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

WCAT Decision Number: WCAT-2006-02424
WCAT Decision Date: June 06, 2006
Panel: Daphne Dukelow, Vice Chair

Introduction

The worker is requesting reconsideration of the August 30, 2004 decision of a panel (original panel) of the Workers' Compensation Appeal Tribunal (WCAT). The August 30, 2004 WCAT decision confirmed the Workers' Compensation Board (Board) decision of April 13, 2000 not to accept the worker's claim for plantar fasciitis and osteoarthritis.

The employer is not participating in this application although invited to do so.

I am satisfied that this application can be determined fairly without an oral hearing. It involves legal issues and can be determined on the basis of the claim file and the worker's submissions.

Issue(s)

The issue in this application is whether the August 30, 2004 WCAT decision should be reconsidered on the basis of new evidence or on the basis that there was a denial of natural justice or breach of the duty of fairness.

Jurisdiction

This application has been assigned to me by the chair of WCAT as authorized by WCAT *Decision of the Chair #8*, March 3, 2006.

Reconsiderations of decisions of the tribunal, on the grounds of new evidence, are authorized by section 256 of the *Workers Compensation Act* (Act). WCAT also has authority to reconsider one of its decisions and possibly set it aside 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 #15.23 to 15.25 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP). 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 *Powell Estate v. Workers' Compensation Board,* 2003 BCCA 470, [2003] B.C.J. No. 1985, 19 WCR 211.

The appeal coordinator advised the worker in a letter dated February 17, 2006 that a reconsideration application can be made one time only. She also drew the worker's attention to general information, available on WCAT's website and in the information sheet provided to him, concerning the reconsideration process and particularly about applications on the grounds of new evidence or on common law grounds.

Standard of Review

Section 245.1 of the Act provides that section 58 of the *Administrative Tribunals Act, 2004,* S.B.C. 2004, (ATA), among others, applies to WCAT. Section 58 of the ATA reads as follows:

> 58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
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> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
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>> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
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>> (b) 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, and
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>> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
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> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
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>> (a) is exercised arbitrarily or in bad faith,
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>> (b) is exercised for an improper purpose,
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>> (c) is based entirely or predominantly on irrelevant factors, or
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>> (d) fails to take statutory requirements into account.

This provision is intended to codify the common law standard of review. The applicable standard of review to apply to the question whether a breach of the duty of procedural fairness occurred has been discussed and summarized in the authorities referred to below. Jones and de Villars, *Principles of Administrative Law*, Third Ed. (Toronto: Carswell, 1999) at 513-514, contains the following analysis:

> (a) The Standard for Determining Whether there has been a Breach of the Principles of Natural Justice and Procedural Fairness
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> Neither the "correctness" test nor the "patently unreasonable" test really fits this ground for judicial review. Although a breach of natural justice or procedural fairness has the effect of taking the statutory delegate outside its jurisdiction--and so might at first glance engage the "correctness" test--any student of Administrative Law will quickly reply that there is no mathematical formula for determining whether a particular alleged defect in procedure is sufficient to constitute a breach of natural justice; it almost always depends upon all of the circumstances...
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> Perhaps the better way to look at this question is to articulate a separate test for judicial review of alleged breaches of natural justice: namely, would a reasonable person, reasonably knowledgeable about all the facts, reasonably perceive that the process is unfair? This echoes the way the Rule Against Bias is usually articulated, but it can be generalized to apply to all alleged breaches of natural justice. Of course, the reasonable person is the court. If this question is answered affirmatively, then the standard for review has been tripped, and the delegate's proceedings should be quashed.

