As of December 18, 2014, this decision is no longer considered by WCAT to be noteworthy.

WCAT Decision Number: WCAT-2004-04957
WCAT Decision Date: September 24, 2004
Panel: Herb Morton, Vice Chair

Introduction

The worker seeks reconsideration of *Workers' Compensation Appeal Tribunal* (WCAT) *Decision #2004-00736-AD*, dated February 12, 2004. By letter of July 29, 2004, a WCAT appeals coordinator confirmed to the worker that WCAT had received 32 separate letters from him concerning his application. Additional letters were subsequently received by the worker in support of his application, including letters dated August 29, 2004 and September 1, 14 and 19, 2004.

The WCAT panel did not accept the worker's position that he is unemployable. The WCAT panel allowed the worker's appeal in part, finding that he is entitled to a loss of earnings pension award on the basis that he would, over the long term, be capable of employment under the general heading of "electronic assembler", in the occupations of electronics fabricator, electronics inspector and electronic tester (i.e. occupations in the "light-strength" category). The WCAT panel noted the worker's disability is with respect to his left shoulder, and the worker is right-handed. As well, the worker has transferable skills in the area of electronics, based on his prior employment experience as an electrician and electronics repairer. The WCAT panel disagreed with prior decisions, which had found the worker could obtain employment earning $15 an hour, and could also work as a security guard. The WCAT panel found that a more realistic upper level of earning for the worker would be $12 per hour, and that the occupation of a security guard would not be suitable for the worker. The WCAT panel did not accept that the worker is unemployable as a result of his April 23, 1996 work injury to his left shoulder. With respect to the worker's vocational rehabilitation benefits, the WCAT panel found the Workers' Compensation Board (Board) had appropriately reduced his "continuity of income" benefits effective May 21, 2001 on the basis of the worker's deemed earning capacity. This decision was based on the policy at #89.12 of the former *Rehabilitation Services and Claims Manual*, and the worker's refusal to actively participate in the rehabilitation process. The panel found, however, that this reduction should be recalculated, on the basis of the panel's findings that the worker could only earn $12 per hour rather than $15 per hour. Finally, the WCAT panel directed the Board to determine, as a new issue, whether there had been substantive deterioration in the worker's functional impairment since his disability was assessed.

The employer is not participating in this application, although invited to do so. The worker is unrepresented.

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The worker has sent many letters in support of his application for reconsideration. In this decision, I have endeavoured to address the worker's main arguments under separate subject headings. Particular quotations have been selected as representative of the worker's submissions on such issues. In so doing, I have noted that other letters also contained similar arguments. These other arguments have been taken into account, even if not expressly referenced. While I have considered all of the worker's letters, I do not consider it necessary to expressly respond to every sentence in those letters. In this decision, I have focussed on the central question as to whether the requirements for reconsideration are established.

Issue(s)

Have grounds been established for reconsidering the WCAT decision (on the basis of the common law grounds of an error of law going to jurisdiction, including a breach of natural justice, or on the basis of new evidence which meets the requirements of section 256 of the *Workers Compensation Act* (Act))?

Jurisdiction

WCAT uses the broad heading of "reconsideration" to encompass situations both where an applicant seeks to have a decision reconsidered on the basis of new evidence, and where an applicant seeks to have a decision set aside on the basis of the common law ground of an error of law going to jurisdiction. WCAT's authority to reconsider on the basis of new evidence is defined by section 256 of the Act. WCAT also has authority to "reconsider" (i.e. to set aside or void one of its decisions) on the common law ground of an error of law going to jurisdiction, including a breach of natural justice. These grounds are described at items #15.20 to #15.24 of WCAT's *Manual of Rules, Practices and Procedures* (MRPP), accessible on WCAT's website at: http://www.wcat.bc.ca/publications/toc.htm. A tribunal's common law authority to set aside one of its decisions on the basis of jurisdictional error was confirmed by the British Columbia Court of Appeal in the August 27, 2003 decision in *Powell Estate v. Workers' Compensation Board*, (2003) BCCA 470, [2003] B.C.J. No. 1985, (2003) 186 B.C.A.C. 83.

