

### Noteworthy Decision Summary

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**Decision:** WCAT-2008-00457      **Panel:** Jill Callan      **Decision Date:** February 13, 2008

***Reconsideration – Authority to reconsider prior Appeal Division Decisions on the Basis of Jurisdictional Error (Common Law Grounds) – Item #15.24 of the Manual of Rules of Practice and Procedure***

Reconsideration decision by the chair. WCAT does not have the authority to set aside and reconsider a previous Appeal Division decision on the basis of jurisdictional error (common law grounds). Item #15.24 of the *Manual of Rules of Practice and Procedure* (MRPP) is amended accordingly.

The worker requested reconsideration of an Appeal Division decision which had been rendered before the Appeal Division ceased to exist in March 2003. There was no reconsideration application on file relating to this Appeal Division decision at that time which could have been transferred to WCAT under the transitional provisions of Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002*.

The chair found that WCAT does not have statutory or common law authority to set aside and reconsider a prior Appeal Division decision on the basis of jurisdictional error. Although item #15.24 of the MRPP provides that WCAT has the authority to do so, some WCAT panels have concluded that WCAT does not have this power. The chair stated that item #15.24 of the MRPP is only a guideline which can be departed from. The chair reviewed the previous WCAT decisions which had addressed this issue, in particular, *WCAT-2004-04928* and *WCAT-2007-02083*. Both are noteworthy decisions. The chair adopted the reasoning in *WCAT-2007-02083* because she found it more persuasive in explaining why WCAT lacked this authority. She is supported in this conclusion by the judgment of the Supreme Court of British Columbia in *Solowan v. British Columbia (Attorney General)* 2007 BCSC 752.

The chair directed that item #15.24 of the MRPP be amended by deleting the statement that WCAT has the authority to set aside and reconsider an Appeal Division decision on the basis of jurisdictional error (common law grounds).

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<b>WCAT Decision Date:</b>	February 13, 2008
<b>Panel:</b>	Jill Callan, Chair

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## Introduction

The worker has applied to the Workers' Compensation Appeal Tribunal (WCAT) to have *Appeal Division Decision #2002-3031*, dated December 2, 2002, set aside on common law grounds and reconsidered. In the Appeal Division decision, the panel denied the worker's appeal and determined that the worker's wage loss and other benefits under his claim were correctly terminated as of June 29, 1999. Although invited to do so, the employer is not participating in this application.

In a July 24, 2007 memorandum to the WCAT appeal coordinator assigned to the worker's application, I noted:

Pursuant to the *Workers Compensation Amendment Act (No. 2)*, 2002, the Appeal Division of the Workers' Compensation Board, operating as WorkSafeBC (Board) ceased to exist and was replaced by the WCAT effective March 3, 2003. Section 256 of the *Workers Compensation Act* clearly provides that WCAT may reconsider decisions of the Appeal Division on the basis of new evidence. However, there is no statutory provision that expressly provides that WCAT may set aside and reconsider Appeal Division decisions on common law grounds.

WCAT vice chairs have issued conflicting decisions on the question of whether WCAT has the authority to set aside and reconsider Appeal Division decisions on common law grounds. In *WCAT Decision #2004-04928*, dated September 22, 2004, and *WCAT Decision #2007-00817*, dated March 8, 2007, a vice chair found that WCAT has the jurisdiction to set aside and reconsider Appeal Division decisions on common law grounds. However, in *WCAT Decision #2007-02083*, dated July 11, 2007, the vice chair determined that WCAT does not have the jurisdiction to do so.

Therefore, [the worker's] reconsideration application raises the question of whether WCAT can set aside and reconsider an Appeal Division decision on common law grounds.

I requested that the appeal coordinator disclose my memorandum to the worker and invite his submissions on the preliminary question of whether WCAT has the jurisdiction to set aside and reconsider an Appeal Division decision on common law grounds. The worker did not provide a submission.

The preliminary issue raised by the worker's reconsideration application is a legal issue. Accordingly, I find it can be fully and fairly considered without an oral hearing.

### **Issue(s)**

The preliminary issue raised by the worker's application is whether WCAT has jurisdiction to set aside and reconsider Appeal Division decisions on common law grounds.

