Noteworthy Decision Summary

Decision: WCAT-2004-06118 **Panel**: Herb Morton **Decision Date:** November 22, 2004

Varying a Decision to the Detriment of Appellant - Scope of Decision – Issue not Raised by Appeal – Procedural Fairness - Relief from Costs - Reconsideration on Common Law Grounds of Error of Law going to Jurisdiction – Natural Justice - Section 39(1)(e) of the Workers Compensation Act (Act) – WCAT Manual of Rules, Practice and Procedures, Item #14.30 – Section 253 of the Act

Where a party has been partially successful in a lower decision, the party cannot assume that there is no "risk" in pursuing an appeal. Where an employer obtains a favourable relief of costs decision from the Workers' Compensation Board (Board) but only receives relief for a portion of the worker's claim, and appeals, WCAT has the authority to reweigh the evidence and find that the employer is not entitled to any relief of costs.

So long as the issue before the panel remains the same, and is not of a fundamentally different character than that which was brought before the decision-maker, it is open to the panel to reach his or her own conclusions on the issue. The panel is not obliged to give the parties notice of his or her proposed findings, in respect of the issue in dispute. There is no breach of natural justice if notice is not given and the decision represents a possible outcome regarding the issues which were properly before the panel for decision.

When an appellant places a question in issue, the appellant cannot assume that the outcome of the appeal will be to either confirm the original decision, or grant some additional benefit. There is always the possibility that the original decision, which may be in the appellant's favour, will be varied in a manner contrary to the interests of the appellant. Section 253(1) of the *Workers Compensation Act* (Act) provides that on an appeal, WCAT may confirm, vary or cancel the appealed decision or order.

In this case, the employer applied to the Board for relief of costs under section 39(1) (e) of the Act in relation to a claim by a worker for an injury as there was evidence that the worker suffered a pre-existing condition. The Board initially refused the application, finding that there was insufficient evidence to conclude that the worker's ongoing symptoms were caused by the condition. On reconsideration, the Board ordered relief of costs for only a portion of the claim (the "Board's Decision").

The employer appealed the Board's Decision. Prior to the appeal being heard the Board again reconsidered the issue and ordered additional, although not complete, relief of costs to the employer. The employer persisted with the appeal. On appeal, the WCAT panel varied the Board's Decision and denied the employer any relief of costs. It did not question the conclusion of the Board that the worker had a pre-existing condition but found that there was insufficient medical evidence to conclude, as the Board had, that the worker's recovery was prolonged or enhanced by the pre-existing condition. The employer applied for a reconsideration of the WCAT decision on common law grounds. It argued that the panel decided the appeal on an issue that was not before it, namely whether the worker's pre-existing condition prolonged the worker's symptoms. The employer argued that the Board had already accepted that the worker had a pre-existing condition and that it prolonged the worker's recovery. It argued that the only issue on appeal was the appropriate date for the relief of costs.

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Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

WCAT denied the employer's reconsideration application. At issue on appeal was whether the prolongation or enhancement of the worker's disability, due to a pre-existing condition, was either greater than, or less than, had been determined by the Board. Recognizing that the panel was required to weigh the medical evidence, possible outcomes of the appeal could be that greater relief would be granted, lesser relief would be granted, or that no relief would be granted. While notice to the parties that the panel would be reconsidering the significance of the worker's pre-existing condition was not legally required, it may have been desirable.

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Panel: Herb Morton, Vice Chair

Introduction

The employer requests that Workers' Compensation Appeal Tribunal (WCAT*) Decision #2004-01157-AD*, dated March 3, 2004, be set aside on the basis of the common law ground of an error of law going to jurisdiction.

The employer appealed a decision to grant 100% relief of costs effective August 1, 2001 (subsequently extended to May 31, 2001). The employer was seeking relief of costs from the 13 week point on the claim (approximately May 7, 2001). The WCAT decision found that the employer was not entitled to relief of any of the costs associated with the worker's temporary disability under this claim.

The employer is represented by a consultant. The consultant argues that the WCAT panel "stepped outside the scope of his authority." The consultant complains, in effect, that the WCAT decision concerned an issue which was different from the one raised by the employer's appeal. This application concerns both the scope of the WCAT panel's jurisdiction, and the question as to whether there was any lack of procedural fairness in the decision-making process, with respect to the appellant's right to be heard.

Although invited to do so, the worker is not participating in this application. The employer's appeal regarding relief of costs does not affect the worker, in any event.

Issue(s)

Did the WCAT decision involve an error of law going to jurisdiction? Did the WCAT panel exceed its jurisdiction, or breach the requirements of natural justice and procedural fairness, in reversing the decision by the Board to grant relief of costs?

