

Noteworthy Decision Summary

Decision: WCAT-2008-00031 **Panel:** Randy Lane **Decision Date:** January 7, 2008

Reconsideration – Authority to reconsider and set aside a seized Appeal Division Decision issued after March 3, 2003 on the basis of jurisdictional error (common law grounds)

Reconsideration application. WCAT does not have the authority to reconsider and set aside a seized Appeal Division decision which was issued after March 3, 2003 on the basis of jurisdictional error (common law grounds).

The worker asked WCAT to reconsider and set aside a March 25, 2003 decision of a panel of the former Appeal Division of the Workers' Compensation Board, operating as WorkSafeBC (Board).

The reconsideration panel found that WCAT does not have the authority to reconsider and set aside a seized Appeal Division decision issued after March 3, 2003 on the basis of jurisdictional error. The panel adopted the same analysis he set out in *WCAT-2007-02083* dated July 11, 2007 in reaching this conclusion.

The panel acknowledged that the circumstances surrounding the issuing of the March 25, 2003 Appeal Division decision differed slightly from the one addressed in *WCAT-2007-02083* which involved an Appeal Division decision issued prior to March 3, 2003 – the date the Appeal Division ceased to exist. The circumstances in this case were similar to those found in *WCAT-2004-04928* dated September 22, 2004. However, the panel did not consider these facts were significantly different. That the Appeal Division decision in the case before him may have been issued by an Appeal Division appeal commissioner who was also a WCAT vice chair did not somehow make the Appeal Division decision a WCAT decision over which WCAT could exercise common law reconsideration authority. The March 25, 2003 decision was issued by an appellate body separate from WCAT. The panel concluded that the analysis set out in *WCAT-2007-02083* was applicable to the Appeal Division decision in the case before him.

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Panel: Randy Lane, Vice Chair

Introduction

The worker has asked the Workers' Compensation Appeal Tribunal (WCAT) to reconsider a March 25, 2003 decision of a panel of the former Appeal Division of the Workers' Compensation Board, operating as WorkSafeBC (Board). In *Appeal Division Decision #2003-0454* the panel allowed the employer's appeal from the April 30, 2002 finding of a panel of the former Workers' Compensation Review Board (Review Board). The Appeal Division panel determined that on October 14, 1999 the worker had not suffered an injury arising out of and in the course of his employment.

The worker's initial expression of disagreement with the Appeal Division panel's decision was set out in a May 21, 2003 letter. In its June 6, 2003 response WCAT advised the worker of the existence of reconsideration applications and indicated it would be necessary for him to specify the grounds upon which he relied. In November 2006 the worker submitted a May 20, 2003 letter addressed to a WCAT officer, an undated document which appears to be a letter from him to a third party, a copy of a July 3, 2000 statement by Mr. W (not his real initial), a copy of his May 21, 2003 letter, a copy of an exchange of e-mails on July 13, 2000, a copy of a May 15, 2000 document from Mr. V (not his real initial), and a copy of WCAT's June 6, 2003 letter.

In its December 21, 2006 letter WCAT advised that the worker's materials would be processed as a reconsideration application. In June 2007 the worker provided copies of his May 21, 2003 letters upon which Mr. V and Mr. U (not his real initial) had written that they believed the contents of that letter to be accurate. The worker also submitted a June 21, 2007 letter. The employer's representative provided a July 11, 2007 submission. While the worker was given an opportunity to respond to that submission, WCAT did not receive a rebuttal submission from him.

In my October 24, 2007 memorandum distributed to the parties, I queried whether WCAT had jurisdiction to reconsider an Appeal Division decision on common law grounds. The worker provided a November 27, 2007 submission. While the employer was provided with an opportunity to respond to the November 27, 2007 submission, no response was received by WCAT. By letter of December 10, 2007 submissions were declared complete.

The rule in item #8.90 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) provides that WCAT will normally conduct an appeal on a read and review basis where the issues are largely medical, legal, or policy based, and credibility is not an issue.

Similar considerations apply to a reconsideration application. I have reviewed the issues, evidence and submissions on the worker's file and have concluded that this reconsideration application may be determined without an oral hearing. The issue before me is primarily legal in nature.

