

# Applications for Reconsideration – WCAT Information Sheet

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## 1. Introduction

WCAT decisions are “final and conclusive”, but are subject to reconsideration based on two limited grounds:

- statutory grounds - new evidence not previously available (see items 9 and 10)
- common law grounds - an error of law going to jurisdiction (see item 11)

## 2. How to apply

Parties applying for reconsideration must write to Tribunal Counsel Office, and must explain the specific grounds for reconsideration.

## 3. Preliminary review

Tribunal Counsel Office will conduct a preliminary review of a party's objection to a WCAT decision. If the objection sets out potential grounds for reconsideration, WCAT will advise the applicant that the reconsideration will proceed. The Registry will then process the application and will invite written submissions from the parties. Once submissions are complete, the matter will be assigned to a WCAT panel for a formal decision about whether there are grounds for reconsideration.

If the objection does not appear to set out potential grounds for reconsideration, Tribunal Counsel staff will provide the applicant with information about the grounds for reconsideration and will advise them of the procedure for applying. A written objection that does not appear to set out potential grounds for reconsideration will not be forwarded to the Registry for further handling.

## 4. Time limit

There is no time limit for applying for reconsideration.

## 5. Which decisions can be reconsidered

WCAT has the authority to reconsider WCAT decisions on both common law and statutory grounds. WCAT also has the authority to reconsider decisions by the former Appeal Division on statutory grounds. WCAT does not have the authority to reconsider Appeal Division decisions on common law grounds.<sup>1</sup>

WCAT does not have the authority to reconsider decisions of the former Review Board or the current Review Division. Objections to Review Board and Review Division decisions will be treated as appeals, or applications for extensions of time to appeal.

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<sup>1</sup> See WCAT-2008-00457.

## **6. Two-stage process**

Applications for reconsideration involve a two-stage process. The first stage results in a formal written decision, issued by a WCAT panel, about whether there are grounds for reconsideration. This decision is made based on written submissions only. If the panel concludes that there are no grounds for reconsideration, WCAT will take no further action on the matter.

If a panel decides that there are common law grounds for reconsideration, then the original decision will be found void, in whole or in part, and the application will proceed to the second stage in which a WCAT panel will hear the appeal afresh. WCAT will decide whether the second stage will be conducted by oral hearing or written submissions. WCAT will invite respondents to participate in both stages of the reconsideration process.

If a panel decides that there are “new evidence” grounds for reconsideration, then the application will proceed to the second stage in which a WCAT panel will reconsider the previous decision on the basis of the new evidence. As with common law reconsiderations, WCAT will decide how the second stage will be conducted and will invite respondents to participate.

## **7. One time only**

It is important not to apply for reconsideration until you are ready to proceed as a party may apply for reconsideration on each ground once only. Parties may apply on each ground separately or on both grounds at the same time.

Where a party appealed more than one decision, and WCAT administratively joined the appeals such that WCAT only issued one decision, the party may bring separate reconsideration applications pertaining to each appeal on the basis of new evidence on separate occasions. However, where the new evidence is relevant to more than one of the joined appeals, the party must bring the reconsideration applications at the same time.

WCAT will consider a second reconsideration, on common law grounds only, where a party is alleging a new breach of natural justice related to the previous reconsideration.

## **8. Time frame for decision**

There is no statutory time frame for WCAT to issue its decisions concerning whether there are grounds for reconsideration (the first stage). If grounds are established, WCAT will apply a 180-day time frame to its decision on the merits (the second stage).

## **9. Reconsideration based on new evidence**

Section 256(3) of the *Workers Compensation Act* (Act) allows for reconsideration of a decision based on evidence which:

- (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.

## 10. If you apply for reconsideration based on new evidence, you must explain:

- why the new evidence is *substantial* (has weight and supports a different conclusion),
- how it is *material* (is relevant to the decision),
- whether or not the evidence previously existed, and
- if it did exist previously, why you did not discover (and submit) it at the time of the original hearing despite reasonable diligence.

You will not be able to re-apply based on any new evidence which might become available in the future.

## 11. Reconsideration on common law grounds

Section 58 of the *Administrative Tribunals Act* sets out the common law grounds on which WCAT may reconsider its decisions.

There are three main types of errors of law going to jurisdiction:

- Breaches of the rules of “natural justice”;
- Errors of law with respect to jurisdiction;
- Patently unreasonable errors of fact, law or exercise of discretion that do not involve jurisdiction.

The rules of “natural justice” refer to fair procedures. For example, it would be a breach of natural justice if WCAT failed to:

- invite the respondent to participate,
- notify a participating party of an oral hearing,
- disclose relevant new evidence which WCAT obtained, or
- consider a timely submission from a party.

