

Decision of the Chair, Workers' Compensation Appeal Tribunal

Number: 20

Date: March 13, 2015

Subject: *Manual of Rules of Practice and Procedure* (MRPP) Item 20
Post-Decision Revisions

1. Under section 234 of the *Workers Compensation Act* (WCA) the chair is responsible for the general operation of the Workers' Compensation Appeal Tribunal (WCAT).
2. The chair's authority includes responsibility, among other things, for:
 - establishing any rules, forms, practices and procedures required for the efficient and cost effective conduct of appeals to WCAT;
 - making accessible to the public any rules, forms, practices and procedures established by the chair; and,
 - establishing administrative practices and procedures for the effective operation of WCAT.
3. Under section 11 of the *Administrative Tribunals Act* (ATA), WCAT has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.
4. Under section 13 of the ATA, WCAT may issue practice directives consistent with the ATA, the WCA, their regulations and any rules of practice and procedure made by WCAT.

Post-Decision Amendments

5. In *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499 (December 18, 2014) the majority of the British Columbia Court of Appeal held that WCAT does not have the power to reconsider a WCAT decision for patent unreasonableness and that only the panel who decided the appeal can reconsider the decision in order to cure a jurisdictional defect.

After a period of consultation, the chair has amended WCAT's practices and procedures relating to post-decision matters to implement the decision of the British Columbia Court of Appeal.

6. Pursuant to the chair's authority, the attached amendments to Item #20 (Post-Decision) are approved as an amendment and replacement of the previous MRPP provisions regarding Post-Decision which were effective October 27, 2014 (Appendix A).

7. The amendments to the post-decision provisions apply to all WCAT post-decision matters arising after December 18, 2014, with the exception of #8 below.
8. The amendments to item #20.1.3 of the post-decision provisions apply to all WCAT post-decision matters arising after March 13, 2015.
9. These rules of practice and procedure remain in effect until their amendment, replacement or revocation by the chair.

Caroline Berkey
Chair, Workers' Compensation Appeal Tribunal

Signed at Richmond, British Columbia, this 13th day of March, 2015

Appendix A

20	POST-DECISION	2
20.1	Amendments to Final Decisions	2
20.1.1	Corrections	2
20.1.2	Clarifications	3
20.1.3	Incomplete Decision	3
20.2	Reconsideration of Final Decisions.....	3
20.2.1	Reconsideration Based on New Evidence (Section 256).....	3
20.2.2	Reconsideration to Cure a Jurisdictional Defect Error	4
20.2.3	Reconsideration on Both Grounds.....	5
20.2.4	Time Limit	5
20.2.5	One Time Only.....	5
20.3	Reconsideration Applications.....	5
20.3.1	Reconsideration not to Proceed.....	6
20.3.2	Reconsideration to Proceed.....	6
20.4	Judicial Review	7
20.4.1	Reconsideration and Judicial Review	8
20.4.2	Time Limit for bringing a Judicial Review.....	8
20.4.3	Standards of Review.....	8
20.4.4	Publication of Judicial Review Decisions	8
20.5	Effect of Application for Reconsideration or Petition for Judicial Review	8

20 POST-DECISION

A decision of WCAT is final and conclusive and is not open to question or review in any court [s. 255(1)]. There is no further right of appeal and the Board must comply with a final decision of WCAT [s. 255(3)]. This includes summary decisions (such as those concerning applications for extensions of time to appeal or dismissals or withdrawals of appeals) and decisions on the merits. It does not include referrals back to the Board under section 246(3), and interim decisions such as ~~decisions~~ determinations on stay applications under section 244 (chapter 8) ~~whether an appeal will be heard orally or in writing, whether an order will be issued, or findings of fact made prior to a final decision on an appeal.~~

Given the final and conclusive nature of a decision, WCAT has no authority over the Board's implementation of the decision. Inquiries regarding implementation of a WCAT decision must be directed to the Board.

Functus officio means "a task performed". In the context of quasi-judicial tribunals like WCAT, this common law doctrine means that, having rendered its decision, a tribunal has no further legal authority or jurisdiction over the matter.

The WCA contains some limited exceptions to the general principle of *functus officio* where it is necessary to correct a clerical error, an inadvertent error or omission, or to clarify an ambiguity in the decision [ss. 253.1(1), (2), (3) and (4)]. WCAT may complete a decision where a panel has failed to decide an issue.

