

Noteworthy Decision Summary

Decision: WCAT-2006-01331 **Panel:** Herb Morton **Decision Date:** March 22, 2006

Reconsideration – Abandonment – Transitional appeal – Failure to comply with the deadline for filing notice of appeal - part 2 – Section 246(5) of the Workers Compensation Act – Section 5 of the Workers Compensation Act (Review Board) Regulation – Workers Compensation Amendment Act (No. 2), 2002

This was a reconsideration of a registry decision to consider a worker's appeal abandoned. The worker filed his notice of appeal – part 1 with the Workers' Compensation Review Board (Review Board) and was given a deadline for filing his notice of appeal – part 2. He was later advised that, due to changes in the appellate structure, his appeal would be considered by WCAT instead, but that he still had to file his notice of appeal – part 2 by the same deadline. When he failed to meet the deadline and provided no explanation for this failure, WCAT treated his appeal as abandoned. In these circumstances, WCAT had jurisdiction to find that the worker's appeal was abandoned. His request for reconsideration of the WCAT decision was denied.

The worker filed his notice of appeal - part 1 with the Review Board in 2002, and was advised that he had to submit notice of appeal – part 2 by May 27, 2003. The workers' compensation appeal structures were amended effective March 3, 2003, pursuant to the *Workers Compensation Amendment Act (No. 2), 2002*, and as a result, his appeal was transferred to WCAT for completion. In a letter dated May 1, 2003, a registration clerk advised the worker of these changes and that his notice of appeal - part 2 had to be submitted to by May 27, 2003. When the worker failed to complete the appeal form by the due date, the deputy registrar advised him in a provisional decision that his appeal would be treated as abandoned. Given that this was a provisional decision, if the worker disagreed with it and had reasons of an exceptional nature which prevented him from submitting his part 2 by the due date, he should submit them in writing by July 9, 2003. The worker completed a request for review by the Review Division of the Workers' Compensation Board dated July 8, 2003, which was then faxed to WCAT. He then sought a reconsideration of the provisional decision.

For the purposes of the worker's application for reconsideration, the reconsideration panel treated the worker's July 8, 2003 request for review as equivalent to a completed notice of appeal – part 2. Even if the request for review was received by WCAT by the July 9, 2003 deadline, the fact remained that the worker failed to comply with the requirement to complete a notice of appeal – part 2 by May 27, 2003. The decision of the deputy registrar was of a provisional nature, and the worker was given an opportunity, until July 9, 2003, to explain whether there were reasons of an exceptional nature which prevented him from submitting his part 2 by the due date. The worker then simply submitted an appeal form, with no explanation as to why this had not been provided by the May 27, 2003 deadline. While the worker argued that the submission of the form should be accepted as constituting his reasons, he in fact provided no reasons or explanation with this form for his failure to provide this by the deadline. In these circumstances, the registry had jurisdiction to find that the worker's appeal was abandoned.

WCAT Decision Number : WCAT-2006-01331
WCAT Decision Date: March 22, 2006
Panel: Herb Morton, Vice Chair

Introduction

The worker seeks reconsideration of the June 18, 2003 Workers' Compensation Appeal Tribunal (WCAT) provisional decision. The vice chair/deputy registrar advised the worker that as he failed to file part 2 of the notice of appeal by the due date, his appeal would be treated as abandoned. The vice chair/deputy registrar explained:

This is a provisional decision. Therefore, if you disagree with this decision and there were reasons of an exceptional nature which prevented you from submitting your Part 2 by the due date, you must send your reasons in writing to WCAT within 21 days. If we do not hear from you by **July 09, 2003**, WCAT will take no further action on your appeal.

On July 8, 2003, the worker completed a request for review by the Review Division, which was stamped as received by WCAT on July 11, 2003.

By letter dated December 5, 2003, the worker wrote to WCAT seeking to re-establish his appeal. By letter dated November 8, 2004, the vice chair, Quality Assurance, advised the worker that as his response was received after the due date, his appeal was currently considered abandoned. She advised the worker that his letter of December 5, 2003 would be treated as an application for reconsideration of the decision to consider his appeal abandoned.

The worker has a new representative, who provided a written submission dated October 5, 2005. In addition to requesting reconsideration, the worker's representative requests that "in the alternative and at the very least the reasons for the delay in filing part 2 should be considered on the basis of extension of time request."

