

Noteworthy Decision Summary

Decision: WCAT-2006-00208**Panel:** Herb Morton**Decision Date:** January 19, 2006

Reconsideration – Request for oral hearing – Panel not limited to arguments raised by parties – Natural justice – Procedural fairness – Failure to exercise discretion – Failure to provide reasons – Policy item #8.70 of the WCAT Manual of Rules, Practices and Procedures

Reconsideration of a Workers' Compensation Appeal Tribunal (WCAT) decision. WCAT must provide adequate reasons to explain why an oral hearing has not been held if a party to an appeal has requested one. Otherwise, there is a breach of procedural fairness. Failure to acknowledge a request for an oral hearing is a failure to exercise a discretion.

The worker, an airline pilot, was injured in a plane crash. Eighteen months later he applied to the Workers' Compensation Board (Board) for compensation. The Board denied his claim due to his delay in making his application. The worker appealed to the former Review Board and requested an oral hearing. The Review Board denied the request for an oral hearing. The worker's lawyer wrote to the Review Board to express his disappointment with this decision. On March 3, 2003, the Review Board was replaced by WCAT and the appeal was transferred to WCAT.

The original WCAT panel denied the worker's appeal. The panel stated it had decided the appeal based on a review of the file and the submissions. The worker requested a reconsideration on the basis that there had been an error of law going to jurisdiction in that the panel made findings of fact without any evidentiary support, apparently rejected evidence from the worker without any evidence to support any adverse finding as to credibility, failed to take relevant factors into account, and based the decision on extraneous matters. The worker submitted the original panel did not have any basis for concluding he lacked credibility.

The reconsideration panel concluded he was not limited to addressing the specific arguments raised by the worker. Furthermore, a reconsideration panel is not required to defer to an original panel on issues of procedural fairness. The reconsideration panel found that the letter by the worker's lawyer expressing disappointment with the Review Board decision not to hold an oral hearing was a renewal of the request for an oral hearing even though it did not expressly state this.

The reconsideration panel found no express indication that the original panel was aware of the worker's request for an oral hearing or that the panel turned its mind to whether the appeal could be properly decided without an oral hearing. This raised an additional question as to whether there had been a breach of procedural fairness.

The reconsideration panel noted that section 253(3) of the *Workers Compensation Act* requires WCAT to provide written reasons. Policy item #8.70 of the *WCAT Manual of Rules, Practices and Procedures* states that WCAT panels have the discretion whether to hold an oral hearing. Thus, the original panel had a discretion to exercise, and the written reasons did not reveal whether the panel had turned its mind to this issue.

The reconsideration panel concluded the original panel had breached procedural fairness by failing to acknowledge and address the worker's request for an oral hearing. The reconsideration was allowed, the original decision was set aside and the worker's appeal was returned to the WCAT registry.

WCAT Decision Number : WCAT-2006-00208
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Panel: Herb Morton, Vice Chair

Introduction

The worker seeks reconsideration of the July 16, 2003 Workers' Compensation Appeal Tribunal decision (*WCAT Decision #2003-01517-RB*, or the WCAT decision). This application was initiated by a written submission dated February 20, 2004 from the worker's lawyer. He argued that the WCAT panel's approach and conclusion were patently unreasonable.

On September 23, 2005, the appeals coordinator wrote to the worker's lawyer, providing information about the reconsideration process (including the "one time only" limitation). She invited further submissions, and the lawyer provided a further submission dated October 14, 2005.

On September 23, 2005, the appeals coordinator also wrote to the worker's employer (a limited company) to invite its submissions. By letter dated October 18, 2005, she noted that the worker had telephoned and advised he was the president and owner of the company, which would not be participating in this matter.

This application is brought on the common law ground of an error of law going to jurisdiction (which includes a breach of natural justice). I find that this application involves essentially legal questions which can be properly considered on the basis of written submissions, without an oral hearing.

Issue(s)

Did the WCAT decision involve an error of law going to jurisdiction?

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 “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*, 20 W.C.R. 291).

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 *Decision Number 6*, “Delegation by the Chair”, June 1, 2004).

Background

The worker was a principal of a seaplane business providing air service between the lower mainland and the Gulf Islands. He was also a pilot. He was injured in a plane crash on December 28, 1999. He did not complete an application for compensation until May 28, 2001. By letter dated June 27, 2001, he advised that his injuries included “extensive facial fractures, a compound depressed skull fracture, damage to my brain stem and fracture of my left ankle”.

