

Workers' Compensation Appeal Tribunal

Application to Reconsider

Regarding Decision No. #2 – Claim No. 92-1177

Date of Hearing: June 23, 2000

Date of Decision: December 11, 2000

Appeal Committee Members

Presiding Officer:	Heather MacFadgen
Member representative of employers:	Jan Stick
Member representative of workers:	Joseph Radwanski

Introduction

This is an application for the reconsideration of an earlier decision (Decision No. 2) under section 18.4 (6) of the *Workers' Compensation Act* 1992, c. 16 as amended by SY 1999, c. 23, s. 13 (the "Act"). The appeal tribunal has the discretionary power to re-open and re-determine any matter that it has decided.

On July 26, 2000, Decision No. 2 was released. It increased the appellant's permanent partial impairment from 40% to 70%. No interest was requested or ordered on the compensation which resulted from the adjustment of the permanent partial impairment award.

On September 11, 2000, the appellant wrote the tribunal requesting a re-opening of Decision No. 2 to address the issue of interest.

On October 3, 2000, the appeals officer, on behalf of the tribunal, wrote to the worker asking him why he had not raised this issue previously and pointing out that to her knowledge no board policy with respect to interest per section 19.4 of the *Act* existed.

On October 5, 2000, the worker replied in writing as follows: (1) he did not request interest as it was mandated by the *Act* and by law it should be paid; (2) certain Bill 83 amendments did not come into force until April 1, 2000 [including section 19.4] in order to allow the WCB board time to prepare and make necessary changes to enforce the new *Act*; and (3) by failing to establish an interest policy the board is breaking the law.

Issues

1. Should Decision No. 2 be re-opened? If so, why?
2. Should interest be awarded by the tribunal under section 19.4 of the current *Act*?

Answers

1. Yes, Decision No. 2 should be re-opened because there was a clear error of law: that is, the failure of the appeal tribunal to follow the express terms of the *Act*.
2. Yes, interest should be awarded under section 19.4 of the *Act*.

Reasons

1. Section 18.4 (6) says:

The appeal tribunal may at any time examine, inquire into, reopen and re-hear any matter that it has dealt with previously and may rescind or vary any decision or order previously made by it. [Emphasis added.]

It is clear from the permissive language of this section - - “may” - - that the tribunal has the discretion to re-open previous decisions. “Discretion” refers to the tribunal’s power to exercise its judgement to choose whether or not to act. In contrast to requests for “reconsiderations,” appeals are a right and the tribunal has no discretion to refuse to hear an appeal within its “jurisdiction” [that is within the authority of tribunal under section 18.4 (1) of the *Act*].

We think it is important that there be some finality to the appeal decision-making process. However, our worker’s compensation legislation is designed to allow some flexibility to re-open decisions where, in the tribunal’s judgement, it should do so.

The appeal tribunal has been in existence for approximately eight months. Rather than set out general guidelines at this time for re-openings, we have decided, for now, to proceed on a case-by-case basis. However, we have reviewed some cases with respect to re-openings from other jurisdictions (see, for example, Decision No. 29, W.C.R. 1 at 118).

For the reasons we set out below, we think the tribunal, in Decision No. 2, failed to follow a mandatory provision of the *Act* and that it was an error of law to fail to do so. Therefore, we think the tribunal should exercise its discretion to re-open.

2. Section 19.4 of the current *Act* says:

Interest

Where compensation is payable, the adjudicator, hearing officer or appeal tribunal shall order that interest be paid on such compensation in accordance with board policy and the board shall pay such interest.

The effect of Decision No. 2, is that “compensation [was] payable” to the appellant in the form of an increase in his permanent partial impairment award. Once the condition in the opening clause of section 19.4 is met (as here), then it is clear that the appeal tribunal must order that interest be paid on such compensation.

In other words, there are two steps under the *Act* to decide first, compensation, and then, interest. Entitlement to compensation is determined by section 90, the “transition provision”. In this case, as set out in Decision No. 2, section 90 (1)(b) applies because the worker’s disability occurred in 1992. Therefore, his entitlement

to compensation was determined according to the legislation as it was in force at the time of the workplace accident which caused his disability.

The worker filed his Notice of Appeal with the tribunal on May 1, 2000 “pursuant to section 18”. In this regard, the transition provision says as follows:

- (1.2) Where a worker, . . . has commenced an appeal pursuant to section 18 on March 31, 2000 or earlier, the **appeal shall be determined pursuant to predecessor legislation as it was in force before April 1, 2000.** [Emphasis added.]

We find that since this worker filed his appeal after March 31, 2000, his appeal must be decided according to current legislative provisions including section 19.4. Therefore, we find that section 19.4 applies to this worker’s appeal and he is entitled to interest on the compensation payable under Decision No. 2.

Conclusion

Decision No. 2 is re-opened and varied as follows:

- the tribunal orders that interest be paid to the worker on the compensation payable as a result of Decision No. 2.

Dated this 11th day of December, 2000 in the City of Whitehorse, in the Yukon Territory.

Jan Stick, Member

Heather MacFadgen, Presiding Officer

Joseph P. Radwanski, Member