

As of October 6, 2014, this decision is no longer considered by WCAT to be noteworthy.

WCAT Decision Number : WCAT-2006-02805
WCAT Decision Date: July 07, 2006
Panel: Randy Lane, Vice Chair

Introduction

The worker seeks reconsideration of a Workers' Compensation Appeal Tribunal (WCAT) decision dated February 11, 2005 (*WCAT Decision #2005-00747-RB*). The WCAT panel in that decision confirmed an earlier November 20, 2002 decision by the Workers' Compensation Board (Board). The WCAT panel considered that earlier decisions regarding the worker's 1983 claim left it without jurisdiction to consider the issue of the compensability of the worker's L4-5 spinal condition.

With the assistance of his legal counsel, Mr. Ishkanian, the worker filed a February 22, 2005 request for reconsideration which was followed by a May 31, 2006 submission. Mr. Ishkanian also provided WCAT with a copy of his filed petition in which he sought relief under the *Judicial Review Procedure Act*. The worker's employer is no longer registered with the Board.

Item #8.90 of the *Manual of Rules of Practice and Procedure* (MRPP) provides that WCAT will normally conduct an appeal on a read and review basis where the issues are largely medical, legal, or policy based, and credibility is not an issue. I have reviewed the issues, evidence and submissions on the worker's file and have concluded that this appeal may be determined without an oral hearing. The issue before me is primarily legal in nature.

Issue(s)

Has the worker established grounds for reconsidering the WCAT decision?

Jurisdiction

Section 255(1) of the *Workers Compensation Act* (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 current Act, or on the basis of an error of law going to jurisdiction. 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. WCB (BC)*, 2003 B.C.C.A. 470, [2003] B.C.J. No. 1985, (2003) 186 B.C.A.C. 83, 19 W.C.R. 211. This authority is further confirmed by section 253.1(5) of the Act.

Section 245.1 of the Act provides that section 58 of the *Administrative Tribunals Act* (ATA) applies to WCAT. Section 58 of the ATA concerns the standard of review to be applied in a petition for judicial review of a WCAT decision. Section 58 of the ATA provides as follows:

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,

(b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and

(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.

(3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

Practice and procedure at item #15.24 of WCAT's MRPP provides that WCAT will apply the same standards of review to reconsiderations on the common law grounds as would be applied by the court on judicial review.

The reconsideration application was assigned to me by the Chair of WCAT on the basis of a written delegation (paragraph 25 of *Decision of the Chair No. 8*, "Delegation by the Chair", March 3, 2006).

Background

Histories of the worker's 1983 and 1984 claims are set out in numerous documents on the file. In particular, I note the following: a December 14, 1984 decision of the former boards of review; May 25, 1988, January 27, 1992, and February 5, 2002 findings of the former Workers' Compensation Review Board (Review Board); and May 3, 2001 (*Appeal Division Decision #2001-0860*) and February 27, 2002 decisions (*Appeal Division Decisions #2003-0535* and *#2002-0536*) of the former Appeal Division of the Board. The Appeal Division decisions which contain considerable detail regarding the histories of the claims may be viewed on the Internet at the Board's website at www.worksafebc.com.

Some recitation of the histories of the claims is required to put the issues associated with this reconsideration application in context.

The worker's claim for a March 7, 1983 back injury was accepted by the Board. Temporary disability wage loss benefits were paid. A claim for a February 15, 1984 back injury was initially denied by the Board. The boards of review determined that the symptoms commencing in February 1984 should be treated as a recurrence of the 1983 injury. Further periods of temporary disability in 1984 were accepted by the Board, culminating with payment for the worker's disability in late November 1984.

The worker stopped working in early December 1986. By decision of December 29, 1986 the worker was advised that he was no longer in a temporary phase of recovery. On April 10, 1987 the worker was examined by a Board medical advisor. By letter April 13, 1987 the worker was advised that he was in a state of plateau rather than a state of temporary disability. Temporary disability wage loss benefits would not be paid.

