

Noteworthy Decision Summary

Decision: WCAT-2007-00880**Panel:** Jill Callan**Decision Date:** March 15, 2007

Reconsideration – Extension of Time Application – Failure by Legal Counsel to file Notice of Appeal within Time – No Different Standard Imposed on Acts or Omissions of Legal Counsel as Opposed to Lay representatives – Section 243(3) of the Workers Compensation Act – Item #5.31 of the Manual of Rules of Practice and Procedure

As a result of the BC Court of Appeal's decision in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499, decisions in the Noteworthy Decisions Index that discuss WCAT's jurisdiction to reconsider a prior decision for jurisdictional error are no longer noteworthy for this point. However, these decisions remain noteworthy for the other points set out in the noteworthy summary. For a summary of the *Fraser Health* decision, click here: [Fraser Health Authority summary](#)

Reconsideration of a previous WCAT decision. The reconsideration panel set aside as void a decision which denied an extension of time application on the basis that the original panel considered that there were different standards expected from legal counsel as opposed to lay representatives when filing a notice of appeal within time. It is the conduct of the applicant, not the representative, that is paramount and, thus, the factors the original panel took into account were predominantly irrelevant and the decision was patently unreasonable.

The worker's legal counsel failed to file the notice of appeal in time. She explained that this was due to illness affecting her and her assistant which had led to a failure in their bring forward system. She argued that this constituted special circumstances which had precluded the timely initiation of the appeal.

The original panel found that the lawyer's explanations did not constitute special circumstances that precluded the worker from filing his appeal in a timely fashion. He stated that the real reason for missing the filing date was that legal counsel and her assistant were both ill. While the original panel had a certain degree of sympathy for the lawyer, a legal professional must have systems in place, especially for important dates. A bout of the flu, even though serious, was not in itself an acceptable reason for losing track of a filing date. While a lawyer should not automatically be subject to a higher standard than a lay representative, given that a deadline is the type of matter that a lawyer must deal with all the time, a high standard was expected.

The reconsideration panel found that there was nothing in item #5.31 of the *Manual of Rules of Practice and Procedure* (MRPP) to suggest that different standards would be applied when considering the acts and omissions of a representative depending on whether the representative was a lawyer or a lay representative. Although item #5.31 of the MRPP provided that "any other relevant circumstances particular to the case" might be taken into account, there was a difference between considering particular circumstances that might arise in an individual case and making general statements that a different standard would apply when considering acts and omissions of lawyers as opposed to lay representatives. The fact that the worker's representative was a lawyer was not a circumstance particular to the case within the meaning of the factor listed in item #5.31.

The reconsideration panel found that the original panel had taken predominantly irrelevant factors into account – namely that the worker's representative was a lawyer and that her acts and omissions were unacceptable. As a result, the original panel made a patently unreasonable finding that special circumstances that precluded a timely filing of the appeal had not been established. The original decision was set aside as void.

The reconsideration panel also considered the extension of time application afresh, at the request of the worker's representative. The employer was no longer registered with the Workers' Compensation Board, operating as WorkSafeBC, and, thus, there was no party that could be prejudiced. The panel found that special circumstances existed that precluded a timely appeal and allowed the extension of time to appeal application.

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1. Introduction

The worker has applied for reconsideration of *WCAT Decision #2005-05995*, dated November 9, 2005 (which I will call the previous WCAT decision) on common law grounds. In that decision, a panel of the Workers' Compensation Appeal Tribunal (WCAT) denied the worker's application for an extension of time to appeal a January 27, 2005 decision of the Review Division of the Workers' Compensation Board, operating as WorkSafeBC (Board). Counsel for the worker submits that the previous WCAT decision is tainted by an error of law going to jurisdiction.

By letter dated September 26, 2006, a WCAT appeals coordinator informed the worker that he could bring an application for reconsideration on common law grounds on one occasion only.

The worker is represented by counsel, who has been retained specifically to represent him for this application. Another lawyer represented the worker in the application that was before the previous WCAT panel. In order to be clear, I will refer to that lawyer as "EOT counsel" and simply refer to counsel in this application as "counsel".

The employer is no longer registered with the Board.

