

As of October 6, 2014, this decision is no longer considered by WCAT to be noteworthy.

This decision has been published in the *Workers' Compensation Reporter*:
21 WCR 111, #2004-05728, Reconsideration Grounds - Failure to Consider
Argument Made by a Party

WCAT Decision Number : WCAT-2004-05728
WCAT Decision Date: October 29, 2004
Panel: Herb Morton, Vice Chair

Introduction

The worker requests that Workers' Compensation Appeal Tribunal (WCAT) *Decision #2003-00361-RB*, dated May 1, 2003, be set aside on the basis of a breach of natural justice. The worker submits that the WCAT panel erred, in making a decision concerning the cause of his right arm complaints in April 2001 (i.e. as to whether this should be adjudicated as a reopening of his compensable right arm injury of January 10, 2001 or as a new claim). The worker submits the WCAT panel erred by failing to take into account the evidence regarding his December 1993 left elbow epicondylitis claim, and reopening in 1994 (for a cortisone injection) and 1995 (for wage loss benefits). The worker's left elbow problems were adjudicated by the Board under a 1994 claim, which was not mentioned in the WCAT decision. Although the 1994 and 2001 claims involved opposite arms, the worker's argument was that the WCAT panel should apply the same approach as was applied in the appellate decisions under his 1994 claim. The worker describes the former appellate decisions as "my precedent".

The employer is not participating in this application, although invited to do so. The worker had provided written submissions.

Issue(s)

Did the WCAT panel's failure to refer in its decision to an argument raised by the appellant involve a breach of natural justice with respect to his right to be heard?

Jurisdiction

WCAT uses the broad heading of "reconsideration" to encompass situations both where an applicant seeks to have a decision reconsidered on the basis of new evidence, and where an applicant seeks to have a decision set aside on the basis of the common law ground of an error of law going to jurisdiction. WCAT's authority to reconsider on the basis of new evidence is defined by section 256 of the *Workers Compensation Act* (Act). WCAT also has authority to "reconsider" (i.e. to set aside or void one of its decisions) on the common law ground of an error of law going

to jurisdiction, including a breach of natural justice. These grounds are described at items #15.20 to #15.24 of WCAT's *Manual of Rules, Practices and Procedures* (MRPP), accessible on WCAT's website at: <http://www.wcat.bc.ca/publications/toc.htm>. A tribunal's common law authority to set aside one of its decisions on the basis of jurisdictional error was confirmed by the British Columbia Court of Appeal in the August 27, 2003 decision in *Powell Estate v. Workers' Compensation Board*, (2003) BCCA 470, [2003] B.C.J. No. 1985, (2003) 186 B.C.A.C. 83.

This matter has been assigned to me by the WCAT chair for consideration under a written delegation of authority.

Standard of Review

Section 255(1) of the Act provides that a WCAT decision is final and conclusive and is not open to question or review in any court. In keeping with the legislative intent that WCAT decisions be final, they may not be reconsidered except on the basis of new evidence as set out in section 256 of the Act or on the basis of the common law ground of an error of law going to jurisdiction. The question as to whether a decision involved an error of law going to jurisdiction generally requires application of the "patently unreasonable" standard of review. On a jurisdictional issue, however, with respect to whether the tribunal had authority to do the act, the decision must be correct. On a natural justice issue, the question to be addressed is whether the procedures followed by WCAT were fair (see *WCAT Decision #2004-03571*).

Analysis

WCAT is subject to a statutory requirement to provide written reasons for a decision. Section 253(3) of the Act provides:

The appeal tribunal's final decision on an appeal must be made in writing with reasons.

The worker's application for reconsideration raises two related concerns. The first relates to the appellant's right to be heard. The second relates to the adequacy of the reasons provided for the panel for its decision. There is a connection between these two concerns, as to whether a failure to provide reasons with respect to an argument raised by an appellant amounts to a breach of natural justice with respect to the appellant's right to be heard.

