DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

Introduction

[1] The employer operates in the residential construction sector. On January 30, 2015, a Workers' Compensation Board (Board) officer attended a condominium construction project for which the employer was the prime contractor. The officer observed a number of safety contraventions and recorded them in an inspection report, which I will describe as the "January Inspection Report."

[2] The safety officer returned to the construction site on March 5, 2015. He again observed safety contraventions, several of which were similar to those already described in the January Inspection Report. The officer recorded these further contraventions in an inspection report, which I will describe as the "March Inspection Report."

[3] The Board decided to impose an administrative penalty on the employer for the January Inspection Report and for the March Inspection Report. The Board therefore issued two separate orders for the employer to pay $29,827.56, for a total of $59,655.12. I will refer to the penalty order related to the January Inspection Report as the "January Penalty Order." I will refer to the penalty order related to the March Inspection Report as the "March Penalty Order." The Board issued the January Penalty Order and the March Penalty Order on the same day, that is, April 27, 2015.

[4] The employer disagreed and requested a review. In *Review Decisions #R0193076* and *#R0193078*, both dated April 18, 2016, a review officer confirmed the Board's decisions, except that the review officer concluded that the March Penalty Order should have been doubled as it reflected a "repeat" of many of the same contraventions identified in the January Inspection Report. The review process therefore left the employer in a worse position than beforehand.

[5] The employer now appeals to the Workers' Compensation Appeal Tribunal (WCAT).

Issue(s)

[6] The employer's appeal raises the following issues:

1) Did the employer contravene its safety obligations, as set out in the January Inspection Report?

2) Did the employer contravene its safety obligations, as set out in the March Inspection Report?

3) Should an administrative penalty be levied on the employer in relation to the January Inspection Report?

Workers' Compensation Appeal Tribunal

150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

4) If so, does the January Penalty Order set out the proper quantum?

5) Should an administrative penalty be levied on the employer in relation to the March Inspection Report?

6) If so, does the March Penalty Order set out the proper quantum?

Jurisdiction

[7] The WCAT's jurisdiction in this appeal arises under subsection 239 of the *Workers Compensation Act* (Act). The January Inspection Report and March Inspection Report are not appealable to WCAT on their own; however, where, as here, a contravention order is relied on to justify a penalty order, the WCAT may address both the contravention and the penalty orders.[1]

Background and Evidence

[8] The review officer has already summarized much of the relevant evidence in the decisions under appeal. As I intend to resolve the employer's appeals on relatively narrowly grounds, and as the Review Division decisions are publicly available (at www.worksafebc.com) I need not repeat that background at length.

[9] It will suffice to note at this point that the safety officer's key concerns identified in the January Inspection Report were the employer's alleged failure to: generally maintain proper occupational health and safety systems; investigate a worker's injury; ensure proper guarding of a pit; and ensure that a subcontractor had proper fall protection systems in place.

[10] With respect to the March Inspection Report, the safety officer identified similar key concerns, including: inadequate health and safety systems; failure to investigate a worker's injury; and additional fall safety problems. The safety officer also identified a new problem in that the employer's workers had been exposed to silica dust without proper respiratory protection.

[11] It is against this background that the Board imposed the January Penalty Order and the March Penalty Order.

Submissions

[12] The employer has filed detailed submissions. It disagrees with most of the alleged contraventions identified in the January Inspection Report and the March Inspection Report. The employer further disagrees that it should be subject to any administrative penalty. Given the narrow grounds on which I intend to resolve the employer's appeals, I need not reference the bulk of the employer's submissions. I will address specific aspects of those submissions only as they relate to the path of my reasoning.

[1] See item #3.13 of the WCAT's *Manual of Rules of Practice and Procedure*.

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Reasons and Findings

[13] I confirm the January Inspection Report and the March Inspection Report. I find that an administrative penalty is appropriate in relation to the latter but not the former. I further find that the penalty should be calculated on a "Category A" basis without variation and without a repeat multiplier. I therefore confirm the March Penalty Order, as imposed by the Board, but cancel the January Penalty Order.

[14] I set out my reasons for these conclusions below.

1) Did the employer contravene its safety obligations, as set out in the January Inspection Report?

