

# **Workers' Compensation Appeal Tribunal**

## **Decision # 12**

**Claim No.: 95-0593**

Date of review by appeal committee: April 26 and 27, 2001

Date of Decision: April 30, 2001

### **Appeal Committee Members**

Presiding Officer:	Heather MacFadgen
Member representative of employers:	Jan Stick
Member representative of workers:	Karen Waroway

### **Documentary Review**

**Location:** Boardroom 2A, 419 Range Road,  
Whitehorse, Yukon Territory

## Summary for the Reader

**Decision under review:** Appeal Panel – April 30, 1999

**Sections of Act considered or applied by appeal panel:** Preamble to the Act and ss.16, 18(1), 22(1), 44(3) but no reference to which version of the *Act* used.

**Policies considered or applied by appeal panel:** CL-35 and CS-08

**Issues addressed by appeal panel:** “(1) calculation of wage loss benefits retroactive to August 30, 1992; (2) the wage rate on application of deeming; (3) reimbursement of medical costs with respect to an examination and report arranged on the appellant’s own initiative and at the appellant’s own expense; (4) reimbursement for 10 cords of firewood.”

### **Decisions made by appeal panel:**

Issue 1 – The appeal is allowed. The decision of the Internal Review Committee is confirmed, and the appeal panel hereby directs that the file be reviewed to ensure compliance. [as written; emphasis added]

Issue 2 – The appeal is allowed. The decision with respect to the wage rate applicable on deeming is hereby varied and the Appeal Panel directs that the wage rate applicable on deeming be recalculated in an amount consistent with the appellant’s on the job training position. Issue 3 – The appeal is allowed. The decision with respect to payment of the costs associated with Dr. Van Rijn’s report is reversed. Issue 4 – The appeal is denied. The decision with respect to payment of the cost of 10 cords of firewood is upheld.”

### **Appeal Committee decision summary:**

The tribunal has no authority to hear this matter because (a) the jurisdiction of the tribunal on appeals is set out at section 18.4(1) of the *Act* which does not give the tribunal authority to hear the appeal from the decision of an appeal panel (only decisions under sections 17, 7, and 19.4 of the *Act* can be appealed, 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 1999 appeal panel decision – a decision that the tribunal did not make; (c) 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; (d) 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 96.(5) of the 1992 *Act*.

**Policies considered or applied by appeal committee:** none

**Issues addressed by appeal committee:**

1. Is this an *appeal* or a *rehearing*?
2. Does the tribunal have authority to rehear a matter previously dealt with by appeal panel?

**Decisions made by appeal committee:**

1. It is not an appeal but rather a “hearing” of a matter previously dealt with by an appeal panel.
2. The tribunal has no authority to hear this matter.

## Introduction

- (1) We begin by explaining how this matter came before us and why it has taken almost four months to issue a decision. We point out that the worker is representing himself; and the history of this claim is very complex. We also note that the worker has a Grade 9 education: he told the appeal committee that it is sometimes difficult for him to put concerns or other types of submissions in writing. For this reason, in order to make the process as accessible as possible, either the appeals officer or the appeal committee, whenever possible, listened to the worker's concerns or oral submissions and then committed them to writing for him to review for accuracy.
- (2) On January 7, 2001, the worker filed a Notice of Appeal with respect to an appeal panel decision dated April 30, 1999. The Notice of Appeal says "I ask for a new hearing because WCB withheld evidence during previous appeals. Previous decision also has wrong claim number 89-0465. Also after talking with the Ombudsman, he believes that I should have another hearing because of misleading evidence provided by WCB. I was denied rules of natural justice." The changes the worker seeks are stated as "issue of deeming (improperly deemed); IRC decision of Oct. 1/96 not complied [with]; appeal panel decision dated April 30, 1999 not clear."
- (3) The tribunal office did not immediately request the worker's record for the following reason: the worker asked that the Notice of Appeal not be forwarded to the Workers' Compensation Health and Safety Board (the "WCB") until the issue of jurisdiction had been determined. He requested that this be done in a letter from the Chair of the tribunal. On January 11, 2001 the Chair wrote the worker to explain that the decision could not be done in this way - - the jurisdiction issue would need to be decided by the appeal committee. In addition, she explained that the tribunal would need to use the Notice of Appeal to obtain the worker's record and asked if he was ready to proceed on that basis or if he would prefer to withdraw. There was no response to this letter.
- (4) On January 30, 2001 the tribunal appeals officer wrote the worker about the lack of response to the chair's letter. She advised that one of the objectives of the appeal process is to minimize delays. Therefore, she would try to reach the worker by phone and if she did not hear from him by February 2, 2001, she would ask the board for disclosure of his record to minimize further delay. On February 1, 2001 he attended the tribunal office and reviewed the letter and asked the tribunal go forward and access his record. The file was requested February 2 and provided on February 26, 2001, taking almost a month. It is a lengthy file but as the worker has pointed out WCB had previously agreed that it would provide records to the tribunal within 10 working days and his was not.
- (5) The appeal committee first met on March 19, 2001, to prepare for the hearing. The committee decided that a pre-hearing conference was necessary to clarify the issues, identify evidence to be presented at the hearing, deal with any disclosure issues, estimate how long the hearing should take, etc. The employer, though notified,