Counsel has provided written submissions on behalf of the worker. Given that this application turns on questions of law, I find it can be fully and fairly considered without an oral hearing.

2. Issue(s)

The issue is whether common law grounds have been established for reconsideration of *WCAT Decision #2005-05995*.

3. Jurisdiction

Section 255(1) of the *Workers Compensation Act* (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, including a breach of natural justice (which goes to the question as to whether a valid decision has been provided). 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 WCR 211. This authority is further confirmed by section 253.1(5) of the Act.

The test for determining whether there has been an error of law going to jurisdiction generally requires application of the “patently unreasonable” standard of review.

Effective December 3, 2004, the provisions of the *Administrative Tribunals Act (ATA)* affecting WCAT were brought into force. Section 58 of the ATA concerns the standard of review to be applied in a petition for judicial review of a WCAT decision. Item #15.24 (Reconsideration on Common Law Grounds) of the *Manual of Rules of Practice and Procedure (MRPP)*, as amended December 3, 2004, 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.

4. Background

The background relevant to this matter may be briefly summarized as follows:

- The worker’s 1985 claim was accepted by the Board for a low back injury.
- By decision dated June 1, 2004, the Board informed the worker of his permanent partial disability pension.
- The worker requested a review of the pension decision. In *Review Decision #21343* dated January 27, 2005, the review officer varied the June 1, 2004 decision.
- The worker was not fully satisfied with the Review Division decision and instructed EOT counsel to appeal it to WCAT.
- As the appeal was initiated 14 days beyond the statutory deadline for doing so, the worker was required to apply for an extension of time. That application was the subject of the previous WCAT decision.
- EOT counsel provided a submission dated April 14, 2005 in support of the worker’s extension of time application. She pointed out that the worker had provided instructions to file a timely appeal. However, there was a delay in filing the notice of appeal due to the severe flu and cold viruses that affected EOT counsel and her assistant leading to the failure of their bring forward system. She submitted that, accordingly, there were special circumstances that precluded the timely initiation of the appeal. EOT counsel fully acknowledged that the errors and omissions that led to the delay in filing the notice of appeal were her responsibility.

5. The Previous WCAT Decision

In the previous WCAT decision, the panel noted the requirements for obtaining an extension of time under section 243(3) of the *Workers Compensation Act* (Act), which provides:

- (3) On application, and where the chair is satisfied that
 - (a) special circumstances existed which precluded the filing of a notice of appeal within the time period required in subsection (1) or (2), and
 - (b) an injustice would otherwise result,

the chair may extend the time to file a notice of appeal even if the time to file has expired.

The panel provided the following summary of EOT counsel's April 14, 2005 submission:

- She received instructions from the worker "to file a timely appeal."
- She received the Review Division decision on or about January 28, 2005 and phoned the worker on the same day. The worker agreed to appeal the decision.
- She wrote the date of February 25, 2005 as a bring-forward date on the file.
- She directed her assistant to add the date of February 25, 2005 as a date in their limitation diary system; however, the assistant entered it as the wrong date being February 27, 2005.
- She neglected to add an interim bring forward date as was her usual practice, likely because of her flu symptoms during this period.
- She had severe flu (including risk of pneumonia) for about ten days and visited her physician within this time. She was placed on Salbutamol, an inhaler usually prescribed for treatment of asthma.
- Because of her flu symptoms she did not do the usual reporting letter to the client, therefore the worker did not know "that February 26, 2005 was his limitation date."

- Her flu symptoms, including fatigue, carried on for a number of weeks through most of February 2005. She did not notice the time limit until March 21, 2005 and she completed the notice of appeal that day.
- Her legal assistant was also ill in mid-February.

The panel noted the factors that had been identified in *WCAT Decision #2003-04175* as relevant to whether the conduct of a representative constitutes special circumstances within the meaning of section 243(3) as follows:

- whether there is evidence that the party intended to request a review within the 90-day time limit through instructing the representative to do so;
- whether there is evidence that the party gave instructions promptly (early in the 90-day period);
- whether the party followed up with the representative within the 90-day time limit to ensure that the representative acted in accordance with the party's instructions;
- whether the failure to comply was somehow the responsibility of the party, for example failure to provide the necessary information to file a request for review such as the date of the decision in dispute;
- whether the representative acted as quickly as possible to remedy the error as soon as it was identified;
- if the representative is no longer representing the party, whether the party acted as quickly as possible to remedy the error as soon as it was identified;
- whether the failure to comply was the result of a failure in the representative's normal business practices or something more; and
- whether the failure to comply resulted from a reasonable choice on the part of the representative in dealing with the party's case that was "superseded" by subsequent developments beyond the representative's control.