In a unanimous decision of the Supreme Court of Canada, *Moreau-Bérubé* v. *New Brunswick (Judicial Council)*, 2002 S.C.C. 11, [2002] 1 S.C.R. 249 at paragraphs 74-75, Justice Arbour stated:

> (3) Procedural Fairness
> 74 The third issue requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation. (See generally *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, and *Baker*, *supra*.)
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> 75 The duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority (see *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Cardinal v. Director of Kent*

> *Institution*, [1985] 2 S.C.R. 643, at p. 653; *Baker*, *supra*, at para. 20; *Therrien*, *supra*, at para. 81). Within those rules exists **the duty to act fairly, which includes affording to the parties the right to be heard, or the *audi alteram partem* rule. The nature and extent of this duty, in turn, "is eminently variable and its content is to be decided in the specific context of each case**" (as *per* L'Heureux-Dubé J. in *Baker*, *supra*, at para. 21). Here, the scope of the right to be heard should be generously construed since the Judicial Council proceedings are similar to a regular judicial process (see *Knight*, *supra*, at p. 683); there is no appeal from the Council's decision (see D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 1, at pp. 7-66 to 7-67); and the implications of the hearing for the respondent are very serious (see *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113).
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> [emphasis added]

The BC Court of Appeal in *Speckling v. WCB,* 2005 BCCA 80, has set the following standards for review of a decision of the appellate body in the compensation system:

> "Patently unreasonable" means openly, clearly, evidently unreasonable: *Canada (Director of Investigation and Research)* v. *Southam Inc.*, 1997 CanLII 385 (S.C.C.), [1997] 1 S.C.R. 748.
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> A decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not: *Douglas Aircraft Co. of Canada Ltd.* v. *McConnell*, 1979 CanLII 5 (S.C.C.), [1980] 1 S.C.R. 245, and *Board of Education for the City of Toronto* v. *Ontario Secondary School Teachers' Federation et al* 1997 CanLII 378 (S.C.C.), (1997), 144 D.L.R. (4th) 385 (S.C.C.).

Section 256(3) of the Act provides for reconsideration of a WCAT decision on the grounds of new evidence. The requirements which an application on these grounds must meet are set out in section 256(3) of the Act which reads as follows:

> 256 (3) On receipt of an application under subsection (2), 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
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> > (a) is substantial and material to the decision, and
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> > (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.

Background

The worker completed an application for compensation in February 2000. His claim was disallowed by the Board by decision letter dated April 13, 2000. The worker appealed from the Board's decision to the former Workers' Compensation Review Board (Review Board). His appeal was heard and decided as a WCAT appeal. The original panel conducted an oral hearing and denied the worker's appeal in her decision of August 30, 2004.

The worker seeks reconsideration on common law grounds and on the grounds of new evidence. The worker has provided a submission dated October 6, 2005 and a further submission dated March 7, 2006. He has attached letters, data, and articles to both of these submissions. I will refer to these submissions in my analysis, below.

Analysis

I wish to make a few general comments before considering the merits of the worker's application for reconsideration of the August 30, 2004 application. The worker's very lengthy and detailed submissions indicate that he has considered this reconsideration application an opportunity to reargue his appeal. A reconsideration application deals only with the questions whether there is new evidence substantial and material to the original decision and whether there have been errors of law going to jurisdiction, the common law grounds for reconsideration. These errors may involve a breach of the rules of natural justice or the duty of fairness or a patently unreasonable error in a finding of fact or in a finding of law within the exclusive jurisdiction of the tribunal.

I will not respond to the worker's arguments concerning the evidence on the claim log or the evidence presented at the oral hearing except as it relates to the grounds for reconsideration. The arguments concerning the evidence could have been made at the oral hearing or in post-hearing submissions, if requested by the worker and permitted by the original panel. The worker has presented, for example, argument and evidence to dispute the Board medical advisor's opinion on file. This reconsideration application is not the proper forum for this argument.

I will now consider the grounds raised directly or by inference by the worker.

New Evidence

I will deal first with the issue of new evidence. I have pointed out the statutory requirements for this ground of reconsideration above, under the heading "Jurisdiction". The new evidence must be new in the sense that it did not exist at the time of the hearing, or, if it did exist, it must not have been discoverable through the exercise of reasonable diligence. In addition to being new as defined, the evidence must be "substantial and material" to the decision.

Weather Conditions

The worker has submitted evidence to this panel concerning weather conditions at the time of the onset of his symptoms in late 1999 and early 2000. He indicates that this information was not available. This type of information was available to the worker at the time of the oral hearing before the original panel. If he did not have it at the hearing, he could have asked for an opportunity to provide it after the hearing. It is necessary to be as prepared as possible for an oral hearing. When walking conditions including the amount of snow on the ground formed part of the worker's stated reasons for suffering from symptoms of plantar fasciitis and osteoarthritis of the foot or ankle, it might be expected that snowfall records would be of interest to the original panel. If the worker did not know what the conditions were when asked at the hearing, he could have asked for an opportunity to provide that information rather than try to provide it from memory.

