Noteworthy Decision Summary

Decision: WCAT-2005-04517 **Panel:** Herb Morton **Date:** August 29, 2005

WCAT Reconsideration – Common Law Grounds – Breach of Natural Justice – Evidence Overlooked – Failure of Appellant to Mention Documentary Evidence in Oral Hearing

A panel must include all written documentation in its consideration, including attachments to the notice of appeal, even if an appellant fails to draw attention to the evidence in the oral hearing. Failing to acknowledge evidence which is directly relevant to the essential issue in the appeal is a breach of the worker's right to be heard.

The worker sought reconsideration of a Workers' Compensation Appeal Tribunal (WCAT) decision dismissing her appeal of the Workers' Compensation Board's decision not to grant her a loss of earnings pension. The issue in the decision under reconsideration was whether she was unable to work due to her compensable right shoulder injury or due to her non-compensable back injury. The original panel noted the absence of recent medical evidence in the oral hearing. The worker sought reconsideration on the basis that she did not receive a fair hearing and on the basis of new evidence. The new evidence she provided was a medical report indicating that her inability to work was due primarily to her compensable shoulder injury. This report was similar to the one she had attached to her notice of appeal to WCAT, which was not referred to in the hearing or in the reasons.

The medical report which was attached to the notice of appeal was not mentioned in the decision, gave rise to the inference that it was overlooked. The failure to acknowledge this evidence, which was directly relevant to the essential issue in the appeal, involved a breach of the worker's right to be heard. A panel is not relieved of its responsibility to familiarize itself with the written documentation provided in support of an appeal due to the failure of the appellant to mention this evidence in an oral hearing.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

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Panel: Herb Morton, Vice Chair

Introduction

The worker requests reconsideration of the Workers' Compensation Appeal Tribunal (WCAT) decision dated May 24, 2005 (*WCAT Decision #2005-02650*). The worker's application is presented on the common law ground of an error of law going to jurisdiction, and on the basis of new evidence under section 256 of the *Workers Compensation Act* (Act).

The worker, who is unrepresented, has provided written submissions in support of her application. The employer is not participating in this application, although invited to do so. I find that the question as to whether grounds for reconsideration are established in this case is one which can be properly considered on the basis of written submissions without an oral hearing.

Issue(s)

Did the WCAT decision involve a breach of natural justice, or other error of law going to jurisdiction? Alternatively, has new evidence been provided which meets the requirements of section 256 of the Act?

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, 19 WCR 211.

The test for determining whether there has been an error of law going to jurisdiction generally requires application of the "patently unreasonable" standard of review. With respect to an alleged breach of natural justice, the common law test to be applied is whether the procedures followed by WCAT were fair (see *WCAT Decision #2004-03571*).

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Effective December 3, 2004, the provisions of the *Administrative Tribunals Act* (ATA) which affect WCAT were brought into force. Section 58 of the ATA concerns the standard of review to be applied in a petition for judicial review of a WCAT decision. Practice and procedure at item #15.24 of WCAT's *Manual of Rules of Practice and Procedure*, as amended December 3, 2004, provides that WCAT will apply the same standards of review to reconsiderations on the common law grounds as would be applied by the court on judicial review. Under section 58(2)(a) of the ATA, questions concerning the WCAT panel's handling of the evidence involve the patent unreasonableness standard, which is defined in section 58(3). Section 58(2)(b) of the ATA provides that 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.

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).

Reasons and Findings

By letter dated May 31, 2005, the worker objected to the WCAT decision, stating that she "did not have a fair hearing." In a further submission provided to WCAT on July 29, 2005, the worker requested reconsideration on the basis of new evidence. She explained:

> I was told by the gentleman who heard my last hearing I should have had an up to date letter from my Dr. stating I had not returned to work due to the inability to do repetitive movement with my right arm due to my rotator cuff injury. It wasn't submitted last time because I thought all that info was in previous report submitted before.

The worker provided as new evidence a report dated July 27, 2005 from Dr. C.H. Silverthorne. This report states:

> [The worker's] primary reason for not returning to work at the [employer's name] was related to her right shoulder problems. (Rotator cuff injury) she is right-handed. She was unable to do repetitive motions with her right arm which restricted her in dealing or any repetitive activity. She also was handicapped with a carpal tunnel syndrome on the left. This increased the dependency on the right arm.

