As of December 18, 2014, this decision is no longer considered by WCAT to be noteworthy.

WCAT Decision Number: WCAT-2005-04725
WCAT Decision Date: September 08, 2005
Panel: Herb Morton, Vice Chair

Introduction

The worker requests reconsideration of the Workers' Compensation Appeal Tribunal (WCAT) decision dated October 10, 2003. That decision, which advised the worker that his appeal of a decision dated November 7, 2001 was withdrawn, was provided in a letter signed by a WCAT vice chair.

Under section 256(4) of the *Workers Compensation Act* (Act), and item #15.24 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP), applications for reconsideration may be made on the basis of common law grounds, and on the basis of new evidence under section 256, but each type of application is limited to one occasion only. The worker's application is brought on the common law ground of an error of law going to jurisdiction.

Written submissions have been provided by the worker, who is unrepresented. Written submissions have also been provided by a representative for the employer. A memo dated November 25, 2004, and a copy of the audio recording of the September 29, 2003 oral hearing, were disclosed to the parties for comment.

Issue(s)

Did the WCAT decision concerning the withdrawal of the worker's appeal involve an error of law going to jurisdiction?

Jurisdiction

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 an error of law going to jurisdiction, including a breach of natural justice (which goes to the question as to whether a valid decision has been provided). 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. *WCB (BC)*, 2003 BCCA 470, [2003] B.C.J. No. 1985, (2003) 186 B.C.A.C. 83, 19 WCR 211.

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The test for determining whether there has been an error of law going to jurisdiction generally requires application of the "patently unreasonable" standard of review. With respect to an alleged breach of natural justice, the common law test to be applied is whether the procedures followed by WCAT were fair (see *WCAT Decision #2004-03571*).

Effective December 3, 2004, the provisions of the *Administrative Tribunals Act* (ATA) which affect WCAT were brought into force. Section 58 of the ATA concerns the standard of review to be applied in a petition for judicial review of a WCAT decision. Practice and procedure at MRPP item #15.24, as amended December 3, 2004, provides that WCAT will apply the same standards of review to reconsiderations on the common law grounds as would be applied by the court on judicial review. Under section 58(2)(a) of the ATA, questions concerning the WCAT panel's handling of the evidence involve the patent unreasonableness standard, which is defined in section 58(3). Section 58(2)(b) of the ATA provides that questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

This application has been assigned to me for consideration on the basis of a written delegation from the WCAT chair (paragraph 26 of *WCAT Decision No. 6*, "Delegation by the Chair", June 1, 2004).

Background and Submissions

The October 10, 2003 letter from the vice chair followed an oral hearing on September 29, 2003. The oral hearing was convened in relation to the worker's appeals of two decisions under separate claim files:

- a decision dated November 7, 2001 in relation to his March 23, 2001 work injury, and,
- a decision dated March 20, 2002 in relation to his December 22, 2001 work injury.

Apart from the October 10, 2003 decision, there is no documentation on file concerning a request by the worker that his appeal of the November 7, 2001 decision be withdrawn. This withdrawal occurred in the September 29, 2003 oral hearing, in which the worker was assisted by a union representative.

By letter dated October 17, 2003, the worker requested cancellation of the notification by his union representative to withdraw the appeal. The worker submitted:

> Due to bad communications and too many people handling this appeal at the Union level, [the union representative] must have been at a loss as to what and why I was appealing the above claim during the hearing on

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> September 29, 2003. Somehow [the union representative] was under the impression that I was appealing this particular decision for wage loss.
>
> This was not the reason why this decision was appealed.

The worker's claim for an injury at work on March 23, 2001 was accepted by the Board. By decision dated November 7, 2001 decision, the case manager advised the worker as follows:

> It was the medical advisor's opinion that you sustained a low back strain superimposed on your pre-existing degenerative back condition (severe degenerative changes in your thoracic and lumbar spine)…
>
> I find that I agree with the opinion of the Medical Advisor that your ongoing symptoms are related to your non-compensable medical condition. Therefore, I have made the decision to conclude benefits effective November 11, 2001.
>
> Mr. [name of worker], please be advised that the Worker's [*sic*] Compensation Board denies approval of the proposed surgery by Dr. Gittens, and will not cover the costs of further medical appointments or investigations relating to this claim.

