

Workers' Compensation Appeal Tribunal

Decision # 11

Claim No.: 80-1766

Date of Hearing: February 26, 2001

Date of Decision: April 12, 2001

Appeal Committee Members

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

In attendance: The Worker
The Worker's representative - Michael Travill
Reporter/Recorder - Doug Ayers

Location: Boardroom 1B Main, 419 Range Road
Whitehorse, Yukon Territory

Summary for the Reader

Decision under review: Appeal Panel – March 22, 1996

Sections of Act considered or applied by appeal panel: s. 18 of the 1992 *Workers' Compensation Act*; ss. 14.1, 25, and 28(3) of the *Workers' Compensation Ordinance* (1973)

Policies considered or applied by appeal panel: none

Issues addressed by appeal panel: Is the Board responsible for retraining costs under the articles and statutes of the *Worker's Compensation Ordinance* (1973)?

Decisions made by appeal panel: No, not responsible; decision of the Internal Review Committee confirmed.

Appeal Committee decision summary:

The tribunal has no authority to hear this matter because (a) the jurisdiction of the tribunal is set out at section 18.4(1) of the *Act* which does not give the tribunal authority to review the decision of an appeal panel (only decisions under sections 17.1, 7, and 19.4 of the *Act* can be reviewed, none of which apply here); (b) the tribunal's power to reopen and rehear *its own decisions* under section 18.4(6) does not give it authority to (re)hear decisions it has not made and therefore the tribunal cannot use this section of the *Act* to (re)hear the matters dealt with in the 1996 appeal panel decision – a decision that the tribunal did not make; (c) the board's decision to rehear a matter cannot give the tribunal jurisdiction – it can only come from the *Act*; (d) jurisdiction is not a procedural issue, it is a substantive one; and therefore, legislation creating the new appeal tribunal cannot be used retroactively to give the tribunal jurisdiction over this case which was to be (re)heard as of 1998; (e) nothing in section 90 of the *Act* gives the tribunal jurisdiction over this case either – this is not a review under section 17 nor an appeal under section 18 of the *Act*.

Sections of the Act considered or applied by appeal committee:

7(1), 17(1), 18.4(1), 18.4(6), 19(4), 90, 96.(5), of the *Worker's Compensation Act*, 1992, as amended by SY 1999, c.23, s.11 (the "*Act*") and section 95.(5) of the 1992 *Act*.

Policies considered or applied by appeal committee: none

Issues addressed by appeal committee:

1. Which decision -- that of the IRC dated January 23, 1996 or that of the Appeal Panel dated March 22, 1996 – is properly before the tribunal for review in this case?
2. Is this an *appeal* or a *rehearing*?

3. Does the tribunal have authority to rehear a matter previously dealt with by appeal panel where the WCB board under previous legislation has decided the matter should be re-heard?

Decisions made by appeal committee:

1. The decision which is before the appeal committee is the March 22, 1996 appeal panel decision.
2. It is not an appeal but rather a “hearing” of a matter previously dealt with by an appeal panel.
3. The tribunal has no authority to hear this matter.

Introduction

We begin by explaining how this matter came before us. On August 17, 2000, the worker filed a Notice of Appeal with respect to two decisions: (a) an internal review committee (“IRC”) decision dated January 23, 1996 and a subsequent (b) appeal panel decision (heard on February 22, 1996) decided on March 22, 1996. Attached to the Notice of Appeal were two handwritten pages in which the worker raised a number of issues, some of which were not addressed in either the IRC or appeal panel decisions.