Correspondence from worker's physician

The worker says that correspondence between his physician, Dr. O'Malley, and his employer dated March 7, 2000 was not released to the Board. This is not new evidence within the meaning of section 256. It was in existence. The worker could have requested all correspondence from his physician prior to the oral hearing. The letter of March 10, 2000 was written by the worker's physician to the employer's consulting physician in connection with the worker's return to work. Obtaining information from a worker's physician is part of the process of determining when and in what capacity a worker is fit to return to work. The letter did not relate to causation which was the issue before the original panel. It related to the worker's return to work. Thus, the letter was not directly relevant to the issue before the original panel. It is not "substantial and material" to the decision of the original panel.

Walking distances and volume of work

The worker notes that he discovered recently that he made an error in calculating his walking distances. Clearly, this evidence was within his own control and could have been obtained prior to the oral hearing by the original panel. It is not new evidence within the meaning of the Act.

The worker indicates that he now has evidence from his employer concerning the volume of mail delivered in his city during the period December through March in two different years. The years are 1999/2000 and 2004/2005. Obviously the information for the most recent year was not available at the time of the hearing. However, given that the oral hearing took place in mid-2004, the information concerning the 1999/2000 period likely was available. If not, the same information for other years could have been obtained to make the worker's point about the volume of mail delivery in the four-month period March through December.

Articles and other medical information

The worker has supplied the entire article to which the case manager makes reference in a claim log entry. Obviously, this is information which could have been obtained for the oral hearing. The worker has provided email correspondence from a number of medical practitioners. This is evidence which could have been obtained prior to the oral hearing.

The worker has provided summaries of medical information which he says he was not allowed to reference at the oral hearing. This is not new evidence, clearly.

The worker has submitted more articles with his March 7, 2006 submission. Although these articles post-date the hearing, they are not "substantial and material" to the decision of the original panel. They are general articles about the condition of plantar fasciitis and not new objective or even new opinion evidence concerning this particular worker.

This type of information submitted does not meet the standard required by section 256 of the Act.

Critique of original panel's decision

The worker has provided a paragraph by paragraph critique of the panel's decision. This is not new evidence. It is the worker's opinion about the panel's decision, an opinion not relevant to her decision. It is also a reargument of the appeal, again a matter not relevant to reconsideration.

Natural justice or duty of fairness

Panel's questions to the worker at the hearing

The worker states that there were several issues and questions directed at him during the WCAT oral hearing that he "should not have been expected to answer." The panel is free to question the parties on matters relevant to the issue at hand. In this case, the original panel asked the worker questions about why his plantar fasciitis was unilateral and what he thought was the cause of it. These are fair questions. The panel was simply asking for the worker's own views. He could have provided them or other evidence in response to the questions.

The employer's submission to the original panel

The worker notes that correspondence from his employer to WCAT dated June 8, 2004 was not released to him or his representative prior to or at the oral hearing. The correspondence is a written version of the employer's submissions made to the original

panel at the end of the oral hearing. The worker has written what he calls a rebuttal to the employer's June 8, 2004 letter. I have listened to the recording of the oral hearing before the original panel. The employer's representative read from his 3-page submission at the hearing and provided his written copy to the panel. From my understanding of the recording of the hearing, the employer's representative provided a copy of his submission to the worker's representative once he had finished reading from it, toward the end of the hearing. The worker says this did not occur. The worker's representative did not object to the procedure the panel followed. The panel gave the worker's representative an opportunity to provide an oral rebuttal to the employer's submission. In all the circumstances I consider that there was no breach of the duty of fairness or breach of the rules of natural justice in relation to this submission. The worker was provided an opportunity to respond to the employer's submission, the worker did not object to not receiving a copy of the written version, and the employer's representative read some of the submission out in the hearing providing a realistic opportunity for response to it. Simply for purposes of providing context for this brief written version of the employer's oral submission, the original WCAT file consists of almost 400 pages, the large majority of which was provided by the worker.

