

### Noteworthy Decision Summary

**Decision:** WCAT-2007-02651**Panel:** Herb Morton**Decision Date:** August 30, 2007***No show at Oral Hearing – Breach of Implied WCAT Order – Failure to Diligently Pursue Appeal – Section 246(5)(c) of the Workers Compensation Act – Section 31(1)(e) of the Administrative Tribunals Act***

This decision is noteworthy as it illustrates a situation where, following a no show at an oral hearing, the appellant's appeal was dismissed for failure both to comply with an implicit order of the WCAT to attend the oral hearing, and to diligently pursue the appeal.

The original panel decision to dismiss the appellant's appeal following a no show at an oral hearing was set aside by a reconsideration panel. The worker's representative had mistakenly sent the reasons for the failure to attend the oral hearing to the Workers' Compensation Board, operating as WorkSafeBC. The appellant's reason for not attending the oral hearing was that he had car problems out of town.

The second stage reconsideration panel found the worker had failed to provide adequate reasons for not attending the oral hearing. The appellant did not respond to the questions posed by the respondent as to why he was out of town when the date of the hearing had been set for months. WCAT notified the appellant of the date of the oral hearing, and a confirmation letter was sent to him prior to the oral hearing. The appellant did not explain why, if he experienced car problems out of town, he did not contact WCAT by telephone regarding his inability to attend the hearing.

The panel noted that the WCAT notice of oral hearing letter sent to the appellant stated that a failure to attend the scheduled oral hearing may result in the panel dismissing his appeal. This statement was taken to be an implicit WCAT order for the appellant to attend the oral hearing. Failure to comply with this implicit order authorized WCAT to dismiss the appellant's appeal pursuant to section 246(5)(c) of the *Workers Compensation Act*. The appellant's failure to provide any additional comments or explanation in support of his application did not support an exercise of the discretion in section 246(5)(c) not to dismiss the appeal even though there had been a failure to comply with this WCAT implicit order.

Alternatively, the panel dismissed the appellant's appeal pursuant to section 31(1)(e) of the *Administrative Tribunals Act* on the basis that he failed to diligently pursue his appeal, in light of his failure to attend the oral hearing without adequate reasons.

**WCAT Decision Number :** WCAT-2007-02651  
**WCAT Decision Date:** August 30, 2007  
**Panel:** Herb Morton, Vice Chair

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## Introduction

This decision concerns the second stage of the worker's application for reconsideration of the Workers' Compensation Appeal Tribunal (WCAT) decision dated July 8, 2005.

The worker's appeal from *Review Decision #19407* dated November 25, 2004 was dismissed based on the worker's failure to provide reasons (by June 28, 2005), for not attending the WCAT oral hearing scheduled for June 8, 2005. *WCAT Decision #2007-00336* dated January 30, 2007 found that the worker's representative mistakenly forwarded the worker's June 28, 2005 explanation for his failure to attend the oral hearing to the Workers' Compensation Board, operating as WorkSafeBC (Board), rather than to WCAT. Accordingly, the WCAT panel was not aware that the worker's reasons for failing to attend the oral hearing had been provided by the specified deadline. Fairness required that the July 8, 2005 decision be set aside as void, and that the worker's June 28, 2005 reasons for failing to attend the oral hearing be considered by WCAT.

Item #4.20 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) sets out the following practice directive:

*If more than two years has elapsed since the party authorized the representative to act, WCAT will require a current authorization.*

[italics in original to denote a practice directive]

Following the January 30, 2007 WCAT decision, the WCAT registration clerk wrote to the worker's union representative to request a current authorization. No response was received to that letter. By letter dated March 14, 2007, the registration clerk wrote to the worker, advising that as no current authorization had been received, all future correspondence would be directed to him. A copy of this letter was sent to the worker's former union representative. All subsequent WCAT correspondence was directed to the worker alone, with no copy to the worker's former representative.

By letter dated May 4, 2007, the appeal coordinator invited a submission from the worker. The worker did not provide a submission. The employer is represented by a consultant. By letter dated June 1, 2007, the appeal coordinator wrote to the consultant representing the employer to invite her submission. In that letter, she noted that no submission had been provided by the worker in response to her May 4, 2007 invitation.

A copy of the June 1, 2007 letter was sent to the worker. The employer's representative provided a submission dated June 8, 2007. On June 12, 2007, the appeal coordinator provided the worker with a copy of the employer's submission and invited his response. No reply was provided by the worker. By letter dated July 2, 2007, the appeal coordinator wrote to the worker to advise that as he had not provided a final submission by the specified deadline, submissions were considered complete.

As no further submission has been provided by the worker, his failure to attend the WCAT oral hearing scheduled for June 8, 2005 will be considered on the basis of the explanation provided in his letter of June 28, 2005.

**Issue(s)**

Has the worker provided adequate reasons for his failure to attend the WCAT oral hearing scheduled for June 8, 2005? If not, should the worker's appeal proceed on the basis of the existing evidence or on the basis of written submissions, be rescheduled for an oral hearing, or be dismissed? Should the worker's appeal be dismissed on the basis of his failure to diligently pursue his appeal?

