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

WCAT Decision Number: WCAT-2006-02931
WCAT Decision Date: July 21, 2006
Panel: Herb Morton, Vice Chair

Introduction

The worker seeks reconsideration of the January 30, 2004 Workers' Compensation Appeal Tribunal (WCAT) decision (*WCAT Decision #2004-00557-RB*). This application is based on the common law grounds of an error of law going to jurisdiction, including a breach of natural justice. The workers' adviser submits that the WCAT decision involved a breach of the worker's right to be heard (by not taking into account the evidence and argument presented on behalf of the worker), as well as a legal or jurisdictional error (by treating a prior Workers' Compensation Review Board (Review Board) finding as binding).

The worker is represented by the workers' adviser, who initiated this application by letter dated March 12, 2004. On August 25, 2004, the vice chair, quality assurance, provided information regarding the grounds for requesting reconsideration, including the "one time only" limitation on reconsideration applications. She advised that it did not appear that the workers' adviser had raised potential grounds for reconsideration, and advised that if he wished to proceed he must specify the grounds on which this application was based. A further submission was provided by the workers' adviser dated September 13, 2004, specifying the grounds for this application. The workers' adviser explains:

> The error of law, as was stated, was the Panel believing she had no jurisdiction to deal with the new decision, where we submit she did. Further, the Panel's finding of fact did not address the evidence given in this representative's submission of January 7, 2004, and we submit she had a responsibility to do so.

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

The workers' adviser has provided written submissions. I agree that the issue as to whether the WCAT decision involved an error of law going to jurisdiction involves questions of a legal nature which can be properly considered on the basis of written submissions without an oral hearing.

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In this decision, the *Workers Compensation Act* will be referred to as the Act, the *Administrative Tribunals Act* will be referred to as the ATA, and the Workers' Compensation Board will be referred to as the Board.

Issue(s)

Did the WCAT decision involve a breach of natural justice or other error of law going to jurisdiction?

Jurisdiction

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 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 BCCA 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.

The test for determining whether there has been an error of law going to jurisdiction generally requires application of the "patently unreasonable" standard of review. With respect to an alleged breach of natural justice, the common law test to be applied is whether the procedures followed by WCAT were fair (see *WCAT Decision #2004-03571*).

Section 245.1 of the Act provides that section 58 of the 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:

> 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 *Manual of Rules of Practice and Procedure* (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 on the basis of a written delegation (paragraph 25 of *Decision of the Chair No. 8*, "Delegation by the Chair", March 3, 2006).

Background

The worker was a journeyman automotive body repairman for approximately 27 years. He had to leave this occupation as he developed a reaction to chemicals in his workplace (sensitivity to paint solvents). The worker's eligibility for rehabilitation assistance under this claim was the subject of a Review Board finding dated April 8, 1999, *Appeal Division Decision #99-1857* dated December 3, 1999, a Review Board finding dated December 14, 2001, and *WCAT Decision #2004-00557* dated January 30, 2004.

The December 14, 2001 Review Board finding identified the issues before it as including the following:

- Were vocational rehabilitation benefits prematurely terminated effective November 19, 2000?

- Did the Board provide **appropriate and sufficient** vocational rehabilitation benefits under this claim?

[emphasis added]

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The December 14, 2001 Review Board finding concluded as follows:

> I find the retraining provided by the Board to [the worker] "heavy duty/auto parts person" was inappropriate for his medical condition "sensitivity to paint solvents".
>
> Paints and solvents are readily available and on sale at heavy duty and at auto parts stores. Further, such products are occasionally used at these kinds of stores. Once an individual becomes sensitized or super sensitized to such products, other related/similar products also pose medical problems and even minute exposures may pose a serious health threat to the individual.
>
> I find that [the worker's] job search for employment as a heavy duty/auto parts person was going to fail no matter where he worked because of his medical condition. I find that the job search efforts, although well intentioned, were a complete waste of both resources and time.
>
> I agree with [the worker] and his representative that employment as a truck driver would most likely provide him with work which would maximize his earning potential under this claim.
>
> **I direct the Board to provide to [the worker] vocational rehabilitation benefits equal to wage loss benefits from November 20, 2000 and ongoing. I also direct the Board to provide training to [the worker] such that he obtains a Class 1 driver's license with air endorsement.**
>
> **I further direct the Board to provide to [the worker] up to 12 weeks of job search allowance, equal to wage loss benefits, subsequent to his completion of the truck driver course, in order that he may obtain a truck driving job.**
>
> [emphasis added]

The Board had previously provided the worker with substantial rehabilitation assistance towards becoming a "heavy duty/auto parts person". The Review Board found this assistance, although well-intentioned, had been misdirected. The Review Board provided specific directions to the Board regarding the additional rehabilitation assistance to be given to the worker, in its determination regarding whether "appropriate and sufficient" rehabilitation assistance had been provided to the worker.

The worker appealed the decisions of the Board concerning the implementation of the Review Board finding. The workers' appeals were filed to the former Review Board, and were transferred to WCAT for completion effective March 3, 2003 based on the statutory changes contained in the *Workers Compensation Amendment Act (No. 2),*

2002 (Bill 63). At the time of the January 30, 2004 WCAT decision, item #26.20 of the March 3, 2003 version of WCAT's MRPP, (accessible as an archived version of the MRPP on the Publications page of the WCAT website) provided:

> If, by March 3, 2003, the Review Board has not:
>
> - completed an oral hearing, or
> - commenced its deliberations following completion of final written submissions,
>
> the following apply:
>
> …
>
> (e) in considering an appeal which was initially brought to the Review Board, WCAT has jurisdiction to address issues which would not be appealable to WCAT (such as vocational rehabilitation, or commutation requests). In other words, the limitations as to what will be appealable to WCAT, do not restrict WCAT's jurisdiction to deal with appeals which were previously filed to the Review Board;

The WCAT panel held an oral hearing on December 9, 2003. It had been anticipated that the worker would be represented at the oral hearing by the workers' adviser. The workers' adviser was unable to attend due to illness. The WCAT panel gave the worker the option of postponing the oral hearing. The worker elected to proceed with the hearing in the absence of his representative. At the oral hearing, the WCAT panel advised the worker of its concern as to whether it had jurisdiction to grant additional rehabilitation assistance to the worker beyond that provided for in the December 14, 2001 Review Board finding. The WCAT panel advised the worker that it would allow the workers' adviser the opportunity to provide a submission following the oral hearing. By letter dated December 18, 2003, the WCAT appeal liaison invited the workers' adviser to provide a written submission. The workers' adviser provided a written submission dated January 7, 2004, which was cited by the WCAT panel at the top of page 3 on its decision.

The WCAT panel reasoned in part (following review of the various sections of the Act dealing with the legal effect of a Review Board finding and the extent of the Board's reconsideration authority):

> Since the Review Board finding of December 2001 was not appealed to the Appeal Division the Board and WCAT are bound by that finding.

> *Implementation of the Review Board Finding*
>
> I find that the worker is entitled to rehabilitation allowances from February 8, until February 25, 2001. The Review Board finding was very clear. The worker was to receive rehabilitation allowances until 12 weeks after he successfully completed the driving course.
>
> The Board sponsored the worker with his Class 1 drivers' training on March 25, 2002 to April 14, 2002. Twelve weeks of job search allowances were paid inclusive to July 14, 2002.
>
> *Entitlement to other rehabilitation benefits*
>
> The worker claimed the Board sponsored driver training was not sufficient for him to find work as a truck driver. After the worker was provided his driving license he felt that the training did not include sufficient attention to backing up a rig. He personally paid for more training and requested the Board reimburse the cost.
>
> The Board declined to pay for the cost of this training. **The rehabilitation consultant advised the worker that a panel of the Review Board determined what was sufficient for the worker to access truck driving jobs. The Review Board finding also dealt with the issue of what was needed in the way of assistance to allow the worker to be a viable employee.** The cost of taking extra training would not be paid by the Board.
>
> **I agree with the reasoning of the rehabilitation consultant. The Review Board panel considered what was required for the worker to be able to access suitable employment.** The Board Is not responsible for finding workers jobs; its responsibility is, and was, to make sure this worker has been provided with the necessary skills to find suitable work.
>
> [emphasis added]