Standard of Review

Section 255(1) of the Act provides that a WCAT decision is final and conclusive and is not open to question or review in any court. In keeping with the legislative intent that WCAT decisions be final, they may not be reconsidered except on the basis of new evidence as set out in section 256 of the Act or on the basis of the common law ground of an error of law going to jurisdiction. The question as to whether a decision involved an error of law going to jurisdiction generally requires application of the "patently unreasonableness" standard of review. On a jurisdictional issue, however, with respect to whether the tribunal had authority to do the act, the decision must be correct. On a

natural justice issue, the question to be addressed is whether the procedures followed by WCAT were fair.

Delegation

By letter of August 29, 2004 (marked as letter #33), the worker pointed out that all of his letters in this application were addressed to the chair. He stated that he wishes to deal directly with the WCAT chair.

Section 234(4) of the Act provides:

> Subject to section 251(9), the chair may delegate in writing to another member of the appeal tribunal or to an officer of the appeal tribunal a power or duty of the chair and may impose limitations or conditions on the exercise of that power or performance of that duty.

Practice and procedure decisions of the chair are accessible on WCAT's website at: http://www.wcat.bc.ca/publications/chair-decisions.htm. Paragraph 26 of *Decision #6*, "Delegation by the Chair", June 1, 2004, delegated the following authority of the WCAT chair to WCAT members, upon assignment by the chair:

> (a) under section 256, to refer a WCAT or Appeal Division decision to WCAT for reconsideration, and,
>
> (b) where such authority exists at common law, the authority to set aside a decision as void or to find that a decision is incomplete, and to return the matter to WCAT for completion of the decision.

On September 1, 2004, the worker's application was assigned to me by the chair, pursuant to this written delegation of authority under section 234(4) of the Act.

Oral Hearing Request

The worker has provided numerous written submissions in support of this application. By letter of August 11, 2004, he wrote to the chair to state that:

> I absolutely must see you and I must talk to you before your final reconsideration decision. I must make sure that: you will not again overlook any of the facts or evidence. I must make sure that you will contact all of my doctors for answers!

This explanation followed the worker's earlier requests for an oral hearing in connection with this application.

An oral hearing was held by the Workers' Compensation Review Board on September 18, 2002, prior to its November 21, 2002 finding. The worker appealed the November 21, 2002 Review Board finding to the Appeal Division. Effective March 3, 2003, the Review Board and Appeal Division were replaced by WCAT pursuant to the restructuring of the workers' compensation appeal structures contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). The WCAT panel also held an oral hearing on November 24, 2003. At the WCAT hearing, the worker attended with an observer, as well as with his own video and audio recording equipment. The WCAT panel advised the worker that WCAT hearings are recorded by use of WCAT's own recording equipment (pursuant to MRPP item #9.40). However, the WCAT panel exercised its discretion to permit the worker to make his own additional recording of the hearing (as noted on page 8). The worker's request to videotape the hearing was denied by the panel on the basis that this would constitute a distraction from the hearing process. An observer was permitted to attend the hearing with the worker, as noted on the cover of the WCAT decision.

An application for reconsideration is unlike the initial hearing of an appeal. In the initial hearing of an appeal, a WCAT panel weighs the evidence concerning the issues raised in the worker's appeal, to reach its own conclusions regarding the weight of the evidence. My review for the purpose of this proceeding must necessarily be more limited in scope. My consideration must be limited to considering whether there is any new evidence which meets the requirements of section 256 of the Act. Alternatively, I must consider whether the WCAT decision involved an error of law going to jurisdiction. The test for finding such a common law ground is normally the same as would be applied by a court in a judicial review proceeding. In the text *Administrative Law in Canada*, 3rd ed. (Ontario: Butterworths, 2001) at 191, Sara Blake states:

> Findings of fact are reviewable only if patently unreasonable. An unreasonable finding of fact is one that is not supported by any evidence. A court will not review the evidence considered by the tribunal to determine whether there was sufficient evidence to support a finding of primary fact. A court will go no further than to determine whether there was any evidence, and only essential findings of fact upon which the decision of the tribunal turns will be reviewed in this manner. Non-essential findings of fact are not reviewable.
>
> . . .
>
> A patently unreasonable rejection of evidence or a refusal in bad faith to consider relevant evidence may be grounds for review. If a tribunal, without explanation, completely ignores important evidence, its decision may be set aside.

Having regard to the specific nature of the issues which may be addressed in an application for reconsideration, the information which has been provided to the worker concerning the reconsideration process (and the grounds on which such an application may be brought), and the ample opportunity given to the worker to set out the basis for his application in written submissions, I find that the worker's application may properly be considered upon the basis of written submissions without an oral hearing.

One Time Only

By letter of May 5, 2004, WCAT's legal counsel advised the worker that his letters would be treated as an application for reconsideration. She provided an updated information sheet regarding WCAT's reconsideration authority. She drew to the worker's attention that pursuant to section 256(4) of the Act, and MRPP item #15.24 (as amended March 31, 2004), an application for reconsideration on the basis of new evidence or on the common law grounds will be considered on one occasion only. Separate applications may be made on the basis of the common law grounds, or on the basis of new evidence under section 256, but each type of application is limited to one occasion only. It is open to a party to seek reconsideration on both grounds at the same time. In an earlier letter of March 3, 2004, the WCAT legal counsel had explained to the worker the importance of ensuring the completeness of the information provided in support of an application for reconsideration, given the fact that such an application can only be addressed on one occasion and precludes a subsequent application. She stated, in relation to section 256(4) of the Act:

> . . . each party is entitled to apply for reconsideration under section 256 **on one occasion only**. This means that if you make an application for reconsideration on the basis of new evidence, which is unsuccessful, you would be barred from making another application in the future on the basis of any further new evidence which might be obtained. . . .
>
> As there is only one opportunity under the new legislation to apply for reconsideration based on new evidence, it is important to ensure that the new evidence is complete.

Further Inquiry

By letter of August 4, 2004, the worker requests that WCAT obtain additional evidence. He writes:

> . . . you finally confirmed that you have received 32 of my letters and submissions. But again, you are not talking about extremely important and urgent issues and requests that are in my letters. Again, you show me that you have no interest to gather new evidence and you show me to that you do not want to assist me to gather the new evidence.

> Once again, I remind you that I need your assistance. I need an Official Request from you to the doctors for any of medical reports and many of the hundreds of dollars to pay for them to obtain these medical reports.
>
> . . .
>
> You do not cooperate with me at all! There is no communication between us! You do not show any interest to gather any new evidence! But in the near future you will blame me that "unfortunately there is no new evidence! You simply do not want to know the truth! . . .
>
> Go to my doctors for answers! Ask them whether they will clear me to return to the workforce.

Section 255(1) of the Act provides that:

> Any decision or action of the chair or the appeal tribunal under this Part is final and conclusive and is not open to question or review in any court.

The legislature intended, as set out in section 255(1) of the Act, that WCAT decisions be final and conclusive. Accordingly, I do not consider it necessary or appropriate to request additional evidence or reports for the purpose of considering the worker's application. The worker has been fully informed as to the requirements for providing new evidence for the purposes of making an application under section 256. The worker's request that WCAT seek out further evidence in relation to his application for reconsideration is denied.

