Noteworthy Decision Summary

Decision: WCAT-2006-02601 **Panel**: Herb Morton **Decision Date:** June 22, 2006

Reconsideration – Withdrawal of appeal – Whether WCAT acted fairly in accepting worker's withdrawal – WCAT does not have obligation to question worker or provide advice – Item #8.70 of the WCAT Manual of Rules of Practice and Procedure

Reconsideration of a prior WCAT registry decision to accept a worker's withdrawal of his appeal. WCAT does not have an obligation to enquire as to whether an unrepresented party understands the significance of the withdrawal of an appeal or to provide advice. WCAT is only obliged to follow fair procedures in accepting the withdrawal of an appeal.

The worker appealed a 2002 decision by the Workers Compensation Board operating as WorkSafeBC (Board) setting his long-term wage rate for wage loss purposes. He then returned to work with his accident employer on a part-time basis. As he remained temporarily partially disabled, the Board decided the wage rate for wage loss purposes should remain at the initial rate set on the claim, pursuant to the exception contained in item #35.22 of the *Rehabilitation Services and Claims Manual, Volume I*. The worker then withdrew his appeal. WCAT confirmed the withdrawal in a decision letter dated April 23, 2003. The employer subsequently went into receivership. As he was no longer employed with his accident employer, in February 2004 the Board re-established the worker's wage rate based on his long-term wage rate. The worker requested a review of this decision. The Review Division of the Board found it did not have jurisdiction to address the worker's long-term wage rate, as the Board did not determine this issue in the February 2004 decision. The only issue before the review officer was whether the Board was correct in using the previously established long-term wage rate. The worker asked WCAT to re-establish his appeal of the 2002 Board decision.

The reconsideration panel recognized there was some sense of unfairness in that the worker was unrepresented and did not appreciate the significance of the determination of his long-term wage rate for his claim. When the significance of the long-term wage rate became evident, the worker acted promptly in seeking to re-establish his appeal. The panel noted the worker would arguably have had a good chance of success on an application for an extension of time for his appeal.

The reconsideration panel concluded, however, that it did not have any discretion to exercise on the worker's application for reconsideration. The panel was limited to considering whether fair procedures were followed in making the decision and whether WCAT acted fairly in accepting the worker's withdrawal. The panel noted that item #8.70 of the WCAT *Manual of Rules of Practice and Procedure* in effect at the time stipulated that an appellant may withdraw the appeal at any time before the appeal has been assigned to a WCAT panel. At the time of the WCAT decision, the worker's appeal had not been assigned to a WCAT panel.

The reconsideration panel found no unfairness in WCAT's acceptance of the worker's request for withdrawal. WCAT did not have an obligation to inquire further as to whether the worker understood the significance of his decision, or to provide advice to the worker.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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WCAT Decision Number: WCAT-2006-02601
WCAT Decision Date: June 22, 2006
Panel: Herb Morton, Vice Chair

Introduction

The worker seeks reconsideration of the April 23, 2003 letter from the Workers' Compensation Appeal Tribunal (WCAT) vice chair/deputy registrar. That letter acknowledged receipt of the worker's request to withdraw his appeal, and confirmed that the appeal was considered withdrawn. The worker seeks reinstatement of his appeal concerning his long term-wage rate for wage loss purposes. He submits that at the time he withdrew his appeal, he thought it only concerned "a short time of wage reduction", and that "I was not informed that it would cause me a big problem in the future."

The worker is represented by a workers' adviser, who provided a written submission dated May 12, 2004. The employer is no longer active. I find that the legal issues raised by this application can be properly considered on the basis of written submissions, without an oral hearing.

By letter dated November 14, 2005, the WCAT appeals coordinator provided an information sheet containing general information about the reconsideration process, 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 and #10, **New Evidence;** #11, **Common Law Grounds;** and #14, **Law, Policy and Decisions on Reconsiderations**, in the information sheet).
>
> [emphasis in original]

No further submission was received at that time. Upon preliminary review, by memo of May 2, 2006 I noted:

> WCAT's *Manual of Rules of Practice and Procedure* (MRPP) explains in part, at item #15.24:
>
> > . . . separate applications may be made on the basis of common law grounds, or on the basis of new evidence under section 256, but each type of application is limited to one occasion only. Parties may seek reconsideration on both grounds at the same time.

