

### Noteworthy Decision Summary

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**Decision:** WCAT-2006-01332      **Panel:** Herb Morton      **Decision Date:** March 22, 2006

***Reconsideration – Abandonment – Transitional appeal – Breach of procedural fairness – Failure to comply with the deadline for filing notice of appeal - part 2 – Notice that WCAT would require compliance with a deadline set by the former Review Board – 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 former Workers' Compensation Review Board (Review Board), which advised him that he was required to submit a notice of appeal – part 2 by April 8, 2003 or his appeal would be treated as abandoned. He was not advised that WCAT would require compliance with this same. Some communication was required from either the Review Board or WCAT about the status of the deadline in light of the March 3, 2003 statutory changes to the appeal bodies, in order for this deadline to provide sufficient basis for treating the worker's appeal as abandoned. The reconsideration was allowed on the basis of a breach of procedural fairness.

The worker filed a notice of appeal – part 1 with the Review Board in 2001, and requested an extension of time to file his notice of appeal - part 2. By letter dated April 8, 2003, the Review Board's deputy registrar advised him that his appeal was suspended, and that if a request for reactivation was not received within one year, the appeal would be treated as abandoned. On March 3, 2003, the workers' compensation appeal structures were amended by the *Workers Compensation Amendment Act (No. 2), 2002*. The Review Board and Appeal Division were replaced by WCAT. The worker had no written notice that WCAT would be requiring compliance with the deadline set by the former Review Board. He sought a reconsideration of the decision to treat his appeal as abandoned.

In the absence of any advice to the worker from either the Review Board or from WCAT that WCAT would be requiring compliance with the deadline set for the filing the notice of appeal – part 2, the reconsideration panel was not satisfied that fair procedures were followed in determining that the worker's appeal was abandoned due to his failure to meet that deadline. It is possible that WCAT might not have required a notice of appeal - part 2, or would have permitted this information to be provided in some other manner or time frame.

The setting of the deadline by the former Review Board did not constitute sufficient notice to the worker as to what WCAT would require from him, because that letter contained no reference to the pending changes to the appeal structures. Some communication was required from either the former Review Board or WCAT regarding the status of the deadline in light of the March 3, 2003 statutory changes to the appeal bodies. The worker's application for reconsideration was allowed on the basis of a breach of procedural fairness, and the decision to treat his appeal as abandoned was set aside as void.

**WCAT Decision Number :** WCAT-2006-01332  
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**Panel:** Herb Morton, Vice Chair

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## Introduction

The worker seeks reconsideration of the Workers' Compensation Appeal Tribunal (WCAT) decision to treat his appeal from a case manager's decision dated April 10, 2001 as abandoned.

The worker failed to reactivate his appeal, and provide a notice of appeal - part 2, by the April 8, 2003 deadline set by the former Workers' Compensation Review Board (Review Board). On April 20, 2004, the worker sought to reactivate his appeal. He provided a letter explaining his delay, and stated he was enclosing a completed notice of appeal - part 2 together with a report dated December 16, 2003 by Dr. Dhawan, a specialist in physical medicine and rehabilitation. I have not been able to find the notice of appeal - part 2 which the worker stated was enclosed with his April 20, 2004 letter.

In an internal entry in WCAT's computerized appeal tracking system (CASE) dated April 23, 2004, a WCAT vice chair/deputy registrar noted as follows:

REACTIVATION REQUEST TO [WCAT VICE CHAIR, QUALITY ASSURANCE] FOR RECONSIDERATION AS APPEAL ABANDONED APRIL 08, 2003.

By letter dated November 8, 2004 (remailed November 15, 2004), WCAT's vice chair, Quality Assurance, advised the worker that his reactivation request would be treated as an application for reconsideration of the decision that his appeal was abandoned effective April 8, 2003. As there had not been any prior communication to the worker from WCAT regarding the status of his appeal, I will treat the November 8, 2004 letter as being the decision which is the subject of this application for reconsideration.

By letter dated September 22, 2005, the WCAT appeal coordinator provided information to the worker and his representative regarding the grounds for requesting reconsideration, including the "one time only" limitation on reconsideration applications. She explained:

It is important that your submission explains how your application meets the requirements for reconsideration (see headings #9 & 10, **New**

**Evidence; #11, Common Law Grounds; and #14, Law, Policy and Decisions on Reconsiderations**, in the information sheet).

[emphasis in original]

Although invited to do so, no submission has been provided by the worker or the employer concerning this application. The worker's representative did not provide a submission, although his request for an additional 60 days to provide a submission was granted.

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)**

Did the WCAT decision involve a breach of natural justice or procedural fairness, or other 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. 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 suffered a back injury at work on April 23, 1999, and received wage loss benefits from April 26, 1999 until May 24, 1999. He suffered a second back injury at work on August 10, 2000, and received wage loss benefits from August 15, 2000 until December 31, 2000. The worker seeks to appeal a decision dated April 10, 2001, which denied the worker's request for further benefits under his 2000 claim after December 31, 2000.