Issue(s)

At issue is whether reconsideration grounds have been established.

Jurisdiction

At the time the Appeal Division decision was issued, subsection 96.1(1) of the *Workers Compensation Act* (Act) provided that a decision of the Appeal Division was final and conclusive. The Appeal Division's common law authority to set aside one of its decisions on the basis of jurisdictional error was confirmed by the British Columbia Court of Appeal in the August 27, 2003 decision in *Powell Estate v. Workers' Compensation Board*, 2003 BCCA 470, [2003] B.C.J. No. 1985, (2003) 186 B.C.A.C. 83, 19 W.C.R. 211.

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 current Act, or on the basis of an error of law going to jurisdiction (*Powell Estate*). This latter authority is further confirmed by section 253.1(5) of the Act.

Section 245.1 of the Act provides that section 58 of the *Administrative Tribunals Act* (ATA) applies to WCAT. Section 58 of the ATA concerns the standard of review to be applied in a petition for judicial review of a WCAT decision. Section 58 of the ATA does not apply to the Board and would not apply to a decision of the former Appeal Division.

Section 256 of the Act permits reconsideration of a WCAT decision or an Appeal Division decision on the basis of new evidence, as follows:

- (2) A party to a completed appeal may apply to the chair for reconsideration of the decision in that appeal if new evidence has become available or been discovered.
- (3) On receipt of an application under subsection (2), the chair may refer the decision to the appeal tribunal for reconsideration if the chair is satisfied that the evidence referred to in the application
 - (a) is substantial and material to the decision, and

- (b) 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.
- (4) Each party to a completed appeal may apply for reconsideration of a decision under this section on one occasion only.

Also of note is that item #15.24 of the MRPP provides that a common law reconsideration request may be made only once.

The reconsideration application was assigned to me by the chair of WCAT on the basis of a written delegation (*Decision of the Chair, Workers' Compensation Appeal Tribunal, No. 9, "Delegation by the Chair", February 1, 2007*).

Background

By decision of November 2, 1999 the Board denied reopening of the worker's 1999 claim.

The worker submitted a November 4, 1999 application for compensation in which he indicated that he injured his back on October 14, 1999 while handling timbers. In its November 15, 1999 letter the employer indicated the worker had been on vacation from October 18 to October 27, 1999. He returned to work on October 28, 1999 and advised his supervisor, Mr. Y (not his real initial) that he had a sore back from his vacation.

In December 1999 the worker's union submitted an undated letter from Mr. Z and a November 4, 1999 letter from Mr. X (not their real initials). The Board also received a copy of a December 20, 1999 letter from Mr. W. A Board claims investigator interviewed the worker, Mr. W, Mr. T (not his real initial), Mr. X, Mr. Z, and Mr. Y.

In his February 23, 2000 decision the case manager denied the worker's claim. He considered that statements taken by the Board (i) did not support the worker's claim that he lifted timbers on October 14, 1999 and (ii) indicated the worker did not report this event to his employer until after he had returned from vacation.

The worker appealed the February 23, 2000 decision to the Review Board. One of the exhibits submitted to the Review Board was a copy of Mr. W's July 3, 2000 statement.

In its April 30, 2002 finding the Review Board panel allowed the worker's appeal from the February 23, 2000 decision. The panel reviewed the evidence on file, the submissions to the Review Board, and the worker's testimony at a March 26, 2002 oral hearing. It concluded that timbers and blocks used for blocking under the loader were not all moved by use of a machine and there was "physical involvement" by the worker in this activity. The panel noted that Mr. W, the truck driver who delivered

the loader on October 14, 1999, had provided a written statement to that effect. It accepted that the worker injured his back in the manner he had described. While there was some question as to when the worker's back injury was reported, with the worker maintaining that he told his supervisors on October 14, 1999 and October 15, 1999 and the supervisors denying that they had been advised, there was evidence that when the worker saw his physician on October 18, 1999 he indicated he had been lifting heavy timbers the previous week and had injured his back.

