Noteworthy Decision Summary

Decision: WCAT-2004-05845 **Panel**: Herb Morton **Decision Date:** November 5, 2004

Reconsideration – Panel not obliged to request additional evidence from parties – Natural justice – Error of law going to jurisdiction – Sections 246, 247, 249, and 253(3) of the Workers Compensation Act

As a result of the B.C. Court of Appeal's decision in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499, decisions in the Noteworthy Decisions Index that discuss WCAT's jurisdiction to reconsider a prior decision for jurisdictional error are no longer noteworthy for this point. However, this decision remains noteworthy for the other points set out in the noteworthy summary.

This was a reconsideration of a prior Workers' Compensation Appeal Tribunal (WCAT) decision which denied the appeal on the basis of insufficient medical evidence. The reconsideration panel held that parties to an appeal have an obligation to provide sufficient evidence to enable WCAT to make a decision. Although WCAT has the discretion to request further evidence from parties and to seek independent medical advice it does not have an obligation to do so. Failure to do so is not a lack of procedural fairness or other common law error of law going to jurisdiction.

The worker claimed compensation for a right knee injury. The Workers' Compensation Board (Board) denied the worker's claim. The worker appealed to the former Workers' Compensation Review Board (Review Board). On March 3, 2003, WCAT replaced the Review Board and the appeal was transferred to WCAT.

WCAT approved the worker's request for an oral hearing. The worker later developed throat cancer and requested the appeal be decided based on written submissions. WCAT denied the appeal on the basis of insufficient medical evidence. The worker subsequently died. The worker's estate asked for a reconsideration on the basis the WCAT panel had made an error of law going to jurisdiction.

The worker submitted the WCAT panel had failed to comply with policy item #97.00 of the *Rehabilitation Services and Claims Manual* as he had failed to take the initiative to seek further evidence. The reconsideration panel concluded that item #97.00 applies to the Board and does not apply directly to WCAT. However, in the event the policy did apply, the reconsideration panel concluded WCAT does not have the responsibility to evaluate an appeal and then notify parties of the weaknesses in their case for the purpose of obtaining further evidence. Although WCAT is an inquiry body, and has the discretion to seek further evidence, it is not obliged to do so. It is up to the panel to determine whether to exercise the inquiry powers under sections 246, 247, or to request independent medical assistance from a health professional under section 249 of the *Workers Compensation Act* (Act).

The reconsideration panel also noted that section 253(3) of the Act places some onus on parties to exercise reasonable diligence in providing WCAT with the evidence the party wishes to have considered in the appeal.

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The reconsideration panel concluded the original WCAT panel had accepted all of the background facts presented by the worker. Thus there was no issue of credibility that could have been resolved by an oral hearing. What was lacking was expert medical evidence to support the conclusion that the worker's injury was work-related. The decision was not patently unreasonable and there was no lack of procedural fairness, or breach of natural justice, in the panel proceeding to reach a decision on the basis of the evidence before him.
The reconsideration panel commented that a party cannot, by making a "conditional" submission, place an onus on WCAT to respond to the submission and grant the party a further period of time to provide additional evidence or argument. Parties should provide all the evidence and argument they wish the panel to consider. Once submissions are complete, WCAT may proceed to issue its decision, which under section 255(1) of the Act is final and conclusive.

The panel concluded there is nothing unusual in an appeal being denied due to insufficient medical evidence to support the appellant's position. There is no inconsistency in WCAT denying an appeal on this basis without holding an oral hearing.

The reconsideration application was denied.

WCAT Decision Number: WCAT-2004-05845
WCAT Decision Date: November 05, 2004
Panel: Herb Morton, Vice Chair

Introduction

The executor for the estate of the deceased worker requests that Workers' Compensation Appeal Tribunal (WCAT*) Decision #2003-04171-RB*, dated December 17, 2003, be set aside on the basis of the common law ground of an error of law going to jurisdiction.

Submissions have been provided on behalf of the estate of the deceased worker, by the lawyer who acted as the worker's union representative in his appeal. A letter of authorization has been provided by the executor of the worker's estate. For simplicity, I will in this decision refer to the worker and the worker's representative, as meaning the deceased worker and the representative for his estate.