This application for reconsideration is brought on the common law ground of an error of law going to jurisdiction (which includes a breach of natural justice). The background facts are not in contention. I find that this application can be properly considered on the basis of written submissions, without an oral hearing.

Issue(s)

The general issue in this application is whether the WCAT decision involved a breach of natural justice or procedural fairness, or other error of law going to jurisdiction. Additional questions arise in relation to the representative's extension of time request.

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. This authority is further confirmed by section 253.1(5) of the Act.

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 was assigned to me by the chair on the basis of a written delegation (paragraph 26 of *Decision of the Chair No. 6*, "Delegation by the Chair", June 1, 2004). This delegation was confirmed in *Decision of the Chair No. 8*, March 3, 2006, at paragraphs 25 and 31.

Background

The worker seeks to appeal a decision dated August 17, 2002 by an entitlement officer. That decision noted that the worker was employed as a mechanic. On January 4, 2002, he knelt to work under a vehicle and experienced right knee symptoms. The worker underwent surgery (an arthroscopic partial medial meniscectomy) for a medial meniscus tear of his right knee on January 21, 2002. The entitlement officer noted the worker's advice that he was kneeling under a vehicle for a minute, and when he got up and turned, his knee popped and he felt pain. The entitlement officer denied the worker's claim for compensation, with reference to the policy at item #15.10 of the *Rehabilitation Services and Claims Manual*. She advised the worker that her decision could be appealed within 90 days.

The worker initiated a timely appeal to the former Workers' Compensation Review Board (Review Board). His notice of appeal - part 1 was signed by his union representative, and was received by the Review Board on November 21, 2002. It provided the worker's contact information, his claim number, the name of his employer, the date of the decision under appeal, and the contact information for the worker's union representative.

By letter dated November 26, 2002, the senior deputy registrar of the Review Board wrote to the worker's union representative. He provided a copy of the notice of appeal - part 2, and advised:

If you are ready to go ahead now, please send Part 2 to the address at the top of this letter....

We cannot deal with the appeal until you complete and send us Part 2. **You must mail Part 2 to the Review Board by May 27, 2003 or the appeal may not proceed.**

[emphasis in original]

The workers' compensation appeal structures were amended effective March 3, 2003 pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). The worker's appeal was transferred to WCAT for completion. By letter dated May 1, 2003, the WCAT registration clerk wrote to the worker's union representative. She explained:

As a result of recent changes to the *Workers' [sic] Compensation Act*, effective March 3, 2003, the Workers' Compensation Review Board no longer exists. The new external appeal tribunal, the Workers' Compensation Appeal Tribunal will consider this appeal; however, no statutory time frame will be applied to the WCAT decision. There is no further avenue of appeal from a WCAT decision.

The registration clerk reminded the worker's representative that "Part 2 of the Notice of Appeal must be mailed to WCAT by May 27, 2003." She advised:

If you need more time to complete Part 2, you must make a request with reasons, in writing, before the due date. Please do not send an incomplete Part 2.

If we have not received the Part 2 by the due date, the appeal will be treated as abandoned.

We have enclosed another Notice of Appeal, Part 2.

By letter dated June 18, 2003, the vice chair, deputy registrar, wrote to the worker's union representative. He noted that no reply had been received to the May 1, 2003 letter. He advised:

As you did not file Part 2 of the Notice of Appeal by the due date, as previously advised, the appeal will now be treated as abandoned.

This is a provisional decision. Therefore, if you disagree with this decision and there were reasons of an exceptional nature which prevented you from submitting your Part 2 by the due date, you must send your reasons in writing to WCAT within 21 days. If we do not hear from you by **July 09, 2003**, WCAT will take no further action on your appeal.

[emphasis in original]

The worker did not provide reasons for his delay in filing the part 2. Rather, he completed a request for review by the Review Division, which he signed and dated July 8, 2003. This was sent by fax to WCAT. It is unclear as to when this fax was first received by WCAT or the Review Division. A handwritten notation on the bottom left side of the form states: "DEL July. 09/03" (Wednesday). The fax information on the bottom of the form indicates the document was transmitted by fax on July 10, 2003 (Thursday). The document was stamped as received by WCAT on July 11, 2003 (Friday). There was no intervening holiday or weekend. No further letter was issued by the WCAT Registry in response to the worker's appeal form.