By decision of October 28, 1987 the worker was advised that his claim would be reopened for temporary disability effective August 20, 1987. A November 13, 1987 L5-S1 discectomy was accepted under the claim.

In its May 25, 1988 findings the Review Board found that the file should be returned to the Board to make required decisions regarding the worker's entitlement to further wage loss benefits in 1985 or 1986. It indicated assessment needed to be made as to whether the worker's periodic fluctuations were normal fluctuations in his permanent condition.

By decision of August 23, 1988 the worker was advised of his entitlement with respect to additional periods of temporary disability wage loss benefits in 1985 and 1986. By decision of December 6, 1988 the worker was advised his condition had reached a state of plateau. No further temporary total disability benefits were payable. That decision was reiterated in a July 11, 1989 decision, which also indicated a proposed myelogram would not be accepted as compensable.

By decision of August 30, 1989 the worker was advised a disc protrusion at the L4-5 level, found at the July 27, 1989 myelogram was not the result of his March 7, 1983 work activities. By decision of September 11, 1989 the worker was advised that proposed surgery for the L4-5 disc area would not be accepted as a Board responsibility. The worker underwent surgery on March 5, 1990.

By decision of September 7, 1990 the worker was advised that, effective November 26, 1984, he was entitled to a permanent partial disability pension of 2.68% of total disability. The worker was advised the Board had only accepted responsibility for the surgery to the worker's L5-S1 disc and that his condition had been stable since November 26, 1984. The claims adjudicator noted that the worker returned to work from April 1985 to December 1986. He observed it was apparent the worker was able to return to employment, notwithstanding some minor fluctuations in his condition, with no reduction in earning capacity. The worker was not paid a loss of earnings pension, as it was not felt the worker's compensable condition would result in a long-term loss in earning capacity in excess of the award payable for his functional impairment.

In its January 27, 1992 findings the Review Board denied the worker's appeals from the decisions of August 23, 1988 and September 7, 1990. The Review Board framed the issues before it as follows:

1. Whether the worker's pension has been correctly determined.
2. Whether the worker's L4-5 disc problem and surgery was likely related to the compensable incident in 1983.
3. When should the worker's compensable condition be regarded as plateaued.

The "Findings and Reasons" section of the Review Board finding contains the following conclusions regarding the worker's L4-5 disc problem and surgery:

We find on all of the evidence before us, and particularly from Dr. [B's] interpretation and conclusions on the various radiological investigations, the operation reports and the various medical opinions, the L4-5 disc problem and surgery are not likely related to the 1983 compensable work injury. There is no sufficient qualified objective medical opinion to the contrary. Dr. Griesdale's support for a relation is expressed as only a suspicion, without explanation of the issues. Neurologist Bozek does not support a relation. We agree with Dr. [B] that the L4-5 abnormalities shown in the 1985 CT Scan was not apparently considered by Dr. Griesdale as significant to produce the worker's symptoms at the time, and that the clinical findings amply support that conclusion. The fact that the 1987 CT Scan showed in respect of the L4-5 disc only a slight bulge and that on the right side,

further supports Dr. [B's] conclusion that [the worker's] L4-5 symptoms and surgery likely result from a natural gradual deterioration rather than the 1983 work injury. We find no indication in the medical evidence before us that the L4-5 disc problem may have in some manner been secondary to the L5-S1 injury and surgery. Judging from Dr. Griesdale's May 1990 report, the second surgery appears to have produced little improvement in the worker's condition, to reduce impact of any consideration that there was simply a failure on the first surgery to appreciate the real nature of the worker's problems as an L4-5 disc injury – such an argument would not be reasonable in any case considering Dr. [B's] interpretation of the medical evidence. We also take note of Dr. [N's] view, repeated by Dr. [B], that is most unusual for a back strain to produce protrusions at two levels and we do find that this further supports Dr. [B's] conclusion.

[all quotations in this decision are reproduced as written,
save for changes noted]

By letter of May 5, 1998 a former representative of the worker sought to reopen the worker's claim based on a questioning of the January 27, 1992 Review Board findings. He provided an April 17, 1988 report from Dr. Hill.