WCAT ~~also~~ has the statutory power to reconsider a decision on the ~~statutory~~ ground of new evidence that meets the requirements of section 256(3), ~~and the power to set aside a decision to cure a jurisdictional defect~~ WCAT also has a limited power to cure all or part of a decision if it contains one or more particular types of jurisdictional error. These types of jurisdictional error exist where WCAT had no power to decide a matter, failed to decide a matter that WCAT was required to decide, or was procedurally unfair. [s. 253.1(5)]

Post-decision communications should be in writing and directed to TCO.

20.1 Amendments to Final Decisions

20.1.1 Corrections

A panel may, on request by a party or on the panel's own initiative, amend a final decision to correct any of the following [s. 253.1(1)]:

- (a) a clerical or typographical error;
- (b) an accidental or inadvertent error, omission, or other similar mistake;
- (c) an arithmetical error made in a computation.

Panels must issue amendments within 90 days of all parties being served with the final decision, unless the panel determines otherwise [s. 253.1(2)].

20.1.2 Clarifications

Within 90 days after being served with a final decision, a party may apply to the panel for clarification of the decision. The panel may amend the decision if it considers that the amendment will clarify its decision [s. 253.1(3)]. WCAT has no ability to extend the 90 day time limit for applications for clarification.

As the Board is not a party to an appeal, the Board does not have the authority to request that WCAT clarify a decision. WCAT may not clarify a final decision on its own initiative.

20.1.3 Incomplete Decision

If a panel fails to address an issue ~~which was contained in the appeal before it, that it was required to decide~~, its decision is not complete and the panel may complete its adjudicative function by issuing an addendum to the original decision, either on its own initiative or on request ~~by~~ for reconsideration of a party on the basis that the panel has not completed the decision.

~~If a party requests alleges that a panel complete has not completed its decision, and the panel declines or is unable to complete its decision, WCAT will treat the request as an application for reconsideration. the party may apply for reconsideration on the basis that the panel has not completed its decision. This will not, however, exhaust a party's one-time only opportunity to apply for reconsideration to cure a jurisdictional defect (item 20.2.5).~~

20.2 Reconsideration of Final Decisions

20.2.1 Reconsideration Based on New Evidence (Section 256)

A party to a completed appeal may apply to the chair for reconsideration of a decision if new evidence has become available or been discovered. The chair may refer the decision for reconsideration if the chair is satisfied that the new evidence [s. 256(3)(a) and (b)]:

- (a) is substantial and material to the decision. Substantial means that it has weight and supports a different conclusion; material means that it is relevant to the decision; and
- (b) did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not have been discovered through the exercise of reasonable diligence.

The chair has delegated this authority to vice chairs (see Appendix 5).

A new evidence reconsideration application does not call into question the validity of the decision. Rather, the application is based on new evidence now available which may support a different decision on the merits.

20.2.2 Reconsideration to Cure a Jurisdictional ~~Defect~~ Error

Section 253.1(5) states that provisions regarding amendment of errors or ~~to clarify clarification of~~ a decision do not limit WCAT's ability to reopen an appeal to cure a jurisdictional defect on the request of a party. WCAT calls this process a reconsideration to cure a jurisdictional error. A reconsideration is not an opportunity to re-argue the appeal.

WCAT may ~~set aside one of its decisions~~ reopen its decision to cure a jurisdictional ~~defect~~ error. There are ~~three main~~ two types of jurisdictional ~~defect~~ errors which WCAT has the power to cure: breaches of the duty of procedural fairness; ~~patently unreasonable and narrow jurisdictional errors~~. of fact, law Narrow jurisdictional errors arise where WCAT had no power to decide a matter or exercise of discretion in respect of matters that are within WCAT's exclusive jurisdiction; and, errors of law in respect of matters that are not within WCAT's exclusive jurisdiction. WCAT failed to decide a matter that WCAT was required to decide.

An application for reconsideration to cure a jurisdictional ~~defect~~ error calls into question the validity of the decision.

WCAT will apply the same standards of review to reconsiderations to cure jurisdictional ~~defects~~ errors as will be applied by the court on judicial review (item 20.4.3).

20.2.2.1 Limits on WCAT's Reconsideration Power

The authority to consider an application to cure a jurisdictional error is discretionary in nature.

WCAT cannot change the outcome of a decision on the basis that it is incorrect, unreasonable, or patently unreasonable.

