

Noteworthy Decision Summary

Decision: WCAT-2007-00475 **Panel:** Herb Morton **Decision Date:** February 8, 2007

Authority of WCAT to order reimbursement of expenses – Withdrawn appeals – Section 7 of the Workers Compensation Act Appeal Regulation –

This is a reconsideration of a prior WCAT decision. WCAT has the authority to grant reimbursement of expenses under section 7 of the *Workers Compensation Act Appeal Regulation* (Appeal Regulation), in connection with a summary decision regarding a request by the appellant to withdraw the appeal.

The original panel accepted the worker's request to withdraw his appeals, and denied the worker's request for reimbursement of expenses under section 7 of the Appeal Regulation. The original panel found that, as the worker had requested the withdrawal of the appeals registered with WCAT, he could not order reimbursement of expenses related to a functional capacity evaluation and medical-legal opinion as there was no appeal.

The worker requested a reconsideration of the original panel's decision on the basis of common law grounds of error of law going to jurisdiction. The reconsideration panel allowed the worker's application on the common law grounds. The reconsideration panel found that the worker's appeals remained before WCAT until the original panel issued its decision (whether a summary decision to accept the withdrawal or a decision on the merits). There was an inherent contradiction between the original panel's finding that there was no appeal before it, and its issuance of a decision regarding the worker's requests for withdrawal of his appeals. In finding that "there are no expenses that can be granted if there is no appeal", the original panel effectively fettered its discretion under section 7 of the Appeal Regulation. The wording of section 7 of the Appeal Regulation does not limit WCAT's authority to order reimbursement of expenses to situations where a final decision has been made concerning the merits of the appeal. The original panel appeared to have read this provision as referring to evidence submitted to, and considered by, the appeal tribunal. The effect of the original panel's decision seemed to add a limitation not contained in the wording of section 7.

WCAT Decision Number : WCAT-2007-00475
WCAT Decision Date: February 08, 2007
Panel: Herb Morton, Vice Chair

Introduction

The worker seeks reconsideration of one aspect of the February 6, 2006 Workers' Compensation Appeal Tribunal (WCAT) decision (*WCAT Decision #2006-00580*), concerning his request for reimbursement of expenses. The WCAT panel accepted the worker's requests for withdrawal of his appeals, and denied the worker's request for reimbursement of expenses under section 7(1) of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/2002 (the Appeal Regulation).

The worker's request for reconsideration was initiated by a letter dated April 4, 2006 from his union representative. By letter dated September 21, 2006, the WCAT appeal coordinator provided information to the worker 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 and #10, **New Evidence**; #11, **Common Law Grounds**; and #14, **Law, Policy and Decisions on Reconsiderations**, in the information sheet).

[emphasis in original]

The worker's representative provided a further submission dated October 5, 2006. The employer is represented by a consultant, who provided a submission dated October 27, 2006. This was disclosed to the worker's representative, who declined to provide a rebuttal. By letter dated November 17, 2006, the appeal coordinator advised that submissions were considered complete.

Rule #8.90 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) provides that 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 an issue. Similar considerations apply to a reconsideration application. I find that the issue as to whether the WCAT decision involved an error of law going to jurisdiction involves questions of a legal nature which can be properly considered on the basis of written submissions without an oral hearing.

Issue(s)

Did the WCAT decision involve an error of law going to jurisdiction?

Jurisdiction

Section 255(1) of the *Workers Compensation Act*, R.S.B.C. 1996, ch. 492 (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 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 *Administrative Tribunals Act*, S.B.C. 2004, ch. 245 (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. This section 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* (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 reconsideration application was assigned to me by the WCAT 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 appealed two Review Division decisions to WCAT: *Review Decision #14332* dated July 21, 2004, and *Review Decision #20160* dated December 23, 2004. In a written submission dated December 15, 2005, the worker's union representative advised:

The issues remaining under the two decisions were the date of stabilization / termination of wage loss benefits under the February 5, 2004 decision. [The worker] withdraws that appeal.

[The worker] disagreed with the April 28, 2004 decision with respect to the issue of a loss of earnings component for his pension. However, in view of the fact that he has returned to work with the injury employer at the same job, and has remained at that job since January 2004, he is no longer disputing that issue.

The only issue remaining is payment for costs incurred by [the worker] in obtaining a Functional Capacity Evaluation and a medical opinion from his attending physician. [The worker] submits that under the circumstances it was reasonably necessary for him to undergo an evaluation on his own and to obtain a medical opinion. Furthermore, even though he is no longer disputing the original decisions, if he had not taken these measures it would have been difficult for the WCAT panel to deal with the issues he appealed....

