Noteworthy Decision Summary

Decision: WCAT-2008-00058 Panel: Jill Callan Decision Date: January 8, 2008

Reconsideration – Extension of Time – Statutory interpretation – Section 243(3) of the Workers Compensation Act – Items #5.30 - 5.33 of the Manual of Rules of Practice and Procedure

Reconsideration decision by the chair. Section 243(3) of the *Workers Compensation Act* (Act) contains a residual discretion to deny an extension of time application (EOT) even when the requirements of sections 243(3) (a) and (b) of the Act had been met. The original panel's statutory interpretation of the word "may" in section 243(3) was not patently unreasonable.

The original panel found that section 243(3) of the Act had a residual discretion to deny an EOT even if the requirements of sections 243 (3)(a) and (b) of the Act are met. Sections 243(3)(a)and (b) require that special circumstances existed which precluded the filing of the appeal on time and that an injustice would otherwise result if the EOT were not granted. Items #5.31 to 5.33 of the *Manual of Rules of Practice and Procedure* (MRPP) set out the guidelines for determining whether the requirements for granting an EOT had been established. The original panel did not exercise the residual discretion in the worker's favour because the delay that followed the expiration of the 30-day time limit for appealing had not been adequately explained, particularly in light of a WCAT letter to the worker, which clearly identified that the relevant Review Division decision had not been appealed.

The worker argued that the EOT decision was patently unreasonable because section 243(3) of contains no residual discretion. Once the statutory conditions are met, the EOT had to be granted. If there were a residual discretion, the original panel exercised it in a patently unreasonable manner. The deemed employer argued that section 243(3) granted a residual discretion in the WCAT chair and that it had been properly exercised in accordance with item #5.33 of the MRPP.

The worker's reconsideration application was denied. The chair found that both the primary question of whether section 243 contains a residual discretion and the secondary issue of whether the discretion was appropriately exercised fell within WCAT's exclusive jurisdiction and therefore the appropriate standard of review under section 58(2) of the *Administrative Tribunals Act* was patent unreasonableness. The chair found that the original panel's interpretation that section 243(3) contained a residual discretion was not patently unreasonable. It was both rational and correct. She considered the modern principles of statutory interpretation, section 8 of the *Interpretation Act*, the presumption of consistent expression and the use of the word "may" in various provisions in Part 4 of the Act, including section 238(6). She also considered various provisions of the Act which either established an obligation or conferred a discretion when special circumstances had been established. Given the presumption of consistent expression, it must be presumed that the legislature would have used "must" rather than "may" in section 243(3) if it had intended to establish a duty rather than a discretion to grant an EOT. By using the word "may", section 55 of the Act also supports the conclusion that the legislature intended that section 243(3) confer the discretion rather than a duty to grant an EOT.

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The chair also found that the original panel's exercise of the residual discretion under section 243(3) in accordance with item #5.33 of the MRPP was not patently unreasonable. Although it is open to a WCAT panel to depart from the MRPP, its provisions are essential for supporting fairness through consistency of decision-making. The original panel did not exercise the discretion arbitrarily or in bad faith or for an improper purpose, nor did it take irrelevant factors into account or fail to consider the statutory requirements when denying the EOT application.

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This decision has been the subject of a BC Court of Appeal decision. See 2011 BCCA 7.

This decision has been the subject of a BC Supreme Court decision. See 2010 BCSC 644.

WCAT Decision Number: WCAT-2008-00058
WCAT Decision Date: January 08, 2008
Panel: Jill Callan, Chair

1. Introduction

The applicant (worker) applies for reconsideration of an October 20, 2006 Workers' Compensation Appeal Tribunal (WCAT) decision (*Decision #2006-03952*), which I will call the EOT decision. In that decision, a WCAT vice chair (original panel) denied the worker's request for an extension of time (EOT) to appeal a December 19, 2005 decision of the Review Division of the Workers' Compensation Board, operating as WorkSafeBC (Board) (*Review Decision #R0054059*). The original panel found that the worker met the statutory criteria set out in sections 243(3)(a) and (b) of the *Workers Compensation Act* (Act) but denied the EOT based on an exercise of discretion.