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. As described in MRPP item #15.24, separate applications for reconsideration may be made on the common law grounds, or on the basis of new evidence under section 256 of the Act, but each type of application is limited to one occasion only.

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's claim was accepted by the Board for a traumatic-onset right De Quervain's tenosynovitis. Temporary disability benefits were paid from October 11 to 19, 2000, and from February 13, 2001 until October 3, 2001 (173 days in total).

By decision dated May 11, 2001, the case manager denied relief of claim costs on the basis that there was no evidence to support the conclusion the worker had a pre-existing disease, condition or disability. In a subsequent letter to the worker dated September 3, 2002, the case manager noted that bone scans performed in January and April 2001 had shown evidence of a bilateral distal radial-ulnar articulation arthropathy, which would be considered a pre-existing condition. The case manager concluded the worker's ongoing symptoms were not related to his right De Quervain's tenosynovitis which appeared to have resolved. The case manager commented: "Although not confirmed, the Medical Advisor felt that your recent wrist symptoms may relate to the radial ulnar arthropathies noted above." Reopening of the worker's claim was denied.
By decision of November 6, 2002, the case manager reconsidered the May 11, 2001 decision to deny relief of costs. He granted 100% relief of costs effective August 1, 2001. By notice of appeal dated November 18, 2002, the consultant appealed the

November 6, 2002 decision to the Appeal Division, on the grounds of error of fact and contravention of published policy.

On December 3, 2002, the case manager again reconsidered this matter. He noted:

> ...I have been contacted by [the consultant representing the employer]. He pointed out that an MRI on file (dated May 31st, 2001) would seem to suggest that [the worker's] compensable tenosynovitis condition was no longer present at that time. I have been asked to consider whether a relief of costs should be applied effective May 31st, 2001.
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> Having considered the above information, I agree with [the consultant's] suggestion. It is now my decision to apply Section 39(1)(e) to this claim effective May 31st, 2001 at 100%.

Due to the restructuring of the workers' compensation appeal structures pursuant to the *Workers Compensation Amendment Act (No. 2), 2002*, the employer's appeal of the November 6, 2002 decision was transferred to WCAT on March 3, 2003. In a written submission to WCAT dated February 6, 2004, the consultant argued:

> We are not sure why the Case Manager continues to chose dates of medical reports to establish the foundation for Section 39(1)(e) rather than follow the policy which states (if medically supported) that the application of this should occur following 13 weeks of wage loss benefits being paid.
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> 13 week of wage loss benefits paid would be approximately May 7, 2001. We would therefore are respectfully request that as it has now been clearly established that a chronic bi-lateral pre-existing condition existence, and was there from the start of the claim, that Section 39(1)(e) be correctly applied as per the WCB policies.
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> [reproduced as written]

By decision dated March 3, 2004, the WCAT panel varied the November 6, 2002 decision. The WCAT panel concluded:

> I vary the November 6, 2002 decision to the extent of denying relief of costs under section 39(1)(e) of the Act to the costs associated with the worker's temporary disability. The case manager erred in fact by finding that there was sufficient evidence of a pre-existing condition which had enhanced and/or prolonged the worker's temporary disability arising from his compensable right wrist de Quervain's tenosynovitis. There is insufficient evidence that the worker's pre-existing bilateral radiolunate (or radioulnar) arthropathy enhanced and/or prolonged the worker's temporary disability.

The WCAT panel provided lengthy reasons for its decision. At the bottom of page 8, the panel found:

> [Dr. N] in his May 4, 2001 opinion states: "As per Dr. Snelling's consult of March 26, 2001, " "the bone scan of January 25, 2001…is hard to tie in to the actual symptoms." There is therefore no evidence at present of a pre-existing condition prolonging his recovery." Dr. Sharma had been asked whether the worker's bilateral wrist symptoms in 2002 (not the worker's right wrist symptoms from February 2001 onward to October 2001 when wage loss benefits were terminated) were related to the worker's compensable de Quervain's tenosynovitis. He indicated that Dr. Kester found that by mid 2001 the worker's compensable condition had clinically and radiologically resolved. Dr. Sharma did not indicate that the worker's right wrist symptoms from May 7, 2001 onward were likely (probably) related to the worker's pre-existing bilateral condition. Dr. Sharma indicated that the worker's bilateral complaints in 2002 could (possibly) be related to the worker's pre-existing bilateral arthropathy. The case manager in the September 3, 2002 decision states: "Although not confirmed, the Medical Advisor felt that your recent bilateral wrist symptoms may relate to the radial ulnar arthropathies noted above." Dr. Sharma did not refer to the opinions made by Dr. Snelling which did not link the worker's ongoing symptoms in 2001 to the findings on the bone scans. Dr. Kester in his June 18, 2001 report (after the MRI was performed) indicated he did not know what the source of the worker's discomfort was in his right wrist. He did not indicate that these symptoms were likely (probably) linked with the results of the bone scans.
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> I find that there is insufficient evidence to establish, on the balance of probabilities (not possibilities) that the worker's bilateral radiolunate (or radioulnar) arthropathy (shown on the January and April 2001 bone scans) enhanced and/or prolonged the worker's temporary disability arising from his compensable injuries. I find there is insufficient evidence of the presence of any other pre-existing condition, disease, or disability which might have enhanced and/or prolonged the worker's temporary disability.