By letter of March 17, 2004, the worker's representative advised that this application was brought on the common law grounds of an excess of jurisdiction (involving a failure to comply with policy), and discrimination on the grounds of physical disability. These concerns relate to the fact that the worker's appeal was heard (at the worker's request) on the basis of written submissions, rather than by oral hearing, due to the worker's serious illness. In making its decision to deny the worker's appeal, the WCAT panel made reference to the insufficiency of the evidence before it without pursuing further inquiries. The worker's representative submits that the WCAT panel erred in not taking the initiative to seek further evidence.

By submission dated July 18, 2004, the employer's representative submitted that grounds for reconsideration have not been established. On July 23, 2004, the worker's representative advised the union would not be filing a rebuttal.

Issue(s)

Did the WCAT decision involve an error of law going to jurisdiction (due to the fact the panel addressed the worker's appeal on the basis of written submissions, did not invite additional input from the worker or his representative, and denied the appeal due to an insufficiency of evidence)?

Jurisdiction

WCAT uses the broad heading of "reconsideration" to encompass situations both where an applicant seeks to have a decision reconsidered on the basis of new evidence, and where an applicant seeks to have a decision set aside on the basis of the common law ground of an error of law going to jurisdiction. 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, Practices and Procedures* (MRPP), 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.

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 involved 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*).

Background

The worker claimed compensation for a right knee injury on August 7, 2000. He underwent arthroscopic surgery on September 6, 2000. The postoperative diagnosis was a medial meniscal tear of the right knee with Grade 2 chondromalacia of patella. On January 16, 2001, an entitlement officer of the Workers' Compensation Board telephoned the worker to obtain a detailed description of the circumstances surrounding the occurrence of the worker's injury. By decision dated February 6, 2001, the entitlement officer denied the worker's claim. The entitlement officer found that the worker's employment was not of causative significance in producing the worker's injury.

The worker appealed the February 6, 2001 decision to the former Workers' Compensation Review Board (Review Board).

Due to the restructuring of the workers' compensation appeal bodies pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), the worker's appeal was transferred to WCAT effective March 3, 2003 for completion. Section 38(1) of the transitional provisions contained in Part 2 of Bill 63 provided:

> Subject to subsection (3), all proceedings pending before the review board on the transition date are continued and must be completed as proceedings pending before the appeal tribunal except that section 253(4) of the Act, as enacted by the amending Act, does not apply to those proceedings.

The worker's request for an oral hearing was granted, and this was scheduled for May 9, 2003. By letter of May 5, 2003, the worker's representative advised WCAT that the worker had been diagnosed with throat cancer. She requested that the oral hearing be postponed *sine die* (without rescheduling to a new date), pending further advice regarding the worker's ability to attend a hearing. By further letter of September 30, 2003, the worker's representative requested that the worker's appeal proceed on a "read and review" basis. She enclosed a written submission on behalf of the worker. She advised that the worker's condition continued to worsen and it did not seem likely that he would be able to participate in a hearing in the foreseeable future. She further requested the worker's appeal be heard on an expedited basis. A written submission was provided on behalf of the employer on November 1, 2003, and the worker's representative provided a rebuttal submission on November 21, 2003.

The WCAT panel issued its decision on December 17, 2003. The panel found, first of all, that the worker's knee problems were not caused by a subsequent injury while gardening at home. The panel reasoned:

> Although I accept that the worker experienced complaints while gardening at home I find those complaints were likely due to the initial complaint and were not due to a new injury.

In its decision, the WCAT panel provided the following analysis regarding the circumstances giving rise to the worker's injury on August 7, 2000:

> Prior to the worker's conversation with the entitlement officer there were a number of descriptions of what occurred proximate to the August 7, 2000 onset of his complaints. One medical report suggested he was simply leaning forward, while two others included information to suggest the worker twisted his right knee. The worker's information to his employer, as well as that contained in his letter to the Board, did not include any

described twist and was instead more compatible with the initial medical reporting that the onset occurred while leaning forward. As such, considering the differing descriptions it was appropriate for the entitlement officer to contact the worker directly to obtain a more detailed description of what he did at work on August 7, 2000.

During his conversation with the entitlement officer the worker was unable to recall if his knee complaints were onset while pulling out the pin. Even if they were, I do not accept the argument put forth by the worker's representative that that activity would unduly stress the worker's right knee by causing torque or twisting. The worker described that the pin was directly in front of him and had to be pulled out to the side. He did not describe that any particular effort was involved, or that pulling the pin involved any particular bodily movement apart from his arm. In short, I accept that the entitlement officer fully questioned the worker regarding that particular activity and that no knee twist was evident in that description.