The panel stated that these factors were also applicable when there is a 30-day period for filing the notice of appeal.

The panel's analysis was as follows:

This is a situation in which it appears the worker gave instructions to his representative, a lawyer, well within the time. Accordingly the criteria set out in the chair's decision with respect to the conduct of representatives must be reviewed. The lawyer states and I will accept that the worker gave instructions to appeal early in the period. There does not appear to be any suggestion that the worker was at fault in this himself by having to provide further information before the filing could be made. However, there is no indication that the worker followed up on this matter. The lawyer states that this is because the worker would not have known of the limitation date because she did not send the worker her customary reporting letter due to her illness. However, the worker would have been aware of the date for filing as the date is clearly stated on the letter accompanying the Review Division decision. It appears that the mistake was discovered by the lawyer. I will accept that the lawyer filed the documentation as soon as she realized there was a problem. This was not exactly a failure of the lawyer's office systems. The worker's matter was entered into the lawyer's system for February 27, 2005. If the system performed, then it would have come to the attention of the lawyer or her assistant on that date, which was within time. It appears the system performed but due to the illness of the lawyer and her assistant the reminder was not acted upon.

The lawyer appears to have been under the assumption that the last date for filing was February 27. This is presumably why the matter was diarised for February 25. She states that her assistant mistakenly diarised the matter for February 27. In fact, this did not matter as due to the allowance of time for service by mail, the time was extended until March 7, 2005. A filing made on February 27 would have been in time. Accordingly this confusion with dates is not directly relevant to the issue of special circumstances.

The lawyer's real reason for missing the filing date is that she and her assistant were ill. The lawyer provided the name of her doctor and a copy of her prescription. She does not indicate how many, if any, days she missed from work, but does note that she did not go on a planned holiday and suffered from fatigue for a number of weeks. **While I have a certain degree of sympathy with the lawyer, a legal professional must have systems in place, especially for important dates. A bout of the flu, even though serious, is not in itself an acceptable reason for losing track of a filing date.** She gives no reason why she discovered the error on March 21, 2005. She was then some 14 days beyond the actual date for filing and even longer beyond the date she says she thought was the

actual date for filing. **While a lawyer should not automatically be subject to a higher standard than a lay representative, given that a deadline is the type of matter that a lawyer must deal with all the time, a high standard is expected.**

Accordingly, for the foregoing reasons I cannot accept that the lawyer's explanations constitute special circumstances. As well, although the worker did give an indication of intention to appeal within the time limit, it appears he did not follow up that matter with his lawyer. I find the worker did not have special circumstances that precluded him from filing his appeal in a timely fashion. I deny the application.

[emphasis added]

6. The Reconsideration Application

Counsel has provided a submission dated April 21, 2006 in which he sets out numerous arguments in support of his position that the previous WCAT decision is tainted by one or more errors of law going to jurisdiction. It will become apparent that I have found it unnecessary to address all of counsel's arguments in this regard. In addition to requesting that the previous WCAT decision be set aside, counsel has requested that WCAT grant the extension of time to appeal to the worker and, accordingly, he has provided submissions on the merits of that matter.

(a) WCAT Decisions #2003-01810 and #2003-04175 and items #5.31 to #5.33 of the MRPP

The enactment of section 243(3) of the Act resulted in a significant change in the criteria applicable for granting an extension of time to appeal. The criteria set out in that section are more stringent than the criteria that were previously applied by the Workers' Compensation Review Board and the Appeal Division of the Board.

WCAT Decisions #2003-01810 and #2003-04175 were both released in the early days of applying section 243(3). Both decisions were summarized as noteworthy decisions of WCAT. While WCAT decisions that are summarized as noteworthy may be of assistance to the workers' compensation community and WCAT vice chairs, they do not constitute precedent decisions and WCAT panels are not required to apply the analysis in those decisions.