The tribunal office received the file in September. The chair reviewed the file as well as a number of letters and notes from the worker dated or received September 13 and 25, and October 16 and 18. On October 26, 2000, the chair of the tribunal wrote the worker a letter which stated that the tribunal had no authority under the *Workers’ Compensation Act* (the “*Act*”) to hear an *appeal* from either decision and explained the reasons. However, the file review indicated there might be grounds for “inquiring into” and possibly “reopening” (different from an “appeal”) the decision of the appeal panel. Under section 18.4(6) of the *Act*, the tribunal can “reopen” certain matters. Accordingly, the tribunal sought legal advice in this regard and an appeal committee was struck which reviewed the legal advice. However, before any decision was made with respect to the legal advice, on December 6, 2000, the workers’ advocate wrote the tribunal requesting a hearing into this matter. On December 11, 2000, the chair on behalf of the appeal committee wrote both the workers’ advocate and the chair of the Workers’ Compensation Health and Safety Board (the “WCB”) stating that the first issue to be determined was one of “jurisdiction”-- that is, given the requirements of the transitional provision [s.90] of the *Act*, what body has the authority to reopen a 1996 appeal panel decision – the tribunal or the board? The appeal committee decided that it would be useful to have written submissions on this issue from both the workers’ advocate and WCB and so asked these be provided by January 26, 2001 and they were.

The hearing was held on February 26, 2001. The employer, though notified, did not attend. The appeal committee asked that counsel for WCB attend to answer questions based on his written submission and of course the workers’ advocate was present to answer and ask questions as well. It is clear from the submissions that will be discussed later in these reasons that the workers’ advocate’s view of the matter is different from that of WCB’s lawyer. The workers’ advocate says that it is the IRC’s decision which should be reviewed as an *appeal* by the tribunal. WCB’s lawyer says it is the subsequent appeal panel decision that should be *reheard* by the tribunal. These are two different processes under the *Act*. Both the workers’ advocate and WCB’s lawyer say the tribunal has the authority to proceed with this matter but in different ways and for different reasons.

Background

- (1) What follows are not findings of fact but rather a context for this decision. The worker's claim began when he was 24 years old and experienced a significant work-related injury to his knee. At the time of the injury in 1980 he was working as a construction worker.
- (2) He underwent a series of medical treatments for the injury including surgery on two occasions. He also had extensive rehabilitation and was discharged from the British Columbia Rehabilitation Centre in February 1985 "with permanent restrictions against squatting, kneeling, moving in awkward places and walking on uneven ground."
- (3) The worker's file indicates that in January of 1985, he began to inquire about retraining. He was assessed a number of times by WCB Medical Consultants. In July 1985, the worker was assessed to have a 10% partial permanent disability because of his injured knee. He was told by letter that he was awarded a monthly pension and that he could be paid this pension in a lump sum. Most importantly, this letter said that "acceptance of the lump sum payment does not affect any further medical treatment or compensation to which you may become entitled as a result of your accident." (Emphasis added.)
- (4) The record indicates the worker accepted the lump sum. He appealed the 10% assessment and it was increased to 15% in a decision that also said that the matter of retraining could not be determined at that time due to insufficient information from the worker. The worker was subsequently awarded another lump sum payment to reflect the increased award. The letter informing him of this award included the same declaration as before -- that acceptance of the lump sum would not in any way affect future compensation to which he may be entitled.
- (5) From 1986 to 1995 the worker continued to deal with the board regarding his medical treatment. Several times throughout this period the worker requested retraining benefits, funding for courses, supplies, and an allowance. In turn, the board requested that he put his requests in writing but the record does not contain any written requests. Then in 1995, the worker's adjudicator wrote him a memo saying the board would support retraining as a painter if the costs were reasonable and asked for estimates of expenses. Several days later the worker provided a handwritten memo setting out these amounts (\$2500 for art instruction and \$2500 for art supplies). A series of handwritten memos from the adjudicator followed advising the worker he would receive a retraining allowance of \$75.21 per day for six months, then an additional six months, as well as approval for the two requested amounts for instruction and supplies.
- (6) However, within three months of the beginning of the retraining allowance, funding for this and for instruction and supplies was cancelled. The Acting Director of Claims wrote the worker advising that an adjudicative error had been made and he

was not eligible for any retraining as he had accepted lump sum payments under section 28 of the 1973 *Ordinance*.