The workers' adviser complains that the WCAT panel failed to consider his January 7, 2004 submission. With respect to the question as to whether WCAT was bound by the unappealed Review Board finding dated December 14, 2001, and the nature of WCAT's jurisdiction in determining the worker's eligibility for rehabilitation assistance, the January 7, 2004 submission by the workers' adviser had argued:

> Regarding the need to appeal the past RBF [Review Board finding], hindsight is a fine thing, but when the RBF was issued, it appeared all was

> now going to proceed well. So, there was no need to appeal those Findings.
>
> …
>
> We realise that the Panel may see the previous RBF as being restrictive, in that there was only 12 weeks of job search given. We submit that this Panel is not bound by those Findings, and can decide to award additional job search benefits, based upon the merits of these appeals, and the discretion given under Section 16(1) of the Act. Under policy #88.51 (Vol. I), there are two (2) guidelines. The first says the Board should, where practical, support a program sufficient to restore the worker to an occupation comparable in terms of earning capacity to the pre-injury occupation. The basic program has now been completed, that being the Class I with air certification.
>
> The second guideline talks about the gravity of the residual effect. In this case, there is a great residual effect, and prior to the latest initiative (truck driving), it has been proven to be a great detriment in properly identifying and making vocational expenditures efficient. The guideline goes on to say that the Board should go to great lengths in cases where the residual disability is serious compared to being minor.
>
> We submit, this is where the Panel does have the discretion to extend benefits. There has been a very significant expenditure to date (+$220,000) but the vast majority of that, was “going down the wrong road”. As said before, this was also affirmed by the past Panel as being useless. This is now the opportunity for a ‘fresh start’. . . .

The workers’ adviser complains that the WCAT decision “does not give any recognition of either the worker’s evidence, nor mine. We wonder if this evidence was properly considered.” He further submits:

> The Panel makes reference, that since the previous Review Board Findings (RBF) were not appealed; the Panel was bound by those results. The results were to direct the Board to provide Class 1 training and a specific period of job search assistance. One of issues arising from this appeal was the non payment of additional costs for incomplete training. This is a new separate issue from the past RBF; therefore the new Panel was not ‘bound’ by those past Findings. This is just one point where both the worker and I submit the Panel erred in her decision.
>
> [reproduced as written]

By further submission of September 12, 2004, the workers' adviser argues:

> …the Panel believed she was "bound" by a past Review Board Finding, and we pointed out a new decision was what had to be addressed. This, in my mind, also constitutes an error of law.

Analysis

Under section 255 of the Act, a WCAT decision is "final and conclusive." Unless the strict grounds for obtaining reconsideration are met, a reconsideration panel is not empowered to engage in a fresh exercise of discretion. The reconsideration panel is limited to considering whether the prior WCAT decision involved an error of law going to jurisdiction.

The first issue in this application is whether there was a breach of natural justice, with respect to the worker's right to be heard. This is a question about the application of common law rules of natural justice and procedural fairness, which must be decided having regard to whether, in all of the circumstances, the WCAT panel acted fairly (under section 58(2)(b) of the ATA). The second issue in this application is whether the WCAT decision involved an error of law going to jurisdiction, in finding that it was bound by the unappealed 2001 Review Board finding. For reasons provided at the end of this decision, I found this issue involved a question of law within the WCAT panel's exclusive jurisdiction, for which the appropriate standard of review is patent unreasonableness (under section 58(2)(a) of the ATA). I found that this did not involve a truly jurisdictional issue to which the standard of correctness would apply (under section 58(2)(c) of the ATA).

