Noteworthy Decision Summary

Decision: WCAT-2007-00655 **Panel**: Herb Morton **Decision Date:** February 23, 2007

Reconsideration - Breach of Procedural Fairness or Natural Justice – Delay in Objection – Waiver of Right to Object

This reconsideration decision is noteworthy because it illustrates that a party should raise any concern regarding a possible breach of procedural fairness or natural justice at the earliest practicable opportunity. Otherwise, WCAT may find that the party has waived the right to raise such an objection after the decision has been issued.

The worker sought a reconsideration of the original WCAT decision on the basis that he had not been allowed to present two witnesses at a WCAT oral hearing. The worker's notice of appeal – part 2 had identified two witnesses he intended to ask to attend the oral hearing. The letters and other evidence on file, including the original WCAT decision, did not contain documentation regarding the consideration given to the worker's stated intent to call two witnesses at the oral hearing. The reconsideration panel accepted the worker's evidence that he had been told verbally by an appeal liaison, on behalf of the original panel, that these witnesses were not necessary to address the issues under appeal as the initial acceptance of his claims for injury were not in dispute.

The reconsideration panel denied the worker's application for reconsideration of the original WCAT decision on common law grounds. He found no breach of natural justice or other error of law going to jurisdiction had been established. The question was whether the original panel had, in all of the circumstances, acted fairly.

The reconsideration panel found that the original panel had the authority, subject to the requirements of natural justice, to decline to hear the evidence of a witness on the basis that this was not relevant or necessary to considering the issues under appeal. At the oral hearing the worker's representative did not request that the worker be allowed to present these witnesses at the hearing. Neither the worker nor his representative objected to the original panel's preliminary direction. Inasmuch as neither of them pursued the request, the original panel was not required to address and rule on any such objection to her preliminary direction. In the absence of any objection being made on behalf of the worker to the original panel, the reconsideration panel considered that the worker must be deemed to have waived the right to later complain that this amounted to a breach of natural justice.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

WCAT Decision Number: WCAT-2007-00655
WCAT Decision Date: February 23, 2007
Panel: Herb Morton, Vice Chair

Introduction

The worker seeks reconsideration of the July 30, 2004 Workers' Compensation Appeal Tribunal (WCAT) decision (*WCAT Decision #2004-04090-RB*). The worker complains that there was a breach of natural justice or procedural fairness, as he was not allowed to present two witnesses at the WCAT oral hearing on June 25, 2004.

The worker's request for reconsideration was initiated by a submission dated September 13, 2005 from his representative. On November 16, 2005, the representative forwarded a package of documents, described as "additional evidence for reconsideration."

By letter dated March 9, 2005, WCAT's counsel provided information to the worker regarding the grounds for requesting reconsideration, including the "one time only" limitation on reconsideration applications. Similar information was again provided to the worker by the WCAT appeal coordinator on August 18, 2006.

The employer is represented by an industry association. The employer's representative provided a submission dated October 27, 2006. A rebuttal submission dated November 16, 2006 was provided by the worker's representative. By letter dated November 20, 2006, the appeal coordinator advised that submissions were considered complete.

I find that the issue as to whether grounds for reconsideration are established 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 a breach of natural justice, or other error of law going to jurisdiction?

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

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. 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, 186 B.C.A.C. 83 (see *Workers' Compensation Reporter*, *Volume 19*, page 211). This authority is further confirmed by section 253.1(5) of the Act.

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 under "Publications".

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 W.C.R. 291). These different standards of review are also set out in section 58 of the *Administrative Tribunals Act* (ATA).

The important point is that an application for reconsideration is not an opportunity to have another full review of the issues and evidence, unless the standard of review is correctness. If the standard of review is patent unreasonableness then a reconsideration panel cannot, for example, make its own judgement about how the evidence should be weighed. The Court of Appeal described that approach in

Speckling v. *British Columbia (Workers' Compensation Board),* [2005] B.C.J. No. 270, 2005 BCCA 80, 46 B.C.L.R. (4th) 77, as follows:

> …a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review…to second guess the conclusions drawn from the evidence…and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable.