By letter dated March 12, 2004, the consultant states he reviewed the WCAT decision with considerable shock. He requests reconsideration, submitting:

> Both the WCB Case Manager and the employer were already in agreement that Section 39(1)(e) was applicable in this case – that was not the appealable issue before WCAT. The only disagreement was in determining the most appropriate date for it to be applied – this was the only issue being appealed.

> It would therefore appear [the WCAT panel] has in fact created his own appealable issue, rather than dealing with the appeal that we originally brought forth. It is our belief that he has stepped outside the scope of his authority and responsibilities, and has failed to address the actual appeal that we brought forth.
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> [emphasis removed]

Analysis

The central issue in this application concerns whether the WCAT panel erred by proceeding to consider an issue which had not been raised by the appellant. In other words, even if the issue was within the panel's jurisdiction, was there any lack of procedural fairness or breach of natural justice in the panel proceeding to address the issue without notice to the appellant? Was there a breach of the appellant's right to be heard? This is, in effect, the substance of the complaint raised by this application.

The employer's appeal in this case was filed to the Appeal Division from the November 6, 2002 decision to grant relief of costs effective August 1, 2001. The November 6, 2002 decision reconsidered and reversed the prior Board decision dated May 11, 2001, to deny relief of costs. The employer did not file an appeal from the later decision of December 3, 2002, to grant additional relief in relation to the period between May 31, 2001 and August 1, 2001. It is evident, therefore that the decision letter which gave rise to the employer's appeal was the decision concerning whether any relief of costs should be granted, rather than the later decision concerning whether additional relief of costs should be granted.

WCAT's *Manual of Rules, Practices and Procedures* (MRPP) provides, at item #14.30 regarding *Scope of Decision* (in part):

> **However, WCAT will generally restrict its decision to the issues raised by the appellant in the appellant's notice of appeal and submissions to WCAT....**
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> **The WCAT panel has a discretion to go beyond the issues expressly raised by the parties to the appeal, which were contained in the lower decisions giving rise to the appeal. A WCAT panel will normally not proceed to address such other issues, but has a discretion to do so.** For example, where the panel considers there may have been a contravention of law or policy in the lower decision, the panel may proceed to address that issue whether or not it was expressly raised by the appellant. **However, to ensure that the parties have notice of the issues which are to be addressed by the WCAT panel, the panel will ensure that notice is given to the parties of the panel's intention to**

> **address any issue which was not raised in the appellant's notice of appeal or submissions to WCAT, or which was not raised in the respondent's submissions.**
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> ...
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> **In sum, the focus of an appeal is generally on the issues raised by the appellant. Panels are not precluded from considering other matters raised in the decision under appeal, either on their own initiative or raised by the respondent which, on review, appear to have been incorrectly decided....**
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> **If the panel is contemplating making a decision on an issue which has not been raised by the appellant or respondent, the panel will notify the parties and invite submissions to ensure the parties are not taken by surprise by the panel's decision on that additional issue. Natural justice requires specific notice to the parties in such circumstances. Such notice will normally be given in writing.** However, the notice may be given orally in an oral hearing, in which case the panel will consider whether any additional steps are required to allow the parties adequate opportunity to provide input on that issue.
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> [emphasis added]

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.

In the text *Administrative Law in Canada*, Third Ed. (Ontario: Butterworths, 2001) at 12, Sara Blake states:

> Essentially, the courts require that decisions made in individual cases be made following procedures that are fair to the affected parties. This requirement is called the "doctrine of fairness" or the "duty to act fairly".

> At a minimum, the doctrine of fairness requires that, before a decision adverse to a person's interests is made, the person should be told the case to be met and be given an opportunity to respond. The purpose is twofold. First, the person to be affected is given an opportunity to influence the decision. Second, the information received from that person, should assist the decision maker to make a rational and informed decision.

