Noteworthy Decision Summary

Decision: WCAT-2007-00293 **Panel:** John Steeves **Decision Date:** January 26, 2007

Reconsideration on common law grounds – Breach of rules of natural justice - Failure to address request for oral hearing

This decision is noteworthy as a reconsideration panel sets aside the original WCAT decision on the basis that the original panel did not address the request for an oral hearing and, thus, did not adequately consider the important issue of the worker's right to be heard.

The worker, a bus driver, applied for compensation for a right shoulder, right elbow, and lower back strain. The Workers' Compensation Board operating as WorkSafeBC (Board), denied the claim finding that the risk factors were insufficient to cause the worker's problems. The Review Division decision, confirming the Board's decision, was appealed to WCAT. The notice of appeal stated that the work site visit carried out by the Board was not a comprehensive report regarding the worker's work requirements. An oral hearing was requested so that the worker could fully explain his driving restrictions.

In *WCAT Decision #2003-04345* the original panel denied the worker's appeal. There is no reference to the worker's request for an oral hearing in that decision nor any discussion about whether an oral hearing was necessary. The worker's union submitted that WCAT breached the rules of natural justice when it denied an oral hearing.

On reconsideration, the reconsideration panel concluded that a decision was required by the original panel about whether the request for an oral hearing would be allowed or not, with reasons related to the particular facts of the case. That did not happen and, therefore, the original panel did not consider the important issue of the worker's right to be heard adequately, or at all. For this procedural reason the decision was set aside. In addition, the reconsideration panel noted that the original panel found that the worker had not provided any new evidence with regard to an analysis of the risk factors or calculation of exposure, yet the worker had requested an oral hearing to present new evidence that his stature was not considered by the work site evaluation.

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Panel: John Steeves, Vice Chair

Introduction

This is a decision with regards to the worker's application for reconsideration of a previous Worker's Compensation Appeal Tribunal (WCAT) decision dated December 29, 2003.

The worker submits that there was a breach of natural justice with his appeal to the previous WCAT panel when his request for an oral hearing was denied. He requests that the previous WCAT decision be set aside.

The employer is participating in this application. They submit there was no denial of natural justice when WCAT denied a request for an oral hearing. The employer requests that the worker's application for reconsideration be dismissed.

Issue(s)

Does the previous WCAT decision contain a patently unreasonable error of law, including a breach of natural justice?

Jurisdiction

WCAT uses the broad heading of "reconsideration" to include two situations. The first is where an applicant seeks to have a decision reconsidered on the basis of new evidence. WCAT's authority to reconsider on the basis of new evidence is defined by section 256 of the *Workers Compensation Act* (Act).

WCAT also has authority to "reconsider" (i.e. to set aside or void one of its decisions) on the common law ground of an error of law going to jurisdiction, including a breach of natural justice. These grounds are described at items #15.20 to #15.24 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP), accessible on WCAT's website at: http://www.wcat.bc.ca/publications/toc.htm. 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. *Workers' Compensation Board*, (2003) BCCA 470, [2003] B.C.J. No. 1985, (2003) 186 B.C.A.C. 83 (see *Workers' Compensation Reporter*, Volume 19, page 211).

This matter has been assigned to me by the WCAT chair for consideration under a written delegation of authority.

Standard of Review

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 Act or on the basis of the common law ground of an error of law going to jurisdiction. The question as to whether a decision involves an error of law going to jurisdiction generally requires application of the "patently unreasonable" standard of review. In other cases the standard is correctness. Further, on a natural justice issue, the question to be addressed is whether the procedures followed by WCAT were fair (see *WCAT Decision #2004-03571*, 20 WCR 291). These different standards of review are also set out in the *Administrative Tribunals Act.*

Background

The facts related to this application can be briefly summarized.

On January 18, 2003 the worker submitted an application for compensation with regards to a right shoulder, right elbow, and lower back strain as a result of continual turning of a steering wheel while employed as a bus driver. A form 7 submitted by the employer indicated that there was "consistent overtime" for the periods January 16, 2002 to January 15, 2003 and October 16, 2002 to January 15, 2003.

The Workers' Compensation Board, operating as WorkSafeBC (Board) visited the work site on February 26, 2003. The worker, two representatives of his union, and representatives of the employer participated in the work site evaluation. Two bus routes were evaluated. The Board's conclusion was that, on one route, 8.3% of the shift involved awkward movements and the percentage was 9.3% on the other route.

The employer provided further information to the Board on February 27, 2003 in the form of a generic ergonomic assessment, dated May 16, 2002. This report assessed the position of bus driver and, among other things, it concluded that the motion of turning was not classified as a repetitive motion, the grip on the steering wheel was not sustained for the entire duration of a turn, and the operation of the door controls was not classified as repetitive motion. Further, the operation of signal controls was not classified as a repetitive motion, but the seated posture placed the operator at a high risk hazard category for a significant portion of the shift.

