

Noteworthy Decision Summary

Decision: WCAT-2005-06073**Panel:** Herb Morton**Decision Date:** November 15, 2005

Reconsideration – Natural justice – Sections 96.4(8), and 239(2)(a) of the Workers Compensation Act – Section 4(d) of the Workers Compensation Act Appeal Regulation – Policy item #14.30 of the WCAT Manual of Rules of Practice and Procedure

This was a reconsideration of a prior Workers' Compensation Appeal Tribunal (WCAT) decision. The worker suffered a back injury and received a permanent disability award (PDA) on a functional impairment basis, but not a loss of earnings basis. The Review Division of the Workers' Compensation Board (Review Division) referred the matter back to the Workers' Compensation Board (Board) to conduct loss of earnings and employability assessments. The worker appealed to WCAT on another issue. The original WCAT panel found that, as the Review Division had mistakenly not been informed that an employability assessment had already been conducted, the matter should not be referred back to the Board. The reconsideration panel held that the original panel had acted unfairly by not notifying the worker that the loss of earnings aspect would be addressed. This aspect of the decision was set aside as void.

The worker injured his back and received a PDA. His back condition worsened. On February 17, 2003, the Board informed the worker that his PDA would be increased from 1.5% to 4% of total disability and that a vocational rehabilitation consultant (VRC) would assess his ability to return to work. A VRC subsequently concluded the worker would not sustain a long-term loss of earnings. The worker requested a review by the Review Division. On January 28, 2004, a review officer referred the worker's file back to the Board to conduct loss of earnings and employability assessments, as the Board had not examined the impact of the increased disability on the worker's employability. The worker appealed a different aspect of the review officer's decision to WCAT.

In *WCAT Decision #2005-00946-RB*, the panel considered whether she had jurisdiction to decide the matter of whether the worker sustained a loss of earnings. The panel acknowledged that policy item #2.41 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) appeared to exclude the matter from WCAT's jurisdiction. The panel noted, however, that there appeared to have been an oversight or miscommunication within the claim file with respect to whether an employability assessment had already been conducted. The panel concluded that it was more practical for her to deal with the loss of earnings aspect rather than require another appeal process to be commenced only to comply with section 96.4(8)(b) of the *Workers Compensation Act*. As no evidence had been presented to suggest the worker would sustain a long-term loss of earnings, the panel concluded the PDA was correctly based on the functional impairment. The Review Division decision was varied. The worker applied for reconsideration by a different WCAT panel.

On February 13, 2004, the Board informed the worker that a loss of earnings assessment had already been completed. The Board also acknowledged it had failed to include the VRC's judgement with respect to loss of earnings in the February 17, 2003 letter. The worker requested a review of the February 13, 2004 decision by the Review Division. The review was before the Review Division at the time *WCAT Decision #2005-00946-RB* was issued. The

review officer subsequently concluded she was bound by *WCAT Decision #2005-00946-RB* and confirmed the February 13, 2004 decision denying the worker a PDA on a loss of earnings basis.

The reconsideration panel addressed the issue of whether the original panel had breached the principles of natural justice by addressing the worker's loss of earnings eligibility without putting the worker on notice that she would be addressing this issue. The reconsideration panel referred to item #14.30 of WCAT's MRPP. This item states that although panels will normally ensure notice is given to parties of the panel's intention to address any issue not raised by the parties, an exception exists where the subject of the appeal is a PDA. The reconsideration panel found that item #14.30 of the MRPP did not contemplate the situation of a panel addressing an aspect of a PDA decision that had been referred back to the Board under section 96.4(8)(b). Furthermore, the original panel's decision had the effect of pre-empting the Review Division's review of the February 13, 2004 implementation decision.

The reconsideration panel found the worker would have reasonably believed the loss of earnings issue was not before the original panel. Thus, the original panel reached a decision adversely affecting the worker without notifying the worker of the matter to be addressed. This was unfair. Therefore, the original panel's finding on the issue of the worker's loss of earnings was set aside as void. The remainder of *WCAT Decision #2005-00946-RB* remained valid.

The reconsideration panel did not address the submission that the original panel had exceeded her jurisdiction in addressing the loss of earnings issue, based on section 4(d) of the *Workers Compensation Act Appeal Regulation*, as it was not necessary to decide the appeal. However, the reconsideration panel was inclined to the view that the original panel had exceeded her jurisdiction.

