Noteworthy Decision Summary

Decision: WCAT-2005-04555 **Panel**: Herb Morton **Decision Date:** August 30, 2005

Reconsideration – Natural justice – Communication to employer's representative is communication to employer – WCAT not required to seek clarification of party's submission – Section 256 of the Workers Compensation Act

The employer requested reconsideration of a decision denying the employer's application for an extension of time to appeal a decision of the former Workers' Compensation Review Board (Review Board). The employer had received a letter from the Workers' Compensation Appeal Tribunal (WCAT) that led it to believe it would have the opportunity to provide further submissions before the appeal was decided. WCAT subsequently informed the employers' adviser that the application had been transferred to a panel for a decision. The employer did not indicate it wished to provide further submissions before the decision was made. The reconsideration was denied. It was reasonable for WCAT to view the communication of information to the employers' adviser as communication to the employer. The employer did not meet its obligation under section 256 of the *Workers Compensation Act* (Act) to exercise reasonable diligence in providing evidence to WCAT. WCAT was not obliged to seek clarification of the employer's submissions.

The employer sought reconsideration of a WCAT decision denying its application for an extension of time to appeal. The Workers' Compensation Board (Board) awarded the worker wage loss benefits in 2001 after the former Review Board determined the worker sustained a psychological injury in the course of his employment. In 2002 a psychologist determined the worker did not meet the diagnostic criteria for a mental disorder.

In 2003 the employer wrote to the former Workers' Compensation Appeal Division (Appeal Division) requesting an extension of time to appeal the 2001 Review Board decision. The employer stated that it believed there was significant new medical evidence that was not available to it within the initial appeal time lines. On March 3, 2003 the Appeal Division was replaced by WCAT. On June 10, 2003, WCAT wrote to the employer, stating that WCAT would forward the employer's notice of appeal and reasons to the worker and invite the worker to make submissions. On July 8, 2003, WCAT informed the employer that WCAT would contact it to advise how the appeal would proceed. On December 1, 2003, the employers' adviser contacted WCAT to follow up on the status of the appeal. WCAT stated that the appeal had been returned to a panel for a decision as the worker had not provided a submission. In January 2004 WCAT denied the employer's application. The panel noted that the employer had not specified the medical evidence that was not available or why it was significant.

The reconsideration panel noted that there was no indication in the employer's letter of January 16, 2003 that it would be providing a further submission to WCAT. It was also apparent from the June 10, 2003 letter that WCAT was proceeding on the basis that the employer had furnished its reasons for requesting an extension of time to appeal. The reconsideration panel accepted that the July 8, 2003 letter from WCAT may have introduced some confusion in the matter. However, on the basis of the December 1, 2003 communication between WCAT and the employers' adviser, the employer should have been aware its application was before a panel for a decision. In the absence of evidence to the contrary, the communication of information to the employers' adviser meant the information had been communicated to the employer.

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The reconsideration panel concluded that although it may have been preferable for the panel to have sought clarification from the employer with respect to the significant new medical evidence, it was entitled to make a decision based on the information before it. Furthermore, under section 256 of the Act, the employer was required to exercise reasonable or due diligence in ensuring that it provided the panel with the evidence and argument the employer wished the panel to consider. There was no breach of fairness in the panel's procedure.

The employer's application for reconsideration was denied. There was no error of law going to jurisdiction.

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WCAT Decision Date: August 30, 2005
Panel: Herb Morton, Vice Chair

Introduction

The employer requests reconsideration of the Workers' Compensation Appeal Tribunal (WCAT) decision dated January 13, 2004 (*WCAT Decision #2004-00136-AD*). The employer submits there was a breach of natural justice and procedural fairness with respect to the handling of the employer's application for an extension of time to appeal.

Under section 256(4) of the *Workers Compensation Act* (Act), and item #15.24 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP), applications for reconsideration may be made on the basis of common law grounds, and on the basis of new evidence under section 256, but each type of application is limited to one occasion only. The employer requests that the WCAT decision be set aside on the basis of the common law ground of an error of law going to jurisdiction.

