NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2004-06588 **Panel**: Herb Morton **Decision Date**: December 13, 2004

WCAT jurisdiction over Board decisions on vocational rehabilitation – Role of the vocational rehabilitation consultant in adjudication of claims – Relationship between the provision of vocational rehabilitation assistance and WCAT's determination of loss of earnings permanent disability awards – WCAT authority to refuse to apply Board policy[1] under section 251(1) of the Workers Compensation Act (Act) – Standard of review on WCAT reconsiderations where error of law going to jurisdiction is alleged – Sections 16, 23(3) and 239(2)(b) of the Act

WCAT's lack of jurisdiction over appeals from vocational rehabilitation decisions under section 16 of the Act does not prevent WCAT from considering vocational rehabilitation evidence for the purpose of adjudicating other aspects of a worker's claim, such as whether a worker is entitled to a loss of earnings permanent disability award under section 23(3) of the Act. Therefore, section 16 does not interfere with a worker's right to have WCAT consider all evidence that is relevant to an appeal.

In this case, the Review Division upheld several Board decisions not to provide the worker with further vocational rehabilitation. The worker appealed to WCAT, and WCAT's registry staff informed the worker that the Review Division decisions were not appealable to WCAT because they concerned vocational rehabilitation under section 16 of the Act, and section 239(2)(b) of the Act provides that WCAT has no jurisdiction to hear appeals from section 16 decisions (WCAT decision). The worker requested a reconsideration of the WCAT Decision on the basis of an error of law going to jurisdiction.

The WCAT panel (Reconsideration Panel) that reconsidered the WCAT Decision upheld the WCAT Decision and found that WCAT lacked the jurisdiction to hear the worker's appeal. In respect of the standard of review applicable on a WCAT reconsideration where an error of law going to jurisdiction is alleged, the Reconsideration Panel determined that the standard was "correctness". On this standard, and in relation to this reconsideration, the Reconsideration Panel would overturn the WCAT Decision if it determined that the WCAT Decision was wrong when it decided that WCAT did not have the jurisdiction to hear the worker's appeal.

The worker argued that preventing WCAT from hearing appeals of vocational rehabilitation decisions under section 16 of the Act limits the worker's right to have all evidence considered in an appeal. The Reconsideration Panel found that WCAT's lack of jurisdiction over section 16 appeals does not limit the worker's right to have all evidence considered because although WCAT is restrained from hearing section 16 appeals, WCAT is free to receive evidence from vocational rehabilitation consultants (VRC) relating to other aspects of a worker's claim.

[1] This decision is noteworthy for the points discussed in this summary but should be viewed with some caution as policy item #40.00 was significantly amended on April 26, 2012. Click here for more information.

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Section 239(2)(b) limits WCAT's ability to hear certain appeals, not its ability to receive evidence.

The Reconsideration Panel explained that the confusion surrounding this issue stems from the fact that VRCs play dual roles within the workers' compensation system. Firstly, they are decision-makers who decide a worker's eligibility for vocational rehabilitation assistance under section 16 of the Act. Secondly, they are sources of expert evidence for decision-makers in the Disability Awards Department on issues relating to the worker's eligibility for a loss of earnings permanent disability award under section 23(3) of the Act. In this second role, the decision-maker is free to accept or reject the expert evidence provided by the VRC. Although the two roles are related (for instance, a refusal to provide vocational rehabilitation benefits may increase the likelihood of a loss of earnings permanent disability award), they are separate areas of decision-making.

The worker also argued that section 251(1) of the Act authorizes WCAT to refuse to apply section 239(2)(b) of the Act on the basis that it is patently unreasonable. The Reconsideration Panel rejected this argument because it found that section 251(1) only authorises WCAT to refuse to apply Board policies which it considers to be patently unreasonable. It does not allow WCAT to challenge the lawfulness of the Act itself, or any of its provisions, including section 239(2)(b).