Background

The worker appealed three decisions dated May 23, 2001, July 27, 2001 and January 8, 2002 to the former Workers' Compensation Review Board (Review Board). Those appeals were transferred to WCAT for completion, following the March 3, 2003 changes to the Act. All three appeals were assigned to a WCAT panel to be heard together, by oral hearing.

The oral hearing was first scheduled for March 26, 2003. At the worker's request, this was rescheduled to February 18, 2004. That hearing did not proceed. By letter of January 30, 2004, the worker requested a postponement of the oral hearing. As well, the WCAT panel invited submissions regarding its jurisdiction (as set out in the vice chair's letter of February 23, 2004). The February 23, 2004 letter from the WCAT vice chair to the worker's representative inviting submissions regarding the panel's jurisdiction concluded by noting:

> The appeal officer assigned to this case is [name] and she will be handling the correspondence. Could you please let her know how long you will need to prepare your submissions?

The WCAT panel provided a preliminary decision dated May 5, 2004 (*WCAT Decision #2004-02328-RB*) which involved consideration of written submissions from the worker's representative (March 8, 2004 and April 5, 2004) and from the employer's representative (March 29, 2004). The WCAT panel found as follows:

> I conclude the following issues arise from the decision letters under appeal.
>
> 1. May 23, 2001 – The first is whether the worker had subjective complaints to a pensionable degree in the back, shoulder or right leg, as a result of his injury in 1997. The second issue is whether the worker had a right ankle injury in 1997 that has left him with a permanent injury.

2. July 27, 2001 – Whether the worker suffered any permanent right ankle injury in either his 1990, 1991, 1992 and 1995 claims.
3. January 8, 2002 – Whether the worker had recovered from the effects of his 2001 injury at the time benefits were terminated on January 13, 2002.

An oral hearing will now be scheduled to deal with these issues.

The hearing was rescheduled to May 28, 2004 but did not proceed due to the WCAT vice chair's illness. The worker's representative furnished a copy of his written submission prepared for the May 28, 2004 hearing date, together with a letter dated February 16, 2004 from Dr. R. Horner, family practice.

The oral hearing was held on June 25, 2004. Representatives for both the worker and the employer attended the hearing. The hearing was recorded (contained on two compact discs). At the outset of the hearing, the worker's representative presented the worker's request for reimbursement of expenses in connection with the May 28, 2004 hearing which did not proceed, and in relation to the June 25, 2004 hearing. After the worker was sworn, the worker's representative provided an outline of the remedies the worker was seeking in his appeals. The worker sought further benefits for temporary disability under section 29 or 30 (for approximately two weeks until January 27, 2002), acceptance of a right ankle injury under the 1997 claim, a permanent functional impairment (PFI) assessment for his right ankle, a pension award for subjective complaints in relation to the worker's other problems (right leg, shoulder, neck and back), and reimbursement for the expense of Dr. Horner's letter. He argued that there was a compensable right ankle injury in 1991, with an aggravation in 1997.

The worker gave detailed oral evidence under oath in the oral hearing. No other witnesses attended the hearing for the worker or employer.

The WCAT panel issued its decision on July 30, 2004. The panel defined the issues before it as follows (on page 1):

1. Did the worker suffer a right ankle injury in 1997? If so, was he left with a permanent residual disability?

2. Was the worker left with subjective complaints of a pensionable degree in the back, shoulder, right leg or ankle as a result of his injury in 1997?

3. Did the worker suffer any permanent right ankle injury in either his 1990, 1991, 1992 or 1995 claims?

4. Had the worker recovered from the effects of his 2001 injury when wage loss benefits were terminated on January 13, 2002?

On page 6, the WCAT panel concluded:

1. The worker did suffer a minor right ankle injury in the fall on April 29, 1997 but it did not cause any permanent injury or increase any permanent injury that may have been there before.

2. The worker's 1997 injury did not leave him with subjective complaints of a pensionable degree in the back or elsewhere.

3. The post-traumatic arthritis in the worker's right ankle is a consequence of the 1991 injury and he is entitled to a permanent functional impairment assessment on that right ankle.

4. The worker's wage loss benefits were properly terminated on January 13, 2002 and he is not entitled to more.

The worker was also granted reimbursement of expenses for attendance on both the May 28, 2004 and June 25, 2004 hearing dates, and for Dr. Horner's medical opinion of February 16, 2004.

