

Noteworthy Decision Summary

Decision: WCAT-2006-02532**Panel:** Herb Morton**Decision Date:** June 15, 2006

Reconsideration – Reimbursement for expense of physician’s letter – Whether panel required to consider if it was reasonable for party to obtain letter – Requirement to provide reasons – Use of guidelines by WCAT – Sections 234(2) and 253(3) of the Workers Compensation Act – Policy items #13.00 and #13.23 of the Manual of Rules, Practices and Procedures

This was a reconsideration of part of a prior WCAT decision to deny reimbursement of expenses. The original panel had decided the worker should not be reimbursed for the letter as it only reported the worker’s symptoms and treatment but did not provide an opinion on causation. The reconsideration panel held that WCAT panels are not bound by the guidelines set out in the *Manual of Rules, Practices and Procedures* (MRPP). However, panels must provide written reasons explaining how the relevant guidelines contained in the MRPP were considered and applied in the appeal.

The reconsideration panel noted that section 7 of the *Workers Compensation Act Appeal Regulation, B.C. Reg. 321/2002* provides that WCAT may order the Workers’ Compensation Board to reimburse a party to an appeal the expenses associated with obtaining or producing evidence submitted to WCAT. The panel also noted that under section 234(2)(d) of the *Workers Compensation Act* (Act), the WCAT chair is responsible for establishing administrative practices and procedures. The panel noted the chair had established, under policy items #13.00 and #13.23 of the MRPP, that WCAT will generally order reimbursement of expenses incurred for obtaining expert evidence where the evidence was useful or helpful to the panel or where it was reasonable for the party to have requested the evidence.

The panel noted that the original panel’s written reasons appeared to only address the first test set out in the MRPP. The panel considered the effect of the MRPP guidelines on the original decision and cited several passages from administrative law texts and court decisions. The panel concluded that although the original panel was not bound by the MRPP, parties rely on the MRPP in obtaining medical reports for appeals. The panel noted that it assists WCAT in the efficient and cost effective conduct of appeals if the evidence available to the panel at the time of the hearing is complete.

The panel noted that section 253(3) of the Act requires WCAT to provide written reasons. The reasons provided by the original panel did not expressly acknowledge and address both tests set out in the MRPP.

The panel concluded that the decision to deny expenses must be characterized as arbitrary, and thus patently unreasonable, due to its failure to acknowledge one of the applicable tests and to provide reasons to explain the consideration provided to the worker’s request with reference to this test. The panel allowed the reconsideration. The original panel’s decision to deny reimbursement of expenses in relation to the physician’s letter was severed from the rest of the decision and set aside as void.

WCAT Decision Number : WCAT-2006-02532
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Panel: Herb Morton, Vice Chair

Introduction

The worker seeks reconsideration of one aspect of the April 16, 2004 Workers' Compensation Appeal Tribunal (WCAT) decision (WCAT *Decision #2004-01883-RB*). This concerns the denial of the worker's request for reimbursement of the expense of a letter provided by her attending physician in support of her appeal. In this application, the worker does not request reconsideration of the WCAT decision to deny her appeal. The WCAT decision confirmed the October 21, 2002 decision by the entitlement officer, which denied the worker's claim for compensation for a right knee injury on August 10, 2002.

By letter dated April 27, 2004, the worker's union representative wrote to request reconsideration of the WCAT decision "as pertaining to costs." On May 5, 2004, WCAT's legal counsel advised the representative that his letter would be processed as an application for reconsideration. By letter dated November 4, 2005, the appeals coordinator provided the worker with an information sheet containing general information 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 heading #9 & #10, **New Evidence**; #11, **Common Law Grounds**; and #14, **Law, Policy and Decisions on Reconsiderations**, in the information sheet).

[emphasis in original]

Although an extension of time for submissions was granted until January 9, 2006, no additional submission was provided by the worker. The employer completed a notice of participation, but did not provide a submission. I find that the narrow question of law and policy raised by this application can be properly considered upon the basis of the April 27, 2004 written submission by the worker's representative, without an oral hearing.

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

Issue(s)

Did the WCAT decision, to deny reimbursement of the expense of a letter from the worker's physician, involve an 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. This authority is further confirmed by section 253.1(5) of the Act.

Section 245.1 of the Act provides that section 58 of the ATA applies to WCAT. 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* 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.