These questions were addressed in two published decisions of the former Appeal Division. Published Appeal Division and WCAT decisions are accessible at: http://www.worksafebc.com/publications/wc_reporter/default.asp. Those decisions provide relevant background to the worker's application. In *Appeal Division Decision #97-0083*, "Reconsideration of an Appeal Division decision — natural justice — the right

to be heard”, 14 WCR 37, the panel considered a situation in which the panel did not address a central argument raised by the appellant, in the panel’s reasons for its decision. The Appeal Division panel reasoned (at page 44):

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 the case before me though the panel did not simply omit to acknowledge and address every point raised by the employer. The panel’s omissions were of a more serious nature. The employer had requested that the appeal proceed by way of an oral hearing and written submissions. The request for an oral hearing was denied. In the written submissions, the employer focused on a particular issue, namely, the occurrence of repeat violations of regulation 1.02. Evidently, the employer believed that the case turned on that issue — a belief that was arguably reinforced by the tenor of the letters and decisions from the variance and review section. Furthermore, the occurrence of repeat violations seemed central to the panel’s conclusion, as this conclusion was worded. And yet the panel did not address the employer’s arguments regarding the repeat violations — be it to dismiss them as irrelevant or reject them as unfounded. In the circumstances, I find this to have amounted to a breach of the principles of natural justice. Having denied the employer’s oral hearing request, the panel had a particular obligation to satisfy the employer that his arguments, whether or not meritorious, had been properly considered. Indeed, the panel may well have fully considered these arguments. But, according to a well-established principle of administrative law, an appearance of injustice, such as an appearance of bias, may taint a decision. In this case, bias is not the issue. Rather, the issue is whether the employer appears to have been heard. Unfortunately, on its face, the impugned decision does not convey the impression that he was heard.

The Appeal Division decision was set aside as involving an error of law going to jurisdiction, due to the breach of natural justice.

Appeal Division Decision #2001-1794, “Whether Previous Appeal Division Decision Provided Adequate Reasons”, 17 WCR 453, reviewed several administrative law texts concerning the requirement to provide reasons (at pages 458-460):

(25) Reasons, defined narrowly, can be seen as that part of the decision that sets out the basis for the finding or conclusion. However, in administrative law, the term “reasons” is usually taken to mean the entire decision. As a matter of common law a decision is expected to have adequate reasons in this broader sense because it may be necessary to

have an adequate discussion of the facts for a decision to comply with the requirements of natural justice and administrative fairness. The latter, broader definition of reasons is used in the following discussion about what constitutes good reasons,

Reasons should be just that, the explanation for the important decisions which the agency made. Good reasons do at least two things:

1. They explain how the agency reached the decision it did. To do this, as a minimum, the reasons should set out the facts, law and reasoning which formed the basis for the decision reached.
2. **They show that due regard was had to the balance of the evidence and arguments advanced by the parties. This serves to avoid claims that the agency failed to consider some relevant evidence or argument which should have been considered.**

[emphasis added]

Macauley & Sprague, *Practice before Administrative Tribunals*, (2001) page 22-74

(26) A British decision has pointed out that a decision might be “perfectly right” but it could be open to challenge if the person against whom it was made is not told why the decision was made. In a discussion of a statutory requirement for tribunals to provide reasons the court also stated that reasons must be proper, adequate, intelligible and they have to deal with the substantial points that have been raised in the case (*Re Poyser and Mills’ Arbitration* [1964] 2 Q.B. 467 at 477–78). A Canadian administrative law text is to the same effect,

Where reasons are required by law, a decision-maker must give reasons that not only contain no misstatement of the law or other legal error, but are adequate. For example, they must be “sufficiently clear, precise and intelligible” to enable the individual to know why the tribunal decided as it did. That is, the reasons must set out the chain of reasoning and the findings of fact on which the decision is based in such a way as to serve the purposes for which the reasons requirement was imposed. Thus, courts have assessed the adequacy of the reasons by asking whether, for example, the losing party was able to understand why the case was lost and to assess whether there were grounds to challenge the decision, whether the reasons enabled the reviewing body to test the

validity of the decision or to show curial deference, **and whether the reasons made it clear that the party's representations were considered**, and due weight was given to the important individual interests affected by the decision.

[emphasis added]

Brown & Evans, *Judicial Review of Administrative Action in Canada*, (1998) 12:5310

(27) Within this discussion of the broad nature of reasons and their importance lies the sub-issue of the "adequacy" or "sufficiency" or length of a decision or reasons. The subject has been considered at some length in the literature. The following quotes provide a good summary of the prevailing views,

Whether reasons are regarded as adequate will be determined in light of all the circumstances. Neither the form nor the length of the reasons is determinative. Thus, reasons that have been characterized as "terse and perfunctory," brief, skimpy, short, "manifest[ing] some deficiencies" and even "lamentably sparse," have nonetheless been held to be adequate in the circumstances. Moreover, written reasons need not be given simultaneously with an oral decision.