On September 10, 2003, the worker wrote to a review officer with the Board's internal Review Division, stating:

We requested for review of my claim on the august 17th 2002 decision on November 2002. You said you received part one of the appeal in a letter dated November 26th 2002, you asked us in that letter when we were ready to send part two of the appeal. We ask for discloser of my file and did not receive it; we asked again for the discloser on May 7th 2003 and

received it in late May. My representative [name] sent part two of the appeal in on late June. You said you received part two of the appeal on July 10th, one day late from the deadline of 21 days. Because of the delay in getting discloser, and also of holidays I had during that time I could not get together any sooner with my representative to fill out part two of the notice of appeal. I phoned on August 17th 2003 asking why part two of the appeal was denied and was told to submit into writing reasons why. I'm asking that you please process my request and carry on with the review for these reasons.

[reproduced as written]

On October 2, 2003, the review officer of the Review Division advised the worker that as he had already exercised his right of appeal to the former Review Board prior to March 3, 2003, the new Review Division had no jurisdiction to consider a request for an extension of time to obtain review of the August 17, 2002 decision letter. By letter dated December 5, 2003, the worker stated:

My claim has gotten mixed up, lost, and passed off in the last year because of the change from the W.C.B. Review board to W.A.T.C. My representative [name] and myself have gone through the proper procedures to file this appeal and it has gone in circles. I wish to have my appeal reestablished with the one starting in November 2002. {letter enclosed.}

My appeal has gone from review division [name] to W.C.A.T. to review division and now I'm told to go back to W.C.A.T. I have appealed part one and part two of my claim as requested. I'm sending you some of the recent letters to show you what has occurred and hopefully you can see what has happened?

[reproduced as written]

On November 8, 2004, WCAT's vice chair, Quality Assurance, advised the worker that as his response was received after the due date, his appeal was currently considered abandoned. She further advised the worker that his letter of December 5, 2003 would be treated as an application for reconsideration of the decision to consider his appeal abandoned.

The worker's letter of September 10, 2003 makes reference to the delays in obtaining disclosure of his claim file. The worker's representative requested disclosure on November 22, 2002. By letter dated November 29, 2002, the Board sent the worker's representative a full copy of the claim file. By letter dated May 7, 2003, the representative wrote to the Board providing a copy of the request for disclosure, stating that this had not been received and requesting another copy. By letter dated May 8, 2003, a full copy of the worker's claim file was sent to his representative.

Submissions

The worker's representative submits that the worker did not fail to respond to the June 18, 2003 decision. The worker did not abandon his appeal, and was relying on his representative to provide written reasons within specified due dates. The representative advises:

The worker had great difficulty in meeting with his representative about his appeal due to personal circumstances experienced by his representative. The worker's representative during the period May, June and July 2003 was experiencing back problems which disabled him from work in addition to his wife expecting a child at that time. These personal circumstances impacted on his diligence in complying with appeal procedures and deadlines.

The worker's representative further explains:

His experience in dealing with the new appellate system and bodies was also limited as noted by his forwarding a Request for Review to the Review Division rather than responding directly to the WCAT.

The worker's representative submits that there has been a breach of natural justice. He further submits that "in the alternative and at the very least the reasons for the delay in filing Part 2 should be considered on the basis of extension of time request."

The employer's representative submits that the worker's application does not meet the requirements of the new evidence grounds under section 256 of the Act and that no error of law going to jurisdiction is established. He submits that the arguments provided are more appropriate to an application for an extension of time to appeal. He submits that the worker was given notice, was afforded time to respond and failed to do so, and that there was no denial of natural justice.

Reasons and Findings

A. Common law grounds

This is an application for reconsideration by the worker, on the common law grounds. It is not an appeal from a decision by the WCAT vice chair/deputy registrar. There is no avenue of appeal from a WCAT decision, and WCAT's jurisdiction to reconsider a decision is limited to the grounds set out above. Accordingly, I am not free to assess the additional reasons provided for the worker's delay in appealing, and to reach my own conclusions. Questions which I have jurisdiction to address in this application concern whether there was any procedural unfairness or breach of natural justice in the

WCAT Registry's handling of this matter, whether the Registry's decision involved any jurisdictional error, and whether the Registry's decision was patently unreasonable.