By decision of July 20, 1998 the Board determined no new medical information had been submitted which would support a reopening request.

By letter of March 3, 1999 Mr. Ishkanian observed the worker had suffered compensable claims dating back to 1975 and that he had been engaged for several decades in relatively hard labour. He asked the Board to determine whether some or all of the worker's current medical conditions could have been caused or at least contributed to, by the cumulative effect of labour, as well as repeated compensable injuries and surgeries.

The worker appealed the July 20, 1998 decision to the Review Board. By letter of October 17, 2000 the Review Board registrar indicated that the Review Board did not have jurisdiction over the appeal, as it had already made a finding as to the compensability of the worker's problems at his L4-5 level. In his October 27, 2000 letter Mr. Ishkanian took issue with the October 17, 2000 decision. In her February 27, 2001 letter, counsel to the chair of the Review Board confirmed the October 17, 2000 letter. By decision of May 3, 2001 (*Appeal Division Decision #2001-0860*) the Appeal Division denied the worker's request for an extension of time in which to appeal the January 27, 1992 Review Board findings.

By decision of February 27, 2002 (*Appeal Division Decision #2002-0535*) the Appeal Division denied the worker's appeal from the Review Board decisions of October 17, 2000 and February 27, 2001. The panel determined the worker was seeking further

consideration as to whether his disc protrusion at L4-5 was causally related to his 1983 work injury and that the 1992 Review Board findings clearly determined the disc protrusion at that level was not causally related to the 1983 work injury.

By decision of February 27, 2002 (*Appeal Division Decision #2002-0536*) the Appeal Division denied the worker's request for a reconsideration of the May 3, 2001 Appeal Division decision.

By letter of September 20, 2002 a case manager advised Mr. Ishkanian his March 3, 1999 request had never dealt with by the Board. The case manager indicated he was prepared to give final consideration to the matter, but he required some degree of clarity as to exactly which conditions the worker was asking the Board to accept as a responsibility under his 1983 claim or due to a combination of any prior claims established with the Board.

In his September 27, 2002 letter Mr. Ishkanian indicated the worker stopped working in December 1996 and was asking the Board to consider his low back condition, including both disc levels at L4-5 and L5-S1, which rendered him disabled from employment. He noted at no time had a Board medical advisor reviewed the worker's various claim files with regard to the effects of many years of hard labour and the cumulative effect of several compensable back strains. He commented the 1983 injury appeared to have been the most significant compensable injury, but that there were many other injuries that were, save for one, consolidated into his 1983 claim. He noted the Board's decision to deny acceptance of the L4-5 disc protrusion was based on a medical opinion which considered the incidents of 1983 and 1984 and did not consider the 1985 claim or strains associated with reopenings of the 1983 claim. He indicated the worker suffered an incident in December 1986 and was entitled to a decision as to whether he was entitled to benefits resulting from that incident. He referred to a medical report which indicated the worker's problems at both disc levels were aggravated by work. Mr. Ishkanian also submitted that there had been no follow-up with respect to a diagnosis of post-traumatic stress disorder in 1985.

In his November 20, 2002 decision the case manager indicated that there had been no follow-up with respect to the diagnosis of post-traumatic stress disorder but that the worker declined or was not available to attend counselling sessions. He indicated that, in order for the Board to give any further consideration with respect to the 1985 claim, it would require an updated psychological assessment which should be arranged on a private-patient basis. The case manager denied reopening of the 1978 head injury claim, as no medical evidence had been received on the 1978 claim since 1981.

With respect to the issue of any interaction between compensable injuries and years of physical labour, the case manager noted that, in each of the claims established with the Board, the worker was working as a foreman and/or supervisor. He commented that, while recognizing the physical nature of the longshoring industry, it must be said that the worker in all likelihood was afforded some protection from the physical aspects

of this occupation as a result of his foreman/supervisor duties. While Mr. Ishkanian referred to several compensable back strain/claims, there had been only three back claims established with the Board, one of which, the 1984 claim, was disallowed. The worker had only two compensable back claims to consider regarding any cumulative effect.