### **The Previous Appeal Structure and the Transitional Provisions**

WCAT came into existence on March 3, 2003. The previous appeal system was comprised of the Workers' Compensation Review Board (Review Board), the Appeal Division of the Workers' Compensation Board, operating as WorkSafeBC (Board), and the Medical Review Panels. WCAT replaced the Review Board and the Appeal Division. Effective March 3, 2003, appeals to a Medical Review Panel were eliminated.

The statutory amendments that established the new appeal system were contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63) (Amendment Act No. 2). Part 2 of the Amendment Act No. 2 contains transitional provisions. Section 39 of the transitional provisions provides that proceedings that were pending before the Appeal Division on March 3, 2003 were continued and were to be completed by WCAT. Those proceedings included "appeal proceedings" and "proceedings for reconsideration of decisions". Section 39(4) of the transitional provisions contained an exception for certain appeals that were required to be completed as decisions of the Appeal Division. That exception does not apply to the worker's application.

Section 256 of the *Workers Compensation Act* (Act) (as amended by Amendment Act No. 2) authorizes WCAT to reconsider Appeal Division decisions on the basis of new evidence that meets the requirements of section 256(3).

### **WCAT's Manual of Rules of Practice and Procedure**

Item #15.24 (Reconsideration on Common Law Grounds) of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) provides, in part:

WCAT may set aside one of its decisions on the basis of certain common law grounds or principles. These consist of fraud or an error of law "going to jurisdiction" (including a breach of the rules of natural justice). **WCAT also has jurisdiction to consider an application to set aside an Appeal Division decision on common law grounds (see WCAT-2004-04928).** Where an applicant is successful in impugning a WCAT decision, WCAT has a responsibility to complete its task of providing a valid decision.

...

A tribunal's authority at common law to set aside its own decision (and to then address the matter anew) on the basis of an error of law going to jurisdiction, was confirmed in a decision of the British Columbia Supreme Court in *Atchison v. WCB*, 2001 BCSC 1661. The Court rejected the argument that the Appeal Division's authority to review its own decisions was limited to the new evidence grounds of section 96.1. Mr. Justice Vickers reasoned:

[18] There is no doubt the courts have the power of review. However, this does not mean that administrative tribunals lack the power to reconsider a decision, particularly where the decision is made without jurisdiction. The doctrine of *functus officio* applies to administrative tribunals based, however, "on the policy ground which favours finality of proceedings, rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal." *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at 849. The application of the principle is more flexible and tribunals are able to reopen decisions in order to discharge the function committed to them by the enabling legislation. **In particular, where a tribunal has made an error of jurisdiction, it is entitled to correct such an error:** *Chandler, supra*; *Right to Rediscover* [sic] *Appeal Division Decisions* (1993), 10 W.C.[R]. 127 (A.D.); *Re Trizak Equities Ltd. v. Area Assessor Burnaby New Westminster* (1983) 147 D.L.R. (3d) 637 (B.C.S.C.).

An appeal from this decision was denied by the British Columbia Court of Appeal on August 27, 2003 (*Powell Estate v. Workers' Compensation Board*, 2003 BCCA 470). The BCCA reasoned:

[17] The first question is whether a panel of the Appeal Division has jurisdiction to determine that a decision of another panel of the Appeal Division was a nullity as being made beyond its jurisdiction: *Chandler v. Alta. Assoc. of Architects*, [1989] 2 S.C.R. 848, citing with approval *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637 (B.C.S.C.).

[18] On those authorities, the answer must be, in my view, as found by Mr. Justice Vickers. The Appeal Division was able to reconsider the matter and correct its own jurisdictional error.

[emphasis added]

### **WCAT's Reconsideration Authority**

There is no specific provision of the Act that states that WCAT may set aside and reconsider its own decisions on common law grounds. However, as noted in item #15.24 of the MRPP, there are court decisions that grant to WCAT the common law authority to do so. This common law authority was recognized when the Act was amended in December 2004 to add section 253.1(5), which provides:

This section must not be construed as limiting the appeal tribunal's ability, on request of a party, to reopen an appeal in order to cure a jurisdictional defect.

The worker's application raises the question of whether WCAT can also set aside and reconsider Appeal Division decisions on common law grounds. Although item #15.24 of the MRPP provides that WCAT has the authority to do so, some WCAT panels have concluded that WCAT does not have this authority. The relevant statement in item #15.24 is a guideline and, therefore, I have the authority to depart from item #15.24. If neither the common law nor the relevant statutory provisions authorize WCAT to set aside and reconsider Appeal Division decisions on common law grounds, I have no authority to do so in this case.