When the worker's appeal was filed to the Review Board, section 5 of the *Workers Compensation Act (Review Board) Regulation*, B.C. Reg. 32/86, provided in part:

- 5 (1) An appeal to the review board shall be filed at its office or at an office of the board.
- (2) An appeal shall
- (a) be in writing signed by the appellant or his agent,
 - (b) specify the decision being appealed and state why, in the opinion of the appellant, the decision is incorrect, and
 - (c) set out the remedy sought.
- (3) Where the grounds of appeal relate to evidence that was apparently not considered by or disclosed to the officer of the board, the written appeal must contain
- (a) the names and addresses of any witnesses to be produced,
 - (b) a description of any documentary evidence to be offered, and
 - (c) if the evidence is additional medical evidence, a short statement as to how the evidence will affect the decision under appeal.
- (4) If subsections (2) and (3) are not fully complied with, the review board may require the appellant to file with it a completed notice of appeal in the form determined by the review board.

The Review Board utilized a notice of appeal - part 1 and a notice of appeal - part 2. Provision of the part 1 form sufficed to meet the time limit for initiating an appeal. However, completion of part 2 of the form was required in order to comply with the requirements of section 5(2) and (3) of the *Workers Compensation Act (Review Board) Regulation*. Section 5(4) provided that the Review Board was empowered to require the appellant to file a completed notice of appeal in the form determined by the Review Board.

The correspondence from the former Review Board, and from the WCAT Registry, was clear in communicating to the worker the requirement that he complete and return a notice of appeal - part 2 by a specified deadline. The November 26, 2002 letter set a

deadline for this of May 27, 2003. A reminder letter was sent to the worker dated May 1, 2003, which acknowledged the changes in the appeal structures, confirmed the May 27, 2003 deadline for filing the part 2, and advised the worker that failure to meet this deadline would result in his appeal being treated as abandoned.

All of the correspondence concerning this matter was sent to the worker's representative, with copies to the worker, and was properly addressed.

No response was received from the worker by the May 27, 2003 deadline or prior to the June 18, 2003 decision being issued. The WCAT Registry took the additional precaution of issuing its "abandonment" determination in the form of a provisional decision, which allowed the worker one final opportunity to explain whether there were "reasons of an exceptional nature which prevented you from submitting your part 2 by the due date" before a final decision was made.

The latter events summarized above occurred a few months following the March 3, 2003 changes to the appeal structures. Although the correspondence sent to the worker was clear, I appreciate that he or his representative may have been confused by information obtained from other sources regarding this transition. The worker did complete a further appeal form, prior to the July 9, 2003 deadline set for his response to the June 18, 2003 provisional decision. The fact that he completed his request for review on July 8, 2003 suggests that this was done in reference to the July 9, 2003 deadline for response to the June 18, 2003 provisional decision. I accept the submissions provided by the worker's representative, in this regard.

As noted above, the evidence regarding the date this form was received by WCAT is not entirely clear. The worker's representative acknowledges that this form was sent on July 10, 2003, one day after the deadline. The worker's request for review included his reasons as to why he disagreed with the August 17, 2002 decision, the outcome he was seeking, and his request that the "read and review" method of hearing be used. For the purposes of considering the worker's application, I will treat the worker's July 8, 2003 request for review as equivalent to a completed notice of appeal - part 2.

However, even if the form had been received by WCAT by the July 9, 2003 deadline, the fact remains that the deadline for submission of the appeal form was March 27, 2003. A provisional decision was made on June 18, 2003 that the worker's appeal would be treated as abandoned, due to his failure to complete the appeal form. This decision was of a provisional nature, and the worker was given an opportunity, until July 9, 2003, to explain whether there were reasons of an exceptional nature which prevented him from submitting his part 2 by the March 27, 2003 due date. The worker then simply submitted an appeal form, with no explanation as to why this had not been provided by the March 27, 2003 deadline. While the worker's representative argues that the submission of the form should be accepted as constituting the worker's reasons, he in fact provided no reasons or explanation with this form for his failure to provide this by the March 27, 2003 deadline.

In 2003, 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 worker failed to comply with the requirement to complete a notice of appeal – part 2 by March 27, 2003. He then failed to furnish reasons for this delay, by July 9, 2003. While the worker eventually furnished reasons for his delay in completing this appeal documentation, these reasons were contained in his letter of September 10, 2003 (two months after the July 9, 2003 deadline for providing reasons).