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Panel: Herb Morton, Vice Chair

Introduction

The worker seeks reconsideration of *WCAT Decision #2005-00946-RB* dated February 23, 2005. By submission dated March 1, 2005, the workers' adviser argues that the Workers' Compensation Appeal Tribunal (WCAT) decision involved both jurisdictional error, and a breach of natural justice, in addressing the worker's eligibility for a loss of earnings pension award. The Review Division decision (*Review Decision #3103*) which had been appealed to WCAT had referred the loss of earnings issue back to the Board officer for adjudication, with directions.

By letter dated October 11, 2005, an appeals coordinator provided the applicant with further information regarding the grounds for requesting reconsideration, and the "one time only" limitation. By letter dated October 31, 2005, a workers' adviser stated that the worker was relying on the March 1, 2005 submission and no further submission would be provided. The employer is not participating in this application, although invited to do so.

Issue(s)

Did the WCAT decision involve a breach of natural justice or jurisdictional error?

Jurisdiction

Section 255(1) of the *Workers Compensation Act* (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 current Act, or on the basis of an error of law going to jurisdiction. 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 W.C.R. 211.

The test for determining whether there has been an error of law going to jurisdiction generally requires application of the standard of review of patent unreasonableness. 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. 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. On all other matters (i.e. jurisdictional issues), the standard of review is correctness (see *WCAT Decision #2005-01984*).

This application has been assigned to me by the chair on the basis of a written delegation (paragraph 26 of 55. 6, "Delegation by the Chair", June 1, 2004).

Background

Review Decision #3103, dated January 28, 2004, found at pages 5-6:

Issue #2 is the Board did not make a determination of a projected loss of earnings entitlement.

Policy item #38.00 requires that the Board consider the two methods of assessing permanent partial disabilities in every case where applicable. The worker's pension would be the higher of the two figures produced by the two methods.

I note that the RB found that the Board appropriately denied the worker's loss of earnings award in July 1997. However, the panel found that the worker's pensionable low back condition had worsened and that Disability Awards should reassess him. The panel also stated:

Since the worker's pensionable condition has worsened, the Board should re-examine the impact of this condition on his functional capacity and ability to return to work once the Disability Awards reassessment has taken place.

I find that the Board did reassess the worker but did not re-examine the impact of the increased disability on the worker's employability.

Policy item #89.10 explains that requests for employability assessments ("EA") are made in cases where the worker may sustain a loss of earnings which is greater than compensated for by the compensable disability. The

Board Officer in Disability Awards declined to request an EA. In this worker's case, I find that an EA is required to determine if the worker has a loss of earnings which is greater than his functional award.

As a result, I refer the decision of February 17, 2003 back to the Board with the following directions:

The Board will conduct a projected loss of earnings assessment under the provisions of section 23(3) of the former *Act* and policy item #40.10 after the VRC completes an employability assessment of the worker.

Conclusion

As a result of this review, the Board's decision of February 17, 2003 will be referred back to the Board with the above-noted directions.

The worker appealed *Review Decision #3103*, dated January 28, 2004, to WCAT, which resulted in *WCAT Decision #2005-00946-RB* dated February 23, 2005 (the subject of this application for reconsideration).

At the same time, a Board officer proceeded to implement the Review Division decision. By decision dated February 13, 2004, the disability awards officer explained that in fact, a request for an employability assessment was made on February 11, 2003. The vocational rehabilitation consultant had replied on February 13, 2003. The disability awards officer acknowledged that this response "was not clearly defined" in her February 17, 2003 decision letter (which was the subject of *Review Decision #3103*). Her February 13, 2004 decision concluded by advising the worker:

You will not sustain a loss of earnings in the long term. The appropriate compensation was the loss of function award as previously paid to you in February 2003.

The worker requested review of the February 13, 2004 decision. His request for review was stamped as received by the Review Division on May 6, 2004. The workers' adviser provided a written submission to the Review Division dated November 10, 2004, arguing that the worker was suffering a loss of earnings. That request for review was under consideration by the Review Division at the time *WCAT Decision #2005-00946-RB* (dated February 23, 2005) was issued.