By decision dated August 23, 2001, the case manager denied the worker’s claim for compensation under section 55 of the Act, due to his delay in making an application for compensation. At the time of that decision, there were no medical records on file regarding the worker’s injuries.

The worker appealed the August 23, 2001 decision to the Workers’ Compensation Review Board (Review Board). In his Notice of Appeal – Part 2 dated May 16, 2002, he requested an oral hearing. He stated he wished to bring a witness to the hearing. By written submission dated May 16, 2002, his former lawyer submitted:

We respectfully request an oral hearing of this matter. No one can tell [the worker's] story better than he can. Although we have included additional medical information with our submissions, an oral hearing would allow us to provide additional clarification of our position and will give the Review Board an opportunity to make a full inquiry into the circumstances of this appeal. We feel that this is particularly important given that the arguments we make appear to be somewhat novel.

By letter dated August 26, 2002, the worker's lawyer wrote to the Review Board, stating she was "extremely surprised to be informed that it takes over a year to schedule an oral hearing and that [the worker's] appeal would not likely be heard until August, 2003." She requested advance notice of the hearing date and noted:

In the meantime, should the circumstances of the Review Board change, such that an earlier hearing date is possible, [the worker] would certainly appreciate knowing that.

By letter dated September 16, 2002, the Review Board senior deputy registrar advised:

We have concluded that the appeal can be considered by a one person panel without an oral hearing. Therefore, please send any further information or submissions to the Review Board within thirty (30) days of the date of this letter.

[underlining in original]

On October 1, 2002, the worker's lawyer wrote to the Review Board senior deputy registrar. She requested that if the matter was to proceed on a read and review basis, that it be assigned to a three person panel. She further stated:

[The worker] is extremely disappointed by your decision to have his appeal considered without an oral hearing. He has asked me to explain why workers are given the opportunity to request an oral hearing if the WCRB does not have to grant it. I did inform him of your policies on hearing allocations, as contained in your procedures manual, but he remains frustrated by the decision nonetheless.

She advised she had no additional information or submissions to provide.

On December 17, 2002, a Review Board senior deputy registrar advised that the worker's appeal would proceed by way of a three-person panel on the basis of a review of the claim file and submissions already received. In a further letter dated March 7, 2003, a WCAT vice chair/deputy registrar advised the worker that his appeal had been transferred to WCAT due to the March 3, 2003 changes to the Act, and that his appeal would now be decided by a one-person panel.

In its decision of July 16, 2003, the WCAT panel noted under the heading “Introduction” as follows:

The worker, appeals the decision made by an officer of the Workers' Compensation Board (the Board) which was conveyed in a letter dated August 23, 2001. In that letter the case manager disallowed the worker's claim for compensation benefits as it was considered statute barred based on section 55 of the *Workers Compensation Act*, (the Act) which requires an application for compensation to be filed within one year after the injury. The manager was unable to conclude that any special circumstances existed which precluded the worker from pursuing his claim within the prescribed period.

The worker has disagreed with this decision. **The appeal has been decided following a read and review of all evidence contained in the claim file as well as submissions with respect to the issue under appeal.**

[emphasis added]

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 contrast, reconsideration on the basis of new evidence under section 256 of the Act involves the reconsideration of a decision which was valid at the time it was issued. A successful application on the common law grounds requires that the appeal be heard afresh without regard to the WCAT decision, while an application on the basis of new evidence involves a reconsideration of the matters addressed in the prior WCAT decision.

By submission of February 20, 2004, the worker's current lawyer cited the decision of the Supreme Court of Canada in *Service Employee's International Union v. Nipawin Union Hospital*, [1975] 1 S.C.R. 382, regarding the common law grounds for finding that a decision involved an error of law going to jurisdiction. The Supreme Court of Canada reasoned:

A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on

an inquiry or answer a question not remitted to it.

In his subsequent submission of October 14, 2005, the worker's lawyer noted that this reasoning had been followed in a WCAT reconsideration decision (*WCAT Decision #2004-05730*, October 29, 2004).

The February 20, 2004 submission by the worker's lawyer concludes by arguing:

On the whole, the panel made findings of fact without any evidentiary support, apparently rejected evidence from the worker without any evidence to support any adverse finding as to credibility, failed to take relevant factors into account, and based his decision on extraneous matters, as described in *Nipawin*. The panel's approach and conclusion were patently unreasonable, and the decision was based on those jurisdictional errors.

The submissions by the worker's lawyer do not expressly take issue with the denial of the worker's request for an oral hearing. However, the argument that the worker's evidence was rejected without any evidence to support any adverse finding as to credibility, would seem to raise this question (i.e. as to whether an oral hearing was necessary to assess credibility).