The worker submits that the EOT decision is patently unreasonable because section 243(3) of the Act contains no residual discretion. According to the worker, once the statutory conditions are met, the EOT must be granted.

The employer under the worker's claim is no longer registered with the Board. The Employers' Advisers Office is the deemed employer and is participating in this application as the respondent. The Employers' Advisers Office submits that section 243(3) grants a residual discretion to the WCAT chair.

The worker and the Employers' Advisers Office have provided written submissions. Given that the worker's application raises legal issues only, I find it can be fully and fairly considered without an oral hearing.

2. Issue(s)

The issue broadly stated is whether the EOT decision contains a jurisdictional error. More specifically, the primary issue is whether the original panel's interpretation that section 243(3) of the Act contains a residual discretion to deny an EOT even where the statutory conditions set out in sections 243(3)(a) and (b) have been met is patently unreasonable. If section 243(3) contains such a residual discretion, the secondary issue is whether the original panel's exercise of that discretion was patently unreasonable.

3. Jurisdiction

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, WCAT may not set aside and reconsider a final decision except on the basis of new evidence as set out in section 256 of the Act, or on the basis that the decision is invalid because the WCAT decision contains a jurisdictional error.

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, which authorizes WCAT to "reopen an appeal in order to cure a jurisdictional defect". The term "jurisdictional defect" is not defined in the Act. In my view, section 253.1(5) was intended to confirm WCAT's common law authority to set aside its own decisions on the basis of jurisdictional error and for that reason I consider the terms "jurisdictional defect" and "jurisdictional error" to be synonymous.

4. WCAT's Extension of Time Authority and Criteria

Section 243(1) of the Act provides that a notice of appeal from a Review Division decision must be filed within 30 days after that decision was made. As section 221(2) provides that documents sent by mail are deemed to have been received on the 8th day after mailing, WCAT considers that the 30-day period commences after the 8-day mailing period has expired.

WCAT's authority to grant an EOT to appeal arises under section 243(3), which provides:

> 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.
>
> [emphasis added]

I have delegated my authority to grant an EOT to all vice chairs.

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WCAT's practices and procedures regarding EOTs to appeal are set out in items #5.30 to #5.33 of its *Manual of Rules of Practice and Procedure* (MRPP). Item #5.30 specifies that three requirements must be met in order for an application for an EOT under section 243(3) to be successful. They are:

> (a) the chair must be satisfied that special circumstances precluded the filing of the appeal on time;
> (b) the chair must be satisfied that an injustice would result if the extension were not granted; and
> (c) **the chair must exercise the discretion to extend time in favour of the applicant.**
>
> [emphasis added]

The first two requirements reflect the statutory conditions found in sections 243(3)(a) and (b). The worker's reconsideration application focuses on the third requirement which has been interpreted as reflecting a residual discretion in section 243(3). Items #5.31 to #5.33 provide guidance on each of the three criteria.

The worker also submits that the MRPP is not binding on WCAT panels. In *WCAT Decision #2007-00880*, I discussed the authority for establishing the MRPP and the effect of the rules, practice directives, and items that it contains (see discussion at pages 11 to 14). I agree with the worker that it is open to a WCAT panel to depart from the MRPP. However, I also note the MRPP provisions are essential for supporting fairness through consistency of decision-making.

5. The EOT Decision

In the EOT decision, the original panel noted that the worker was 186 days late in initiating the appeal. The key dates noted in the EOT decision are:

- December 19, 2005 – the date of the Review Division decision.

- February 8, 2006 – the date on which WCAT wrote to the worker and his representative to acknowledge receipt of notices of appeal regarding three other Review Division decisions. The letter did not refer to the December 19, 2005 Review Division decision because the worker had not appealed that decision to WCAT.

- August 2, 2006 – the date on which WCAT received the worker's July 31, 2006 letter initiating an appeal of the December 19, 2005 Review Division decision.

