

WORKERS COMPENSATION APPEAL TRIBUNAL

BETWEEN:

WORKER  
CASE ID # (personal information)

APPELLANT

AND:

WORKERS COMPENSATION BOARD OF  
PRINCE EDWARD ISLAND

RESPONDENT

---

DECISION #104

---

Appellant	Jonathan Greenan, Solicitor representing the Worker
Respondent	Brian Waddell, Solicitor representing the Workers Compensation Board
Place and Date of Hearing	November 20, 2008 Conference Room A, Credit Union Place 511 Notre Dame Street Summerside, Prince Edward Island
Date of Decision	February 18, 2009

## **FACTS AND BACKGROUND**

1. This is a Preliminary Objection to Appeal submitted to WCAT by the Board's solicitor on January 28, 2008, with respect to the Worker's Appeal to WCAT of IRO Decision 07-72, dated October 25, 2007.
2. By way of background, the Worker, a (personal information), filed an application for compensation (Worker's Report) with the Board dated August 26, 2004. The Worker's claim was approved by the Board on October 6, 2004, for repetitive strain injury to both wrists and was later revised on January 28, 2005, to include both shoulders.
3. The Worker received temporary wage loss and medical aid benefits until the Worker's claim was closed by the Board effective September 27, 2006, in a decision of Larry Phalen, Case Co-ordinator, dated August 29, 2006.
4. On April 18, 2007, the Board received a medical report from Dr. Gregg MacLean with respect to the Worker dated March 26, 2007, which read in part:

*"He (referring to the Worker) is a 36 year old man who has been a (personal information). As you know, he developed increasing problems with bilateral arm and shoulder pain. He had to stop working. He is on replacement benefits from Workers Compensation. He was involved in a motor vehicle accident on (personal information). He was seen by you at the time the day after his Emerg visit and had multiple lacerations and superficial scrapes on his hands. Since that time, he has had more knee pain and more neck and low back pain. The aching discomfort in his arms has not really changed since he was put off work on compensation a couple of years before that. He had seen Dr. Tom Loane, for a medical evaluation in Halifax and apparently when compensation got word that he had been in a car accident they stopped his benefits.*

*The Worker (referring to him by name) reports that the problems with his arms and hands was not much different before or after the accident. He had a number of trials of therapy without much success. As soon as he starts using his arm and hand he develops the symptoms. "*

The letter later reads:

*"The Worker (referring to him by name) had developed a repetitive strain syndrome and chronic myofascial pain. I do not believe this was substantially altered by the motor vehicle accident although he took on some extra chronic pain in his neck, low back and legs. He certainly cannot go back to work in his previous occupation."*

5. Subsequently, on July 9, 2007, Angie Fullerton, Entitlement Officer, sent a letter to the Worker which read in part:

*"The purpose of this correspondence is to provide you with a response following receipt of information submitted to your file on April 18, 2007, specifically a consult report from Dr. Gregg MacLean, dated March 26, 2007."*

*"Your claim was closed effective September 27, 2006. A decision letter regarding the closure of your claim was sent to you on August 29, 2006. Enclosed with this letter was information regarding your appeal rights. You were given ninety (90) days to appeal the decision to close your claim. You did not exercise your right to appeal within the above noted time frame and those appeal rights have now expired."*

6. Later, a representative of the Worker filed two Notices of Request for Internal Reconsideration. The first request was filed with the Board on October 3, 2007, and challenged a decision of Dave Follett dated September 29, 2006.
7. The Board had no record of any such decision by Dave Follett and by letter dated October 17, 2007, Charlotte McGuirk, the Board's Appeal Registrar, so notified the Worker's representative stating:

*"as there is no decision on file which is dated September 29, 2006, from David Follett, I presume you are referring to the decision letter dated August 29, 2006, from Larry Phalen, Case Co-ordinator. If this is not correct, please advise."*

8. Apparently there was no further clarification from the Worker's representative and for the purposes of the reconsideration, the Board assumed that the Worker was seeking internal reconsideration of Mr. Phalen's August 29, 2006, decision.
9. The second request for Internal Reconsideration was filed with the Board by the Worker's representative on October 17, 2007, and did not identify the Board decision being challenged.
10. On October 25, 2007, a letter from Shauneen J. Hood, Internal Reconsideration Officer, to the Worker's representative, read in part:

**"Further to your request for Internal Reconsideration, I confirm that your request does not meet the criteria for the following reason(s)."**

**"Time limit expired:"**

**"Your request for reconsideration is outside the 90-day time limitation from the date of notification of the decision letter, as required by Section 56(1) of the Workers Compensation Act R.S.P.E.I. 1988, Cap. W-7.1. As a result, this reconsideration is dismissed."**

**"If you are not satisfied with this decision, you may, within 30 days of this decision; appeal in writing to the Workers Compensation Appeal Tribunal (WCAT) by following the steps outlined in the attached Appeal Regulations."**

11. Subsequently, the Worker's solicitor filed a Notice of Appeal to WCAT dated November 22, 2007, appealing the decision of Shauneen J. Hood, Internal Reconsideration Officer, dated October 25, 2007.

12. And then subsequently, the Board's solicitor by letter dated January 28, 2008, to WCAT submitted the Board's Preliminary Objection to Appeal on the ground that the Worker had missed the 90-day time limit for applying for reconsideration of the Board's decision of August 29, 2006, as required under Section 56(1) of the *Workers Compensation Act*, and that WCAT should dismiss the Worker's Appeal on that basis and that the Worker's Appeal on the merits should not be heard or considered by WCAT.

### **ISSUE**

13. Was the IRO decision dated October 25, 2007, not to reconsider a decision of the Board to close the Worker's claim file and terminate his benefits effective September 27, 2006, appropriate?