This report is similar to a prior report on the claim file dated October 12, 2004 from Dr. Silverthorne, which stated:

> [The worker] continues to be unable to return to work, her major restrictions unfortunately are still coming from her right shoulder pain

> which has never recovered completely from the injury and also from her carpal tunnel symptoms in her left hand. Her back also causes chronic pain and restriction of movement but her major disability is from the first two.

This October 12, 2004 letter from Dr. Silverthorne was submitted by the worker as part of her October 21, 2004 notice of appeal (marked as page 4 of 5). The October 12, 2004 letter was not mentioned in the WCAT decision. The worker submits that the WCAT panel "did not understand or didn't listen to what I was saying or look and see documents that I showed him or that were in my file."

The central issue in the worker's appeal of her pension award concerned her request for a loss of earning pension. A related question concerned whether the worker's inability to return to work was due to her compensable right shoulder disability, or to her non-compensable back problems. The WCAT panel stated it did not find "convincing medical evidence on file that indicates the worker was physically unable to perform that job due to her right shoulder injury." The panel concluded:

> The worker must not only have a disability accepted by the Board, but the disability accepted by the Board must be a significant factor in the reduced employability or loss of earnings potential. Based on the evidence on file and listening to the worker at the oral hearing, I am not satisfied that the worker's right shoulder disability is a significant factor in her reduced employability or loss of earnings potential. I am not satisfied that the worker is suffering a loss of earnings due to her compensable injury.

I have listened to the audio recording of the May 2, 2005 oral hearing held by the WCAT panel. In the May 2, 2005 oral hearing, the WCAT panel provided the worker with ample opportunity to present her appeal, as well as specifically inquiring regarding the medical evidence supporting her appeal. The worker cited the August 8, 2003 report by Dr. P. Wright, orthopaedic surgeon. However, the worker failed to mention the October 12, 2004 medical report in her presentation to the WCAT panel. No reference was made by the panel or by the worker during the oral hearing to the October 12, 2004 medical report.

In the hearing, the panel made reference to the absence of new medical evidence, and the fact the last medical report on file was dated August 27, 2003. The panel noted, however, that it would further review the medical evidence on file before reaching its decision.

The October 12, 2004 medical report was submitted with the worker's written notice of appeal, and was directly relevant to the central issue in the worker's appeal. The comments made by the WCAT panel during the oral hearing concerning the absence of new medical reports, and the lack of any reference in the decision to the October 12, 2004 report, give rise to an inference that the report may have been overlooked by the

panel. In that event, a question arises as to the significance of the panel's possible failure to consider the October 12, 2004 medical report, given the fact this report was not mentioned by the worker in the oral hearing. Was it incumbent on the WCAT panel to consider the October 12, 2004 report, given the fact the report was not mentioned by the worker in the oral hearing?

In the text *Administrative Law in Canada*, Sara Blake states at page 191:

> 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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> ...
>
> 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.**
>
> [emphasis added]

In the 1998 decision *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425, (1998) 157 F.T.R. 35, the Federal Court Trial Division reasoned as follows:

> 16 On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (*Medina v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.

> 17 **However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence":** *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.
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> [emphasis added]

This reasoning was followed in the 2004 Federal Court decision in *Tryus v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 737, 2004 FC 606, (2004) 15 Admin. L.R. (4th) 238.

In *WCAT Decision #2005-03571* dated July 6, 2005, a WCAT panel allowed an application for reconsideration based on the breach of an appellant's right to be heard. The panel reasoned:

> I note the fundamental importance of a party's right to be heard. In *Appeal Division Decision #97-0083*, "Reconsideration of an Appeal Division decision — natural justice — the right to be heard", 14 WCR 37(available at http://www.worksafebc.com/publications/wc_reporter/volume_14/default.asp), the panel stated (at pages 43-44):
>
> > Part of the concept of natural justice is the principle that a person has a right to be heard before a tribunal makes a determination that affects his rights or interests. The right to be heard includes the right to present evidence as well as to submit arguments when all the evidence has been received. It follows that the decision-maker must hear that evidence and those arguments — that is, he must familiarize himself with the evidence and arguments presented.
> >
> > . . . .
> >
> > In sum, natural justice requires providing those individuals who may be affected by a decision with the opportunity to present their point of view. Providing them with that opportunity is not sufficient. They must also be genuinely heard.