[15] The employer has largely reiterated its earlier submissions to the Review Division in relation to the contraventions identified in the January Inspection Report. I do not find those submissions persuasive and instead would prefer and adopt as my own the reasoning of the review officer.

[16] More particularly, I disagree with the employer's assertion that it complied with its duty under section 173 of the Act to "immediately" carry out a preliminary investigation of the workplace injury to Mr. H. The employer appears to believe that a first aid attendant "commenced" this process by asking the worker what happened and identifying a witness. I disagree.

[17] Paragraph 175(2)(b) of the Act requires that a preliminary investigation report be completed within "48 hours of the occurrence of the incident...." Here, no such report was completed within the time frame required. It follows that the employer did not effectively complete a "preliminary investigation" into Mr. H's injury as required under section 173 of the Act. As with the Board officer and the review officer, I therefore conclude that the employer contravened section 173 of the Act.

[18] With respect to proper guarding of a pit on the worksite, the employer asserts that the pit was actually for a swimming pool. The pit was said to have a berm of 14 inches in height and also to be surrounded by "bright orange delineators." The employer therefore says there was no risk of a worker falling into the pit. Again, I disagree.

[19] The berm was too low to prevent access to the pit. On the contrary, it seems to me it posed a tripping hazard that might have even exacerbated the risk of falling into the pit. With respect to the use of high-visibility delineators, they do not adequately protect a worker from falling into the pit. They, at most, might alert a worker of a hazard. However, the relevant regulatory provision does not permit that type of guarding. Rather, guardrails are required to be permanently in place, or movable only to the extent necessary to conduct work in the pit. Indeed, the Board officer observed workers in close proximity to the pit, despite the orange delineators. Although not necessary to my conclusion, this further emphasizes the inadequate nature of the guarding in place around the pit in question. I therefore disagree that the employer's reliance on the berm and delineators was sufficient to protect workers from the hazards of the pit and I find that the employer contravened section 4.59 of the *Occupational Health and Safety Regulation* (OHS Regulation).

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[20] As I have already concluded that the swimming pool pit reflected a violation of section 4.59 of the OHS Regulation, I need not address whether the employer also violated that section in relation to the two manhole covers identified in the January Inspection Report.

[21] With respect to the remainder of the violations set out in the January Inspection Report, the employer's appeal submission essentially appears to amount to an evidentiary concern about the lack of detail provided by the safety officer and the resulting difficulty for the employer to respond. Again, I do not find this argument persuasive.

[22] The safety officer described his observations in the narrative to the January Inspection Report. That is an adequate basis, in the absence of any contrary evidence, to establish the contraventions in question. The employer cannot simply complain that the evidence was relatively superficial. Given the nature of administrative regulatory systems, evidence is often relatively superficial. It is then up to the employer to assert, through witness statements, contrary documentation, or other evidence, that the officer was incorrect in his or her observations. Depending on the depth and scope of an officer's observations, that task may be relatively easy or relatively difficult. The employer in the appeal before me has not provided sufficient contrary evidence and has merely complained that the Board officer's observations lack other evidentiary support. That complaint is not responsive to the nature of the administrative regulatory regime inherent in the Board's mandate under Part 3 of the Act. I therefore do not find the employer's submission on this point to be persuasive.

[23] It follows that I confirm the January Inspection Report; however, little turns on this as I have ultimately decided to vacate the January Penalty Order on other grounds.

2) Did the employer contravene its safety obligations, as set out in the March Inspection Report?

[24] I rely on three of the contraventions identified in the March Inspection Report to support the March Penalty Order. Therefore, I need not consider the other elements of the March Inspection Report.

[25] The first contravention of significance is the safety officer's allegation of a further instance of failing to complete a preliminary inspection, as required under section 173, for a workplace injury. The employer agrees that a worker was injured on February 17, 2015 and that he required medical attention. Indeed, the worker broke several bones in his hand when he slipped and fell on the worksite.

[26] The employer says that the safety officer was mistaken and that the employer in fact faxed in a copy of the preliminary investigation report on the same day as the injury occurred. The employer points out that the report was signed by the occupational first aid attendant and by a senior management person with the employer. The employer argues that the signatures and date show the document was transmitted to the Board and that the Board erred in its view that the required investigation did not take place.