Brown & Evans, *supra*, page 12-66

Earlier in this chapter I referred to the "transcript" form of reasons in which every detail of the proceeding is carefully recorded in chronological order, every piece of evidence noted, every argument canvassed, and every comment, ruling, and conclusion of the decision-maker is dutifully set out. Frankly, if at all possible, I believe these types of decisions should be avoided. I recognize, however, that in proceedings where no form of record or tape recording, or transcript is kept these type of decisions may be necessary to serve as that record. Often, where an agency fails to maintain some sort of record of the proceedings, the reasons are the only way to ensure that important details of the proceeding are recorded. However, these types of reasons take a long time to write, are usually tedious to read, and sometimes end in obscuring the important with mountains of ancillary detail.

Macauley & Sprague, *supra*, page 22-74

Appeal Division Decision #2001-1794 denied the employer's application for reconsideration. The panel reasoned at paragraph 41:

It is clear from the file that the specific concerns of the employer's representative were before the Board and the medical advisor (see Memo 9, for example). The fact that the previous Appeal Division panel accepted the general statement in the June 30, 1999 as adequately dealing with these concerns — even though they were not specifically mentioned in the opinion — does not amount to an error of law going to jurisdiction or any error. "The absence of a reference to an item of evidence or an issue of fact does not mean that that bit of evidence or that issue was ignored. Far from it." (*Sangha v. Dhaliwal*, B.C.S.C., Vancouver Registry No. B952733, February 11, 1998). The employer submits that the previous panel should be held to a very high standard of specificity but this is not supported by the authorities or the particular facts of this case. I accept that the employer disagrees with the previous panel's conclusion but that does not mean the decision and reasons were inadequate. In short, the previous panel's reasons were clear, precise, intelligible and they communicated how the panel made its decision.

I agree with the reasoning set out in the two Appeal Division decisions cited above. The difficulty presented by the present application concerns the need to balance two competing considerations, namely, the statement that a failure to acknowledge and address every point raised will not constitute a breach of the rules of natural justice, and the fact that a failure to provide reasons concerning a particular argument presented by a party may give rise to a concern that the tribunal failed to consider some relevant evidence or argument which should have been considered.

The issue for my consideration is not whether the WCAT panel provided "good" reasons, in the sense of providing a well-written decision. Rather, the issue is whether the reasons provided failed to meet the minimum standard of legal adequacy, in regard to the requirements of natural justice and procedural fairness regarding the appellant's right to be heard.

The March 7, 2001 decision of the entitlement officer on this claim set out the basis on which the worker's January 10, 2001 right elbow epicondylitis claim was accepted:

As outlined by the worker, he was pulling a 220 volt cable which was woven through the ceiling joists in a house that was under contract to be demolished. He states that each time he was pulling on it, he was only getting about 6 to 7 inches through the wall and because of complaints from co-workers, that he was not pulling hard enough, he "reefed" on it and felt a sudden pain in his right elbow.

The WCAT panel gave detailed consideration to the expert opinion provided by the worker's attending physician, which supported the worker's request for reopening of his 2001 claim. The WCAT panel noted as follows, under the heading of "Background and Evidence":

In support of his appeal, the worker submitted a January 16, 2002 letter from Dr. S. Lubin. Dr. Lubin said he had first seen the worker October 12, 2000 and again on November 7, 2000 for low back problems. At that time, there were no complaints with respect to the worker's elbow. He saw the worker January 10, 2001 for right arm symptoms and diagnosed a right lateral epicondylitis resulting from an injury at work. The worker was next seen March 5, 2001, at which time the pain in right elbow was quite severe. Dr. Lubin provided a steroid injection of Depomedrol. On May 1, 2001, the worker reported improvement with the injection and noted he had returned to part-time work, progressing to full-time work, one week prior to May 1, 2001. On May 1, the worker told his doctor that "one week ago" there was increased pain with using a hammer. Dr. Lubin diagnosed a recurrent right lateral epicondylitis and recommended the worker be seen by a Board doctor. On June 12, 2001, the worker attended Dr. Lubin who noted the epicondylitis had been improving and the worker was now fit for modified part-time work. Dr. Lubin noted the worker's comment that he had attained full recovery by June 22, 2001 and declined to comment as he had not seen the worker subsequent to June 12. Dr. Lubin said, on March 5, 2001, the worker had not fully recovered and should have remained off work. With respect to the April 2001 re-injury, the doctor said he was not aware of any such injury and was of the opinion the worker's right lateral epicondylitis was persistent from January to June 2001.