The worker's representative submitted:

[The worker] submits that he acted reasonably in obtaining a functional capacity evaluation and a medical opinion and, therefore, he should be reimbursed for the costs obtaining those reports, in accordance with WCAT policy and the Board's Schedule of Fees and Tarrifs.

[reproduced as written]

In *WCAT Decision #2006-00580*, the panel granted the worker's request for withdrawal of his appeals, but denied the worker's request for reimbursement of expenses. The WCAT panel reasoned:

With regards to the worker's representative's request for expenses of the functional capacity evaluation report and the medical-legal opinion, section 7(1) of the *Workers Compensation Act Appeal Regulation* provides that WCAT may order the Board to reimburse a party to an appeal of any expenses which include expenses associated with obtaining or producing evidence submitted to the appeal tribunal. As the worker has no dispute with the loss of earnings pension issue, in the decision of the Board and the review officer, there is no live outstanding issue that can be resolved in a remedy at appeal. **As the worker has requested the withdrawal of the appeals registered with WCAT, there are no expenses that can be granted if there is no appeal.**

I find that the worker is not entitled to any expenses for the functional capacity evaluation report and the medical-legal opinion.

[emphasis added]

Submissions

By submission dated April 4, 2006, the worker's representative argued:

I note that Section 7(1)(b) of the Appeal Regulation does not indicate that a party must follow through with an appeal, only that "it was reasonable for the party to have sought such evidence in connection with the appeal". Item 13.23 of the WCAT MRPP notes that as the workers' compensation system functions on an inquiry basis, rather than on an adversarial basis, reimbursement of expenses is not dependent upon the result in the appeal. I repeat that, at the time the Functional Capacity Evaluation and medical the worker had been involved in a number of negative decisions from the WCB and the Review Division and at that time it was reasonable for him to undergo the evaluation. We believe that if [the worker] is denied payment of costs because he acted reasonably, it could place workers in a position where they should pursue appeals, no matter what the merits are,

simply to address the issue of costs, which could well place an unnecessary burden on the appeals system.

[reproduced as written]

On October 5, 2006, the worker's representative further argued:

...the panel did have jurisdiction to deal with the issue of the payment of costs and, by determining that it did not have jurisdiction, failed to exercise its lawful obligation, resulting in an error of law with respect to jurisdiction.

The employer's representative quotes the reasoning in the WCAT decision and submits:

The above is obviously a reasonable statement and conclusion. The Functional Capacity Evaluation supposedly would be required and forwarded to support the worker's appeal. The payment of the Evaluation was not necessary for any aspect of the adjudication or the appeals on this claim and therefore the payment for the obtaining of the Functional Capacity Evaluation would not be a reasonable expense.

The employer does not agree that there is any basis for a reconsideration of that reasonable decision.

Reasons and Findings

(a) *Standard of review*

In *Ontario Public Service Employees Union v. Seneca College of Applied Arts & Technology*, [2006] O.J. No. 1756, (2006) 267 D.L.R. (4th) 509, the Ontario Court of Appeal reasoned:

29 Unfortunately, in its decision, the Divisional Court did not undertake this pragmatic and functional analysis. Instead, it seemed to take the view that because the question in issue was, in its opinion, a question of jurisdiction and a question of law, the standard of review must be correctness.

30 That is not a sound view. **Simply because the court labels an issue "jurisdictional" does not automatically mean that the standard of review of a tribunal's decision on that issue is correctness.** As Evans J.A. pointed out in *Via Rail Canada Inc. v. Cairns* (2004), 241 D.L.R. (4th) 700 at para. 33 (F.C.A.), "Conceptual abstractions, such as 'jurisdictional question', now play a much reduced role in determining the standard of review applicable to the impugned aspect of a tribunal's decision."

31 In other words, a court's finding that an issue has a jurisdictional aspect does not obviate the court's obligation to do a pragmatic and functional analysis. See *Voice Construction, supra* at paras. 20-22; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 21; *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.J. No. 4, 2006 SCC 4 at paras. 22-23. The "jurisdictional" nature of the issue is but a factor in that analysis, or more often, the characterization of the outcome of that analysis. See *Via Rail, supra* at para. 36 and *Pushpanathan, supra* at para. 28.