Written submissions have been provided by the employer's health and safety officer. Written submissions have also been provided on behalf of the worker by his union's legal counsel.

Issue(s)

Did the WCAT decision involve a breach of natural justice, or other 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, 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*).

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. 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).

Background and Submissions

By finding dated October 11, 2001, the Workers' Compensation Review Board (Review Board) concluded that the worker had sustained a psychological injury (post traumatic stress disorder) that arose out of and in the course of his employment as a teacher. This related to his exposure to a student with Tourette's Syndrome, involving loud startling outbursts. (The Review Board finding was made prior to the June 30, 2002 amendments contained in section 5.1 of the Act, concerning claims for compensation for mental stress that do not result from an injury for which the worker is otherwise entitled to compensation.)

Following the Review Board finding, the worker received 267 days of wage loss benefits (primarily between May 4, 1998 and April 9, 1999, with the last day on September 24, 2001). The worker was also referred for a permanent partial disability assessment. A psychological assessment was performed on July 16, 2002 by Dr. C, psychologist. She expressed the opinion that the worker did not meet the diagnostic criteria for posttraumatic stress disorder (or other diagnosable mental disorder).

By decision dated November 4, 2002, the disability awards claims adjudicator advised the worker that no permanent partial disability award was payable. By letter dated December 12, 2002, the case manager advised the employer that the worker was appealing the denial of a pension.

By letter dated January 16, 2003, the employer's health and safety officer wrote to the former Appeal Division of the Board. She requested an extension of time to appeal the October 11, 2001 Review Board finding. She stated:

> Please accept this as our request for an extension of time to appeal the Review Board finding of October 11, 2001.
>
> We believe there is significant new medical evidence that was not available to us within the initial appeal time lines.
>
> The worker recently appealed to the Review Board a new decision regarding a pension. On receipt of the updated file disclosure in December of 2002 we were presented with new and what we believe is very significant medical evidence.
>
> Upon receiving this information we began inquiries into our access to the appeal process.
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> Section 96(1) [*sic*] of the *Workers Compensation Act* provides that you may grant an extension of time to appeal to the Appeal Division. We ask for your consideration of our request, as we believe we have acted as soon as we became aware of this substantial new information.
>
> Thank you for your consideration.

This letter was marked as having been copied to an employers' adviser. The employer enclosed a completed Notice of Appeal form.

On January 28, 2003, the Appeal Division intake clerk acknowledged receipt of the employer's application, and advised that "After receiving the file, an Appeal Officer will contact you in writing to provide you with further information and commence your appeal."

The workers' compensation appeal bodies were restructured effective March 3, 2003. The Review Board and Appeal Division were replaced by WCAT. On June 10, 2003, a WCAT registration clerk wrote to the employer, stating:

> Thank you for your completed Notice of Appeal and Extension of Time reasons received on January 16, 2003 indicating an intention to appeal the decision noted above.
>
> I am providing a copy of your notification of appeal to [the worker] along with your reasons for the extension of time. They will be invited to participate and to provide a submission with respect to the extension of time request.

By letter dated July 8, 2003, the WCAT registration clerk wrote to an employers' adviser, with a copy to the employer, to advise that the worker would be participating. She stated:

> The appeal will proceed to an Appeal Assessor. The Appeal Assessor will notify the Workers' Compensation Board to provide disclosure to the participating parties. You will be contacted shortly to advise you how the appeal will proceed.

No further correspondence was sent by WCAT to the employer, prior to the WCAT decision being issued on January 13, 2004. By submission dated January 30, 2004, the employer's representative requested reconsideration of the WCAT decision. In that submission, the employer's representative noted:

> I contacted the WCAT in December to see what was occurring with our request and did not receive a call back. I then contacted the Employers' Advisers Office and they called WCAT and were told the file had been returned by the panel as submissions had not been exchanged but on reviewing the information it was noted the worker did not send in a submission by the July 01, 2003. It was apparently then determined that the file should then be sent back to the panel.

