WSIAT
DECISION NO. 2264/19R

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INTRODUCTION

- A worker requested reconsideration of WSIAT *Decision No. 2264/19.*
  - The worker sustained injuries as a result of a compensable motor vehicle accident in 1995.
  - Among other things, the worker was granted entitlement to wage loss benefits on the basis that he was unemployable as a result of the accident.
  - *Decision No. 2264/19* considered the worker's appeal with respect to the calculation of his wage loss benefits.
  - *Decision No. 2264/19* granted the worker's appeal, in part.
- The worker was self-represented. The employer was not participating.
- Reconsideration was requested on the basis that *Decision No. 2264/19* erred in law, and that new evidence was available.

WSIAT'S RECONSIDERATION PROCESS

- The *Workplace Safety and Insurance Act* ("*WSIA*") provides that WSIAT decisions are final (s. 123).
- However, s. 129 of the *WSIA* states that the WSIAT may reconsider its decisions "at any time if it considers advisable to do so".
- Due to the need for finality in the appeal process, the WSIAT has developed a high standard for review which it applies when reconsidering a decision.

- As outlined in the Tribunal's Practice Direction: *Reconsiderations*, reconsideration is a two-step process:
  1. The WSIAT first decides whether it is advisable to reconsider the decision. This is called the "threshold test".
  2. If the threshold test is met, the WSIAT must decide whether the decision should be changed and, if so, how it should be changed. This is a decision on the merits.

RECONSIDERATION THRESHOLD TEST

- The “threshold test” asks two questions:

  1. Is there a significant defect in the administrative process or content of the decision which, if corrected, would probably change the result of the original decision?
  2. If there is, does this outweigh the public interest that decisions be final and the prejudice to any party of reconsidering a decision?

- The Divisional Court has upheld the WSIAT’s reconsideration process in *Gowling v Ontario Workplace Safety and Insurance Appeals Tribunal,* [2004] O.J.919 (div Ct). The Court found that:

  > “because a reconsideration is distinct from an appeal, a high threshold test is required to balance the interests of the Tribunal and other parties”

HOW IS “NEW EVIDENCE” TREATED IN A RECONSIDERATION?

- The onus is on the Applicant to demonstrate that the new evidence would, on a balance of probabilities, have been sufficiently persuasive or “substantial” to effectively outweigh all of the evidence which led to the original finding.

- In determining whether new evidence is “significant new evidence” that makes it advisable to reconsider the original decision, WSIAT case law draws a distinction between “new evidence” and “more evidence on the same issue”.

- Where the evidence submitted at the reconsideration was available prior to the completion of the original hearing, the diligence of the party will be considered.

THE DECISION

- Although the new evidence could have be excluded on the basis of "more evidence on the same issue" and the worker could have provided it at the time of his appeal, the Vice-Chair determined that it was not appropriate to adopt this strict approach.

- The Vice-Chair considered the worker's self-represented status.

  [22] "Appellants are rightly expected to argue *all* potential and alternative positions with respect to the issues on appeal; reconsiderations are not an opportunity to explore alternative arguments that could have been presented in the first instance.

  [23] However, it would be unfair to hold this worker to such a standard. The worker is unrepresented, the issue involves legislative interpretation, and he is in receipt of a significant permanent impairment, as evidenced by the 72% NEL award. In my view, to refuse to consider the new evidence on the basis that the worker could have provided it on appeal is at odds with the Tribunal's goals of providing access to justice in a less formal process than that of the courts."

- The Vice-Chair accepted and considered the new evidence provided by the worker, but decided that the WSIAT's threshold test for granting a reconsideration had not been met.

TAKEAWAYS

- In certain circumstances, it may be suitable to adopt a more lenient approach when dealing with self-represented parties.
- Access to justice means ensuring that legal processes are accessible and responsive to the needs of individuals, and the complexity of the issues at hand.
- The Canadian Judicial Council Statement of Principles for Self-represented Litigants and Accused Persons, which emphasizes ensuring access to justice for those without legal representation, was endorsed by the WSIAT (See *Decision Nos. 1318/13R*, *1829/21R* and *1073/20R*).

THANK YOU!