WCAT must correctly apply and interpret statutory provisions related to its jurisdiction. This means that WCAT must not do something which it does not have the statutory authority or power to do. A jurisdictional error will be grounds for reconsideration

In deciding whether there is an error of law going to jurisdiction regarding findings of fact, law, or the exercise of discretion, the test is whether the finding was “patently unreasonable”. Decisions will not be set aside simply because they contain an error of fact, law, or the exercise of discretion, or because they are incomplete in some respect. In most cases, an error of law going to jurisdiction will not be established based on the way a panel has weighed the evidence, even if another panel would have reached a different conclusion. The error must be one that is “patently unreasonable” or not capable of being rationally supported. Examples of patently unreasonable findings of fact would be findings based on no evidence, or the rejection of undisputed evidence without explanation.

In deciding whether an exercise of discretion is patently unreasonable, WCAT will consider whether the discretion has been exercised arbitrarily or in bad faith, for an improper purpose, based entirely or predominantly on irrelevant factors, or fails to take statutory requirements into account.

If WCAT concludes that there are common law grounds for reconsideration, the original decision will be found void, in whole or in part, and a WCAT panel will hear the appeal afresh.

## **12. Missed issue**

If the WCAT panel did not address an issue raised by the appeal, it may be appropriate to return the matter to the same panel to complete its decision. This does not mean that WCAT decisions must address every argument raised by the parties.

## **13. Judicial review**

A party may apply for judicial review of a WCAT decision by the British Columbia Supreme Court (BCSC) within 60 days of the date on which a decision is issued. Under certain circumstances, the court may extend the time for applying.

Judicial review is not an appeal and will be granted only in limited circumstances. You may wish to contact a lawyer if you have any questions regarding the judicial review process.

A Judicial Review FAQ, which provides general information about judicial reviews of WCAT decisions, is accessible online at [www.wcat.bc.ca](http://www.wcat.bc.ca), under “research”.

## **14. Reconsideration and Judicial Review**

A party may apply for reconsideration as well as a judicial review of the same decision. In that case, WCAT will provide the reconsideration panel with the judicial review petition and related documents. The panel will consider the portions of those documents which are relevant to the reconsideration application.

## **15. Law, policy and decisions on reconsiderations**

WCAT's *Manual of Rules of Practice and Procedure* is accessible online at [www.wcat.bc.ca](http://www.wcat.bc.ca), under “publications”. Items #15.00 to #15.32 concern the reconsideration process.

WCAT's decisions are accessible at the same website under “research”. If you want to view previous WCAT decisions made on applications for reconsideration, you can select “reconsideration grounds”, under “type of decision”. Examples include #2003-01116, #2003-01120 and #2004-01313.

Decisions by the former Appeal Division are also accessible on the Board's website at: [www.worksafebc.com](http://www.worksafebc.com). Similar grounds applied to reconsideration by the Appeal Division.

## 16. Recent developments affecting standard of review

In *Dunsmuir v. New Brunswick*<sup>2</sup> (*Dunsmuir*), the Supreme Court of Canada held that there are only two standards of review at common law: correctness and reasonableness.<sup>3</sup> This raised a question as to whether the standard of patent unreasonableness continues to apply under the *Administrative Tribunals Act* (ATA), in relation to WCAT findings of fact or law. (This did not affect the consideration of issues involving the adequacy of reasons or procedural fairness and natural justice).

Some court decisions found that the three standards in the ATA, including patent unreasonableness, continue to apply in British Columbia.<sup>4</sup> Others held that “reasonableness” now applied to findings of fact and law.<sup>5</sup>

In *Tallarico v. Workers’ Compensation Appeal Tribunal*, 2009 BCSC 49, January 22, 2009, the BCSC found that it is now settled law (subject to any different decision by a higher court) that the three standards of review set out in section 58 of the ATA continue to apply in British Columbia despite *Dunsmuir*. In *Asquini v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2009 BCSC 62, January 23, 2009, the BCSC found that the standards of review in section 58 of the ATA are constitutionally valid and are not affected by *Dunsmuir*.

It remains open to parties to provide submissions regarding the applicable standard of review, and how the reconsideration application should be determined under the applicable standard.

This information sheet will be updated and a message will be posted on the “what’s new” section of the WCAT website, should a future court decision provide additional guidance on this issue.

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<sup>2</sup> [2008] S.C.J. No. 9, 2008 SCC 9, March 7, 2008.

<sup>3</sup> At para. 47 of *Dunsmuir*, the majority stated: “In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

<sup>4</sup> *Carter v. Travelex Canada Limited*, 2008 BCSC 405, *D. & A. Investments. Inc. v. Hawley*, 2008 BCSC 937, *Evans v. University of British Columbia*, 2008 BCSC 1026, *Lavigne v. British Columbia (Workers Compensation Review Board)*, 2008 BCSC 1107.

<sup>5</sup> *Howe v. 3770010 Canada Inc.*, 2008 BCSC 330; *British Columbia Securities Commission v. Burke*, 2008 BCSC 1244.