The employer appealed the April 30, 2002 finding to the Appeal Division. The Appeal Division panel issued a March 25, 2003 decision. The panel advised that it began its deliberations prior to March 3, 2003 and was seized with the appeal (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 39.) Had an Appeal Division panel not begun deliberations prior to March 3, 2003, the appeal to the Appeal Division would have been transferred WCAT, with the result that a WCAT panel would have issued the final decision on the appeal.

The Appeal Division panel reviewed the evidence on file and the submissions. It noted subsection 5(1) of the Act and item #97.00 of the *Rehabilitation Services and Claims Manual* (no volume was specified).

The Appeal Division panel noted the presence of conflicting evidence as to whether the timbers were lifted and the absence of evidence from co-workers as to their awareness of the worker having suffered a back injury:

There is a considerable amount of conflicting evidence in front of the panel. There is evidence that the workers did not lift any of the timbers, but rather any lifting was carried out by a loader. The worker's evidence at the oral hearing is that when the machines were brought into the yard on the low bed, these machines were supported by timbers placed underneath the machine. I accept that the more likely means of moving the timbers after the machine was jacked up was by hand, or a combination of by hand and machine. The statements of X. and Z. support the worker's statement that these blocks were moved by hand. I agree that the loader would likely have been used for some of these movements, but there were occasions when it would have been more expedient to move or place the blocks by hand.

The worker stated at the oral hearing that as he carried out this activity of moving the blocks during the morning on October 14, his back pain increased. The worker stated that he made his coworkers aware of his back complaints and kept working. The worker further testified that his back felt "terrible" after lunch. The worker states that his coworkers would have known by that time that he was experiencing problems with his back.

After he left work, he took his usual 40 minute drive home and could barely get from his car to the house when he arrived.

The worker has virtually no support from his coworkers with respect to his contention that they were aware of his back injury. In addition to the coworker's information contained in the field investigator's report, the worker also solicited written statements from both X. and Z. Neither of the statements is supportive of the worker's position. X. told the field investigator that he could definitely state that the worker did not injure himself October 14. His November 4, 1999 statement only supports the fact that the workers were involved in moving the timbers that were supporting the machine. There is no mention in this statement of the worker complaining of injury or of suffering an injury. Similarly, Z.'s statement mentions moving heavy timbers and states that the worker was working with him on that activity. Z. also stated that sometime during that week and on October 14 the worker had stated to him that he had a sore back.

That last statement is not helpful in supporting the worker's position, as the worker had complained of back pain for a considerable period of time previous to this date and so the complaint of a sore back on October 14 would not have been unusual. Noticeably absent from Z.'s statement is any indication that the worker experienced an injury on that day or that his back pain had increased considerably after unloading the machine from the low bed.

The low bed driver provided a statement that the timbers were moved by hand from under the machine before unloading the machine. He only went so far as to state that the worker was present and helped with this activity.

The worker has stated that these workers were not being truthful in their statements to the Board field investigator and presumably in their written statements. The worker has provided no evidence as to why these workers would be untruthful.

According to the worker's testimony at the Review Board hearing, he was in very considerable pain after lunch on that day. That pain apparently continued throughout the afternoon as the worker described a painful drive home after which he could barely get out of his car. The worker attended work the following day, but the evidence is that he did very little work on that day. This worker, as noted above, has filed 37 claims with the Board in a 41-year period. He had filed a claim with the Board several months previous for a thoracic back strain; the Board accepted that claim.

The worker also testified that there was a first aid facility on this job site. The above information begs the question as to why this worker, if he was in such considerable pain, did not attend the first aid facility to establish that he experienced a workplace injury and why he did not contact the Board this one time when he was in serious pain, when he apparently had no hesitation in doing so previously. Also not explained is why, if this pain was so serious, the worker did not seek medical attention before he did.

The worker's immediate supervisor was present while the log loader was unloaded from the low bed. His statement was that the worker did not hurt himself on that day and that he never complained of any injury.

[all quotations in this decision are reproduced as written
in the decision on file, save for changes noted;
paragraph numbering deleted from all quotations
from the Appeal Division decision]

The Appeal Division panel queried the persuasiveness of evidence from Dr. C, the worker's attending physician:

Medical evidence indicates that his attending physician, Dr. C., examined him on September 13, 1999. The next examination was on October 18, at which time Dr. C. reported that the worker's back had become worse over the previous month, and particularly over the previous week. Dr. C. noted in this report that the worker had been lifting heavy timbers and injured his back. He provided no diagnosis and reported the worker symptoms as marked tenderness and muscle spasm. Dr. C.'s reports are not particularly helpful with respect to establishing causation; his reporting is based on information provided by the worker, which is hearsay with respect to his statements regarding causation.