The Appeal Division panel concluded, at page 44:

> . . . the issue is whether the employer appears to have been heard. Unfortunately, on its face, the impugned decision does not convey the impression that he was heard.
>
> I have decided, therefore, to set aside the decision on the grounds that it involves a breach of the rules of natural justice and, therefore, involves an "error of law going to jurisdiction." Appeal Division Decision No. 93-1486 is consequently of no force or effect.

In the present case, I conclude that the previous Appeal Division panel did not fully familiarize himself with the evidence and arguments presented. This led to an error that was significant to the issues before the panel. That is, it was a relevant question whether the representative received the Board's decision. The panel assumed, incorrectly, that there had been no submission on this point. Therefore, it could not have adjudicated that issue as it was required to do. It follows from this that the employer, through its representative, was not given the opportunity to be genuinely heard.

I find that it may reasonably be inferred from the comments by the WCAT panel at the oral hearing concerning the lack of new medical evidence, together with the absence of any reference in the WCAT decision to the October 12, 2004 medical report submitted with the worker's notice of appeal, that this evidence was overlooked. While the worker did not mention the October 12, 2004 medical report at the oral hearing, it was part of the written evidence provided by the worker in support of her appeal. I find that the failure to acknowledge the expert evidence submitted in support of the worker's appeal, which was directly relevant to the central issue in the appeal, involved a breach of the worker's right to be heard.

It might be argued that no significance should attach to the failure of the WCAT panel to mention the October 12, 2004 report in its decision, given the fact this report was not even mentioned by the worker in the hearing despite ample opportunity to do so. If the worker had mentioned the report in the hearing, it is unlikely that it would have been overlooked by the panel. It is possible that the worker, who was unrepresented, forgot to mention the October 12, 2004 report due to unfamiliarity with the oral hearing process. Nevertheless, I find that it was incumbent on the WCAT panel to include the worker's written notice of appeal, and attachments, in its consideration, as they contained expert evidence which was important to the worker's appeal. I find that a WCAT panel is not relieved of its responsibility to familiarize itself with the written documentation provided in support of an appeal, due to the failure of the appellant to mention this evidence in an oral hearing.

Section 58(2)(b) of the ATA provides that 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. I find that there was a breach of fairness which requires that the WCAT decision be set aside. The worker's appeal will be heard afresh by WCAT, which will include consideration of the additional evidence submitted by the worker. In view of my conclusion on this basis, I need not address the other arguments raised by the worker. I would note, however, that the worker's evidence at the oral hearing made reference to a "fill clerk" position, rather than a "file clerk" position, in connection with the consideration given to alternative work at the casino.

While not necessary to my decision, I would note that the worker stated in the oral hearing that she was not disputing any of the components of her pension award apart from the denial of a loss of earnings pension award. However, at the close of the oral hearing, the worker inquired whether, if her appeal were to be successful, any loss of earnings pension award would be based on her low earnings prior to the establishment of her claim. In a letter dated August 7, 2003, Dr. Silverthorne had advised the Board:

> In June of 2001 because of ongoing problems with her shoulder I recommended her to reduce her work hours to three days a week from four. Until that time she had been working four days although she tells me she had reduced from five days when she was with her previous doctor also because of ongoing problems with her shoulder.

It appears that the worker's concluding comments in this regard implicitly raised an issue regarding the average earnings on which her pension award was based, notwithstanding her statement that the other components of her pension award were not in issue. The calculation of the worker's average earnings would be relevant to her pension award whether the award were payable on a functional impairment or loss of earnings basis. If the worker has concerns regarding the average earnings on which her pension award is based, these may be presented as part of her current appeal. Pursuant to item #14.30 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP), it would be open to the WCAT panel to include that issue in its consideration of the worker's appeal.

Conclusion

The worker's application for reconsideration of *WCAT Decision #2005-02650* is granted. The WCAT decision overlooked a medical report provided with the worker's written notice of appeal, which was directly relevant to the worker's appeal. The WCAT decision is set aside as void, due to a breach of procedural fairness involving the worker's right to be heard. In view of my conclusion on this basis, I need not address the worker's application for reconsideration on the basis of "new evidence" under section 256 of the Act.

The worker's appeal will be heard afresh. The WCAT Registry will contact the worker concerning the further handling of her appeal.

Herb Morton
Vice Chair

HM/cd

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