The case manager reviewed the worker's 1975 claim accepted for an acute lumbar strain involving soft tissue only and his 1983 claim under which surgery at the L5-S1 level was accepted. He noted that reopening of the claim in 1989 for a disc protrusion at the L4-5 level was denied and that decision was confirmed by the Review Board. The case manager provided the following analysis in support of his determination that the worker had no further entitlement:

Mr. [F - not his real initial], I am unable to conclude that there is any further entitlement forthcoming for low back complaints noted from 1986 forward as a result of either the accumulative affect of previous, compensable back claims or as a result of the nature of your work. I base this decision on the following factual information.

- There have been only two compensable back claims registered with the Workers' Compensation Board, not "several" as indicated in your lawyer's submission dated September 27, 2002.
- The first back claim, [1975 claim number], was accepted for a soft tissue injury only with no time loss being incurred from work. This would indicate a relatively straight forward, minor claim.
- While recognizing the significance of your 1983 work injury, you have been adequately compensated by way of a permanent functional impairment award (pension).
- Through the appeals process, it has been determined that complaints at the L4-5 level of your low back are not to be seen as a Workers' Compensation Board responsibility.
- Your work history has been described as being a longshoreman who has worked in either a foreman or supervisory capacity for many years. This would not indicate an excessive exposure to significant stresses to the lumbar spine.

Noting the above reopening of your 1975 and 1983 back claims must therefore be denied and there is no basis to establish any new claim.

The worker appealed the November 20, 2002 decision to the Review Board. The appeal was transferred to WCAT as a result of the terms of section 38 of the *Workers Compensation Amendment Act (No. 2), 2002*.

Mr. Ishkanian supplied, among other documents, an October 20, 2003 letter from Dr. Sam, the worker's attending physician, in which she indicated she felt the worker's degenerative changes were secondary to trauma he sustained to his low back throughout his work career and that there was more than a 50% probability that the worker's current back condition was related to his work activities. She indicated extradural enhancing tissue seen at the L5-S1 level was directly due to his compensable surgery.

The WCAT panel held a December 13, 2004 oral hearing. I have listened to a compact disc copy of the audiotape of that hearing. When, at the commencement of the hearing, the panel asked if the worker was pursuing issues regarding post-traumatic stress disorder and a head injury, Mr. Ishkanian indicated they were focusing on the worker's back. When the panel indicated the worker's L4-5 disc protrusion was not compensable, Mr. Ishkanian noted prior decisions with respect to that disc protrusion concerned a particular injury and did not involve the issue before the WCAT, which was whether that disc was somehow aggravated by the worker's many years of work. The worker testified as to his longshoreman activities which commenced in 1954.

As noted in a January 3, 2006 letter from WCAT legal counsel, Mr. Ishkanian's submissions which followed the worker's evidence were not recorded on the audiotape.

The WCAT panel documented, in its "Introduction", the nature of the issue being pursued by the worker:

The worker's representative is seeking, on the worker's behalf, the Board's acceptance of the worker's low back L4-5 condition. He argues that the cumulative effect of several years in a very heavy job and the compensable back strains caused the L4-5 disc level condition. He is seeking reopening or the establishment of a new claim in December 1986.

The panel noted there was "a preliminary matter that requires discussion." It reviewed the history of the worker's 1983 claim. It noted the May 25, 1998 decision and subsequent history, the effect of which it summed up as follows:

- A Review Board finding dated January 27, 1992 denied the worker's appeal of decisions set out in letters dated August 23, 1988 and September 7, 1990. This finding identifies some of the issues before it as:
1. Whether the worker's pension has been correctly determined.
 2. Whether the worker's L4-5 disc problem and surgery was likely related to the compensable incident in 1983.
 3. When should the worker's compensable condition be regarded as plateaued.

The panel found that “the L4-5 disc problem and surgery (in 1990) are not likely related to the 1983 compensable work injury.” The panel reasoned in part that the “1987 CT scan showed in respect of the L4-5 disc only a slight bulge and that on the right side, further supports Dr. [B’s] conclusion that the worker’s L4-5 symptoms and surgery likely result from a natural gradual deterioration rather than the 1983 work injury.” The panel also found no error in the worker’s permanent functional impairment pension award that was calculated on the worker’s functional loss, caused by the low back injury and surgery to L5-S1 spinal level, equal to 2.5% of total disability effective from November 26, 1984.