declined to participate at the pre-hearing conference set for March 30, 2001 and the tribunal staff understood from her conversation with the employer that the employer did not intend to take part in the appeal. The worker agreed to a date, and was advised by letter as to the members appointed to an appeal committee.

- (6) Meanwhile, the worker contacted the tribunal on March 27, 2001 stating that he objected to one of the members of the appeal panel. The worker thought this member had a conflict of interest. He agreed that the appeal committee would hear his concerns at the pre-hearing conference on March 30, 2001; the worker would also have an opportunity then to present any further documents he wished the appeal committee to consider.
- (7) The pre-hearing conference was held with the worker at the tribunal offices on Friday March 30, 2001; all three members heard the workers concerns with respect to a conflict of interest for one of the appeal committee members. It was agreed that the chair and other appeal committee member would consider the worker's allegations and would render a decision on the issue of bias the following week. However, the worker subsequently advised the Appeals Officer on April 3, 2001, (before the chair and the other appeal committee member had made a decision) that he withdrew his objection to one member of the appeal committee participating on his appeal. He confirmed this withdrawal in a letter he signed on April 6, 2001.
- (8) In addition, at the March 30, 2001 pre-hearing conference, the worker presented more documents that had not been provided as part of the record from the board. Some of these documents were obtained by the worker through the *Access to Information and Protection of Privacy Act*.
- (9) Earlier the worker advised the appeals officer (on March 21, 2001) that he intended to request that the tribunal compel the board to provide additional documents as part of his record for the purposes of his appeal.
- (10) Therefore, on March 23, 2001, in advance of the pre-hearing conference, the chair on behalf of the appeal committee wrote the alternate chair of WCB (in the WCB chair's absence) to ask that WCB produce the entire "record" including all legal opinions and investigative materials with respect to the board's management of the claim. This letter also points out that in the workers compensation context legal opinions may not be "privileged" because workers compensation is inquiry-based rather than adversarial: the letter cited the case of *Melanson v. New Brunswick (Workers' Compensation Board)*[1994] N.B.J. No. 160 decided by the New Brunswick Court of Appeal which states:

Legal opinions given in relation to the interpretation of legislation which is germane to a claim before one of the Board's tribunals is not privileged. Such professional opinions are, in my view, for the benefit of employers, employees and dependents in the processing of claims by the Workers' Compensation Board, not simply something for the exclusive use of the Board. When the W.C.B. is in

an adversarial position or has caused the legal opinion to be generated for matters unrelated to claims, a solicitor-client privilege relationship arises vis-à-vis other parties. However, when the legal opinions relate to the interpretation of W.C.B. legislation or the duty or obligation to pay claims, they must not be withheld from employers, employees or their dependents. Privilege does not attach.[emphasis added]

- (11) This letter pointed out that even if privilege arguably attaches to certain documents, there are situations where the recipient of legal advice, such as the board, for good reasons waives that privilege and decides to disclose: the tribunal requested the board to do so in this case.
- (12) The Board's response dated and received April 2, 2001 indicated that although they had considered the tribunal chair's request at their March 27, 2001 meeting, they would require further time to decide: they therefore scheduled this item for the next Board meeting two weeks later. The Board's letter also states that the Board's lawyer did not prepare any legal opinions with respect to issues raised by the adjudicator or the Internal Review Committee. The tribunal provided a copy of this letter to the worker.
- (13) In a letter from the worker dated April 9, 2001, he provided two documents – one written by the Board's lawyer to the worker's lawyer dated August 27, 1996 and one to the worker dated July 19, 1997. Neither was provided to the tribunal as part of the record from the board. This causes us some concern. In particular, in the second letter the Board's lawyer advises the worker that an independent claims consultant made a decision on his claim on March 27, 1997 as follows: “ It would appear that the decision of September 4, 1996 no longer is in effect because of the decision of the independent claims consultant.” [Emphasis added]
- (14) The tribunal received a letter on April 19, 2001 (dated April 11, 2001) that said the Board would not provide any further documentation to the tribunal on the basis of a Claims Management Directive issued by the President of WCB. This directive states: “Documents shall not be placed on a work's claim file that are (1) legal opinions, except those used in the adjudication of the claim, and (2) investigative materials, except that which is used in the adjudication of the claim.” In this letter, the Board chair also refers to a report done for WCB by an individual and says that this report was not an adjudication. The chair also says that the worker has a copy of this report and can provide it to the tribunal if he so desires. From our review of the record (see paragraph 13 regarding second letter) it is clear that the individual named in the Board chair's letter is the same person who the Board's lawyer points out was an independent claims consultant whose work on the worker's claim led to an adjudicative decision on March 27, 1997. We also note that we never referred to this individual's report in our letter to the Board requesting full disclosure of the worker's record; so it is puzzling that the Board chair draws our attention to this