The worker also complains of the WCAT panel's failure to call witnesses. I note that the WCAT panel requested additional medical records following its oral hearing, as documented on page 10 of the WCAT decision. These records were disclosed to the worker and the worker provided a further submission. MRPP items #8.50 and #8.51 concerning expert evidence provide that the evidence of an expert is admissible in the form of a written report by the expert, without the necessity of the expert attending an oral hearing before WCAT. Having regard to the panel's authority under sections 246 and 247 of the Act, I find no error of law going to jurisdiction in respect of the panel's determinations as to whether it was necessary to require any of the expert witnesses to attend the oral hearing, and whether it was necessary to obtain further evidence from any of the expert witnesses.

Employability (Fitness to return to work)

By letter of July 30, 2004, the worker wrote:

> . . . my occupational therapist from Columbia Rehabilitation Centre, Mrs. Theresa Wong, after studying all my documents and talking to Dr. Paula Chalmers said that: "Medical clearance from your physician would be required prior to your return to the workforce."
>
> My physician did not clear me, Dr. Paula Chalmers did not clear me, Professor Dr. Stoessl from UBC hospital did not clear me and Dr. Margaret Dobson did not clear me. Only you cleared me! But you are not a doctor and hence have no authority to act as one.

Section 254 of the Act provides, in part, that:

> The appeal tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined under this Part, . . .

In deciding appeals, WCAT panels must make decisions on factual, medical and legal issues, as well as interpreting and applying the applicable policies of the board of directors. In making a decision on a medical issue, WCAT panels must evaluate the medical evidence which has been provided from a variety of sources (including the worker's attending physician, treating specialist(s), Board medical advisors, and other qualified practitioners). It is open to a WCAT panel to seek independent health professional assistance or advice under section 249 of the Act (although that was not done in this case). WCAT panels also consider expert advice provided by other persons such as vocational rehabilitation consultants and occupational therapists. WCAT panels must evaluate the evidence of a variety of experts in different fields. A similar function is performed by judges who are lawyers by training but who must hear and assess expert evidence from physicians. Clearly, the WCAT panel had authority to address and determine the issues raised by the worker's appeal.

In its reasons, WCAT the panel noted (at page 14):

> Although the worker is preoccupied with his pain complaints, and has made certain choices about participating in vocational activities, I do not find that the weight of evidence supports the worker's position that he is rendered unemployable by reason of his pain complaints. Stated another way, the available evidence concerning the worker's functional abilities, including the observations of treatment personnel while the worker attended the ORP and participated in treatment and assessment

> activities, is incongruent with his statements that his pain is so debilitating it prevents him from performing any type of work.
>
> The worker has pointed to the wording on the discharge report from the ORP, indicating he was not fit to return to work at the time of discharge. Dr. Chalmers has clarified that at the time of discharge various medical options were being reviewed. I have concluded that the statement that the worker was not fit to return to work must be viewed in the context of the medical investigations, which I interpret to mean that the worker was not fit to return to work pending the outcome of those medical investigations. The statement that the worker was not fit to return to work at the time of discharge cannot be reasonably interpreted as a conclusion that the worker was unfit for any type of work in the future, especially since another part of the discharge report confirmed the worker met the requirements for light-strength work. Although the evaluator who conducted the assessment later indicated that the assessment did not address the worker's ability to participate in sustained work activities, the worker refused to participate in vocational rehabilitation activities, which may have included Board-sponsored work assessments, and for this reason, a determination concerning the worker's likely capacity for employment must be made on a deemed basis.

Medical reports which were expressly cited in the WCAT decision included the March 10, 2003 from Dr. Chalmers, the July 10, 2003 letter from the worker's attending physician, Dr. Kalinowski, and the July 29, 2003 report from Dr. Stoessl (neurologist). At pages 13 and 14 of the WCAT decision, the WCAT panel provided detailed reasons as to the basis on which it reached its conclusion that the worker is employable, notwithstanding the worker's position that his pain complaints are so debilitating as to render him unemployable. The panel took into account the medical opinions which had been provided, together with the evidence concerning the worker's attendance at an occupational rehabilitation program (ORP) at a rehabilitation centre between July 12, 1999 and August 10, 1999. I find that there was evidence before the WCAT panel to support its decision, and the decision was not patently unreasonable. Accordingly, I find no error of law going to jurisdiction in relation to the WCAT decision on this issue.

