

# Workers' Compensation Appeal Tribunal

## Decision # 14

**Claim No.: 85-0248**

Date of Hearing: April 9, 2001

Date of Decision: May 11, 2001

### Appeal Committee Members

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

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

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

For a summary of this decision, please see the end of the decision at Appendix A

## Introduction

We begin by explaining how this matter came before us. The chair of the Yukon Workers' Compensation Health and Safety Board ("Board") wrote the chair of the tribunal advising that the members of the Board had reviewed an October 11, 2000 appeal panel decision at a Board meeting on November 28, 2000. This review was under section 97.(6) of the *Workers' Compensation Act*, 1992, as amended by SY 1999, c.23, s.11 (the "Act") which states:

Where the members of the Board consider that an appeal panel has not properly applied the Act or a policy of the board it may stay the decision and direct a new hearing before a new panel. [Emphasis added.]

The letter also explains that at the same November, 2000 meeting, the members of the Board made a decision to stay this decision and direct a new hearing before a new "panel". (This letter was copied to the Workers' Advocate who represents the worker on this matter.)

The stay was signed by the chair on behalf of the members of the Board on December 5, 2000. However, the members of the Board subsequently received a legal opinion from the Board's lawyer that the appeal tribunal is the appropriate administrative body to rehear the matter. Therefore, an amended stay dated January 31, 2001 was approved by the members of the Board on January 30, 2001. The amended stay states: "the new hearing shall be by an appeal committee of the tribunal, and not a panel of the members of the Board." The legal opinion was not provided to the tribunal.

We point out that no written reasons for the direction to re-hear were provided at the time of the amended stay. These were received by the tribunal on February 19, 2001 by letter dated February 13, 2001.

The tribunal appeals officer contacted the Worker's Advocate to determine whether or not he wished to provide written submissions with respect to the Board's reasons on the directions to re-hear the appeal panel decision. He requested an oral hearing instead of a documentary review with written submissions.

Under section 18.3(1) of the *Act*, the chair of the tribunal established an appeal committee of the tribunal to hear this matter, consisting of Heather MacFadgen, presiding chair, Karen Waroway, member representative of workers, and Jan Stick, member representative of employers.

The hearing was opened on April 9, 2001 in Boardroom 2B Main, 419 Range Road, Whitehorse, Yukon. The worker did not attend but was represented by the workers' advocate. No one appeared on behalf of the employer, though the employer was notified. The proceedings were recorded by court reporter Doug Ayers.

The appeal committee considered all of the worker's record as provided by the board. In addition, the board's Hearing Officer provided the following policies as relevant to the matter under appeal according to section 18.3 (4) of the *Act*:

1. GC-09 TRANSITIONAL CLAUSE
2. CL-30 SUSPENSION, REDUCTION AND TERMINATION OF COMPENSATION
3. CL-42 DISABILITY
4. CL-42 ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT
5. CS-01 TREATMENT
6. CS-08 FITNESS FOR EMPLOYMENT, SUITABLE OCCUPATION, DEEMING

At the outset of the hearing the appeal committee stated its view that jurisdiction was the first issue to be determined – that is, given the requirements of the *Act*, what body has the authority to conduct a new hearing where a 2000 appeal panel decision has been stayed by members of the Board – an appeal committee of the tribunal or a “new panel” of the board?

The workers' advocate requested that the issue of jurisdiction be decided first and if the tribunal found that it had jurisdiction then he requested the remainder of the hearing be rescheduled to a later date to deal with the merits. The appeal committee agreed to provide a written decision on jurisdiction after hearing the workers' advocate's submission. The appeal committee adjourned the hearing to consider and decide this question.

## **Issue**

1. Does the tribunal have authority to conduct a new hearing into a matter previously dealt with by appeal panel decision where the members of the Board stayed the decision and stated that it “shall be heard by an appeal committee of the tribunal, and not a panel of the members of the Board?”

## **Analysis and Reasons on Issue #1**

- (1) At the outset, it is important to emphasize the distinction under the Act between two different appeal bodies:
  1. “appeal committees” formed from members of the appeal tribunal created by legislative amendments known as “Bill 83”; and
  2. “appeal panels” formed from members of the Board, which pre-existed the Bill 83 amendments and continue to exist with some changes after Bill 83.

- (2) It is the decision of the appeal panel dated October 11, 2000 that is before the tribunal at this time.
- (3) This decision was stayed by the members of the Board under section 97.(6) of the *Act* in the fall of 2000 and then again by an amended stay in January, 2001.
- (4) Section 97.(6) states:

Where the members of the board consider that an appeal panel has not properly applied the Act or a policy of the board it may stay the decision and direct a new hearing before a new panel.