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> Neither the worker nor the workers' adviser has indicated whether this application is based on the common law ground of an error of law going to jurisdiction (including a breach of procedural fairness or natural justice), or whether it is based on new evidence under section 256.
>
> Please request clarification as to whether this application is being made on one ground only, or on both grounds. It would also be helpful to receive comments as to how the tests for reconsideration are met, with reference to the ground or grounds on which this application is based.

A further submission dated May 8, 2006 was provided by the workers' adviser. The workers' adviser submits that the worker's "circumstances fall broadly within an error of law going to jurisdiction – more specifically a breach of procedural fairness."

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 WCAT act fairly in accepting the worker's withdrawal of his appeal? Did the decision to accept the withdrawal of the worker's appeal involve a breach of natural justice or procedural fairness?

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.
>
> [emphasis added]

Practice and procedure at item #15.24 of WCAT's MRPP 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.

This application was assigned to me by the WCAT 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 background to the worker's claim is set out in *WCAT Decision #2006-01084* dated March 3, 2006. That decision noted:

> While employed as a construction flag person, the worker was injured on June 19, 2002. He was lifting a sign stand out of the back of his truck (15 to 20 pounds) when a vehicle honked its horn, distracting him, resulting in injuries to the worker's right shoulder and upper back. The worker's claim was accepted by the Workers' Compensation Board (Board) for a right shoulder strain, manipulation and injection of the shoulder under anesthetic, as well as acromioplasty and excision of the bursa on April 20, 2003.

The worker received wage loss benefits for temporary total disability (TTD) under section 29 of the Act, and for temporary partial disability (TPD) under section 30 of the Act, for the following periods (total of 1183 days):

Time Period	Benefits	Act
July 5, 2002 until September 15, 2002	TTD	s. 29
September 16, 2002 until December 15, 2002	TPD	s. 30
December 16, 2002 until December 29, 2002	TTD	s. 29
December 30, 2002 until February 8, 2004	TPD	s. 30
February 9, 2004 until October 10, 2004	TTD	s. 29
April 21, 2005 until April 9, 2006	TTD	s. 29

The worker underwent surgery on April 30, 2003 for a right shoulder acromioplasty and excision of bursa, and again on April 21, 2005 for an arthroscopic lysis of adhesions of the right subacromial space.

By decision dated September 16, 2002, the case manager advised the worker concerning the establishment of a long-term wage rate after the initial eight weeks of wage loss benefits on his claim. She advised that effective August 30, 2002, his new wage rate would be 100% of $189.99 per week based on his one-year total gross earnings of $9,906.71. She advised the worker that if he had any other earnings, he should submit this information (noting that she could not consider employment insurance or social assistance as earnings). She further noted if the worker felt the earnings used did not accurately reflect his long-term average earnings pattern, he could submit earnings for the three or five years prior to his injury. As well, if he was unable to work due to illness or injury, this time would be deducted if he provided medical certificates giving the periods he was unable to work.

The worker appealed the September 16, 2002 decision to the former Workers' Compensation Review Board (Review Board). His notice of appeal – part 1 was received by the Review Board on October 3, 2002, within the 90-day appeal period. By letter dated October 15, 2002, the Review Board's senior deputy registrar advised the worker:

> We cannot deal with the appeal until you complete and send us Part 2. **You must mail Part 2 to the Review Board by April 15, 2003 or the appeal may not proceed**.
>
> [emphasis in original]

The October 15, 2002 letter from the senior deputy registrar also explained:

> With this letter, we are sending Part 2 of the appeal form. Before you return it, you might want to :
>
> * Get advice from a representative (Union, Lawyer, Compensation Advisor, etc.).
>
> . . .
>
> If you need assistance with your appeal you may contact the Workers' Advisers. . . .

Due to changes in the workers' compensation appeal structures pursuant to Bill 63, the *Workers Compensation Amendment Act (No. 2), 2002*, the worker's appeal was transferred to WCAT effective March 3, 2003. The worker contacted WCAT on April 14, 2003, the day prior to the deadline for filing his notice of appeal – part 2. By telephone call on April 14, 2003, the worker called to state he did not have a fax machine but wished to withdraw his appeal as soon as possible. By letter dated April 23, 2003, WCAT's vice chair/deputy registrar acknowledged the worker's request, and confirmed that his appeal was considered withdrawn.