WCAT does not have the authority to reconsider a final decision on its own initiative. As the Board is not a party to an appeal, the Board does not have the authority to request that WCAT reconsider a decision.

WCAT does not have the authority to reconsider decisions by the former Review Board or the current Review Division. Objections to those decisions will be treated as appeals, or applications for extensions of time to appeal. WCAT also does not have the authority to reconsider decisions of the former Commissioners on any ground, or decisions of the former Appeal Division to cure a jurisdictional ~~defect~~ error. An objection to one of those decisions must be brought as a judicial review in the Supreme Court of British Columbia.

WCAT has the authority to reconsider a former Appeal Division decision on new evidence grounds [s. 256(1)(b)].

20.2.3 Reconsideration on Both Grounds

As an application for reconsideration to cure a jurisdictional ~~defect~~ error concerns the validity of the initial decision, such applications ~~are often~~ should be made soon after the decision is issued. However, new evidence to support an application under section 256 may not arise until a few years after the decision. For that reason, parties may seek reconsideration on both grounds at the same time or separately.

20.2.4 Time Limit

There is no time limit for applying for reconsideration.

20.2.5 One Time Only

A party to a completed appeal may apply for reconsideration of a decision on the basis of new evidence on one occasion only [s. 256(4)].

Where a party had more than one appeal, and WCAT administratively joined the appeals such that only one decision was issued, the party may bring separate reconsideration applications for each appeal ~~on the basis of new evidence on separate occasions~~ grounds. However, where the new evidence is relevant to more than one of the joined appeals, the party must bring the reconsideration applications at the same time.

~~The authority to consider an application to cure a jurisdictional defect is discretionary in nature.~~ WCAT will hear an application for reconsideration on this basis to cure a jurisdictional error on one occasion only regardless of the number of appeals that were administratively joined.

WCAT will not hear a further application for reconsideration of a WCAT decision provided in response to an application for reconsideration unless a new jurisdictional ~~defect~~ error (including a new breach of procedural fairness) is alleged in relation to the second decision.

If, before a decision has been made, a party ~~withdraws~~ requests to withdraw the reconsideration application, ~~they~~ WCAT has the discretion to accept or deny the withdrawal request. If the request is accepted, the party may reapply at a later date.

20.3 Reconsideration Applications

Practice Directive

~~Reconsideration applications, whether on the ground of new evidence or to cure a jurisdictional defect error, normally involve a two-stage process. The first stage results in a formal written decision, issued by a reconsideration panel, about whether there are grounds for reconsideration, that is, whether the threshold test has been met. require WCAT to first determine whether the statutory requirements for reconsideration have been met (i.e. whether the evidence is new and is substantial and material or whether there is a~~

jurisdictional error that is within WCAT's jurisdiction to address). Only if these requirements have been met can WCAT then consider the new evidence or, in the case of a jurisdictional error, rehear all or part of the appeal.

~~If the reconsideration panel finds that there was a jurisdictional defect, and sets aside the decision (as void), the second stage involves a fresh hearing of the appeal. If the reconsideration panel finds that the new evidence grounds are established, the second stage involves a reconsideration of the decision on the basis of the new evidence.~~

~~The second stage may be considered by the original panel, the reconsideration panel or a new panel. To avoid putting the parties to unnecessary effort and expense, WCAT will often consider the first question separately as stage one in a two stage process. However, where appropriate, both stages of the reconsideration process will may be considered at the same time. If this is the case, parties will be advised in advance how WCAT will be proceeding.~~

A reconsideration based on new evidence may be considered by the original panel or a new panel. A reconsideration based on jurisdictional error (including a breach of procedural fairness) will normally be considered by the original panel.

The reconsideration procedure is flexible and can be varied to fit the needs of a particular case. Reconsideration applications are normally decided on the basis of written submissions. This is the usual process that will be followed:

- (a) Parties applying for reconsideration must complete the Application for Reconsideration form and must explain the specific grounds for reconsideration. Forms are available from TCO and WCAT's website at www.wcat.bc.ca. Completed forms should be sent to TCO.
- (b) TCO will conduct a preliminary review of a party's objection to a WCAT decision.