WCAT values consistency in decision making (see the guiding principles set out in item #1.30 of the MRPP). In order to promote consistency in the application of section 243(3) and, in order to provide parties to applications for extensions of time with guidance as to the criteria that WCAT will take into account, those criteria are set out in items #5.31 to #5.33 of the MRPP, which state:

5.31 Special Circumstances Precluded

Special circumstances must preclude the filing of the appeal on time. The definition of “special” includes “unusual”, “uncommon”, “exceptional” and “extraordinary”. In the context of section 243(3), “preclude” does not mean “absolutely prevent”. It may include “prevent”, “hinder”, “impede”, or “delay” (see *WCAT Decision #2003-01810*). In the context of an extension of time application, panels will not consider the merits of the appeal.

The following factors may be considered in deciding whether special circumstances precluded the filing of an appeal on time:

- (a) the date on which the applicant actually received the decision under appeal;
- (b) if there was a delay in receipt of the decision, the reason for the delay (e.g. inaccurately addressed mail, applicant out of town);
- (c) whether the applicant was aware of the right of appeal and the time limit for initiating the appeal;
- (d) whether the applicant has obtained significant evidence which, at the time the decision was issued, either did not exist or existed but was not discovered and could not through the exercise of reasonable diligence have been discovered (see *WCAT Decision #2004-00433*); and,
- (e) whether the applicant took all reasonable steps to ensure a timely appeal.

Additionally, in considering whether acts and omissions of representatives constitute special circumstances that precluded the filing of the appeal on time, WCAT will take into account the following factors (see *WCAT Decision #2003-04175*):

- (a) whether, within the relevant appeal period, the party instructed a representative to appeal;
- (b) whether the party gave appeal instructions promptly (early in the appeal period);
- (c) whether the party followed up with the representative within the appeal period to ensure that the representative initiated the appeal;
- (d) whether the party was in any way responsible for the delay;
- (e) whether the representative acted as quickly as possible to appeal as soon as the delay was brought to their attention;
- (f) if the party is no longer represented, whether the party acted as quickly as possible to appeal as soon as they became aware of the delay; and

(g) any other relevant circumstances particular to the case.

5.32 Injustice

In order to extend the time to appeal, an injustice must result from the refusal to grant the extension. "Injustice" means "unfairness", "lack of justice", "wrong". In determining whether "an injustice would otherwise result", the chair will consider the significance of the matter under appeal (i.e. the magnitude or importance of the issues under appeal). The chair will consider other factors which may be relevant to this requirement, including whether a refusal to extend the time where there is a clear error of law on the face of the decision would constitute an injustice.

5.33 Exercise of Discretion

If the two criteria in section 243(3) are met, the chair must then decide whether to exercise the discretion to extend the time to appeal. The following factors will be considered in this context:

- (a) the length of the delay;
- (b) the reasons for any delay beyond the expiry of the appeal period;
- (c) whether the applicant acted promptly to initiate an appeal when they became aware of the decision, the time limit for appealing, or the significant new evidence that would support the appeal;
- (d) whether there is prejudice to the respondent resulting from the delay.

These versions of item #5.31 to #5.33 came into effect on December 3, 2004. Accordingly, they were in effect when the previous WCAT decision was released.

While item #5.31 regarding special circumstances refers to *WCAT Decision #2003-01810*, it is not entirely consistent with that decision, which states (at page 7):

I have read several Review Division decisions regarding applications for extensions of time. **They indicate that the two key factors in considering special circumstances are evidence of the appellant's intention to request a review within the time limit and the length of the delay. I also view these factors to be relevant to the determination of whether there are special circumstances.** An explanation that may be adequate for a short delay by an appellant who had demonstrated the intention to file an appeal on time may not be adequate where the delay is longer and the appellant did not demonstrate the intention to appeal in a timely manner.

[emphasis added]

Initially WCAT considered the length of the delay in initiating the appeal to be relevant to the question of whether there were special circumstances. However, as WCAT's decisions on the application of section 243(3) evolved, we took the approach that the length of the delay was relevant to the exercise of discretion rather than whether special circumstances existed. Accordingly, one of the factors listed in item #5.33 regarding the exercise of discretion is the length of the delay.