Under the subsequent heading of "Reasons and Findings", the WCAT panel noted:

While Dr. Lubin may not be aware of the chainsaw fixing incident in April 2001, the worker has confirmed that something occurred during the month of April which can only be classed as a "new" injury since it was initiated by a single specific incident. A medical report dated May 1, 2001 from Dr. Lubin refers to a problem arising when the worker was using a hammer "one week ago". That same report refers to the worker as having been working part-time and "went back to full-time last week".

. . .on review of the file and the worker's various letters and submissions the following fact pattern emerges:

- On January 10, 2001 the worker sustained a compensable right forearm injury accepted by the Board as a right lateral epicondylitis.
- In spite of some confusion and negative decisions, eventually the claim was accepted and wage loss benefits were paid to March 13, 2001.
- Following termination of wage loss benefits the worker returned to work as a shake-blocker.
- This work is different employment than his work at the time of his compensable injury.
- . . .
- While engaged in the shake-blocking activity, the worker re-injured his right forearm.
- This was a specific incident with a mechanism of injury similar to the mechanism of injury which initiated this claim.

It is evident that the WCAT panel considered the expert evidence provided by Dr. Lubin, which concerned the nature and cause of the worker's right arm problems under his claim 2001 and the request for reopening. In considering that evidence, the panel made specific factual findings. The panel concluded that in April 2001, the worker was engaged in different employment from that in which he was engaged at the time of his January 10, 2001 injury. As well, the panel found that the worker re-injured his right forearm, as a result of a specific incident in the shake-blocking activity.

The worker's complaint is that the panel failed to expressly acknowledge and respond to his arguments, concerning the fact that his appeal to have a reopening of his left arm complaints under his 1994 claim had been successful. From the worker's perspective, the course of his problems regarding his left arm problems was substantially similar, and the WCAT panel should have taken guidance from the prior Review Board and Appeal Division decisions which granted the worker's request for a reopening of his claim.

I agree that it would have been desirable for the WCAT panel to expressly acknowledge and respond to the worker's arguments on this basis. This was more than an incidental reference in the worker's submissions. To the extent this involved one of the worker's central arguments, the concern that the panel failed to expressly comment on the worker's submission has some force.

At the same time, however, I note that the WCAT decision provided detailed reasons as to the basis on which it was made. The panel dealt with the substance of the worker's request that his April 2001 right arm problems be addressed by reopening of his January 10, 2001 claim rather than as involving a new injury (even if it did not expressly comment concerning the decisions made regarding his left arm claim reopening). The fact that the worker was engaged in different employment, and the fact that there was a specific incident in which the worker re-injured his right arm, were clearly identified as significant factors in the WCAT decision.

I am satisfied that the reasons provided in the WCAT decision explained how the panel reached the decision it did. The reasons set out the facts, law and reasoning which formed the basis for the decision reached. The reasons were sufficiently clear, precise and intelligible to enable the worker to know why the panel decided as it did. It is clear that due regard was had to the expert evidence provided in support of the worker's appeal. While the reasons lack express reference to the argument presented by the worker concerning the precedent provided by the appellate decisions with respect to the adjudication of his left arm problems, it is not a legal requirement that every argument be canvassed and every ruling and conclusion of the decision-maker be dutifully set out. The failure to acknowledge and address every point raised will not constitute a breach of the rules of natural justice.

It would have been preferable for the WCAT panel to address the argument raised by the worker, even if only briefly for the purpose of explaining why the panel did not consider the argument relevant or persuasive. However, in the context of the panel's reasons as a whole, I consider that it may reasonably be inferred that such was the case. The panel identified key factors on which its decision was based, which would serve to distinguish the matter before it for decision regarding the cause of the worker's right arm complaints in April 2001, from the prior decision-making regarding the reopening of the worker's 1994 claim for his left arm complaints. While there are some apparent similarities between these two situations, there are also significant differences which are readily apparent from the reasons provided in the WCAT decision.