[27] I do not accept the employer's position. Had the report been faxed to the Board I consider it a matter of common experience that there would be a record to this effect. Further, the safety officer, in a statement to the Board, advised that he had not received the report until March 20,

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2015. I also note that the employer's version of the document, at pages 26-28 of its March 20, 2015 submission to the Board, does not appear to have any confirmation of delivery by fax.

[28] In addition, the first page of the report appears to say in handwriting that the report was "emailed" yet the employer now refers to the report as having been faxed. Although none of these points is particularly conclusive on their own, the cumulative effect leads me to infer that the employer did not, in fact, file the report with the Board until March 20, 2015. I note that the employer has not provided a sworn statement from either signatory to that document disagreeing with the Board officer's statement that the report was not provided to the Board until March 20, 2015. This appears to me to be an obvious step that the employer should have taken and its failure to do so further reinforces my conclusion that the document was not sent to the Board in a timely manner.

[29] Accordingly, I conclude that the employer did not comply with section 173 of the Act in relation to the February 17, 2015 injury to one of its workers. This contravention is of particular significance given that it occurred after the employer had already been specifically advised of its duty under section 173 by way of the January Inspection Report.

[30] The second contravention of significance relates to a prime contractor's supervisory obligations over fall protection. In this regard, the officer noted that a subcontractor used inadequate fall protection at the worksite. The employer's argument appears to be that it had not designed or installed the system and that the fault therefore rested with the subcontractor. In addition, the employer appears to suggest that, because no injuries occurred, the deficiencies were not serious. I do not agree with either argument.

[31] I have no difficulty in concluding that the fall safety anchors were wholly inadequate and unsafe. I did not understand the employer to seriously contest this point. The employer's argument that this contravention was a failure of the subcontractor, while true, fails to recognize the significant obligations of a prime contractor. The employer has not demonstrated that it reviewed the planned fall safety setup of its subcontractor or conducted inspections from time to time to ensure ongoing compliance. In my view, given the central role of a prime contractor in ensuring workplace safety on multi-employer worksites, the employer's failure to take such basic steps, particularly in relation to as fundamental a safety issue as fall protection on the site for which the employer had ultimate control and responsibility, reflects a clear breach of section 3.5 of the OHS Regulation within the context of fall protection.

[32] The third contravention of significance relates to the employer's failure to take protective measures against its workers having potential exposure to silica dust. The employer's workers were engaged in grinding concrete in an enclosed parkade. According to the Board officer's observations and opinion, this would have resulted in exposure to silica dust because silica is generally found in concrete. Yet, the workers did not have properly fitted respiratory equipment or an analysis of the risks in this regard.

[33] For its part, the employer argues that there is no evidence of exposure to silica dust beyond the permitted threshold. In the absence of such evidence, there was no obligation to have properly fitted equipment or to undertake a risk assessment. Further, the employer says it stopped the work in question as soon as the Board officer identified his concerns. Neither argument is persuasive.

[34] The wording of section 8.32 of the OHS Regulation does not require the presence of actual excessive exposure to silica dust; rather, it requires merely that a worker "might" be exposed to such excessive dust. Here, the employer had taken no steps to ascertain the likely extent of such exposure or prepare any sort of analysis. Indeed, the employer appears to have been wholly unaware of the very serious risk for severe or even fatal pulmonary conditions that are related to silica dust exposure. To say that there must be specific evidence of excessive exposure misconstrues the regulatory provision in question and the employer's submission in this regard is as reflective of an unsatisfactory safety culture in relation to silica exposure as its actions in the first place.

[35] Here, given that the safety officer's observations are uncontested and given that silica is generally understood to be present in concrete, I conclude that there was at least potential exposure to excessive silica. In the absence of evidence from the employer showing that there was no potential silica exposure, it is not necessary for the Board to prove that actual exposure to excessive silica was present and, accordingly, the employer's argument to this effect is unpersuasive.