By decision of the Appeal Division dated May 3, 2001 (*Decision #2001-0860*), an extension of time to appeal the Review Board finding dated January 27, 1992 was denied. A further Appeal Division decision dated February 27, 2002 (*Decision #2002-0536*) decided that the commissioner’s decision of May 3, 2001 did not involve an error of law and denied the worker’s application for reconsideration of that decision.

Another Appeal Division Decision dated February 27, 2002 (*Decision #2002-0535*) confirmed Review Board summary decisions dated October 17, 2000 and February 27, 2001 wherein the registrar and counsel to the Chair decided the Review Board was without jurisdiction to reconsider finding of January 27, 1992 that decided that the worker’s L4-5 disc condition was not compensable.

The above decisions leave me without jurisdiction to consider the issue regarding the compensability of the worker’s L4-5 spinal level condition. From these facts, it is apparent that the worker has exhausted all levels of appeal except judicial review. WCAT has no jurisdiction to disturb previous appellate decisions.

Evidence

The worker has not worked since November 1986. He told the panel that he had to stop work at that time because of his back. However, the 1992 Review Board finding determined that the worker would not sustain a long-term loss of earnings greater than provided by his functional award for L5-S1 impairment. This decision clearly determined the worker’s entitlement after 1986.

In his May 31, 2006 submission Mr. Ishkanian contended the WCAT panel misstated the issue under appeal and misdirected itself with respect to the issue. He contended the issue was not whether the L4-5 disc protrusion *per se* was compensable and that the WCAT panel had partially correctly identified the issue in the “Introduction” section of the decision. He noted his March 3, 1999 letter cited policy items #14.20,

#15.10 and #15.20 of the *Rehabilitation Services and Claims Manual* (RSCM; there was no RSCM I or RSCM II in 1999).

Mr. Ishkanian submitted the WCAT panel had made up its mind at the commencement of the hearing that it lacked jurisdiction. The opening remarks made by the panel made it clear the panel had narrowed its consideration of the appeal solely to the question of the compensability of the L4-5 disc level and further solely as it might arise in the 1983 claim.

Mr. Ishkanian noted the WCAT panel did not render any findings of fact as a consequence and did not decide the merits of the worker's appeal. The worker was entitled to a decision as to the causative significance of his years of labour and his compensable back injuries. The WCAT panel's failure to decide the appeal was both unfair and a failure of jurisdiction.

Mr. Ishkanian submitted the worker was seeking a decision regarding his entire low back condition, not just the L4-5 or L5-S1 levels. He was not seeking a reopening of the 1983 claim, as claimed by the WCAT panel. By confining itself in the manner it did, the WCAT panel failed to decide the issue on appeal. The panel's failure to address items #14.20, #15.10 and #15.20 amounted to a failure of jurisdiction to the extent that section 250 of the Act requires WCAT to apply relevant policies.

Mr. Ishkanian provided a summary of his submissions which were made at the end of the WCAT oral hearing but which were not recorded. The Board's November 20, 2002 decision established the Board had not investigated the nature of the worker's work activities and made it sound as if there was only one significant claim. He submitted the only medical evidence on point was provided by the worker and by Dr. Sam. Mr. Ishkanian submitted the WCAT panel did not address that evidence, and its failure to rule upon the issue was a failure of jurisdiction. He submitted that, as identified in the September 27, 2002 letter, the Board had accepted several low back disabilities, including those at the L4-5 level. Even if the L4-5 disc level problems were not compensable under the 1983 claim, they could still be acceptable in response to the question raised by the worker, namely whether they were caused by, or contributed to, his many years of labour and his compensable injuries. It was submitted the panel should either accept Dr. Sam's opinion or refer the question to an appropriate health care professional pursuant to section 249(6) of the Act.