Similarly, our approach to the consideration of situations in which there was an error on the part of the worker's representative evolved over time. Therefore, the section of item #5.31 that outlines factors to be taken into account in connection with representative delay do not include the following factors that were included in *Review Decision #4090* and quoted with approval in *WCAT Decision #2003-04175*:

- whether the failure to comply was the result of a failure in the representative's normal business practices or something more;
- whether the failure to comply resulted from a reasonable choice on the part of the representative in dealing with the party's case that was "superseded" by subsequent developments beyond the representative's control;...

Although "a failure in the representative's normal business practices or something more" is not listed in item #5.31, paragraph (g) in the section in item #5.31 regarding acts and omissions of representatives opens the door to the consideration of "any other relevant circumstances particular to the case", which could include the failure of office systems.

(b) Consideration of EOT counsel's conduct as a lawyer

Counsel contends that the WCAT panel erred in emphasizing that, as a lawyer, EOT counsel had an obligation to have systems in place for meeting statutory deadlines, including when she was ill during the relevant time period. He characterizes the panel's comments regarding EOT counsel's professional obligations as relating to whether the error was acceptable. He contends that this renders the previous WCAT decision patently unreasonable for a variety of reasons. Among other things, he submits it was patently unreasonable to focus on the unacceptable nature of counsel's error rather than the fact that the conduct of the worker was reasonable in the circumstances. He argues that the panel asked himself the wrong question in considering the acceptability of the acts and omissions of EOT counsel. He characterizes the panel's focus in this regard as arbitrary.

Counsel also notes the following statements in *WCAT Decision #2003-04175* regarding the question of whether acts or omissions of representatives constitute special circumstances:

...One approach to this issue is to attribute the acts and omissions of the representative to the appellant because the representative is the appellant's agent. However, this would be quite a technical approach. It would render appellants accountable for delays that occur when they have acted reasonably in relying on a representative to initiate an appeal on their behalf and the representative's failure to do so has been beyond the control of the appellant.

The essence of counsel's argument is that, by considering the acceptability of EOT counsel's professional conduct, the previous WCAT panel strayed from the relevant criteria set out in the MRPP and took irrelevant considerations into account. Therefore, the questions that arise are whether the panel departed from the MRPP criteria and, if so, whether the departure rendered the previous WCAT decision patently unreasonable.

In the previous WCAT decision, the panel acknowledged the factors in item #5.31 that would support the worker in establishing special circumstances. However, the panel found that those factors were outweighed by the fact that the worker had not followed up to ensure that EOT counsel filed a timely notice of appeal (which is a factor listed in item #5.31) and the unacceptable nature of the acts and omissions of EOT counsel. The panel makes statements that suggest that the outcome may have been different if the worker had been represented by a lay representative rather than counsel. He states that "a legal professional" must have systems in place for meeting deadlines, and a bout of the flu is not "an acceptable reason for losing track of a filing date". He acknowledges that "a lawyer should not always be subject to a higher standard than a lay representative". However, he goes on to say "given that a deadline is the type of matter that a lawyer must deal with all the time, a high standard is expected".

There is nothing in item #5.31 of the MRPP to suggest that different standards will be applied in considering the acts and omissions of a representative depending on whether the representative is a lawyer or a lay representative. I acknowledge that item #5.31 provides that "any other relevant circumstances particular to the case" may be taken into account. However, it seems to me that there is a difference between considering particular circumstances that might arise in an individual case and making general statements that a different standard will apply in considering acts and omissions of lawyers as opposed to lay representatives. As discussed further below, I do not find the fact that EOT counsel is a lawyer is a circumstance particular to the case within the meaning of the factor listed in item #5.31.

I have reviewed other WCAT extension of time decisions regarding representative error, but have not identified any others where the acceptability of a lawyer's conduct as a professional was a factor to be taken into account in determining whether special circumstances had been established.