In these circumstances, I do not consider that there was any procedural unfairness, in the WCAT Registry treating the worker's appeal as abandoned. I find that the WCAT Registry had jurisdiction to find that the worker's appeal was abandoned, on the basis that he failed to perfect his notice of appeal documentation. I do not consider that the decision of the WCAT Registry was patently unreasonable. Accordingly, I find that the determination by the WCAT Registry did not involve any error of law going to jurisdiction.

B. Extension of time to provide notice of appeal - part 2, or to consider reasons for lateness

The worker's representative requests, in the alternative, that the worker's reasons for his delay in filing part 2 be considered "on the basis of extension of time request." I do not consider, in this regard, that I have jurisdiction in the context of this reconsideration application to consider granting an extension of time for the worker to respond to the June 18, 2003 provisional decision, so that the reasons provided in the worker's September 10, 2003 letter might be considered. I cannot interfere with the determination that the worker's appeal was abandoned unless grounds for reconsideration are established.

C. Extension of time to appeal August 17, 2002 decision

It appears, in any event, that the request by the worker's representative for an extension of time was intended as a request for an extension of time to appeal the August 17,

2002 decision by the entitlement officer. As this matter has been assigned to me as a reconsideration application, I will not make a determination regarding a possible application for an extension of time to appeal. I would, however, point out that it does not appear that WCAT has jurisdiction to consider such an application.

Section 40 of the transitional provisions contained in part 2 of Bill 63 provided:

Unexercised appeal rights to review board

40 (1) If, before the transition date,

- (a) a person has not exercised a right under the Act to appeal a decision of the Board to the review board, and
- (b) the time period within which that right must be exercised would not have expired but for the repeal of that right on the date the section of the amending Act repealing that right came into force,

that person may request a review of that decision under section 96.2, as enacted by the amending Act, before the time period referred to in paragraph (b) of this subsection has expired.

(2) Section 96.2 (4) applies to the time period referred to in subsection (1)(b) of this section.

Section 2 of the *Transitional Review and Appeal Regulation*, B.C. Reg. 322/02, provided:

2 (1) If, before the transition date,

- (a) a person has not exercised a right under the Act to appeal a decision of the Board to the review board, and
- (b) the time period within which the person must exercise that right has expired,

the person may apply to the chief review officer under section 96.2 (4) of the Act, as enacted by the amendment Act, to extend the time to request a review under that section and the chief review officer may extend the time to file the request for review under that section.

(2) If, before the transition date,

- (a) a person has not exercised a right under the Act to appeal

- (i) a decision of the Board to the appeal division, or
- (ii) a finding of the review board to the appeal division, and

(b) the time period within which the person must exercise that right has expired,

the person may apply to the chair under section 243 (3) of the Act, as enacted by the amendment Act, to extend the time to file a notice of appeal under that section and the chair may extend the time to file the notice of appeal under that section.

(3) A person who is granted an extension of time to file a request for review or a notice of appeal under subsection (1) or (2) may request a review or appeal the decision or finding, as the case may be, within the extended period.

In *WCAT Decision 2004-03980*, flagged as “noteworthy” on WCAT’s Internet decision search site, the WCAT chair reasoned:

Section 2(2) of the Regulation only provides an appeal right to a person who has not previously exercised a right of appeal. Given that the worker had previously initiated an appeal of the December 30, 1994 Review Board finding to the Appeal Division and had, in essence, abandoned that appeal, I do not find the worker can now appeal to WCAT on the basis that she has “not exercised a right under the Act to appeal ... a decision of the review board to the appeal division” within the meaning of section 2(2) of the Regulation.

WCAT’s authority to consider an application for an extension of time to appeal a decision issued prior to March 3, 2003 is limited to decisions which were appealable directly to the Appeal Division. If the worker had not exercised his right of appeal to the former Review Board, his request for an extension of time would have to be made to the Review Division under section 2 of the *Transitional Review and Appeal Regulation*. By decision dated October 2, 2003, a review officer informed the worker that as he had already exercised his right of appeal to the former Review Board, the Review Division did not have jurisdiction to consider his extension of time request. The October 2, 2003 decision was not appealed to WCAT.

Conclusion

I find that no common law ground of an error of law going to jurisdiction has been established. The worker's application for reconsideration is denied. His appeal of the August 17, 2002 decision by an entitlement officer remains abandoned, as communicated by the provisional decision of June 18, 2003 by the vice chair/deputy registrar (and confirmed by the November 8, 2004 letter by the vice chair, Quality Assurance).

Herb Morton
Vice Chair

HM/jm