This decision has been published in the *Workers' Compensation Reporter*: 21 WCR 121, #2004-06588, WCAT's Jurisdiction - Section 16 Limitation Over Vocational Rehabilitation Does Not Affect Ability to Consider All Relevant Evidence in an Appeal

WCAT Decision Number: WCAT-2004-06588
WCAT Decision Date: December 13, 2004
Panel: Herb Morton, Vice Chair

Introduction

By letter dated December 19, 2003, the Workers' Compensation Appeal Tribunal (WCAT) vice chair/deputy registrar advised the worker that four Review Division decisions were not appealable to WCAT. He advised that these four decisions concerned vocational rehabilitation under section 16 of the *Workers Compensation Act* (Act), and that section 239(2)(b) provides that such decisions are not appealable to WCAT. These four decisions, all contained in a single Review Division document dated November 14, 2003, were as follows:

Review Decision #	Date of decision by the Board officer	WCAT Appeal
4870	May 12, 2003	K
4872	June 5, 2003	L
7723	June 13, 2003	O
7638	September 2, 2003	P

These four decisions were addressed together at pages 8 to 12 of the November 14, 2003 Review Division decision. The Review Division denied the worker's requests in relation to these four decisions, and found that Vocational Rehabilitation Services has no further obligation to the worker. The review officer further noted that it was not open to her to address a loss of earnings issue in her review, as that issue had been addressed in the Workers' Compensation Review Board (Review Board) finding (which the worker appealed to the Appeal Division).

The worker requests reconsideration of the December 19, 2003 WCAT decision, on the basis of an error of law going to jurisdiction. The worker is represented by a workers' adviser, who has provided a written submission dated December 30, 2003. The employer is not participating in this application, although invited to do so.

In addressing this application, I take note of a recent WCAT decision regarding other appeals brought by the worker. Those appeals included an appeal of the

December 23, 2002 Review Board finding (filed to the former Appeal Division), appeals of decisions by a vocational rehabilitation consultant (VRC) dated January 7, 2003 and January 9, 2002 (filed to the former Review Board), and appeals of several Review Division decisions (including the "M" and "N" appeals which were also dealt with in the November 14, 2003 Review Division decision). *WCAT Decision #2004-06493-RB* dated December 7, 2004 concluded as follows:

> The worker's appeals are allowed, in part, as follows:
>
> I vary the Review Board's December 23, 2002 decision, to the extent that the worker is entitled to an additional award of 1% in recognition of his reduced grip strength. I confirm the pension wage rate has been accurately determined. Furthermore, I confirm that the worker will not have a loss of earnings in the long term as the recommended vocational rehabilitation plan will likely restore the worker's earning capacity in the long term.
>
> I confirm the vocational rehabilitation consultant's decision of January 7, 2003, in which the worker was advised he would not be provided with a financial contribution, equal to the cost of an accepted vocational rehabilitation plan, to enhance a viable business.
>
> I vary the vocational rehabilitation consultant's decision of January 9, 2003 decision, to the extent that the worker should be provided with the opportunity to utilize the funds which were allowed for his training as a service advisor to participate in a viable alternate plan. It is also open to the worker to request a contribution to a viable rehabilitation plan under category 2 in item #88.51 of the RSCM I.
>
> I confirm the review officer's August 29, 2003 decisions, in which she concluded no appealable issues arise from a vocational rehabilitation consultant's letter of April 4, 2003 and correspondence the worker received from a private training institution.
>
> With respect to the review officer's November 14, 2003 decision, I confirm that the Board correctly determined the reopening wage rate. I confirm the worker is not entitled to the purchase of anti-vibration gloves and herbal remedies as health care expenses.

This application has been assigned to me for consideration on the basis of a written delegation from the WCAT chair (paragraph 26 of *WCAT Decision No. 6*, "Delegation by the Chair", June 1, 2004).

Issue(s)

Did the WCAT decision, to reject the worker's appeals as being outside WCAT's jurisdiction, involve an error of law going to jurisdiction?

Jurisdiction

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 an error of law going to jurisdiction, including a breach of natural justice (which goes to the question as to whether a valid decision has been provided). 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. *WCB (BC)*, (2003) BCCA 470, [2003] B.C.J. No. 1985, (2003) 186 B.C.A.C. 83.

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. WCAT's approach to applying these common law grounds has been as follows. 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*). This analysis is now subject to section 58 of the *Administrative Tribunals Act* (ATA).

Order in Council No. 1143 brought sections 174 to 176 and 179 to 188 of the ATA into force effective December 3, 2004. Section 182 of the ATA amends the Act by the addition of section 245.1, which concerns the application of the ATA to WCAT proceedings. This provides:

> Sections 1, 11, 13 to 15, 28 to 32, 35 (1) to (3), 37, 38, 42, 44, 48, 49, 52, 55 to 58, 60 (a) and (b) and 61 of the *Administrative Tribunals Act* apply to the appeal tribunal.