- (7) Section 28 *Ordinance* 1973 (3rd), c. 6, s.1; 1977 (2nd), c.10, s. 1 provides in part as follows: “. . . periodic payments of compensation may be commuted to a lump sum at the written request of the worker. (3) Where a lump sum has been made to a worker . . . as a settlement in full of all compensation payable to him in respect of his disability and has been so accepted by him in writing, the worker is not thereafter entitled to be paid any further other compensation.”
- (8) We note there is no indication in the record of any “written” request by the worker or an acceptance by him “in writing” as a settlement in full. During this same month in which the retraining funding was cancelled, the worker suffered an aggravation to his knee injury while he was undergoing rehabilitation in the POWER program. He was entitled to benefits as a result but did not receive any because the board determined he had an overpayment now owing due to the retraining program that had been cancelled. The worker filed an appeal to the IRC which upheld the decision to terminate benefits and seek recovery of an overpayment. The worker then appealed this decision to an appeal panel of the board.
- (9) On March 22, 1996, the appeal was denied and the appeal panel ruled that the worker was not entitled to further benefits. The worker hired a lawyer who filed a petition to the court. WCB’s lawyer filed an affidavit, in the court proceeding, that stated that the Board Members agreed to strike a new panel. Meanwhile, a new appeal panel hearing date was scheduled but was cancelled at the request of the worker. The worker told us in the hearing that his lawyer advised him not to go back to another appeal panel to deal with his issues. As well, apparently the court proceeding did not go ahead after the worker’s lawyer left the territory.
- (10) We explained in our introduction how this matter came to the tribunal.

The Hearing Before the Appeal Committee

- (11) The hearing was held on February 26, 2001 before an appeal committee of the tribunal established by the tribunal Chair under section 18.3 (1) of the *Workers’ Compensation Act*, 1992, as amended by SY 1999. C.23, s.11 (the “*Act*”).
- (12) The appeal committee considered all of the worker’s record on claim # 80-1766 provided by the board, according to section 18.3 (4) of the *Act* as well as board policies CL-43, Recovery of Overpaid Compensation, effective date 93-11-17 and CS-07, Vocational Rehabilitation, effective date 94-11-09. [Because of our decision on jurisdiction, these policies were not applied as they go to the merits.]
- (13) At the outset of the hearing, the appeal committee determined that the first issue to be addressed was whether or not it had jurisdiction under the *Act* to hear the appeal.

The appeal committee decided to proceed by first hearing submissions on the jurisdiction issue and reserving on that question but continuing to hear submissions on the merits.

- (14) The worker attended the hearing and gave evidence under oath. No one appeared on behalf of the employer.

[At the beginning of the hearing, the Chair explained that any new evidence submitted at the hearing would be provided to the board: the worker and his representative did not object to this.]

Issues

1. Which decision -- that of the IRC dated January 23, 1996 or that of the Appeal Panel dated March 22, 1996 – is properly before the tribunal for review in this case?
2. Is this an *appeal* or a *rehearing*?
3. Does the tribunal have authority to rehear a matter previously dealt with by appeal panel where the WCB board under previous legislation has decided the matter should be re-heard?

Analysis and Reasons on Issue #1

Which decision -- that of the IRC dated January 23, 1996 or that of the appeal panel dated March 22, 1996 – is properly before the tribunal for review in this case?

- (15) Based on documents in the worker's record, we find that on January 14, 1998 the WCB Board of Directors made a decision unanimously agreeing that another appeal panel would be struck to rehear the appeal previously decided by an appeal panel on March 22, 1996. The Board of Directors also appointed members to form the new appeal panel. The Board minutes indicate that this decision was made according to section 96.(5) of the *Act* as it then was. This section says: "The board has the authority to examine, inquire into and hear any matter that it has dealt with previously and has the power to rescind or vary any decision or order previously made by it." This refers to a "rehearing" power, not an appeal.
- (16) The workers' advocate says that, as a result of this February 1998 Board decision, the earlier appeal panel decision of March 22, 1996 is "rescinded". He says this is so because the *Act* in section 96.(5) only gives the board the power to rescind or vary: it cannot do anything else. Therefore, the decision that the tribunal must hear an "appeal" from is the IRC's decision of January 25, 1996 – the only decision left after the appeal panel's decision was "rescinded" and thereby brought to an end as if it never were.