32 The purpose of the pragmatic and functional analysis - of considering the four contextual factors - is to ascertain the legislature's intent. See *Dr. Q, supra* at para 26. Did the legislature intend that a reviewing court give deference to the Board's decision, and if so, what level of deference? Or, put in terms of jurisdiction, did the legislator intend this issue to be exclusively within the Board's jurisdiction to resolve? See *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1089-1091.

33 In my opinion, the interplay of the four contextual factors points to a high degree of deference to the Board of Arbitration's decision. The question of the Board's remedial authority to award aggravated and punitive damages is a question that the legislature intended the arbitrators to decide. Their decision must stand unless it is patently unreasonable.

[emphasis added]

An application for leave to appeal to the Supreme Court of Canada was dismissed, November 16, 2006, [2006] S.C.C.A. No. 281.

In *United Brotherhood of Carpenters and Joiners of America Locals 527, 1370, 1598, 1907, and 2397 v. Labour Relations Board*, [2005] B.C.J. No. 3019, 2005 BCSC 1864, the British Columbia Supreme Court similarly reasoned:

[17] The decision in *Zero Downtime* is a finding of fact and law which the legislature clearly intended the Board to determine exclusively. At common law and under the *Administrative Tribunals Act*, the standard of patent unreasonableness is the standard to be applied to any judicial review of this type of decision. In my view, to view this decision as one going to jurisdiction, to apply to this review the standard of correctness, ignores the pragmatic and functional approach developed at the Supreme Court of Canada and in the British Columbia Court of Appeal and applied on a number of occasions by our Court of Appeal. This decision is not so fundamental to the operation that it is jurisdictional. This decision cannot

be viewed as the Board taking onto itself something, or acting in an area, that the legislature did not intend it to do. Those are true jurisdictional disputes for which the court has an obligation to review on a standard of correctness.

An appeal from this decision was dismissed by the British Columbia Court of Appeal on August 3, 2006 [2006] B.C.J. No. 1757, 2006 BCCA 364, (2006) 55 B.C.L.R. (4th) 325. The Court of Appeal determined that the pragmatic and functional approach must be applied to determine whether a question decided by an administrative tribunal was within its exclusive jurisdiction. At paragraph 47, it found that such an approach “requires reference to the four factors of: the presence or absence of a privative clause; the tribunal's relative expertise; the purpose of the Act as a whole and the provision in particular; and the nature of the problem.”

WCAT's decisions are protected by a privative clause, under section 255(1) of the Act. WCAT is an administrative tribunal with specialized expertise. The particular provision of the Appeal Regulation in question, and the nature of the problem under consideration, concerned WCAT's authority to address a request for reimbursement of expenses after an appellant has asked to have his or her appeal withdrawn. The WCAT chair has authority to establish practice and procedure for WCAT. WCAT's practice and procedure governing requests for withdrawal of appeals, and concerning reimbursement of expenses, has relevance to this issue. WCAT's practice and procedure on both points is based on WCAT's functioning on an inquiry basis, rather than on an adversarial basis. MRPP Rule #5.60 provides that a WCAT panel may refuse an appellant's request for withdrawal of an appeal. MRPP item #13.23 provides that “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.” While the courts have expertise in interpreting statutes and regulations, upon consideration of the foregoing I consider that the issue as to the interpretation of section 7 of the Appeal Regulation was one within WCAT's exclusive jurisdiction. Accordingly, the applicable standard of review is one of patent unreasonableness under section 58(2)(a) of the ATA.

(b) Other WCAT decisions

Other WCAT decisions (accessible on the WCAT website) have taken jurisdiction to make an award of expenses, in the context of considering an appellant's request for withdrawal of an appeal to WCAT under MRPP item #5.60.

WCAT Decision #2003-01714-RB, July 25, 2003, concerned an employer's appeal which was scheduled for an oral hearing on July 16, 2003. The employer faxed a letter to WCAT requesting permission to withdraw the appeal on July 11, 2003. However, this request was not brought to the WCAT panel's attention until after the time set for the oral hearing. The worker and his representative attended for the hearing at the

scheduled time. The panel granted the employer's request for withdrawal of the appeal, but found the worker was entitled under section 7(1)(a) of the Appeal Regulation to reimbursement of expenses incurred in travelling to attend the oral hearing.

In *WCAT Decision #2003-04114-RB*, December 12, 2003, the worker sent his request for a withdrawal of his appeal by fax on the same day as the oral hearing was scheduled to commence at 9:00 a.m. The respondent employer attended at the designated hearing place on time. Due to the 9:00 a.m. hearing time, it was necessary for the employer to travel the previous evening to the hearing location. The WCAT panel granted the employer's request for reimbursement of travel, accommodation and subsistence expenses related to attending the scheduled hearing.