[36] Further, the employer's action of stopping the work in question does nothing to disguise the contravention itself. Had the Board officer not advised the employer of the problem, it appears that the work would have continued until completion. The employer was obviously required to stop the work once the Board officer identified the hazard. Indeed, the Board officer issued a stop work order in this regard. The employer's action of complying with the Board officer's concerns is essentially irrelevant to the presence of the contravention in the first place. This element of the employer's argument is therefore similarly unpersuasive.

[37] It follows that the silica exposure contravention is well-founded and the third significant contravention identified in the March Inspection Report. I turn now to address the appropriate consequences.

3) Should an administrative penalty be levied on the employer in relation to the January Inspection Report?

[38] As noted earlier, I have concluded that the January Penalty Order should be cancelled. I reach this conclusion not on the basis that the January Inspection Report could not justify the imposition of a penalty, but rather on the basis of my broader concerns about issuing two penalties on the same day.

[39] The starting point of my analysis is policy item D12-196-1, as it read at the time in question. It provides that the main purpose of an administrative penalty is to encourage compliance for a particular employer as well as the general employer community. It does not appear to me to be consistent with this purpose to levy two penalties on the same day in the context of the appeals before me.

[40] Rather, it appears to me that, before a second penalty should be levied, a period of time must elapse in which the employer may be evaluated to ascertain whether, after the first penalty, it has been encouraged to comply with its safety obligations. If the first penalty does not encourage compliance, a further penalty, potentially on a repeat basis, would appear entirely warranted.

150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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[41] However, in the current case, the employer received the January Inspection Report with only a vague statement that the Board **might** impose a penalty. Moreover, there was no warning that the employer would also continue to face further penalties and that any such further penalties would be calculated on a repeat basis. The Board's practice of taking this vague approach to alerting employers of potential penalties may require revisiting and change. In my view, the compliance effect of a penalty is all the greater if an employer is advised clearly and right up front that a penalty will be imposed. This compliance effect will in turn be all the greater if an employer is also specifically and clearly advised that further breaches may result not only in further penalties, but repeat penalties. In such cases, further breaches may reasonably lead to further penalties because the employer has been given a "bright line" notice that it must bring improve its safety procedures.

[42] Conversely, a vague suggestion that the employer might be subject to a penalty waters down the seriousness of how an employer is to perceive the underlying inspection and violations. In every case when a penalty may be issued, it seems to me that an employer should be made clearly aware of the seriousness of the violations, the jeopardy the employer faces, and the ongoing jeopardy of further and greater penalties in the face of continued safety non-compliance.

[43] The vague nature of the Board's practice as it currently exists appears to undermine the very goal of encouraging compliance and I see no principled reason for the Board "pulling its punches" in its underlying inspection reports by using vague language about the scope for a penalty and for additional, repeat, penalties. I note similar concerns in principle were expressed recently in *WCAT Decision A1606046*, dated November 16, 2017. I agree with the panel's observations in that regard.

[44] The corollary of the Board's vague notice of an employer's jeopardy is that imposing a second penalty on the same day as the first penalty, without clear notice of such a possibility, appears to be more in the nature of arbitrary punishment than a principled effort to encourage safety compliance. Indeed, it seems to me that the Board's action of issuing two penalties on the same day has no more likelihood of encouraging compliance than if it had issued a single penalty, in relation to either grouping of contraventions.

[45] A similar point is made in relation to an earlier version of the Board's repeat penalty regime in *WCAT-2012-00416*, dated February 13, 2012. Although that dealt with a now-repealed version of the repeat penalty policy, the underlying theme of the decision is that an employer should be given an opportunity to improve after a penalty before further penalties are imposed. I agree with that panel's concerns and suggest that they apply equally not only to repeat penalties but also to issuing multiple single penalties on the same day. In order for the penalty scheme to be effective, I consider that clear, unequivocal notice of either an impending penalty or an actual penalty is generally to be preferred before a second, or repeat, penalty should be imposed. To merely provide vague notice of a possible penalty but then unexpectedly impose two penalties on the same day seems to me to be somewhat arbitrary. In any event, arbitrary or not, I do not consider that issuing two penalties on the same day serves the dominant purpose of encouraging compliance.