It is also apparent the activity the worker undertook was a regular work activity. Also, during his August 7, 2000 shift the worker performed that particular activity on 25 previous occasions, all without any difficulty or knee complaint. Although injuries can occur in the performance of routine work-required motions I do place some significance on the fact that no right knee complaint of any type was experienced during the numerous previous times the worker undertook that particular work-required motion.

From the evidence presently before me I find that at the time the worker's right knee complaints were onset he was kneeling on his left knee while leaning forward with a bent right knee. **There has been no medical opinion submitted to suggest that type of right knee use would normally be considered causative of a medial meniscus tear. In the end, I am left with insufficient evidence to conclude that leaning forward with a bent right knee would cause the worker's diagnosed medial meniscus tear.** As such, I am unable to conclude that he sustained a work-related injury that arose both out of and in the course of his employment on August 7, 2000.

[emphasis added]

The worker's representative submits that the WCAT panel failed to apply, or incorrectly applied, the applicable law and policy. She cites item #97.00 of the *Rehabilitation Services and Claims Manual*, which provided:

#97.00 EVIDENCE

Under the old English system, which was an adversary system of workers' compensation, there was a burden of proof imposed on the worker, but that is not the correct practice here. The Claims Adjudicator must not start with any presumption against the worker, but neither must there be any presumption in the worker's favour. The correct approach is to examine the evidence to see whether it is sufficiently complete and reliable to arrive at a sound conclusion with confidence. If not, the Adjudicator should consider what other evidence might be obtained, and must take the initiative in seeking further evidence. After that has been done, if, on weighing the available evidence, there is then a preponderance in favour of one view over the other, that is the conclusion that must be reached. But if it appears upon the weighing of the evidence that the disputed possibilities are evenly balanced then the rule comes into play which requires that the issue be resolved in accordance with that possibility which is favourable to the worker.

Although there is no burden of proof on the claimant, the Act contains prerequisites for benefits. Compensation will not be paid simply because, for example, a telephone call is received from someone claiming to be a worker, who has been hurt, and was disabled for a certain number of days. Some basic evidence must be submitted by the worker to show that there is a proper claim. The extent of that basic evidence necessary, and the weight to be attached to it, is entirely in the hands of the Adjudicator.

It is therefore not uncommon to see that a claim will be denied when a claimant, away from employment, begins to feel some pain and discomfort in the lower back, and seeking to find a reason for this condition, thinks back to the work being done over a period of time and concludes that the problem must have resulted from something which occurred on a certain day when certain heavy work was being performed. The question then arises whether there was anything other than the claimant's hindsight which would allow the Adjudicator to conclude that the work done some weeks or months previously had causative significance. It is at this point that investigation takes place and the evidence is weighed. If there is nothing objective to indicate any activity at work was potentially causative of the condition complained of, at or near the time alleged by the claimant, it can fairly be said that the claim has not been established. The claimant has simply failed to present those fundamental facts which bring the provisions of the Act into play.

The worker's representative argues that the WCAT vice chair failed to comply with policy at #97.00. She objects to the finding by the WCAT panel that there was

insufficient evidence to conclude the worker's right medial meniscal tear was work caused. She further submits that the vice chair's finding that the appeal could be considered through a read and review process, is inconsistent with the panel's ultimate finding that the evidence before it was insufficient.

By submission dated July 18, 2004, the consultant representing the employer argues:

> Even if the Panel had secured this kind of direct evidence from the worker it would not likely have changed the outcome as there was still no conflicting medical evidence present to dispute the Board's opinion. This sort of decision has to be made frequently at the WCAT and if this is a ground for reconsideration, then the WCAT will be looking at virtually every case again.

I note, in this regard, that in her submission dated September 30, 2003, the worker's representative had argued:

> It is submitted that the following uncontroverted facts are before the tribunal:
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> - The worker was in the course of performing a work-related function when he felt a pop in his knee.
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> - He reported the incident immediately.
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> - He had not been disabled from work by reason of his right knee prior to the incident of 7 August, 2000.
>
> - There is no evidence that he suffered any injury to his right knee outside of work between 7 August, 2000, and 14 August, 2000, when he first sought medical attention.
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> In the event the panel is not satisfied as to those facts, perhaps a telephone conference could be arranged with the worker and the employer's representative.

Upon reviewing the reasons provided in the WCAT decision, it appears to me that the panel accepted all of the points listed above. There is nothing in the WCAT decision to indicate that any of these background facts were not accepted by the panel. Thus, there was no issue of credibility on which further inquiry with the worker was required.