### **Previous WCAT Decisions and Analysis**

While the panel in *WCAT Decision #2004-04928* (the first WCAT panel) concluded that WCAT has jurisdiction to set aside and reconsider Appeal Division decisions on common law grounds, WCAT panels have not been consistent in this regard. In *WCAT Decision #2006-03098*, a second WCAT panel cast doubt on whether WCAT has jurisdiction to do so. In *WCAT Decision #2007-00817*, the first WCAT panel addressed the concerns raised in *WCAT Decision #2006-03098* and, again concluded that WCAT has jurisdiction. However, in *WCAT Decision #2007-02083*, a third WCAT panel concluded that WCAT does not have jurisdiction to set aside and reconsider Appeal Division decisions on common law grounds.

*WCAT Decision #2004-04928* (the decision of the first WCAT panel) has been summarized by WCAT as a noteworthy decision. The summary sets out the following list of factors and considerations that were taken into account by the first WCAT panel

in concluding that WCAT can set aside and reconsider Appeal Division decisions on common law grounds:

- As the legislation is silent on this issue, it is implied that WCAT has the ability to determine the extent of its own authority at common law to correct an error of law going to jurisdiction.
- Section 256 of the [Act], which sets out statutory rules relating to WCAT's reconsideration of decisions, should not be read as defining the limits to WCAT's reconsideration authority.
- In determining its jurisdiction to reconsider at common law, a tribunal may look to "indications" in its enabling statute rather than an express statutory grant of authority. Key indicators from [the Amendment Act No. 2] include: section 39 of the transition provisions, which demonstrates a legislative intent that all Appeal Division proceedings be properly concluded; and section 256 of the Act, which gives WCAT the same jurisdiction to reconsider both WCAT and Appeal Division decisions.
- It is in the public interest for parties to be able to rely generally on the finality of a tribunal decision and to avoid unnecessary court proceedings.
- An appellant retains the right to bring a judicial review application in respect of any WCAT reconsideration decision and a court would apply similar criteria as WCAT had on the reconsideration application.
- The legislature has provided a mandate under section 39 of [the Amendment Act No. 2's] transitional provisions for the continuation and completion of all proceedings pending before the Appeal Division on March 3, 2003. A decision may be viewed as incomplete if it contains an error of law going to jurisdiction.
- The Appeal Division or WCAT would continue to be responsible for completing appeals filed to the former Appeal Division (in the event a court was to find that the decision involved an error of law going to jurisdiction). This constitutes a powerful argument for inferring jurisdiction to hear such arguments without the necessity for intervention by the courts.
- In the case of remedial statutes such as workers' compensation legislation, it is important that the statute be given such fair, large and liberal interpretation as will best ensure the attainment of its objects

In *WCAT Decision #2006-03098*, the second WCAT panel was considering a rather unique set of circumstances, which are not germane to this decision. However, that panel's analysis of the jurisdictional issue is relevant to the issue before me. The second WCAT panel concluded that neither the common law nor the Act authorizes WCAT to set aside and reconsider decisions of the Appeal Division. That panel emphasized the fact that the Appeal Division was a separate and different tribunal from WCAT.

In *WCAT Decision #2007-00817*, the first WCAT panel provided additional reasons as to why WCAT has jurisdiction to set aside and reconsider an Appeal Division decision. While acknowledging that there was no legislative provision that expressly authorized WCAT to do so, the panel found it could be inferred that the legislature intended that WCAT would complete the Appeal Division decision when grounds to set aside the decision were established. The panel again emphasized that it was in the public interest for WCAT to be authorized to do so. Otherwise, the applicant would be required to bring a judicial review application in the Supreme Court of British Columbia.

In *WCAT Decision #2007-02083*, the third WCAT panel emphasized that WCAT is a different appeal body from the Appeal Division. The panel acknowledged that it might be desirable and make practical sense for WCAT to have the authority to set aside and reconsider Appeal Division decisions. However, the panel went on to state:

...it must be remembered that administrative tribunals are creatures of statute and have no more jurisdiction than is granted to them by statute. I find it would not be appropriate for the common law rule to be extended in circumstances where the legislation completely fails to provide for this possible transitional matter or is otherwise silent in respect of the question. Where the legislation does provide for this power, either expressly or by reasonable implication, the power is naturally no longer grounded in a common law rule but rather is grounded in the statute itself. In my view, any power to set aside decisions of another tribunal, if at all defensible, would need to be supported by the legislation (unlike a tribunal's power to set aside its own decisions which appears not to require any legislative support). Therefore, if after considering the relevant statutory language as a whole and applying the modern principle of statutory interpretation, if it cannot be said that a WCAT power to set aside decisions of the Appeal Division is implied, then no such power exists.