20.3.1 Reconsideration not to Proceed

- (c) If the objection does not appear to set out potential grounds for reconsideration, TCO will provide the applicant with information about the grounds for reconsideration and will advise them of the procedure for applying for reconsideration. TCO will not forward an objection that does not appear to set out potential grounds for reconsideration to the registry. WCAT will take no further action with respect to the objection.

20.3.2 Reconsideration to Proceed

- (d) If the objection sets out potential grounds for reconsideration, TCO will advise the applicant that the reconsideration will proceed. TCO will forward the application to the registry which will process the application and invite written submissions from the parties.

- (e) *Once submissions are complete, the reconsideration application will be assigned to a panel for decision about whether there are grounds for reconsideration.*
- (f) *If a panel decides that there was a ~~jurisdictional defect~~, breach of procedural fairness, that WCAT had no power to decide a matter, or that WCAT failed to decide a matter that WCAT was required to decide then the ~~original decision will be found void, in whole or in part, and the~~ application will proceed to the second stage in which ~~a~~ the panel will hear all or part of the appeal afresh. WCAT will decide how the second stage will be conducted (item 7.1). ~~The second stage panel will explain the adjudicative history in their decision. The statutory 180 day time limit for decision making applies to the second stage reconsideration to cure a jurisdictional defect (item 17.1. to 17.1.2).~~*
- (g) *If a panel decides that there are new evidence grounds for reconsideration, the ~~original decision is not found to be void, in whole or in part.~~ The application will proceed to the second stage in which ~~a~~ the panel will reconsider the previous decision on the basis of the new evidence. The second stage panel's decision will only concern the specific issues on which the new evidence grounds were met and whether the new evidence will result in a change to the original decision.*
- (h) *WCAT will decide how the second stage of new evidence reconsiderations will be conducted (items 7.1 and 7.5). The statutory time limit for decision-making does not apply to the second stage of a new evidence reconsideration, however WCAT will nominally apply a 180-day time limit.*
- (i) *WCAT will invite respondents to participate in both stages of the reconsideration process.*
- (j) *Where a reconsideration application is based on new evidence, requests for reimbursement of expenses will generally be addressed ~~by~~ in the second stage of the reconsideration ~~panel (chapter 16)~~.*

20.4 Judicial Review

A judicial review is a legal procedure that takes place in the Supreme Court of British Columbia. In a judicial review, a Supreme Court judge reviews a decision that has been made by an administrative tribunal or an administrative decision maker. WCAT is an administrative tribunal.

A judicial review is not an appeal and will be granted only in limited circumstances. General information about judicial reviews of WCAT decisions is accessible on WCAT's website at www.wcat.bc.ca. Parties are advised to contact a lawyer if they have questions regarding the judicial review process. Further information is also available on-line at the B.C. Supreme Court's Self-Help Information Centre at: www.supremecourtselfhelp.bc.ca.

20.4.1 Reconsideration and Judicial Review

A party may apply to WCAT for reconsideration of a decision and apply to the court for judicial review of the same decision at the same time. In that case, WCAT will provide the reconsideration panel with the judicial review petition and related documents. The panel will consider the portions of those documents which are relevant to the reconsideration application.

20.4.2 Time Limit for bringing a Judicial Review

A judicial review of a final WCAT decision must be commenced within 60 days of the date the decision is issued [s. 57(1), ATA]. Under certain circumstances, the court may extend the time.

20.4.3 Standards of Review

The court will not interfere in a final WCAT decision unless threshold grounds are met. There are three possible standards of review [s. 58(2), ATA]:

- (a) patently unreasonable for a finding of fact or law or an exercise of discretion in respect of a matter over which WCAT has exclusive jurisdiction under the privative clause [s. 254, WCA];
- (b) fairness in all of the circumstances for questions about the application of common law rules of natural justice and procedural fairness; and
- (c) correctness for all other matters.

A court will consider a discretionary decision to be patently unreasonable if the discretion is exercised arbitrarily or in bad faith, is exercised for an improper purpose, is based entirely or predominantly on irrelevant factors, or fails to take statutory requirements into account [s. 58(3), ATA].

20.4.4 Publication of Judicial Review Decisions

In addition to the court websites, all judicial review decisions regarding WCAT decisions are accessible on WCAT's website at www.wcat.bc.ca.

20.5 Effect of Application for Reconsideration or Petition for Judicial Review

An application for reconsideration or a petition for judicial review does not act as a stay of the WCAT decision. Unless and until the WCAT decision has been set aside, it continues to be final and conclusive.