

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

Number: 15  
Date: March 9, 2011  
Subject: *Manual of Rules of Practice and Procedure (MRPP)*  
Item #8.2, Extension of Time to Appeal

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.

### *Extension of Time Amendment*

5. The British Columbia Court of Appeal in *Kerton v. Workers' Compensation Appeal Tribunal*, 2011 BCCA 7 allowed WCAT's appeal from the British Columbia Supreme Court *Kerton v. Workers' Compensation Appeal Tribunal* (2010 BCSC 644), thus restoring WCAT's 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. After the British Columbia Supreme Court decision in *Kerton*, the chair amended the MRPP on an interim basis.

7. After a period of consultation, the chair has decided to amend WCAT's practices and procedures relating to applications for extensions of time in accordance with the decision of the British Columbia Court of Appeal.
8. Pursuant to the chair's authority, the attached amendment to the extension of time provisions (item #8.2) in the MRPP dated January 10, 2011 (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 May 5, 2010.
9. The amendments to the extension of time provisions applies to all WCAT applications for an extension of time to appeal received on or after January 10, 2011.

*Housekeeping Amendments: Supreme Court Civil Rules*

10. Effective July 1, 2010 new *Supreme Court Civil Rules*, B.C. Reg. 168/2009 came into effect. The glossary and items #11.7, #11.7.1, #16.2.1, and #18.8 contain references to the previous British Columbia *Rules of Court*, B.C. Reg. 221/90. As a result, the attached housekeeping amendments to the glossary and the items listed are required. These amendments can be found in Appendix B.
11. These housekeeping amendments are effective March 9, 2011.
12. 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 9th day of March, 2011.

# Appendix A

## 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~~ Extending the 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 ~~may~~ has discretion to extend the time to appeal under section 243(3). ~~There are two requirements for an application under section 243(3) to be successful. In order for the chair to exercise that discretion in favour of extending the time to appeal, an applicant must meet, at a minimum, the following two requirements:~~

- (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.

In considering whether to exercise the discretion to extend the time to appeal, the chair may also consider other relevant factors, such as whether there is prejudice to the respondent and whether the delay is so long that WCAT cannot reasonably or fairly decide the appeal.

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:*~~

*In determining whether special circumstances precluded the filing of the appeal on time, the chair may consider a number of factors, including:*

- (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*~~ *In determining whether acts and omissions of a representative constitute special circumstances that precluded the filing of an appeal on time, the chair may consider a number of factors, including:*

- (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 “unfairness”, “lack of justice”, or “wrong”. In determining whether “an injustice would otherwise result”, the chair ~~will~~ may 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);*
- (b) the length of the delay;*
- (c) the reasons for any delay beyond the expiry of the time limit to appeal;*

- (d) *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; and,*
- (e) *any other relevant circumstances particular to the appeal.*

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).

## Appendix B

### GLOSSARY

“ADR”	means alternative dispute resolution.
“allow”	means the WCAT panel disagrees with the determination made on an issue covered by a decision or order under appeal, or grants the remedy requested in an application.
“appeal”	includes an application.
“Appeal Division”	means former Appeal Division of the Workers’ Compensation Board (Board).
“Appeal Regulation”	means <i>Workers Compensation Act Appeal Regulation</i> , B.C. Reg. 321/02.
“appellant”	includes applicant.
“application”	includes an application for an extension of time to appeal, an application for reconsideration of a WCAT decision, and an application for a section 257 certificate.
“at least”	when referring to the calculation of time, means that the first and last days are not included.
“ATA”	means <i>Administrative Tribunals Act</i> , S.B.C. 2004, c. 45.
“Amendment Act”	means <i>Workers Compensation Amendment Act, 2002</i> , S.B.C. 2002, c. 56.
“Amendment Act No. 2”	means <i>Workers Compensation Amendment Act (No.2), 2002</i> , S.B.C. 2002, c. 66.
“Board”	means Workers’ Compensation Board, now operating as WorkSafeBC.
“board of directors”	means board of directors of the Board.
“Cabinet”	means Lieutenant Governor in Council.
“cancel”	means that the WCAT panel disagrees with a decision under appeal and determines that the decision should be set aside without a new or changed decision being substituted.

