

on the merits, is final and conclusive and is not open to question or review in any court [s. 255(1)]. There are two grounds on which a WCAT decision may be further considered or reconsidered.

A party to a completed appeal may apply to the chair for reconsideration of a decision if new evidence has become available or been discovered. The chair may refer the decision for reconsideration if the chair is satisfied that the new evidence [s. 256(3)(a) and (b)]:

- (a) is substantial and material to the decision, and
- (b) did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

A party to a completed appeal may apply for reconsideration of a decision on the basis of new evidence on one occasion only [s. 256(4)].

15.24 Reconsideration on Common Law Grounds

WCAT may set aside one of its decisions on the basis of certain common law grounds or principles. These consist of fraud or an error of law "going to jurisdiction" (including a breach of the rules of natural justice). ~~WCAT also has jurisdiction to consider an application to set aside an Appeal Division decision on common law grounds (see WCAT 2004-04928).~~^{*} Where an applicant is successful in impugning a WCAT decision, WCAT has a responsibility to complete its task of providing a valid decision.

Section 253.1(5) states that provisions regarding amendment of errors or for clarification do not limit WCAT's ability to cure a jurisdictional defect on the request of a party.

A tribunal's authority at common law to set aside its own decision (and to then address the matter anew) on the basis of an error of law going to jurisdiction, was confirmed in a decision of the British Columbia Supreme Court in *Atchison v. WCB*, 2001 BCSC 1661. The Court rejected the argument that the Appeal Division's authority to review its own decisions was limited to the new evidence grounds of section 96.1. Mr. Justice Vickers reasoned:

[18] There is no doubt the courts have the power of review. However, this does not mean that administrative tribunals lack the power to reconsider a decision, particularly where the decision is made without jurisdiction. The doctrine of *functus officio* applies to administrative tribunals based, however, "on the policy ground which favours finality of proceedings, rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal." *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at 849. The application of the principle is more flexible and tribunals are able to reopen decisions in order to discharge the function committed to them by

* Amended effective February 13, 2008. See WCAT-2008-00457.

the enabling legislation. **In particular, where a tribunal has made an error of jurisdiction, it is entitled to correct such an error:** *Chandler, supra*; *Right to Rediscover [sic] Appeal Division Decisions* (1993), 10 W.C.[R]. 127 (A.D.); *Re Trizak Equities Ltd. v. Area Assessor Burnaby New Westminster* (1983) 147 D.L.R. (3d) 637 (B.C.S.C.).

[emphasis added]

An appeal from this decision was denied by the British Columbia Court of Appeal on August 27, 2003 (*Powell Estate v. Workers' Compensation Board*, 2003 BCCA 470). The BCCA reasoned:

[17] The first question is whether a panel of the Appeal Division has jurisdiction to determine that a decision of another panel of the Appeal Division was a nullity as being made beyond its jurisdiction: *Chandler v. Alta. Assoc. of Architects*, [1989] 2 S.C.R. 848, citing with approval *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637 (B.C.S.C.).

[18] On those authorities, the answer must be, in my view, as found by Mr. Justice Vickers. The Appeal Division was able to reconsider the matter and correct its own jurisdictional error.

An application for reconsideration should be made in writing and addressed to the tribunal counsel office.

The authority to consider an application on common law grounds is discretionary in nature. WCAT will hear an application for reconsideration on the basis of common law grounds on one occasion only. WCAT will not hear a further application for reconsideration of a WCAT decision provided in response to an application for reconsideration on common law grounds, unless a new breach of natural justice is alleged in relation to the second decision.

An application on the basis of common law grounds concerns the validity of the initial decision. Accordingly, such applications are often made soon after the decision. However, new evidence to support an application under section 256 may not arise until a few years after the decision. For that reason, separate applications may be made on the basis of common law grounds, or on the basis of new evidence under section 256, but each type of application is limited to one occasion only. Parties may seek reconsideration on both grounds at the same time.

WCAT will apply the same standards of review to reconsiderations on common law grounds as will be applied by the court on judicial review (see item 15.32).