It is evident from the decision by the WCAT panel that what was lacking was expert medical evidence to support the conclusion that the worker's meniscal injury was caused by the specific work activity. A teleconference with the worker and his

representative could not, by itself, have provided the WCAT panel with such expert evidence. The question as to medical causation would be a matter requiring an expert medical opinion, which the worker would not be qualified to provide.

By its wording, policy at #97.00 is framed with reference to the consideration to be given by Board officers in the initial adjudication of a claim. As such, it does not have direct application to the consideration to be given by WCAT, in terms of the manner in which a WCAT vice chair is to evaluate the evidence in an appeal. However, even if this policy is considered to apply to WCAT, it provides that: "The correct approach is to examine the evidence to see whether it is sufficiently complete and reliable to arrive at a sound conclusion with confidence". The question as to whether the evidence is sufficiently complete and reliable to arrive at a sound conclusion with confidence is one which rests with a WCAT panel. It is not the responsibility of a WCAT panel to evaluate an appeal, and to then notify the parties of the weaknesses in the case for the purpose of obtaining further evidence. While WCAT is an inquiry body, and has a discretion to seek further evidence, it is not obliged to do so.

Section 38(1) of Bill 63's transitional provisions provides, in effect, that the worker's appeal must be completed as a WCAT appeal except that the 180 day time frame for decision-making under section 253(4) does not apply. Section 42 of the transitional provisions further provides:

> As may be necessary for the purposes of applying sections 250 (2) and 251 of the Act, as enacted by the amending Act, in proceedings under sections 38 (1) and 39 (2) of the amending Act, published policies of the governors are to be treated as policies of the board of directors.

As well, section 256 of the Act permits a party to request reconsideration of a WCAT decision if new evidence has become available or been discovered. Section 256(3) provides:

> (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.

Section 256(3) is similar in its effect to the former section 96.1 of the Act, which applied to Appeal Division decisions. These provisions have the effect of placing some onus on an appellant, in proceeding with an appeal to the Appeal Division or to WCAT, to

exercise due or reasonable diligence in furnishing the appeal body with the additional evidence which the party would wish to have considered in the appeal.

In *Appeal Division Decision #91-0724*, "Section 96.1", 7 WCR 145, a former chief appeal commissioner analyzed the due diligence requirement as follows (at pages 148 and 149):

> I find, first of all, that the test of "due diligence" applies to the person requesting reconsideration rather than to the decision-maker. The most reasonable interpretation of Section 96.1 is that it constitutes a bar to reconsideration to an applicant, where the basis for their request is that ... the Appeal Division did not consider evidence which the applicant could through the exercise of due diligence have obtained and submitted prior to the making of the impugned decision.
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> **The effect of this provision is to place some onus on an appellant for ensuring that the Appeal Division is in possession of the information necessary to the proper consideration of their appeal in the first instance. While the Appeal Division functions on an inquiry basis, and may itself seek out additional information, an appellant should be aware of the ramifications of Section 96.1 if they proceed with their appeal without taking reasonable steps to ensure that the evidence on file is complete.**
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> It is important to note, however, that the test of "due diligence" includes a concept of reasonableness as to the nature and scope of the inquiries an appellant is expected to have pursued. The fact that information previously existed and could have been obtained upon inquiry is not conclusive as to whether it could through the exercise of "due diligence" have been discovered. The circumstances of the particular case must also be considered, with regard to the extent of the inquiries which due diligence would have required.
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> The question is not simply whether the appellant could have obtained the particular information if they had made diligent inquiries for the purpose of obtaining it. The requirement of "due diligence" is more properly interpreted as referring to the degree of care which a prudent and reasonable appellant would have exercised in ensuring that the Appeal Division had all relevant information necessary to the proper consideration of their appeal. If, for example, certain information existed, but it was not reasonably foreseeable that it would be germane to the Appeal Division's consideration, "due diligence" would not have required the appellant to search it out.
>
> [emphasis added]

In *WCAT Decision #2003-01120-AD* dated June 25, 2003, the WCAT chair adopted the above-quoted analysis from *Appeal Division Decision #91-0724*. *WCAT Decision #2003-01120-AD* is flagged as a noteworthy decision on WCAT's internet decision site at: http://www.wcat.bc.ca/research/noteworthy_decisions.htm. The WCAT chair noted that the above-quoted analysis may also be of assistance in interpreting section 256(3) of the current Act.