Section 58 concerns the standard of review if the tribunal's enabling Act has a privative clause. Section 58 provides:

> **58** (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
>
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
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> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
>
> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

WCAT's *Manual of Rules, Practices and Procedures* was replaced by a *Manual of Rules of Practice and Procedure* (MRPP) effective December 3, 2004 (*Chair's Decision No. 7*). Item #15.24 of the MRPP now provides:

> WCAT will apply the same standards of review to reconsiderations on common law grounds as will be applied by the court on judicial review (see item 15.32).

Item #15.32 of the MRPP further provides:

> **15.32 Standards of Review Act**
>
> The court will not interfere in a final WCAT decision unless threshold grounds are met. There are three possible standards of review [s. 58(2), ATA]:

(a) patently unreasonable for a finding of fact or law or an exercise of discretion in respect of a matter over which WCAT has exclusive jurisdiction under the privative clause (see section 254, WCA);

(b) whether WCAT acted fairly in all of the circumstances for questions about the application of common law rules of natural justice and procedural fairness; and

(c) correctness for all other matters.

A discretionary decision will be considered to be patently unreasonably if the discretion is exercised arbitrarily or in bad faith, is exercised for an improper purpose, is based entirely or predominantly on irrelevant factors, or fails to take statutory requirements into account [s. 58.3, ATA].

I have considered whether additional submissions should be invited concerning the application of the ATA and the amended items of the MRPP to this application. I consider, however, that this application concerns a jurisdictional issue. I find that under both the former common law test described above, and section 58, the standard of review on a jurisdictional issue is correctness. No deference is given to the WCAT decision on a jurisdictional issue. As the test to be applied is the same under both the common law and section 58 of the ATA, I find it unnecessary to invite additional submissions on this point. I further note that the guidance provided by item #15.24 is in the form of practice rather than a rule. Section 13 of the ATA provides that practice directives are not binding — section 12(3) provides that WCAT may waive or modify one or more of its rules in exceptional circumstances. Accordingly, while it may assist in understanding the applicable standards of review to refer to the wording of section 58, as a re-statement of these standards, I consider that it remains open to WCAT to consider and apply relevant common law authority in determining whether there has been an error of law going to jurisdiction.

Background

By finding dated December 23, 2002, the Review Board denied the worker's appeal from the September 6, 2001 decision by a Board officer. The Review Board confirmed the assessment of the worker's permanent functional impairment at 1.5% of total disability. The Review Board further concluded that the Board's plan to train the worker as a service advisor was a good one, and that if it had been carried out the worker would not have suffered any loss of earnings. The worker appealed the Review Board finding to the Appeal Division. The worker's appeal was transferred to WCAT on March 3, 2003, as a result of the changes to the workers' compensation appeal structures contained in the *Workers Compensation Amendment Act (No. 2), 2002*

(Bill 63). That appeal was addressed in *WCAT Decision #2004-06493-RB* dated December 7, 2004, as described above.

Following the Review Board finding, Board officers issued several additional decisions. The four decisions which are at the root of this appeal were all issued by a VRC and concerned the following:

May 12, 2003 — The VRC set out in detail (7 pages) the vocational rehabilitation assistance which was offered to the worker, conditional on his active cooperation in the vocational rehabilitation program.

June 5, 2003 — The VRC addressed various concerns raised by the worker regarding his current vocational rehabilitation plan.

June 13, 2003 — The VRC addressed the worker's request that his vocational rehabilitation assistance be changed to job search and training on the job.

September 2, 2003 — The VRC rejected the worker's request for sponsorship of a training-on-the-job arrangement with a particular automotive firm, on the basis that the earnings from this job would be too low.

Analysis

A. Preliminary – Right to be Heard

A preliminary question arises as to whether the December 19, 2003 WCAT decision, which advised the worker that the four Review Division decisions are not appealable to WCAT, involved a breach of natural justice. *WCAT Decision #2004-05889* commented:

> I do not consider, however, that every letter issued by a vice chair in the WCAT Registry constitutes a decision. The Registry may make a decision concerning a matter, which will be final and conclusive under section 255(1) of the Act. Alternatively, the Registry may elect to make a provisional determination regarding a matter. A higher standard of procedural fairness is required where a decision is being made. In the case of provisional determinations, however, notice to the party and an opportunity to make submissions are not required. The provisional determination itself constitutes such notice, and if the party is aggrieved by the determination he or she has the opportunity to make representations before the matter is finally determined. This latter approach permits greater efficiency in dealing with preliminary matters, while respecting the requirements of natural justice. Such preliminary or provisional determinations may serve to provide guidance to appellants,

> without denying the appellant the opportunity to make submissions regarding the issue if they do not agree with the initial response from the WCAT Registry.
> For example, the Registry may advise an appellant, on a preliminary or provisional basis, that the issue in his or her appeal is not within WCAT's jurisdiction. If the appellant disputes that advice, the matter can be formally determined after the parties have had the opportunity to provide submissions on the matter.