Blake further states, at page 41:

> A party should not be left in the position of discovering, upon receipt of the tribunal's decision, that it turned on a matter on which the party had not made representations because the party was not aware it was in issue.

It is necessary to consider, therefore, whether the issue addressed by the WCAT panel was within the panel's jurisdiction, and whether the panel followed fair procedures in arriving at its decision.

Under the Issue(s) heading, the WCAT panel defined the issue before it as follows:

> Did the Board err in law or fact or contravene published policy by not granting the employer relief of costs under section 39(1)(e) of the Act after 13 weeks of disability.

A literal reading of this statement of the issues would seem to indicate that the only question before the panel was whether the employer should be granted relief of costs from the 13 week point. This statement of the issue(s) reflected the basis on which the employer's appeal was presented.

However, in order to consider this issue, it was necessary for the panel to consider the extent to which the worker's pre-existing condition (which was not in dispute), prolonged or enhanced the worker's disability. The appellant could not, by the fashion in which it framed the issues, require the WCAT panel to take the approach that any additional relief would necessarily involve granting complete relief of costs after 13 weeks of disability. It would surely have been foreseeable to the employer, and could not have been the subject of complaint by the employer, if the WCAT panel had decided to allow the employer's appeal in part, and found that the medical evidence regarding enhancement or prolongation of disability supported granting relief after 14, 15 or 16 weeks of disability. In that event, any disagreement with the WCAT decision would likely be with the weighing of the medical evidence rather than with the panel's jurisdiction (or the procedures followed by the panel).

It is evident, therefore, that the true issue before the panel concerned the extent to which the worker's pre-existing condition had the effect of prolonging or enhancing the

worker's disability. At issue was whether the prolongation or enhancement of the worker's disability, due to his pre-existing condition, was either greater than, or less than, had been determined by the Board.

When an appellant places a question in issue, the appellant cannot assume that the outcome of the appeal will be to either confirm the original decision, or grant some additional benefit. Under section 253 of the Act, WCAT's jurisdiction is not limited to determining whether the appeal should be allowed or denied. Section 253(1) provides that on an appeal, WCAT may confirm, vary or cancel the appealed decision or order.

Similar considerations would seem to apply regarding the assessment of the extent of a worker's permanent functional impairment, or the quantum of the administrative penalty imposed for a violation of the *Occupational Health and Safety Regulation*. So long as the issue before the panel remains the same, and is not of a fundamentally different character than that which was brought before the decision-maker, it is open to the decision-maker to reach his or her own conclusions on the issue. The decision-maker is not obliged to give the parties notice of his or her proposed findings, in respect of the issue in dispute. An unsuccessful party may be shocked by the outcome of the appeal, as the party obviously hoped for a different outcome, but there is no breach of natural justice if the decision represents a possible outcome regarding the issues which were properly before the panel for decision.

Recognizing that the panel was required to weigh the medical evidence regarding the extent of any prolongation or enhancement of the worker's disability by reason of his pre-existing condition, possible outcomes of the appeal could be that greater relief would be granted, lesser relief would be granted, or that no relief would be granted. While it is open to a WCAT panel to choose to limit their consideration to the question as to whether any basis has been provided for allowing the appeal, I do not consider that there is any error of law or policy in a WCAT panel reweighing the evidence and reaching a conclusion which adversely affects the appellant. Further, so long as the appellant knows which questions are in issue, I do not consider that a WCAT panel has any obligation to provide the appellant with notice of a possible adverse decision. I do not consider, therefore, that it was outside the jurisdiction of the WCAT panel to address the employer's appeal in the fashion described above.

In the present case, the WCAT panel did not proceed to question the Board's finding as to the existence of a pre-existing condition (involving the bone scan evidence of a bilateral distal radial-ulnar articulation arthropathy). If the appellant's submissions had focused only upon the significance of this pre-existing condition, which had been accepted by the Board, I am inclined to the view that the WCAT panel would have been obliged to give notice to the appellant were the panel to question the existence of any pre-existing disease, condition or disability. The existence or non-existence of any pre-existing disease, condition or disability could more readily be characterized as

involving a different issue, than the question as to the significance of an accepted pre-existing condition. While it would be within the jurisdiction of the panel considering a relief of costs appeal to address such an issue, notice to the appellant might well be required.