Review Decision #16929 dated March 18, 2005 concerned the Board's decision of February 13, 2004 to deny the worker a loss of earnings pension award. The review officer concluded she was bound by the February 23, 2005 WCAT decision. The worker has appealed *Review Decision #16929* to WCAT, and his appeal has been assigned to another WCAT panel for consideration (the "N" appeal). An appeal of

Review Decision #22067 dated January 31, 2005, concerning the worker's claim for depression, has also been assigned to the same WCAT panel (the "L" appeal).

Act and Regulations

Section 96.4(8) of the Act provides:

The review officer may make a decision

- (a) confirming, varying or cancelling the decision or order under review, or
- (b) referring the decision or order under review back to the Board, with or without directions.

Section 239(2)(a) of the Act provides:

The following decisions made by a review officer may not be appealed to the appeal tribunal:

- (a) a decision in a prescribed class of decisions respecting the conduct of a review;

Section 224(2)(j) of the Act further provides that the Lieutenant Governor in Council may make regulations:

prescribing any decisions or orders under this Act or the regulations that may be appealed to the appeal tribunal under Part 4, prescribing who may appeal those decisions or orders and prescribing classes of decisions for purposes of section 239 (2) (a);

Section 4 of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/02, also cited as Order in Council 1039/2002, stipulated:

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:

- (a) decisions applying time periods specified by the board under section 96 (8) of the Act;
- (b) decisions made under section 96.2 (4), 96.2 (7), 96.4 (2) to (5) or 96.4 (7) of the Act;
- (c) orders by the chief review officer under section 96.2 (5) of the Act;
- (d) decisions about whether or not to refer a decision back to the board under section 96.4 (8) (b) of the Act;**

- (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.

[emphasis added]

The *Appeal Regulation* is accessible on WCAT's website at: <http://www.wcat.bc.ca/publications/321-2002.htm>. It is also accessible at: http://www.qp.gov.bc.ca/statreg/reg/W/WorkersComp/321_2002.htm.

The WCAT Decision

The WCAT panel identified that there was a jurisdictional issue as to whether or not the worker's eligibility for a loss of earnings pension was properly before WCAT. The panel explained its reasons for proceeding to address this issue as follows:

The review officer referred the worker's file back to the Board to determine the impact of the increased permanent disability on the worker's employability.

The Board responded that an employability assessment had, in fact, been conducted as noted in the VRC's notation of February 13, 2003 wherein she said the worker would not sustain a loss of earnings over the long term and was being retrained.

WCAT's *Manual of Rules of Practice and Procedure* sets out, at item #2.41, the classes of decisions respecting the conduct of a review by the Review Division which are not appealable to WCAT and provides a listing of such various matters, including item #2.41(j) "a decision by a review officer under section 96.4(8) to refer a decision or order under review back to the Board, with or without directions."

I have considered whether I have jurisdiction by which to consider the matter of whether the worker has sustained a loss of earnings because of his compensable residual impairment, or whether I am precluded from dealing with this matter because the Review Division had referred the question back to the Board to conduct a loss of earnings assessment following completion of an employability assessment.

In this case, there appears to have been an oversight or a miscommunication within the claim file with respect to whether an employability assessment had been conducted and subsequently, whether a decision had been made regarding the worker's projected loss of earnings as a result of that assessment.

As noted earlier in these findings, the Board did conduct an extensive employability assessment and, based on the information in that assessment, a Board officer concluded the worker could access suitable employment at no long-term loss of earnings. The worker had been provided with a copy of the evaluation assessment report in which the evaluator concluded the worker would not sustain a loss of earnings. Those reports were, in fact, on the claim file prior to the Review Division finding of January 28, 2004.

The Board's decision letter of February 13, 2004 acknowledged that the VRC's specific judgement with respect to loss of earnings had not been included in the letter of February 17, 2003. While the VRC's determination was not cited in the pension decision letter it was, nonetheless, previously considered with associated analyses supporting the decision on the claim file.

The omission of the VRC's determination as to the loss of earnings in the appealed decision letter of February 17, 2003 does not negate the fact that the projected loss of earnings had, in fact, been properly considered by the Board with relevant and current information as directed by the Review Board.

Clearly, the worker's dissatisfaction with the impairment decision letter and his intent to appeal the findings has been demonstrated in his initiation of an appeal process at both levels of appellate bodies.

