

Application for Reconsideration — WCAT Information Sheet

1. Introduction

WCAT decisions are “final and conclusive”, but are subject to reconsideration on limited grounds. This sheet contains general information about the process for requesting reconsideration of a Workers’ Compensation Appeal Tribunal (WCAT) decision. This may include a request:

- for reconsideration on the basis of new evidence;
- that the WCAT decision be set aside or voided and that the appeal be assigned to a new panel to be considered afresh; or,
- that the WCAT decision be returned to the original panel to address a missed issue.

An application for reconsideration must be sent in writing, addressed to WCAT Tribunal Counsel Office. If WCAT receives objections in writing from a party concerning the WCAT decision, these are reviewed to determine whether they should be processed as a reconsideration application. Such objections will not be received by telephone.

If evidence or argument has been provided which appears to correspond to the requirements for obtaining reconsideration, the application will be referred by Tribunal Counsel Office to the Registry staff for further handling of submissions. If the expressed concern does not fit within a possible ground for obtaining reconsideration, the applicant will be advised of this and will be provided with information concerning the grounds for seeking reconsideration. The application will not be forwarded to the Registry for further handling unless it raises a possible ground for requesting reconsideration.

2. Time Limit

There is no time limit for making an application for reconsideration.

3. What Decisions can be Reconsidered

WCAT has authority to reconsider a WCAT decision. WCAT also has authority to reconsider an Appeal Division decision on the basis of new evidence (section 256(1)(b)). (It has not yet been determined whether WCAT has authority to reconsider an Appeal Division decision on the common law grounds). WCAT does not have authority to reconsider decisions by the former Review Board or the current Review Division — objections to those decisions will be treated as appeals, or applications for an extension of time to appeal. WCAT does not have authority to reconsider decisions of the former commissioners of the WCB (dated prior to June 3, 1991).

4. Two Stage Process

Applications for reconsideration involve a two stage process. The 1st stage involves a decision about whether there are grounds for reconsideration. This decision is made based on written submissions only. If there are no grounds for reconsideration, WCAT will take no further action on the matter.

If a panel decides that there are grounds for reconsideration, then the application will proceed to the 2nd stage to deal with the merits. WCAT will decide whether this stage will be decided by oral hearing or written submissions.

Respondents will be invited to participate in both stages of the reconsideration process.

5. One Time Only

A party may apply for reconsideration based on new evidence on one occasion only [see section 256(4) of the *Workers Compensation Act* (the Act)]. Therefore, it is important not to apply for reconsideration until you are certain you have all the new evidence you wish to have considered.

Similarly, WCAT will hear an application for reconsideration on the basis of the common law grounds on one occasion only (see MRPP item 15.24). WCAT will not hear a further application for reconsideration of a WCAT decision provided in response to an application for reconsideration on the common law grounds, unless a new breach of natural justice is alleged in relation to the second decision.

Separate applications may be made on the basis of the common law grounds, or on the basis of new evidence under s. 256, but each type of application is limited to one occasion only. It is open to a party to seek reconsideration on both grounds at the same time.

6. Time Frame for Decision

There is no statutory time frame for WCAT to decide whether there are grounds for reconsideration (the 1st stage). If grounds for reconsideration are established, WCAT will apply a 180 day time frame to its consideration of the merits (the 2nd stage).

7. Grounds for Reconsideration

You may apply for reconsideration either on the basis of new evidence, or on the basis of the common law grounds, or on both grounds.

8. New Evidence

Section 256(3) of the Act states:

. . . the chair may refer the decision to the appeal tribunal for reconsideration if the chair is satisfied that the evidence referred to in the application

- (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.

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 the evidence previously existed or not, and
- if it did exist previously, why you did not discover (and submit) it at the time of the original hearing.

9. Common Law Grounds

WCAT decisions are intended to be “final and conclusive” (section 255). However, WCAT has limited authority to reconsider its decisions where there was an error of law going to jurisdiction. A party may apply for judicial review of a WCAT decision in the Supreme Court of British Columbia on this ground.