- (17) We do not agree with this interpretation of the board's powers under section 96.(5) of the *Act* as it stood in 1998. In our view, section 96.(5) gives the board the power to examine or inquire into a previous decision and decide to let it stand as well as to rescind or vary it. There is no indication from the minutes of the board meeting of January 14, 1998 that the board decided to rescind the earlier appeal panel decision. We agree with board's lawyer that the Board of Directors had just taken the first step under section 96.(5): that is, it had decided to (re)hear the appeal and had appointed an appeal panel to do so.
- (18) Therefore, we find that it is the decision of the appeal panel dated March 22, 1996 that is before the tribunal at this time, not the IRC decision.

Analysis and Reasons on Issue #2

Is this an *appeal* or a *(re)hearing*?

- (19) It follows, from our decision on issue #1, that this is a "hearing" of a matter previously dealt with and not an appeal. We are dealing with a decision of an appeal panel. There is no authority in the *Act* for an "appeal" of an appeal panel decision: it is the final level of appeal and is "final and conclusive" unless it is "heard" again.

Analysis and Reasons on Issue #3

Does the tribunal have jurisdiction to rehear a matter previously dealt with by an appeal panel where the WCB board acting under previous legislation has decided the matter should be re-heard?

- (20) This is an unusual case. Normally, one would have expected that a decision to hear a matter again made in 1998 would mean that by 2001 there would already have been a new hearing and a decision.
- (21) In this case, by 1997 the worker had been unsuccessful at all three levels of WCB decision-making and appeal under the *Act* and had therefore hired a lawyer. That lawyer began legal action in 1997 in the Supreme Court for an order or declaration that WCB had acted contrary to the provisions of the 1973 *Ordinance* in its decisions regarding the worker's entitlement to compensation and retraining. Other documents as well as the written submissions from the board show that the board's position -- once the legal action began and on a "without prejudice" basis -- was that the worker was entitled to compensation (less the amounts he had already received) as well as rehabilitation. The worker gave evidence that a board rehabilitation staff person met with him informally at this time about rehabilitation at a local coffee shop and there was nothing further with respect to rehabilitation from the board. Meanwhile, his lawyer advised him not to proceed

with a rehearing in front of a new appeal panel. It is reasonable for a worker to rely on his lawyer's advice; it is also clear from the worker's testimony that he no longer trusted WCB. There never was a rehearing. Although the board scheduled a hearing, the record indicates it was cancelled at the worker's request. Nothing further was done by the board. It appears that when a new and independent appeal tribunal came into existence, the worker decided to bring the matter to the tribunal.

- (22) The answer as to whether or not the tribunal has authority to rehear this matter must be found within the legislation. The tribunal can only do what the *Act* says it can do. We turn first to the arguments made in this regard by the worker's advocate. He says that the worker's request for hearing is based on section 18.(1) which is the section which says a worker can appeal a section 17 decision – that is, a hearing officer's decision: The workers' advocate says the worker does not request a section 18.4 (6) "reopening". However, since we have decided that the appeal panel decision was not rescinded, it is not open to us to use the tribunal's powers under section 18.(1) to review the January 1996 IRC decision. It has now been replaced by the subsequent March 1996 appeal panel decision.
- (23) On the broader issue of the whether or not the appeal tribunal has the authority to reopen former appeal panel decisions, the workers' advocate says it does. He bases this view on his work with the Task Force, which was part of the process leading up to the legislative amendments in Bill 83. The Bill 83 amendments created the appeal tribunal with power to hear certain appeals in compensation matters. Other Bill 83 amendments removed from the board appeal panels the authority to hear appeals in compensation matters (but left intact the power to continue to hear appeals in occupational, health and safety as well as assessment matters). He says that as a result, the current board from which assessment and occupational health and safety appeal panels are drawn has no expertise or training in compensation matters. However, the appeal tribunal or appeal panels do not get their authority based on their expertise but rather based on what the *Act* says is their authority – so this argument based on "expertise", although a practical one, is not a legal one in the context of "jurisdiction" or authority to act [although arguments about expertise can be relevant when courts are judicially reviewing tribunal decisions – it is a factor in setting the standard of review].
- (24) We cannot conclude as the workers' advocate does that the appeal tribunal has authority to reopen matters previously decided by an appeal panel: we say this because of the plain and ordinary meaning of the words of the section 18.4(6) of the *Act* which deals with tribunal's powers to reopen. This section 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.)