**Background**

The worker failed to attend the oral hearing of his appeal scheduled for June 8, 2005. By letter of June 28, 2005, he advised:

This letter is in regards to my appeal that was to be on June 8/05. I was unable to attend due to car problems out of town. I would like to continue with the appeal.

By memorandum of March 29, 2007, I noted:

(a) *Adequacy of Reasons*

The worker's stated reason for not attending the oral hearing was that "I was unable to attend due to car problems out of town."

Item #9.24.2 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) states:

The panel may investigate the appellant's reasons by reviewing relevant records (e.g. when did the appellant first contact WCAT to explain why they could not attend the hearing; was a postponement requested for the same

reason and refused), or by requesting documentary verification (e.g. medical letter, towing bill, letter from employer).

MRPP items #9.24.3 and #9.24.4 concern "Valid Reasons" and "Inadequate Reasons" for failing to attend an oral hearing without notice. (These are not "Rules").

By submission dated August 2, 2006, the employer questioned, in part:

Why would someone be out of town on the day of his hearing that had been set for months?

Why didn't he call the hearing location or his Union Rep on that date to advise he couldn't get there?

I invite any additional comments or explanations, or related documentary evidence, the worker wishes to provide related to his failure to attend the oral hearing.

*(b) Authority to dismiss appeal*

Another issue which may arise concerns WCAT's legal authority to dismiss an appeal on the basis that the worker's reasons for failing to attend an oral hearing were inadequate.

The *Workers Compensation Act* (Act) was amended effective December 3, 2004. The revised section 246(5) of the Act provides:

**(5) If a party fails to comply with an order of the appeal tribunal or with the rules of practice and procedure of the appeal tribunal, including any time limits specified for taking any actions, after giving notice to that party the appeal tribunal may do one or more the following:**

- (a) schedule a written, electronic or oral hearing;
- (b) continue with the appeal and make a decision based on the evidence before it, with or without providing an opportunity for submissions;
- (c) dismiss the application.

[emphasis added]

Effective December 3, 2004, section 245.1 of the Act provides:

Sections 1, 11, 13 to 15, 28 to 32, 35 (1) to (3), 37, 38, 42, 44, 48, 49, 52, 55 to 58, 60 (a) and (b) and 61 of the *Administrative Tribunals Act* apply to the appeal tribunal.

Copies of sections 11, 13, 14 and 15 of the ATA are attached, which concern WCAT's authority to make rules, practice directives, and orders. The December 3, 2004 version of the MRPP (the current version) explains at item #1.10:

This Manual of Rules of Practice and Procedure (MRPP) sets out legislation relevant to WCAT's operation, as well as rules of practice and procedure and practice directives established by the chair. **Rules are identified in bold while practice directives are in italics.** Both are included in Appendices 1 and 2, respectively, at the end of this MRPP.

[emphasis added]

A question for consideration is whether the appellant failed to comply with a WCAT order, or with WCAT's rules of practice and procedure, including any time limits specified for taking any actions. The February 21, 2005 "oral hearing" letter from the WCAT appeal liaison which provided particulars of the June 8, 2005 oral hearing date stated: "Failure to attend the scheduled oral hearing may result in the panel dismissing your appeal." Arguably, this may be characterized as an implicit order that the worker attend the oral hearing. Comments are invited as to whether the worker failed to comply with a WCAT order (in not attending the oral hearing), so as to warrant consideration of the three options listed in section 246(5) of the Act.

(c) *Failure to diligently pursue the application*

Section 31 of the ATA further provides:

31(1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:

...

(e) the applicant failed to diligently pursue the application or failed to comply with an order of the tribunal;

(2) Before dismissing all or part of an application under subsection (1), the tribunal must give the applicant an opportunity to make written submissions or otherwise be heard.

(3) If the tribunal dismisses all or part of an application under subsection (1), the tribunal must inform the parties and any interveners of its decision in writing and give reasons for that decision.

I would also invite comments as to whether the worker's appeal should be dismissed on the basis that he failed to diligently pursue his appeal. I appreciate that this raises a separate or additional question for consideration which was not posed by the July 6, 2005 letter inviting reasons from the worker for his failure to attend the oral hearing.

This matter may proceed on the basis of written submissions. Please disclose this memo and attachments to the parties and invite any additional comments they wish to provide.

By letter dated April 3, 2007, the appeal coordinator wrote to the employer, with a copy to the worker, enclosing the March 29, 2007 memorandum and inviting participation by the employer. On May 4, 2007, the appeal coordinator wrote to the worker to invite his submissions. That letter asked the worker to refer to this memo in making his submission. As noted above, no further submission has been provided by the worker.

By submission dated June 8, 2007, the employer's representative argued:

This worker has been given ample opportunity and assistance in the system. We do not agree that he should be given the opportunity to pursue the original appeal as his reasons for not attending the oral hearing have not been substantiated.