The worker initiated a timely appeal of this decision to the Review Board. His letter of April 12, 2001 was received by the Review Board on April 12, 2001, and was accepted as part 1 of the Review Board notice of appeal.

By letter dated April 25, 2001, the deputy registrar of the Review Board wrote to the worker. She 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 October 24, 2001 or the appeal may not proceed.**

[emphasis in original]

On October 9, 2001, the senior deputy registrar sent a further letter to the worker, stating:

This letter is to remind you that Part 2 of the Notice of Appeal must be mailed to the Review Board by October 24, 2001.

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 either the Part 2 or a request for more time by the due date, the appeal will be treated as abandoned.

In a further letter dated October 23, 2001, the senior deputy registrar granted an extension to April 24, 2002 for sending in the part 2 notice of appeal.

By letter dated March 28, 2002, the worker requested a further extension. He explained:

I would like an extension on my Part 2 of the appeal, I am presently waiting to see a surgeon, the waiting list at VGH spine clinic is 2 years, My doctor and my insurance company are trying to get me in to see another specialist sooner the waiting lists are long.

I need to see the specialist to continue with my appeal.

[reproduced as written]

By letter dated April 8, 2002, the senior deputy registrar advised the worker:

Further to your recent request for more time to submit the Part 2, we have now suspended the above noted appeal.

We will take no further action on the appeal until you tell us in writing that you are prepared to proceed. If a request for reactivation is not received within one year of the date of this letter, the appeal will be treated as abandoned. Please enclose a completed Part 2 with your reactivation request.

On March 3, 2003, the workers' compensation appeal structures were amended by the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). The former Review Board and Appeal Division were replaced by WCAT. Upon review of the claim file, I have not located any correspondence on file to the worker from either the Review Board or from WCAT, regarding how these changes might affect his appeal (including the requirement that he file a notice of appeal - part 2 by April 8, 2003).

WCAT's computerized appeal tracking system (CASE) contains no entry following the April 8, 2002 suspension of the worker's appeal, until January 22, 2004. The January 22, 2004 entry states:

PHONE CALL FROM WKR ADVISING HE IS READY TO PROCEED – ADVISED WKR TO SEND IN A LTR REQ. THIS & GIVING REASONS FOR NOT REACTIVATING WITHIN THE ONE YEAR PERIOD GRANTED – SPOKE TO [name of worker's lawyer] – HE REQ'D A COPY OF OUR SUSPEND LTR BE FAXED....

[reproduced as written]

In a letter addressed to the Review Board dated April 20, 2004, the worker stated:

Further to your telephone discussions January 22....I am writing to request that my appeal of the WCB decision of April 10, 2001 be reactivated.

As it was near the one year suspension period from April 8, 2002, I contacted the appeals board by telephone and explained that I was awaiting a specialists appointment and, hopefully a report. She told me that when I received the specialists report I could reactivate the appeal, no mention was made to me about having to write again to the review board, otherwise, I would have written as I did on March 28, 2002.

...

I am sending you a completed Part 2 and a December 16, 2003 report from Dr Dahwan. I am desperate in this matter, And ask that my appeal be reactivated.

[reproduced as written]

Although the worker stated he was enclosing a completed part 2, it appears this was not received by WCAT. On April 22, 2004, a WCAT staff member noted in CASE:

FAX REC'D FROM WKR DATED APRIL 20/04 ENCLOSING LTR FROM DR. DHAWAN – PART 2 NOT ENCLOSED – CALLED [name of representative] TO SEE IF HE WAS REP. & IF PART 2 WAS COMING – WKR FORGOT TO ENCLOSE IT – WKR WILL FAX IT TODAY OR TOMORROW . . .

In a second CASE entry dated April 22, 2004, the WCAT staff member noted that the part 2 had still not been received.

As noted above, a WCAT vice chair/deputy registrar made an internal entry in WCAT's CASE system on April 23, 2004, finding that the worker's appeal had been abandoned on April 8, 2003. This was not communicated to the worker at that time.

By letter dated November 8, 2004, the vice chair, Quality Assurance, advised the worker that his reactivation request would be treated as an application for reconsideration of the decision that his appeal was abandoned effective April 8, 2003.

She explained:

On March 3, 2003, the Review Board was replaced by the Workers' Compensation Appeal Tribunal (WCAT). Your appeal would have been addressed by WCAT, if you had reactivated it within the one year period for doing so.

### **Reasons and Findings**

For the purposes of considering this application, I will treat the November 8, 2004 letter by the WCAT vice chair, Quality Assurance, as the "abandonment" decision. The April 8, 2002 letter by the Review Board's senior deputy registrar was not a WCAT decision, and the April 23, 2004 determination contained in a CASE entry by the WCAT vice chair/deputy registrar was not communicated to the worker.