- (25) We are not dealing here with a decision that the appeal tribunal has previously made.
- (26) In addition, under the authority given to the board in section 96.(5) of the current *Act* “the board has the authority to examine, inquire into and hear any matter that it has dealt with previously and has the power to rescind or vary any decision or order previously made by it.” (Emphasis added.)
- (27) The board’s lawyer says that when sections 96.(5) and 18.4(6) are read together, it is clear that the board continues to have the power to reopen its previous decisions – and that the tribunal does not have the power to reopen previous board decisions. We agree based on the plain and ordinary meaning of the words in these sections.
- (28) However, the board’s lawyer says that once the board decides to reopen one of its previous decisions, then it is possible for the tribunal to do the (re)hearing. He says the Bill 83 amendments changed the jurisdiction of the appeal panels by removing authority to hear appeals of compensation claims and by giving this authority to the new tribunal. Appeal panels no longer hear such matters. He also says that the *Act* does not specifically address the situation we find here -- that is, a decision has been made under previous legislation by a body with jurisdiction at the time to both (re)open and rehear. But only the first of two steps were accomplished.
- (29) We do not agree that this situation is not specifically addressed by the *Act*. We think that section 96.(5) of the *Act* as it stood in 1998 clearly gave the board the power to reopen **and** rehear its previous decisions. The words of that section are unchanged in the current legislation at 96.(5) which says:
- The board has the authority to examine, inquire into and hear any matter that it has dealt with previously and has the power to rescind or vary any decision or order previously made by it.
- (30) In other words, this jurisdiction of the board with respect to reopening and rehearing its own decisions has not changed as a result of the Bill 83 amendments. (Also, we note that under the legislation as it existed in 1998 as well as the current legislation, a decision of an “appeal panel” is “deemed to be a decision of the board”.)
- (31) The tribunal also sought independent legal advice on the jurisdiction question. (It was provided to both the workers’ advocate and board counsel.) At the time the opinion was done, the lawyer who provided it did not have a copy of the minutes of the January 14, 1998 board decision: that is, that another appeal panel would be struck (under s. 96.(5) of the *Act* at the time). In addition, the opinion does not address the distinction between the tribunal’s reopening power (for its own decisions) as contrasted with the board’s corresponding power (for its own

decisions) under s. 96.(5) of the legislation at the time this jurisdiction was exercised [or in s. 96.(5) of the current *Act*].

- (32) Bearing both these points in mind, we reviewed this legal opinion: it came to the conclusion that the tribunal can (re)open and hear again a matter previously dealt with by an appeal panel. The opinion is based on the common law presumption that a claimant or appellant will receive the benefit of procedural changes in legislation. In other words, procedural amendments can operate “retroactively”. The opinion characterizes the question of who hears “appeals” as a matter of procedure, not substance. However, it is well established that legislative amendments relating to jurisdiction are matters of substance, not procedure. The Supreme Court of Canada stated the law in this regard in *Royal Bank of Canada v. Concrete Column Clamps (1960) Ltd.* [1971] S.C.R.1038. In that case, the appellant company asked the Supreme Court of Canada to grant its request to hear its appeal from a decision that was made before the legislative amendments were passed which gave the court the authority (or “jurisdiction”) to grant this request [in legal language, a “leave to appeal”]. Before the legislative amendments came into force such requests for “leave to appeal” were to be decided by a different court. The Supreme Court of Canada therefore dismissed the appellant’s request for leave to appeal to the Supreme Court of Canada because at the time the right to appeal arose the court did not have that authority. The court said: “retrospective operation must not be given to legislation conferring a new jurisdiction.”
- (33) Although the *Royal Bank of Canada* case is not a (re)hearing case but instead involves an “appeal”, in our view the principle it sets out still applies very clearly to the case before us.
- (34) Lastly, we turn to the transition provision in the current *Act* to see if it has any bearing on the question of “jurisdiction” before us. The first part of the section [90.(1)] deals with “entitlement to compensation”. It says such entitlement issues are to be determined according to the legislation in force at the time the worker suffered a disability. However, deciding what body has the authority to hear the matter before us is not an entitlement-to-compensation issue. Moreover, the remaining provisions of this transition section do not cover the matter before us either: this is not a review under section 17 commenced before March 31, 2000 [as set out in 90.(1.1)] nor is it an “appeal” under section 18 commenced before March 31, 2000 [as set out in 90.(1)]. Therefore, the transition provision does not help us.
- (35) As we said earlier, the appeal tribunal only has the authority that the *Act* gives to it and the section in the *Act* which sets out that authority is 18.4(1). It says: “the appeal tribunal has exclusive jurisdiction to examine, inquire into, hear and determine all matters arising in respect of an appeal from a decision of the board under subsection 7(1), from a decision of a hearing officer under subsection 17(1), or from a decision of the president under subsection 19(4) and it may confirm, reverse or vary the decision.” Unfortunately, the 1996 appeal panel decision