As requested by the workers' adviser, I have listened to the audio tape of the December 9, 2003 oral hearing held by the WCAT panel. The panel gave the worker the option of deferring the hearing until a later date, so his representative could attend. The WCAT panel identified its concern in the hearing regarding whether it was bound by the prior Review Board finding. I do not view this as meaning the panel had made up its mind on this issue. Rather, this was an attempt to utilize the hearing in a meaningful fashion, by making known to the appellant the difficulty the panel saw in connection with the position being advanced by the worker so that the appellant could address this concern. The panel also invited a written submission from the workers' adviser following the oral hearing. The WCAT panel advised the worker in the hearing that it would be doing so, and advised the worker of its concern regarding its jurisdiction. In his submission of January 7, 2004, the workers' adviser argued that the WCAT panel was not bound by the prior Review Board finding. It is evident that the workers' adviser was aware of the concern flagged by the WCAT panel, even though the December 18, 2003 letter from the appeal liaison did not provide any particulars apart from inviting the workers' adviser to provide a written submission. I find no breach of procedural fairness in relation to those aspects of the hearing process.

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The workers' adviser provided a submission to respond to the jurisdictional concern flagged by the WCAT panel. Firstly, the workers' adviser provided an explanation as to why the worker did not appeal the 2001 Review Board finding. Those reasons might have been relevant to an application by the worker for an extension of time to appeal the Review Board finding to the Appeal Division, or to WCAT. These reasons did not, however, advance the worker's position that the WCAT panel was not bound by the Review Board finding.

Secondly, the workers' adviser reviewed the policies of the Board regarding the determination of a worker's eligibility for rehabilitation assistance in the first instance. Those policies would have been relevant to the Review Board's consideration of this issue. The workers' adviser did not attempt to explain, however, how those policies applied in the context of an unappealed Review Board finding. It is evident that the WCAT panel read the 2001 Review Board finding as determining, in the context of addressing the issue as to whether the Board had provided "appropriate and sufficient" vocational rehabilitation benefits under this claim, the extent of the Board's further responsibility under section 16 of the Act. It is evident that the WCAT panel did not accept the assertion by the workers' adviser that the Board could simply address the worker's request for additional rehabilitation assistance as a new issue, without regard to the prior directions provided by the 2001 Review Board finding as to what would constitute appropriate and sufficient rehabilitation assistance in this case.

In some situations a prior appellate decision might conclude that a worker was entitled to appropriate rehabilitation assistance in being retrained in a new occupation and in obtaining employment in this occupation. Such an "open-ended" finding would leave ample discretion to subsequent decision-makers to determine the extent of rehabilitation assistance which would be appropriate. The workers' adviser did not point to wording in the Review Board finding which would support a conclusion that the WCAT panel had jurisdiction to further consider the worker's eligibility for rehabilitation assistance, based upon the framework provided by the prior Review Board finding. Rather, the workers' adviser appears to have assumed that the Board officer had continuing authority to address any new request for rehabilitation assistance made by the worker, without regard to the specific directions provided by the Review Board as to what additional rehabilitation assistance was appropriate and sufficient.

The issue for the WCAT panel was whether the Board officer had correctly implemented the 2001 Review Board finding. The Board officer, and the WCAT panel, were obliged to give proper legal effect to an unappealed Review Board finding. *WCAT Decision #2005-02376* reasoned, in this regard:

> The question as to the extent to which the Board has authority to disregard or reconsider a decision of the external Review Board has a long history (see *Guadagni v. BC (WCB*), (1989) 35 B.C.L.R. (2d) 363, (1989) 58 D.L.R. (4th) 1, and the *Report and Recommendations to the*

Minister of Labour and Consumer Services by the Advisory Committee on the Structures of the Workers' Compensation System of British Columbia, October 31, 1988 (the Munroe Committee Report), 8 WCR 231 (at pages 241-242)). An assertion of authority on the part of the Board to disregard or reconsider decisions of an external appeal body is not one to be made lightly.

