

Noteworthy Decision Summary

Decision: WCAT-2016-01148 **Panel:** Elaine Murray **Decision Date:** May 2, 2016

Reconsideration – Procedural Fairness – Right to be heard - Section 253.1(5) of the Workers Compensation Act – Policy item #AP1-42-1(a) of the Assessment Manual.

This was a reconsideration decision that considered two issues: whether an employer that is no longer registered with the Workers' Compensation Board, operating as WorkSafeBC (Board), has standing to request reconsideration of a WCAT decision, and whether the employer was denied the right to be heard, resulting in a breach of procedural fairness. The decision is noteworthy for its analysis of both issues.

The employer, which was registered with the Board at the time of the worker's injury but not at the time of the request, applied for reconsideration of a WCAT decision allowing the worker's appeal and entitling the worker to be assessed for a loss of earnings award.

Despite the fact that the employer had filed an authorization with the Board's Compensation Services Division authorizing a consultant as its representative on all compensation matters, documents respecting entitlement decisions and Review Division decisions were sent only to the employer's head office and not to the consultant. When the worker appealed Review Division decisions to WCAT, the notices of appeal and invitations to participate were similarly sent to the employer's head office and not to the consultant. The employer did not participate in the appeal. The WCAT decision, which was favourable to the worker, was also sent to the employer's head office. By that time, the employer carried on no activities or had any employees in British Columbia, and its account with the Board had been cancelled. The employer applied for reconsideration of the WCAT decision on the ground that it had been denied the right to be heard.

The panel considered the employer's standing to request reconsideration, as a preliminary issue. The panel considered policy item AP1-42-1(a) of the *Assessment Manual*, noting that under subparagraph (5), the experience rating (ER) plan uses claims costs arising from claims commenced in the three calendar years prior to the year in which the assessment calculation is made. The panel concluded that the employer could be directly affected by the WCAT decision if it re-registered with the Board within the three year "ER window" and, therefore, had standing to request reconsideration of the WCAT decision.

The panel concluded that the standard of review applicable to fairness issues is the standard set out in section 58(2) of the *Administrative Tribunals Act*, which is whether, in all the circumstances of the case, WCAT acted fairly. The panel found that the fact an employer has authorized a representative does not mean the employer can ignore correspondence directed to it. The panel noted that the employer should have been alerted to a possible problem when it received the Review Division decision in which the consultant was not included on the distribution list, and again when it received a copy of a WCAT decision granting an extension of time to appeal to the worker. The panel acknowledged that it would be a breach of procedural fairness if the employer was not given an opportunity to participate in the appeal, but while the consultant was not notified of the appeal, the employer clearly was, and was afforded an opportunity to participate. In all the circumstances, WCAT did not act unfairly; consequently, the grounds for reconsideration were not established.

WCAT Decision Number :

WCAT-2016-01148

WCAT Decision Date:

May 02, 2016

Panel:

Elaine Murray, Vice Chair

Introduction

- [1] The employer's representative, B¹ Ltd., applies to the Workers' Compensation Appeal Tribunal (WCAT) for reconsideration of *WCAT-2015-01471*, a decision I issued on May 8, 2015 (the "original WCAT decision"), in which I allowed the worker's appeal of a May 1, 2014 Review Division decision (*Review Reference #R0160184*). I found the worker met the requirements to be assessed for a potential loss of earnings award under the *Workers Compensation Act* (Act).
- [2] The employer did not participate in the appeal of the original WCAT decision. B Ltd. submitted in an August 27, 2015 letter that WCAT's procedure was unfair because it did not alert it – as the employer's representative – of the appeal.
- [3] On October 8, 2015, WCAT's Tribunal Counsel Office informed B Ltd. that the WCAT Registry would process the August 27, 2015 letter as an application for reconsideration.
- [4] On January 28, 2016, I wrote to B Ltd. to advise that a preliminary issue had arisen concerning whether the employer has standing to request reconsideration of the original WCAT decision. This matter arose because the employer's account at the Board was cancelled effective January 1, 2014. I invited B Ltd. to provide submissions on this preliminary matter. It did not do so.
- [5] The employer's reconsideration application does not raise any circumstances that require an oral hearing, and one was not requested. I am satisfied the application may proceed in writing. The worker is participating in this application, and he has representation.