Weight of the Evidence

By letter of February 18, 2004, the worker also submits:

> You always see Half of the Facts, Half of the Evidence, Half of the Truth, "the Better Half" this is Pathetic and this is a Crime! Half of the truth is a Lie! . . . And, you have a terrible habit of overlooking the facts and the evidence!

For similar reasons as those expressed above, I find that the worker's objections largely relate to the WCAT panel's evaluation and weighing of the evidence which was before it. I find that there was evidence before the WCAT panel to support its decision. There was no patently unreasonable rejection of evidence, or a refusal in bad faith to consider relevant evidence. This is not a case where it may be considered that the panel completely ignored important evidence, without explanation. The WCAT panel reviewed the evidence in detail and explained the basis for its conclusions. I find no error of law going to jurisdiction on this basis.

Shoulder Dislocation

By letter of May 10, 2004, the worker complains:

> You forgot to notice that my shoulder is unstable and dislocates. How is this possible? You pretend you did not see Monica's Report from Lion Gate Hospital Rehabilitation Centre! I told you that; if you don't believe me that my shoulder dislocates, I am the evidence and I am still alive and I can show you any time how I "align" my dislocated shoulder!

The worker submits that his shoulder is totally destroyed and he is in need of a shoulder replacement.

A March 18, 1999 report from Lions Gate Hospital noted the worker's complaint that his shoulder was recurrently dislocating. This point was considered by the WCAT panel in its decision. On page 2, the WCAT panel noted:

> Surgery was carried out on February 9, 1999. When seen in follow-up by Dr. Vaisler on June 11, 1999, the worker reported most of the pain he had in the posterior aspect of the left shoulder had improved, but he still had persistent pain about the anterior and lateral aspects of the left shoulder. Dr. Vaisler said information provided to the worker by a physiotherapist, that his shoulder "dislocates," was not confirmed under anaesthetic. Dr. Vaisler confirmed the worker had a full range of motion with minimal pain at the extremes, and mildly positive impingement findings. There was also some crepitation on movement of the shoulder, which was presumed to be from chondromalacia of the humeral head, which was noted at surgery. No instability was found to be present. Dr. Vaisler recommended that the worker enter a return-to-work program, commenting that the worker was probably not capable of doing sustained or repetitive work at and above shoulder level, although he thought the worker's tolerance to these activities should gradually improve.

On page 4 of the WCAT decision, the panel noted:

> The worker was examined by Dr. [L], disability awards medical adviser, on October 30, 2001. Dr. [L] indicated in a memo of that date that the worker presented with similar pain presentation in 1993, when he was assessed by an orthopaedic specialist. Those symptoms resolved following exercise, but as a result of the 1996 fall at work, there were some new findings of crepitus, more severe recurrent pain, as well as a feeling of the shoulder actually dislocating. Dr. [L] said, "this is actually a sensation and not a true dislocation."

The WCAT panel noted the worker's oral hearing evidence on this issue at page 5. The panel further noted, at pages 7-8:

> A July 10, 2003 letter from Dr. Kalinowski noted that the worker's shoulder, clinically, does not dislocate, and the worker deals with the feeling of instability in his shoulder by performing manoeuvres of flexion, internal rotation and external rotation to get it to click back with a clearly audible crunch. Dr. Kalinowski said that capsular laxity, documented by Dr. Vaisler, is consistent with the worker's reports of instability, crunching, clicking, shooting pain, and other descriptors. Dr. Kalinowski confirmed that the worker finds any activities, of any kind, to be aggravating. He said the worker reported the pain is most aggravating when his arm is simply hanging at his left side with gravity. The worker reported that he performs various manoeuvres to reduce the pain, including using a leather belt tightened around his body around the upper arms, causing his arm to be elevated using a broomstick pulled behind his back with his left arm abducted and extended, and cold packs and hot water bottle heat. When driving, the worker finds relief by rolling his window part-way down and resting the elbow upon it. He said the worker reported that he keeps his arm in one position, in which he finds the least amount of pain, and therefore cannot use his left shoulder to perform sustained left arm reaching, pushing, pulling, etc. Dr. Kalinowski expressed his opinion the worker is not able to perform, on a full-time basis, the jobs of security guard or bench-level electronics, because the worker is unable to use his left shoulder.