Upon reading the WCAT decision, I find no express indication that the panel was aware of the worker's request for an oral hearing, or that the panel turned its mind as to whether the worker's appeal could be properly considered on the basis of written submissions without an oral hearing. I do not consider that it may be inferred, from the silence of the WCAT decision in this regard, that the panel had taken note of the worker's request for an oral hearing and further considered the worker's request. The fact that the WCAT panel referred to the hearing method in the last paragraph of the introduction, without reference to the worker's request for an oral hearing, tends to suggest that this request may have been overlooked. This raises an additional question as to whether there may have been a breach of procedural fairness.

In this application, the worker seeks to have the WCAT decision set aside on the basis that it involved an error of law going to jurisdiction. In considering the worker's application, I do not consider that I am limited to addressing the specific arguments presented on his behalf. If some different flaw in the decision-making process is discovered, in the course of reviewing the file materials and decision for the purpose of considering the worker's objections, I consider it appropriate to proceed to address that matter. While the statute provides that WCAT decisions are final and conclusive, WCAT has an interest in ensuring that a valid decision has been issued. For example, even where an application for reconsideration has not been brought, if WCAT discovered that there had been a breach of natural justice (e.g. such as if a submission by a party to an appeal was misplaced and not provided to the panel for consideration

at the time of its decision), WCAT would consider it necessary to advise the parties of this circumstance so that the parties could consider whether an application for reconsideration should be initiated. In some situations, natural justice may require notice to the parties, and an additional opportunity for submissions, regarding the additional concern which is identified.

Questions about the application of the 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. No deference applies in relation to the question as to whether the procedures followed by WCAT were fair.

In *Appeal Division Decision #97-0083*, “Reconsideration of an Appeal Division decision — natural justice — the right to be heard”, 14 WCR 37, the panel reasoned (at pages 43-44):

Part of the concept of natural justice is the principle that a person has a right to be heard before a tribunal makes a determination that affects his rights or interests. The right to be heard includes the right to present evidence as well as to submit arguments when all the evidence has been received. It follows that the decision-maker must hear that evidence and those arguments — that is, he must familiarize himself with the evidence and arguments presented. **There is a presumption in law in favour of the regularity of the acts of public officials. That presumption applies to decision-makers in administrative tribunals. That presumption is, however, rebuttable.** There is no general requirement at common law for members of administrative tribunals, nor for judges for that matter, to give reasons for their decisions. **Generally speaking, therefore, the absence of reasons in support of a decision is not a breach of the principles of natural justice. However, inferences adverse to a tribunal may be drawn from the tribunal’s failure to give reasons.** Moreover, the courts have held that, regardless of whether there is a duty to give reasons, any reasons given must be adequate. To be adequate — that is, of value to the affected parties — the reasons should explain how the tribunal reached its conclusions, both on fact and on law or policy.

In sum, natural justice requires providing those individuals who may be affected by a decision with the opportunity to present their point of view. Providing them with that opportunity is not sufficient. They must also be genuinely heard.

...

... the panel may well have fully considered these arguments. But, according to a well-established principle of administrative law, an

appearance of injustice, such as an appearance of bias, may taint a decision. In this case, bias is not the issue. Rather, the issue is whether the employer appears to have been heard. Unfortunately, on its face, the impugned decision does not convey the impression that he was heard.

I have decided, therefore, to set aside the decision on the grounds that it involves a breach of the rules of natural justice and, therefore, involves an “error of law going to jurisdiction.” Appeal Division Decision No. 93-1486 is consequently of no force or effect.

[emphasis added]

The reasoning in *Appeal Division Decision #97-0083* was followed in *WCAT Decision #2005-03571* dated July 6, 2005. Exercising the delegated authority of the chair, the WCAT panel allowed an application for reconsideration based on the breach of an appellant’s right to be heard. The panel reasoned:

I note the fundamental importance of a party’s right to be heard.

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

Appeal Division Decision #97-0083 was similarly followed in *WCAT Decision #2005-04517* dated August 29, 2005. That decision quoted from a Court decision concerning the situation in which it may be appropriate to draw an adverse inference from the silence of the reasons provided for a decision regarding a particular point:

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

16 On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (*Medina v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, *Hassan v. Canada*

(*Minister of Employment and Immigration*) (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.

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

[emphasis added in *WCAT Decision #2005-04517*]

The denial of a request for an oral hearing may, in some circumstances, constitute a breach of natural justice. However, there are many Court decisions upholding tribunal decisions involving the denial of a request for an oral hearing (some of which are summarized in *WCAT Decision #2005-03001* dated June 8, 2005).