[46] I do not say that the Board cannot as a matter of law issue two penalties on the same day. I merely point out that doing so may often risk appearing more arbitrary and punitive than

encouraging of compliance. The precise effect of multiple penalties in any particular case appears to me to be properly considered under the "other circumstances" element of the analysis as to whether to actually impose an administrative penalty on an employer. At least in the current appeals, I conclude as an "other circumstance" that, once the Board decides to impose one penalty on an employer, it serves no useful purpose to levy another on the same day. It does not particularly matter which penalty is cancelled for this reason; however, I consider it more appropriate to cancel the January Penalty Order, as the overall cumulative effect of both sets of contraventions provides even stronger support for the March Penalty Order.

[47] Consequently, I find that the imposition of two penalty orders on the same day does nothing more to encourage compliance than a single order in this particular case. I also find that a second order on the same day, at least in this case, reflects an appearance of arbitrariness and punishment that does nothing to further the purpose of encouraging employer compliance. I therefore conclude that, notwithstanding the validity of the January Inspection Report, it is improper to actually impose an administrative penalty for those contraventions.

[48] It follows that I cancel the January Penalty Order.

4) Does the January Penalty Order set out the proper quantum?

[49] This issue is moot in light of my decision to cancel the January Penalty Order.

5) Should an administrative penalty be levied on the employer in relation to the March Inspection Report?

[50] I adopt as my own the reasons of the review officer in relation to the significance of the March Inspection Report. I further conclude that the fall safety and silica exposure orders discussed earlier are of a high risk nature. In addition, I conclude that, due to its prior knowledge gleaned from the January Inspection Report, the employer's second inadequate worker injury investigation reflects a repeat violation with reckless disregard for section 173 of the Act. There is consequently a basic or "*prima facie*" reason to impose a penalty for any of these three grounds.

[51] Having established a *prima facie* case for imposing a penalty, the next step is whether that penalty should, in fact, be imposed. In this regard, I again agree with and adopt as my own the review officer's reasons. In particular, I consider that the employer fell well below the standard of due diligence expected of a contractor in the construction industry, particularly an employer carrying out the safety-critical role of prime contractor on a multi-employer worksite. Further, several of the employer's submissions even many months later demonstrate an ongoing misunderstanding of basic safety systems and the responsibilities of a prime contractor in a multi-employer worksite.

[52] Add to this the similarity between several of the contraventions in the January Inspection Report and the March Inspection Report and I conclude that the employer was not taking seriously its obligations under the OHS Regulation and the Act. I therefore find that the employer did not act with due diligence. More generally, I consider that the exposure of workers to improper fall

safety systems, to potential silicosis, and the repeat failure to properly investigate a serious work injury are individually and collectively deserving of an administrative penalty.

[53] I therefore confirm that an administrative penalty is the appropriate response to the March Inspection Report.

6) Does the March Penalty Order set out the proper quantum?

[54] Having concluded that a penalty is required, the next step of the analysis is to decide the proper amount of the penalty. In this regard, policy item D12-196-6, "Administrative Penalties – Amount of Penalty" provides for two types of administrative penalty.

[55] The "Category A" type of penalty applies to more serious breaches of occupational health and safety obligations while the "Category B" type of penalty applies to the less serious situations not captured under Category A. Category B penalties are significantly less costly than Category A penalties.

[56] The basic amount of a Category A or Category B penalty may be varied up or down by as much as 30%, depending on the circumstances of each individual case. Policy item D12-196-6 lists a number of factors relevant to varying a penalty up or down.

[57] The applicable policy therefore sets out a two-step approach for calculating the amount of an administrative penalty. The first step is to classify the penalty as either Category A or Category B. The second step is to consider whether the resulting basic amount of the penalty should be varied up or down.

i. Is a Category A or Category B penalty appropriate?

[58] In my view, the fall safety supervision order and the silica exposure order both fall within the concept of a "high risk" violation as described in policy item D12-196-2. In addition, I consider that the second worker injury investigation order, although not of a high risk nature, was the result of non-compliance that was wilful and with reckless disregard because the employer had already been alerted to the issue by way of the January Inspection Report. Any one of these three conclusions would support a Category A penalty. The collective weight of all three contraventions merely further reinforce that outcome.

[59] Accordingly, I find that the March Penalty Order is properly assessed on the Category A basis.