The worker appealed the November 7, 2001 decision to the former Review Board. His notice of appeal – part 1 stated that his ongoing symptoms were work related. His notice of appeal – part 2 stated he was seeking wage loss benefits from November 12, 2001 until his return to work. He also ticked the box for indicating he was requesting "something else", stating he was requesting "allow for proposed surgery". The worker attached a report dated January 15, 2002 from Dr. P. Huang. Dr. Huang advised:

> [The worker] sustained severe soft tissue strain to his low back while working on March 23, 2001. He had pre-existing advanced degenerative back condition which was work related. Dr. Gittens saw him for neurosurgical consultation in October 2001. Dr. Gittens recommended surgery maybe [*sic*] beneficial for [the worker].
>
> [The worker] had not recovered completely from his back strain as of November 11, 2001. His ongoing back symptoms are work related and are WCB compensable condition [*sic*].

In a written submission dated September 29, 2003 (currently located on the worker's e-file records for his December 22, 2001 injury, together with *WCAT Decision #2003-02994*), the worker argued:

> I feel [the case manager] was remise in his duty to me as a badly injured worker on [claim number], in that he did not follow through by taking seriously of his own resident specialists' recommendations. Doctors' Bishop then Dr. Gittens. Recommendations that I have an operation classified as a "decompressive laminectomy", if I ever want to work in my trade again. In all fairness to [the case manager], he did follow through with all of the pre-op tests ordered by Dr. Bishop and Dr. Gittens. But he fell short and failed by not keeping me on the fast track for tests and following through with Dr. Gitten's recommendation that I have that operation which would have enabled me to return to my trade relatively pain free.
>
> Instead, by cutting short my claim, he forced me back to work and certain re-injury. A very bad decision on his part. Within less than a month and a half of his closing this claim on November 11, 2001, I was re-injured.
>
> [reproduced as written]

I have listened to the recording of the September 29, 2003 oral hearing. In his presentation and submissions, the worker's representative focused on the worker's appeal of the March 20, 2002 decision in relation to the worker's injury on December 22, 2001. The employer's representative provided detailed submissions regarding the various issues raised in the worker's two appeals, including the issue as to whether the worker's subsequent surgery was causally related to his March 23, 2001 injury. The worker's representative (WR) then provided a rebuttal, in which he advised:

> WR We did not deal with you, with the issue of the November 11, 2001 wage loss in our closing and we're not doing that now, as well. We would ask you to review the worker's submission, which we gave you today. . . .

This gave rise to the following exchange:

> WCAT Panel And your entitlement to wage loss after November 11, 2001? You said you are not commenting on it. Are you withdrawing that?
>
> WR No, we're just . . .
>
> WCAT Panel Are you saying he continued to be disabled after November 11, 2001?
>
> WR No, what we've, what we've discovered is that the worker did return to work and that there is a prescription note from the doctor

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> suggesting he was able to return to work. So questioning whether or not he should have wage loss would be inappropriate.
>
> WCAT Panel: So you are withdrawing that appeal?
>
> WR [long pause] . . . for the wage loss portion. . .
>
> WCAT panel: For the wage loss portion after November 11, 2001?
>
> WR Yeah

The foregoing gives rise to two issues. Firstly, is the worker bound by the action of his representative in withdrawing his claim for wage loss after November 11, 2001? If so, was there a breach of fair procedure, or was the WCAT decision patently unreasonable, in taking this as a complete withdrawal of the worker's appeal of the November 11, 2001 decision?