Section 253(3) of the Act required that the WCAT decision "be made in writing with reasons." In this case, there is nothing in the reasons provided in *WCAT Decision #2003-01517* to show that the panel turned its mind to the worker's request for an oral hearing. This raises a question as to whether the worker's request was heard by the WCAT panel. In the "Introduction" to the WCAT decision, the panel cited the worker's disagreement with the case manager's decision of August 23, 2001, but did not refer to the worker's disagreement with the denial of his request for an oral hearing.

A counter argument could be made that the worker's request for an oral hearing had been addressed by the Review Board, and that it was not incumbent on the WCAT panel to revisit that issue. Alternatively, it may be argued that the worker had not expressly renewed his request for an oral hearing, and that he had not asked the WCAT panel to reverse the decision of the Review Board Registry concerning the hearing method. It may further be argued that while the WCAT panel had a discretion to change the hearing method, it may be inferred from its issuance of a decision based on the written submissions alone that it was satisfied that the worker's appeal could be properly considered on this basis, without an oral hearing.

Each of these arguments has some force. If it were appropriate to accord deference to the WCAT decision, one of these arguments might suffice to uphold the validity of the WCAT decision. On issues of procedural fairness, however, no deference is accorded a tribunal decision.

I do not read the October 1, 2002 letter from the worker's lawyer, which advised that the worker was "extremely disappointed" and "frustrated" by the denial of his oral hearing request, as being intended simply to register dissatisfaction with the Review Board's procedures. I am inclined to read this as amounting to a reiteration or renewal of the worker's request for an oral hearing, although this was not expressly stated.

WCAT's published practices and procedures, which were in effect at the time of the July 16, 2003 decision, made it clear that the final decision concerning the hearing method rested with the WCAT panel. The March 3, 2003 version of WCAT's *Manual of Rules, Practices and Procedures* is accessible on the WCAT website (as an archived version). Item #8.70 of the MRPP provided:

A WCAT panel has the discretion to change the method of hearing. A panel may decide to convene an oral hearing if the panel considers this necessary or helpful to its decision. If an oral hearing has been scheduled, the panel may conclude that an oral hearing is not necessary to its decision and proceed by way of written submissions.

In the context of WCAT's published practice and procedure, the WCAT panel had a discretion to exercise. The reasons provided in the WCAT decision do not reveal whether the WCAT panel turned its mind to the question as to whether the worker's request for an oral hearing should be granted. I do not consider that the "presumption of regularity" suffices to uphold the validity of the WCAT decision, in this context.

For the purposes of my decision, I do not consider it necessary to consider whether the circumstances of this case were such that natural justice would have required that the worker's request for an oral hearing be granted. I find that there was a breach of procedural fairness based on the panel's failure to acknowledge and address the

worker's request for an oral hearing. This requires that the WCAT decision be set aside.

My decision is made on a somewhat different basis than was presented by the worker's lawyer. As this decision provides the worker with the remedy he is seeking, and as the employer is not participating, I did not consider it necessary to invite further comments on this issue. In view of my conclusion on this basis, it is not necessary that I address the additional arguments presented by the worker's lawyer in support of his application for reconsideration.

While not necessary to my decision, I note that a practice has developed in WCAT decision-making of normally addressing the method of hearing (with brief reasons for the determination of the hearing method) even where no oral hearing request has been made. This may well go beyond what is required by the principles of natural justice, as a feature of quality decision-making. My decision in this case does not turn on the panel's failure to follow this practice (which to my recollection developed subsequent to the decision in this case, in terms of becoming a general practice). Rather, my decision turns on the fact that the panel failed to acknowledge and respond to the October 2, 2002 letter from the worker's lawyer, regarding the worker's expression of dissatisfaction with the denial of his request for an oral hearing. This concern involves the panel's failure to exercise a discretion, rather than the manner in which the panel exercised its discretion.

Conclusion

WCAT Decision #2003-01517-RB is set aside as void, due to a breach of natural justice. This concerns the failure to address the worker's expression of dissatisfaction with the denial of his request for an oral hearing, to consider whether an oral hearing should be granted or to explain why the panel found that an oral hearing was not necessary. The worker's appeal will be considered afresh. Accordingly, the worker's appeal is returned to the WCAT registry for further handling. In view of the circumstances outlined above, it may be desirable that a WCAT panel be assigned at an early date to give further consideration to the worker's request for an oral hearing as a preliminary issue.

Herb Morton
Vice Chair

HM/cda