The Appeal Division panel documented the reasons for its disagreement with the Review Board panel's weighing of and assessment of the evidence.¹ It had concerns as to the manner in which the facts used to reach the Review Board panel's findings were derived from the evidence. It considered that the Review Board panel had not demonstrated that it weighed and assessed the evidence of the worker's co-workers, including sworn statements gathered by the Board's claims investigator.

The Appeal Division panel considered the Review Board panel had not demonstrated it considered the records of the case manager found in the file that were inconsistent with the worker's version of events given at the Review Board oral hearing. In particular, it noted a November 4, 1999 claim log entry which established the worker

¹ Notably, the version of the Appeal Division panel's decision found on the Board's website as of the date of the issuance of my decision does not contain the panel's analysis of the Review Board panel's finding.

told the case manager he had hurt his back after working one day following his return from a vacation. It also noted a February 22, 2000 claim log entry in which the case manager noted several post-October 14, 1999 conversations with the worker during which the worker never once mentioned an October 14, 1999 incident. It referred to the employer's statement that the worker advised his supervisor that he had a sore back from his vacation. The panel observed that, at the Review Board oral hearing and in his submissions, the worker had not substantially addressed or refuted evidence unsupportive of his position, other than a general statement that his co-workers had not been truthful.

Reasons and Decision

Common law reconsideration grounds

In *WCAT Decision #2007-02083*, a copy of which was sent to the worker on October 26, 2007, I found that WCAT lacked the jurisdiction to set aside Appeal Division decisions on common law grounds. In his November 27, 2007 submission the worker does not address the analysis in *WCAT Decision #2007-02083*.

I am aware that the circumstances surrounding the issuance of the March 25, 2003 Appeal Division decision in the case before me differ slightly from the circumstances surrounding the issuance of the May 27, 2002 Appeal Division decision considered by me in *WCAT Decision #2007-02083*. In particular, the Appeal Division decision in the case before me was issued by an Appeal Division panel that was seized of the appeal as of the March 3, 2003 transition date. Those circumstances are similar to those found in *WCAT Decision #2004-04928* in which a reconsideration panel determined that WCAT had the authority to reconsider an April 17, 2003 Appeal Division decision issued after the March 3, 2003 transition date. In *WCAT Decision #2007-02083* I allowed that it might be possible that WCAT has the authority to set aside Appeal Division decisions that were issued after March 3, 2003 as seized Appeal Division matters. It was not necessary for me to resolve that issue as part of the reconsideration application before me in that case.

I have considered whether the facts of this case are significantly different from those in *WCAT Decision #2007-02083* such that a different conclusion might be reached as to WCAT's authority to set aside Appeal Division decisions on common law grounds. I do not consider that the facts are significantly different. That the Appeal Division decision in the case before me may have been issued by an Appeal Division appeal commissioner who was also a WCAT vice chair does not somehow make the Appeal Division decision a WCAT decision over which WCAT can exercise common law reconsideration authority. The March 25, 2003 decision was issued by an appellate body separate from WCAT. I consider that the analysis set out in *WCAT Decision #2007-02083* is applicable to the Appeal Division decision in the case before me.

I find that reconsideration applications filed with WCAT regarding Appeal Division decisions are limited to new evidence grounds. Thus, I will not review whether the March 25, 2003 Appeal Division decision contains errors of law going to jurisdiction. It is not open to me to consider the worker's concerns as to the Appeal Division panel's handling of the evidence.

New evidence reconsideration grounds

As indicated above, section 256 of the Act provides that a party to a completed appeal may apply for reconsideration if new evidence has become available or has been discovered. Reconsideration may take place if the evidence is substantial and material to the decision and (i) did not exist at the time of the oral hearing or (ii) did exist at that time, but was not discovered, and could not through the exercise of reasonable diligence have been discovered.