The original panel's findings may be summarized as follows:

- Special circumstances precluded the timely filing of the appeal because the worker had instructed his former representative to appeal the December 19, 2005 Review Division decision and his representative failed to carry out those instructions.

- An injustice would result if the EOT was not granted because the decision under appeal related to the worker's long-term wage rate under his claim, which would affect any award for permanent disability under the claim.

- The discretion under section 243(3) to grant an EOT should not be exercised in favour of the worker because the delay that followed the expiry of the 30-day time limit for appealing had not been adequately explained, particularly in light of the February 8, 2006 letter from WCAT to the worker, which clearly identified that the relevant Review Division decision had not been appealed.

6. Positions of the Parties

The worker submits that the EOT decision is tainted by a patently unreasonable interpretation of section 243(3) of the Act. He contends that since the original panel found that special circumstances precluded the timely filing of the appeal and that an injustice would result if an EOT was not granted, the original panel was required by section 243(3) to grant the EOT. In his view, the original panel erred in finding that, even though these two conditions had been established, he had the discretion to decline to grant the EOT. In the alternative, the worker submits that, if section 243(3) establishes a residual discretion, the original panel exercised that discretion in a patently unreasonable manner.

The Employers' Advisers Office argues that, based on the phrase in section 243(3), "the chair **may** extend the time to file a notice of appeal" [emphasis added], the original panel was correct in determining he had the discretion to deny the EOT even though the special circumstances and injustice criteria had been met. They submit that, in exercising that discretion, the panel properly considered and applied the criteria set out in item #5.33 of the MRPP.

7. Standard of Review

Although the submissions of the parties assume that the applicable standard is patent unreasonableness, I have nonetheless turned my mind to the question.

At the heart of the worker's application to set aside the EOT decision is the question of whether it contains a jurisdictional error. Not every error made by an administrative tribunal, such as WCAT, is a jurisdictional error. In order to provide a degree of finality to decision-making, the legislature considers some errors to be tolerable.

At common law, a jurisdictional error is one that would cause the courts to set aside an administrative tribunal's decision. Conversely, a non-jurisdictional error is one that would survive review by the courts. To determine whether an error is jurisdictional, the court first determines the appropriate standard of review, which is the degree of scrutiny the court will apply in reviewing the defect alleged to be found in the decision. At common law, there are three possible standards of review: correctness, unreasonableness, and patent unreasonableness (see *Law Society of New Brunswick v. Ryan* [2003] S.C.J. No. 17 at para. 24). Once the appropriate standard of review is determined, the error is assessed against that standard. An error will be a jurisdictional error if it meets the applicable standard. In this way, an error is a jurisdictional error if the standard of review is correctness, an unreasonable error is a jurisdictional error if the standard of review is unreasonableness, and a patently unreasonable error is a jurisdictional error if the standard of review is patent unreasonableness. In each case, judicial intervention is required.

Determining the appropriate standard of review is a matter of determining the legislature's intent. Did the legislature intend the question addressed by the administrative tribunal in its decision, and in relation to which the error is alleged, to be a question within the "exclusive jurisdiction" of the administrative tribunal (see *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)* (Pasiechnyk), [1997] 2 S.C.R. 890)? If so, a more deferential standard is appropriate. To determine the legislature's intent and thus, the appropriate standard of review, the courts have developed the "pragmatic and functional approach" (see *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193). In applying the pragmatic and functional approach to establish the applicable standard of review, the courts consider the following four factors:

(1) whether the decision is protected by a privative clause (a statutory provision that provides that the decision is final and not to be reviewed or set aside by any court or other body);

(2) the expertise of the decision-maker in relation to the reviewing body on the question in issue;

(3) the purpose of the legislation and the provision in question; and

(4) the nature of the problem or issue (a question of law, fact, or mixed fact and law).