- (5) This section of the *Act* does not say that the members of the Board can stay a decision of an appeal panel and direct a new hearing before an appeal committee of the tribunal.
- (6) The answer as to whether or not the tribunal has authority to hear this matter must be found within the legislation. The tribunal can only do what the *Act* says it can do.
- (7) There is a separate section in the *Act* for staying and directing the rehearing of appeal committee decisions at section 18.3(8) and (10) which state:

18.3(8) Where the members of the board consider that an appeal committee has not properly applied the policies established by the board, or has failed to comply with the provisions of the Act or the regulations, the members of the board may, in writing and with reasons, direct the appeal committee to rehear the appeal and give fair and reasonable consideration to such policies and provisions.

18.3(10) The members of the board may stay a decision, ruling or order of the appeal committee pending a rehearing of the appeal.

- (8) When sections 97.(6) and 18.3(8) are read together, it is clear to us, based on the plain and ordinary meaning of the words in these sections, that the board cannot direct the tribunal to hear a matter decided by an appeal panel. The board can only do what the *Act* says it can do. It is without jurisdiction to order the tribunal to

hear this matter. Similarly, the tribunal can only do what the *Act* says it can do: it cannot get its jurisdiction from an order of the board, only from the *Act*.

- (9) 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. The court said: “retrospective operation must not be given to legislation conferring a new jurisdiction.” In other words, legislation creating the new appeal tribunal cannot be used retroactively to give the tribunal jurisdiction over this case.
  
- (10) Next 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. It is also not a “review” or “appeal” commenced after March 31, 2000.
  
- (11) Lastly, the workers’ advocate says that the Board has the power under s.96(1) to interpret all matters and questions under the *Act* and therefore can determine the issue of jurisdiction with respect to what appeal body can conduct the new hearing. However, the Board has not used its powers under s.96(1) in this matter, rather it is acting under s.97(6). Even if it had invoked section 96(1) we think (without deciding the matter as it is not before us) that it may be difficult to interpret s.96(1) as giving the board power to, in effect, amend the clear wording of the jurisdiction provisions in the *Act* which we have discussed earlier in this decision.
  
- (12) 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.” It can also reopen and rehear one of its own decisions under section 18.4(6). And finally under section 18.3(8), it can be directed by members of the Board to rehear a matter the tribunal has already

decided when the considers it has not properly applied board policies or the *Act*. Unfortunately, the 2000 appeal panel decision before us is not any of the above – 7(1), 17(1),19(4), 18.3(8), 18.4(6). 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.”

- (13) 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 and directions to rehear beyond a short transition time while matters already underway before the creation of the appeal tribunal were completed. However, we must abide by what the *Act* says, not what it could have or, some would say, should have said.
- (14) 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.
- (15) Accordingly, because we are without jurisdiction, we cannot proceed with or reconvene this hearing to deal with the merits, and therefore we close this hearing.

**Conclusion/Decision**

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

Dated this 11<sup>th</sup> day of **May, 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

## APPENDIX A

### Summary for the Reader

**Decision under review:** Appeal Panel – October 11, 2000

**Sections of Act considered or applied by appeal panel:** s.90(1)(6) of the *Workers' Compensation Act* (1992); definition of “permanent total disability” in the *Workers' Compensation Act* (1973) [no section reference given]

**Policies considered or applied by appeal panel:** None, however there is reference made to Directive No.: 19.

#### Issues addressed by appeal panel

1. “Did the April 12, 1985 accident arise out of and in the course of the workers’ employment?”
2. “Was the worker disabled by the accident?”
3. “Has the worker recovered from the disability?”

#### Decisions made by appeal panel:

“The Appeal Panel reverses the decision of the previous Panels and finds in favour of the worker.

The workers’ disability does not meet the definition of “permanent total disability” in the *Workers' Compensation Act* (1973). Thus, benefits for temporary total disability should be reinstated to the date they were terminated.”

In addition the Appeal Panel made the following findings.

1. The accident arose out of and in the course of employment.
2. The worker was disabled by the accident, as a result of her consistent and continuing pain.
3. The worker has not yet recovered from her disability.”

#### 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 rehear *its own decisions* at the direction of the members of the Board under section 18.3(8) does not give the tribunal authority to

(re)hear decisions it has not made; (c) the members of the Board cannot use section 97.(6) of the *Act* to direct the tribunal to (re)hear the matters dealt with in a 2000 appeal panel decision – a decision that the tribunal did not make: this section only allows the board to direct a new hearing before a new panel of the board; (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; (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),18.3(8), 90, 97.(6), of the *Worker's Compensation Act*, 1992, as amended by SY 1999, c.23, s.11 (the "*Act*").

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

**Issue addressed by appeal committee:**

1. Does the tribunal have authority to rehear a matter previously dealt with by appeal panel?

**Decision made by appeal committee:**

1. The tribunal has no authority to hear this matter.