## Noteworthy Decision Summary

**Decision:** WCAT-2005-06660 **Panel**: Herb Morton **Decision Date:** December 14, 2005

***Abandonment – Failure to attend hearing – Telephone communication – Receipt of letter after deadline – Procedural fairness – Natural justice – Section 246(5) of the Workers Compensation Act – Policy item #9.23 of the WCAT Manual of Rules, Practices and Procedures***

The worker requested reconsideration of a Workers' Compensation Appeal Tribunal (WCAT) decision that he had abandoned his appeal. The worker claimed he had asked for his oral hearing to be rescheduled. However, WCAT documented that the worker had only raised the possibility of rescheduling the hearing. The panel denied the request for reconsideration. In the circumstances, it was not unfair for WCAT to proceed with the scheduled oral hearing date. Although the worker wrote to WCAT to explain his failure to attend the hearing, his letter was received after the deadline.

The worker received temporary wage loss benefits. The Workers' Compensation Board (Board) terminated the benefits after concluding the worker had recovered. The worker appealed to the former Workers' Compensation Review Board (Review Board). The Review Board was replaced by WCAT on March 3, 2003.

WCAT informed the worker an oral hearing was scheduled for July 22, 2003. On June 16, 2003, WCAT documented that the worker telephoned to say he might ask for a rescheduled hearing. The worker did not communicate further with WCAT before the oral hearing.

On July 31, 2003, WCAT wrote to the worker asking him to explain in writing why he did not attend and to provide these reasons by August 14, 2003. The worker had called on August 6, 2003 and said he would provide the reasons on August 7, 2003. On August 22, 2003, WCAT issued a decision letter advising the worker that his appeal had been abandoned. WCAT also received a letter from the worker, which was date-stamped as received on August 22, 2003. The letter was dated August 7, 2003, and was marked as having been faxed on August 25, 2003. In this letter, the worker said he had informed WCAT on June 16, 2003 that he would be unable to attend the hearing on July 22, 2003 and that WCAT said it would inform him of the rescheduled date of the hearing.

The panel held that a determination or decision that a worker's appeal was abandoned constitutes a final and conclusive decision, which is subject to being reconsidered on the same grounds as a formally numbered WCAT decision. The panel concluded the worker had alluded to the possibility that he might ask for his hearing to be rescheduled but did not follow up on this possibility with WCAT. In the circumstances, it was not unfair for WCAT to proceed with the scheduled oral hearing.

The panel also concluded that WCAT's handling of the worker's August 7, 2003 letter was fair. There was no record of WCAT receiving the letter by the deadline of August 14, 2003. Accordingly, there was no unfairness in WCAT proceeding to make a decision on August 22, 2003. The panel noted it was uncertain whether WCAT received the letter on August 22, 2003 or August 25, 2003. In any event, WCAT received the letter after the August 14, 2003 deadline.



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

The panel noted that it might have been preferable for WCAT to contact the worker to ask if he had sent the letter containing his reasons on August 7, 2003, as he had promised. However, the failure to do so did not amount to a breach of procedural fairness.

The worker's request for reconsideration was denied.



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

**WCAT Decision Number:** WCAT-2005-06660
**WCAT Decision Date:** December 14, 2005
**Panel:** Herb Morton, Vice Chair

---

## Introduction

The worker requests reconsideration of the August 22, 2003 decision of the Workers' Compensation Appeal Tribunal (WCAT). This decision was contained in a letter from a WCAT vice chair, advising the worker that his appeal was considered abandoned.

The worker failed to attend the oral hearing scheduled for Tuesday, July 22, 2003. By letter of July 31, 2003, the worker was requested to provide reasons for this failure by August 14, 2003. No response was received by WCAT, by the specified deadline of August 14, 2003. In a letter dated August 22, 2004, the vice chair advised the appeal was considered abandoned.

The worker's application for reconsideration has been presented on the basis of written submissions. The employer is participating in this application by way of written submissions.

In this decision, the *Workers Compensation Act* will be referred to as the Act, and the *Administrative Tribunals Act* will be referred to as the ATA.

## Issue(s)

Did the WCAT decision to treat the worker's appeal as abandoned, due to his failure to attend the oral hearing, 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 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 "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 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. Section 58 of the ATA provides:

> 58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
>
> (b) 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, and
>
> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
>
> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

Practice and procedure at item #15.24 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. 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.