By letter dated February 25, 2004, the case manager wrote to the worker concerning his wage rate. The case manager noted that the worker's employer was now in receivership. The February 25, 2004 decision explained:

> In a decision letter of July 22, 2002 you were advised that the initial wage rate on your claim would be set using your 3 month earnings of $5,685.04. This was equal to $436.11 per week, of which you would be paid 75% (327.08).
>
> A further decision letter was sent dated September 16, 2002 confirming that the long term rate review had been done and that, based on your prior one year earnings, your long term rate was $189.99, of which you would receive 100%.
>
> Shortly thereafter you had returned to work with your accident employer on a part time basis. Although you were not able to continue working the part time hours of physical work of flagging, it was understood and confirmed with your employer that you continued to receive payment for duties with your accident employer (for supervisory work). On this basis, the wage rate for payment of wage loss purposes would then remain at the initial rate set on the claim.

However, with the recent change in your employer's status in that you are no longer receiving payment for the supervisory work, the rate must revert to the long term wage rate set on the claim.

The *Rehabilitation Services and Claims Manual* Vol. I is applicable. This policy states, in part:

> *"#35.22 Calculation of Earnings*
>
> The average earnings of the claimant before the injury are for the purpose of Section 30 generally calculated in accordance with the Board's practice set out in Chapter 9. Therefore, where the period of temporary disability has gone beyond eight weeks, the rate set at the time of the 8-week rate review will be used. (6) An exception to this is made in computing temporary partial disability entitlements where a worker returns to the same employer on a suitable employment basis at a reduced wage, and where the rate has been reduced at the 8-week point following the injury. In calculating the worker's loss, the Adjudicator uses the wage rate at the time of the injury and not the 8-week rate set on the basis of average earnings. If the worker returns to a different employer, the 8-week rate is used."

What this means is that if a worker returns to work with the accident employer and an 8-week review or review of the long term rate has been done, the rate is maintained at the original rate. If however, the worker either does not return to work with the accident employer or returns to work with a different employer or has not returned to work in any capacity, then the long term rate is applicable.

I have reset the wage rate, based on the long term earnings, as outlined in the earlier decision letter of September 16, 2002.

By decision dated January 13, 2005, the worker was granted a pension award of 14.42% of total disability, plus age adaptability of 1.44%, for a total award of 15.86% of total disability.

The worker also requested review by the Review Division of four Board decisions:

Board Decision	Review Division	Review Reference
February 25, 2004	May 12, 2004	#14625
May 26, 2004	January 5, 2005	#23381
July 14, 2004	July 14, 2005	#28554
April 26, 2005	December 13, 2005	#R0053517

By decision dated January 5, 2005, the chief review officer denied the worker's request for review of a decision dated May 26, 2004 (that his left shoulder symptoms did not result from his accepted right shoulder injury).

The May 12, 2004 Review Division decision confirmed the Board's decision of February 25, 2004 to pay further wage loss benefits based on the worker's long term wage rate. The review officer reasoned in part:

> Modified work became available with the accident employer. The Board provided ongoing wage loss benefits based on his initial wage rate to February 8, 2004, when the modified work was no longer available. As of February 9, 2004, the worker's wage loss benefits were paid based on his long term wage rate.
>
> **The worker has requested a review of the Board's determination of his long term wage rate. I am unable to review this determination as it was not contained in the Board's letter of February 25, 2004.**
>
> I contacted the worker on May 5, 2004 to discuss this matter. The worker has requested that I proceed with a review of the issue that is contained in the letter of February 25, 2004, specifically the Board's decision to pay further wage loss benefits based on his long term wage rate.
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> [emphasis added]

The July 14, 2005 Review Division decision confirmed the worker's functional permanent partial disability award, including the decision to use the prior long term wage rate for wage loss purposes for pension purposes as well. The worker appealed the July 14, 2005 Review Division decision to WCAT. By decision dated March 3, 2006 (*WCAT Decision #2006-01084*), the WCAT panel denied the worker's appeal.

The December 13, 2005 Review Division decision concerned the setting of a new wage rate for the reopening of the worker's claim on April 21, 2005, having regard to the June 30, 2002 amendments to the Act.

By decision dated May 4, 2006, the worker was granted an increase of 2.5% for chronic pain, for a total award of 18.36% of total disability, with no loss of earnings pension award. The worker has requested review of the May 4, 2006 decision by the Review Division.

