

NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2005-03420 **Panel:** Susan L. Polsky Shamash **Decision Date:** June 29, 2005

WCAT Jurisdiction over Review Division Extension of Time Decisions – Section 2(1) of the Transitional Review and Appeal Regulation – Section 4(b) of the Workers Compensation Act Appeal Regulation – Sections 96.2(3) and 96.2(4) of the Workers Compensation Act – Section 31(1)(a) of the Administrative Tribunals Act

By virtue of section 239(2)(a) of the *Workers Compensation Act* (Act) and section 4(b) of the *Workers Compensation Act Appeal Regulation*, WCAT does not have the jurisdiction to hear appeals from decisions by the Review Division refusing to extend the 90-day time limit for workers to request a review of a Board decision from the Review Division. The statutory scheme is unequivocal in this respect.

In this case, the worker applied to the Review Division under section 96.2(4) of the Act for an extension of time to request a review of a Board decision. The Review Division declined to grant the worker an extension of time as it found that special circumstances did not exist which precluded the worker from bringing his request for review within the 90-day time limit required in section 96.2(3) of the Act. The worker appealed the Review Division decision to WCAT on several grounds. The appeal was dismissed pursuant to section 31(1)(a) of the *Administrative Tribunals Act* on the basis that WCAT had no jurisdiction over the appeal.

First, the worker argued that a statutory entitlement to an appeal vested as of the date of his injury, which arose five years prior to the passage of the *Workers Compensation Amendment Act, (No. 2), 2002* (Bill 63), which created the limitations on WCAT's jurisdiction. The WCAT panel found this argument was without legal foundation as the statutory transitional provisions provide a complete transition framework.

Second, the worker argued that the transitional provisions and amendments to the appeal system are so convoluted and complex that the typical worker could not reasonably be expected to understand them. The WCAT panel agreed that the changes were confusing; however, this does not give the worker a right of appeal in the face of clear legislative language.

Third, the worker argued that WCAT is an independent appeal tribunal and, as such, has a clear obligation to ensure that every reasonable effort is made to ensure the worker's appeal rights are protected. The WCAT panel found that the worker had statutorily protected appeal rights, which he chose not to exercise by missing the time limitation. WCAT's obligation in this circumstance is to comply with its statutory mandate. WCAT is a creature of statute with no inherent jurisdiction.

Finally, the worker argued that since his permanent disability award entitlement is appealable, and that award would be impacted by this decision, the concept of congruency should operate to render this decision also appealable to WCAT. The WCAT panel found that this argument was without legal foundation. The WCAT panel found that WCAT does not have jurisdiction to consider an appeal from a Review Division decision to deny an extension of time to request a review. Any possible lack of congruency is created by the legislation.

**This decision has been published in the *Workers' Compensation Reporter*:
21 WCR 201, #2005-03420, WCAT Jurisdiction - Review Division Extension of
Time Decisions**

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WCAT Decision Date: June 29, 2005
Panel: Susan L. Polsky Shamash, Vice Chair

Introduction

The worker appeals a June 2, 2004 decision of a review officer (*Review Decision #9599*) declining to grant the worker an extension of time to review an October 3, 2001 decision written by a case manager in the Disability Awards department of the Workers' Compensation Board (Board). The review officer concluded that special circumstances did not exist which precluded the worker from bringing his request for review within the 90-day time limit.

The worker, who is self-employed, is represented by a lawyer. Although the worker's representative requested an oral hearing before a three-person precedent panel established under section 238(6) of the *Workers Compensation Act* (Act), this appeal has been conducted by a one person non-precedent panel based on a review of the claim file and written submissions from the worker's representative.

Because the issue is entirely one of legal interpretation, I have concluded that it can be fully and fairly determined without an oral hearing. Although the issue raised on this appeal may be of special interest or significance to the workers' compensation system as a whole, this is the first time that the Workers' Compensation Appeal Tribunal (WCAT) has been asked to address it. It is therefore not an appropriate matter for a precedent panel at this time.

Issue(s)

Does WCAT have the authority to consider an appeal from a decision of a review officer declining to extend the time to review a decision of the Board?

Jurisdiction

Section 239(1) of the Act provides that a final decision made by a review officer in a review under section 96.2 may be appealed to WCAT. Section 239(2) limits this right by stating that there are certain decisions of a review officer that may not be appealed. These include decisions in a prescribed class respecting the conduct of a review (section 239(2)(a)). Section 224 enables the Lieutenant Governor in Council to make

regulations prescribing the classes of decisions that may not be appealed for purposes of section 239(2)(a). Section 41 of the *Interpretation Act* states that such regulations have the force of law.