Mr. Ishkanian submitted the WCAT panel had a duty to consider all the evidence, to reach findings of fact regarding the nature of the worker's employment, and to decide whether the nature of the worker's employment and his compensable injuries had causative significance with respect to his disability in December 1986. The panel's failure to do so was unfair, in that the worker did not receive a full hearing. As well, it was a failure of jurisdiction and an error of law going to jurisdiction, in that the WCAT decision mischaracterized the issue under appeal and ruled upon an irrelevant issue while not deciding the issue before the panel.

Reasons and Findings

I consider that an analysis of the nature of the 1992 Review Board findings is relevant to the reconsideration application before me. The WCAT panel appeared to attach significance to the 1992 findings.

Earlier in this decision, I excerpted a lengthy passage from the “Findings and Reasons” found in the 1992 Review Board findings. While the 1992 Review Board panel commented that the CT scan provided support for Dr. B’s conclusion that the worker’s L4-5 disc symptoms and surgery likely resulted from a natural gradual deterioration rather than the 1983 work injury, the Review Board did not render a finding that the L4-5 disc symptoms and surgery were due to a natural deterioration.

If the issue before the Review Board in 1992 had involved the compensability of the worker’s L4-5 disc problems with respect to the worker’s employment activities, or a combination of those activities coupled with compensable injuries, then one might argue the Review Board’s comments might have been intended to be a determination of the compensability of the worker’s L4-5 disc problems with respect to all possible compensable causes. Had the Review Board rendered such a finding, one could argue it was not open to the Board to consider the compensability of the L4-5 disc problems with respect to the worker’s employment activities or a combination of those activities and his compensable injuries.

However, the appeal before the Review Board was of the September 7, 1990 decision which advised the worker of the outcome of the Board’s further review of whether the L4-5 disc problems were due to the 1983 injury. The September 7, 1990 decision did not address the broader issue of whether the worker’s L4-5 disc problems were due to his employment activities or a combination of those activities and his compensable injuries. In that regard, I note that the panel in *Appeal Division Decision #2002-0535* provided the following analysis of how the issue of the worker’s L4-5 disc symptoms arose out of the worker’s appeal of the September 7, 1990 pension decision:

I have also considered whether the 1992 Review Board finding concerning the cause of the worker’s L4-5 disc protrusion should be treated as a valid Review Board finding. It would appear that the worker’s appeals of the board officer’s decisions dated August 23, 1988 and September 7, 1990 concerned his wage loss and pension benefits. The documents on file do not show an appeal by the worker of the decisions dated July 11, 1989, August 30, 1989, or September 11, 1989 to deny acceptance of the myelogram, disc protrusion and surgery at L4-5. Upon review of the records on file, however, it is apparent that the June 25, 1990 review (memo #95) by the orthopaedic consultant involved a detailed re-examination of the issue as to whether the worker’s L4-5 protrusion was causally related to his 1983 work injury, and the results of that

reconsideration (expressed by the claims adjudicator in memo #97) were communicated to the worker in the September 7, 1990 decision by the disability awards officer. The worker appealed the September 7, 1990 decision to the Review Board, and it is apparent that the worker sought acceptance under this claim, of his L4-5 disc problems, in that appeal. I consider, therefore, that there was a clear basis for the Review Board taking jurisdiction to address that issue in its finding of January 27, 1992.

I find that the 1992 Review Board findings merely confirmed that the L4-5 disc symptoms were not due to the 1983 injury:

We find on all of the evidence before us..., the L4-5 disc problem and surgery are not likely related to the 1983 compensable work injury.

As the 1992 Review Board findings addressed the compensability of the L4-5 disc problems and surgery only as they related to the 1983 work injury, those findings did not preclude the Board or WCAT from addressing the worker's request regarding the compensability of his low back condition with respect to his employment activities or a combination of those activities and his compensable injuries. As demonstrated by the decision in *Plamondon v. Workers' Compensation Board* (1988) 21 B.C.L.R. (2d) 261 (BCSC), the scope of subsection 5(1) of the Act is broad and a decision-maker would be addressing the wrong issue if it confined itself only to the issue of whether work activities on a specific day were of causative significance rather than addressing whether an injury arose out of the course of employment over a period of time.

