Noteworthy Decision Summary

Decision: WCAT-2009-00141 **Panel:** Warren Hoole **Decision Date:** January 16, 2009

Section 239(2) of the Workers Compensation Act – Jurisdiction over Review Division denial to extend 90 day time limit for filing request for review

This decision is noteworthy as it sets out that WCAT lacks jurisdiction to hear an appeal from a determination by the Review Division with respect to whether or not a request for review was filed within the 90 day time limit in section 96.2(3) of the *Workers Compensation Act* (Act) in the context of the chief review officer (or delegate) making a decision under section 96.2(4) of the Act.

In an April 4, 2007 decision, a WCAT deputy registrar decided that the applicant had no right of appeal to WCAT from three Review Division decisions that had denied the applicant an extension of the 90-day time limit for filing three requests for review. A WCAT reconsideration panel concluded that, in relation to one of the three appeals, the WCAT deputy registrar had erred by failing to address a relevant issue, namely whether the applicant had filed her request for review outside the 90-day time limit. The reconsideration panel found that the applicant had filed her request for review outside the 90-day time limit, with the result that she was unable to proceed with her request for review. The applicant requested that WCAT reconsider the first reconsideration decision.

The second reconsideration panel found, although not necessary to the decision, that WCAT lacks the jurisdiction to hear an appeal on whether a request for review is within the 90-day time limit. The panel found that that the question of whether 90 days has passed or not is a necessary element of a larger decision, a decision reserved exclusively for the chief review officer or his delegate, as to whether to exercise his authority under subsection 96.2(4) of the Act to extend the time within which a request for review may be filed. Subsection 239(2) of the Act, in conjunction with section 4 of the *Workers Compensation Act Appeal Regulation*, states that WCAT has no authority to hear appeals of decisions made under subsection 96.2(4) of the Act. The specific exception embodied in subsection 239(2) should prevail over the general authority of the WCAT under subsection 239(1) to hear appeals from Review Division decisions declining to conduct an appeal. The intent of the Act is therefore that no appeal lies to the WCAT in respect of each necessary element of the chief review officer's decision under subsection 96.2(4), including whether or not the request for review was filed within the time period required in subsection 96.2(3).

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Introduction

[1] This is an application to reconsider a reconsideration decision of the Workers' Compensation Appeal Tribunal (WCAT).

[2] In an April 4, 2007 decision, a WCAT deputy registrar decided that the applicant had no right of appeal to the WCAT from three Review Division decisions that had denied the applicant an extension of the 90-day time limit for filing three requests for review.

[3] The applicant requested a reconsideration of the deputy registrar's April 4, 2007 decision. In *WCAT Decision #2007-03378*, the reconsideration vice chair concluded that, in relation to one of the three appeals, the WCAT deputy registrar had erred by failing to address a relevant issue.

[4] The reconsideration vice chair then went on to address the merits of the issue in respect of which the April 4, 2007 decision was in error. That issue was whether or not 90 days had expired before the applicant requested a review. On the merits, the reconsideration vice chair found that the applicant had filed her request for review to the Review Division outside the 90-day time limit.

[5] In the result, the ultimate effect of *WCAT Decision #2007-03378* was that the applicant remained unable to proceed with her requests for review.

[6] The applicant now requests a reconsideration of *WCAT Decision #2007-03378*.

[7] I have considered the WCAT's *Manual of Rules of Practice and Procedure* (MRPP), including item #8.90, "Method of Hearing," and I have reviewed the issues, evidence and submissions in this appeal. The issues on the application are legal ones and can be dealt with fairly by written submissions. I therefore find that an oral hearing is not necessary for the full and fair adjudication of this appeal.

Issue(s)

[8] Has the applicant established grounds for reconsideration of *WCAT Decision #2007-03378*?

Jurisdiction

[9] The WCAT's jurisdiction to reconsider one of its decisions flows from two sources.

[10] First, subsection 256(2) of the *Workers Compensation Act* (Act) provides that the chair of the WCAT may reconsider a WCAT decision on the grounds of new evidence.