This is a situation where it is practical, from the viewpoints of common-sense, system efficiency and fairness, to deal with this aspect of the worker's impairment decision, rather than require the parties to commence another appeal process on this narrow aspect simply in order to comply with the strict provisions of section 96.4(8)(b). On the basis of the foregoing, I find I have sufficient broad jurisdiction to consider the matter of the worker's loss of earnings.

Following the analysis set out above, the WCAT panel proceeded to address the merits regarding the worker's eligibility for a loss of earnings pension award (without reference to any input from the worker). This analysis included the following statement:

No evidence has been presented to buttress an opinion that such work was not reasonably available or that it was physically unsuitable for the worker given the compensable conditions accepted under this claim.

The WCAT decision concluded as follows:

I vary the Review Division's decision of January 28, 2004 to the extent that I have found the worker has not sustained a long-term loss of earnings as a result of his compensable condition under this claim.

Analysis

An application for reconsideration on the common law grounds concerns whether or not a valid decision has been rendered, or whether the decision should be set aside as void. In this case, the worker's complaint only concerns the decision by the WCAT panel regarding his eligibility for a loss of earnings pension award.

The workers' adviser presents two arguments. Firstly, he submits the WCAT panel exceeded its jurisdiction by addressing the worker's loss of earnings pension eligibility, when that issue had been referred back to the Board. Secondly, he submits that even if the WCAT panel had jurisdiction to address the worker's loss of earnings eligibility, there was a breach of natural justice as the worker had no notice that this issue would be addressed by the WCAT panel, and had no opportunity to provide submissions on this issue. The workers' adviser argues:

...the desirability of system efficiency does not override the principles of natural justice or sections 239 or 96.4 of the Act. Further, we see no fairness in deciding the most important part of a worker's disability award; that is the loss of earnings component, without giving the worker the opportunity to be heard specifically on the matter. Finally, although the Vice Chair might see the issue of the loss of earnings as merely a "narrow aspect" of the disability award decision, that "aspect" is potentially the most significant aspect of the decision. For all of these reasons, we submit that it is fundamentally unfair to decide the matter of a loss of earnings without providing the opportunity to the worker to plead his case.

In the text *Administrative Law in Canada*, Third Ed. (Ontario: Butterworths, 2001), Sara Blake states at pages 12-13:

...Essentially, the courts require that decisions made in individual cases be made following procedures that are fair to the affected parties. This requirement is called the 'doctrine of fairness' or the 'duty to act fairly'.

At a minimum, the doctrine of fairness requires that, before a decision adverse to a person's interests is made, the person should be told the case to be met and be given an opportunity to respond. The purpose is twofold. First, the person to be affected is given an opportunity to influence the decision. Second, the information received from that person, should assist the decision maker to make a rational and informed decision. A person is more willing to accept an adverse decision if the process has been fair.

A right to be heard does not imply a right to have one's views accepted nor does it encompass a right to be granted the order sought. It is only a right to have one's views heard and considered by the decision maker.

Review Decision #3103 did not expressly cite section 96.4(8)(b) of the Act. However, the panel stated in its conclusion that "the Board's decision of February 17, 2003 will be referred back to the Board with the above-noted directions." This wording closely parallels the wording of section 96.4(8)(b), which states that a review officer may make a decision referring the decision or order under review back to the Board, with or without directions. The WCAT panel identified the review officer's disposition of the appeal as being based on the Review Division authority under section 96.4(8)(b) of the Act.

The worker's "notice of appeal from Review Division" dated February 26, 2004 concerning *Review Decision #3103* stated that the decision was incorrect because:

The Review Division erred in finding that the permanent functional impairment award was appropriate in the circumstances.

The worker requested the following outcome:

- A further PFI assessment
- Re-assessment of the permanent partial disability award assessing the sensory and reflex changes noted by Dr. Brown and Dr. Schweigel.

The WCAT panel noted on page 2:

With respect to the decision of January 28, 2004, the worker is seeking a "further PFI assessment"; a reassessment of the permanent partial disability award addressing the sensory and reflex changes noted by Dr. Brown and Dr. Schweigel.

The worker's representative prepared a submission dated August 20, 2003 in relation to the decision letter of November 7, 2002. No submission was received regarding the Review Division decision of January 28, 2004. The employer, although invited to do so, did not complete a notice of participation in the appeal.

The appeal has been considered on review of all documentary evidence and submissions on file.