Submissions

Following the February 25, 2004 letter, the worker wrote to WCAT on May 12, 2004 to request that his appeal of the September 16, 2002 decision be reinstated. The worker explained:

> On April 23-03 I was written that the request to withdraw an appeal was acepted. I would appreciate very much for you to reinstate my appeal.
>
> Because at the time I didn't know how the appeal system worked. My wages at that time were reduced for only 2 or 3 wks. I spoke with my case management about it. I was informed at that time, that it was such a short time of wage reduction. I might as well withdraw my appeal. I was not informed that it would cause me a big problem in the future. I apologise for being so dum in these matters. If I wasn't I would never have withdrawen my appeal.
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> [reproduced as written]

By submission of May 12, 2004, the workers' adviser argued:

> Unfortunately, [the worker] had not received any advice from our office prior to requesting a withdrawal of his active appeal. [The worker] alleges that he was provided with incorrect advice by his Case Manager regarding his wage rate concerns. [The worker] felt that he had no reason to disbelieve the advice given by the Case Manager. This advice resulted in [the worker] inadvertently withdrawing his appeal to the WCAT. Further, the issue associated with [the worker's] previously registered appeal could have been easily misunderstand [*sic*] with what has actually transpired with his WCB claim. The evidence supports that [the worker] has been confused with the administration and the decisions made on his WCB claim.
>
> Specifically, [the worker's] wage rate was adjusted when he resumed working under Section 30 benefits, and this adjustment in his wage loss top-up reflected his day of injury earnings rather than his long term wage rate according to Board policy 35.22. Now that [the worker] has be [*sic*] considered temporarily totally disabled his wage loss benefits are once again based on his long term rate which he had previously disagreed with and consequently appealed and withdrawn in error.

In a submission dated May 8, 2006, the workers' adviser further argues:

> [The worker's] May 12, 2004 letter to WCAT describing the situation surrounding his request to withdraw his Review Board appeal must be viewed in the proper context. [The worker] believed his wage rate was fixed when his rate was increased when he returned to work part-time and received Section 30 benefits. [The worker] indicates that he relied on the advice of his Case Manager, at that time, who apparently informed him that he did not have to appeal his wage rate decision and his wages would be increased. In these circumstances, the Case Manager's advice was only partially true. However, [the worker] accepted his Case Manager's words at face value and withdrew his appeal of the September 16, 2002 decision to the Review Board.
>
> Under these circumstances, was the Deputy Registrar's decision to accept [the worker's] request to withdraw his appeal reasonable? In this writer's experience, on many occasions the Deputy Registrars of the Review Board routinely contacted workers and representatives to validate the intent and understanding of questionable requests that came before that appellate body. In [the worker's] case, his request was accepted at face value without any inquiry. While we admit there is no defined procedure requiring the Deputy Registrar to question the validity of an appellate request, there jurisprudence through the courts where there is an inquiry into questionable decisions with significant ramifications. In this writer's view, the lack of inquiry into [the worker's] request to withdraw is consistent with a breach in procedural fairness.
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> . . .
>
> Viewing the situation and circumstances broadly, we admit that they do not fall within the classic definition of a breach of procedural fairness historically considered by WCAT. However, the evidence speaks volumes for reasons why this application should succeed. The Board, as the primary player in the compensation system, allegedly mislead [the worker] with respect to a major entitlement issue. This conduct has had serious consequences on [the worker's] compensation entitlement. . . . In [the worker's] case, he made a bad choice without knowing all of the factors at play and a simple inquiry from the Registrar's Office would have probably avoided this situation. For these reasons, we submit that [the worker's] application for reconsideration should be granted.
>
> [reproduced as written]

Findings and Reasons

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. As discussed in *WCAT Decision #2004-03571*, "Reconsideration Application — Whether There Has Been a Breach of Natural Justice Almost Always Depends on All of the Circumstances", 20 W.C.R. 291, this test represents a codification of the common law.

The text, Jones and de Villars, *Principles of Administrative Law*, Third Ed. (Toronto: Carswell, 1999) at 513-514, contains the following analysis:

> (a) The Standard for Determining Whether there has been a Breach of the Principles of Natural Justice and Procedural Fairness
>
> Neither the "correctness" test nor the "patently unreasonable" test really fits this ground for judicial review. Although a breach of natural justice or procedural fairness has the effect of taking the statutory delegate outside its jurisdiction--and so might at first glance engage the "correctness" test--any student of Administrative Law will quickly reply that **there is no mathematical formula for determining whether a particular alleged defect in procedure is sufficient to constitute a breach of natural justice; it almost always depends upon all of the circumstances...**
>
> Perhaps the better way to look at this question is to articulate a separate test for judicial review of alleged breaches of natural justice: namely, **would a reasonable person, reasonably knowledgeable about all the facts, reasonably perceive that the process is unfair**? This echoes the way the Rule Against Bias is usually articulated, but it can be generalized to apply to all alleged breaches of natural justice. Of course, the reasonable person is the court. If this question is answered affirmatively, then the standard for review has been tripped, and the delegate's proceedings should be quashed.
>
> [emphasis added]