Submissions

The worker's submissions in support of this application for reconsideration were provided by a different representative than the one who represented the worker at the June 25, 2004 oral hearing. The worker's current representative acknowledges that her submissions "originate with the worker's discussion of the oral hearing events." By submission of September 13, 2005, she states:

> [The worker] says that a couple of days before the June 30 [*sic*], 2004 hearing [the appeal liaison] contacted him and questioned him about what testimony the two individuals were going to provide. He says he told her there was one witness for each claim incident. He said he had called them because they would attest to the major traumatic injuries he sustained at the time of both claims. [The worker] says there was mis-information on the file about how one of the injuries occurred and that it needed clarification in order to gauge the nature of the injury(ies) in the face of the intervening years and the development of arthritic processes.
>
> The worker says that [the appeal liaison] told him that the board accepted those accidents had occurred therefore, it wasn't required for the witnesses to be there.

> The worker says he told [the appeal liaison] that he had a right to present his witnesses, to which she responded that he did not.
>
> After that conversation with [the appeal liaison] the worker says he believed it was the tribunal's decision as to whether a witness or witnesses would be allowed and their decision was final.
>
> . . .
>
> The worker says that very few people understand the severity of the injuries workers sustain [in his particular work environment]. The worker is confident the witnesses could have given corroborative evidence that would have assisted in his case had he been permitted to present them.
>
> . . .
>
> The worker says that when he left the hearing room he had a "negative feeling", that he was disenchanted with the whole process. He says, notwithstanding the fact that he lost his appeal, he felt that without his witnesses, he was powerless to present corroborative testimony about the two severe injuries and their ongoing effects that those individuals observed. He knew they could have provided essential character references because his witnesses were not social friends. He thought their evidence would be unbiased and helpful to establish the nature and extent of both trauma's [*sic*].

The worker's representative submits:

> What I can say from my experience sitting on the prior Workers' Compensation Review Board is that it was customary, in the preliminary opening to the appeal, to ask the appellant what evidence the witnesses were going to provide. Often individuals brought witnesses to attest to the original injury. Often the appellants were informed that their testimony was un-necessary since the claim had been accepted, if in fact, it had been accepted. And when the panel made those pronouncements few individuals argued their right to present the witness(es) and proceeded with their presentations.
> The practice of pre-qualifying a witnesses' relevant testimony is not part of the manual of rules, practices and procedures published by WCAT in the section that deals with witnesses. For that reason, it is a process that should not be undertaken in what is the final level of entitlement for the potential for error is high should a tribunal assistant mis-understand for what purpose what the evidence is being provided.

> **The worker was represented, but the representative failed to raise any objections to the tribunal's refusal to hear the witness**. I consider this a carry-over from the previous practices at the Workers' Compensation Review Board where the tribunal had paternalistic view of its processes and procedures that is different from WCAT's role today.
>
> [reproduced as written, except emphasis added]

The worker's representative further argues that grounds for reconsideration are established:

> It is appropriate, given the impediment created by the tribunal assistant, no matter how well-meaning, deprived the worker of the opportunity to present evidence that he had determined was essential to establishing the severity of the injuries and the post-injury impairments.
>
> It is essential this worker be granted another oral hearing where he can present the witnesses and their testimony since his credibility has been destroyed and he has been rendered powerless by the administrative error to defend himself. We say that this is a classic case of an error of common law caused by a denial of natural justice, and it is one of the permissible grounds for a reconsideration of a WCAT finding.

The worker's representative also makes submissions regarding the vice chair's demeanour in the oral hearing:

> He interpreted her behaviour as incredulous and for that reason he became more strident in his efforts to describe the effects of the injury. He says that she was expansive and that he responded to her free expression in kind, and that it was demoralizing to read how she interpreted his unguarded testimony.

The employer's representative submits that:

> …the Worker's witness evidence does not possess sufficient probative value that, taken with the other evidence adduced, it might have reasonably affected the outcome of WCAT decision no. 2004-04090-RB. In accordance with Policy Item #97.33, the testimony of a lay witness cannot stand in lieu of objective medical evidence. The fact that a workplace incident occurred is not in dispute, therefore the proposed witness testimony possesses severely limited (if any) probative value.

