4, prescribing who may appeal those decisions or orders and prescribing classes of decisions for purposes of section 239(2)(a); . . .

Section 4(e) of the Appeal Regulation provides:

- 4 For the purposes of section 239(2)(a) of the Act, the following are classes of decisions that may not be appealed to the appeal tribunal:

- (e) decisions respecting the conduct of a review if the review is in respect of any matter that is not appealable to the appeal tribunal under section 239(2)(b) to (e) of the Act.

I am inclined to the view that the decision on the worker's request for legal fees, in connection with his request for review of the decision to deny his commutation request, was a decision respecting the conduct of the review. I note, in this regard, that under section 7 of the Appeal Regulation, WCAT's authority to order the Board to pay expenses (such as the reimbursement of medical-legal reports) is limited to situations where the evidence was submitted to WCAT. If the subject matter of the appeal cannot be appealed to WCAT, there would be no opportunity to submit the evidence to WCAT. As well, section 7(2) of the Appeal Regulation provides that WCAT cannot order the Board to pay legal expenses, and the policy of the Board of Governors also provides that legal expenses will not be paid by the Board. To the extent the phrase "conduct of a review" is ambiguous, I interpret this as extending to consideration of issues relating to the costs and expenses associated with the review. Alternatively, the decision regarding the worker's request for legal fees may simply be viewed as part of the decision regarding the commutation request, which is not appealable to WCAT.

On the basis of this reasoning, an appeal cannot be brought to WCAT regarding a request for reimbursement of legal fees or other expenses, if the subject matter addressed in the Review Division decision is not appealable to WCAT under section 239(2)(b) to (e) of the Act. I find that as the Review Division decision concerning the worker's commutation request was not appealable to WCAT, it is not within WCAT's jurisdiction to hear the worker's appeal on the issue of legal fees alone.

I agree with the panel's reasoning in Decision #2004-06308 and find that, for the same reasons, WCAT does not have jurisdiction to hear an appeal on the sole issue of legal costs in the present case.

Conclusion

It is questionable whether WCAT has the jurisdiction to address an appeal regarding interest with respect to an award of retroactive vocational rehabilitation assistance. If WCAT has jurisdiction to address this question, I find that neither the Act nor the policies provide for the payment of interest on such an award.

WCAT does not have jurisdiction to address a request for legal fees and costs related to appeal proceedings outside of its jurisdiction to address an appeal of a final decision of a review officer under section 239 of the Act. WCAT does not have the jurisdiction to hear an appeal on the sole issue of legal costs with respect to a final decision of a review officer on vocational rehabilitation expenses.

I confirm the implied decision in Review Division Decision #17297 denying interest on retroactive vocational rehabilitation assistance benefits.