Section 4(b) of the *Workers Compensation Act Appeal Regulation* (Regulation) provides that decisions made under section 96.2(3) may not be appealed to WCAT. Section 96.2(3) provides a 90-day time limit to request a review from the Review Division. Section 96.2(4) states that the chief review officer may extend the time to file a request for review where he is satisfied that special circumstances existed which precluded the filing within the 90-day time limit and an injustice would otherwise result. Section 96.6 enables the chief review officer to delegate his powers and duties to a review officer.

Procedure

As this statutory framework appears to lead to the inexorable conclusion that WCAT does not have the jurisdiction to consider this appeal, I wrote to the worker's representative on June 15, 2005 quoting the applicable legislative provisions. I indicated that I was considering dismissing this appeal pursuant to section 31(1)(a) of the *Administrative Tribunals Act* (ATA) on the grounds that it is not within WCAT's jurisdiction.

The worker's representative responded in a June 24, 2005 submission.

Analysis

The worker's representative made several arguments in support of me finding that WCAT has jurisdiction to consider this appeal. I will deal with each in turn.

The representative stated that the worker's disability arose over five years prior to the passage of the *Workers Compensation Amendment Act, (No. 2), 2002* (Bill 63) which created the current appeal system, including WCAT, and placed limits on WCAT's jurisdiction. It is the representative's position that the worker's statutory entitlement arose and was vested as of the date of his injury.

The worker's representative provided no legal foundation for this argument.

The Transitional Provisions of Bill 63 provide a schema for continuing appeals that were pending before the former Workers' Compensation Review Board (Review Board), Appeal Division and Medical Review Panel on the transition date, March 3, 2003 (sections 36, 38 and 39). They also provide a schema where unexercised rights of appeals still existed and the time limit for appeal had not yet expired by the transition date (sections 40 and 41). Finally, section 44 of the Transitional Provisions enables the Lieutenant Governor in Council to make regulations respecting any matters not sufficiently provide for that were necessary for the orderly transition of appeals.

Section 2(1) of the *Transitional Review and Appeal Regulation* provides that where, on transition date, a person had not yet exercised their statutory right to appeal a decision to the Review Board and the time limit to appeal had expired, the person could apply to the chief review officer under section 96.2(4) of the Act to extend the time to request a review.

I find that these legislative provisions clearly establish that the worker did not have a vested right to consideration of this appeal under the former appeal provisions.

The representative's second argument is that there is no published WCAT or Board policy with respect to the statutory provisions to which I referred in my June 15, 2005 letter.

WCAT's practices and procedures with respect to its jurisdiction is set out in items #2.20 to 2.44, in particular, item #2.41 of our *Manual of Rules of Practice and Procedure*. I find that there is published policy with respect to WCAT's jurisdiction. I also find that the lack of published Board policy is not relevant since the Board does not make policy with respect to WCAT's jurisdiction.

The representative's third argument is that no typically disabled worker can be expected to understand this complex and convoluted material.

I agree that the amendments to the Act and the changes to the appeal system occasioned by Bill 63 have caused confusion. Bill 63 created substantial changes to an appeal structure that has remained unchanged since 1991 and that has been substantially similar since 1974. However, the fact that the new system may be complex and the change may be confusing does not give a worker a right of appeal in the face of clear legislative language.

The representative's fourth argument is that WCAT is an independent appeal tribunal and, as such, has a clear obligation to ensure that every reasonable effort is made to ensure the worker's appeal rights are protected. There is no prejudice to the employer or the Board for allowing this appeal to proceed. Further, WCAT should err on the side of procedural fairness.

While I have some sympathy for the worker's situation, he had appeal rights that were statutorily protected. But, those appeal rights included a time limit and he did not bring his appeal within the statutory time limit. He therefore had to request an extension of time for review which was denied by the chief review officer. WCAT's obligation in this circumstance is to comply with our statutory mandate. WCAT is a creature of statute with no inherent jurisdiction.

The representative's final argument is that this decision impacts upon the worker's permanent disability award entitlements which are appealable and the concept of congruency applies.

The worker's representative provided no legal foundation for this argument.

There is no question but that permanent disability award decisions are appealable to WCAT (subject to the limitations in section 239(2)(c)). However, decisions of the chief review officer denying extensions of time to request a review of permanent disability award decisions are not appealable. Any possible lack of congruency is created by the legislation.

The balance of the representative's submission addresses the merits of the worker's appeal. It is not relevant to my consideration of WCAT's jurisdiction to consider this appeal.

Given the statutory scheme outlined above, which I consider to be very clear and unequivocal, I find that WCAT does not have jurisdiction to consider an appeal from a decision of the chief review officer or his delegate to deny an extension of time to request a review. I therefore dismiss this appeal.

Conclusion

Pursuant to section 31(1)(a) of the ATA, I dismiss the worker's appeal on the ground that it is not within WCAT's jurisdiction.

Susan L. Polsky Shamash
Vice Chair

SLPS/gl