It does not appear from the excerpt quoted above that the worker's representative initially intended to withdraw the worker's appeal of the November 11, 2001 decision. His initial request was that the panel consider this appeal on the basis of the worker's written submission, which was provided at the time of the oral hearing. It was only upon further questioning by the WCAT panel that the representative agreed that the worker's appeal of the November 11, 2001 decision was being withdrawn, in respect of the worker's claim for further wage loss. Accordingly, it does not appear that the question of withdrawal had been canvassed with the worker in advance of the hearing, or that the representative had specific instructions from the worker regarding a withdrawal. On the other hand, the representative came to the hearing with the worker as his representative, and the worker did not, at the time of the hearing, take exception to the position expressed by his representative.

In his October 17, 2003 letter, the worker stated:

> I therefore request the Appeal Tribunal to appreciate the fact that I was ill represented at the hearing on Sept. 29, 2003, and to review [WR's] notification to withdraw … this appeal.
>
> In all fairness to [WR], this appeal was initially filed by [X], passed onto another Union Executive Member, then recently, onto [WR]. On my part, I assured [WR] that I had a well prepared brief one week before the hearing. He would have had that brief and we could have had a proper Q & A session well in advance of the hearing. I lost that initial brief in a computer crash and had to do a quick re-write on the Sunday prior to the hearing. In the 15 minutes we had together prior to the hearing, [WR] had no time to absorb the essence of this brief. That was my fault.

By submission dated December 13, 2004, the worker further states:

> I am not a good speaker at the best of times… I entered that hearing room in shear [*sic*] terror and panic. Speaking, trying to defend and to represent myself when it became clear that [WR] had read nothing, prepared nothing, and appeared unaware of the reason he was there, was not the way I expected that hearing to proceed.

The worker submits that the WCAT chair should have realized that his representative was not prepared, and should have postponed the hearing until a later date when the worker's representative would have been prepared.

In *Cyrus v. Canada (Minister of Health and Welfare)*, [1992] F.C.J. 471, (1992) 142 N.R. 207, the Federal Court of Appeal reasoned in part:

> The applicant's only point is that the Appeal Board breached natural justice by not realizing that the applicant's representative at the hearing was wholly incompetent and insisting that she be represented by someone who was capable of understanding and adequately presenting her case. Assuming this rather startling proposition to have any validity in law [Footnote: We know of no case in which the Court has imposed a duty to ensure adequate representation; the most the Court has done is to require that a party be given the opportunity to have the assistance of a representative of his choice. Opportunity for representation is something the Court can supervise and appreciate; it will usually be quite unable to judge the adequacy of representation of a case which, by definition, has only come to it through the representative himself.], we are all of the view that there is nothing in the record before us to give it any foundation in fact.

An application for leave to appeal to the Supreme Court of Canada was dismissed on January 21, 1993.

In *R. v. White and Sennett* (1997), 114 C.C.C.(3d) 225, the Supreme Court of Canada reasoned as follows:

> ...we shall state the principles applicable to a claim of incompetent legal representation. These principles, drawn from the judgment of the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), are now well established in this court. The right to be competently represented by counsel is an integral part of both the right to make full answer and defence and the right to a fair trial. It is therefore constitutionally guaranteed by ss. 7 and 11(d) of the Charter…

Effective December 3, 2004, WCAT's authority to address Charter issues was removed by section 44 of the ATA. This section provides:

> (1) The tribunal does not have jurisdiction over constitutional questions.
> (2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

It is not evident that the protections provided under ss. 7 and 11(d) of the Charter would have any application in respect of a claim to workers' compensation benefits as opposed to a prosecution under the Criminal Code or similar proceeding. However, to the extent the worker's argument might be viewed as invoking a Charter right, it is one which WCAT does not have authority to hear.

In the text *Administrative Law in Canada*, Third Ed. (Ontario: Butterworths, 2001), Sara Blake states at page 50:

> A party may not complain if counsel chosen by the party failed, for whatever reason, to present the case competently. In these situations the tribunal is not at fault. The tribunal has no obligation to ensure competent representation.