By memo dated December 21, 2004, I noted the following:

> One of the concerns raised in this application is that both the January 28, 2003 letter from the intake clerk, Appeal Division, and the final letter of July 8, 2003 from the registration clerk, WCAT, advised the employer that it would be contacted further. The July 8, 2003 letter stated: "You will be contacted shortly to advise you how the appeal will proceed". There was no further correspondence after this letter until the January 13, 2004 decision was issued. These letters tend to support the employer's contention that they believed there would be a further opportunity to make submissions regarding the application for an extension of time to appeal.
>
> On the other hand, entries in WCAT's computer system by WCAT staff regarding the progress of the appeal indicate that the employers' adviser telephoned on December 1, 2003 to verify the status of the application. The December 1, 2003 file activity notation states:
>
> > EMP ADVISOR CALLED TO FOLLOW UP STATUS. CONFIRMED THAT EOT HAD BEEN RETURNED TO PANEL FOR DECISION. WRKR HAD INDICATED WOULD PARTICIPATE, BUT DID NOT PROVIDE A SUB IN RESPONSE TO ER'S SUB
>
> A complete copy of these computer entries is attached. Based on this entry, it would appear that the employer was aware their application was before a WCAT panel for a decision. The decision was not issued until

> January 13, 2004. There was no indication from the employer at that time that they considered their submission incomplete, or were seeking time to make a further submission. I invite further comments from the parties regarding the above.

By submission dated January 12, 2005, the employer's representative states:

> We acknowledge the noted conversation of the Employers' Adviser with the WCAT appeal staff. It has however, always been our expectation that the employer would receive a written request from WCAT requesting our written submission to this appeal and subsequently a written communication that informed us written submissions were considered complete. This has been WCAT's practice and our experience with all of our other appeals before the tribunal.
>
> At no other time has a verbal discussion taken the place of written notification from WCAT especially when done via a third party. It is often, in our experience, the forerunner of written confirmation regarding the verbal discussions but not a replacement.

The employer cites *WCAT Decision #2004-03571* concerning the test to be applied in considering whether a breach of natural justice occurred. The employer's representative argues:

> We submit that by looking at the lengthy (almost 2 year) process, the confusion throughout this appeal including; the transitioning from the Appeal Division to WCAT, the telephone communication misunderstanding and the absence of written correspondence to us from WCAT all constitute a breach of natural justice that prevented us, the appellant from being heard.

The employer's representative further submits that the WCAT panel's consideration of the employer's "new evidence" was patently unreasonable. She argues that even though the employer did not specifically identify what the new medical evidence was, a review of the worker's claim file would have quickly shown which evidence was new based on the dates after the 2001 Review Board finding (i.e. the July 16, 2002 assessment by the Board psychologist).

The worker's representative acknowledges that if the July 8, 2003 letter had been the last contact between WCAT and the employer, there "may be some limited merit in the Employer's argument." She submits, however:

> …the Employer, through the Employer's Advisor, knew as of December 1, 2003 that the extension of time application had been referred to a Panel for a decision. At this point, the Employer could have easily advised

> WCAT that it had further submissions to make and that it was still waiting for a letter further to the July 8, 2003 WCAT letter. The Employer did not do this…
>
> The Employer's Advisor could have, at that point, advised the WCAT staff member that the Employer planned to make a further submission. The Employer's Adviser could have written to WCAT immediately and advised that the Employer wished to make a further submission in support of its application for an extension of time. The Employer's Advisor's Office has trained representatives who are very familiar with the process.