[60] The next question to consider regarding the proper quantum of the administrative penalty is whether or not the Category A penalty should be varied up or down.

ii. Variation of the Category A penalty?

[61] Policy item D12-196-6 describes the following as the relevant factors to consider in assessing whether or not to vary the basic amount of a Category A penalty:

(a) nature of the violation;

(b) nature of the hazard created by the violation;

(c) degree of actual risk created by the violation;

(d) whether the employer knew about the situation giving rise to the violation;

(e) the extent of the measures undertaken by the employer to comply;

(f) the extent to which the behaviour of other workplace parties has contributed to the violation;

(g) employer history;

(h) whether the financial impact of the penalty would be unduly harsh in view of the employer's size; and

(i) any other factors relevant to the particular workplace.

[62] The employer has not raised any significant mitigating factors other than the fact that it is having financial difficulties. I do not consider this point well-established. The employer has identified its liabilities; however, it has not provided evidence of its financial resources. I consider it a matter of common knowledge that large, sophisticated construction projects will have sophisticated banking arrangements in place. I further consider it a matter of common knowledge that condominium prices and real estate in general is experiencing a boom. I am therefore not persuaded that the employer's circumstances are as dire as it suggests.

[63] In any event, the purpose and structure of administrative penalties is to recognize proportionality through a ratio based on payroll. Larger employers with larger payrolls will pay relatively larger penalties for the same violation. Here, the employer appears to be mid-sized and has received a mid-sized penalty. In addition, I have effectively reduced the overall cost of that penalty by cancelling the January Penalty Order.

[64] In all these circumstances, I am not persuaded that the quantum of the March Penalty Order should be varied either up or down. I therefore confirm the **Board's** calculation of the March Penalty Order. I do not confirm the review officer's calculation of the March Penalty Order because she added a repeat multiplier, which is obviously not applicable given my cancellation of the January Penalty Order.

[65] As a result, I allow the employer's appeals, in part.

Conclusion

[66] I vary *Review Decision #R0193076*. I find that the January Contravention Orders are valid; however, I cancel the January Penalty Order.

[67] I vary *Review Decision #R0193078*. I find that the March Contravention Orders are valid and that an administrative penalty is the appropriate regulatory response to those contraventions.

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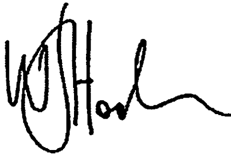
However, I find that the proper quantum of the March Penalty Order is as set out in the **Board** decision and I vary the Review Division decision accordingly to remove the repeat component of that penalty.

[68] The employer did not request reimbursement for appeal expenses and no such expenses were apparent to me. Consequently, I make no order for the reimbursement of appeal expenses.



Warren Hoole
Vice Chair

WCAT Workers' Compensation Appeal Tribunal

150 – 4600 Jacombs Road
Richmond, BC V6V 3B1
Telephone: (604) 664-7800
Toll Free: 1-800-663-2782
Fax: (604) 664-7898
Website: www.wcat.bc.ca

ADVISORY NOTICE

The enclosed WCAT decision is final and conclusive pursuant to section 255 of the *Workers Compensation Act*. It cannot be appealed. The Workers' Compensation Board, operating as WorkSafeBC (Board), must comply with a final decision of WCAT.

A copy of this decision has been sent to the Board to ensure that:

- the decision is placed on the appropriate Board case file;
- the Board takes the necessary steps to implement the decision (if applicable).

NOTE: If you have any questions concerning the implementation of this decision, please contact the Board officer or department that is handling the case file.

For telephone inquiries:

Local call: **604-273-2266**
Toll free: **1-888-967-5377**

If you are writing to the Board, please mail correspondence to:

WorkSafeBC
PO Box 4700 Stn Terminal
Vancouver, BC V6B 1J1

or fax to:

WorkSafeBC
Local fax: 604-233-9777
Toll free: 1-888-922-8807

For workplace health and safety inquiries:

Local call: 604-276-3100
Toll free: 1-888-621-7233

For employer assessment inquiries:

Local call: 604-244-6181
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For information on processes that may be available to you after this decision, see WCAT's Post Decision Guide available on our website at www.wcat.bc.ca.
Time limits apply to some of these processes.