An error of law going to jurisdiction includes a breach of “natural justice” which refers 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 new evidence which WCAT obtained, or,
- consider a submission from a party, even though it was received by WCAT in the time provided.

In deciding whether there is an error of law going to jurisdiction, the test is whether the decision was “patently unreasonable”. Decisions will not be set aside simply because they contain an error of fact or law, or 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. This is the case even if another

panel would have reached a different conclusion. However, there are some situations in which the way the evidence is dealt with will constitute an error of law going to jurisdiction (e.g. if important evidence has been disregarded, uncontradicted material evidence has been rejected without explanation, or an important finding of fact is not supported by any evidence).

10. 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.

11. Additional Information

WCAT's *Manual of Rules, Practices and Procedures* is accessible online at www.wcat.bc.ca, under "publications". Items #15.00 to #15.24 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.worksafefbc.com. Similar grounds applied to reconsideration by the Appeal Division. Attached is a list of some decisions by the Appeal Division concerning applications for reconsideration, with selected quotes from these decisions. These decisions have all been published in the *Workers' Compensation Reporter*.

A. New Evidence

#91-0724, 7 WCR 145 (at pages 148-149)

I find, first of all, that the test of "due diligence" applies to the person requesting reconsideration rather than to the decision-maker. The most reasonable interpretation of section 96.1 is that it constitutes a bar to reconsideration to an applicant, where the basis for their request is that the prior Commissioners or the Appeal Division did not consider evidence which the applicant could through the exercise of due diligence have obtained and submitted prior to the making of the impugned decision. The effect of this provision is to place some onus on an appellant for ensuring that the Appeal Division is in possession of the information necessary to the proper consideration of their appeal in the first instance. While the Appeal Division functions on an inquiry basis, and may itself

seek out additional information, an appellant should be aware of the ramifications of section 96.1 if they proceed with their appeal without taking reasonable steps to ensure that the evidence on file is complete.

It is important to note, however, that the test of "due diligence" includes a concept of reasonableness as to the nature and scope of the inquiries an appellant is expected to have pursued. The fact that information previously existed and could have been obtained upon inquiry is not conclusive as to whether it could through the exercise of "due diligence" have been discovered. The circumstances of the particular case must also be considered, with regard to the extent of the inquiries which due diligence would have required.

The question is not simply whether the appellant could have obtained the particular information if they had made diligent inquiries for the purpose of obtaining it. The requirement of "due diligence" is more properly interpreted as referring to the degree of care which a prudent and reasonable appellant would have exercised in ensuring that the Appeal Division had all relevant information necessary to the proper consideration of their appeal. If, for example, certain information existed, but it was not reasonably foreseeable that it would be germane to the Appeal Division's consideration, "due diligence" would not have required the appellant to search it out. To interpret the requirement of "due diligence" otherwise would be to create an artificial and unrealistic legal barrier to reconsideration which, in my view, was not intended by the statute. The requirements of section 96.1 of the Act must be interpreted in a fair and meaningful fashion, with regard to the realities of the appeal process.

B. Error of Law going to Jurisdiction, including a breach of natural justice

#95-0257, 11 WCR 307 (at page 313)

While the employer's representative submits that the appeal division involves an error of law, he has provided no comments as to whether this alleged error, if such exists, is one "going to jurisdiction". For the reasons expressed in Decision #93-0740 [10 WCR 127], at pages 130-131, the appeal division has no authority to reconsider one of its decisions on the basis of an "error of law" unless this is one which goes to jurisdiction. Even if, for example, the chief appeal commissioner were to disagree with a panel's interpretation of law or policy, this would not provide grounds for

reconsideration of the appeal division decision. In order to conclude that a decision involved an error of law going to jurisdiction, it would be necessary to find that the panel had exceeded its jurisdiction, or made a patently unreasonable decision.