before us is not any of the above – 7(1), 17(1), or 19(4). We say unfortunately because it is very regrettable when a worker becomes what one workers' compensation expert (Terence Ison) has called “an unwilling participant in a process of jurisdictional ping-pong.”

- (36) The board has taken the view that the appeal tribunal should hear this matter. So has the workers' advocate. Neither has an answer for the problem that sections 18.4(1), 18.4(6), and 96.(5) in the current *Act* as well as section 96.(5) in the *Act* as it existed in 1998 present to their position. Both say the creation of the appeal tribunal was to provide an independent body external to the board to hear appeals and that it was not intended to continue with appeal panels for final level appeals or (re)hearings beyond a short transition time while matters already underway under the old mechanism of appeal panels were completed. (We note that it may not be an appeal panel that would continue with this matter, given the language of the section allowing the “board” to hear/vary/rescind etc.: but that is for the Board to determine.)
- (37) It may not be viewed as an ideal state of affairs to have the Board (which is not an independent appellate body) continuing to deal with some pre-Bill 83 matters. And it may not have been intended this would be so when the Task Force did its work. However, we must abide by what the *Act* says, not what it could have or, some would say, should have said. We note that in at least one other province – British Columbia – the question of jurisdiction before a new appeal body with respect to decisions by the former appeal body was specifically addressed in statutory amendments as follows:

The British Columbia *Workers Compensation Act* was amended on June 3, 1991 when Bill 27 (the *Workers Compensation Amendment Act*, 1989) came into force. Under the former legislation, the commissioners were the “board”, and had responsibility for the administration of the Board, policy-making, and appellate decision-making on claims. Under the amendments contained in Bill 27, these functions were divided among the administration, the Governors, and the Appeal Division, respectively. Section 17(5) of Bill 27 granted to the Appeal Division the authority to reconsider decisions of the former commissioners made under section 91 or section 96 of the *Act*, on the following basis: “ A worker, the worker’s dependents, the worker’s employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision made under section 91 or 96 of the former *Workers Compensation Act* on the same grounds and in the same manner as that set out in section 96.1 of the new *Workers Compensation Act*. [from page 32 of the March 12, 2001 *Re: Draft Appeal Division Practice and Procedure Decision* dated 01/03/13, <http://www.worksafebc.com/appeal/appealdiv/pdf/Draftapdivppd.pdf>]

- (38) As members of the appeal committee, we want to say to the worker that we are sorry that our reasoning leaves us unable to take jurisdiction to hear your case. We are sorry because we understand that “justice delayed, is justice denied”: you have lived almost six years with the consequences of a board decision which the Board (on a “without prejudice” basis) has acknowledged was a mistake.
- (39) Over the years since, the worker has tried several times to have this decision changed, including his application to the tribunal. It appears, however, that the Board does wish to correct the mistake and participated in this hearing with submissions in order to help clarify the jurisdiction issue in good faith. We thank board counsel, the workers’ advocate, and the worker for their assistance.

Dated this **12th** day of **April, 2001** in the City of Whitehorse, in the Yukon Territory.

Jan Stick, Member

Heather MacFadgen, Presiding Officer

Joseph P. Radwanski, Member