[11] Second, the WCAT has an implied common law authority to set aside a WCAT decision if that decision reveals an error of law going to jurisdiction, including a breach of the rules of natural justice. The British Columbia Court of Appeal has endorsed this implied common law reconsideration authority in *Powell Estate v. Workers' Compensation Board* 2003 BCCA 470. Item #15.24 of the MRPP provides further guidance regarding reconsiderations.

Background and Evidence

[12] The applicant worker injured her left leg at work on March 15, 2005, when she tripped and fell on a concrete floor.

[13] In a decision dated April 8, 2005, the Board set the applicant's short-term average earnings rate. In a decision letter dated May 27, 2005, the Board set the applicant's long-term average earnings rate.

[14] In a decision letter dated May 17, 2006, the Board provided the applicant with a permanent partial disability (PPD) award. In a claim log entry dated May 12, 2006, the Board noted the applicant's long-term average earnings rate. The applicant requested a review of the PPD award decision. In the course of the review proceedings, the Board disclosed the applicant's claim file, including the May 12, 2006 claim log entry, to her representative.

[15] The applicant filed a request for review of the Board's April 8, 2005 decision letter on December 14, 2006. The applicant filed a request for review of the Board's May 12, 2006 claim log entry on December 14, 2006. The applicant filed a request for review of the Board's May 27, 2005 decision letter on January 21, 2007.

[16] In the course of the prior reconsideration decision proceedings, the applicant's representative stated that he received disclosure of the applicant's 410-page claim file on August 3, 2006. The representative went through the disclosure; however, it was not until the last week of September 2006 that he discovered the May 12, 2006 claim log entry.

[17] In *WCAT Decision #2007-03378*, the reconsideration vice chair concluded that the April 4, 2007 decision of the WCAT deputy registrar was valid in relation to the April 8 and May 27, 2005 decision letters. However, the reconsideration vice chair decided

that the deputy registrar failed to address whether or not 90 days had passed in relation to the applicant's filing of a request for review of the May 12, 2006 claim log entry. The reconsideration vice chair concluded that this "missed issue" was material and that the deputy registrar's failure to consider it was a breach of natural justice. Because the applicant had filed extensive submissions on the missed issue, the reconsideration vice chair decided to address the merits of this question and concluded that more than 90 days had expired before the applicant filed a request for review.

Submissions

[18] The applicant contacted the WCAT by letter on November 15, 2007, alleging a breach of natural justice in relation to *WCAT Decision #2007-03378*. The applicant indicated that, because the reconsideration vice chair accepted the representative's statement about receiving disclosure on August 3, 2006, the vice chair was also obliged to accept the representative's statement that he did not discover the May 12, 2006 claim log entry until the last week of September 2006 and that the request for review was therefore filed within 90 days. The applicant says that the vice chair's failure to accept this latter statement without any explanation is sufficient ground for a reconsideration.

[19] The applicant also re-argues the merits of whether the request for review was filed within the 90-day time limit. The applicant's representative repeats his earlier submission regarding the "hidden" nature of the May 12, 2006 claim log entry, the inadequate service of the disclosure, and the lack of "legal status" of the disclosure.

[20] The WCAT Registry responded to the applicant and notified him of the reconsideration process in a letter dated November 10, 2008. The WCAT Registry included a reconsideration information sheet. The applicant filed a further written submission in response, dated November 23, 2008.

[21] In his November 23, 2008 submission, the applicant's representative suggested that the applicant's circumstances engaged the "new evidence" reconsideration authority of WCAT in that the May 12, 2006 claim log entry was material new evidence that was not reasonably discoverable until the last week of September 2006. The representative argues that these circumstances satisfy the new evidence reconsideration requirements of subsection 256(2) of the Act.

[22] The representative also says that the reconsideration panel's failure to accept that the December 14, 2006 request for review was made in a timely manner reflects a breach of the rules of natural justice and a factual error sufficient to merit reconsideration.

Preliminary Matter

[23] The applicant's submissions appear to suggest that he is seeking a reconsideration of *WCAT Decision #2007-03378* on the basis of new evidence. In my view, the "new evidence" that the applicant describes is, in fact, merely a repetition of the same arguments he already made to the reconsideration panel.