Effective December 3, 2004, the provisions of the *Administrative Tribunals Act* (ATA) affecting WCAT were brought into force. Section 58 of the ATA sets out the standards of review to be applied by a court in a petition for judicial review of a WCAT decision. Section 58 provides:

> (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
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> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
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> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
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> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
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> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
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> (3) For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
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> (b) is exercised for an improper purpose,
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> (c) is based entirely or predominantly on irrelevant factors, or
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> (d) fails to take statutory requirements into account.

Section 58 provides that decisions that are reviewed for substantive error (as opposed to procedural fairness) are to be reviewed on either a standard of patent unreasonableness or correctness; unreasonableness is no longer available as a possible standard of review.

Item #15.24 (Reconsideration on Common Law Grounds) of the MRPP provides that WCAT will apply the same standards of review to applications for reconsideration on common law grounds as would be applied by the court on judicial review.

A question of law that the legislature intended to be within an administrative tribunal's exclusive jurisdiction is subject to the standard of patent unreasonableness. A question of law includes questions of statutory interpretation. The question of whether an EOT should be granted under section 243(3) of the Act is a matter of mixed fact and law and an exercise of discretion that is clearly within WCAT's exclusive jurisdiction by virtue of sections 239, 250, 254, and 255 of the Act.

On August 3, 2006, the B.C. Court of Appeal released the judgment in *United Brotherhood of Carpenters and Joiners of America, Local 527 v. British Columbia (Labour Relations Board)*, [2006] B.C.J. No. 1757, 2006 BCCA 364. In that case the court held that the pragmatic and functional approach should be applied to determine whether a question of statutory interpretation decided by an administrative tribunal falls within the tribunal's exclusive jurisdiction.

While I am convinced that the issues in question are clearly within WCAT's exclusive jurisdiction under the Act, I have considered whether the pragmatic and functional approach supports a finding of exclusive jurisdiction regarding both the primary issue of interpreting section 243(3) of the Act and the secondary issue of exercising discretion. I have applied that test from the vantage point of the court because item #15.24 of the MRPP provides that, in considering a reconsideration application, WCAT will apply the same standard as the court would apply on judicial review. My analysis is as follows:

- WCAT is an administrative tribunal whose decisions are protected by privative clauses (see sections 254 and 255 of the Act). I therefore find that this factor favours a finding that WCAT enjoys exclusive jurisdiction over matters arising under the Act.

- Applications for an EOT to appeal are commonly addressed by WCAT and its expertise over this issue is greater than that of the courts. WCAT is also charged with interpreting and applying the Act and ensuring that the purposes of the Act are not defeated. WCAT's expertise in this area is also greater than that of the courts. (See Pasiechnyk and *Council of Canadians with Disabilities v. Via Rail Canada Inc.* (Via Rail), 2007 SCC 15.) In my view, this factor also favours a finding of exclusive jurisdiction.

- The purpose of the Act is to provide a comprehensive workers' compensation and injury prevention scheme. Part 4 establishes WCAT and sets out, among other things, its authority, powers, and duties. The purpose of section 243(3) is to authorize WCAT to extend the time for filing a notice of appeal. It is part of the comprehensive appeal process that the legislature entrusted to WCAT. I find this factor favours exclusive jurisdiction.

- Generally, the question of whether an EOT to appeal should be granted is a mixed question of fact, law, and discretion and the nature of that question therefore

suggests exclusive jurisdiction. However, whether section 243 of the Act contains a residual discretion is a question of statutory interpretation and thus a question of law. But it is a question which involves the interpretation of WCAT's enabling or home legislation. The Supreme Court of Canada has said in Via Rail that questions of interpreting a tribunal's home statute deserve deference. I find this factor also favours exclusive jurisdiction.

Having considered the privative clause, the expertise of the WCAT, the purposes of the Act, and nature of the question before the original panel, I find that both the primary question of whether section 243 contains a residual discretion and the secondary issue of whether the discretion was appropriately exercised fall within WCAT's exclusive jurisdiction and therefore the appropriate standard of review under section 58(2) is patent unreasonableness.