The employer's representative further submits that the employer:

> …takes issue with the Worker's interpretations of 'the demeanor of the Vice-chair". Absent evidence to the contrary, one must assume that a panel of WCAT will proceed on an impartial and objective basis. The Worker's attack of the Vice-chair's integrity is completely unfounded and based solely upon paranoia and flaw of reasoning.

In rebuttal, the worker's representative submits in part:

> The worker is proceeding on the grounds that his right to be heard was violated by the panel's refusal to hear his witnesses' testimony. Their testimony is part of the process by which a person's rights to be heard lead to a fair and impartial hearing. The worker is able to allege that he was not granted a fair and impartial hearing by the exclusion of his witnesses. The result of that exclusion was that the panel drew a conclusion that the injury resulted in a "minor injury". It is axiomatic that the injury must have been minor as well since the panel went on to decide that the "minor" injury resulted in no permanent injury or consequences. To some degree the panel made a finding of fact (see #2 March 09, 2005 letter) that was not supported by any evidence.

Reasons and Findings

The worker complains that he was not permitted to present two witnesses at the WCAT oral hearing on June 25, 2004. This involves a question about the application of the common law rules of natural justice and procedural fairness. Accordingly, the question to be determined is whether, in all of the circumstances, the WCAT panel acted fairly.

The worker's appeal was filed with the former Review Board. In his notice of appeal - part 2, the worker requested an oral hearing, and indicated that he would ask two witnesses (identified by name) to attend the oral hearing. The letters and other evidence on file, and the WCAT decision, do not contain documentation regarding the consideration given to the worker's stated intent to call two witnesses at the oral hearing. For the purposes of making my decision, I will accept as accurate the evidence provided by the worker, namely, that he was verbally advised by the appeal liaison, on behalf of the WCAT vice chair, that these witnesses were not necessary to the issues in the worker's appeal as the initial acceptance of his claims for injury was not in dispute.

At the time of the June 25, 2004 oral hearing, section 246 of the Act provided:

> **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 or by means of teleconference or videoconference facilities.
>
> (2) Without restricting subsection (1), the appeal tribunal may do one or more of the following:
>
> (a) **receive evidence or information on oath, by affidavit or otherwise, as it considers appropriate**, whether or not the evidence is admissible in a court;
>
> (b) receive new evidence;
>
> (c) inquire into the matter under appeal and consider all information obtained;
>
> (d) request the Board to investigate further into a matter relating to a specific appeal and report in writing to the appeal tribunal;
>
> (e) require the parties to the appeal to attend a pre-hearing conference to discuss procedural and substantive issues relating to the conduct of the appeal;…
>
> [emphasis added]

Subject to the requirements of natural justice, I consider that it was within the authority of the vice chair to decline to hear the evidence of a witness on the basis that this was not relevant or necessary to considering the issues under appeal.

The WCAT panel noted, on page 6 of its decision, that the May 28, 2004 hearing did not proceed because she was ill. The worker's representative provides additional background concerning that postponement as follows:

> The worker says that in March or April he presented himself at the tribunal and he sat and waited to be called for over an hour. He was informed that the Vice-Chair took ill. He says the tribunal staff told him they would arrange for a replacement Vice-Chair that morning. The worker and his representative said they were concerned about proceeding since the

> replacement would not have had any opportunity whatsoever to read the two (very large) files.
>
> Despite his concerns he says the tribunal staff tried to persuade him to proceed. The worker says he refused because the files were large and because he did not believe he would be able to properly present his case.
>
> The hearing was rescheduled for June 30 [*sic*], 2004.

I infer from the foregoing that the worker and his representative were capable of expressing an objection to a proposed process which they considered to be unfair.

The worker's representative provided oral submissions at the June 24, 2004 oral hearing, as well as written submissions dealing with both preliminary issues and the merits of the worker's appeal. None of those submissions contained a request that the worker be allowed to present other witnesses at the oral hearing. No objection was expressed to the WCAT panel, to the effect that the evidence of these witnesses would have relevance to the issues in the worker's appeal so as to warrant permitting them to testify.