In *WCAT Decision #2006-03573*, a panel considered an application for an extension of time in a case where a notice of appeal was filed late because the worker's lawyer's secretary had become suddenly ill. The panel's analysis included the following:

The evidence on file fails to indicate the worker's conduct in any way contributed to the delay in filing. On the contrary, the evidence indicates it was counsel's secretary's departure because of illness partly through the day on February 13, 2006 that caused the worker's notice of appeal to be slightly late. **In making this finding I have contemplated the employer's representative's argument about counsel's ability to make alternative arrangements for staff illnesses in order to meet deadlines. However, the test found in item #5.31 of WCAT's MRPP does not focus on the relative competence of the representative at the time of the late appeal in deciding whether special circumstances exist. Instead, the relevant factors seem to focus more on the conduct on the appellant (in this case the worker) in relation to his representative's failure to act.** In this case, the worker's counsel failed to meet the deadline for appeal despite instructions from the worker. The worker's conduct had no bearing on the delay and it was not reasonable for the worker to have inquired into the timely filing where the delay was less than an hour in nature. I am satisfied the departure of the worker's representative's secretary on February 13, 2006 amounted to special circumstances precluding a timely appeal to WCAT.

[emphasis added]

Accordingly, that decision constitutes an example of a decision in which the conduct of the applicant was considered to be the paramount factor in the consideration of the extension of time application.

I have considered whether the panel's statements about the acceptability of EOT counsel's acts and omissions and the standards applicable to lawyers can be characterized as *obiter dicta* (incidental remarks). However, I do not find they can reasonably be read as not being central to the previous WCAT decision. I find that the panel took the acceptability of EOT counsel's conduct as a lawyer into account in reaching his decision.

The next question for consideration is whether the panel erred in taking factors additional to those listed in the MRPP into account. Therefore, I have considered the authority and responsibility for establishing the MRPP, which is found in the Act and the *Administrative Tribunals Act* (ATA).

Section 234(2) of the Act sets out that the WCAT chair is responsible for:

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

Section 245.1 of the Act provides that the sections of the ATA applicable to WCAT include section 11 (General power to make rules respecting practice and procedure) and section 13 (Practice directives tribunal may make). Section 11(3) provides that WCAT may “waive or modify one or more of its rules in exceptional circumstances” and section 13(2) provides that it is not bound by its practice directives. Sections 11(4) and 13(3) require WCAT to make rules and practice directives accessible to the public.

The MRPP includes rules, practice directives, and items that are designated as neither. Items #5.31 to #5.33 fit into the latter category. It was open to the panel in the previous WCAT decision to depart from the factors set out in item #5.31.

While it was generally open to the panel to depart from those factors, I must consider whether the panel erred in the circumstances of this case. In my view, a decision to grant an extension of time to appeal is discretionary in nature. Section 58(2)(a) of the ATA provides that the standard for reviewing the exercise of discretion is patent unreasonableness and section 58(3) provides:

- (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.

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

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

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

[emphasis added]

Blake further states, at pages 98 to 99:

Many tribunals issue guidelines indicating the considerations by which they will be guided in the exercise of their discretion or explaining how they interpret a particular statutory provision. The publication of policies and guidelines is a helpful practice. It gives those in the industry advance knowledge of the tribunal’s opinion on various subjects so that they may govern their affairs accordingly. It assists applicants by listing the criteria that will be considered when deciding whether to grant the application. Also, in tribunals that have many members presiding over a large number of proceedings, guidelines ensure a certain level of consistency and avoid a patchwork of arbitrary and haphazard decisions....

However, care must be taken so that guidelines formulated to structure the use of the discretion do not crystallize into binding and conclusive rules. If discretion is too tightly circumscribed by guidelines, the flexibility and judgment that are an integral part of discretion may be lost. **A balance must be struck between ensuring uniformity and allowing flexibility in the exercise of discretion. The tribunal may not fetter its discretion by treating the guidelines as binding rules and refusing to consider other valid and relevant criteria...** The guidelines should be disclosed to parties so that they may make representations regarding the application of the guidelines in their case. **Conversely, because people may arrange their affairs in reliance on published policy, departures from policy in specific cases should be explained.**

[emphasis added]

Accordingly, it is clear that the MRPP plays an important role in providing notice as to the approach WCAT will take in dealing with various matters. The MRPP supports consistency and transparency and guards against arbitrary decision-making. While WCAT panels must be careful not to fetter their discretion through blindly applying the MRPP provisions, they must also recognize that parties to appeals and applications may be relying on those provisions.

