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

WCAT Decision Number: WCAT-2006-00941
WCAT Decision Date: February 27, 2006
Panel: John Steeves, Vice Chair

Introduction

This is a decision with regards to the worker's application for reconsideration of the Workers' Compensation Appeal Tribunal (WCAT) decision dated October 17, 2003 (*WCAT Decision #2003-03022-RB)*.

The worker, through his representative, submits there was a breach of natural justice in the previous WCAT decision when an important exhibit was disregarded by the panel.

The employer is no longer registered with the Workers' Compensation Board (Board) and no successor employer was found.

Issue(s)

Has there been a breach of natural justice?

Jurisdiction

WCAT uses the broad heading of "reconsideration" to include two situations. The first is where an applicant seeks to have a decision reconsidered on the basis of new evidence. 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 of Practice and Procedure*, 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.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

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 involves 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* available at http://www.wcat.bc.ca/research/appeal-search.htm). These different standards of review are also set out in the *Administrative Tribunals Act.*

The important point is that an application for reconsideration is not an opportunity to have another full review of the issues and evidence, unless the standard of review is correctness. If the standard of review is patent unreasonableness then a reconsideration panel cannot, for example, make its own judgement about how the evidence should be weighed. The Court of Appeal described that approach in *Speckling v. British Columbia (Workers' Compensation Board),* (2005) BCCA 80, [unreported], February 16, 2005, as follows:

> … a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review … to second guess the conclusions drawn from the evidence … and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable.

Background

The worker is an experienced welder. On June 6, 1995, he fell approximately 15 feet, landing on his buttocks onto a steel rail at work. At the time, he was 39 years of age.

X-rays at the time described a fracture at L2 and L4 of the lumbar spine. Some anterior compression at T-12 was noted but, "this may be chronic". The Board accepted the worker's claim for compensation for fractures at L4 and L2 and contusions of the right knee and right calcaneous. However, according to memo #2 on February 9, 1996, the claim was not accepted for the anterior compression of the T-12 vertebra as it appeared to be chronic.

Eventually, the Board awarded the worker a pension of 2.25% of total. This was communicated to the worker in a decision dated February 27, 1997. He disputed this decision by appealing it to the Workers' Compensation Review Board (Review Board).

In a finding dated December 19, 1997 the Review Board panel noted that the percentage of disability appeared to be the source of the worker's concern. However, the panel concluded that the medical evidence on the file was unopposed by any other medical evidence and the appeal was denied.

The worker's condition continued to deteriorate and he requested a reopening from the Board. In a decision dated December 2, 1998, this was denied on the basis that there had not been any significant change to his disability. A managerial review of this decision was requested by the worker but the review resulted in another denial. The file does not indicate that the worker appealed the decision further.

In March 1999, the worker had an acute episode of severe back pain. He was admitted to hospital and a discharge summary of March 23, 1999 described the worker as totally incapacitated. A CT scan showed degenerative changes in the facet joints in the lower lumbar spine but no focal disc protrusion and no spondylolisthesis. The worker's symptoms improved and he was discharged.

Following this episode, Dr. G, a specialist, saw the worker and an L5 decompression was performed on June 21, 1999. This gave the worker some dramatic improvement. But, in May 2001, he was, according to his general physician, "so incapacitated by backpain that he is not able to work for more than ninety minutes". On June 29, 2001, Dr. G thought that surgery was no longer useful for the worker. A new vocation was recommended.

On December 7, 2001, the worker's general physician described the worker as suffering from degenerative disease affecting both the discs and facet joints of the lumbar spine. He also stated that the "natural history of this clinical picture is a steady deterioration with time. It is quite safe to surmise therefore that his lumbar spine has deteriorated since 1996".

The Board did a review of the worker's condition, including whether his current problems were related to his 1995 work injury. In a memo dated May 15, 2002, a Board medical advisor made the following comments:

> 1. Investigations at the time of the fall in 1995 did reveal multilevel degenerative disc disease with evidence of desiccation at multiple levels. In addition, there were mild central and right posterolateral changes at the L4-L5 level as well as some flattening due to a central disc bulge at the L5-S1 level. There was no confirmed

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

radicular findings at the time of repeat reviews and clinical assessments in 1995 and following in 1996. In addition, the noted compression fractures were to the L2 and the L4 levels.