Section 256 of the Act also permits reconsideration of a WCAT decision on the following basis:

> (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.
>
> (4) Each party to a completed appeal may apply for reconsideration of a decision under this section on one occasion only.

This application has been assigned to me by the WCAT chair on the basis of a written delegation (paragraph 26 of *WCAT Decision No. 6*, "Delegation by the Chair", June 1, 2004).

**Background and Submissions**

The worker suffered a work injury on September 8, 2000. By decision dated January 30, 2001, the case manager advised the worker that his claim was accepted for a left gluteal strain. She noted that x-rays taken on November 28, 2000 revealed severe multi-level degenerative changes of the lumbar spine and L1-2 discitis. This was diagnosed as septic discitis. The case manager found that the worker had recovered from his work injury, and that his ongoing symptoms were not the result of his September 8, 2000 injury. Wage loss benefits were ended effective February 2, 2001. The worker appealed the January 30, 2001 decision to the Workers' Compensation Review Board (Review Board). The former Appeal Division and Review Board were replaced by WCAT effective March 3, 2003. The worker's appeal was transferred to WCAT for completion pursuant to section 38 of the transitional provisions contained in Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). Section 38(1) provided as follows:

> Subject to subsection (3), all proceedings pending before the review board on the transition date are continued and must be completed as proceedings pending before the appeal tribunal except that section 253(4)

> of the Act, as enacted by the amending Act, does not apply to those proceedings.

By letter dated May 27, 2003, the WCAT appeal liaison advised the worker that an oral hearing of his appeal had been scheduled for July 22, 2003. That letter was addressed to the worker's union representative, and a copy was also provided to the worker. On page 2, the letter advised:

> If this date is not acceptable, you must arrange another date by writing or telephoning our Scheduling Department. . . within fourteen (14) days of the date of this letter. After that period, we will postpone this hearing only in exceptional circumstances.

A four page guide was enclosed, entitled "Oral Hearings at the Workers' Compensation Appeal Tribunal." This stated, in part:

> POSTPONEMENT AND FAILURE TO APPEAL
>
> If you cannot attend the oral hearing, you must advise WCAT as soon as possible. Postponements will be granted only in exceptional cases.
>
> If the appellant or applicant does not appear at the oral hearing, WCAT may decide that the appellant or applicant has abandoned the appeal.

WCAT's computerized appeal tracking system (CASE) contains various typed entries concerning the status of the appeal. On June 13, 2003, the appeal liaison noted that the copy of the May 27, 2003 letter which had been sent to the worker's union representative had been returned to WCAT. Her following entry on June 16, 2003 stated as follows:

> CONTACTED WRK – LEFT MSSG – REGARDING HIS REP – [NAME] IS NO LONGER HIS REP.
> WRK CALLED – HE WILL CONTACT [UNION] - WILL RTN CALL – MAY ASK FOR RESCHEDULED HRG.

Both entries were followed by the initials of the appeal liaison. Subsequent entries on June 19 and 24, 2003 indicated that a panel had been assigned and the file had been placed in the hearing stacks. A vice chair attended for the oral hearing in Fort St. John on July 22, 2003, but the worker did not attend.

By letter dated July 31, 2003, the WCAT appeal liaison wrote to the worker as follows:

> You failed to appear at the scheduled oral hearing. Please provide reasons in writing why you did not attend. Any reasons received will be forwarded to the panel for consideration. You will be advised if the panel

> will reschedule your oral hearing proceed by way of a read and review, or determines that your appeal has been abandoned. Please forward your reasons to my attention on or before August 14, 2003.
>
> If a response is not received by August 14, 2003, the appeal will be forwarded to the panel for its consideration.
>
> [reproduced as written]

The appeal liaison concluded the letter by providing her telephone number, inviting the worker to contact her if he had any questions.

The CASE notes include the following entry by the appeal liaison on August 6, 2003:

> WRK CALLED LEFT VMSSG – RTN'D CALL AND MENTIONED WE WERE WTG FOR HIS NO SHOW REASONS – HE SAID THEY WILL BE IN TOMORROW.

In a subsequent entry dated August 19, 2003, the appeal liaison noted:

> FILE TO VC FOR INSTRUCTIONS – NO SHOW REASONS NEVER REC'D BY DEADLINE.