Issue(s)

- [6] Two issues arise on this application:
- Does the employer have standing to request reconsideration of the original WCAT decision?
 - If so, does the original WCAT decision involve a true jurisdictional error, namely, a breach of procedural fairness?

¹ Not its real initials.

Jurisdiction

- [7] Subsection 255(1) of the Act provides that a WCAT decision is final and conclusive and is not open to question or review in any court. In keeping with the legislative intent that WCAT decisions be final, they can only be reconsidered in limited circumstances.
- [8] Section 255 of the Act provides that a party to a completed appeal may apply to the chair of WCAT for reconsideration of the appeal decision on certain grounds. The WCAT chair has delegated the authority in this section to WCAT vice chairs.
- [9] In *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499, the court found WCAT has no authority to review one of its decisions to determine if it was patently unreasonable. Rather, WCAT's authority to review one of its own decisions is limited to true jurisdictional error grounds and new evidence grounds. This is not an application on new evidence grounds. There are two types of true jurisdictional errors for which WCAT has the power to cure: breaches of the duty of procedural fairness and narrow jurisdictional errors. Narrow jurisdictional errors arise where WCAT had no power to decide a matter that it purported to decide or WCAT failed to decide a matter that WCAT was required to decide. This application does not involve any narrow jurisdictional errors.

Background and Evidence

- [10] The worker was injured in the course of his employment in October 2012. The Workers' Compensation Board (Board)² accepted his claim for a right wrist fracture.
- [11] On February 19, 2013, the employer filed an authorization with the Board's Compensation Services Division appointing B Ltd. as its representative on all compensation matters. It was not specific to any particular claim file or files.
- [12] By decision dated June 5, 2013, the Board informed the worker of his entitlement to a number of further benefits. That decision was copied to the employer's head office, but not to B Ltd.
- [13] On June 6, 2013, the worker filed a request for review with the Board's Review Division of the June 5, 2013 decision.
- [14] On June 13, 2013, the Review Division informed the employer's head office of the request for review and sent it a notice to participate form. The Review Division did not write to B Ltd. or copy it with the letter and/or the form that it had sent to the employer's head office.
- [15] The employer did not file a notice of participation in the request for review.

² Operating as WorkSafeBC.

- [16] In his May 1, 2014 decision (*Review Reference #R0160184*), the review officer noted the employer did not participate in the review although it had been invited to do so. The last page of every Review Division decision is entitled “Distribution List” and shows to whom the decision has been sent. The review officer’s decision was sent to the employer’s head office.
- [17] The worker then filed a notice of appeal with WCAT of *Review Reference #R0160184* on June 13, 2014.
- [18] Item #6.3.1 of the WCAT *Manual of Rules of Practice and Procedure* (MRPP) provides that WCAT will normally assume a representative continues to act in an appeal of a Review Division decision where that representative has been given a copy of the decision by the Review Division. Since B Ltd. was not given a copy of the Review Division decision, WCAT was unaware that the employer intended B Ltd. to be its representative on the appeal of *Review Reference #R0160184*.
- [19] *Review Reference #R0160184* was designated as the “B” appeal at WCAT, as the worker had earlier filed an appeal of another Review Division decision, which was designated as the “A” appeal. A WCAT vice chair decided that appeal on February 17, 2014. The employer was also invited to participate in that appeal and did not do so. After the decision on the A appeal was made, B Ltd. wrote to WCAT on behalf of the employer to request clarification of that decision.
- [20] On August 25, 2014, WCAT wrote to the employer at its head office to notify it of the worker’s notice of appeal of *Review Reference #R0160184*. That letter invited the employer to participate in an extension of time application filed by the worker³, as well as to participate in the merits of the appeal if the extension of time was granted. The letter informed the employer it had until September 8, 2014 to complete and return an enclosed notice of participation form, and that failure to complete the form by that date would result in the employer not receiving any further information other than a copy of the final decision on the extension of time application and the merits of the appeal (if the extension of time was granted).
- [21] The employer did not contact WCAT or file a notice of participation form.
- [22] On October 30, 2014, a vice chair granted the extension of time to appeal *Review Reference #R0160184*. That decision was sent to the employer’s head office.
- [23] The B appeal was then assigned to me with an oral hearing date set for March 3, 2015. I proceeded with the appeal on the understanding that the employer was not participating as it had not filed a notice of participation or contacted WCAT to advise it wished to participate. I issued the original WCAT decision on May 8, 2015. A copy was

