

Noteworthy Decision Summary**Decision:** WCAT-2005-05949**Panel:** Jill Callan**Decision Date:** November 7, 2005***Reconsideration on the basis of new evidence – Application of the due diligence requirement in section 256, and bias in applying this test – Section 256(3)(b) of the Workers Compensation Act – Policy item #103.40 of the Rehabilitation Services and Claims Manual, Volume I***

This was a reconsideration on common law grounds of a prior WCAT reconsideration decision on new evidence grounds. The original reconsideration panel did not err in its interpretation or application of the reasonable diligence requirement in section 256 of the *Workers Compensation Act* (Act), nor in its conclusion that the worker and his counsel ought to have marshalled all of the evidence that was available in support of the appeal. In applying the reasonable diligence test, the original reconsideration panel compared the worker's actions to that of a reasonable person, and its decision that the worker had not taken the steps that would have been taken by a reasonable appellant did not give rise to a reasonable apprehension of bias.

The worker's request for examination by a Medical Review Panel (MRP) was denied by the MRP registrar because, after his deadline for submitting a bona fide medical certificate was extended, he submitted his certificate 3 days late. The original WCAT panel found that the circumstances of his case did not warrant accepting a late certificate outside policy item #103.40 of the Rehabilitation Services and Claims Manual, Volume I (RSCM I). On reconsideration, a reconsideration panel found that the worker's evidence did not meet the reasonable diligence requirement in section 256(3)(b) of the *Workers Compensation Act* (Act) because a reasonable appellant would have marshalled all the relevant evidence in support of his appeal; it also found that the evidence did not constitute new evidence. The worker objected to the reconsideration panel's application of the reasonable diligence requirement and sought a further reconsideration.

The MRP registrar had advised the worker that "the guidelines provided [in item #103.40] should be followed unless there are strong and exceptional reasons to depart from them". The worker was represented by counsel at the appeal, and both he and his counsel provided submissions in support of the appeal. Accordingly, the worker was aware that a high standard had to be met in order for an examination by an MRP to proceed. The original reconsideration panel did not err in its interpretation or application of the reasonable diligence requirement in section 256, nor in its conclusion that the worker and his counsel ought to have marshalled all of the evidence that was available in support of the appeal.

The worker also alleged that the impugned decision was biased because, in applying the reasonable diligence standard, the original reconsideration panel concluded that the worker had not taken the steps that would have been taken by a reasonable appellant. His allegation was that the panel must have been biased because it applied a legal test requiring consideration of the conduct of a reasonable appellant in a manner that did not favour the worker. There was no reasonable apprehension of bias on this basis.

WCAT Decision Number : WCAT-2005-05949
WCAT Decision Date: November 07, 2005
Panel: Jill Callan, Vice Chair

Introduction

The worker requests reconsideration of a November 5, 2004 decision of the Workers' Compensation Appeal Tribunal (WCAT) (*WCAT Decision #2004-05840*), which I will call the "impugned decision", on common law grounds. In the impugned decision, a WCAT reconsideration panel considered the worker's application for reconsideration of *WCAT Decision #2003-00691-RB*, dated May 28, 2003 (which I will call the "2003 WCAT decision") on the basis of new evidence under section 256 of the *Workers Compensation Act* (Act). The reconsideration panel concluded that the new evidence requirements of section 256 had not been satisfied and, accordingly, the 2003 WCAT decision stood as final and conclusive.

Although participating in this application, the employer has not provided a submission regarding this application.

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) affecting 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. Item #15.24 (Reconsideration on Common Law Grounds) of WCAT's *Manual of Rules of Practice and Procedure* (MRPP), 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 is somewhat unique because this decision will be the first decision issued by WCAT where the applicant is seeking reconsideration of a reconsideration decision. Item #15.24 of the MRPP states, in part:

The authority to consider an application on common law grounds is discretionary in nature. WCAT will hear an application for reconsideration on the basis of common law grounds on one occasion only. WCAT will not hear a further application for reconsideration of a WCAT decision provided in response to an application for reconsideration on common law grounds, unless a new breach of natural justice is alleged in relation to the second decision.