In a further entry dated August 21, 2003, the appeal liaison noted:

> NO SHOW REASONS NOT RECEIVED – WRK DID NOT REPLY & REFERRED TO ORIGINAL PANEL WITH FILE & T/S FOR DIRECTION – VC DEEMED APPEAL ABANDONED. SUMMARY DECISION: ABANDON/WITHDRAW

The WCAT vice chair signed a decision letter dated August 22, 2003, which advised the worker:

> On July 31, 2003 you were invited to provide reasons why you were not in attendance at the scheduled oral hearing, and asked to do so by August 14, 2003. As no reasons were received, the file was forwarded to me for consideration.
>
> I have reviewed the appeal and have determined the appeal has been abandoned. WCAT will not be proceeding with this appeal.

WCAT received a letter from the worker, which was stamped as received by WCAT on August 22, 2003. This letter was dated August 7, 2003, and was marked as having been faxed on August 25, 2003. In that letter, the worker advised:

> After receiving the first letter notifying me of a July 22nd date for an oral hearing I called [name] at 604-664-7895 and informed her of my inability to attend in Fort St John on that date as I would be on holidays. I told her I would be in Vancouver from July 10th through July 16th and if it could be arranged I would come for a meeting then or reschedule for August or September. I was told that I would be notified of a reschedule date. The first notification I have received either by phone or mail was the second letter which in essence says I just "failed to appear" and needed to answer for myself or my appeal would be "abandoned".
>
> I am enclosing a copy of my phone records as proof of the phone conversation which as it shows lasted 6 minutes. I would greatly appreciate a correction made regarding my failure to appear and new oral hearing scheduled.

The worker provided a copy of the monthly statement dated July 14, 2003 from his telephone company, listing his long distance charges. This provides confirmation that the worker made a direct dialled call at 3:53 p.m. on June 16, 2003. The phone call was to the direct line of the WCAT appeal liaison and the call lasted six minutes. No other phone calls to WCAT were shown during the period from June 16, 2003 until July 8, 2003.

On August 29, 2003, the worker's wife called the appeal liaison to inquire regarding the status of this matter. By letter dated January 20, 2004, the WCAT vice chair, quality assurance, advised the worker:

> On August 22, 2003, we received your August 7, 2003 letter.
>
> Your appeal from a January 30, 2001 decision was considered to be abandoned by a WCAT vice chair on the basis that you did not submit an explanation for your failure to attend the oral hearing by the due date of August 14, 2003. Therefore, your appeal is not active at this time.
>
> For your reference, I have enclosed an information sheet regarding WCAT's limited authority to reconsider its own decisions.

By letter dated January 29, 2004, the worker's wife advised (above the name of the worker and his wife):

> . . . this is a case of mistake being made at that end in June 2003 and cover up ever since. My husband wants this situation rectified as soon as possible.

She provided another copy of the letter dated August 7, 2003. A handwritten notation on the bottom of the copy of this letter indicated that it was faxed on August 8, 2003,

and faxed again on August 22, 2003. As noted above, a copy of the August 7, 2003 letter is on file, stamped as having been received by WCAT on August 22, 2003.

By letter dated February 4, 2004, WCAT's legal counsel advised the worker that the January 29, 2004 letter would be processed as an application for reconsideration. She noted that an information sheet concerning the limited reconsideration grounds had been provided by the vice chair, quality assurance, on January 20, 2004.

By letter dated July 21, 2005, the employer's WCB claims agent commented:

> We are not in agreement that grounds for reconsideration have been established and we rely on Section 256(3) of the Workers Compensation Act wherein reconsideration is allowed based on new evidence. There has been no new evidence submitted substantiating that the worker's letter of August 7, 2003, was submitted by the August 14, 2003 date. There have been no errors of law in connection with this claim.