## **Reasons and Findings**

The worker's appeal to WCAT concerned the November 25, 2004 Review Division decision (*Review Decision #19407*). The review officer confirmed the April 22, 2004 decision by the case manager. The worker's claim for mental stress, in relation to an explosion at work on February 2, 2004, was denied under section 5.1 of the Act. The review officer found that there was no dispute that the worker was in the vicinity of a significant explosion at work, which was sudden and unexpected. However, the worker was able to continue working and did not seek medical attention for 3 ½ weeks.

The review officer found that he did not suffer an “acute reaction” to the explosion. The worker’s attending physician and treating psychiatrist both diagnosed the worker as suffering from post traumatic stress disorder. However, the review officer preferred the opinion of a psychologist, who had performed a detailed assessment of the worker and advised that he did not have a diagnosable psychological condition.

MRPP item #9.24.3 provides that an appellant’s failure to appear at an oral hearing without prior notice to WCAT would normally only be justified by a personal emergency or other serious and unforeseen circumstance which prevented the appellant both from attending the hearing, and from notifying WCAT, in advance, of the situation. Acceptable reasons would include a personal or family emergency that could not have been predicted, or other compelling, unpredictable situations, which made it difficult or impossible for the appellant to notify WCAT in advance. MRPP item #9.24.3 indicates that examples could include:

- (a) a motor vehicle accident on the way to the hearing;
- (b) admission to hospital for emergency health care;
- (c) acute physical or mental disability;
- (d) death of a family member on or immediately before the day of the hearing; or,
- (e) failure to receive notice of the hearing where the appellant had previously provided WCAT with their current address.

MRPP item #9.24.4 provides that WCAT panels will generally not consider the following as adequate reasons for failing to attend an oral hearing without notice:

- (a) concern about jeopardizing current employment by taking time off for the hearing;
- (b) a non-emergency medical situation, such as a cold or flu;
- (c) misunderstanding the hearing notice;
- (d) forgetting about the hearing, or oversleeping on the day of hearing;
- (e) failure to receive the hearing notice, where this resulted from the appellant’s failure to notify WCAT of their change of address;
- (f) important personal activities (preparations for a wedding, divorce or funeral, care of sick family members, administering an estate, etc.); or
- (g) vacation.

MRPP item #9.24.5 further provides that despite the inadequacy of the reasons for not appearing or not notifying WCAT in advance, panels have the discretion to reschedule the hearing where the panel considers that the appeal should be addressed on the

merits despite the failure to appear, and an oral hearing is essential to consideration of the appeal. A panel may exercise this discretion where, for example, the issue under appeal is very significant and credibility is a central issue.

In this case, the worker has explained that he was unable to attend the oral hearing due to car problems out of town. However, the worker has not responded to the questions posed by the employer's representative, as to why he was out of town when the date of his hearing had been set for months. The worker was notified of the date of the oral hearing by letter dated February 21, 2005, and a confirmation letter was sent on April 28, 2005. No explanation has been provided by the worker as to why, if he experienced car problems out of town, he did not contact WCAT by telephone regarding his inability to attend the hearing.

I am not satisfied that the worker's letter of June 28, 2005 provides an adequate explanation for his failure to attend the scheduled oral hearing. The worker's explanation is lacking in particulars, and further details have not been provided notwithstanding a request for these. Accordingly, it is necessary to consider the effect of the worker's failure to attend the oral hearing, without adequate reasons.

The February 21, 2005 letter from the WCAT appeal liaison which provided particulars of the June 8, 2005 oral hearing date stated: "Failure to attend the scheduled oral hearing may result in the panel dismissing your appeal." This letter may be characterized as an implicit order that the worker attend the oral hearing. On that basis, I consider that the worker's appeal should be dismissed pursuant to section 246(5)(c) of the Act. The worker's failure to provide any additional comments or explanation in support of this application does not support an exercise of discretion in his favour. I do not consider that the worker's appeal is one which should proceed to be heard on the merits, notwithstanding the worker's failure to attend the oral hearing without adequate reasons.

Alternatively, if I am wrong in my determination that the February 21, 2005 letter from WCAT amounted to an order that the worker attend the June 8, 2005 oral hearing for the purposes of section 246(5) of the Act, I have further considered this matter under section 31(1)(e) of the ATA. Section 1 of the ATA defines "application" as including an appeal. I find that the worker's appeal should be dismissed on the basis that he failed to diligently pursue his appeal, in light of his failure to attend the June 8, 2005 oral hearing without adequate reasons.

No expenses were requested, and it does not appear from a review of the file that any expenses were incurred related to this appeal. I therefore make no order regarding expenses of this appeal.



**Conclusion**

The worker's appeal from the November 25, 2004 Review Division decision is dismissed on a summary basis, due to the worker's failure to attend the WCAT oral hearing without adequate reasons. This amounted to both a failure by the appellant to comply with a WCAT order, and a failure to diligently pursue his appeal. Accordingly, the worker's appeal is dismissed under section 246(5)(c) of the Act, and under section 31(1)(e) of the ATA.

Herb Morton  
Vice Chair

HM/gw