Questions which I have jurisdiction to address in this application concern whether there was any procedural unfairness or breach of natural justice in WCAT's handling of this matter, whether the WCAT decision involved any jurisdictional error, and whether WCAT's decision was patently unreasonable.

The November 8, 2004 decision was issued prior to December 3, 2004, when the provisions of the ATA concerning WCAT came into effect. Accordingly, its provisions (including section 31 of the ATA concerning the summary dismissal of appeals) did not apply to the November 8, 2004 decision.

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 April 8, 2002 letter from the former Review Board was clear in communicating to the worker the requirement that he complete and return a notice of appeal - part 2 within one year. However, it does not appear that any letter was sent to the worker concerning the effect of the March 3, 2003 changes to the appeal bodies, in connection with this deadline. The worker was not advised (by either the Review Board or WCAT), that WCAT would also require the worker to complete the notice of appeal - part 2 by April 8, 2003, or the worker's appeal would be considered abandoned.

In the absence of some communication to the worker to advise that WCAT would also be requiring the notice of appeal part 2 to be filed by April 8, 2003, I consider that there was a procedural unfairness in respect of WCAT's closure of the worker's appeal as abandoned effective April 8, 2003. The worker had no written notice that WCAT would be requiring compliance with this deadline set by the former Review Board. It is possible that WCAT might not have required a notice of appeal - part 2, or would have permitted this information to be provided in some other manner or time frame. I do not view the setting of the April 8, 2003 deadline by the former Review Board as constituting sufficient notice to the worker as to what WCAT would require from him, as that letter contained no reference to the pending changes to the appeal structures.

Two other applications involving similar circumstances recently came before me. In both of those cases, correspondence was sent to the worker concerning the effect of the changes to the appeal bodies, and advising that WCAT would require compliance with the deadline set for filing the notice of appeal – part 2 or the appeal would be treated as abandoned (see *WCAT Decision #2006-01273* and *WCAT Decision #2006-01331*.) I find that it would be unfair to the worker in this case, to treat his appeal as abandoned in the absence of any similar notice.

The worker submits that he contacted WCAT by telephone near the end of the one year suspension period. There is no entry in WCAT's computerized records to confirm that



this occurred. The worker states that he received verbal advice that he could reactivate his appeal when he obtained a specialist's report. If the worker had received written notice from the Review Board or WCAT to tell him that WCAT would be requiring compliance with the April 8, 2003 deadline, this might have prevented such a misunderstanding on the part of the worker. While the worker sought assistance from two representatives in January 2004 and following, he appears to have been unrepresented prior to that date.

In the absence of any advice to the worker from either the former Review Board or from WCAT that WCAT would be requiring compliance with the April 8, 2003 deadline set for the filing of the worker's notice of appeal - part 2, I am not satisfied that fair procedures were followed in the determination that the worker's appeal was abandoned effective April 8, 2003 due to his failure to meet that deadline. In my view, some communication was required from the former Review Board, or from WCAT, regarding the status of this deadline in light of the March 3, 2003 statutory changes, in order for this deadline to provide sufficient basis for treating the worker's appeal as abandoned. Accordingly, the worker's application for reconsideration is allowed. The decision to treat his appeal as abandoned is set aside.

In his letter of April 20, 2004, the worker explained:

I telephoned [name of representative] who also called you on my behalf. I was only able to afford the fee to meet with him today April 20, 2004.

While the worker makes reference to the payment of a fee to his representative, section 7(2) of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/02, provides:

The appeal tribunal may not order the Board to reimburse a party's expenses arising from a person representing the party or the attendance of a representative of the party at a hearing or other proceeding related to the appeal.

No expenses were requested, and it does not appear from a review of the file that any other expenses were incurred related to this application. I therefore make no order regarding the expenses of this application, apart from finding that WCAT has no authority to direct the Board to reimburse the worker for any fee paid to his representative. In the event the worker's appeal proceeds, it is open to the worker to request the WCAT panel hearing his appeal to consider a claim for reimbursement of expenses incurred in obtaining any medical legal letters or reports for his appeal.

## **Conclusion**

The worker's application for reconsideration is allowed, on the basis of a breach of procedural fairness. The decision (communicated on November 8, 2004) that his appeal was abandoned effective April 8, 2003, is set aside as void.

The WCAT Registry will contact the worker and employer concerning the further handling of the worker's appeal, including any new deadline set by WCAT for the provision of a completed notice of appeal - part 2. If the worker fails to comply with this requirement, it will be open to the WCAT Registry to again consider whether the worker's appeal should be treated as abandoned.

Herb Morton  
Vice Chair

HM/mmc