However, it is clear from the reasons provided by the panel in *WCAT Decision #2004-01157-AD* that the panel accepted the worker suffered from a pre-existing condition. The issue before the WCAT panel required an assessment of the medical evidence regarding the significance of this pre-existing condition to the enhancement or prolongation of the worker's disability. The WCAT panel concluded that the medical evidence did not establish any prolongation or enhancement of the worker's disability due to this pre-existing condition. I do not consider that the panel's determination concerned an issue of a different character than the one presented by the employer's appeal. Rather, the WCAT panel simply reached a different conclusion regarding the significance of the worker's pre-existing condition.

While not necessary to my decision, I note that an example of a situation in which a WCAT decision was set aside, due to the fact the panel proceeded to address an issue of a different nature than the one raised by the appellant, is *WCAT Decision #2004-05944* dated November 12, 2004. In that case, the worker's claim had been accepted for a lifting incident at work, and the worker appealed the termination of wage loss benefits. In denying the worker's appeal, the panel concluded that there had been no specific incident to give rise to the worker's injury, and rejected the medical opinions regarding the worker's disability which were based on such an incident having occurred. This involved a breach of natural justice, as the appellant was not aware that the question as to whether he had suffered a lifting injury at work was in issue, and had not had the opportunity to make submissions on this point.

The consultant expresses shock at the WCAT decision concerning the employer's appeal. I consider, however, that such shock may be viewed as involving chagrin or disappointment with the panel's conclusions regarding the weighing of the evidence, rather than surprise at a different issue being addressed than was raised in the appeal. I am not persuaded that the WCAT panel proceeded to address a new or separate or different issue, of a different character, than the one raised by the employer's appeal. The panel's authority to vary or cancel the decision under appeal means that an appellant cannot assume that there is no "risk" in pursuing an appeal, where the party has been partially successful in the lower decision. I am not persuaded that the question as to whether the worker's pre-existing condition caused any enhancement or prolongation of the worker's disability is truly a question of a different character than the question as to the extent of such prolongation or enhancement. A decision that there was no such enhancement is simply a determination at one end of the continuum of possible outcomes regarding the extent (in this case, zero) to which the worker's pre-existing condition produced an enhancement or prolongation of the worker's disability.

The February 6, 2004 submission by the consultant in support of the employer's appeal had argued that policy provided for the application of relief following 13 weeks of wage loss benefits, "if medically supported". The WCAT panel concluded that the medical evidence was insufficient to establish that the worker's pre-existing condition produced an enhancement or prolongation of the worker's disability.

I do not find there was any lack of procedural fairness which amounts to a breach of natural justice, based on the lack of notice to the parties that the panel would be making its own determination regarding the significance of the worker's pre-existing condition in producing an enhancement or prolongation of the worker's disability. Accordingly, the employer's application for reconsideration must be denied.

Despite my conclusion that the WCAT panel was not legally obliged to give further notice or to invite further submissions from the appellant, I consider that it might have been desirable to do so. Where it is evident that a possible outcome of the appeal may not have been anticipated (even if it should have been), a panel may wish to consider whether it would be useful to invite further submissions from the parties on the particular concern. While the decision-maker cannot be viewed as having a duty to inform parties as to the possible ramifications of the issues raised in the appeal, the decision-maker may, on a discretionary basis, choose to give additional notice in certain situations (to promote confidence in the fairness in the decision-making process, particularly with unrepresented parties). While I note the desirability of such a course of action, I am also cognizant of the practical constraints inherent to the appeal tribunal's responsibility for producing sufficient decisions, on a timely basis, to meet its obligations under the Act. WCAT panels must continuously balance the value of pursuing further inquiries or investigations, or inviting further submissions, against the need to decide appeals where there is sufficient evidence before the panel to make a decision (and the parties have had an adequate opportunity to make submissions). The requirements of natural justice and procedural fairness must prevail, as a failure to meet these requirements may result in the decision being voided. In some circumstances, however, and it is difficult to define when they might exist, it may well be prudent to go beyond the minimum legal requirements regarding notice and the opportunity to make submissions, to ensure that the parties will feel that there was a sufficient opportunity to be heard.

As WCAT decisions are final and conclusive, and protected by a privative clause, they cannot be set aside unless there has been an error of law going to jurisdiction or the new evidence requirements of section 256 are met. A decision will not be set aside due to a lack of notice, unless this involves the breach of a legal obligation (i.e. where there was a lack of procedural fairness amounting to a breach of natural justice). I do not consider that any such breach occurred in this case.

Conclusion

The employer's application for reconsideration is denied. There was no lack of procedural fairness, or other common law error of law going to jurisdiction, in *WCAT Decision #2004-01157-AD*. The WCAT decision stands as final and conclusive.

Herb Morton
Vice Chair

HM/dc