In *WCAT Decision #2006-02301*, May 29, 2006, the worker's representative sent a fax to WCAT the day before the scheduled hearing to advise that the worker wished to withdraw her appeal. This was not forwarded to the WCAT panel prior to the time of the hearing. The employer's representative attended the oral hearing as scheduled, and requested reimbursement for the expense of obtaining a medical-legal report, as well as travel expenses from Victoria to Richmond to attend the oral hearing. The WCAT panel granted the worker's request for withdrawal of the appeal, and granted the employer's requests for reimbursement of expenses. The WCAT panel stated:

I find that since the employer's representative attended the oral hearing that did not proceed, they are entitled to expenses for both attendance at the oral hearing and the expenses of the medical report from Dr. Dipcotts dated April 19, 2006. These expenses are to be paid pursuant to the applicable Board tariffs.

(c) *Law and practice*

Section 7 of the Appeal Regulation provides:

- 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.

MRPP Rule #5.60 provides:

RULE: An appellant may withdraw an appeal by right at any time before the appeal has been assigned to a WCAT panel. After assignment, the panel decides whether to allow a request for withdrawal. The request for withdrawal will normally be granted. A panel could refuse the withdrawal request where, for example, there is evidence of fraud or misrepresentation by the appellant. Similarly, where there is evidence of an error of law or policy in favour of the appellant, the WCAT panel may refuse the request for withdrawal.

[bolding in original to denote a "Rule"]

The practice set out in MRPP Rule #5.60 is consistent with the court decision in *Canpar Industries Ltd. v. Assessor of Area #17 – Penticton*, 2000 BCSC 509, [2000] B.C.J. No. 585.

(d) *Analysis*

The employer submits that the WCAT decision is reasonable. Even if the decision was unreasonable, this would not be a basis for setting aside the WCAT decision. For the reasons set out above under "standard of review", the test for setting aside the WCAT decision is whether it is patently unreasonable.

Other WCAT decisions have interpreted section 7 of the Appeal Regulation differently, in granting requests for reimbursement of expenses to a party in connection with considering the appellant's request to withdraw the appeal. The fact that there are inconsistent WCAT decisions regarding the interpretation of section 7 of the Appeal Regulation does not necessarily mean, however, that one interpretation is patently unreasonable. A provision in the Act or regulations may be capable of being interpreted in more than one fashion. Both interpretations may be viable. Similarly, the fact that a tribunal renders inconsistent decisions on an issue does not necessarily mean that one interpretation is patently unreasonable (see *Appeal Division Decision #00-1596*, "Reconsideration of an appeal division decision – consistency and "Hallmarks of Quality Decisions", 16 W.C.R. 349).

In *Speckling v. British Columbia (Workers' Compensation Board)*, [2005] B.C.J. No. 270, (2005) BCCA 80, (2005) 46 B.C.L.R. (4th) 77, the British Columbia Court of Appeal described the effect of the "patent unreasonableness" standard of review:

[33] Having confirmed the correctness of the patently unreasonable standard of review, I agree with the chambers judge's summary of the approach to be taken in applying that standard. He noted the following principles (at para. 8):

1. The standard of review is that of patent unreasonableness: *Canada (Attorney General) v. P.S.A.C.* (1993), 101 D.L.R. (4th) 673 (S.C.C.).
2. "Patently unreasonable" means openly, clearly, evidently unreasonable: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
3. The review test must be applied to the result not to the reasons leading to the result: *Kovach v. British Columbia (Workers' Compensation Board)* (2000), 184 D.L.R. (4th) 415 (S.C.C.).
4. The privative clause set out in s. 96(1) of the Act requires the highest level of curial deference: *Canada Safeway v. B.C. (Workers' Compensation Board)* (1998), 59 B.C.L.R. (3d) 317 (C.A.)
5. A decision may only be set aside where the board commits jurisdiction error.
6. A decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not: *Douglas Aircraft Co. of Canada Ltd. v. McConnell*, [1980] 1 S.C.R. 245, and *Board of Education for the City of Toronto v. Ontario Secondary School Teachers' Federation et al* (1997), 144 D.L.R. (4th) 385 (S.C.C.).