In its November 20, 2002 decision the Board did not consider that the 1992 findings limited its ability to consider the compensability of the worker's L4-5 disc problems and surgery with respect to matters other than the narrow issue of the 1983 injury. This was the correct approach for the Board to take, given that the Review Board findings did not address the broader issue of causation. That the issue arising out of the worker's appeal of the November 20, 2002 decision dealt with more than the causative significance of the worker's 1983 injury is clear from the language of the November 20, 2002 decision.

I find that the WCAT panel clearly misapprehended the effect of the earlier 1992 Review Board findings, in that it determined there was no scope for it to consider the compensability of the worker's low back symptoms. Its misapprehension led it to determine that WCAT had no jurisdiction to consider the matter and that its considering of the matter would involve disturbing appellate decisions. The WCAT panel did not address the issue raised by the worker's appeal of the November 20, 2002 decision; the worker did not receive consideration by an appellate tribunal of his disagreement with the November 20, 2002 decision.

What is the effect of the WCAT panel's misapprehension of the effect of the 1992 Review Board findings?

A lengthy discussion of the standard of review to be applied at common law in relation to jurisdictional issues, the considerations involved in determining whether a decision is jurisdictional, and the application of the standards of review set out in the ATA is set out in *WCAT Decision #2005-01984*. The panel in that case determined that correctness was the standard at common law and that paragraph 58(2)(c) of the ATA, which called for a correctness standard, might reasonably be interpreted as applying to jurisdictional issues. I am aware of a more recent comment expressed in *WCAT Decision #2006-02615* in which the panel found that as the WCAT decision in question withstood scrutiny with regard to the correctness standard of review respecting a jurisdictional matter, it did not have to consider the applicability of another common law standard of review:

...As I found no jurisdictional error on a standard of correctness, it was not necessary to consider whether the standard of "patent unreasonableness" should be applied on an application of the pragmatic and functional approach set out by the Supreme Court of Canada in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, (2003) 223 D.L.R. (4th) 599, [2003] 5 W.W.R. 1, (2003) 11 B.C.L.R. (4th) 1).

Further, the Ontario Court of Appeal, in the recent May 6, 2006 decision of *Seneca College of Applied Arts & Technology v. Ontario Public Service Employees Union* [2006] O.J. No. 1756 (QL), offered the following comments of note regarding the applicable standard of review:

[30] That is not a sound view. Simply because the court labels an issue "jurisdictional" does not automatically mean that the standard of review of a tribunal's decision on that issue is correctness. As Evans J.A. pointed out in *Via Rail Canada Inc. v. Cairns* (2004), 241 D.L.R. (4th) 700 at para. 33 (F.C.A.), "Conceptual abstractions, such as 'jurisdictional question', now play a much reduced role in determining the standard of review applicable to the impugned aspect of a tribunal's decision."

[31] In other words, a court's finding that an issue has a jurisdictional aspect does not obviate the court's obligation to do a pragmatic and functional analysis. See *Voice Construction, supra* at paras. 20-22; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 236 at para. 21; *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.C. 4 at paras. 22-23. The "jurisdictional" nature of the issue is but a factor in that analysis, or more often, the characterization of the outcome of that analysis. See *Via Rail, supra* at para. 36 and *Pushpanathan, supra* at para. 28.

[32] The purpose of the pragmatic and functional analysis – of considering the four contextual factors – is to ascertain the legislature’s intent. See *Dr. Q, supra* at para 26. Did the legislature intend that a reviewing court give deference to the Board’s decision, and if so, what level of deference? Or, put in terms of jurisdiction, did the legislator intend this issue to be exclusively within the Board’s jurisdiction to resolve? See *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1089-1091.

Thus, it seems that the standard of review at common law may not be correctness.