document in particular. In our view, the Board has not fully complied with the requirements of the Act under 18.3(4) to provide the worker's record to the tribunal. For instance, materials relating to issues at the former appeal panel hearing [that is, for the purposes of adjudication at that level of appeal] were not provided by the board, but rather obtained by the worker through his efforts. This causes needless delay and makes it difficult for the worker who is representing himself.

- (15) The tribunal chair wrote to the worker on April 20, 2001 to address his concerns about delays and also his request for a hearing as soon as possible. She drew to the worker's attention (and enclosed) a tribunal decision released on April 12, 2001 dealing with the issue of jurisdiction in a case very similar to this worker's case. The chair explained that although tribunal decisions are not precedents, for reasons of consistency and certainty the tribunal does not lightly depart from the reasoning and results in previous decisions arising out of facts similar to the situation before them. In the letter the chair points out that the jurisdiction issue turns on the interpretation of words in the *Act*, in order to determine what body has the authority to deal with the worker's matter. So on behalf of the appeal committee, the chair offered the worker the choice of either an oral hearing on the jurisdiction issue or the alternative of documentary review without the oral hearing whereby the appeal committee would issue a ruling on the jurisdiction question before proceeding to the merits of the case. It is important to point out that though the record may be incomplete, further documents are not required to come to our decision on jurisdiction. That decision involves interpreting the statute. By letter dated April 24, 2001 the worker confirmed that he wished to proceed with the appeal committee issuing its decision on the matter of jurisdiction without an oral hearing or further submissions by the worker.
- (16) Therefore we turn to the first issue to be determined -- that is, given the requirements of the *Act*, what body has the authority to reopen a 1999 appeal panel decision – the tribunal or the board?

## **Issues**

1. Is this an *appeal* or a *rehearing*?
2. 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

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

- (17) It is the decision of the appeal panel dated April 30, 1999 that is before the tribunal at this time. 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 “reopened and heard” again. This process of “reopening and rehearing” is different from an “appeal”.

## Analysis and Reasons on Issue #2

Does the tribunal have jurisdiction to rehear a matter previously dealt with by an appeal panel?

- (18) 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.
- (19) We conclude that the appeal tribunal has no authority to reopen matters previously decided by an appeal panel of the board: we say this because of the plain and ordinary meaning of the words of the section 18.4(6) of the *Act* which deal with tribunal’s power 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.]

- (20) We are not dealing here with a decision that the appeal tribunal has previously made.
- (21) 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.]
- (22) When sections 96.(5) and 18.4(6) are read together, it is clear, based on the plain and ordinary meaning of the words in these sections, 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.

- (23) In addition, section 96.(5) of the *Act* as it stood before the amendments creating the appeal tribunal 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). 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.
- (24) In addition, 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 decided by a different court. The Supreme Court of Canada 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.”
- (25) 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: jurisdiction is substantive, not procedural.
- (26) 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 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.
- (27) 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 1999 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.”

(28) As we noted earlier the tribunal dealt with this issue of jurisdiction recently in Decision #11 which is very similar to this case and reached the same conclusion as we do here based on the same analysis and interpretation of the *Act*. We have also considered *Task Force Review of the Yukon Workers' Compensation Act: Phase 3, Recommendations* (August, 1999) which states at Recommendation #4 that the creation of the appeal tribunal was intended to provide an independent body external to the board to hear appeals. It may not have been intended that appeal panels continue, with respect to compensation matters, 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; however, we must nonetheless abide by what the *Act* says, not what it could have or, some would say, should have said.

(29) As members of the appeal committee, we want to say to the worker that we are sorry that our reasoning leaves us without jurisdiction to hear your case.

### **Conclusion**

The appeal committee has no jurisdiction under the *Act* to hear this matter.

Dated this **30th** day of **April, 2001** in the City of Whitehorse, in the Yukon Territory.

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Jan Stick, Member

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Heather MacFadgen, Presiding Officer

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Karen Waroway, Member