[24] Simply put, the applicant has not directed me to any new evidence that was not available to the reconsideration panel. Consequently, there is no foundation to reconsider *WCAT Decision #2007-03378* on the basis of new evidence pursuant to subsection 256(2) of the Act. I therefore limit the scope of this reconsideration application to the common law grounds.

Reasons and Findings

[25] My decision need only address in detail the May 12, 2006 claim log entry. In his submissions, the applicant's representative only discussed the May 12, 2006 claim log entry and does not dispute the reconsideration vice chair's conclusions regarding the Board's April 8 and May 27, 2005 decisions.

[26] I see no error in the reconsideration panel's conclusion in relation to those two decisions, and in the absence of submissions from the applicant, I see no reason to address this undisputed portion of *WCAT Decision #2007-03378*.

[27] The question then, is whether or not the reconsideration panel committed an error in concluding that the 90-day time limit for requesting a review had elapsed in relation to the May 12, 2006 claim log entry.

[28] In my view, this question involves two separate issues, one legal and one factual. The first issue raises the legal interpretation of subsection 96.2(3) of the Act and when time starts to run for the purposes of measuring the 90-day time limit.

[29] The second issue raises the factual determination of whether, once time had started to run, 90 days had in fact passed before the applicant filed her request for review of the May 12, 2006 claim log entry. I will address each issue in turn.

1. Interpretation of subsection 96.2(3) of the Act

[30] The reconsideration vice chair calculated the 90-day time period; however, he did not expressly discuss when this period started to run under subsection 96.2(3). It is apparent from the representative's submissions to the reconsideration vice chair that the representative believed time should run from the date disclosure is read, rather than from the date disclosure is received.

[31] Although the reconsideration vice chair's decision lacks detailed reasoning on this point, it is implicit from his decision that he considered time started to run, at the latest, from the date that the applicant's representative received disclosure of the applicant's claim file, that is, August 3, 2006. It is this conclusion that must be assessed in the context of the current reconsideration application.

[32] I note at this point that a reconsideration is not a further appeal. A reconsideration on common law grounds is a relatively narrow process similar to judicial review.

[33] The grounds for judicial review originally developed in the common law and are now set out in the *Administrative Tribunals Act* (ATA). The ATA applies to decisions of the WCAT pursuant to section 245.1 of the Act. In particular, section 58 of the ATA provides in relevant part:

> 58 (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.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (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,
> >
> > …
> >
> > (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.

[34] The finding of law in question is the reconsideration panel's conclusion that time begins to run for the purposes of subsection 96.2(3) from the date that a party receives disclosure of the claim file.

[35] As is evident from subsection 58(2) of the ATA, if a finding of law is in respect of a matter within the exclusive jurisdiction of the WCAT, then the applicable standard of review is whether the finding of law is "patently unreasonable."

[36] If the finding of law is not in respect of a matter within the exclusive jurisdiction of the WCAT, then the applicable standard of review is "correctness."

[37] I noted that the Supreme Court of Canada recently developed a new approach to judicial review in *Dunsmuir v. New Brunswick* 2008 SCC 9. In essence, the court

removed the "patently unreasonable" standard of review, leaving the "correctness" and "reasonableness" standards of review. At the present time, there is some uncertainty in British Columbia as to the impact, if any, that *Dunsmuir* may have on the "patently unreasonable" standard of review described in the ATA.

[38] Because I consider that the current reconsideration application may be resolved even on the "correctness" standard of review, I need not further discuss the possible impact of *Dunsmuir* on the ATA. Similarly, I need not determine whether the finding of law at issue is in respect of a matter that falls inside or outside of the WCAT's exclusive jurisdiction. I will therefore address the reconsideration vice chair's legal finding on the "correctness" standard.

[39] Subsection 96.2(3) of the Act states:

> 96.2(1) Subject to subsection (2), a person referred to in section 96.3 may request a review officer to review the following in a specific case:
>
> …
>
> (3) A request for review must be filed within 90 days after the Board's decision or order was made.