<b>“chair”</b>	means head of WCAT appointed under section 232(2)(a) who has all the powers of the chair set out in Part 4 of the WCA [s. 231].
<b>“Commissioners”</b>	means former governing body of the Board, prior to June 3, 1991.
<b>“confirm”</b>	means that, on every issue addressed in the WCAT decision, the panel agrees with the determinations made by the prior decision-maker in the decision or order under appeal, though not necessarily with the reasons for those determinations.
<b>“decision”</b>	A letter or other communication to a person affected that records the determination of the Board, including the Review Division, as to a person's entitlement to a benefit or benefits or a person's liability to perform an obligation or obligations under any section of the Act.
<b>“deny”</b>	means the WCAT panel agrees with the determination made on an issue covered by a decision or order under appeal, or does not grant the remedy requested in an application.
<b>“FIPPA”</b>	means <i>Freedom of Information and Protection of Privacy Act</i> , R.S.B.C. 1996, c. 165.
<b>“issue”</b>	means each benefit, or each aspect of a benefit or obligation, dealt with in a decision or order where the decision or order includes determinations regarding: different aspects of a benefit or obligation; more than one type of benefit or obligation; or, determinations regarding the same benefit or obligation at different places or times.
<b>“member of family”</b>	means wife, husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half brother and half sister and a person who stood in place of a parent to the worker, or to whom the worker stood in place of a parent, whether related to the worker by blood or not [s. 1].
<b>“members of WCAT”</b>	means chair, vice chairs, and temporary substitute members appointed under section 232(10) [s. 231].
<b>“minister”</b>	means Minister of Labour.
<b>“officer of WCAT”</b>	means senior registry officer, assessment officer, appeal coordinator, or legal counsel.



<b>“party”</b>	means person who may bring or respond to an appeal [s. 241].
<b>“practice directive”</b>	means italicized MRPP item that is consistent with the <i>Workers Compensation Act</i> , R.S.B.C. 1996, c. 492, and its regulations, and the <i>Administrative Tribunals Act</i> , S.B.C. 2004, c. 45, which provides guidance and is not binding on WCAT;
<b>“presiding member”</b>	means the WCAT member (either the chair or any vice chair) chairing a panel [s. 231].
<b>“procedural fairness”</b>	means procedural fairness and natural justice.
<b>“Review Board”</b>	means former Workers’ Compensation Review Board.
<b>“Review Division”</b>	means Review Division of the Board.
<b>“rule”</b>	means bolded MRPP item respecting practice and procedure that facilitates the just and timely resolution of matters before WCAT. Rules are binding, but WCAT may waive or modify a rule in exceptional circumstances;
<b>“section” (or “s.”)</b>	means section of the WCA, unless context otherwise indicates.
<b>“senior vice chair”</b>	means the tribunal counsel and the registrar. Reference to “a senior vice chair” means either of these two positions. Otherwise, references to senior vice chair will be abbreviated to refer specifically to the tribunal counsel or the registrar.
<b>“Supreme Court Rules”</b>	means <del><i>British Columbia, Rules of Court</i>, B.C. Reg. 221/90</del> <u><i>Supreme Court Civil Rules</i>, B.C. Reg. 168/2009.</u>
<b>“TCO”</b>	means tribunal counsel office.
<b>“vary”</b>	means that, on one or more issues addressed in the WCAT decision, the panel reaches a conclusion which differs in whole or in part from the conclusion or outcome provided by the prior decision-maker and provides a changed decision.
<b>“vice chair”</b>	means a WCAT decision maker (not an officer), appointed by the chair, after consultation with the minister, under section 232(2)(b) to make decisions on appeals to WCAT, and whose position is not representative of employers’ or workers’ interests.
<b>“WCA”</b>	means <i>Workers Compensation Act</i> , R.S.B.C. 1996, c. 492.

## 11 EVIDENCE

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### 11.7 Orders (Subpoenas) for the Production of Existing Evidence

At WCAT, an order is what is otherwise known as a subpoena.