I note, in this regard, the decision of the British Columbia Supreme Court in *Thomas v. WCB (BC)*, [2002] B.C.J. No. 1485, 2002 BCSC 866 (accessible at: http://www.courts.gov.bc.ca/jdb-txt/sc/02/ 08/2002bcsc 0866.htm). The worker was examined by a Medical Review Panel (MRP), which certified that his compensable injury was the major cause of his disability. The worker requested examination by a MRP in relation to a later decision, and the second MRP certified that the worker's disability was wholly unrelated to his work injury. The worker appealed the Board's implementation decision (to terminate his benefits) to the Review Board. The Review Board found the second MRP certificate should be disregarded as it was merely a second opinion based on the same evidence. The Board refused to implement the Review Board finding (stating it was a nullity, made outside the Review Board's jurisdiction), but did not undertake a section 96(4) president's referral to the Appeal Division. The Court held that as the Board did not avail itself of the "appeal" provisions in the Act, the Review Board finding remained binding on the Board. The Court reasoned:

> 14 The Workers' Compensation Act scheme provides that decisions of the Review Board must be implemented and adhered to unless overturned on appeal to the Appeal Division on a referral to the Appeal Division by the President of the Board.
>
> 15 The Review Board decision has not been referred or appealed, and time within which either a referral or appeal must be made has long passed.
>
> …
>
> 19 The Workers' Compensation Board holds that it is not bound to implement the decision of the Review Board as the Workers' Compensation Board believes the Review Boards' order is a nullity, having been made beyond their jurisdiction, or in the alternative the Review Board decision gives rise to an operational conflict with the second MRP decision and

the Appeal Division decision on the mandate of the second MRP.

20 The Board's position is that Mr. Thomas knew, or ought to have known, that he was risking all of his entitlement by requesting a second MRP.

21 By refusing to follow the Review Board decision, the Board has forced Mr. Thomas to commence legal action.

22 As the Board had no legal recourse, having missed all appeal limitations, this was a way for them to come before the court and attempt to have the Review Board order set aside.

23 The forcing of Mr. Thomas to seek a court ordered remedy for the implementing of the Review Board order is contrary to the Act's fundamental purpose of compensating workers without court proceedings. (See the Supreme Court of Canada in Pasiechnuk v. Saskatchewan (Workers' Compensation Board), [1997] 2 S.C.R. 890, referred with approval to the decision of Montgomery J., in Medwid v. Ontario (1988), 48 D.L.R. (4th) 272 (O.H.C.)).

24 I disagree with the respondent's position, as the Workers' Compensation Board did not object to the jurisdiction of the Review Board at the time of the hearing, nor did they avail themselves of the appeal provisions contained in the statute.

25 The Review Board order is and remains binding on the Board.

In the British Columbia Supreme Court decision *Candeloro v. WCB (BC)* [1988] B.C.J. No. 1574, the Court commented, in connection with a Review Board "recommendation":

> Review board decisions define rights and obligations. Findings must be implemented. There is a limited right of appeal from the decisions. For these reasons it is incumbent upon a review board to be precise in its use of the language. If this Review Board intended to bind the Board to provide upgrading and retraining, it did not say so.

In this case, the 2001 Review Board finding utilized precise language in the directions it provided to the Board regarding the further rehabilitation assistance which would be appropriate and sufficient. As Review Board findings defined rights and obligations, the Board was required to implement these directions. The workers' adviser did not argue that the directions provided in the prior Review Board finding were in the nature of *obiter*, or that they were mere "recommendations" so as not to be legally binding on the Board.