[40] In *WCAT Decision #2006-02121*, a Noteworthy Decision dated May 17, 2006, the three-member non-precedent panel held that a decision is not "made" for the purposes of the reconsideration, review and appeal provisions of the Act until it is communicated. The communication may be made orally; however, the better approach is to notify a worker in writing of a decision in order to communicate that decision.

[41] The question then, is whether the reconsideration vice chair's decision that the disclosure of a decision, in this case the May 12, 2006 claim log entry, constitutes communication of that decision, such that the decision is "made" for the purposes of subsection 96.2(3).

[42] The representative suggests that communication of a decision does not occur until a party actually reads that decision. The representative has not provided any authority either in the Act or in the case-law to support his argument and I do not agree with him.

[43] If the representative were correct, the result would be that time limits would become effectively meaningless because a party could simply deny having read disclosure and then request a review many months or even years after the decision in question. Such a result would seriously undermine the important purposes of finality and certainty that appellate time limits are intended to foster.

[44] Consequently, in the absence of clear authority to the contrary, I do not agree that time limits associated with requesting a review begin to run only at the point when a worker actually reads a decision in relation to which he or she wishes to request a review.

[45] This means that I am satisfied that the reconsideration vice chair was correct to implicitly conclude that time starts to run for the purposes of subsection 96.2(3) from the time that a party receives disclosure, at the latest. I therefore see no error in the reconsideration vice-chair's finding of law that the 90-day time period for the purposes of subsection 96.2(3) commenced on the date that the applicant's representative received disclosure of the applicant's claim file on August 3, 2006. Having resolved the finding of law issue, I turn now to address the second issue, that is, the reconsideration vice chair's finding of fact that 90 days had elapsed.

2. Had the time limit for filing a request for review expired?

[46] As already noted, for the purposes of my decision, I am prepared to accept that "correctness" is the applicable standard of review in assessing the reconsideration vice chair's decision that more than 90 days had passed before the applicant requested a review of the May 12, 2006 claim log entry.

[47] In this regard, there is no dispute with the reconsideration vice chair's acceptance of the representative's evidence that he received disclosure, including the May 12, 2006 claim log entry, on August 3, 2006. There is similarly no dispute that the request for review of the May 12, 2006 claim log entry was not filed until December 14, 2006. A simple calculation of the intervening days makes it clear that well over 90 days had expired, including the grace period, before the request for review was filed. It follows that the reconsideration vice chair was correct in his factual finding that the relevant time period had expired before the request for review in question was filed. Consequently, I see no reason to allow the applicant's reconsideration request in relation to the finding of fact at issue.

[48] My conclusions above resolve the relevant issues I understand the applicant's representative to have raised in the current reconsideration application. I note that the applicant's representative has used the phrase "breach of natural justice" in his submissions in relation to a failure to consider a timely submission; however, it is apparent from the context of his submission that the representative is describing the request for review as "timely" rather than his submission to the reconsideration vice chair.

[49] In my decision, I am concerned only with procedural fairness and natural justice in the prior reconsideration proceedings, not with the fairness of proceedings before the Review Division or even before the WCAT deputy registrar. In this context, the applicant's references to breaches of natural justice do not merit further consideration.

[50] It follows that the applicant has not established common law grounds for reconsideration of *WCAT Decision #2007-03378*, either on the basis of a breach of natural justice, a breach of procedural fairness, or an error that offends either of the standards of review in subsection 58(2) of the ATA on questions of law or fact. This means that the applicant's reconsideration request must fail.

[51] Although not necessary to my decision, I note as final point that, with respect to the reconsideration vice chair, I wish to offer a different opinion as to the WCAT's jurisdiction to hear an appeal on whether a request for review is within the 90-day time limit. In my view, the WCAT lacks this authority.

[52] I need not address this question at length, other than to state that I consider that the question of whether 90 days has passed or not is a necessary element of a larger decision, a decision reserved exclusively for the chief review officer or his delegate, as to whether to exercise his authority under subsection 96.2(4) of the Act to extend the time within which a request for review may be filed.