In a unanimous decision of the Supreme Court of Canada, *Moreau-Bérubé* v. *New Brunswick (Judicial Council)*, 2002 S.C.C. 11, [2002] 1 S.C.R. 249 at paras. 74-75, Justice Arbour stated:

> (3) Procedural Fairness
>
> 74 The third issue requires no assessment of the appropriate standard of judicial review. **Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a**

> **particular situation**. (See generally *Knight v. Indian Head School Division No. 19,* [1990] 1 S.C.R. 653, and *Baker*, *supra*.)
>
> 75 The duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority (see *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Cardinal v. Director of Kent Institution,* [1985] 2 S.C.R. 643, at p. 653; *Baker*, *supra*, at para. 20; *Therrien*, *supra*, at para. 81). Within those rules exists **the duty to act fairly, which includes affording to the parties the right to be heard, or the *audi alteram partem* rule. The nature and extent of this duty, in turn, "is eminently variable and its content is to be decided in the specific context of each case"** (as *per* L'Heureux-Dubé J. in *Baker*, *supra*, at para. 21). Here, the scope of the right to be heard should be generously construed since the Judicial Council proceedings are similar to a regular judicial process (see *Knight*, *supra*, at p. 683); there is no appeal from the Council's decision (see D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 1, at pp. 7-66 to 7-67); and the implications of the hearing for the respondent are very serious (see *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113).
>
> [emphasis added]

In this case, the worker filed a timely appeal of the September 16, 2002 decision concerning his long-term wage rate for wage loss purposes. However, shortly after that decision he returned to work with his accident employer on a part-time basis. As he remained temporarily partially disabled, the case manager found that the wage rate for payment of wage loss purposes should remain at the initial rate set on the claim, pursuant to the exception contained in the policy at RSCM I item #35.22. It appears, therefore, that the worker may have withdrawn his appeal on the basis that he considered the issue regarding his long-term wage rate for wage loss purposes to be largely moot (apart from the short period before his return to work with his accident employer on temporary partial disability benefits).

I have reviewed the claim log entries on the claim file to see if there is information concerning any discussions which may have occurred between the worker and the case manager during the time period from September 2002 until April 2003. I did not find any relevant information in this regard. For example, there is no evidence that the case manager indicated to the worker that he would have to withdraw his appeal in order for his section 30 benefits to be paid at the higher level. The September 30, 2002 claim log entry by the case manager stated simply:

> **REGARDING: RETURN TO ORIGINAL RATE**

> I note the hours/earnings for this worker. As he has returned to work with th accident employer/S30 – the rate goes back to the initial rate while he is continuing to work at least part time. The date of injury was prior to June 30 – the effective date of the new legislation.
>
> [reproduced as written]

The worker's request for withdrawal of his appeal was made much later, in April 2003.

It was not until the worker's employer went into receivership, and the worker's wage rate was re-established based on his long-term wage rate (as he was no longer employed with his accident employer) that this issue became significant to the worker. The worker was advised of this change by the case manager's decision of February 25, 2004. The worker requested review of the February 25, 2004 decision. As set out in *Review Division Decision #14625* dated May 12, 2004, the review officer contacted the worker by telephone on May 5, 2004 to discuss this matter. The review officer explained that he could not address the worker's long-term wage rate, as this was not an issue determined in the February 25, 2004 decision letter. The only issue before the review officer concerned whether the case manager was correct in proceeding to pay benefits based on the previously established long-term wage rate, once the worker was no longer working for the same employer on a suitable employment basis at a reduced wage rate. The subsequent decision regarding the worker's wage rate for pension purposes was also a separate decision, pursuant to RSCM I item #67.20.

Following this May 5, 2004 telephone discussion with the review officer (and the issuance of the May 12, 2004 Review Division decision), the worker promptly contacted WCAT on May 12, 2004 to request that his appeal of the September 16, 2002 decision be re-established.

Looking at the matter in very broad terms, I would agree that some sense of unfairness flows from the fact that the worker's withdrawal of his appeal appears to have been based on his understanding that his wage loss benefits were being restored to their original level. The worker was unrepresented and did not appreciate the significance of the determination of his long-term wage rate for his claim. When the significance of this determination became evident, the worker acted promptly in seeking to re-establish his appeal.