In a log entry dated March 5, 2003 the Board reviewed the worker's claim. The Board accepted that the worker had frequent shoulder repetition, but only occasional awkward postures and the worker used occasional force within the sedentary strength category when he was making turns. The risk factors at work were thought to be insufficient to cause the worker's right shoulder problems and the claim was disallowed. A decision dated March 6, 2003 was sent to the worker, denying his claim for compensation. It

confirmed that his work activities met the criteria for repetition, but not for significant awkward postures.

The worker appealed the March 6, 2003 decision to the Review Division. He was represented by his union and the request for review (dated March 13, 2003), also requested an oral hearing because, "worker needs to personally demonstrate his driving duties." A submission dated April 24, 2003, made on behalf of the worker, stated that he had shorter legs than most drivers and this was a factor in his right shoulder injury. It was also submitted that the work site evaluation was not complete enough as it was "nothing more than a short runaround serving very little purpose for a true evaluation as to awkward positions." Again, "his stature does indeed place him in an unnatural position." The employer provided submissions disagreeing with the submissions of the worker.

In a decision dated July 8, 2003 the Review Division denied the worker's request for a review. The review officer concluded that she did not have any evidence to contradict the findings in the work site evaluation of February 26, 2003. The worker's case did not meet the test for presumption for work causation under section 6(3) of the Act and it did not meet the requirements of Board policy for establishing a claim where no presumption applies.

WCAT Decision of December 29, 3003

The worker appealed the Review Division decision of July 8, 2003 to WCAT. The worker continued to be represented by his union and a notice of appeal fax dated August 8, 2003 repeated that the site visit was not a comprehensive report regarding the worker's work requirements. An oral hearing was again requested.

In a letter dated September 12, 2003 WCAT advised the worker that, based on WCAT criteria, the worker's appeal would proceed by way of written submissions.

In a letter dated September 30, 2003 the worker's union representative advised WCAT that an oral hearing was required so that the worker could fully explain his driving restrictions. It also stated that if WCAT felt that the worker's claim could be properly adjudicated without the benefit of an oral hearing, they had no objections.

In a decision dated December 29, 2003 WCAT denied the worker's appeal. There is no reference to the worker's request for an oral hearing in that decision or any discussion about whether an oral hearing was necessary.

The reasoning of the WCAT panel can be summarized as follows:

- The panel could not find any important fact or evidence that had been overlooked by the review officer's analysis of the risk factors.

- The panel stated as follows:

> The worker has not provided any new evidence with regard to an analysis of the risk factors or calculation of exposure nor did they provide such analysis to the Review Division. No information has been provided which would confirm that the worksite evaluation and generic ergonomic report are not indicative of the work motions, routes, and exposures found in the normal operation of a public transit bus.

- The panel accepted the examination of risk factors undertaken by the review officer.

Application for Reconsideration

In a submission dated January 7, 2004, the worker's union submitted on his behalf that the WCAT breached his rights of natural justice when it denied an oral hearing. According to this submission, an oral hearing was essential so that the worker could demonstrate his driving habits.

A reply submission from a representative of the employer, dated September 29, 2005, addressed the decision not to grant an oral hearing before the previous WCAT panel. They submit that there is no common law right to an oral hearing and the primary reason for holding an oral hearing has to do with credibility of the evidence. Credibility is not an issue in this case. The employer also questions whether there would be any use for a hearing in this case.

A reply submission on behalf of the worker, dated October 25, 2005, stated that WCAT's MRPP requires an oral hearing where there are significant factual issues to be determined. In this case, an oral hearing was necessary because the work site visit was not representative of the worker's driving habits because it was more generic than factual.

Decision and Reasons

Speaking generally, the right to be heard is a fundamental aspect of natural justice and administrative fairness. But it does not necessarily follow that an oral hearing is always necessary to ensure a fair hearing; "…the duty to be fair does not necessarily mean an *oral* hearing is required" (David Phillip Jones, Anne S. de Villars, *Principles of Administrative Law* (2004 Thomson Canada Limited), page 267, emphasis in original). "The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations" (*Baker* v. *Canada (Minister of Citizenship and Immigration),* [1999] S.C.R. 817 at paragraph 33). Also, in the absence of a statutory requirement for an oral hearing, there is no common law right to an oral

hearing (David Phillip Jones and Anne S. de Villars, *supra*, page 274; citing *Pacific Rim Credit Union* v. *British Columbia (Attorney General)* (1988), 32 Admin. L.R. 49 (B.C.S.C.).

The statutory provision that governs oral hearings before WCAT is section 246(1) of the Act. It is as follows:

> 246(1) Subject to any rules, practices or procedures established by the chair, the appeal tribunal may conduct an appeal in the manner it considers necessary, including conducting hearings in writing or orally with the parties present in person, by means of teleconference or videoconference facilities or by other electronic means.

Clearly, this provision does not require WCAT to hold an oral hearing in every appeal or application. Instead broad discretion is given to WCAT to conduct an appeal "in the manner in which it considers necessary" (subject to the rules, practices or procedures of the chair).