The reconsideration application was assigned to me by the chair on the basis of a written delegation (paragraph 25 of *Decision of the Chair No. 8*, "Delegation by the Chair", March 3, 2006).

Background

The worker's appeal to WCAT concerned her claim to have suffered an injury arising out of and in the course of her employment on August 10, 2002. By letter dated December 9, 2002, the worker's union representative wrote to the worker's attending physician to request a medical opinion. The representative advised:

Enclosed is a copy of the letter we are appealing, which shows how the Claims Adjudicator arrived at the decision and a copy of the Employer's letter to WCB.

We are seeking your support for this appeal and it would assist us if you could answer the following:

1. As [the worker] did not see you until 4 days after the onset of her symptoms, can you conclusively [sic] conclude that in the absence of a specific incident, her work duties could have been the cause? Please elaborate.
2. [The worker's] Employer has questioned her integrity. Do you find her to be a straight-forward person?
3. If you have any other comments to make in support of this appeal, please do.

We are not a law firm and do not charge your patient for our services and would be pleased if you would charge a reasonable fee for your letter. Please inform us what your fee will be so that we may inform the claimant and her local union.

The worker's attending physician, Dr. Lam, provided a two page letter dated January 6, 2003 in response to this request. Both letters were forwarded to the former Workers' Compensation Review Board (Review Board) on January 23, 2003. Dr. Lam commented in part:

As [the worker] was employed as a Room Attendant, her duties involved various physical strains and activities that could certainly render repetitive injuries to any part of her body. These injuries could be in the form of a twisting, bending or overuse injuries.

An oral hearing was held by the WCAT panel on April 7, 2004. By decision dated April 26, 2004, the panel denied the worker's appeal. Under the heading "File Information", the panel took note of the letter from the worker's physician as follows:

In a January 6, 2003 medical-legal letter attending physician, Dr. L, recorded his record of treatment for the worker on August 14, August 19 and September 11 when she was able to return to work.

Under the heading "Reasons and Findings", the WCAT panel concluded:

...there is insufficient evidence to persuade me that something in the employment had causative significance in producing the injury.

The worker was unaware of an event or incident in the employment that gave rise to her symptoms. She became aware of her symptoms about half way through her shift. From the information gathered I conclude that the symptoms arose in the course of employment. However, I find it to be a speculative possibility that the symptoms arose out of the employment. Therefore the two part test of section 5(1) of the Act is not met.

Dr. L's medical-legal letter reported the symptoms and treatment provided but the doctor provided no opinion on causation.

The worker's representative pointed out the job had risks and required a great many body postures including kneeling that, potentially could create symptoms as experienced by the worker. However, I find that to draw a conclusion of causation in this particular appeal, based on such general information would be speculative.

Conclusion

I confirm the Board decision. I deny the appeal.

No costs are permitted.

[emphasis added]

Findings and Reasons

The worker's representative submits:

We requested payment for a Doctor's letter at the hearing and all costs were denied. The Vice-Chair made reference to the Doctor's letter and said that it did not address causation.

With respect, we believe that it was reasonable for us to have obtained the letter and, as such, it should be paid for.

[emphasis added]

The worker's appeal was filed to the former Review Board, and transferred to WCAT effective March 3, 2003 due to the amendments in the workers' compensation appeal structures contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). Section 38(1) of the transitional provisions contained in Part 2 of Bill 63 stated;

38 (1) 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.

Accordingly, the worker's appeal was to be continued and completed as a proceeding pending before WCAT, except that no time frame applied to the making of the WCAT decision.

Section 7 of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/2002 (*Appeal Regulation*), provides as follows:

7 (1) Subject to subsection (2), the appeal tribunal may order the Board to reimburse a party to an appeal under Part 4 of the Act for any of the following kinds of expenses incurred by that party:

- (a) the expenses associated with attending an oral hearing or otherwise participating in a proceeding, if the party is required by the appeal tribunal to travel to the hearing or other proceeding;

(b) the expenses associated with obtaining or producing evidence submitted to the appeal tribunal;

(c) the expenses associated with attending an examination required under section 249 (8) of the Act.

(2) 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.