While it might be argued that section 243(3) is a "jurisdictional" provision, as it authorizes WCAT to do something, with conditions, the courts have made clear that it is inappropriate to label a question jurisdictional and conclude by virtue of that characterization that the standard of review is correctness. In each and every case, the standard of review must be determined by applying the pragmatic and functional approach. As set out in *Judicial Review of Administrative Action in Canada*[1]:

> Thus, the term "jurisdictional question" is today little more than a conclusion following an analysis of the relevant pragmatic and functional considerations, and signifies only that the question in dispute is more appropriately decided by the courts than the administrative agency.

While section 58(3) of the ATA defines patent unreasonableness for purposes of exercising discretion, it does not do so for questions of fact, law, or mixed fact and law. The common law definition remains in place (see *Basura v. British Columbia (Workers' Compensation Board) et. al., 2005 BCSC 407).* In *Davidson v. British Columbia (Workers' Compensation Board) et al.,* 2003 BCSC 1147, the court noted that patently unreasonable means openly, evidently, and clearly unreasonable and summarized a series of authorities including the following:

> [50] Another description of this standard is that enunciated by Beetz J. in *Syndicat des* employés *de production du Québec et de l'Acadie v. Canada (Labour Relations Board)*, [1984] 2 S.C.R. 412:
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>> A mere error of law is to be distinguished from one resulting from a patently unreasonable interpretation of a provision which an administrative tribunal is required to apply within the limits of its

[1] Brown and J. Evans, *Judicial Review of Administrative Action in Canada*, (Toronto: Canvasback Publishing, 2007)

> jurisdiction. This kind of error amounts to a fraud on the law or a deliberate refusal to comply with it. As Dickson J. (as he then was) described it, speaking for the whole Court in *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 at p. 237, it is
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> > …so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review...

8. Analysis

(a) The primary issue: interpretation of section 243(3)

The worker contends that the EOT decision is patently unreasonable because, having established special circumstances and an injustice, the original panel had a duty to grant the EOT. His interpretation of section 243 appears to be as follows:

- Sections 243(1) and (2) establish time frames which must be met in order to establish a valid appeal to WCAT. In the absence of the authority to extend those time frames, a late appeal could not proceed.
- Section 243(3) permits or empowers the chair to grant an EOT even though the time limit set out in section 243(1) or (2) has not been met.
- In order to extend the time, special circumstances and an injustice must be established.
- When those two conditions have been established, an exception to the requirement arising under section 243(1) or (2) exists. The appeal proceeds because the use of "may" in section 243(3) permits or empowers the chair to find that the appeal will proceed even though the time frame for filing the notice of appeal has not been met.

Under the worker's interpretation, the use of "may" does not establish the residual discretion to decline to grant the EOT. Instead, when the two criteria or conditions are met, the chair has an obligation to extend the time and allow the appeal to proceed. Accordingly, the fundamental question raised by the worker is whether it is rational to interpret section 243(3) as granting a residual discretion to deny an EOT when special circumstances and an injustice have been established.

The worker has advanced various arguments in support of his contention that the original panel's interpretation of section 243(3) is patently unreasonable. He submits that the legislature could not have intended that an EOT would be denied if an injustice would result. However, at a minimum, section 243(3) requires special circumstances

and an injustice. Accordingly, the legislature clearly intended that there would be circumstances in which an injustice would be established but an EOT would not be granted because there were no special circumstances.

The original panel's interpretation of section 243(3) is founded on the presence of the word "may" in the phrase "the chair **may** extend the time to file a notice of appeal even if the time to file has expired" [emphasis added]. In arguing that there is no discretion to be exercised, the worker has not addressed the manner in which the word "may" in section 243(3) should be interpreted. However, inherent in his submissions is the argument that it is patently unreasonable to interpret "may" as adding a third requirement of a favourable exercise of discretion by the chair. Accordingly, I have considered the meaning of "may" in section 243(3).