### **LEGISLATION AND WCB POLICIES**

14. The Board is bound by the *Workers Compensation Act* (the *Act*) and Board Policy.
15. WCAT is also bound by the *Act* and Board Policy unless ultra vires (pursuant to Section 56.(17) of the *Act*).

### **REGARDING INTERNAL RECONSIDERATION:**

16. Section 56.(1) of the *Act* reads:

*56.(1) The Board shall not reconsider a decision under this Act or the prior Act made after this section comes into force, except on the written request of a person with a direct interest in the decision made not later than 90 days from the date of notification of the decision.*

17. Board Policy: POL-06-01 (Internal Reconsideration) reads in part as follows:-

*Requests for reconsideration of a decision relating to a worker's claim made by the Workers Compensation Board on or after April 1, 2002, must be made by a person with a direct interest in the decision in writing no later than ninety (90) calendar days from the date of notification of the decision, indicating the specific issues in dispute. Decisions rendered prior to April 1, 2002, are not subject to this time limit.*

*Submitting new evidence is not considered a request for reconsideration. When new evidence is given, the case is returned to the original decision maker for review.*

18. Section 56.(6) of the Act imposes limits on the jurisdiction of WCAT to entertain appeals from Board decisions. It reads:

*56.(6) Following reconsideration, a person who has a direct interest in the matter may, in writing, appeal the decision to the Appeal Tribunal.*

### **ANALYSIS AND DECISION**

19. The Judgment by the Supreme Court of Canada in the case of Union Carbide Canada Ltd. v. Weller (1968) 70DLR (2D)(333) makes it clear that WCAT should deal with this Appeal on a preliminary basis to decide firstly whether the decision of the IRO dated October 25, 2007, based on mandatory time limits was appropriate before entertaining consideration of the Worker's Appeal on the merits.
20. Section 56.(1) of the Act strictly limits the Board's reconsideration power in terms of time, i.e. stating that the Board shall not reconsider a decision under this Act.... except on the written request of a person... not later than 90 days from the date of notification of the decision.

21. I refer to the following passage from Sullivan and Dreidger on the Construction of Statutes at p. 60:

59. *Sullivan and Dridger on the Construction of Statutes, 4<sup>th</sup> ed. at p. 60 distinguishes “mandatory” and “directory” by whether the statute specifies the consequences of non-compliance.*

*When “shall” and “must” are used in legislation to create a prohibition, they leave the persons to which they apply no choice. Furthermore, the consequences of breaching the prohibition are clearly set out in the legislation, either in the Act itself or in a proposition like s. 34 of the Federal Interpretation Act which makes the provisions of the Criminal Code relating to offences applicable to all offences created by an enactment except to the extent that the enactment otherwise provides.*

*When “shall” and “must” are used in legislation to impose an obligation or create a prohibition or requirement, they are always imperative. A person who “shall” or “must” do something has no discretion to decide whether or not to do it. A person prohibited from doing something is equally devoid of lawful choice. The issue that arises in connection with “shall” and “must” is not whether they are imperative, but the consequences that flow from a failure to comply. In some legislation, the consequences of failing to do what one is obliged to do (or not do) are clearly set out, but in other context the legislation is silent and it is left to the Courts to determine whether non-compliance can be cured.*

*If breaching an obligation or requirement imposed by “shall” entails a nullity, the provision is said to be mandatory; if the breach can be fixed or disregarded, the provision is said to be directory. The term “directory” is unfortunate insofar as it implies that “shall” is sometimes not imperative, that it sometimes has the force of a mere suggestion. The confusion is compounded when “mandatory” and “imperative” are used interchangeably; that is, when “mandatory” is used to indicate that a provision is binding or “imperative” is used to indicate that nullity is the consequence of the breach. Strictly speaking, “shall” and “must” are always imperative (binding); neither ever confers discretion. The mandatory - directory distinction merely reflects the fact there is more than one way to enforce an obligation.*

22. I also refer to the case of *Ballum v. Workers Compensation Board (PEI)* 2002 PESCAD 19. There the worker applied to extend the time for filing of the

Notice of Appeal. Mitchell, C.J.P.E.I., dismissed the worker's application, holding that the prescribed time limit under the *Act* was expressed in mandatory terms and was intended to be strictly limited. In the course of his decision, Mitchell, C.J.P.E.I. stressed that the time limits in the *Act* are to be strictly followed:

*The time limit in the statute is prescribed in mandatory terms and the Act, unlike the Rules of Civil Procedure, do not contain a provision for extending the time period. Subsection 25(3) of the Supreme Court Act indicates there is no authority to make Rules of Court that conflict with a statute.*

*Appeals are entirely creatures of statute. Appellate rights are limited by the terms of the granting statute. The right of appeal under the Act is contained in Section 32 and is obviously intended to be strictly limited.*

23. Section 56.(1) of the *Act* unequivocally states the consequence of being beyond the 90-day time limit - in short, the Board shall not reconsider the decision in issue. Under Section 56.(1) of the *Act* the Board has no power or authority to entertain a request for reconsideration made by the worker beyond that time limit and WCAT has no authority or jurisdiction to order an extension of time beyond the 90-day mandatory time limit.
24. This panel therefore shall allow the Board's Preliminary Objection to Appeal finding that the Worker's Notice of Request for Internal Reconsideration of the Board's decision of August 29, 2006 was out of time and could not be



reconsidered by the IRO and that WCAT has no power to extend the time.  
Since this ends the matter the Worker's Appeal is hereby dismissed.

Dated this 18<sup>th</sup> day of February, 2009.

---

John L. Ramsay, Q.C., Vice-Chair  
Workers Compensation Appeal Tribunal

Concurred:

---

Harvey MacKinnon, Employer Representative

---

Gary Paynter, Worker Representative