[emphasis added]

Under section 234(2)(d) of the Act, the WCAT chair had responsibility for:

- (d) establishing any rules, forms, practices and procedures required for the efficient and cost effective conduct of appeals to the appeal tribunal...
- (e) making accessible to the public any rules, forms, practices and procedures established under paragraph (d);
- (f) establishing administrative practices and procedures for the effective operation of the appeal tribunal;

The practices and procedures established by WCAT's chair under section 234(2) of the Act, effective March 3, 2003, were contained in the former *Manual of Rules, Practices and Procedures* (MRPP). Archived versions of the MRPP are accessible on the WCAT website, under "Publications." The March 3, 2003 version of the MRPP (in effect from the time WCAT was created until the MRPP was revised on March 28, 2004) stated, at item #13.00:

WCAT will generally order reimbursement of expenses incurred for the purpose of obtaining expert evidence, regardless of the result in the appeal, where the evidence was useful or helpful to the consideration of the appeal or where it was reasonable for the party to have sought such evidence in connection with the appeal. As the workers' compensation system functions on an inquiry basis (rather than on an adversarial basis as in the court system), reimbursement of expenses is not dependent upon the result in the appeal. However, WCAT will generally limit the amount of reimbursement of expenses to the rates or tariff established by the Board for this purpose.

The March 29, 2004 revision of the MRPP (which came into effect prior to the April 7, 2004 WCAT oral hearing) provided more detailed guidance. This stated in part:

13.23 Expense of Obtaining or Producing Evidence (Section 7(1)(b))

WCAT will generally order reimbursement of expenses for attendance of witnesses or obtaining written evidence, regardless of the result in the appeal, where:

- (a) the evidence was useful or helpful to the consideration of the appeal, or,
- (b) it was reasonable for the party to have sought such evidence in connection with the appeal.

As the workers' compensation system functions on an inquiry basis (rather than on an adversarial basis as in the court system), reimbursement of expenses is not dependent upon the result in the appeal. However, WCAT will generally limit the amount of reimbursement of expenses to the rates or tariff established by the Board for this purpose.

WCAT may direct reimbursement for different types of expert evidence (see items 8.50 and 8.51). Most commonly, this involves additional medical evidence obtained for an appeal. Current tariff items for medical legal matters include....

The same two tests were stated in the March 3, 2003 and April 29, 2004 versions of the MRPP, in connection with the consideration to be provided to a request for reimbursement of the expense of a medical report. These two tests are similarly contained in the current version of the *Manual of Rules of Practice and Procedure*, as revised December 3, 2004.

The worker's representative submits, in effect, that the decision by the WCAT panel to deny the request for reimbursement of expenses failed to consider whether it was reasonable for the worker's representative to have sought such evidence in connection with the appeal (i.e. even if the WCAT panel did not find the report useful or helpful).

As the panel's reasons do not appear to address the second test, it is not evident as to whether:

- the panel overlooked this second test;
- the panel considered this second test, but concluded that it was not reasonable for the worker's representative to have obtained the letter from the attending physician;

- the panel considered that the physician's letter was not reasonably responsive to the questions posed in the representative's letter;
- the panel considered that it need not take into account the guidelines provided in the MRPP;
- the panel considered that a departure from the guidelines in the MRPP was warranted; or,
- some other explanation applies.

In the text *Administrative Law in Canada*, Fourth Ed. (Ontario: Butterworths, 2006) Sara Blake states at pages 95-96:

Discretion is not absolute or unfettered. Decision makers cannot simply do as they please. All discretionary powers must be exercised within certain basic parameters. The primary rule is that discretion should be used to promote the policies and objects of the governing Act. These are gleaned from a reading of the statute as a whole using ordinary methods of interpretation...

Discretionary decisions should be based primarily upon a weighing of factors pertinent to the policy and objects of the statute. "A public authority in the exercise of its statutory powers may not act on extraneous, irrelevant and collateral considerations." **Nor may the public authority ignore relevant considerations.** It should consider all factors relevant to the proper fulfillment of its statutory decision-making duties.

[emphasis added]

Blake further states, at pages 98-99:

Many tribunals issue guidelines indicating the considerations by which they will be guided in the exercise of their discretion or explaining how they interpret a particular statutory provision. The publication of policies and guidelines is a helpful practice. It gives those in the industry advance knowledge of the tribunal's opinion on various subjects so that they may govern their affairs accordingly. It assists applicants by listing the criteria that will be considered when deciding whether to grant the application.