The worker's representative further notes:

> In general practice, reasons in support of an application for an extension of time are filed at the same time that the Notice of Appeal and Application for an Extension of Time are filed. The Employer had provided its reasons for its request in its January 16, 2003 letter. There was no reason for the Tribunal to invite any further submissions… If the Employer had intended to file further reasons in support of its application, it should have advised the Tribunal of this in its January 16, 2003 letter.

By response dated February 22, 2005, the employer's representative submits that her January 16, 2003 letter appears to have been considered as both Part 1 and Part 2 of the Notice of Appeal process. She states that never before in the employer's experience had this happened. She notes that had the employer filled out either the Appeal Division or WCAT two-part Appeal forms, the reasons for the EOT request would have been outlined by the form's questions and a submission filed if additional information was necessary. She submits:

> The role of the Employer's Advisor cannot and should not replace communication between WCAT and the Employer. It is absurd to suggest otherwise. The Advisor's role was limited and largely prompted by the employer's unfamiliarity with the new WCAT system and procedure.

Reasons and Findings

The employer seeks to have the WCAT decision set aside based on a breach of natural justice. The test for determining whether such a breach occurred (both at common law and under section 58 of the ATA) is whether WCAT acted fairly.

It is evident that the employer considers that the procedures followed by WCAT were unfair. However, the question as to whether the procedures were unfair must be determined on an objective basis, having regard to all of the circumstances.

The employer provided a letter dated January 16, 2003, which set out its reasons for requesting an extension of time to appeal. There was no indication in that letter that the employer would be providing a further submission as to why an extension of time to appeal should be granted. The January 16, 2003 letter was sent to the Appeal Division, which did not have Part 1 and Part 2 notices of appeal (which were only used by the former Review Board). The appellant's representative had some limited prior experience with applications for an extension of time to appeal to the Appeal Division (see *Appeal Division Decisions #2003-0009* and *#2002-2324*).

It is apparent from the June 10, 2003 letter by the WCAT registration clerk that WCAT was proceeding on the basis that the employer had furnished its reasons for requesting an extension of time to appeal. The January 16, 2003 letter concluded by thanking the Appeal Division for its consideration. Subject to any further action taken by a WCAT panel to request clarification regarding the employer's reasons, the normal procedure at that time would not have involved inviting any further request for submissions in support of the employer's application, except in reply to any submission provided by the worker. The January 16, 2003 letter was being treated as the employer's "submission". The procedures followed for such "summary" applications were less formal that those followed in connection with appeals on the "merits". If the employer's application for an extension of time to appeal were granted, this would lead to separate consideration as to whether the appeal should be heard by way of an oral hearing or further written submissions on the merits.

I accept that the July 8, 2003 letter from the WCAT registration clerk introduced some confusion in this matter, by advising the employer that it would be contacted shortly to advise how the appeal would proceed. This advice could very well have given rise to an expectation on the part of the employer that it would have a further opportunity to provide input. In this context, I am inclined to the view that it might well have been a breach of natural justice to proceed to issue the WCAT decision without any other communication or notice.

The fact remains, however, that the employers' advisor contacted WCAT on behalf of the employer on December 1, 2003, and was informed that the employer's application "had been returned to panel for decision." In the absence of evidence to show otherwise, I consider that the communication of that information to the employers'

adviser may reasonably be viewed as a communication of this information to the employer. The January 30, 2004 submission by the employer's representative confirmed that she contacted the employers' adviser for assistance when she did not receive a response to her telephone inquiry. It is apparent from the January 30, 2004 submission that the employers' adviser did in fact convey to the employer the information that its application was before a WCAT panel, as the worker had not provided a submission.

To the extent the July 8, 2003 letter may have given rise to any misunderstanding, this may reasonably be viewed as having been dispelled by the December 1, 2003 telephone call. From approximately December 1, 2003, it may reasonably be considered that the employer knew, or ought to have known, that its application was under consideration by a WCAT panel, and that a decision by the WCAT panel would be forthcoming. For more than one month, the employer took no action to alert WCAT that it wished the opportunity to clarify or supplement its reasons for requesting an extension of time to appeal. As of the date the WCAT decision was issued on January 13, 2004, the employer had not taken any further action to contact WCAT. It was not until after the WCAT decision was issued on January 13, 2004, to deny its application, that the employer expressed its concerns in an application for reconsideration dated January 30, 2004.