By letter dated August 20, 2005, the worker advised:

> I am very unclear about what other information you require as I have sent all documentation supporting the mistake made on WCAT's end right back to the first contact for a meeting here in Ft. St. John. I have never had an interview to begin with due to incompetence from the original worker assigned to me. I have been forth coming with all information yet repeatedly receive these letters saying that I am not responding or complying. On top I have been accused to lying about the date that information has been sent. This situation needs and deserves investigation immediately.
>
> [reproduced as written]

By memo dated October 4, 2005, I noted that it would appear that the worker had not specified the grounds on which his application for reconsideration was based. I inferred that this application was being brought on the common law ground of an error of law going to jurisdiction, including a breach of natural justice. I noted:

> Attached is a copy of the computerized records (CASE) maintained by WCAT concerning this appeal. This includes notes entered on June 16, 2003 regarding the conversation with the worker, which include the phrase "WILL RTN CALL - MAY ASK FOR RESCHEDULED HRG."
>
> Please disclose this memo and CASE print-out to the parties for any additional comments they wish to provide.

By letter dated November 7, 2005, the employer's WCB claims agent commented:

> We are not in agreement that grounds for reconsideration have been established. WCAT's computerized records confirm that on June 16, 2004, the worker telephoned WCAT and stated he ***may*** ask for a rescheduled hearing.
>
> We ask that reconsideration of the WCAT decision dated August 22, 2003, be denied.
>
> [emphasis in original]

The worker was given the opportunities to reply to the October 4, 2005 memo (by October 26, 2005) and to the employer's letter of November 7, 2005 (by November 23, 2005). No further comments were provided by the worker. On November 29, 2005, the appeals coordinator advised that submissions were considered complete.

**Law and Practice and Procedure**

At the time of the August 22, 2003 WCAT decision, section 246(5) of the Act provided:

> (5) If, in an appeal, a party fails to comply with the procedures of the appeal tribunal including any time limits specified for taking any actions, the tribunal may, after giving notice to that party,
>
> (a) continue with the proceedings and make a decision based upon the evidence before it, or
> (b) determine that the appeal has been abandoned.

The archived version of WCAT's *Manual of Rules, Practices and Procedures* which was in effect in 2003 is accessible on WCAT's website at: http://www.wcat.bc.ca/publications/toc.htm. MRPP item #9.23 provided in part:

> If the appellant does not appear at the hearing on time, the panel will remain for 15 minutes after the scheduled start of the hearing. If the appellant appears during this time, the hearing will proceed. If the appellant appears after 15 minutes, the panel may proceed with the hearing depending on availability, whether other hearings will be delayed, and whether any respondent has left.
>
> The registrar's office will invite the appellant, within 14 days, to provide reasons for the failure to attend the hearing. The panel will then decide whether to [s. 246(5)]:
>
> (a) reschedule the oral hearing;
> (b) continue the proceedings and make a decision based upon the written evidence before it;
> (c) determine that the appeal is deemed to have been abandoned.

> A failure to appear at an oral hearing without prior notice, would normally only be justified by a personal emergency and re-scheduling of a hearing may be considered in those circumstances.

**Analysis**

I find that a determination or decision that a worker's appeal was abandoned constitutes a final and conclusive WCAT decision, which is subject to being reconsidered on the same grounds as other WCAT decisions (see *WCAT Decisions #2004-01313* and *#2004*-04861). The same grounds for reconsideration apply, in relation to a summary determination or decision of a WCAT vice chair set out in a letter (which constitutes a final resolution of an appeal), as apply to a formally numbered WCAT decision dealing with the merits of the appeal.

No new evidence has been provided which did not exist at the time of the August 22, 2003 decision. The worker's position is that the appeal should not have been abandoned, based on the contents of his August 7, 2003 letter. Accordingly, this application is being brought on the basis of the common law ground of an error of law going to jurisdiction (including a breach of natural justice), rather than on the basis of new evidence as defined in section 256 of the Act.

A central question to be considered is whether the procedures followed by WCAT were fair. The first issue, in this regard, is whether the oral hearing should have been rescheduled based on the June 16, 2003 telephone call. In his letter dated August 7, 2003, the worker asserted that he had asked the appeal liaison for a rescheduling of the hearing date. While objective proof has been provided that the worker spoke with the appeal liaison on June 16, 2003, her notes regarding that conversation do not accord with the worker's recollection of the conversation. The appeal liaison's notes were typed into CASE on June 16, 2003, likely shortly after the telephone conversation concluded. The appeal liaison's notes were disclosed to the worker for reply, and he did not provide any further comments.