Also, in tribunals that have many members presiding over a large number of proceedings, guidelines ensure a certain level of consistency and avoid a patchwork of arbitrary and haphazard decisions....

However, care must be taken so that guidelines formulated to structure the use of the discretion do not crystallize into binding and conclusive rules. If discretion is too tightly circumscribed by guidelines, the flexibility and judgment that are an integral part of discretion may be lost. A balance must be struck between ensuring uniformity and allowing flexibility in the exercise of discretion. The tribunal may not fetter its discretion by treating the guidelines as binding rules and refusing to consider other valid and relevant criteria....

If a statute requires the application of policies or directives issued by the Minister or by another tribunal, then they must be applied because they have the status of law.

Blake cites the decision of the Federal Court of Canada – Trial Division in *Dawkins v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 505, [1992] 1 F.C. 639. In that case, the Court reasoned:

With respect to the guidelines generally, I do not think it can be seriously disputed that general standards are necessary for the effective exercise of discretion in the circumstances, in order to ensure a certain level of consistency from one decision to another, and to avoid a patchwork of arbitrary and haphazard decisions being made across the country. Uniformity in decision-making, however, must be balanced against the need to consider individual cases on their own merits and particular circumstances. Care must be taken so that any guidelines formulated to structure the use of discretion do not crystallize into binding and conclusive rules. If the discretion of the administrator becomes too tightly circumscribed by guidelines, the flexibility and judgment that are an integral part of discretion may be lost. The balance to be struck between the two considerations depends, however, on the circumstances and considerations of a particular decisionmaking situation.

In *Vidal v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 63, (1991) 49 Admin. L.R. 118, the Federal Court of Canada – Trial Division similarly reasoned:

I am satisfied that these guidelines adequately convey to immigration officers that, particularly in respect of humanitarian and compassionate considerations, the guidelines are not to be regarded as exhaustive and definitive. It is emphasized and reemphasized that officers are expected to use their best judgment. I believe they amount to "general policy" or

"rough rules of thumb" which Jerome A.C.J. recognized as permissible in the Yhap case. I would go farther than Jerome A.C.J. and say that such guidelines are not only permissible but highly desirable in the circumstances. No doubt when Parliament conferred the power under subsection 114(2) on the Governor in Council to make exceptions to the requirements of the Act and the Regulations it expected the Governor in Council to exercise that discretion with some sort of consistency throughout the country and not purely arbitrarily or by whim. More particularly, by the principles of parliamentary government the Governor in Council must be responsible to Parliament for the exercise of his discretion. As the Governor in Council is in the vast majority of cases dependent on the recommendations of immigration officers, as approved by the Minister, for the exercise of his discretion it is highly desirable that immigration officers have some sort of guidance as to what factors the Minister thinks important in making recommendations to the Governor in Council in this respect. If the net effect of this is to give more importance to some factors, without necessarily excluding other factors, it appears to me to be a sensible way for the Minister and the Governor in Council to bring some consistency into the exercise of powers under subsection 114(2) and to discharge their political responsibilities to Parliament.

In *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality)*, [1985] 2 S.C.R. 164, the Supreme Court of Canada (SCC) reasoned as follows:

15 There are no allegations of bad faith or discrimination in this case. The question before the Court, in essence, is whether the Council exercised its discretion "according to law" and in accordance with proper principles reflected in the "policy and objects of the [governing] Act": per Lord Reid in *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 at pp. 1030, 1034. More specifically, was it entitled to consider the potential flooding problem and make it the ground of its decision to refuse approval of the subdivision? As Rand J. said in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, any discretionary administrative decision must "be based upon a weighing of considerations pertinent to the object of the administration". For the reasons already given I am of the view that the Council was entitled to take the flooding problem into consideration. The issue does not, however, end there. As Lord Denning pointed out in *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] A.C. 663, at p. 693, **the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration.** In *R. v. Paddington Valuation Officer, Ex parte Peachey Property Corp. Ltd.*, [1966] 1 Q.B. 380 (C.A.), where a property owner applied for a quashing of what was alleged to have been an erroneous municipal tax assessment, Danckwerts L.J. noted at p. 414:

In order to succeed in their application for an order of mandamus and certiorari, the appellants have to show that the valuation officer of the borough council has gone wrong in law in such a way as to render the valuation list invalid, because he has taken into consideration matters which were not proper to be regarded, **or has omitted to consider matters which were of direct [page175] importance** in ascertaining the values to be put upon the hereditaments.