The 2001 Review Board finding did not provide general guidance regarding the nature of the rehabilitation assistance to be provided to the worker. Nor did it specify the minimum amount of job search assistance to be provided to the worker. In using the phrase "up to", the Review Board finding may reasonably be read as having specified a maximum. The issue before the Review Board concerned whether appropriate and sufficient vocational rehabilitation assistance had been provided to the worker, in the context of substantial prior rehabilitation involvement. It was open to the Review Board to specify a maximum on the further assistance to be provided. If the worker disagreed with that finding, or considered that changed circumstances warranted a change in the Review Board finding, it was open to the worker to appeal the Review Board finding to the former Appeal Division (or request an extension of time to appeal to the Appeal Division prior to March 3, 2003, or to WCAT after March 3, 2003).

I agree that it would have been preferable had the WCAT panel expressly referred to the arguments provided by the workers' adviser, with comments as to why she did not find these arguments persuasive. I consider, however, that it may reasonably be inferred that the WCAT panel took the arguments by the workers' adviser into account in addressing the issue as to whether or not WCAT had jurisdiction to award additional rehabilitation assistance beyond that specified in the directions contained in the unappealed 2001 Review Board finding (i.e. in connection with the further training the worker took concerning backing up a truck and trailer, after successfully obtaining his Class 1 licence). In finding that "The Review Board panel considered what was required for the worker to be able to access suitable employment", the WCAT panel concluded that the 2001 Review Board finding had provided a final determination of the worker's eligibility for further assistance under section 16 of the Act.

WCAT Decision #2004-05728 also concerned a situation in which a worker sought reconsideration on the basis that the reasons provided by the WCAT panel did not expressly address certain arguments presented on his behalf. That decision reasoned in part:

> The worker's complaint is that the panel failed to expressly acknowledge and respond to his arguments, concerning the fact that his appeal to have a reopening of his left arm complaints under his 1994 claim had been successful….

> I agree that it would have been desirable for the WCAT panel to expressly acknowledge and respond to the worker's arguments on this basis. This was more than an incidental reference in the worker's submissions. To the extent this involved one of the worker's central arguments, the concern that the panel failed to expressly comment on the worker's submission has some force.
>
> …
>
> I am satisfied that the reasons provided in the WCAT decision explained how the panel reached the decision it did. The reasons set out the facts, law and reasoning which formed the basis for the decision reached. The reasons were sufficiently clear, precise and intelligible to enable the worker to know why the panel decided as it did….
>
> It would have been preferable for the WCAT panel to address the argument raised by the worker, even if only briefly for the purpose of explaining why the panel did not consider the argument relevant or persuasive. However, in the context of the panel's reasons as a whole, I consider that it may reasonably be inferred that such was the case….
>
> Upon consideration of the foregoing, I am not persuaded that the failure by the WCAT panel to expressly comment concerning the argument raised by the worker, regarding the precedent provided by the decisions concerning the reopening of his 1994 claim for his left arm problems, involved a breach of natural justice which requires the WCAT decision to be set aside. On balance, I consider that the circumstances presented by the worker's application are fundamentally more similar to those addressed in *Appeal Division Decision #2001-1794*, than those addressed in *Appeal Division Decision #97-0083.* The worker's application for reconsideration is, therefore, denied.

I find that this reasoning similarly applies in the circumstances of this case. The first issue addressed in the WCAT decision was whether it was bound by the unappealed 2001 Review Board finding. The WCAT panel concluded, upon a review of the statutory framework, that it was bound by that finding. Accordingly, to the extent the WCAT decision turned on this finding with respect to its jurisdiction, the evidence submitted on behalf of the worker in support of a different outcome was no longer relevant once the WCAT panel found it was bound by the 2001 Review Board finding. Accordingly, it was not necessary that the WCAT panel further address the evidence concerning the worker's request for additional rehabilitation assistance, after it found it was bound by the prior Review Board finding.