#97-0050, 14 WCR 23 (at pages 23-24)

The worker's advisor argues that the impugned decision contains "an error of law". A mere error of law is not a sufficient ground to set aside an appeal division decision. The error must amount to an "error of law going to jurisdiction". What constitutes an "error of law going to jurisdiction"? A breach of the rules of natural justice is generally characterized as "an error of law going to jurisdiction". A wrong interpretation or application of a "jurisdictional" provision (such as a provision that defines the scope of a tribunal's powers or a provision that relates to access to a tribunal) is an "error of law going to jurisdiction"; a tribunal must be right when it interprets or applies a "jurisdictional" provision. A wrong interpretation or application of any other type of provision does not constitute, however, an "error of law going to jurisdiction". Where a tribunal is protected by a privative clause, decisions on points of law within the tribunal's expertise may not be reconsidered, unless they involve a patently unreasonable interpretation or application of a statutory provision. An interpretation that has some logical basis and is at all viable, in light of the wording of the legislation, may not be set aside. In other words, the "error of law" test for setting aside an appeal division decision is very strict. As explained in Decision #93-0740, a strict test is in keeping with the statutory scheme contemplated by the Act.

For the impugned decision to be set aside, it must be shown, therefore, either that it involves a wrong interpretation or application of a jurisdictional provision or some analogous error or that it involves a patently unreasonable interpretation or application of a provision within the tribunal's expertise.

#97-0510, 14 WCR 55 (at page 56)

A patently unreasonable application (or interpretation) of the Act would amount to an "error of law going to jurisdiction". The phrase "patently unreasonable" indicates the degree of magnitude of the error before a decision may be set aside. An application (or interpretation) of a statutory provision is not patently unreasonable simply because there are other possible applications (or interpretations). It is "patently unreasonable", if it is not viable, in light of the legislative text and intent.

The test for setting aside appeal division decision is strict because these decisions are protected by a privative clause. According to s. 96.1 of the Act, they are “final and conclusive”. To set aside a decision on the basis that there is a preferable application of a statutory provision than the decision’s own application of the provision would undermine the finality of appeal division decisions as entrenched in the legislation. So would setting aside a decision on the basis that, although viable, its application of a statutory provision is wrong. In other words, I am not at liberty to set aside a decision simply because I disagree with the panel’s conclusion or because the conclusion is wrong. If, in light of the Act, the conclusion is viable, the decision must be respected.

#97-1032, 14 WCR 93 (at page 95)

In neglecting to address an issue that was before it and within its jurisdiction, the appeal division panel could be said to have committed an “error of law going to jurisdiction”. However, the remedy for that type of error is not to invalidate the whole of the decision. The remedy is to remit the missed issue to the panel. Remitting a missed issue to a panel so as to permit it to complete its consideration of the appeal before it will generally have no effect on issues already decided by the panel.

#2001-1794, 17 WCR 453 (at page 462)

A final matter is whether a reconsideration application will be allowed solely on the grounds that the decision is too short. This might be the grounds advanced for the application but the issue is more accurately described as whether the decision provides adequate reasons. Sometimes a short decision will be adequate. This point was made in decision #97-0083 (14 WCR 37);

An appeal division panel need not acknowledge and address in its decision every point raised by an appellant or an affected party to an appeal. The failure to acknowledge and address every point raised will certainly not constitute a breach of the rules of natural justice.

In my view, where there is an opportunity to write a short and clear decision this should be done. The authorities support this approach and there are also policy reasons for doing it. There are finite resources in all tribunals and the task is to allocate resources to decision making in a way that is proportionate to the complexity of appeals. Writing shorter decisions when they are appropriate assists in obtaining clarity in decision making and it ensures that valuable resources can be assigned to the more complex appeals.

Every appeal is important to the appeal division but not all appeals require the same allocation of resources.

. . .

I am satisfied that the decision of the previous appeal division panel was entirely adequate to the circumstances of the case. It was brief but it addressed the substance of the appeal before the panel and it acknowledged the position put forward on behalf of the employer.