The vice chair/deputy registrar did not take the approach of issuing a provisional determination in this case. The decision to reject the worker's four appeals appears to have been made without prior notice to the worker, with an opportunity to comment.

Whether or not the WCAT decision was stated, on its face, to be provisional in nature, it seems to me that the registry could have proceeded to consider the worker's objections to the December 19, 2003 decision on the basis that it was provisional. The alternative is to consider that the December 19, 2003 decision is subject to being set aside based on a breach of natural justice.

I could return the December 19, 2003 decision to the registry, to be addressed anew with the benefit of the further submissions which have been provided. I note, however, that the issue addressed in the December 19, 2003 decision was jurisdictional in nature. On a jurisdictional issue, with respect to whether the tribunal has authority to do the act, the decision must be correct. The workers' adviser has provided submissions regarding the merits of the December 19, 2003 decision, to argue that it was wrongly decided. Accordingly, I consider it appropriate to proceed to consider the worker's objections to the December 19, 2003 decision. For this purpose, no deference will be afforded to the December 19, 2003 decision. A similar approach appears to have been the approach taken by the WCAT senior vice chair and registrar in *WCAT Decision #2003-02542*. To the extent the December 19, 2003 decision involved a lack of procedural fairness, that defect is cured by this further consideration.

While not necessary to my decision, I note that effective December 3, 2003, section 31 of the ATA provides that WCAT may, at any time, summarily dismiss all or part of an application if WCAT considers it is not within WCAT's jurisdiction. However, WCAT is required to give the applicant a prior opportunity to make submissions or otherwise be heard. WCAT must also provide a decision in writing, with reasons. Thus, the approach taken in the December 19, 2003 letter, of summarily rejecting the worker's appeal on the basis it was outside WCAT's jurisdiction, with no prior opportunity for the appellant to make submissions, is an approach which can no longer be followed.

I have proceeded to consider the worker's application for reconsideration.

B. WCAT's Jurisdiction Regarding Rehabilitation Decisions

The submissions provided by the workers' adviser express several concerns relating to the statutory limitation on WCAT's authority to hear an appeal respecting matters under section 16 of the Act.

It is important to note, at the outset, that VRCs play two roles in the workers' compensation system. To put it another way, a VRC has two hats. Wearing one hat, the VRC is a decision-maker, with authority to determine the nature and extent of a worker's eligibility for vocational rehabilitation assistance under section 16 of the Act. Such decisions are reviewable by the Review Division, and the decision of the Review Division is final. Pursuant to section 239(2)(b) of the Act, there is no right of appeal to WCAT from the Review Division decision respecting vocational rehabilitation assistance under section 16 of the Act.

For greater certainty, section 4(e) of the *Workers Compensation Act Appeal Regulation*, *B.C. Reg. 321/02* (the Appeal Regulation), provides:

> **4** For the purposes of section 239 (2) (a) of the Act, the following are classes of decisions that may not be appealed to the appeal tribunal:
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> (e) decisions respecting the conduct of a review if the review is in respect of any matter that is not appealable to the appeal tribunal under section 239 (2) (b) to (e) of the Act.

This regulation is based on the authority set out in section 239(2)(a) and section 224(2)(j) of the Act.

Wearing a second hat, the VRC is a source of expert evidence. The VRC provides advice to decision-makers in the Disability Awards Department on a range of issues relevant to whether the worker is eligible for a loss of earnings pension under section 23(3) of the Act. In this latter capacity, the VRC is not a decision-maker, and the VRC's advice does not concern the provision of vocational rehabilitation assistance under section 16 of the Act. A decision under section 23 is rendered by a Board officer in the Disability Awards Department, not by a VRC. In this latter capacity, the input of the VRC may be treated as analogous to the input provided by physicians employed by the Board. Both are sources of expert evidence, but the authority to make a decision is vested in a decision-maker who is not obliged to accept this expert evidence. The decision-maker has an obligation to consider all the relevant evidence, but may also consider evidence from other sources in making the decision.