The WCAT panel concluded at page 14:

> Although the worker believes his left shoulder spontaneously "dislocates," the medical evidence does not establish that actual dislocation occurs. Rather, there is a "feeling of instability" associated with capsular laxity and a glenoid labral tear/separation.

It is plainly apparent that there was evidence before the WCAT panel to support its decision. There was no error of law going to jurisdiction in the WCAT decision on this issue.

Shoulder Replacement

By letter of June 14, 2004, the worker submits:

> My shoulder is totally destroyed; I am in need of shoulder replacement – artificial shoulder.

The WCAT panel was aware that such surgery might be required. On page 14, the WCAT panel noted:

> Dr. Chalmers confirmed that surgical repair of the glenoid labrum was not feasible. Other than Dr. Chalmers' comment that the only remaining surgical option for the worker is shoulder replacement, the medical reports do not indicate that such a procedure is being seriously contemplated. The worker has now had a great deal of medical investigation and is left with a painful shoulder. The worker's evidence and Dr. Chalmers' March 10, 2003 report indicate that the worker has continued to be focused on a medical solution to his pain complaints. Dr. Chalmers noted that the worker "may be too young at present for a total shoulder replacement, which he finds very disappointing and frustrating."

The WCAT decision dealt with the assessment of the worker's pension based on the level of his disability at the time it was assessed. The panel directed the Board to determine whether there has been substantive deterioration in the worker's functional impairment. Similarly, if the worker were to undergo further surgery in the future, it would be open to the worker to apply to the Board for reassessment of his disability under section 96(2) of the Act. I find no error of law going to jurisdiction in the WCAT decision, in respect of the possibility he might need to have further surgery in the future.

Botox injections

By letter dated April 21, 2004, the worker complained:

> You also forgot to notice that Professor, Dr. J. Stoessl, in his letter said that my problems with my left shoulder are Very difficult associated with Muscle Hypertrophy. He prescribed "Botulinum Toxin Injection" to relieve muscle spasm in my left shoulder blade and to increase blood circulation in the effected area!
>
> [reproduced as written]

On page 6 of the WCAT decision, the panel noted:

> The worker also provided a copy of a July 29, 2003 report from Dr. Stoessl (neurologist). Dr. Stoessl recorded that the worker demonstrated an unstable left shoulder joint resulting in significant pain. Botox injections were being considered, but before those would proceed, authorization from the Board was requested. In a November 24, 2003 letter addressed to the Board, in which authorization to proceed with Botox injections was requested, Dr. Stoessl said he was uncertain whether the worker would benefit from the Botox injections.

I do not view this evidence as central to the issues raised in the worker's appeal. In any event, the WCAT panel took Dr. Stoessl's evidence into consideration in its decision. I find no error of law going to jurisdiction on this basis.

Charter

By submission of April 21, 2004, the worker asserts that the WCAT decision contravened sections 7, 11d and 15 of the *Canadian Charter of Rights and Freedoms*. No explanation has been provided to explain the basis for his submission that the WCAT decision involved such a breach. MRPP item #3.60 provides:

> Where an appellant alleges a contravention or violation of the *Canadian Charter of Rights and Freedoms*, the appellant must provide notices to the Attorneys General of British Columbia and Canada pursuant to s. 8 of the *Constitutional Question Act*, R.S.B.C. 1996, Chapter 68. The appellant must provide WCAT with proof, such as a letter of acknowledgment from the federal and provincial Attorneys General or their representatives, that such notice was provided. Such proof must be received by WCAT at least 30 days in advance of the hearing. In the absence of such proof, the WCAT panel will normally proceed to issue its decision without considering the Charter argument(s).