In *WCAT Decision #2003-01120* the chair of WCAT made the following comments as to the test of substantial and material evidence found in subsection 96.1(3) of the Act before its repeal in March 3, 2003:

I consider that "material" evidence is evidence with obvious relevance to the decision of the Appeal Division panel. I consider that "substantial" evidence is evidence which has weight and supports a conclusion opposite to the conclusion reached by the panel.

While subsection 96.1(3) dealt with the question of whether decisions of the former Appeal Division of the Board could be reconsidered by the Appeal Division on the basis of new evidence, I consider that the comments by the chair of WCAT are applicable to the test of material and substantial evidence found in section 256 of the Act.

Also relevant are the comments of a former chief appeal commissioner of the Appeal Division who commented in *Appeal Division Decision #00-0796* as follows:

From the inclusion of "material" and "substantial" I take it that the legislature contemplated that something more than new and relevant evidence is required to give the Appeal Division authority to reconsider one of its previous decisions. What is required is new evidence that is important, having to do with the substance of the matter and which has sufficient substance or weight to support a particular conclusion. The standard is not as high as to provide proof on a balance of probabilities but it must be more than evidence that is only relevant. It need not be of such weight as to decide an issue one way or the other on its own but it must be more than simply evidence that is admissible. As a general

matter it is not desirable or possible to be more specific than this and the circumstances of each application for reconsideration have to be considered in light of the requirements of section 96.1 of the *Act*.

Some of the materials submitted by the worker as part of his reconsideration application contain evidence that formed part of the evidential record prior to the issuance of the Appeal Division panel's decision. In particular, Mr. W's July 3, 2000 letter had been submitted to the Review Board. Further, the July 13, 2000 exchange of e-mails reproduces the contents of that July 3, 2000 statement.

I do not consider that the re-submission of evidence that was already part of the evidential record when the Appeal Division panel's decision was issued amounts to the submission of new evidence. Only materials that were not on the claim file when the Appeal Division panel issued its March 25, 2003 decision can be eligible to be considered new evidence that satisfies the initial criterion found in section 256 of the *Act*.

The worker's May 20, 2003 and May 21, 2003 letters are very similar. The letters document the worker's disagreement with the Appeal Division panel's decision and his evidence that he injured his back on the job. His undated letter to a third party also documents his evidence as to his having injured his back on the job.

I consider it significant that in the above-noted documents the worker refers to evidence that was in his possession at the time of the Appeal Division's decision. The letters document the worker's belief that he suffered an injury arising out of and in the course of his employment on October 14, 1999.

As such evidence existed at the time of the Appeal Division's decision, it must satisfy the requirement found in section 256 of the *Act* that it be evidence "that could not through the exercise of reasonable diligence" have been provided to the original WCAT panel. On this point, I am guided by *WCAT Decision #2003-01116-AD*. In that decision the chair of WCAT adopted the analysis in *Appeal Division Decision #91-0724* (7 W.C.R. 145) regarding the concept of "due diligence" which applied to reconsideration applications made to the Appeal Division regarding Appeal Division decisions:

It is important to note, however, that the test of "due diligence" includes a concept of reasonableness as to the nature and scope of the inquiries an appellant is expected to have pursued. The fact that information previously existed and could have been obtained upon inquiry is not conclusive as to whether it could through the exercise of "due diligence" have been discovered. The circumstances of the particular case must also be considered, with regard to the extent of the inquiries which due diligence would have required.

The question is not simply whether the appellant could have obtained the particular information if they had made diligent inquiries for the purpose of obtaining it. The requirement of “due diligence” is more properly interpreted as referring to the degree of care which a prudent and reasonable appellant would have exercised in ensuring that the Appeal Division had all relevant information necessary to the proper consideration of their appeal. If, for example, certain information existed, but it was not reasonably foreseeable that it would be germane to the Appeal Division’s consideration, “due diligence” would not have required the appellant to search it out. To interpret the requirement of “due diligence” otherwise would be to create an artificial and unrealistic legal barrier to reconsideration which, in my view, was not intended by the statute. The requirements of section 96.1 of the Act must be interpreted in a fair and meaningful fashion, with regard to the realities of the appeal process.