As noted above, item #15.24 of WCAT’s MRPP provides that WCAT will apply the same standards of review to reconsiderations on the common law grounds as would be applied by the court on judicial review. That item references item #15.32 which sets out the three standards of review found in section 58 of the ATA. The MRPP might suggest that WCAT will apply the ATA provisions to the extent that they have supplanted the common law. That advice in the MRPP is not stated as a rule which binds WCAT; thus, one could argue that it is open to WCAT reconsideration panels to apply the common law without regard to the ATA.

Under the ATA, the standard of review could be argued to be correctness, if one assumed that an issue of jurisdiction fell to be addressed under paragraph 58(2)(c) of the ATA. Yet, one could also argue that the matter before me should be addressed under paragraph 58(2)(a) of the ATA (and its attendant standard of patent unreasonableness), on the basis that an interpretation of the binding nature of an earlier undisturbed Review Board finding is a matter of law.

The court in *Davidson v. British Columbia (Workers’ Compensation Board)*, 2003 B.C.S.C. 1147 set out several authorities with regard to how the test of patent unreasonableness may be satisfied and considerations relevant to its application:

[47] The patently unreasonable test requires that a decision under review to be “openly, evidently, clearly” unreasonable. In the *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, Iacobucci J. stated at ¶57:

The difference between “unreasonable” and “patently unreasonable” lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal’s reasons, then the tribunal’s decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

[48] In *Canada Safeway Ltd. v. British Columbia (Workers' Compensation Board)* (1998), 59 B.C.L.R. (3d) 317 at ¶23, application for leave to appeal dismissed, [1999] S.C.C.A. No. 20:

The Appeal Division may have arrived at its decision by questionable reasoning but it is the result which must be tested for patent unreasonableness.

[49] If a rational basis can be found for the decision, then it should not be disturbed simply because of defects in the tribunal's reasoning: *Kovach v. British Columbia (Workers' Compensation Board)* (1998), 52 B.C.L.R. (3d) 98 (C.A.) per Donald J.A., aff'd [2000] 1 S.C.R. 55, 2000 SCC 3.

[50] Another description of this standard is that enunciated by Beetz J. in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Labour Relations Board)*, [1984] 2 S.C.R. 412:

A mere error of law is to be distinguished from one resulting from a patently unreasonable interpretation of a provision which an administrative tribunal is required to apply within the limits of its jurisdiction. This kind of error amounts to a fraud on the law or a deliberate refusal to comply with it.

As Dickson J. (as he then was) described it, speaking for the whole Court in *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 at p. 237, it is

...so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review...

As noted by the panel in *WCAT Decision #2004-04258*, the court in *Canada (A.G.) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 explained that under the patently unreasonable test a court should only interfere with the decisions of a tribunal if the decision is "clearly irrational." Cory J., writing for the majority, stated:

It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the *Shorter Oxford English Dictionary* "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational.... Not acting in

accordance with reason or good sense”. Thus, based on the dictionary definition of the words “patently unreasonable”, it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.

...

It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.

The panel in *WCAT Decision #2004-04258* also noted comments by the court in *Law Society of New Brunswick v. Ryan*, (2003), 223 D.L.R. (4th) 577 (S.C.C.), as to the standard of patent unreasonableness:

... a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective... A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

I do not consider it necessary to resolve which standard of review is applicable; the result in this case would not change. The standard of review of patent unreasonableness accords the highest deference available. However, even the application of that standard does not save the WCAT decision in question.

After reviewing the matter, I find the WCAT panel’s determination as to the effect the 1992 Review Board findings had on its ability to address the issue raised by the worker’s appeal from the November 20, 2002 decision was patently unreasonable. The WCAT panel’s misapprehension of the effect of the 1992 Review Board findings involves an obvious defect which produced a patently unreasonable decision as to its jurisdiction. That decision as to its jurisdiction resulted in the WCAT panel not providing the worker with a decision concerning the merits of his appeal from the November 20, 2002 decision.

Conclusion

The worker's reconsideration application is allowed. *WCAT Decision #2005-00747-RB* is set aside as void. The WCAT Registry will contact the worker concerning the further conduct of his appeal.

Randy Lane
Vice Chair

RL/jy/jd