[footnote deleted]

The third WCAT panel noted that there was no common law authority for a tribunal to reconsider the decisions of another tribunal. Following a thorough review and analysis of the relevant statutory provisions, the panel concluded that the legislature did not confer on WCAT the authority to set aside and reconsider Appeal Division decisions on

common law grounds. I adopt the reasoning in *WCAT Decision #2007-02083* and find that WCAT does not have the authority to set aside and reconsider Appeal Division decisions on common law grounds.

My conclusion in this regard is supported by the judgment of the Supreme Court of British Columbia in *Solowan v. British Columbia (Attorney General)* 2007 BCSC 752. In that case, Ms. Solowan had applied to the British Columbia Human Rights Tribunal (Tribunal) for reconsideration of a complaint that had been dismissed in 1996 by the B.C. Council of Human Rights (Council), which was a previous statutory body that no longer existed. The court concluded:

[30] The complaint was dismissed in 1996 by the Council under the provisions of the 1984 **Human Rights Act**. Unless the Council, or possibly its successor body (the Commission) had determined that the complaint should be reopened pursuant to the equitable jurisdiction described in **Zutter**, or at least had opened a new complaint file with respect to the matter, the Council and the Commission had exhausted their jurisdiction over the complaint when they ceased to exist. When the new Tribunal came into being on March 31, 2003, its only source of jurisdiction was the **Human Rights Code Amendment Act, 2002**. Since there was no complaint on file relating to Ms. Solowan which could be carried over from the Commission to the Tribunal by the transitional provisions in s. 28 of the **Human Rights Code Amendment Act, 2002**, the Tribunal did not acquire jurisdiction over the dismissed complaint.

[31] I do not find indications in the **Human Rights Code Amendment Act, 2002**, the statute conferring jurisdiction on the Tribunal, that it should be able to reopen decisions made by previous statutory bodies. I conclude that to find jurisdiction in these circumstances would be an unwarranted extension of the equitable jurisdiction found to exist in the **Zutter** case.

[32] I find that the Tribunal was correct in its decision that it lacks jurisdiction to make the order sought by the petitioner.

[emphasis in original]

I find that the court's analysis in *Solowan* is applicable to the question before me. In this case, the Appeal Division no longer had jurisdiction over an appeal from the worker when it ceased to exist because the Appeal Division had decided that appeal on December 2, 2002, when it issued *Appeal Division Decision #2002-3031*. When WCAT came into existence on March 3, 2003, its only source of jurisdiction over Appeal Division matters arose under the transitional provisions in Part 2 of the Amendment Act No. 2 and section 256 of the Act. Since there was no reconsideration application on file



relating to *Appeal Division Decision #2002-3031* which could be transferred from the Appeal Division to WCAT under the transitional provisions, WCAT did not acquire jurisdiction to set aside and reconsider the Appeal Division decision.

In *WCAT Decisions #2004-04928* and *#2007-00817*, the first WCAT panel provided a thoughtful and thorough analysis of the issue that is before me. From a public policy perspective, he provided significant reasons as to why it would be desirable for WCAT to have the authority to set aside and reconsider Appeal Division decisions on common law grounds. However, the analysis in *WCAT Decision #2007-02083* persuades me that WCAT lacks the jurisdiction to do so. I will direct that item #15.24 of WCAT's MRPP be amended to delete the statement that WCAT has jurisdiction to consider an application to set aside an Appeal Division decision on common law grounds.

### **Conclusion**

I find that WCAT does not have jurisdiction to set aside and reconsider Appeal Division decisions on common law grounds. This means that WCAT is not authorized to address the worker's concerns regarding *Appeal Division Decision #2002-3031*, dated December 2, 2002. WCAT cannot set that decision aside and issue a new decision. *Appeal Division Decision #2002-3031* stands as final and conclusive.

Jill Callan  
Chair

JC/hb