An appellant or his or her representative necessarily exercises judgment in considering how best to present an appeal. This requires consideration as to whether additional evidence should be obtained and submitted in advance of a hearing (including expert reports, and written statements or affidavits from witnesses), and as to whether such persons should also be called to attend to give oral evidence at the hearing. In this case, a letter dated February 26, 2004 was furnished from Dr. Horner (which followed his earlier letter of June 3, 2002). As well, the worker furnished a written statement dated November 26, 2001 from one of his witnesses describing the occurrence of his injury on December 10, 1991.

In the event a party's appeal is not successful, the party might begin to wonder whether his or her appeal should have been presented differently. The party might then question the actions of his or her representative, and argue that the representative should have made certain requests or objections regarding the conduct of the hearing, or obtained additional evidence to support the appeal, or made some different submissions in support of the appeal.

With respect to the provision of new evidence, section 256 of the Act expressly limits the right of a party to seek reconsideration to situations where there is substantial and material new evidence which:

- did not exist at the time of the appeal hearing, or
- did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

Accordingly, the right to seek reconsideration on the basis of new evidence is limited, so as to prevent a party from seeking to have his or her appeal reheard based on evidence which could have been submitted to WCAT but was not.

With reference to the common law grounds of a breach of natural justice, a party may also be constrained in arguing that the tribunal decision should be set aside based on an allegation of bias or a breach of natural justice, if the party failed to make an objection at the earliest practicable opportunity. In *N.W. Construction (1993) Ltd. v. Workers' Compensation Board of British Columbia*, 2004 BCCA 182, [2004] B.C.J. No. 714, (2004) 13 Admin. L.R. (4th) 263, the Court of Appeal considered the situation in which the company president was directed by the Appeal Division hearing panel to leave the room when evidence was taken from two employees of the company. This was in the context of an appeal by the company concerning the levying of an administrative penalty, and a claims cost levy, stemming from a work accident. The employer, who was represented by a lawyer, complied with this direction without objecting. However, the employer later sought judicial review of the Appeal Division decision on the basis that the panel breached natural justice by excluding the company's president for part of the hearing.

Mr. Justice Blair of the British Columbia Supreme Court concluded, at paragraph 36:

> Although I find that the Appeal Divsion's [sic] procedure in excluding Mr. Bedard from part of the hearing cannot be justified, I am not prepared to conclude, in the absence of either an objection to the exclusion or evidence of prejudice to N.W. Construction, that an error occurred such as to return the matter to the Appeal Division for further consideration.

The British Columbia Supreme Court decision is reported at 2003 BCSC 224, (2003) 1 Admin. L.R. (4th) 77, [2003] B.C.J. No. 328.

A three member panel of the Court of Appeal was unanimous in dismissing the company's appeal. With respect to the argument that there had been a breach of natural justice, the majority of the panel of the Court of Appeal reasoned:

> [22] I have reached my conclusion on the basis of the straight-forward reason that the company was represented by counsel at the hearing, that both the counsel and Mr. Bedard were in the room when the Appeal Division officer was hearing the appeal and made the order that he did, requesting Mr. Bedard to leave. At that point Mr. Bedard and his counsel together or separately could have objected to that order. Neither of them objected and Mr. Bedard left. In those circumstances, I consider that if it constituted a breach of natural justice to require Mr. Bedard to leave, that breach was waived and cannot now be relied on in these judicial review procedure proceedings. Were it otherwise, counsel could take no objection to breaches of natural justice, even though they were remediable

> at the time and could wait until he knew whether the decision was going to be favourable or unfavourable and then make the objection only on the judicial review proceedings. For those reasons, I would conclude that no error has been demonstrated in the judgment of the trial judge on the second issue. I too would dismiss the appeal.

In the text *Administrative Law in Canada*, Fourth Edition (Ontario: Butterworths, 2006) Sara Blake similarly states at page 115:

> Bias may be waived. A party who was aware of bias during the proceeding, but failed to object, may not complain later when the decision goes against it. The genuineness of the apprehension becomes suspect when it is not stated right away. An objection must be stated when the bias first comes to the party's attention.
>
> It is unwise and unnecessary to absent oneself from the hearing after the tribunal has ruled against an objection. If the objection is clearly raised and not withdrawn, continued participation will not be interpreted as acquiescence.