The following definition of "may" in the *Dictionary of Canadian Law*[2] supports the view that the legislature's use of "may" confers the discretion to grant an EOT:

> …[C]ommonly used to denote a discretion…" *R. c. Potvin*, [1989] 1 S.C.R. 525 at 547, 93 N.R. 42, 68 C.R. (3d) 193, 47 C.C.C. (3d) 289, 21 Q.A.C. 258, La Forest J. and Dickson C.J. 2. "…[P]ermissive and empowering and confers an 'area of discretion'." *Charles v. Insurance Corp. of British Columbia* (1989), 34 B.C.L.R. (2d) 331 at 337 (C.A.), the court per Lambert J.A. 3. "…[S]hould not be construed as imperative unless the intention that it should be so construed is clear from the context…" *Heare v. Insurance Corp. of British Columbia* (1989), 34 B.C.L.R. (2d) 324 at 327 (C.A.), the court per Lambert J.A.

Section 29 of the *Interpretation Act* provides that in interpreting a British Columbia enactment the word "may" "is to be construed as permissive and empowering". In contrast, it provides "must" "is to be construed as imperative".

In *Sullivan and Driedger on the Construction of Statutes*[3] (Sullivan and Driedger), Professor Sullivan discusses the meanings of "may", "shall", and "must" at pages 56 to 65. She notes that "may" is used in legislation to confer an authority or power. She states (at page 57):

> When a statutory power is conferred using the word "may", the implication is that the power is discretionary and that its recipient can lawfully decide whether or not to exercise it. After all, if the legislature wished to impose an obligation, it could easily have used "shall" instead of "may"….

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[2] D.A. Dukelow, *The Dictionary of Canadian Law,* 3d ed., (Thomson Carswell, 2004)
[3] Sullivan, Ruth, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: The Butterworth Group of Companies, 2002).

This approach to the interpretation of “may” supports the view that the original panel did not err in determining that there was a residual discretion to exercise even after special circumstances and an injustice were established. However, Profession Sullivan also notes (at page 58):

> **…the use of “may” implies discretion, but it does not preclude obligation.** The interpreter must determine whether there is anything in the statute or in the circumstances that expressly or impliedly obliges the exercise of the power.
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> The leading authority on “may” and its synonyms is the judgment of the House of Lords in *Julius v. Lord Bishop of Oxford*. Lord Cairns wrote:
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>> [The words “shall be lawful”] confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.
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>> …
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>> [W]here a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised.
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> Lord Selborne wrote:
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>> I agree…that the meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential, and never (in themselves) significant of any obligation. **The question whether a Judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved…in general…from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power.**

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[emphasis added; footnotes deleted]

The questions articulated by Lord Cairns and Lord Selborne are consistent with the modern principle of statutory interpretation, by which statutory interpretation in Canada is governed (see pages 18 to 20 of *WCAT Decision #2005-01710*). This principle was formulated in 1974 by Professor Elmer Driedger in the first edition of the *Construction of Statutes*[4] as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

In British Columbia, the modern principle is further supported by section 8 of the *Interpretation Act*, which provides:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The worker submits that the interpretation of section 243(3) contained in the EOT decision offends section 8 of the *Interpretation Act*.

In addition to considering the modern principle and section 8 of the *Interpretation Act*, I have considered the presumption of consistent expression, which is discussed in Sullivan and Driedger. At pages 162 to 163, the authors state:

> It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it then makes sense to infer that where a different form of expression is used, a different meaning is intended.

The object of section 243(3) is to permit appeals to proceed in certain circumstances when the notice of appeal has been filed late. It establishes an exception to an otherwise strict timeliness requirement.

[4] Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at p.67

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Prior to the Review Division and WCAT coming into existence in March 2003, the appeal system was comprised of the Workers' Compensation Review Board (Review Board), the Appeal Division of the Board, and the Medical Review Panel. In considering the context in which section 243(3) was enacted, I have found it useful to review the authority granted to former appeal tribunals under the Act. The Act did not grant the Medical Review Panel the authority to extend the statutory time frame for initiating an appeal. However, the former sections 90(1) and 91(1) of the Act respectively authorized the Review Board and the Appeal Division to extend the time frame for appealing. After setting out the time frame for an appeal to the Review Board, the former section 90(1) stated that a valid appeal could be initiated "within another time frame the review board allows". Under the former section 91(1), an appeal to the Appeal Division that was not initiated within the statutory time frame could be brought "within a longer period the chief appeal commissioner may allow".