Item #15.23 (Reconsideration Based on New Evidence (Section 256)) of the MRPP does not include any statements regarding reconsiderations of reconsideration decisions where the application was on the grounds of new evidence. As, in my capacity as WCAT chair, I have not exercised the discretion to establish a more restrictive approach for WCAT to take in these circumstances, I will consider the application before me on the basis of whether common law grounds have been established for reconsideration of the impugned decision.

Issue(s)

The issue is whether common law grounds have been established for reconsideration of the impugned decision. Such grounds would include an error of law going to jurisdiction, including a breach of natural justice.

Background

This matter arises as a result of a series of decisions related to the worker's request for an examination by a Medical Review Panel under the Act as it existed prior to the changes that flowed from the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). The history of this matter has been outlined in the 2003 WCAT decision (available online at www.wcat.bc.ca) and has also been summarized in the impugned decision. The relevant history can be briefly summarized as follows:

- The worker's claim was accepted for left foot plantar fasciitis.
- By decision dated May 28, 1999, a case manager of the Workers' Compensation Board (Board) informed the worker he would be paid wage loss benefits up and

including February 18, 1997 and his claim would not be referred to the Disability Awards Department because there was no permanent functional impairment resulting from the plantar fasciitis.

- In findings dated January 22, 2001, the former Workers' Compensation Review Board (Review Board) denied the worker's appeal from the May 28, 1999 decision.
- Under the former section 58(3) of the Act, the worker had the right to be examined by a Medical Review Panel if, not more than 90 days after the decision, he wrote to the Board expressing his disagreement with the decision and sent a certificate from a physician certifying that there was a *bona fide* medical dispute to be resolved.
- The worker requested an examination by a Medical Review Panel and a certificate was provided by a physician within the timeframe for doing so. However, the certificate did not meet all of the necessary requirements. Under the policy that is now item #103.40 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I), the Medical Review Panel Department notified the worker that he would be examined by a Medical Review Panel if a valid certificate was received by October 29, 2001.
- The Medical Review Panel Department received a further certificate from the worker's physician on November 1, 2001. Accordingly, the further certificate was three days late.
- By decision dated December 19, 2001, the Registrar, Medical Review Panels, determined that, in light of the absence of compliance with both section 58(3) and item #103.40, the worker's request for a Medical Review Panel examination was denied.
- The worker appealed the December 19, 2001 decision to the Review Board. Pursuant to the transitional provisions in Bill 63, the appeal was transferred to WCAT and considered in the 2003 WCAT decision. The WCAT panel denied the appeal.

The impugned decision was issued as a result of the worker's application for a reconsideration of the 2003 WCAT decision on the basis of new evidence. Sections 256(2) and (3) of the Act provide:

- (2) A party to a completed appeal may apply to the chair for reconsideration of the decision in that appeal if new evidence has become available or been discovered.
- (3) On receipt of an application under subsection (2), the chair may refer the decision to the appeal tribunal for reconsideration if the chair is satisfied that the evidence referred to in the application

- (a) is substantial and material to the decision, and
- (b) did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

The evidence that the worker provided consisted of letters from his physician and counsel explaining the reasons for the delay in submitting the second certificate to the Medical Review Panel Department. In considering this evidence, the reconsideration panel stated:

It must be noted, at the outset, that under section 255(1) of the Act, the WCAT decision is final and conclusive. There is no further avenue of appeal. I am not free to reweigh the evidence on the claim, with a view to determining whether I would reach the same conclusion. Rather, the narrow question before me in this decision involves the preliminary or threshold issue as to whether the new evidence which has been provided meets the specific requirements of section 256(2) and (3) of the Act.