Upon consideration of the foregoing, I am not persuaded that the failure by the WCAT panel to expressly comment concerning the argument raised by the worker, regarding the precedent provided by the decisions concerning the reopening of his 1994 claim for his left arm problems, involved a breach of natural justice which requires the WCAT decision to be set aside. On balance, I consider that the circumstances presented by the worker's application are fundamentally more similar to those addressed in *Appeal Division Decision #2001-1794*, than those addressed in *Appeal Division Decision #97-0083*. The worker's application for reconsideration is, therefore, denied.

While not raised by the worker, I have also considered two further points regarding the WCAT decision as to whether these might involve an error of law going to jurisdiction. My comments regarding these two additional points may be regarded as *obiter*

(comments which are not necessary to my decision). First of all, the statement provided by the WCAT panel under the "Jurisdiction" heading was incorrect. The panel stated:

This appeal was filed with the Review Board. On March 3, 2003, the Appeal Division and the Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As the Review Board panel started its consideration of this appeal before March 3, 2003, it is being completed as a Review Board appeal. (See the Workers Compensation Amendment Act (No. 2), 2002, Section 38.)

The statement in this paragraph that the worker's appeal was being completed as a Review Board appeal was inconsistent with the fact that the decision was issued as a WCAT decision (i.e. rather than as a Review Board finding under section 38(3) of the transitional provisions to the *Workers Compensation Amendment Act (No. 2), 2002*, which would then be appealable to WCAT under section 41(3)). Upon reviewing WCAT's records, I note that the worker's request that his appeal be expedited was denied by the former Review Board. In response to a telephone call from the worker on March 13, 2003, the worker was advised that his appeal would be assigned to a panel for consideration in approximately three weeks. It is evident, therefore, that this was not a case where a panel of the Review Board commenced deliberations on the basis of written submissions prior to the March 3, 2003 transition date. The assignment of the worker's appeal to a WCAT panel was made after March 3, 2003. Accordingly, the decision was correctly issued as a WCAT decision. There is no indication that the incorrect statement by the panel regarding its jurisdiction affected the consideration provided to the worker's appeal.

I have also noted the concluding comments by the WCAT panel concerning the further consideration which might be available from the Board. The panel commented:

In the August 8, 2001 decision letter appealed, the Board officer considered both and determined firstly, no reopening would occur and, secondly, no new claim would be established. This determination likely was made without the decision-maker being aware of the complete circumstances. The worker has indicated his reluctance to have the person who held the salvage permit under which they were "shake-blocking" held responsible for the April 2001 injury. If the worker wishes to pursue that avenue he should file a new claim and request the Board investigate the April 2001 incident as a "new" injury.

I considered whether these comments failed to take into account the statutory constraints on the Board's reconsideration authority set out in section 96(5) of the Act. Section 96(5) provides that:

. . .the Board may not reconsider a decision or order if

- (a) more than 75 days have elapsed since that decision or order was made,
- (b) a review has been requested in respect of that decision or order under section 96.2, or
- (c) an appeal has been filed in respect of that decision or order under section 240.

The specific decision rendered on August 8, 2001 by the client service manager regarding a new claim was as follows:

On April 6 you re-injured your arm in the course of self-employment work activities, shake blocking. You indicated that you did not purchase personal optional protection coverage from the Workers' Compensation Board for this work, therefore, the Workers' Compensation Board would not cover any injury as a result of this activity.

There is no indication that the Board officer considered the possibility that the worker was working for another person, rather than being self-employed, while doing the shake blocking work. Accordingly, this possibility may be viewed as potentially raising a new issue for decision, which was not previously decided by the Board. Alternatively, if the facts regarding the worker's employment status in April 2001 were misrepresented to the Board, further consideration might be provided under section 96(7) of the Act and the policy at Item #C14-104.01 of the *Rehabilitation Services and Claims Manual, Volume I*. Consequently, I do not consider that the concluding comments by the WCAT panel were indicative of jurisdictional error by the panel regarding the further consideration which might be available from the Board.

Conclusion

The worker's application for reconsideration, on the common law ground of an error of law going to jurisdiction, is denied. For the reasons set out above, I am not persuaded that the WCAT panel's failure to refer in its decision to an argument raised by the appellant involved a breach of natural justice with respect to his right to be heard. Accordingly, *WCAT Decision #2003-00361-RB* stands as final and conclusive.

Herb Morton
Vice Chair

HM/dc