In view of the absence of proof that the worker has provided notice to the federal and provincial Attorneys General of his *Charter* arguments, I will not address them in this decision.

While not necessary to my decision, I note that under section 44 of the *Administrative Tribunals Act, 2004*, which received Third Reading on May 19, 2004 but which has not yet been brought into force in respect of WCAT's operations, WCAT will lose jurisdiction to consider constitutional questions (including *Charter* issues).

Subsequent Board decisions

The worker poses concerns regarding decisions issued by Board officers subsequent to the WCAT decision, as well as complaining that the Board has not yet implemented the WCAT direction that the Board determine whether there has been substantive deterioration in the worker's functional impairment. These concerns do not relate to the validity of the WCAT decision. It is open to the worker to request review by the Review Division of new decisions issued by Board officers. Decisions of the Review Division are appealable to WCAT. Accordingly, I will not address those concerns in this decision.

Fraud

The worker asserts, in multiple letters, that the WCAT decision involved lies and crimes. The worker has expressed his discontent with the WCAT decision, together with the preliminary handling of his application for reconsideration, in similar language. I consider that the worker's objections on this basis represent a means to communicate the extent of his unhappiness with the decision, rather than identifying any adequate basis at common law for reconsidering the WCAT decision.

Apprehension of Bias

On pages 11-12 of the WCAT decision, the panel addressed a concern with respect to a possible apprehension of bias. That stemmed from a preliminary letter in which the WCAT panel referred the worker's letter, alleging that a Review Board tape had been altered, to the attention of the WCAT chair. The WCAT panel explained the intent of that letter, and the fact that panel had convened an oral hearing for the purpose of hearing the worker's evidence afresh. The worker does not appear to be pursuing an objection to the WCAT decision on this basis. I do not, in any event, consider that there was any breach of the requirements of natural justice on this basis.

Section 256 — New Evidence

In his submissions, the worker has not availed himself of the opportunities extended to him to explain the basis for his application by reference to the new evidence and common law grounds. He has not stated that he is limiting his application to the common law grounds. Accordingly, I will address the worker's application on both bases.

Section 256(2) of the Act provides that a party may request reconsideration of a WCAT decision if new evidence has become available or been discovered. Section 256(3) further provides:

> On receipt of an application under subsection (2), the chair may refer the decision to the appeal tribunal for reconsideration if the chair is satisfied that the evidence referred to in the application
>
> (a) is substantial and material to the decision, and
>
> (b) did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

The worker has attached copies of various reports to his submissions. However, these reports pre-date the WCAT decision. The worker emphasizes the occupational therapist's letter of July 15, 2003 and notes of March 18, 1999. However, these documents were stamped as having been received by WCAT on November 10, 2003, as part of the worker's submissions to the WCAT panel in preparation for the November 24, 2003 oral hearing. These documents were part of the evidence before the panel at the time of its February 12, 2004 decision. The worker has also attached a copy of Bill C-10, regarding proposals to amend the Criminal Code regarding cruelty to animals. He provides a chart to illustrate that he suffers at least 10 cycles a day relating to his shoulder pain. No explanation has been provided as to how any of these materials meet the requirements of section 256 of the Act.

I find that the worker's application for reconsideration does not meet the requirements of section 256 of the Act. The worker's application for reconsideration is also denied on this basis.

Conclusion

The worker's application for reconsideration of *WCAT Decision #2004-00736-AD*, dated February 12, 2004, is denied. No error of law going to jurisdiction has been established. The "new evidence" requirements of section 256 have not been met. The WCAT decision is final and conclusive pursuant to section 255(1) of the Act.

Herb Morton
Vice Chair

HM/dc