2. Dr. [G]'s diagnosis prior to the surgery in 1999 is stenosis over the L5 roots bilaterally.

3. There is evidence of pre-existing disease at the investigations following the 1995 fall. There is clear evidence of multilevel degeneration. Given the relatively young age of the gentleman at the time of the investigations, I would define these changes as significant.

4. The fall in 1995 did cause some acute exacerbation of this gentleman's back pain. There are objective and documented changes of pathology at the L2 and L4 levels. The worker had a number of thorough investigations and at the time in 1995 never had any evidence of peripheral deficit at the L5/S1 or any other lumbar level. There is no direct evidence that the subsequent stenosis at the L5/S1 level was as a direct consequence of the injury accepted under this claim. I find it less than 50% likely that stenosis flows directly from the fall in 1995, but are more likely the natural history of progression of the multiple level degenerative changes in this worker's back.

5. There is evidence of a change in this gentleman's PFI relating to the diagnosis and subsequent surgery as outlined in Dr. [G]'s notes.

Following this review, the Board advised the worker by letter of June 10, 2002 that there was no evidence of significant deterioration in his pensionable condition, the anterior wedge compression fractures at L2 and L4. There would be no referral to Disability Awards for a reassessment of his pension.

WCAT Decision of October 17, 2003

The worker appealed the June 10, 2002 decision of the Board to the Review Board. On March 3, 2003, the Review Board was replaced by WCAT and the worker's appeal was decided as a WCAT appeal (*Workers Compensation Amendment Act (No.2), 2002*)

In a decision dated October 17, 2003, a WCAT panel denied the worker's appeal. The reasoning of the panel can be summarized as follows:

- An x-ray report dated January 27, 1995 was received at the oral hearing on October 8, 2003. The panel was advised that this document was recently received by the worker. The panel noted a date stamp from the Board and stated that the document "appears to have been received by the Board in June 1995". In this application for reconsideration the worker takes some exception to this statement.

- The panel noted the worker's concern that the Board accept his extensive degenerating disc disease at multiple levels which he attributed to the compensable injury. The January 1995 x-rays were relied on to indicate that the disc spaces were well maintained. The panel noted that these degenerative changes were not accepted as compensable and they were not included in his 1997 assessment of his pension.

- The Board's 1997 decision on the worker's pension was not appealed. Similarly, the worker's increased symptoms in 1998 were not accepted for purposes of a reopening and that decision was not appealed. The panel concluded that the appeal before her dealt with reassessment of the worker's pensionable condition only. She stated that she would make no decision regarding other symptoms except to note an x-ray report of March 13, 1996 and a memo #16 dated February 3, 1997.

- The worker also relied on Dr. G's opinion. The panel concluded that the opinion described a sequence of events and it did not explain causation. The panel was unable to conclude that the factual premise of Dr. G's opinion had been established.

- The panel did not deny that the worker had suffered an increase in symptoms and the symptoms were progressively more disabling. However, the panel concluded that these were the result of the increased degeneration of the worker's lumbar spine, and not to the L2 and L4 fractures accepted as compensable under the worker's claim.

Application for Reconsideration

It is submitted on behalf of the worker that the WCAT decision of October 17, 2003 contains a breach of natural justice which renders the decision patently unreasonable. His application is not based on new evidence.

The following excerpt from a submission dated January 28, 2004 summarizes the worker's concern.

> We wish to have this case reconsidered on common law grounds, due to the adjudicator's error as explained in my letter dated November 3, 2003.

> We believe this error includes a breach of natural justice which we believe renders the decision "patently unreasonable". We believe the error of disregarding an important exhibit (new evidence revealed in an x-ray report dated January 27, 1995) causes the balance of probability to turn against [the worker] as explained in my November 3, 2003 letter. We believe that this evidence which was not available to the Board previously is crucial to conclude that [the worker] in all probability had a normal back with no significant disease or trauma abnormalities prior to his June, 1995 accident.

Decisions and Reasons

The primary focus of the worker's application for reconsideration is the x-ray report, dated January 27, 1995. He submits that this report was not available prior to it being provided by the worker at the WCAT hearing of October 8, 2003. Further, the previous panel disregarded this report and it was critical to his appeal because it demonstrated the worker had a "normal" back prior to the June 1995 injury.

There are two versions of the January 27, 1995 x-ray report on file.

The first is in the worker's claim file. The document should be included in the disclosure of the worker's claim file, where I located it.