The decision by the WCAT panel was made on the basis of written submissions, without an oral hearing. The notice of appeal and submissions provided on behalf of the worker

did not address his eligibility for a loss of earnings pension. The employer did not participate in the appeal. There was no communication to the worker by the WCAT panel that it was contemplating addressing the worker's eligibility for a loss of earnings pension as part of the panel's consideration of the worker's appeal. It does not appear that the WCAT panel was aware that in proceeding to address the loss of earnings issue, it was pre-empting the Review Division's consideration on the merits of the worker's request for review of the February 13, 2004 decision by the disability awards officer.

Item #14.30 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) concerns "Scope of Decision". This states:

The panel will normally not address issues not expressly raised by the parties, but has the discretion to do so. For example, where the panel considers there may have been a contravention of law or policy in the lower decision, the panel may proceed to address that issue whether or not it was expressly raised by the appellant. However, panels will ensure that notice is given to the parties of the panel's intention to address any issue which was not raised in the notice of appeal or in the parties' submissions to WCAT.

An exception is where the subject of an appeal is a permanent disability award. Panels may address any aspect of the permanent disability award decision (i.e. which was addressed in the Board decision letter, the subject of review by the Review Division, or which was addressed in the Review Division decision) without notice to the parties.

WCAT decisions may, on occasion, adversely affect the appellant. For example, where a worker appeals a permanent disability award decision, the panel may increase, decrease, or confirm the award. If the adverse decision relates to an issue not raised by a party, the panel will ensure the parties are given an opportunity to make submissions on that issue.

I find that in light of:

- the Review Division's referral of the issue concerning the worker's loss of earnings pension eligibility back to the Board,
- the worker's request for review of the February 13, 2004 implementation decision, and,
- section 4(d) of the *Appeal Regulation*,

the worker would reasonably have believed this issue was not before the WCAT panel. I do not consider that it would have been reasonably foreseeable by the worker that the

WCAT panel would address this issue, in the absence of notice to the parties of its intention to do so.

I find that that it was a breach of natural justice for the WCAT panel to proceed to address the worker's eligibility for a loss of earnings pension award, without inviting submissions as to whether this issue was within the panel's jurisdiction, and, if so, how this issue should be determined. The WCAT panel reached a decision adversely affecting the worker, without notice to the worker that the matter would be addressed. While MRPP item #14.30 indicates that a WCAT panel may address any aspect of a pension award which was addressed in the Review Division decision, I do not consider that this passage contemplated the situation of the WCAT panel proceeding to address an aspect of the pension decision which had been referred back to the Board under section 96.4(8)(b) of the Act. The effect of the WCAT panel proceeding in this fashion also had the effect of pre-empting the Review Division's consideration on the merits of the loss of earnings issue.

I find that the procedures followed by the WCAT panel were unfair, in proceeding to address the worker's eligibility for a loss of earnings pension award without notice to the worker. Accordingly, the WCAT finding on this issue is severed from the decision and set aside as void. This does not affect the validity of the WCAT decision on the other issues dealt with by the WCAT panel, which were properly before it. Accordingly, no further consideration is required by WCAT of the worker's appeal of *Review Decision #3103*.

The workers' adviser has also argued that it was outside the jurisdiction of the WCAT panel to address the loss of earnings issue, based on section 4(d) of the *Appeal Regulation*. In view of my conclusion set out above, it is not necessary that I determine this issue. However, I am inclined to the view that it was not open to the WCAT panel to disregard the specific limitation on WCAT's authority contained in section 4(d) of the *Appeal Regulation*.

Conclusion

WCAT Decision #2005-00946-RB dated February 23, 2005 is void in part, in relation to its finding regarding the worker's loss of earnings pension eligibility. The panel's finding on that issue is severed from the decision as void. As this finding was not necessary to the panel's consideration of the worker's appeal of *Review Decision #3103*, the remainder of *WCAT Decision #2005-00946-RB* constitutes a final and conclusive decision on the worker's appeals pursuant to section 255(1) of the Act. No further consideration by WCAT of the worker's appeals (which were addressed in *WCAT Decision #2005-00946-RB*) is required as a result of this decision.

A copy of this decision will be forwarded to the WCAT panel hearing the worker's appeal of *Review Decision #16929* dated March 18, 2005 (the "N" appeal), for consideration as to whether any additional submissions should be invited in light of this decision.

Herb Morton
Vice Chair

HM/ec