Item #9.21 of WCAT's former *Manual of Rules, Practices and Procedures*, which was in effect at the time of the September 29, 2003 oral hearing, provided that postponements of scheduled oral hearings would not be permitted unless there were exceptional circumstances. While not necessary to my decision, I would note that I consider it unlikely that a postponement would have been granted to the representative based on lack of preparedness. In any event, no request was made to the WCAT panel for an adjournment of the oral hearing, in order to allow more time for preparation. I find no error of law going to jurisdiction in respect of the WCAT panel proceeding to hear the worker's appeal, with the involvement of the worker's representative.

In *WCAT Decision #2004-06054*, the withdrawal of an appeal by a worker's representative was set aside when it was discovered that the representative was no longer authorized to represent the worker at the time this action was taken. In the present case, however, the worker and his representative attended the hearing together. In the circumstances, I find that the representative must be considered to have been acting with the worker's authorization. It is inherent to advocacy that questions may arise for response which had not been contemplated, or which had not been discussed with the client. Where a party is represented, the party cannot after the hearing complain that some different position should have been expressed in the hearing and seek to have the decision set aside on that basis. To the extent the worker's request raises a claim under the Charter, it is not one which WCAT has jurisdiction to hear.

Section 94.1 of the Act authorizes lay advocates to provide representation before the Board or WCAT. Section 15 of the *Legal Profession Act* does not apply in this regard. A *Code of Conduct for Representatives* is provided at item #24.00 of the MRPP. At the time of the WCAT oral hearing, item #24.20(b) of the former *Manual of Rules, Practices and Procedures* provided:

> A representative must be prepared. This includes being familiar with the Workers' Compensation Board claim, assessment or prevention file(s) and the relevant law, policy, and precedent decisions. This includes consulting with the client to obtain instructions prior to appearing at an oral hearing. This also includes being in a position to attend an oral hearing or provide written submissions on a timely basis.

Effective December 3, 2004, MRPP item #24.20 was amended as follows:

> A representative must be prepared and must have proper instructions from their client before proceeding. Being prepared includes being familiar with their client's evidence and position on the appeal, as well as the relevant Board file(s) and the relevant law, policy, and precedent decisions. A representative must meet deadlines for written submissions and be prepared for oral hearings. *A representative must obtain instructions from their client before initiating or withdrawing an appeal*.
>
> [emphasis added]

In view of this amendment, it is arguable that it would be a breach of fair procedure for a WCAT panel to accept a withdrawal of an appeal from a representative where it was apparent that the representative had not had the opportunity to obtain instructions from the appellant regarding such a withdrawal. However, this wording was not contained in the MRPP at the time of the oral hearing on September 29, 2003. While it would have been preferable had the WCAT panel given the representative an opportunity to consult with the worker before pressing him for a response on the question as to whether the appeal was being withdrawn, I am not persuaded that this amounted to a breach of fair procedure. It was open to the representative to request an opportunity to consult with the worker, if he needed to confirm his instructions, and he did not do so.

It is not obvious why the panel did not accede to the representative's request that the worker's appeal of the November 7, 2001 decision be considered on the basis of the worker's written submission. However, in response to the questioning by the vice chair, the representative did agree to withdraw the appeal for further wage loss. I find no error of law going to jurisdiction in the WCAT panel's acceptance of the representative's withdrawal of the worker's appeal for wage loss after November 11, 2001.

Section 58(3) of the ATA provides:

> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

In *Administrative Law in Canada*, Sara Blake further states at page 191:

> Findings of fact are reviewable only if patently unreasonable. An unreasonable finding of fact is one that is not supported by any evidence. A court will not review the evidence considered by the tribunal to determine whether there was sufficient evidence to support a finding of primary fact. A court will go no further than to determine whether there was any evidence, and only essential findings of fact upon which the decision of the tribunal turns will be reviewed in this manner. Non-essential findings of fact are not reviewable.
>
> ...
>
> A patently unreasonable rejection of evidence or a refusal in bad faith to consider relevant evidence may be grounds for review. If a tribunal, without explanation, completely ignores important evidence, its decision may be set aside.