There are obvious inter-relationships between the two areas of decision-making. For example, if the VRC refuses to provide vocational rehabilitation assistance, the worker's future employability may be adversely impacted. However, the two areas of decision-making are separate, in terms of WCAT's jurisdiction under section 239 of the

Act. WCAT has no jurisdiction respecting matters referred to in section 16 of the Act (regarding the provision of vocational rehabilitation assistance), but does have jurisdiction to consider a worker's pension eligibility (including eligibility for a loss of earnings pension award). I am, in this regard, only referring to WCAT's authority to consider appeals from decisions of the Review Division. This limitation on WCAT's authority does not limit WCAT's authority in addressing appeals which were initially filed to the former Review Board or Appeal Division under the transitional provisions set out in Part 2 of Bill 63.

In the background set out above, I have not recorded all the details contained in the VRC's four decision letters. Upon close reading of those four decision letters, however, I find no decision regarding any matter other than vocational rehabilitation assistance under section 16 of the Act.

The workers' adviser argues that to not allow the WCAT panel to consider the K, L, O and P appeals would effectively dismiss the worker's right for all evidence to be considered in dealing with related matters as a whole. This submission fails to take into account the distinction between the role of the VRC as a source of expert evidence, and the role of the VRC as a decision-maker under section 16 of the Act. There is no limitation on WCAT's authority to receive evidence from the VRC, notwithstanding the fact that decisions under section 16 are not appealable to WCAT.

The workers' adviser further submits that section 239(2)(b) of the Act is patently unreasonable. He submits:

> Section 251(1) of the Act authorizes that WCAT may refuse to apply Section 239(2)(b) as it does in this case limit its jurisdiction to deal with "related matters".

I find this argument is in error. Section 251 establishes a process for addressing issues concerning the lawfulness of policy under the Act, not for challenging the lawfulness of a provision in the Act. Under section 251(1), a WCAT panel may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. This test must be applied in light of the provisions of the Act. Section 251 does not provide authority for challenging the lawfulness of the Act itself. WCAT is a creature of statute, and only has the authority conferred on it by legislation (as well as certain common law authority). Effective December 3, 2004, section 44(1) and (2) of the ATA have removed WCAT's authority to address constitutional issues (regarding the scope of provincial authority, and *Charter* issues).

Upon consideration of the foregoing, I find that WCAT has no authority to address the worker's appeals from the four Review Division decisions relating to the decisions rendered by the VRC.

In addressing this application, I considered whether additional submissions should be invited in light of *WCAT Decision #2004-06493-RB* dated December 7, 2004. I consider, however, that while it may be convenient to refer to that decision, this is not necessary to my decision. The issues in this application were not rendered moot by that decision. Accordingly, I considered it appropriate to proceed with this decision.

While not necessary to my decision, I have noted that some of the arguments raised by the workers' adviser relate to matters addressed in the recent WCAT decision. The workers' adviser submitted that while the four decisions were made by the VRC, they were provided as a result of the December 23, 2002 Review Board finding which pre-dated the March 3, 2003 legislative changes. He submitted that the VRC erred in interpreting the December 23, 2002 Review Board finding as having stated there would be no loss of earnings. I note, however, that the worker's appeal from the Review Board finding has been decided by *WCAT Decision #2004-06493*. The WCAT decision confirmed "that the worker will not have a loss of earnings in the long term as the recommended vocational rehabilitation plan will likely restore the worker's earning capacity in the long term". There is no basis for me to consider this argument.

The workers' adviser similarly makes arguments regarding the worker's wage rate. I note that the December 7, 2004 WCAT decision dealt with the worker's wage rate, and this was not an issue addressed in the four decisions issued by the VRC which are the subject of this application.

The workers' adviser also submits that section 239(2)(b) of the Act may exclude section 16 matters, but does not deny WCAT the right to deal with loss of earnings or wage rate issues. Again, I note that the loss of earnings and wage rate issues have been addressed in the December 7, 2004 WCAT decision.

Conclusion

The worker's application for reconsideration of the December 19, 2003 decision is denied. The four Review Division decisions concerned vocational rehabilitation under section 16 of the Act. Pursuant to section 239(2)(b), these decisions are not appealable to WCAT. The December 19, 2003 decision is upheld as being jurisdictionally correct. To the extent the December 19, 2003 decision involved a breach of natural justice with respect to the worker's right to be heard, that breach is remedied by this further decision.

Herb Morton
Vice Chair

HM/ml