In *Eckervogt v. British Columbia (Minister of Employment and Investment)*, 2004 BCCA 398, (2004) 241 D.L.R. (4th) 685, [2004] 10 W.W.R. 439, (2004) 30 B.C.L.R. (4th) 291, the British Columbia Court of Appeal considered the situation in which a member of an expropriation panel left the Expropriation Compensation Board to take a position as a Crown counsel after a hearing was completed but remained involved until the decision was handed down. The parties were aware of this but took no action at the time. When a decision was issued that was unfavourable to the appellants, they appealed on the basis that the Expropriation Compensation Board erred in not disqualifying itself on the ground of reasonable apprehension of bias created by the member's continuing participation after he had applied for and accepted a Crown counsel position. The Court of Appeal reasoned in part:

> [47] If, during the course of a proceeding, a party apprehends bias he should put the allegation to the tribunal and obtain a ruling before seeking court intervention. In that way the tribunal can set out its position and a proper record can be formed. This, of course, would not apply when the ground of disqualification is discovered after the tribunal has completed the case and rendered a decision on the merits of the dispute. There is, however, a more fundamental problem with the approach taken by the appellants.
>
> [48] I do not think it is proper for a party to hold in reserve a ground of disqualification for use only if the outcome turns out badly. Bias allegations have serious implications for the reputation of the tribunal and in fairness they should be made directly and promptly, not held back as a tactic in the

> litigation. Such a tactic should, I think, carry the risk of a finding of waiver. Furthermore, the genuineness of the apprehension becomes suspect when it is not acted on right away.

In *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, [2006] F.C.J. No. 631, [2007] 1 F.C.R. 107, (2006) 40 Admin. L.R. (4th) 159, April 10, 2006, the Federal Court similarly reasoned:

> [219] The rationale for why an applicant must raise a violation of natural justice or apprehension of bias at the earliest practical opportunity was articulated by Justice Pelletier (as he was then) in *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 371, 4 Imm. L.R. (3d) 131) (F.C.T.D) aff'd [2001] 4 F.C. 85 (F.C.A.), where he stated at paragraph 25:
>
> > There is a powerful argument in favour of such a requirement arising from judicial economy. If applicants are permitted to obtain judicial review of adverse decisions by remaining silent in the face of known problems of interpretation, they will remain silent. This will result in a duplication of hearings. It seems a better policy to provide an incentive to make the original hearing as fair as possible and to avoid repetitious proceedings. Applicants should be required to complain at the first opportunity when it is reasonable to expect them to do so.
>
> Justice Pelletier went on to say at para. 26 "[t]he crucial element is the reasonableness of the expectation that the claimant complain at the first opportunity."
>
> [220] From the above discussion, **I would take the principle that an applicant must raise an allegation of bias or other violation of natural justice before the tribunal at the earliest practical opportunity. The earliest practical opportunity arises when the applicant is aware of the relevant information and it is reasonable to expect him or her to raise an objection**.
>
> [emphasis added]

WCAT Decision #2006-03001 dated July 27, 2006 (summarized as noteworthy on the WCAT website) concerned the question as to whether a party may be deemed to have waived a "bias" objection. That decision reasoned:

> In this case, whatever comments were made prior to the commencement of the hearing proper were known to the worker and his lawyer, and no objection was raised once the hearing had commenced. The worker's objection was not made until the WCAT panel had issued its decision to deny his appeal. I find that the failure to raise any timely objection means that the worker and his representative may be considered to have waived any objection to the panel's pre-hearing comments.

I consider that similar reasons would apply to the circumstances of the worker's case. Inasmuch as neither the worker nor his representative pursued a request to the WCAT panel that he be permitted to call two witnesses at the oral hearing, the WCAT panel was not required to address and rule on any such objection to the panel's preliminary direction that it was not necessary to call these witnesses. In the absence of any objection being made on behalf of the worker to the WCAT panel, I consider that the worker must be deemed to have waived the right to later complain that this amounted to a breach of natural justice.