The MRPP (item #8.90, December 3, 2004) is also relevant. It states as follows:

> …WCAT will normally grant a request for an oral hearing where the appeal involves a significant issue of credibility. An oral hearing may also be granted where there are:
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> (a) significant factual issues to be determined;
> (b) multiple appeals of a complex nature;
> (c) complex issues with important implications for the compensation system;
> (d) other compelling reasons for convening an oral hearing (e.g. where an unrepresented appellant has difficulty communicating in writing).
>
> WCAT will normally conduct an appeal on a read and review basis where the issues are largely medical, legal, or policy based and credibility is not at issue. For appeals in the regular and complex streams, the registrar's office will determine at the outset whether the case will proceed by way of written submissions or an oral hearing. For appeals in the specialty stream, the panel will determine the method of hearing (see item 4.40). Panels have the discretion to change the method of hearing. A panel may decide to convene an oral hearing if the panel considers this necessary or helpful to its decision. If an oral hearing has been scheduled, the panel may conclude that an oral hearing is not necessary to its decision and proceed by way of written submissions.

It is also open to a panel assigned to an appeal or application before WCAT to change the method of hearing. Item #8.70 of the MRPP is as follows:

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

Despite the broad discretion given to WCAT on the manner of hearing appeals and applications, this is not an absolute discretion. Some situations will require an oral hearing in order to properly apply the right to be heard. When these situations are not recognized there can be reviewable errors on the basis of, for example, a breach of the rules of natural justice. And deference from reviewing authorities should not be expected. The duty to comply with the rules of natural justice (including the application of the right to be heard) is "eminently variable and its content is to be decided in the specific context of each case" (*Baker, supra,* paragraph 21). See also *WCAT Decision #2004-03794* where the panel stated, "On issues of procedural fairness …no deference is accorded a tribunal decision" (page 11*).*

It follows that there is no hard and fast rule that will decide all future questions of when an oral hearing is required before WCAT. Each case has to be considered on its own merits in the light of the rules of natural justice, the Act, and the MRPP.

With regards to this application, by way of a summary, the facts involve a request for an oral hearing by the worker's representative on more than one occasion.

The first request for an oral hearing to WCAT was denied in the letter dated September 12, 2003. The file does not indicate that the registrar of WCAT considered the subsequent request by the worker's representative of September 30, 2003. And the decision of the previous panel contains no reference to the request by the worker for an oral hearing. The letter of September 30, 2003 also states that, if WCAT felt that the worker's claim could be properly adjudicated without an oral hearing, there were no objections. This statement is different than one saying an oral hearing is not necessary and I do not find that it amounts to the representative waiving the worker's right to a hearing. In any event it was not considered by WCAT and, again, after this letter no one at WCAT said the appeal could be adjudicated without an oral hearing.

It is clear that a panel has the discretionary authority to change the method of hearing an appeal under item #8.70 of the MRPP (see above) and the request by the worker's representative clearly raised the exercise of this authority. In my view a decision was required by the panel about whether the request for an oral hearing would be allowed or not, with reasons related to the particular facts of the case (*WCAT Decision #2004-03794).* That did not happen and I conclude the previous WCAT panel did not consider the important issue of the worker's right to be heard adequately, or at all. For this procedural reason it must be set aside.

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Another aspect of the previous WCAT decision is of concern. It is clear that the panel was faced with a factual issue: whether the work as a bus driver was of causative significance for the worker's activity-related soft tissue disorder. In this case, it was a fair question for the worker to pose that he is short in stature and the generalized information on file cannot be determinative of his individual claim (I say this without in any way deciding whether that was the case).

However, the previous WCAT decision stated, "The worker has not provided any new evidence with regard to an analysis of the risk factors or calculation of exposure." This characterization of the evidence is unfortunate in the circumstances of this case. On the one hand, the worker was not permitted to present the evidence he thought was relevant and probative because his request for an oral hearing was not considered. However, the primary reason for the denial of his appeal is that he did not present "any new evidence" to counter the evidence on file. Not many workers (or employers) are able to produce expert reports to counter expert reports on file and an oral hearing is sometimes a practical way to reply to the reports on file (other ways include photographs, video, and so on). Whether the worker was correct that an oral hearing was required in this case is something that cannot be determined because we do not have a reply to his request to an oral hearing.

Conclusion

An oral hearing is not required in every appeal or application before WCAT. That is a discretionary matter to be determined by the rules of natural justice, the provisions of the Act, and the MRPP. In this case the worker's representative made a request for an oral hearing consistent with item #8.70 of the MRPP, after the registrar denied a hearing at the submission stage. There is no indication on the file or the decision of the previous WCAT panel that this request was considered. Further, the worker believed he could only explain through an oral hearing why small stature in his particular case was a significant factor not considered by the Board's general report of his work site. Whether this was the case is not something that cannot be determined because we do not have a reply to his request for an oral hearing.

For the above reasons the worker's application for reconsideration of the WCAT decision dated December 29, 2003 is allowed. The file will be returned to the registrar of WCAT.

John Steeves
Vice Chair

JS/hb

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