Section 247(1) provides that, at any time before or during a hearing, WCAT may order a person:

- (a) to attend an oral or electronic hearing to give admissible, relevant evidence on oath or affirmation or in any other manner that is admissible and relevant to an issue in an appeal, or
- (b) to produce an admissible, relevant document or other thing in a person's possession or control.

Panels may issue an order under section 247(1) on their own initiative, or at the request of a party.

#### *Practice Directive*

*A party to an appeal may request an order where a person who is not a party to an appeal has documentary or oral evidence that is relevant to the matters under appeal and they are not willing or able to provide that evidence voluntarily. This may, for example, include persons who require an order for their employers to give them the time off from work. It may also include experts who have provided a written opinion on which a party wishes to cross-examine them. It does not include Board decision makers but may include Board officers who provide evidence, such as vocational rehabilitation consultants, field investigators and medical advisors.*

*Together with their request for an order under section 247(1), parties must provide WCAT with the following information in writing:*

- (a) *the name and address of the witness or person in possession of the documents or things, and the exact documents or class of documents or things requested;*
- (b) *the relevance of the evidence to the issue under appeal, that is*
  - (i) *how it relates to the issue under appeal, and*
  - (ii) *how it is necessary for WCAT to address the issue under appeal and make a decision in the appeal;*
- (c) *whether the witness is willing to attend voluntarily, or the person is willing to produce the documents or things voluntarily and, if not, why not;*
- (d) *whether there is another way of testing the evidence.*

*Where an oral hearing is scheduled, the request for an order must be made at least 14 days in advance. Where there is no oral hearing, the request for an order must be made at least 14 days before the party's written submission is due. Otherwise, WCAT is under no obligation to consider the request in advance. The party may later repeat a request for an order to the panel.*

*In deciding whether to issue an order under section 247(1), WCAT will consider whether there are other means for obtaining the same evidence, the relevance of the evidence and, if applicable, the reason for the unwillingness of a witness to attend, or a person in possession of documents to provide evidence, voluntarily.*

*The panels will sign an order under section 247(1) in a form approved by WCAT (see Appendix 9 as modified from time to time). A person served with an order compelling their attendance at a hearing is entitled to conduct money payable at the time of service (Supreme Court Civil Rule 40(38) 12-5(35)). A witness is not obligated to attend if the conduct money is not paid. A person served with an order compelling the production of documents is entitled to payment of the reasonable costs of copying and delivering the documents, payable in advance.*

*WCAT will be responsible for service and payment of conduct money and/or the costs of production of documents.*

### **11.7.1 Depositions**

WCAT may order depositions of witnesses (in or out of province) in accordance with the Supreme Court Civil Rules [s. 247(2)].

## **16 EXPENSES AND COSTS**

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### **16.2.1 Legal Costs**

Costs under section 6 of the Appeal Regulation may include legal costs.

Where a panel concludes that the requirements of sections 6(a) or (b) have been met and orders one party to pay the legal costs of another party in an appeal, the panel will generally be guided by the principles set out in Supreme Court Civil Rule 57(3) 14-1(3) when assessing the legal costs. The amount of legal costs assessed under section 6(c) will generally be less than if the legal costs were assessed under sections 6(a) or (b).

A panel will generally award those legal costs that the panel considers were proper or reasonably necessary to conduct the appeal and, in exercising that discretion, the panel will consider all of the circumstances, including:

- (a) the complexity of the appeal and the difficulty or the novelty of the issues involved;
- (b) the skill, specialized knowledge and responsibility required of the lawyer;
- (c) the amount involved in the appeal;
- (d) the time reasonably expended in conducting the appeal;
- (e) the conduct of the party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding;
- (f) the importance of the appeal to the party and the result obtained; and
- (g) the benefit to the party of the services rendered by the lawyer.

## 18 CERTIFICATION TO COURT – SECTION 257 APPLICATIONS

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### 18.8 Effect on the Legal Action

WCAT does not determine the effect of the section 257 certificate on the legal action, that is, whether a legal action is barred pursuant to section 10. Following a section 257 certificate, a party may apply to the court in accordance with the Supreme Court Civil Rules to determine whether the action should be dismissed based on section 10 and the findings contained in the certificate.