A WCAT panel has authority under the Act to seek additional evidence. A panel may request independent assistance or advice from a health professional under section 249 of the Act. The panel may exercise its inquiry powers under sections 246 and 247 of the Act. However, the question as to when and whether such inquiry powers should be exercised is a matter to be determined by the panel.

In the text *Administrative Law in Canada*, 3rd ed. (Ontario: Butterworths, 2001) at 191, Sara Blake states:

> Findings of fact are reviewable only if patently unreasonable. An unreasonable finding of fact is one that is not supported by any evidence. A court will not review the evidence considered by the tribunal to determine whether there was sufficient evidence to support a finding of primary fact. A court will go no further than to determine whether there was any evidence, and only essential findings of fact upon which the decision of the tribunal turns will be reviewed in this manner. Non-essential findings of fact are not reviewable.
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> ...
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> A patently unreasonable rejection of evidence or a refusal in bad faith to consider relevant evidence may be grounds for review. If a tribunal, without explanation, completely ignores important evidence, its decision may be set aside.

In *Service Employee's International Union* v. *Nipawin Union Hospital*, [1975] 1 S.C.R. 382, the Supreme Court of Canada commented:

> A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.

I do not consider that the decision by the WCAT panel with respect to the evaluation of the factual and medical evidence on this claim was unreasonable, much less patently unreasonable, on the basis of the tests described above. Further, I do not consider that there was any lack of procedural fairness, or breach of natural justice, in the panel proceeding to reach a decision on the worker's appeal on the basis of the evidence which was before the panel.

While not necessary to my decision, I would comment that a party cannot, by making a "conditional" submission, place an onus on a WCAT panel to respond to the submission and grant a further period of time to furnish additional evidence or argument in respect to any deficiencies or weaknesses in the party's position. When a party is given the opportunity to make submissions, they should provide all the evidence and argument they wish the panel to consider. Once submissions are complete, it is open to the WCAT panel to conclude that there is an adequate basis for proceeding to issue its decision. Under section 255(1) of the Act, a WCAT decision is final and conclusive.

I would further comment that there is nothing unusual in an appeal being denied based on a lack of, or insufficiency of, medical evidence to support the appellant's position. This applies whether the appeal is being addressed by way of an oral hearing or written submissions. I see no inconsistency in the finding by the WCAT panel that the worker's appeal could be considered on the basis of written submissions, without an oral hearing, and the panel's decision to deny the appeal due to a lack of medical evidence to support the worker's appeal.

The worker's representative further argues that the WCAT decision was discriminatory. She submits:

> In submissions filed on 30 September, 2003, the Union advised that, although [the worker] was unable to attend a hearing by reason of his illness, he was prepared to participate in a telephone conference if the panel was unsatisfied as to the facts before it. That option was not pursued by the Vice Chair, who simply decided that he had insufficient evidence before him. It is submitted that failure to afford [the worker] an opportunity to provide testimony in the only fashion in which he was physically capable of doing so constitutes discrimination on the basis of physical disability.

On February 19, 2004, the worker's representative furnished a letter dated January 13, 2004 written by the worker in response to the WCAT decision. I note, in this regard, that if the worker's representative had considered it necessary to the worker's appeal, she could have furnished the worker's evidence in written form (by letter or affidavit) to the WCAT panel. As noted above, however, it is evident that a central factor in the decision of the WCAT panel was the lack of expert medical opinion to support the worker's appeal. The worker's testimony could not have filled that gap. Expert

evidence (such as a medical legal report) to support an appeal is normally provided to WCAT in writing, whether the appeal is proceeding by way of an oral hearing or by written submissions (see MRPP item #8.50 and #8.51). Thus, the change in hearing method would not have prevented the worker's representative from providing expert evidence to support the worker's appeal. Under MRPP #8.51(d), 21 days notice to WCAT is required if a party intends to call an expert witness to give evidence at an oral hearing. There is no indication that the worker's representative had intended to call any expert witnesses at the oral hearing initially scheduled for May 9, 2003.

In consideration of the foregoing, I find there was no error of law going to jurisdiction in the WCAT decision.

Conclusion

This application for reconsideration (made on behalf of the estate of the deceased worker), is denied. There was no lack of procedural fairness, or other common law error of law going to jurisdiction, in *WCAT Decision #2003-04171-RB*. The WCAT decision stands as final and conclusive.

Herb Morton
Vice Chair

HM/cd