The reconsideration panel determined that the evidence did not constitute “new” evidence for the purposes of section 256. Accordingly, the reconsideration panel considered whether the reasonable diligence requirement set out in section 256(3)(b) had been met and concluded:

As the issues in the worker’s appeal had been clearly identified by the December 19, 2001 decision of the MRP registrar, I find that a reasonable appellant would have marshalled all the relevant evidence in support of his appeal. To the extent that additional explanations were required from the worker’s attending physician, these could have been obtained and provided together with the March 18, 2002 and April 17, 2003 submissions in support of the worker’s appeal. I consider that such explanations could have been discovered and provided to WCAT by the exercise of reasonable diligence, prior to the May 28, 2003 WCAT decision.

In Appeal Division Decision #96-1628, “Reconsideration of an Appeal Division decision — role of credibility considerations in analyzing the causes of a worker’s disability”, 14 WCR 9, a former chief appeal commissioner commented:

Appeal division decisions are final and conclusive and may only be reconsidered if there is new evidence within the meaning of s. 96.1 of the Act or if they are tainted by an “error of law going to jurisdiction”, clerical mistakes or omissions or fraud. The grounds for reconsidering appeal division decisions are, therefore, strict.

The reconsideration process cannot be used simply to continue arguments or strengthen an unsuccessful case.

[emphasis added by reconsideration panel]

Submissions and Analysis

The worker has provided several letters to WCAT outlining his objections to the impugned decision. He has made statements related to his disagreement with the Board's decision that his ongoing problems are unrelated to the compensable injury. He has also provided explanations as to why his physician was late in submitting the certificate to the Medical Review Panel Department. However, as noted by the reconsideration panel, the reconsideration process is not intended to allow the worker an opportunity to restate his position and reargue the evidence related to the previous decisions. The narrow question before me is whether the impugned decision involved an error of law going to jurisdiction, which would include a denial of procedural fairness.

The worker appears to object to the manner in which the reconsideration panel applied the reasonable diligence requirement of section 256. However, I find no error in the manner in which the reconsideration panel interpreted and applied that requirement. In her December 19, 2001 decision, the registrar of the Medical Review Panel Department stated that "the guidelines provided [in item #103.40] should be followed **unless there are strong and exceptional reasons** to depart from them" [emphasis added]. Accordingly, the worker was made aware that a high standard had to be met in order for an examination by a Medical Review Panel to proceed. The worker was represented by counsel on his appeal of the December 19, 2001 decision and he and his counsel both provided submissions in support of the appeal. I find no error in the reconsideration panel's conclusion that the worker and his counsel ought to have marshalled all of the evidence that was available to support the appeal.

The worker states that the impugned decision is a biased decision because, in applying the reasonable diligence standard, the reconsideration panel concluded that the worker had not taken the steps that would have been taken by a reasonable appellant.

A decision of an administrative tribunal, such as WCAT, involves a denial of procedural fairness or breach of natural justice if there is a reasonable apprehension of bias. Perhaps the clearest cases are those in which a decision maker has a pecuniary interest in the outcome of a hearing or has a clear conflict of interest. In this case, the worker does not allege circumstances of this nature. He simply alleges the panel must have been biased because the panel applied a legal test requiring consideration of the conduct of a reasonable appellant in a manner that did not favour the worker. I am not persuaded that there is a reasonable apprehension of bias on this basis.

The worker is clearly frustrated that his request for an examination by a Medical Review Panel did not proceed even though the second certificate was only three days late in being submitted to the Medical Review Panel Department. Section 255(1) of the Act provides that a WCAT decision is “final and conclusive”. The status of WCAT decisions as final decisions is designed to provide some certainty to the parties who appear before WCAT. The standard that must be met in order for a WCAT decision to be reconsidered must be a very high standard in order to give effect to the legislative intent that WCAT decisions are final. Accordingly, the requirements that must be met in order for a WCAT decision to be reconsidered under section 256 are stringent as are the requirements for establishing that a WCAT decision must be set aside on common law grounds.

In this case, the worker has not established common law grounds for the reconsideration of the impugned decision.

Conclusion

The worker has not established grounds for reconsideration of *WCAT Decision #2004-05840*. The decision stands as final and conclusive in accordance with section 255(1) of the Act.

Jill Callan
Chair

JC/jd