[53] Subsection 239(2) of the Act, in conjunction with section 4 of the *Workers Compensation Act Appeal Regulation* (Regulation), clearly states that the WCAT has no authority to hear appeals of decisions made under subsection 96.2(4) of the Act. Of note, the WCAT's general authority under subsection 239(1) of the Act to hear decisions of a review officer declining to conduct a review, is subject to the specific exception described in subsection 239(2). This results in an apparent conflict, in that subsection 239(1) allows for an appeal on final decisions, including a decision declining to conduct a review; whereas subsection 239(2) precludes an appeal from a final decision that relates to subsection 96.2(4).

[54] However, I do not consider that this conflict should be resolved in favour of finding appellate jurisdiction over the 90-day time limit. On the contrary, it is a basic principle of statutory interpretation that, in cases of apparent conflict, such as between subsection 239(1) and subsection 239(2) the specific is to be preferred over the general. I note Sullivan's discussion of this principle at pages 273-5 of *Sullivan and Driedger on the Construction of Statutes*, 4th edition. This means that the specific exception embodied in subsection 239(2) should prevail over the general authority of the WCAT under subsection 239(1) to hear appeals from Review Division decisions declining to conduct an appeal.

[55] In my view, in order to give proper effect to the clear wording of this specific restriction, the restriction must apply not only to the question of whether "special circumstances" existed to justify an extension of time, but the restriction must also apply to all the necessary factual determinations inherent in the subsection 96.2(4) process.

[56] One of these necessary factual determinations is whether or not 90 days have expired. Indeed, paragraph 96.2(4)(a) specifically refers to the 90-day time period and is one of

the factual findings that must be reached by the chief review officer in the overall context of a decision under subsection 96.2(4). I reproduce the relevant portion of paragraph 96.2(4)(a) to illustrate this point:

> 96.2(1) Subject to subsection (2), a person referred to in section 96.3 may request a review officer to review the following in a specific case:
>
> (a) a Board decision respecting a compensation or rehabilitation matter under Part 1;
>
> …
>
> (3) A request for review must be filed within 90 days after the Board's decision or order was made.
>
> (4) On application, and where the chief review officer is satisfied that
>
> (a) special circumstances existed which precluded the filing of a request for review **within the time period required in subsection (3)**, and
>
> (b) an injustice would otherwise result,
>
> the chief review officer may extend the time to file a request for review even if the time to file has expired.
>
> [my emphasis]

[57] The above extract demonstrates that the question of whether or not 90 days have passed must be determined by the chief review officer in the overall context of a decision under subsection 96.2(4). Pursuant to subsection 239(2) of the Act and section 4 of the Regulation, no appeal lies to the WCAT in relation to the chief review officer's 96.2(4) decision.

[58] In my view, the clear intent of the Act is therefore that no appeal lies to the WCAT in respect of each necessary element of the chief review officer's decision under subsection 96.2(4), including whether or not the request for review was filed within the time period required in subsection 96.2(3). To conclude otherwise is in my opinion to ignore the plain meaning, purpose, and context of subsection 239(2) of the Act.

[59] I am therefore doubtful that the reconsideration vice chair correctly concluded that he had the necessary jurisdiction to render a merit decision on whether or not the 90 days had expired. For clarity, my comments on this issue are not findings and are only intended to provide an alternative view to those expressed by the reconsideration vice

chair regarding the WCAT's authority to hear appeals in relation to extensions of time for filing a request for review.

[60] In summary, because I have found that the reconsideration vice chair did not breach the rules of natural justice, or err in his findings of law or fact, I deny the applicant's reconsideration request.

[61] As a result, I deny the applicant's reconsideration request.

Conclusion

[62] I deny the applicant's request for reconsideration on common law grounds of *WCAT Decision #2007-03378*.

[63] The applicant did not request reimbursement for expenses associated with the reconsideration application and no such expenses were apparent to me. Consequently, I make no order for the reimbursement of expenses.

Warren Hoole
Vice Chair

WH/gl