With respect to the implementation of the 2001 Review Board finding, the WCAT panel gave effect to the precise wording of the directions provided to the Board in the 2001 Review Board finding. The WCAT decision cannot be considered unreasonable, much less patently unreasonable, in that interpretation. Whether or not the language of the Review Board finding might have been capable of some different interpretation is not the issue. I find no error of law going to jurisdiction in connection with the WCAT panel's decision regarding the proper implementation of the 2001 Review Board finding.

In summary, I agree that it would have been preferable had the reasons provided by the WCAT panel expressly addressed the submissions provided on behalf of the worker in his appeal. The fact remains, however, that the reasons of the WCAT panel, while brief, provided an adequate explanation as to the basis for its decision. It is also the case that the panel had expressly flagged its concerns regarding the question as to whether it was bound by the prior Review Board finding. The submissions by the worker and the workers' adviser did not in fact contain any legal argument as to how or why the WCAT panel would not be so bound, apart from the argument that the worker's request raised a new issue. Given the finding by the WCAT panel that it was bound by the prior Review Board finding, it was then unnecessary for the WCAT panel to consider the evidence presented in the worker's oral evidence and in the written submissions by the workers' adviser. In consideration of the foregoing, I find the WCAT decision did not involve a breach of the worker's right to be heard. I further find that the WCAT decision did not involve legal or jurisdictional error, by treating the 2001 Review Board finding as binding.

I would reach the same conclusion on this last issue, whether I characterize it as a truly jurisdictional issue to which a "correctness" standard would apply or as an issue which, on an application of the pragmatic and functional approach, is one which the legislature would have intended the appeal tribunal to decide rather than the courts. However, having regard to the reasoning in the Court decisions below, I consider that the appropriate standard of review of the WCAT decision is one of patent unreasonableness, rather than correctness, in its interpretation and application of the prior Review Board finding.

In *Pasiechnyk v. Saskatchewan (Workers' Compensation Board),* [1997] S.C.J. No. 74, [1997] 2 S.C.R. 890, (1997) 149 D.L.R. (4th) 577, [1997] 8 W.W.R. 517, (1997) 50 Admin. L.R. (2d) 1, the Supreme Court of Canada reasoned:

> 18 The presence of a privative clause does not preclude review on the basis of an error of law if the provision under review is one that limits jurisdiction. The test as to whether the provision in question is one that limits jurisdiction is: was the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board? In applying the test, a functional and pragmatic approach is to be

> taken. See *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, at pp. 628-29. Factors such as the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise and the nature of the problem are all relevant in arriving at the intent of the legislature. See *Bibeault, supra*, at pp. 1088-89.

Similarly, in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982, (1998) 160 D.L.R. (4th) 193, (1998) 11 Admin. L.R. (3d) 1, the Supreme Court of Canada reasoned:

> 28 Although the language and approach of the "preliminary", "collateral" or "jurisdictional" question has been replaced by this pragmatic and functional approach, the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal. Some provisions within the same Act may require greater curial deference than others, depending on the factors which will be described in more detail below. ***To this extent, it is still appropriate and helpful to speak of "jurisdictional questions" which must be answered correctly by the tribunal in order to be acting intra vires.*** But it should be understood that a question which "goes to jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, "jurisdictional error" is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown.
>
> [emphasis added]

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, the Supreme Court of Canada further reasoned:

> 25 …it is no longer sufficient to slot a particular issue into a pigeon hole of judicial review and, on this basis, demand correctness from the decision-maker….The pragmatic and functional approach demands a more nuanced analysis based on consideration of a number of factors….
>
> (3) A Review of the Pragmatic and Functional Factors
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> 26 In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors -- the presence or

absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question -- law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law. I find the approach taken in the courts below problematic. As a result, I believe it will be helpful to re-articulate the focus of the factors involved and update the considerations relevant to each. Before doing this, I must emphasize that consideration of the four factors should enable the reviewing judge to address the core issues in determining the degree of deference. It should not be viewed as an empty ritual, or applied mechanically. The virtue of the pragmatic and functional approach lies in its capacity to draw out the information that may be relevant to the issue of curial deference.