³ The worker’s notice of appeal of *Review Reference #R0160184* was filed late with WCAT.

provided to the employer at its head office. I noted in my decision that the employer was not participating in the appeal.

- [24] The employer wrote to WCAT on July 24, 2015 that it was notified by letter from WCAT dated August 25, 2014 that the worker was appealing the May 1, 2014 decision. It also advised that it received notice from WCAT on October 30, 2014 that the worker had been granted an extension of time to file his appeal. However, the next document it or its representative received was the May 8, 2015 decision. The employer wrote that neither it nor its representative was given an opportunity to participate in the appeal.
- [25] On August 14, 2015, legal counsel with WCAT's Tribunal Counsel Office wrote to the employer to explain that the August 25, 2014 letter was an invitation for the employer to participate; however, the employer did not return a completed notice of participation. Thus, the appeal proceeded on the understanding that the employer was not participating. Legal counsel further explained the two grounds to seek reconsideration of a final WCAT decision, and provided the employer with an application for reconsideration and some additional information.
- [26] By letter dated August 27, 2015, B Ltd. informed WCAT that it was the employer's representative and had been since 2012. B Ltd. submitted WCAT was well aware that it was the employer's representative (given the A appeal), but B Ltd. was never copied with the August 25, 2014 or October 30, 2014 letters from WCAT. Thus, B Ltd. was unaware of the appeal, and the employer did not take any action when it received those letters because it expected B Ltd. to address all matters related to the Board. B Ltd. requested reconsideration of the May 8, 2015 decision on the grounds of procedural unfairness.
- [27] When processing the reconsideration request, the WCAT Registry learned the Board's Assessment Department had determined the employer was inactive in the province and had been since January 1, 2014. This had arisen on March 20, 2015 when the Assessment Department had asked the employer why it had no payroll in 2014. On April 1, 2015, the employer told the Assessment Department that it had not had any workers in the province since July 2013, and it was only carrying on business outside of British Columbia. Accordingly, the Assessment Department advised the employer that its account at the Board would be cancelled effective January 1, 2014. A successor employer was not appointed.
- [28] The reconsideration application was assigned to me in November 2015. Given the employer's account had been cancelled, I recognized there may be an issue with the employer's standing to request reconsideration.
- [29] I wrote to B Ltd. to inform it of this preliminary issue. I outlined that subsection 241(1) of the Act provides that an employer "directly affected" by a Review Division decision can appeal to WCAT, and that, in most cases, where a firm has a direct financial interest in an appeal, WCAT will generally grant standing to participate. I explained that whether

the employer has standing to request reconsideration depended on whether it had standing to participate as a respondent on the original WCAT appeal. I invited B Ltd. to provide submissions on this preliminary issue, addressing whether the employer had any residual financial interest in the result of the worker's appeal. B Ltd. did not provide any submissions and neither did the employer.

- [30] The worker is participating in this application. His representative submitted that the employer was notified of the appeal and it is the employer's responsibility to inform its representative. There was therefore no procedural unfairness; rather, there was a lack of due diligence on the employer's part.

