

## Decision of the Chair, Workers' Compensation Appeal Tribunal

Number: 14  
Date: June 4, 2010  
Subject: *Manual of Rules of Practice and Procedure*  
Item #8.2, Extension of Time to Appeal

1. Whereas 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. And whereas 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. And whereas 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. And whereas 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;
5. And whereas the British Columbia Supreme Court in *Kerton v. Workers' Compensation Appeal Tribunal et al.* (2010 BCSC 644) found that WCAT lacked the discretion to deny an extension of time to appeal where the special circumstances and injustice criteria set out in section 243(3) of the *WCA* have been met;
6. And whereas, in order to ensure parties receive timely extension of time decisions, the chair has deemed it necessary to amend WCAT's practices and procedures relating to applications for extensions of time on an interim basis to comply with the Court's findings in *Kerton*, pending the outcome of WCAT's appeal of the Court's judgment to the British Columbia Court of Appeal.

7. Pursuant to the chair's authority, the attached interim amendment to the extension of time provisions (item #8.2) in the *Manual of Rules of Practice and Procedure* (MRPP) dated May 5, 2010 (Appendix A), is approved as an amendment and replacement of the previous MRPP provisions regarding extension of time to appeal (item #8.2) which were effective November 3, 2009.
8. The interim amendment applies to all WCAT decisions respecting an extension of time to appeal made on or after May 5, 2010.
9. These rules of practice and procedure remain in effect until their amendment, replacement or revocation by the chair.

Jill Callan  
Chair, Workers' Compensation Appeal Tribunal

Signed at Richmond, British Columbia, this 4th day of June, 2010.

## **8 SUMMARY DECISIONS**

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WCAT decisions are of two types: merit decisions which involve the weighing of evidence and argument in relation to the primary issues on appeal, and summary decisions which are of three types. A summary decision may be procedural, that is, concerned with the steps or processes in the appeal; it may be an interim decision, such as suspending an appeal; or it may provide a final outcome such as dismissing an appeal without a decision on its merits [s. 31(1) ATA].

Summary decisions may be provided by a formal numbered decision or by letter. They may be issued by the registrar's office or by a panel. They may concern:

- (a) an application for an extension of time to appeal to WCAT;
- (b) a request for a stay of a Board decision pending the outcome of the appeal;
- (c) jurisdictional issues, such as whether a party has standing to initiate the appeal, or whether the issue is one within WCAT's jurisdiction;
- (d) dismissal of an appeal;
- (e) suspension of an appeal; or,
- (f) an appellant's request to withdraw an appeal.

### **8.1 Dismissing Appeals**

Section 31(1) of the ATA allows WCAT to dismiss all or part of an appeal in a summary manner if any of the following apply:

- (a) the appeal is not within WCAT's jurisdiction;
- (b) the appeal was filed out of time;
- (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
- (d) the appeal was made in bad faith or filed for an improper purpose or motive;
- (e) the appellant failed to diligently pursue the appeal or failed to comply with a WCAT order;
- (f) there is no reasonable prospect that the appeal will succeed;
- (g) the substance of the appeal has been appropriately dealt with in another proceeding.

Section 31(2) of the ATA requires WCAT to give the appellant an opportunity to file a written submission or otherwise be heard before dismissing an appeal. Section 31(3) of the ATA requires WCAT to issue a written decision, with reasons, for dismissing an appeal.

## 8.2 Extension of Time to Appeal

There is a 30 day time limit for appealing a decision of a review officer to WCAT [s. 243(1)]. There is a 90 day time limit for appealing a decision of a Board officer concerning a discriminatory action complaint (under section 153) or concerning a reopening on application (under section 96(2)) to WCAT [s. 243(2)] (items 5.1 to 5.1.5). WCAT adds eight days to the time to allow for mailing [s. 221(2)].

The chair ~~has discretion to~~ **may** extend the time to appeal under section 243(3). There are ~~three~~ **two** requirements for an application under section 243(3) to be successful:

- (a) the chair must be satisfied that special circumstances precluded the filing of the appeal on time; **and**,
- (b) the chair must be satisfied that an injustice would result if the extension were not granted; ~~and~~.
- ~~(c) the chair must exercise the discretion to extend time in favour of the applicant.~~

A decision to allow or deny an extension of time to appeal to WCAT is final and conclusive.