Had the worker presented his complaint at the oral hearing, and his objection was overruled by the WCAT panel, his continued participation in the hearing would not amount to acquiescence or waiver of his right to pursue his complaint regarding a breach of procedural fairness at a later date. However, no such objection was raised in this case. I consider that the worker must be viewed as having acquiesced in relation to the panel's preliminary direction that it would not be necessary to call the two witnesses in question.

The worker was represented, and the worker's representative provided a range of submissions regarding both preliminary matters and the merits of the worker's appeal. I find that the absence of any further request or submission to the WCAT panel to support the worker's request to call two witnesses must be viewed as amounting to a waiver of his right to later complain that this amounted to a breach of procedural fairness. To my mind, the worker's complaint regarding the alleged breach of natural justice may be characterized as involving a second-guessing of the manner in which he and his representative presented his appeal. I do not consider that this provides a proper basis for setting aside a WCAT decision.

The worker has also complained of the demeanor of the WCAT vice chair. WCAT vice chairs take an oath of impartiality. Effective March 3, 2003, section 232(8) of the Act provided:

> Before beginning their duties, members of the appeal tribunal must take an oath of office in the form and manner prescribed by the Lieutenant Governor in Council.

The form and manner of the vice chair's oath of office were set out in section 3 of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/02.

I consider that the worker's complaints regarding the demeanour of the WCAT vice chair consist of his subjective impressions and have no real objective foundation. I do not consider that they establish any reasonable apprehension of bias, or otherwise give rise to some breach of procedural fairness. I am not persuaded that the argument provided in this regard provides any basis for setting aside the WCAT decision.

The worker also objects to the findings by the WCAT panel, on page 4, that:

> The worker gave his evidence in sweeping and overstated terms. For instance,….
>
> . . .
>
> The next issue is whether the worker was left with residual subjective complaints as a result of the 1997 injury. The worker's evidence is that his back and ankle symptoms were significant following this injury and limited his occupational flexibility. I place more weight on the medical reports than I do on the worker's evidence which I found to be somewhat dramatic; long on generalizations and short on details.

The worker's representative states that the worker says he has "endured a character assignation [*sic*], one that he was helpless to defend without his witnesses." She also complains that the finding by the WCAT panel on page 4, that "while the worker did have a minor ankle injury after the fall in 1997, it did not cause any permanent injury", was based on no evidence.

Sarah Blake, *supra*, states at page 213:

> Findings of fact are reviewable only if patently unreasonable. An unreasonable finding of fact is one that is not supported by any evidence. A court will not review the evidence considered by the tribunal to determine whether there was sufficient evidence to support a finding of fact. A court will go no further than to determine whether there was any evidence, and only essential findings of fact upon which the decision of

> the tribunal turns will be reviewed in this manner. Non-essential findings of fact are not reviewable.
>
> It is rare for a court to set aside a finding on credibility, because the tribunal, having heard the witnesses, was in the best position to assess credibility.
>
> The weight given to evidence is reviewable only if patently unreasonable. The choice as to which evidence is important and the weight given to each item of evidence is based, in part, on the tribunal's expertise.

The worker's objections to the WCAT decision, in this regard, concern the panel's conclusions regarding the evidence. For the reasons expressed by Blake and by the Court of Appeal in *Speckling* (cited above under "Standard of Review"), I have no jurisdiction to reweigh the evidence which was considered by the WCAT panel in making its decision. My role is limited to considering whether the findings of the WCAT panel were based on no evidence, whether the WCAT panel overlooked or failed to consider significant evidence without explanation, or whether the decision was clearly irrational in light of the evidence which was before the panel. I find no basis for concluding that the WCAT decision contained such an error.

New Evidence

On November 16, 2005, the representative forwarded a package of documents, described as "additional evidence for reconsideration." In a rebuttal submission of November 16, 2006, she clarified that the worker's reconsideration application is not based on new evidence under section 256 of the Act. Accordingly, I have restricted my decision to the common law grounds.

MRPP item #15.24 provides that 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. It remains open to the worker to make a new evidence application in the future.

Conclusion

The worker's application for reconsideration of *WCAT Decision #2004-04090-RB* is denied on the common law grounds. No breach of natural justice or other error of law going to jurisdiction has been established. The WCAT decision stands as "final and conclusive" under section 255(1) of the Act.

Herb Morton
Vice Chair

HM/cda

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898