The current section 243(3) introduced a more comprehensive and stringent test for granting an EOT to appeal. It is apparent that the legislature decided to limit the broad discretion to extend the time to appeal granted under the former sections 90(1) and 91(1) by providing that an EOT could only be granted if the conditions of special circumstances and injustice have been met.

In determining whether the use of "may" in section 243(3) establishes a discretion to grant an EOT or confers an obligation, it is appropriate to consider section 243(3) in the context of part 4 of the Act, which is entitled "Appeals". It is especially germane to consider it in the context of other provisions in part 4 that establish a discretion or confer an obligation on the chair.

In part 4, the legislature generally used "may" to establish a discretion and "must" to establish an obligation. In section 234 (role of the chair) the use of "may" clearly establishes a discretion conferred on the chair while "must" establishes an obligation. Section 238 (panels) provides that the chair "must" establish the panels of WCAT (section 238(2)) and "may" establish a precedent panel (section 238(6)) if certain conditions have been met. Section 238(6) provides:

> If the chair determines that the matters in an appeal are of special interest or significance to the workers' compensation system as a whole, the chair **may** appoint a panel of up to 7 members with either of the following memberships:
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> (a) the chair or a vice chair, acting as presiding member, plus additional vice chairs;
> (b) the chair or a vice chair, acting as presiding member, plus additional vice chairs and extraordinary members.
>
> [emphasis added]

The significance of a decision of a panel appointed under section 238(6) is established by section 250(3), which provides:

> The appeal tribunal is bound by a decision of a panel appointed under section 238 (6) unless
>
> (a) the specific circumstances of the matter under appeal are clearly distinguishable from the circumstances addressed in the panel's decision, or
> (b) subsequent to the panel's decision, a policy of the board of directors relied upon the panel's decision was repealed, replaced or revised.

The structure of section 238(6) is largely parallel to that of section 243(3) because section 238(6) also sets out certain conditions followed by the phrase, "the chair may". In addition, both sections establish an exception to a general rule.

The presumption of consistent expression dictates that, if "may" establishes a duty in section 243(3), it also establishes a duty in section 238(6). However, the legislature could not have intended that the chair have a duty to appoint a precedent panel whenever he or she determines that "matters in an appeal are of special interest and significance in the workers' compensation system as a whole" because, to do so, would be highly detrimental to the appropriate development of WCAT's adjudicative approach to significant workers' compensation issues. Section 250(3) only permits WCAT to depart from a precedent decision in very limited circumstances. It does not provide that a second precedent panel can depart from the decision of the first precedent panel to establish a refined approach to the precedent panel issue. Therefore, it is important that an issue evolve over a period of time so that a variety of fact patterns, submissions, and interpretations can be examined before a precedent panel is appointed. Since it would be extremely problematic to interpret section 238(6) as imposing an obligation on the chair to appoint a precedent panel, consistency requires that section 243(3) be interpreted as establishing a discretion rather than an obligation.

In interpreting section 243(3), I have also found it useful and appropriate to consider other provisions of the Act which either establish an obligation or confer a discretion when special circumstances have been established. My search of the Act reveals that the term "special circumstances" appears in sections 39(9), 55(3), 55(3.1)(a), 96.2(4), and 252(4).