The employer points out that the CASE entry indicated that the worker "may" ask for a rescheduled hearing. Nothing further was heard from the worker regarding this possibility. It appears that the worker alluded to the possibility that he might ask for rescheduling, but did not follow up on this possibility with WCAT. In the circumstances, I am unable to find that it was unfair for WCAT to proceed with the oral hearing date, as scheduled. The written materials provided to the worker made it clear that the onus was on him if he wished to pursue a request for rescheduling of the oral hearing.

The second issue to be considered, in respect of whether the procedures followed by WCAT were fair, concerns the handling of the worker's letter dated August 7, 2003. No record has been located of that letter having been received by WCAT by the deadline of August 14, 2003.

I do note that the worker telephoned on August 6, 2003, to state that his reasons would be provided by the following day. However, it does not appear that anything was received in writing from the worker by the August 14, 2003 deadline. Accordingly, I do not consider that there was any unfairness in the WCAT panel proceeding to make a decision on August 22, 2003.

WCAT's records show that the worker telephoned on August 6, 2003 to advise that he would send his reasons the following day. This evidence tends to corroborate the worker's later claim to having sent his reasons on August 7, 2003, as promised. A copy of the worker's August 7, 2003 letter was in fact stamped as received by WCAT on August 22, 2003. Curiously, this copy is marked as having been sent by fax from the employer's fax machine on August 25, 2003. If the date of the FAX transmission is correct, then an error was made by WCAT in stamping the letter as received on August 22, 2003. It is not clear whether the WCAT decision was issued on the same day as this copy was faxed to WCAT, or whether this copy was sent in reply to the August 22, 2003 decision letter.

The decision by the WCAT vice chair was issued on August 22, 2003, the same day that a copy of the August 7, 2003 letter from the worker was stamped as received by WCAT. There is nothing in the August 22, 2003 decision to show that the August 7, 2003 letter came to the attention of the vice chair before the August 22, 2003 decision was issued. It is not apparent whether the August 22, 2003 letter was signed before or after the August 7, 2003 letter was received by WCAT. It is possible that the August 7, 2003 letter was received by WCAT, and stamped as received on August 22, 2003, but was not forwarded to the WCAT vice chair prior to the time the vice chair issued the August 22, 2003 decision. Alternatively, the August 7, 2003 letter may not in fact have been received until August 25, 2003. In any case, as the deadline for the worker's reply was August 14, 2003, I do not consider that it amounted to a breach of procedural fairness if, for example, the vice chair signed the August 22, 2003 letter without being aware that the worker's letter had been received.

I find that the August 22, 2003 decision by the vice chair to find the worker's appeal abandoned, was within the vice chair's authority under section 245(5) of the Act. The decision did not involve jurisdictional error. The exercise of discretion by the vice chair to select one of the options under section 245(5) was not patently unreasonable as defined by section 58(3) of the ATA. I find that no error of law going to jurisdiction has been established.

I have, however, some residual concern as to whether the procedures followed by WCAT in relation to the issuance of the August 22, 2003 decision were fair. Given the prior telephone contacts with the worker, and the worker's promise to provide his reasons by August 7, 2003, it might have been preferable had the appeal liaison contacted the worker within a few days to confirm whether these had been sent. However, as I am not persuaded that she had a legal duty to do so, I do not consider

that there was a breach of procedural fairness based on the lack of follow-up with the worker by WCAT. I find no unfairness in the WCAT panel making the decision which it did, on the basis of the information known to the WCAT panel at that time. Accordingly, the worker's application for reconsideration is denied.

Even if I were to conclude that the WCAT decision of August 22, 2003 should be set aside, on the basis that the August 7, 2003 submission by the worker had been sent to WCAT but was not received for reasons unknown, this would require that the reasons provided by the worker now be considered by the WCAT. In effect, this involves the same issue as was addressed in the first part of this decision, namely, as to whether the oral hearing should have been rescheduled based on the worker's June 16, 2003 telephone call. As set out above, I did not find this argument persuasive. Accordingly, even if I am wrong on the question as to whether or not there was a breach of procedural fairness, it does not appear that this would result in any different outcome for the worker.

**Conclusion**

The worker's application for reconsideration of the August 22, 2003 WCAT decision is denied. Common law grounds of an error of law going to jurisdiction, including a breach of natural justice, have not been established. The WCAT decision (to treat the worker's appeal from the January 30, 2001 decision by the case manager as abandoned) remains final and conclusive pursuant to section 255(1) of the Act.

Herb Morton
Vice Chair

HM/cda