The respondent municipality, therefore, must be seen not only to have restricted its gaze to factors within its statutory mandate **but must also be seen to have turned its mind to all the factors relevant to the proper fulfilment of its statutory decision-making function.**

[emphasis added]

The guidelines provided by the WCAT chair in the MRPP did not constitute policy of the board of directors. Accordingly, the requirement of section 250(2) of the Act, that WCAT must apply a policy of the board of directors that is applicable in that case, does not apply in connection with the WCAT panel's consideration of the guidelines contained in the MRPP.

However, the WCAT chair has authority under section 234(2) of the Act to establish WCAT's practice and procedure. Pursuant to this authority, the WCAT chair had identified factors which were relevant to the exercise of the panel's discretion under section 7 of the *Appeal Regulation*. In the MRPP, the WCAT chair made known to the community the tests which would be applied to the consideration of a request for reimbursement of expenses. Presumably, parties rely on the guidelines contained in the MRPP, in obtaining medical reports in relation to an appeal.

A factor which may have been relevant to the guidelines formulated by the WCAT chair is that WCAT is subject to a statutory time frame for making decisions as set out in section 253 of the Act (although this did not apply to appeals transferred to WCAT from the former Review Board). It assists WCAT in the efficient and cost effective conduct of appeals if the evidence available to the WCAT panel at the time of the hearing (whether orally or in writing) is complete.

Section 253(3) of the Act provides that WCAT's final decision on an appeal must be made in writing with reasons. The reasons provided by the WCAT panel do not expressly acknowledge and address both tests set out in the former MRPP concerning requests for reimbursement of expenses. A decision which fails to provide reasons on a particular point gives rise to a concern that the decision was arbitrary (i.e. the worker's claim for reimbursement did not receive due consideration under the tests which would normally be applied).

As in the *Oakwood Development* case, this case does not involve any allegation of bad faith or discrimination. However, the SCC held that the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration. Accordingly, I find that it was incumbent on the panel to address the tests set out by the WCAT chair in the MRPP, at least as a starting point for the panel's consideration. The reasons provided by the panel only appear to address the question as to whether the physician's report was useful or helpful, but did not address the further question as to whether the report was reasonably obtained. In the circumstances, I find it appropriate to set aside the panel's decision to deny reimbursement of costs. I find that the tests established by the WCAT chair in the MRPP involved a highly relevant consideration, and that the failure to address one of these tests must be characterized as involving an arbitrary exercise of discretion. I find that the WCAT decision to deny reimbursement of expenses in relation to Dr. Lam's letter must be severed from the WCAT decision and set aside as void. In view of my conclusion on this basis, it is not necessary that I address the other reasoning provided by the panel on this issue.

The employer completed a notice of participation. By letter dated January 18, 2006, the appeals coordinator advised the employer:

An application for reconsideration involves a two step process. The first stage concerns whether or not grounds for reconsideration have been established. At this time, I am inviting your submission on this issue only. If WCAT concludes that grounds for reconsideration have been established, we will invite your submission on the merits at a later date.

Accordingly, I have not proceeded to address the worker's request for reimbursement of the cost of Dr. Lam's report. The worker's request for reimbursement of this cost will be further considered by WCAT.

Conclusion

This application for reconsideration, on the common law grounds, was limited to a narrow issue concerning the denial of the worker's request for reimbursement of the expense of obtaining Dr. Lam's January 6, 2003 medical letter. The worker's application for reconsideration is granted. I find the decision to deny expenses must be characterized as arbitrary, and thus patently unreasonable, due to its failure to acknowledge one of the applicable tests and to provide reasons to explain the consideration provided to the worker's request with reference to this test. The panel's decision to deny reimbursement of expenses is severed from the WCAT decision and set aside as void. The WCAT Registry will contact the parties concerning the further handling of this matter.

This decision does not otherwise affect the validity of WCAT *Decision #2004-01883-RB* (to deny the worker's appeal). That decision remains final and conclusive pursuant to section 255(1) of the Act.

Herb Morton
Vice Chair

HM/gw