In *Cowburn v. BC (WCB)*, [2006] B.C.J. No. 1020, 2006 BCSC 722, 148 A.C.W.S. (3d) 1037, May 5, 2006, the British Columbia Supreme Court granted the petitioner's application to quash a policy of the board of directors on the basis that it involved a patently unreasonable interpretation of the Act. The Court explained the meaning of the test of "patent unreasonableness" as follows:

[25] The judgment of Mr. Justice Iacobucci in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, is

frequently cited by courts attempting to define patent unreasonableness. He said the following at p. 777:

The difference between “unreasonable” and “patently unreasonable” lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal’s reasons, then the tribunal’s decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in **Canada (Attorney General) v. P.S.A.C.**, [1993] 1 S.C.R. 941, at p. 963, “[i]n the Shorter Oxford English Dictionary ‘patently’, an adverb, is defined as ‘openly, evidently, clearly’”. This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem. See **National Corn Growers Assn. v. Canada (Canadian Import Tribunal)**, [1990] 2 S.C.R. 1324, at p. 1370, per Gonthier J.; see also **Toronto (City) Board of Education v. O.S.S.T.F., District 15**, (1997), 144 D.L.R. (4th) 385 *per* Cory J. But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident. [emphasis added]

[26] He expanded on this principle in **Ryan v. Law Society (New Brunswick)**, [2003] 1 S.C.R. 247, where he said at ¶ 52:

[A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as “clearly irrational” or “evidently not in accordance with reason” (**Canada (Attorney General) v. P.S.A.C.**, [1993] 1 S.C.R. 941 (S.C.C.), at pp. 963-964, *per* Cory J., **Sherbrooke (Ville) c. Centre communautaire juridique de l’Estrie**, [1996] 3 S.C.R. 84 (S.C.C.), at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

[27] More recently, in ***Voice Construction Ltd. v. Construction & General Workers' Union***, [2004] 1 S.C.R. 609, Mr. Justice LeBel offered the following comment at ¶ 41:

It is illuminating in this respect to consider the definition of patent unreasonableness by Dickson J. (as he then was) in ***C.U.P.E., Local 963 v. New Brunswick Liquor Corp.***, [1979] 2 S.C.R. 227 (S.C.C.), at p. 237, which is the seminal judgment of our Court in the development of a modern law of judicial review. Rather than contemplating the metaphysical obviousness of the defect, he explained that a decision will only be patently unreasonable if it “cannot be rationally supported by the relevant legislation.”

The circumstances addressed in *WCAT Decision #2006-00580* were different than those in the three other WCAT decisions cited above. Those other decisions all concerned requests by respondents for reimbursement of expenses. In this case, it was the appellant who was seeking to withdraw his appeals while at the same time requesting reimbursement of expenses. However, the general legal issue involved in these four cases is the same, namely, does a WCAT panel have authority to grant reimbursement of expenses under section 7 of the Appeal Regulation, after the appellant requests that his or her appeal be withdrawn? Was it a viable interpretation of section 7 of the Appeal Regulation to treat WCAT's jurisdiction, to order reimbursement of expenses under section 7 of the Appeal Regulation, as being contingent on the worker's appeals proceeding to be heard on the merits?

It is clear from MRPP Rule #5.60 that after an appeal has been assigned to a WCAT panel, a request to withdraw an appeal does not automatically terminate the appeal. After the panel assignment, the panel decides whether to allow a request for withdrawal. While provided in a different context, the reasoning of the British Columbia Supreme Court in *Canpar, supra*, is of interest:

[18] Section 57(1) of the [Assessment] Act provides:

57(1) In an appeal under this Part, the board

(a) may reopen the whole question of the property's assessment to ensure accuracy and that assessments are at actual value applied in a consistent manner in the municipality or rural area, and

(b) when considering whether land or improvements are assessed at actual value, must consider the total assessed value of the land and improvements together.

[19] Courts in some previous cases have considered the significance of the jurisdiction conferred on the board under s. 57(1) in the context of applications to withdraw appeals. Meredith J. in *Quintette Coal Ltd. v. Assessment Appeal Board (British Columbia)* (1986), 8 B.C.L.R. (2d) 51, held that the rule which provided that an appeal could be withdrawn or abandoned only with leave of the Board was valid and that the Board had properly exercised its discretion under it. He made comments (later approved by the Court of Appeal in *Captains Enterprises Ltd. v. British Columbia (Assessor of Area No. 13 - Dewdney - Alouette)*, [1989] B.C.J. No. 1531, (10 August 1989), Victoria Registry, V00690 (B.C.C.A.)) at 55:

... True, litigants generally have the undeniable right to abandon their own proceedings. But Appellants are not litigants. An Assessment Appeal invests the Appeal Board with the power and imposes upon it is well the duty of determining value by a number of means available to it. The process is essentially inquisitorial. On the other hand, processes before Courts of law are adversarial. The Court has, in the nature of things, to be responsive, and only responsive, to the litigant who seeks its aid. Unlike the Assessment Appeal Board, the Court has no function if the litigant decides to quit. Thus the parallel contended for is inaccurate. **The Board may continue its inquiry whatever the wishes of an appellant. Thus the appellant may not be allowed to thwart the function of the Board by withdrawal, once the Appeal process has been put in motion. And once put in motion, the Board has a very broad jurisdiction.** It is not governed by or confined to grounds of appeal alleged or submissions made to it by the appellant or appellants: *Assessment Commissioner of British Columbia v. Western Forest Industries Ltd. et al.* (1980), 25 B.C.L.R. 189, 118 D.L.R. (3d) 500 (C.A.)

Mr. Justice Meredith held that if he had power to interfere with the discretion of the Board to continue with the hearing (and thus refuse leave to abandon or withdraw the appeal) he would not exercise it because the Board was correct in deciding to continue with the hearing because the assessed value was very much in question.

[emphasis added]

The WCAT panel found that “there are no expenses that can be granted if there is no appeal.” However, it reached this conclusion in the course of providing a decision

regarding the worker's request for withdrawal of his appeal. The worker's appeal remained before WCAT until the WCAT panel issued its decision (whether a summary decision to accept the withdrawal or a decision on the merits). The panel's consideration and acceptance of the worker's request for withdrawal involved a summary disposition of the worker's appeal. There was an inherent contradiction between the panel's finding that there was no appeal before it, and its issuance of a decision regarding the worker's requests for withdrawal of his appeals.

In considering the worker's requests for withdrawal of his appeals, the WCAT panel may be viewed as having implicitly recognized that there remained "live" appeals before it. This required that the panel provide a decision as to whether it would accept the worker's requests for withdrawal.

In finding that "there are no expenses that can be granted if there is no appeal", the WCAT panel effectively fettered its discretion under section 7 of the Appeal Regulation. While the panel proceeded to find that the worker was not entitled to reimbursement of any expenses, this did not involve an exercise of discretion having regard to the two criteria at MRPP item #13.23 and the circumstances of the worker's case involving his requests for withdrawal of his appeals.

Section 7(1)(b) authorizes WCAT to order reimbursement of "the expenses associated with obtaining or producing evidence submitted to the appeal tribunal". The wording of section 7 of the Appeal Regulation does not limit WCAT's authority to order reimbursement of expenses to situations where a final decision has been made concerning the merits of the appeal. The WCAT panel appears to have read this provision as referring to evidence submitted to, and considered by, the appeal tribunal. The effect of the WCAT decision, in determining that a WCAT panel has no authority to address a request for reimbursement of expenses in connection with a summary decision regarding a request for withdrawal of an appeal, seems to add a limitation not contained in the wording of section 7.

The panel's decision concerning expenses involved a "finding of law" for the purposes of section 58(2)(a) of the ATA, which must not be interfered with unless it is patently unreasonable. A patently unreasonable decision has been described as one which is "clearly irrational" or "evidently not in accordance with reason". I consider that this is a situation in which the WCAT decision contained a patently unreasonable defect which, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. Inasmuch as the WCAT panel was making determinations concerning the worker's requests for withdrawal of his appeals, it was patently unreasonable for the WCAT panel to conclude that there was no appeal before it.

Alternatively, to the extent the panel's decision may be characterized as involving a discretionary decision, I find that it must be viewed as one which was arbitrary for the purposes of section 58(3)(a) of the ATA.

Accordingly, I find that the part of the WCAT decision concerning the worker's request for reimbursement of expenses must be set aside as void.

Conclusion

The worker's application for reconsideration of one part of *WCAT Decision #2006-00580* is allowed on the common law grounds. The WCAT decision is void in part: the denial of the worker's request for reimbursement of expenses under section 7 of the Appeal Regulation is set aside. The worker's requests for reimbursement of expenses will be considered afresh. The remainder of the WCAT decision (to accept the worker's requests for withdrawal of his appeals) stands as "final and conclusive" under section 255(1) of the Act. The WCAT Registry will contact the parties concerning the further handling of the worker's request for reimbursement of expenses.

Herb Morton
Vice Chair

HM/cda