Section 39(9) relates to assessments for the accident fund. It provides:

> Where **special circumstances**, including legislative change, result in claims being made or liabilities being imposed on the accident fund in excess of what the Board considers should reasonably be funded by

> assessments levied during the current year, the Board **must** raise sufficient funds by assessments during that year to meet the estimated payments due within the year, but need not establish within the year reserves to meet future payments on those claims or liabilities, and the Board **may** establish those reserves by assessments levied over a period of years.
>
> [emphasis added]

If special circumstances are established under section 39(9), the Board "**must** raise sufficient funds by assessments during that year …" [emphasis added] and, regarding reserves to meet future payments, "**may** establish those reserves by assessments levied over a period of years" [emphasis added]. Accordingly, section 39(9) establishes a duty and a discretion through the respective use of "must" and "may". Given the presumption of consistent expression, it is presumed that the legislature would have used "must" rather than "may" in section 243(3) if the legislature had intended to establish a duty to grant an EOT rather than the discretion to do so.

Sections 55(3) and (3.1) are particularly germane to the interpretation of section 243(3). They establish exceptions to section 55(2), which provides that no compensation is payable "unless an application is filed, or an adjudication made, within one year after the date of injury, death or disablement from occupational disease". Section 55(3) establishes an exception that applies when the application is less than three years late and section 55(3.1) does the same when the application is more than three years late. Section 55(3) provides:

> If the Board is satisfied that there existed **special circumstances** which precluded the filing of an application within one year after the date referred to in subsection (2), the Board **may** pay the compensation provided by this Part if the application is filed within 3 years after that date.

At the time of the enactment of section 243(3), the policies of the governing body of the Board interpreted sections 55(3) and 55(3.1) as conferring a discretion to pay compensation under the claim rather than establishing a duty to do so. These policies were well established and the current policies continue to interpret section 55 in that manner (see item #93.22 of the *Rehabilitation Services and Claims Manual, Volumes I* and *II*). In enacting section 243(3), the legislature is presumed to have been aware of the Board's interpretation (see discussion under title *Presumed knowledge of everything* at pages 154 to 155 of Sullivan and Driedger). Accordingly, consideration of section 55 also supports the conclusion that the legislature intended that section 243(3) would confer the discretion to grant an EOT rather than a duty to do so.

Sections 96.2(4) and 252(4) are other EOT provisions that mirror section 246(3).

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I acknowledge that it may be possible to interpret section 243(3) in the manner advanced by the worker. However, in light of my analysis, I conclude that the interpretation applied by the previous panel was not only a rational interpretation; it was also the correct interpretation.

The worker's submissions assume that, if the alternative interpretation of section 243(3) had been the foundation for WCAT's framework for EOTs, his delay following the expiry of the appeal period would not be taken into account. Accordingly, although not necessary to this decision, I have considered the question of whether he is correct in this regard. In my view, to ignore the delay following the expiry of the appeal period would be inconsistent with the general principle that appeals must be filed in a timely manner and that EOTs are exceptional in nature. Therefore, it seems unlikely that the legislature could have intended the delay after the appeal period would not be relevant to an EOT.

The delay following the appeal period is considered in WCAT's MRPP as relevant to the exercise of the discretion to grant an EOT. Items #5.32 and #5.33 of the MRPP provide:

> **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.
>
> [emphasis added]

The definition of injustice in item #5.32 is derived from *Webster's New Twentieth Century Dictionary of the English Language,* 2nd ed. Given the breadth of that definition, the factors set out in item #5.33 regarding the exercise of discretion could also be considered in determining whether an injustice would result if the appeal did not proceed.

(b) The secondary issue: exercise of discretion

In my earlier discussion of the standard of review, I reproduced section 58(3) of the ATA, which outlines the circumstances in which an exercise of discretion will be patently unreasonable. In this case, the original panel considered the criteria in item #5.33 of the MRPP in exercising the discretion under section 243(3). I do not find that the panel exercised the discretion arbitrarily or in bad faith or for an improper purpose. I find the original panel did not take irrelevant factors into account or fail to consider the statutory requirements in denying the EOT application. Accordingly, I do not find the original panel's exercise of discretion was patently unreasonable.

9. Conclusion

Common law grounds to set aside and reconsider *WCAT Decision #2006-03952* have not been established. The decision stands as final and conclusive in accordance with section 255(1) of the Act.

Jill Callan
Chair

JC/hb

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