Pursuant to section 255(1) of the Act, WCAT decisions are intended to be final and conclusive. It would be unfair to the respondent to set aside a WCAT decision due to the applicant's sense of grievance, unless there was in fact a breach of fairness by WCAT requiring such action. In light of all the circumstances set out above, I do not consider that the procedures followed by WCAT were unfair, in proceeding with a decision on the merits without inviting a further submission from the employer.

In its decision, the WCAT panel noted on page 2:

> According to the claim file, the employer requested disclosure on March 29, 1999 and December 3, 2002. …
>
> In its submissions, the employer indicates that there is significant new medical evidence which was not available to the employer within the appeal period. However, the employer does not specify the medical evidence which was not available nor why it is significant to this appeal.
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> I note that the employer did not request disclosure between March 29, 1999 and the oral hearing on September 11, 2001 (over two years) although it was entitled to do so. Given that the new medical evidence is not identified, it is difficult to conclude that the relevant information was not available to the employer until after the appeal period. I also give weight to the significant period of delay. Finally, in the absence of specific

information, I cannot conclude that the new information is so significant to this appeal that an extension of time should be granted.

The worker had appealed the December 23, 1998 decision to deny his claim to the Review Board. The employer was notified of the worker's appeal to the Review Board on March 2, 1999, and obtained disclosure of the worker's claim file on March 29, 1999. The WCAT panel's reference to the time period from March 29, 1999 until September 11, 2001 (the date of the Review Board oral hearing) concerned the period during which the worker's appeal was pending before the Review Board, and the employer was eligible to request updated disclosure.

The employer has now clarified that it was relying on the later psychological assessment dated July 16, 2002, which did not exist prior to the Review Board finding. It is unfortunate the employer's representative did not specifically refer to this document in her January 16, 2003 application for an extension of time to appeal. It is similarly unfortunate that the WCAT panel did not request clarification from the employer regarding the new medical evidence on which the employer's application was based, as that would have permitted fuller consideration of the employer's application. That said, I am not persuaded that the WCAT decision was patently unreasonable, or involved a breach of fair procedure, in proceeding to make a decision on the basis of the information before it. Under section 96.1 of the former Act, and section 256 of the current Act, a party is expected to exercise reasonable or due diligence in ensuring that it has provided the appeal tribunal with the evidence and argument which the party wishes the tribunal to consider. Accordingly, I do not consider that the failure of the WCAT panel to seek clarification from the employer constitutes a basis for setting aside the WCAT decision. While it would, in my view, have been preferable for the panel to have sought such clarification, I do not consider that the decision can be set aside as involving a breach of fairness on that basis.

The employer's representative submits the July 16, 2002 psychological assessment constitutes substantial new evidence which warrants reconsideration of the Review Board finding. However, section 256 only applies to an application for reconsideration of a WCAT or Appeal Division decision. The July 16, 2002 report was on file at the time of the January 13, 2004 WCAT decision. Although not identified as such, it formed the basis for the employer's 2003 application for an extension of time to appeal. Accordingly, it does not constitute new evidence for the purpose of reconsidering the WCAT decision. (This comment is provided in *obiter*, as the employer did not request reconsideration of the WCAT decision on the basis of new evidence. My comments on this point do not involve a "one time only" decision under section 256(4) of the Act).

Conclusion

The employer's application for reconsideration of *WCAT Decision #2004-00136-AD* is denied. No error of law going to jurisdiction (including a breach of natural justice) has been established. The WCAT decision stands as "final and conclusive" under section 255(1) of the Act.

Herb Morton
Vice Chair

HM/cd