Prior to the March 3, 2003 changes to the Act, the former Review Board and Appeal Division both had a discretion to extend time for an appeal under sections 90(1) and 91(1) of the former Act. If I were considering the worker's application on the basis of such a general discretion, I would likely conclude that an extension of time for his appeal should be granted.

In the context of this application, however, I have no statutory discretion to exercise such as was contained in the former sections 90(1) and 91(1) of the Act, to which I

might apply such general notions of "fairness". In the context of this application for reconsideration, my consideration of "fairness" must be concerned with the April 23, 2003 letter from the Workers' Compensation Appeal Tribunal (WCAT) vice chair/deputy registrar, as to whether fair procedures were followed in the making of that decision and whether WCAT acted fairly in accepting the worker's withdrawal. The workers' adviser argues that WCAT did not follow a fair process, by failing to inquire further regarding the worker's request for withdrawal (to ensure that the worker had an adequate understanding as to the significance of this action to his claim).

Archived versions of WCAT's former *Manual of Rules, Practices and Procedures* are accessible on WCAT's website. Effective March 3, 2003, MRPP item #8.70 provided:

> **5.60 Withdrawals**
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> **An appellant may withdraw the appeal by right at any time before the appeal has been assigned to a WCAT panel**. After the appeal has been assigned to a WCAT panel, any request for withdrawal of the appeal will be considered by the panel. The request for a withdrawal will normally be granted. However, once the panel has begun its consideration of the evidence, the WCAT panel has a discretion to decline to grant a withdrawal.
>
> For example, where there is evidence of fraud or misrepresentation by the appellant, the panel may refuse to accept a request for withdrawal. Similarly, where the evidence under consideration by the panel indicates that there was an error of law or policy in the decision under appeal in favour of the appellant, the WCAT panel may refuse a request for a withdrawal.
>
> [emphasis added]

In this case, the request for withdrawal was made prior to the notice of appeal – part 2 being filed, so the requirements for appealing had not been perfected. In this sense, the request for withdrawal was made before there was a valid appeal before WCAT. At the time of the April 23, 2003 letter from the vice chair/deputy registrar, the worker's appeal had not been assigned to a WCAT panel.

In sum:

- the worker had been informed in writing that he must complete a notice of appeal – part 2 by April 15, 2003 or the appeal may not proceed;
- the worker had been informed as to the availability of assistance from the office of the workers' advisers;
- the worker did not complete a notice of appeal –part 2;
- the worker contacted WCAT by telephone the day prior to this deadline, to express his wish to withdraw his appeal;
- MRPP item #5.60 stipulated that an appellant may withdraw the appeal by right at any time before the appeal has been assigned to a WCAT panel; and,
- the worker's appeal had not been assigned to a WCAT panel.

In this context, I find no unfairness in the vice chair/deputy registrar's acceptance of the worker's request for withdrawal. Assuming the worker's request for withdrawal was simply accepted at face value, without any questioning on the part of the vice chair/deputy registrar, I do not consider that this involved any unfairness. I am not persuaded that the vice chair/deputy registrar had an obligation to inquire further, to question the worker's understanding as to the significance of this decision, or to provide advice to the worker concerning the potential significance of this decision to his claim. The worker had been informed in writing as to the availability of assistance from the office of the workers' adviser, and could have sought out such assistance had he so desired. While the workers' adviser makes a general reference to jurisprudence through the courts, no specific court decisions have been cited to support the conclusion that the vice chair/deputy registrar had a duty to question the worker regarding his request for withdrawal.

While not necessary to my decision, I also note that WCAT's *2003 Annual Report* (accessible on the WCAT website) states that when WCAT was created on March 3, 2003, more than 22,400 appeals were transferred to it from the former Review Board and Appeal Division. This backlog was addressed over the following three years, while new appeals were subject to a statutory time frame for timely decision-making. It is readily apparent that such case volumes would have created pressures on the WCAT Registry to deal with the preliminary handling of appeals as expeditiously as possible. Notwithstanding such practical considerations, the worker would be entitled to have his appeal reinstated if WCAT failed to follow a fair process in accepting the withdrawal of the worker's appeal. I am not persuaded, however, that there was any unfairness in the April 23, 2003 letter from the vice chair/deputy registrar.

Conclusion

The worker's application for reconsideration of the April 23, 2003 letter from the WCAT vice chair/deputy registrar is denied on the common law grounds. The decision did not involve a breach of natural justice or procedural fairness. The WCAT decision stands as "final and conclusive" under section 255(1) of the Act.

Herb Morton
Vice Chair

HM/pm/cd