In this case, the panel considered factors in addition to those enumerated in item #5.31 – namely that EOT counsel was a lawyer and her acts and omissions were unacceptable. I have not identified any other WCAT extension of time decisions in which these factors have been taken into account. While these factors could have been included in item #5.31, they are not listed as relevant to the question of whether special circumstances have been established. There are certainly circumstances where it is appropriate to consider factors other than those set out in the MRPP, especially when the parties are aware that those other factors will be considered. However, in this case, I find the factors taken into account by the panel constitute predominantly irrelevant factors within the meaning of section 58(3)(c).

I find the WCAT panel erred in concluding that a higher threshold for establishing special circumstances was applicable because EOT counsel was a lawyer and lawyers have professional obligations to ensure that they meet statutory deadlines. In focusing on these factors as determinative in nature, the panel made a patently unreasonable finding that special circumstances that precluded the timely filing of the appeal had not been established. I find that the previous WCAT decision is patently unreasonable and I set it aside as void.

Finally, while not central to this decision, I note that there is an inconsistency between the factors that the panel took into account. The panel noted that the worker had not followed up with EOT counsel during the appeal period and held EOT counsel to a higher standard than that applicable to a lay representative. Since the panel applied a sliding scale that depended on whether the representative was a lawyer or lay representative, it seems that the extent of the obligation on the applicant to follow up during the appeal period might vary depending on whether the applicant was represented by a lawyer to whom the higher standard was applicable or a lay representative. It seems to follow from the panel's comments about a lawyer's professional obligation to meet statutory deadlines, that the panel would also find it less likely that a reasonable appellant would find it necessary to follow up with a lawyer during the appeal period.

7. Merits of the worker's application for an extension of time

When a WCAT reconsideration panel sets aside a decision as void, the matter is generally returned to the WCAT Registry, which invites further submissions so that the application or appeal can be considered afresh. In this case, counsel has requested that the extension of time application be considered afresh in the course of dealing with the reconsideration application and has provided submissions regarding the merits of the extension of time application. As stated earlier, the employer is no longer registered with the Board. As there is no party that can be prejudiced if I consider the extension of time application afresh in this decision, I will do so.

The background relevant to the extension of time application has been summarized earlier in this decision as have the criteria for granting an extension of time.

In this case, the worker instructed EOT counsel to file a notice of appeal early in the appeal period and acted reasonably in relying upon her to do so. Like the previous panel, I accept that EOT counsel failed to file a timely appeal because she and her assistant were both ill, which somehow resulted in a breakdown of their bring-forward system. I note that EOT counsel immediately filed the notice of appeal upon realizing that the deadline had been missed. I acknowledge that there is no evidence that the worker followed up during the appeal period. However, that is just one of the factors listed in item #5.31 and it can be outweighed by other factors. In other words, it is not determinative. It may be less significant as a factor when the appeal period is 30 days rather than 90 days because the end of the appeal period follows the instruction to appeal more immediately when there is only a 30-day appeal period. In this case, I find it is outweighed by my conclusion that the worker's reliance on EOT counsel to initiate a timely appeal was reasonable. In all of the circumstances of this case, I am satisfied that special circumstances precluded the worker from filing a timely notice of appeal.

In the previous WCAT decision, the panel noted that the decision that was the subject of the Review Division decision related to the effective date of the worker's pension. I note that, in fact, the Review Division decision related to a variety of aspects of the worker's pension including his entitlement to a loss of earnings pension. Given the significance of the Review Division decision, I find that an injustice would result if the appeal did not proceed.

I find it appropriate to exercise the discretion to grant an extension of time to appeal.

8. Conclusion

WCAT Decision #2005-05995 involved a patently unreasonable exercise of discretion and is set aside as void.

In considering the worker's extension of time application afresh, I grant the worker an extension of time to appeal *Review Decision #21354*, dated January 27, 2005.

This matter will be returned to the WCAT Registry for the processing of the appeal from the Review Division decision.

Jill Callan
Chair

JC/hb