Analysis and Findings

- Does the employer have standing to request reconsideration of the original WCAT decision?

- [31] While the original WCAT decision was favourable to the worker, the issue for me was whether the employer was "directly affected" by it when it was no longer registered with the Board. I therefore questioned whether the employer could be directly affected by increased claims costs resulting from a decision favourable to the worker, despite the employer no longer being registered with the Board.

- [32] In that regard, I consider item AP1-42-1(a)(1) to (5) of the Board's *Assessment Manual* is of relevance. It provides:

- (1) The ER [experience rating] plan applies to all employers and independent operators in rated classification units.
- (2) The ER plan is prospective in application. ER adjustments are calculated on the basis of past claims costs and payroll and are applied to employers' assessments. Thus, a firm's experience is a measure of a firm's performance relative to its rate group based on information derived by the Board from appropriate past claims costs and payroll.
- (3) ER adjustments are based solely on claims costs. The costs used are those directly associated with compensation claims, including the capitalized value of pensions awarded. The cost used for fatal claims is the five-year moving Board-wide average rather than the actual cost of each claim.
- (4) The Board's administrative costs are not included in the ER calculation.
- (5) The ER plan uses claims costs arising from claims commenced in the three calendar years prior to the year in which the calculation is made (the "ER Window"). This includes all costs of those claims up to and including June 30th of the year of calculation.

- [33] Based on the above, specifically the Board's practice under paragraph 5, I find the employer could be affected by any increased claims costs if it re-registered with the Board within the three-year ER window that is considered with respect to increased assessment.
- [34] I am satisfied this is sufficient to provide the employer with standing to request reconsideration of the original WCAT decision.
- Does the original WCAT decision involve a true jurisdictional error, namely, a breach of procedural fairness?
- [35] The applicable standard of review on procedural fairness issues is the standard set out in subsection 58(2) of the *Administrative Tribunals Act* (ATA) because WCAT applies the standard set out in the ATA. That standard is whether, in all of the circumstances, WCAT acted fairly. I find it did. My reasons follow.
- [36] I acknowledge that the Review Division failed to recognize B Ltd. was the employer's intended representative on *Review Reference #R0160184*; however, WCAT properly followed the process set out in the MRPP and was unaware that B Ltd. was the intended representative on the B appeal. As a result, WCAT informed the employer of the appeal and afforded it the opportunity to participate. This is not a situation where WCAT failed to notify the employer such that it had no knowledge and therefore no opportunity to participate.
- [37] That an employer has authorized a representative does not mean that the employer can ignore correspondence directed to it. This is particularly so when it ought to have been apparent to the employer when it received the Review Division decision that B Ltd. was not listed on the distribution list and was not a party to the review. When the employer then received the WCAT notice of participation, inviting the employer to return it to WCAT, with no indication that B Ltd. was copied or sent the correspondence, the employer also ought to have been alerted that there might be an issue with representation. Again, when only the employer received the October 30, 2014 WCAT decision granting the extension of time to appeal, the employer ought to have been alerted that there might be an issue with representation. Nonetheless, the employer made no inquiries of WCAT and it seems likely it did not contact B Ltd. either. Of interest, when the employer received the original WCAT decision it quickly took action to seek reconsideration.
- [38] Clearly, it would be a breach of procedural fairness if an employer was not given an opportunity to participate. While B Ltd. was not notified of the appeal, the employer clearly was and it was afforded an opportunity to participate. In these circumstances, I am unable to conclude that WCAT acted unfairly.
- [39] Grounds for reconsideration on the basis of procedural unfairness have not been established.

Conclusion

- [40] Although I have found the employer has standing to request reconsideration, the employer's reconsideration application is denied because procedural unfairness reconsideration grounds have not been established. *WCAT-2015-01471* stands as final and conclusive pursuant to subsection 255(1) of the Act.
- [41] There has been no request for reimbursement of expenses. I therefore make no order in that regard.

Elaine Murray
Vice Chair

EM/lb