The representative requested that the worker's appeal be considered on the basis of his written submission. Upon further questioning, the representative confirmed the worker's appeal was being withdrawn in respect of his claim for further wage loss after November 11, 2001. In his appeal, the worker also sought acceptance of his ongoing back symptoms as being causally related to his March 23, 2001 injury, and acceptance of his proposed surgery under this claim. The decision to treat the remainder of the worker's appeal as withdrawn had no foundation. It may be that the panel overlooked the fact there was more than one issue raised by this appeal, notwithstanding the fact the employer's representative had provided submissions on this additional basis.

While not necessary to my decision, I note from a review of *WCAT Decision #2003-02994* that the panel considered Dr. Huang's report in connection with the worker's appeal of the March 20, 2002 decision concerning his subsequent injury of December 22, 2001. The panel commented in that decision:

> With the notice of appeal – part 2 the worker submitted a January 15, 2002 letter from Dr. Huang who stated the worker's back had not completely resolved from a strain of November 11, 2001 and that his ongoing back symptoms were work related.

The worker provided only one notice of appeal – part 2. That form was stated to be in connection with his appeal of the decision dated "Nov. 07-02 [*sic*]". By letter dated July 24, 2002, the Review Board's senior deputy registrar advised the worker:

> We have received your letter along with the Notice of Appeal – Part 1 regarding the March 20, 2002 decision of the Workers' Compensation Board. We will use the Part 2 previously received for all of the above-noted appeals.

Accordingly, no separate Notice of Appeal – part 2 was provided concerning the worker's appeal of the March 20, 2002 decision. It is possible this may have given rise to some misunderstanding as to whether the worker's request that his surgery be accepted as compensable related to his appeal of the November 7, 2001 decision concerning his March 23, 2001 injury, or to the March 20, 2002 decision concerning his December 22, 2001 work injury. As *WCAT Decision #2003-02994* only concerned the worker's December 22, 2001 injury, it did not address the issue as to whether the worker's surgery was causally related to his March 23, 2001 injury.

With respect to the scope of the withdrawal, I find that the October 10, 2003 decision failed to follow fair procedure in treating this as a complete withdrawal of the worker's appeal of the November 7, 2001 decision. Alternatively, I find that the exercise of discretion contained in the October 10, 2003 decision, regarding the withdrawal of the worker's appeal, was arbitrary in that no evidentiary basis had been provided for finding that the worker intended to withdraw his appeal on any issue apart from the claim for further wage loss. I find that the October 10, 2003 decision was patently unreasonable in treating the withdrawal of the worker's claim for further wage loss as a complete withdrawal of his appeal.

In reaching this conclusion, I have taken into account the fact that at the outset of the oral hearing the panel identified the issues arising in the worker's appeals in a fashion which only identified the termination of wage loss in connection with the worker's appeal of the November 7, 2001 decision, and no objection was expressed to this by the worker's representative. I do not consider, however, that the representative's failure to flag the other issues raised by the worker's appeal amounted to a withdrawal of those issues (on which submissions were provided by the employer's representative at the oral hearing).

Conclusion

The worker's application to set aside the October 10, 2003 WCAT decision is allowed in part. I find no error of law going to jurisdiction in the decision by the WCAT vice chair to accept the withdrawal by the worker's representative of the worker's claim for further wage loss after November 11, 2001, as a result of the worker's March 23, 2001 work injury. However, I find that the decision failed to follow fair procedure, and was patently unreasonable, in treating the withdrawal on this issue as a basis for considering the worker's appeal as withdrawn in total. Any other issues addressed in the November 11, 2001 decision remain outstanding before WCAT. The WCAT Registry will contact the worker and employer concerning the further handling of the worker's appeal in respect of these other issues.

Herb Morton
Vice Chair

HM/cd