Even if I assume that the worker is correct in his statement that his representative did not receive a copy of the employer's submission at the hearing, the representative and the worker did not object to the presentation of the submission to the panel. Also, practically speaking, the worker and his representative had an opportunity to respond to the submission at the hearing. I am satisfied that in all the circumstances there was not a breach of the rules of natural justice or the duty of fairness.

Weighing evidence

The worker says that no weight was placed on evidence he submitted from several podiatrists and other information about plantar fasciitis. Generally speaking, the original panel is free to weigh evidence as the panel sees fit. The panel pointed out at the hearing that she wanted to hear evidence specific to the worker and his job activities. As the original panel pointed out at the hearing, the evidence the worker had collected was general and did not apply to the worker specifically. It was not from practitioners whose qualifications and expertise was known to the panel. The evidence was not from one or more practitioners who examined the worker and formed an opinion. It was email correspondence in some cases and articles about plantar fasciitis in others. It was open to the worker to show how the information applied to his situation. He did not do so at the hearing and he made no request to do so in a written submission. The panel was free to reject this generalized information and prefer evidence from the Board medical advisor who had access to the file. It would have been preferable for the original panel to repeat her ruling on the weight to be given to this evidence in her decision. However, the lack of a repetition of this explanation does not provide grounds for reconsideration of her decision.

The worker has provided a critique of some of the evidence or lack of evidence provided by the employer. These are matters which the worker should have addressed in evidence at the hearing, in submissions at the hearing or he should have asked to address in post-hearing submissions or by providing additional evidence post-hearing. The worker says a risk assessment should have been done. This is something he could have asked the original panel to request or he could have obtained one himself.

Critique of original panel's decision

The worker has provided a paragraph by paragraph critique of the panel's decision. This is to a large extent a reargument of the appeal. An application for reconsideration is not an opportunity to reargue the original appeal. I have reviewed the worker's critique. Keeping in mind, that in order to establish an error of fact or law, the standard is patently unreasonable, I do not consider any errors the worker has pointed to achieve that standard. In relation to errors of fact, in order to find that a decision is patently unreasonable, there should be no evidence in support of the finding of fact. That is not the case here. The panel had some evidence on the matters upon which she made findings of fact.

For example, the worker criticizes the panel's statement that the worker's pain was worse in the mornings and subsided slightly through the day. He says the pain was present after each rest period during the day. He says the pain was worse each day up to and past January 4, 2000. The worker's statements can co-exist, logically, with the panel's findings.

Another example involves the panel's reference to the date of January 4, 2000. This is the date given in the worker's application for compensation as the "date of injury." This is why the original panel referred to that date. The worker points out, in his submission to this panel, that it was a period of time prior to that date which aggravated his condition. The panel clearly understood this since she referred to the worker's evidence that he had experienced pain in his heel during the last two weeks of 1999.

Actions of the employer's representative

The worker has made some complaints about the actions of the employer's representative particularly in regard to use of information relating to the 2000 claim in relation to a 2004 compensation claim by the worker. This is not relevant to this reconsideration application. I do not consider that the worker's concern discloses any wrong-doing on the part of the employer which requires a referral to another agency. The employer was entitled to disclosure of the 2000 claim file and to evidence given by the worker at the oral hearing. The employer is not required to disabuse itself of that information in dealing with a later compensation claim by the worker. The employer may not disclose the information to a third party, such as, for example, another employer. The worker has not suggested that or any other similar breach has occurred.

The worker writes in his submission about concerns which appear to already have been addressed by his employer about a letter written by the employer's representative on June 18, 2004, shortly after the oral hearing. Again, this is not relevant to this reconsideration application. In fact, the letter concerns a later claim for compensation, not the subject of the original panel's decision at all.

Conclusion

I deny the worker's request for reconsideration of the original WCAT panel's August 30, 2004 decision. The worker has not established grounds which meet the standards required. The original panel's decision remains in effect.

This application has been considered on the grounds of new evidence. The worker is precluded from making an application on these grounds again.

Daphne Dukelow
Vice Chair

DD/gw