While the test discussed above concerns due diligence, I consider that it is relevant to the test in section 256 regarding reasonable diligence.

As part of the appeal process, the worker was given the opportunity to make submissions. The September 25, 2001 submission of the worker’s representative to the Review Board, the worker’s testimony before the Review Board as part of the March 26, 2002 oral hearing, and the worker’s representative’s October 30, 2002 submission to the Appeal Division establish that the worker would have been aware of the need to provide evidence concerning the occurrence of an injury arising out of and in the course of his employment on October 14, 1999. A prudent and reasonable appellant would have submitted his own evidence pursuant to reasonable diligence. Thus, its submission now does not satisfy the reasonable diligence test found in section 256.

The worker has submitted a May 15, 2000 unsigned statement from Mr. V. While this statement seemingly pre-dates the Appeal Division panel’s decision by some three years, a copy of this statement is not found on the claim file. If the worker had this document in his possession and failed to submit it as part of the appellate process, he failed to exercise reasonable diligence. Aside from the issue of reasonable diligence, the statement does not contain substantial and material evidence. The statement attests to the worker’s honesty and integrity. It does not address whether the worker suffered an injury arising out of and in the course of his employment on October 14, 1999.

An absence of substantial and material evidence similarly afflicts the copies of the worker’s May 21, 2003 letters bearing handwritten statements by Mr. V and Mr. U to the effect that they believe the worker’s statements in that letter to be true. Those endorsements fall far short of evidence supporting a decision contrary to that reached

by the Appeal Division panel. This is particularly so, given that Mr. U indicates that he was not present at “the incident.” As well, the evidence on file does not appear to establish that Mr. V was present at “the incident” either. Further, I consider that the worker’s failure to submit such documents prior to the issuance of the Appeal Division panel’s decision involves a failure to exercise reasonable diligence. The submission by the worker’s union in 1999 and 2000 of statements from Messrs. Z, X, and W would have demonstrated to the worker the need to provide supportive evidence from witnesses. A prudent and reasonable appellant would have submitted such evidence pursuant to reasonable diligence. This is especially so, given that the worker’s evidence in the May 21, 2003 letter (the accuracy of which Mr. V. and Mr. U vouch for) involves the worker’s evidence that would have been in his possession prior to the Appeal Division panel’s issuance of its decision.

The worker’s June 21, 2007 letter documents his contention that a representative of the employer and various individuals interviewed by the Board have been untruthful. I question whether his letter contains new evidence as opposed to common law reconsideration arguments as to the weighing of evidence that was on the file when the Appeal Division panel issued its decision. To the extent that one could consider that the letter concerns the new evidence reconsideration grounds, the worker’s allegations could be seen as his repeating an allegation documented in a March 2, 2000 claim log entry; that entry noted his assertion that co-workers who gave sworn statements to the Board had not told the truth. His repeating of such an allegation after the issuance of the Appeal Division panel’s decision does not amount to the submission of new evidence. To the extent that the worker’s June 21, 2007 letter could be seen as containing slightly different allegations concerning the untruthfulness of others, I consider his making of such allegations would not involve the submission of new evidence. His letter does not persuade me that it contains evidence that he did not have prior to the issuance of the Appeal Division panel’s decision. He does not claim that his allegations as to the untruthfulness of others stem from knowledge that he obtained after the Appeal Division panel issued its decision.

After having reviewed the matter, and for the reasons set out above, I find that the worker’s reconsideration application has not satisfied the new evidence grounds set out in section 256 of the Act. While I appreciate that the worker continues to disagree with the Appeal Division panel’s decision, the reconsideration process regarding Appeal Division decisions is confined to the submission of new evidence. The worker’s disagreement does not amount to the submission of new evidence. WCAT has no jurisdiction to set aside Appeal Division decisions on common law grounds.

Conclusion

The worker's reconsideration application is denied. New evidence reconsideration grounds have not been established. I find WCAT does not have the authority to set aside the Appeal Division decision on common law grounds. *Appeal Division Decision #2003-0454* stands as "final and conclusive" pursuant to subsection 96.1(1) of the former Act.

Randy Lane
Vice Chair

RL/jy