The report itself is from a hospital and it is an x-ray of the worker's lumbar spine. It has three stamps on it, all with dates. In chronological order, they are as follows:

1. X [CLAIM NUMBER]
   [WORKER'S NAME]
   REGISTERED : 06/12/95 DESK: C11

2. W.C.A.T
   SEP 29 2003

3. RECEIVED
   OCT – 2 2003
   PAYMENT SERVICES

In addition, this version of the report is a faxed copy and the fax information on the document is as follows, "01/29/1[illegible, probably `9'] 97 15:41 [Name of worker] PAGE 1". There is no specific information about the location that received the report; on its face it appears that the Board received it. There is no exhibit stamp on this version of the report.

The second version of the x-ray report has one stamp, an exhibit stamp from WCAT with the date of October 8, 2003, which is the date of the WCAT hearing. It is also a fax document which was faxed on "12/12/2002 17:23 …" from the hospital that took the x-ray. According to the previous WCAT decision, at the hearing the worker advised the Review Board panel that he had recently received this report (page 4). It was relied on for the worker's submission that his lumbar spine was essentially normal prior to the June 1995 work injury.

The WCAT panel's decision contains a section titled "Oral Hearing". In that section, the panel questioned when the worker actually received the January 27, 1995 x-ray report. She seems to be relying on the first version described above (with three stamps on it) because she states that it "appears to have been received by the Board in June 1995" (page 4). That is, the only version with a date of June 1995 on it is the first version. The panel was apparently referring to the stamp that states "REGISTERED : 06/12/95" on the first version.

I am satisfied this was an error by the panel. The reference to "REGISTERED: 06/12/95" refers to the date when the worker's claim was registered with the Board, not when the report was received by the Board. This is confirmed by the mainframe letter section of the electronic file record. I also note that the same stamp has been used on a number of other documents on the file. For example, there is a form 8 from the worker's physician dated June 6, 1995 that indicates that the worker's claim was registered on June 12, 1995.

When the Board or WCAT first received the x-ray report of January 27, 1995 is not clear. The fax information on the first version indicates that the worker faxed it on January 29, probably in 1997. The Board may have received it on that date or the document is a copy of a document the worker faxed to someone else entirely. The electronic claim file of the worker indicates that the first version of the report was scanned into the file ("captured") as a single document on October 3, 2003, before the hearing on October 8, 2003. The second version of the report was scanned into the file in a bulk scan (with the worker's submission) on October 22, 2003.

Then there is a received stamp from WCAT dated September 29, 2003 and also a received stamp from the Board's Payment Services dated October 2, 2003. It is not clear in what circumstances the first version was stamped by WCAT on September 29, 2003 and then, as indicated by the second version, entered as an exhibit at the WCAT hearing with an exhibit stamp of October 8, 2003.

The worker, through his representative, states that the "document accepted as Exhibit #1" at the WCAT hearing on October 8, 2003 (the January 27, 1995 x-ray report) has no date stamp. This is true for the second version of the report (except for the exhibit stamp). But the first version of the report has the date stamp referred to by the panel. There is good reason to conclude that the first version of the report was on the file as of

October 3, 2003 since it was scanned into the file on that date (and it was received by the Board's payment services on October 2, 2003). And it seems clear the panel had the first report, with the June 1995 date on it, before her when she was making her decision. That is, it is probable that the first version was on file at least at the time of the hearing of the worker's appeal on October 8, 2003.

With this admittedly complicated review in mind the following seems to have been a probable course of events. Somehow the first version of the January 27, 1995 x-ray report was on the worker's file just before the hearing, perhaps September 29 or October 2, 2003. How it got on the file is not clear. At the hearing on October 8, 2003 the worker provided another copy of the report and this was marked as an exhibit by the panel. At this point there were two versions of the report on file. After the hearing, when the panel was deliberating the worker's appeal, she saw the two versions of the report that were on file. She mistakenly concluded that that the first version was received by the Board in June 1995. However, she was correct that there was a version of the report on file prior to the hearing.

The panel then commented at page 4 of her decision that the worker told the panel that the report was "secured recently" and "was not available to the case manager at the time of adjudication". The worker's submission of January 28, 2004, on this application for reconsideration, states that the x-ray report was "not available to the Board previously". These statements are consistent the report being placed on file in early October 2003 because the Board's adjudication took place on June 10, 2002.