### *Practice Directive*

#### 8.2.1 Application for Extension of Time

*WCAT will not process an application for an extension of time to appeal where the notice of appeal, letter or other written method of initiating the appeal, does not meet the requirements of section 242(2)(item 5).*

*An application for an extension of time to appeal will normally be considered on the basis of written submissions. Disclosure of the Board file will not usually be provided. WCAT will invite the respondent to participate (item 6.5).*

*Applicants must provide reasons for not appealing within the statutory time frame. Applicants must also provide reasons for any further delay after the expiry of that time. If the applicant fails to provide these reasons, the applicant will be required to provide or complete the reasons within 21 days.*

*If WCAT does not receive the completed reasons by the due date, the appeal will be closed as incomplete and WCAT will take no further action. If the applicant later wishes to pursue the appeal, they must again apply for an extension of time to appeal.*

## **8.2.2 Special Circumstances Precluded**

*Special circumstances must preclude filing the appeal on time. The dictionary definition of “special” includes “unusual”, “uncommon”, “exceptional” and “extraordinary”. In the context of section 243(3)(a), “preclude” does not mean “absolutely prevent”. It may include “prevent”, “hinder”, “impede”, or “delay”. When deciding an extension of time application, panels will not consider the merits of the appeal.*

*The special circumstances test in section 243(3)(a) is only applicable to the failure to file the appeal on time. It does not apply to any subsequent delay after the time to appeal expired.*

*While no single factor is determinative, WCAT may consider the following factors when deciding whether special circumstances precluded the filing of an appeal on time:*

- (a) the date on which the applicant actually received the decision under appeal;*
- (b) if there was a delay in the applicant receiving the decision, the reason for the delay;*
- (c) whether the applicant was aware of the right to appeal and the time limit for initiating the appeal;*
- (d) whether the applicant has obtained significant new evidence that would support the appeal which, when the time limit to appeal expired, either did not exist or existed but was not discovered and could not through the exercise of reasonable diligence have been discovered; and,*
- (e) whether the applicant took all reasonable steps to ensure a timely appeal.*

### **8.2.2.1 Representative Acts or Omissions**

*When considering whether acts and omissions of a representative constitute special circumstances that precluded the filing of the appeal on time, the overriding consideration is whether the applicant acted reasonably in all of the circumstances.*

*While no single factor is determinative, WCAT may consider the following factors when deciding whether acts and omissions of a representative constitute special circumstances that precluded the filing of an appeal on time:*

- (a) whether, within the relevant appeal period, the applicant instructed a representative to appeal;*
- (b) whether the applicant was in any way responsible for the delay;*
- (c) any other relevant circumstances particular to the appeal.*

### 8.2.3 Injustice

In order to extend the time to appeal, an injustice must result from the refusal to grant the extension (s. 243(3)(b)). **“Injustice” is given a wide meaning, including means “unfairness”, “lack of justice”, or “wrong”. In determining whether “an injustice would otherwise result”, the chair will consider a number of factors, including:**

- (a) *the significance of the matter under appeal (i.e. the magnitude or importance of the issues under appeal);* ~~The chair may also consider other factors that may be relevant to this requirement.~~
- (b) **the length of the delay;**
- (c) **the reasons for the delay beyond the expiry of the time limit to appeal;**
- (d) **whether the applicant acted promptly to initiate the appeal when he or she became aware of the decision, the time limit for appealing, or the significant new evidence that would support the appeal; and,**
- (e) **any other relevant circumstances particular to the appeal.**

### ~~8.2.4 Exercise of Discretion~~

~~If the two criteria in section 243(3) are met, the chair must then decide whether to exercise the residual discretion to extend the time to appeal. The following factors will be considered:~~

- ~~(a) the length of the delay;~~
- ~~(b) the reasons for any delay beyond the expiry of the time limit to appeal;~~
- ~~(c) whether the applicant acted promptly to initiate an appeal when they became aware of the decision, the time limit for appealing, or the significant new evidence that would support the appeal;~~
- ~~(d) whether there is prejudice to the respondent resulting from the delay.~~

The WCAT extension of time to appeal application form is accessible on the WCAT website at: [www.wcat.bc.ca](http://www.wcat.bc.ca).