The worker is concerned that the January 27, 1995 x-ray document that he received from his hospital had not been disclosed since "it was originally filed [at the hospital] in January of 1995". I take this to mean that the worker's concern is that somehow the document ended up on the Board's file in June 1995 and that is not consistent with his hospital's records. As above, the report was not on his file until late September or early October 2003.

With regards to the significance of the panel's error, I note, as above, that it was contained in a section entitled "Oral Hearing" in which the panel described the evidence received at the hearing. Her actual decision is contained in a subsequent section entitled "Reasons and Findings". In that section, she discusses the January 1995 x-ray on two occasions as follows,

> [the worker] is most concerned that the Board accept his extensive degenerating disc disease at multiple levels, which he attributes totally to the compensable injury. *He cited the x-rays of January 1995 which indicated that the disc spaces were well maintained,* and further cited Dr. [G]'s opinion. I note again that these degenerative changes were not accepted as compensable. They were not included in the 1997 assessment of the worker's pension, and that was not appealed. The

> worker's increased symptoms in 1998 were not accepted for purposes of reopening. That decision was not appealed. The decision letter before me deals with a reassessment of the worker's pensionable condition only. Therefore, I will make no decision regarding those symptoms. However, I do note that the March 13, 1996 x-rays on the claim file show the worker suffering from degenerating disc disease at all levels of the lumbar spine, at a time far too early for that condition to have resulted from a fall some nine months earlier. *Furthermore, memo #16, dated February 3, 1997 (prior to the first PFI pension award) shows that the adjudicator had indeed seen the 1995 x-rays, and that they were indeed taken into account*. (page 7, emphasis added).

Memo #16 refers to "the June 1995 x-rays" as being reviewed in the context of a medical opinion that there was no change in the worker's impairment. The June 1995 x-ray reports are dated June 6 and June 9, 1995.

The worker's concern is that the panel "erroneously" concluded that the January 17, 1995 x-ray report "had previously been taken into account" (submission dated November 3, 2003). By making the error that the January 1995 x-ray report had been on file since June 1995 the panel was led to the mistaken conclusion that "the adjudicator had indeed seen the 1995 x-rays" when he made the original decision in June 2002. There is perhaps an interpretation of the panel's decision that she was referring to the June 1995 x-rays. However, the entire context of the paragraph at issue is the significance of the January 1995 x-rays. As well, the panel's use of "indeed" suggests that the panel was responding to the worker's submission that the January 1995 x-trays had not been considered previously. I conclude that the worker's analysis of the panel's decision is correct and one error led to another.

I must, however, consider the context of the panel's error. An important part of the panel's decision was the history of decisions on the worker's file. As the panel noted, the worker's degenerative changes were not accepted as compensable in the 1997 pension decision and this was not appealed. Similarly, his increased symptoms in 1998 were not accepted for purposes of reopening and that decision was not appealed. The panel correctly concluded that she could not make any decision regarding these issues. Nonetheless, she went on to make comments about the evidence with respect to the degenerative changes in the worker's back. These comments now lead the worker to submit that his appeal before the panel turned on those unnecessary comments. However, this is not the case.

In legal terms, the panel's errors were expressed in the context of what is called *obiter dicta*. These are incidental remarks that are not essential to the decision being made and they, therefore, have no binding effect (*Concise Oxford Dictionary*, Oxford University Press: 2002). In this case the panel's errors related to information about an issue that was not before the panel: whether his degenerating disc disease at multiple

levels was compensable. That issue had, unfortunately, been decided previously and the previous WCAT panel had no authority to reopen it. Generally, only essential facts upon which the decision of tribunal turns will be reviewable: "Non-essential findings of fact are not reviewable." (Sara Blake, Administrative Law in Canada (Butterworths: 2001), p. 191)

For these reasons I cannot find that errors made incidental to the issue before the panel result in a reviewable error. I appreciate that this is an unsatisfactory result, not least from the worker's point of view. However, if I was to find a reviewable error in the previous WCAT decision I would then set it aside. A new panel would then reconsider the issue but it would be a reconsideration of an issue that WCAT is not authorized to adjudicate because it has been decided previously. In my view it is sound policy to prevent adjudication of issues that are not legally open to adjudication.

Conclusion

For the above reasons the worker's application for reconsideration of the WCAT decision dated October 17, 2003 is denied. There were errors in that decision. But they were errors that were made in the context of an incidental issue that was not essential to the decision itself and the errors have no legal effect.

John Steeves
Vice Chair

JS/dlh