27 The first factor focuses generally on the statutory mechanism of review. A statute may afford a broad right of appeal to a superior court or provide for a certified question to be posed to the reviewing court, suggesting a more searching standard of review: see *Southam, supra*, at para. 46; *Baker, supra*, at [page239] para. 58. A statute may be silent on the question of review; silence is neutral, and "does not imply a high standard of scrutiny": *Pushpanathan, supra*, at para. 30. Finally, a statute may contain a privative clause, militating in favour of a more deferential posture. The stronger a privative clause, the more deference is generally due.

28 The second factor, relative expertise, recognizes that legislatures will sometimes remit an issue to a decision-making body that has particular topical expertise or is adept in the determination of particular issues. Where this is so, courts will seek to respect this legislative choice when conducting judicial review. Yet expertise is a relative concept, not an absolute one. Greater deference will be called for only where the decision-making body is, in some way, <u>more expert than the courts</u> and the question under consideration is one that <u>falls within the scope of this greater expertise</u>: see *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at para. 50. Thus, the analysis under this heading "has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise": *Pushpanathan, supra*, at para. 33.

29 Relative expertise can arise from a number of sources and can relate to questions of pure law, mixed fact and law, or fact alone. The composition of an administrative body might endow it with knowledge uniquely suited to the questions put before it and deference might, therefore, be called for under this factor: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at pp. 591-92. For example, a statute may call for decision-makers to have expert qualifications, to have accumulated experience in a particular area, or to play a particular role in policy development: *Mattel, supra*, at paras. 28-31. Similarly, an administrative body might be so habitually called upon to make findings of fact in a distinctive legislative context that it can be said to have gained a measure of relative institutional expertise: e.g., *Canada [page240] (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554. Simply put, "whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act", an administrative body called upon to answer a question that falls within its area of relative expertise will generally be entitled to greater curial deference: *Pushpanathan, supra*, at para. 32.

30 The third factor is the purpose of the statute. Since the conceptual focus of the pragmatic and functional approach is upon discerning the intent of the legislature, it is fitting that reviewing courts are called upon to consider the general purpose of the statutory scheme within which the administrative decision is taking place. If the question before the administrative body is one of law or engages a particular aspect of the legislation, the analysis under this factor must also consider the specific legislative purpose of the provision(s) implicated in the review. As a general principle, increased deference is called for where legislation is intended to resolve and balance competing policy objectives or the interests of various constituencies: see *Pushpanathan, supra*, at para. 36, where Bastarache J. used the term "polycentric" to describe these legislative characteristics.

31 A statutory purpose that requires a tribunal to select from a range of remedial choices or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations will demand greater deference from a reviewing court : see *Pezim, supra*, and *Southam, supra*. In *Mount Sinai, supra*, at para. 57, Binnie J. recognized that the express language of a statute may help to identify such a purpose. For example, provisions that require the decision-maker to "have regard to all such circumstances as it considers relevant" or confer a broad discretionary power upon a decision-maker will generally suggest policy-

laden purposes and, consequently, a less searching standard of review (see also *Baker, supra*, at para. 56). Reviewing courts should also consider the breadth, specialization, and technical or scientific nature of [page241] the issues that the legislation asks the administrative tribunal to consider. In this respect, the principles animating the factors of relative expertise and legislative purpose tend to overlap. A legislative purpose that deviates substantially from the normal role of the courts suggests that the legislature intended to leave the issue to the discretion of the administrative decision-maker and, therefore, militates in favour of greater deference.

32 In contrast, a piece of legislation or a statutory provision that essentially seeks to resolve disputes or determine rights between two parties will demand less deference. The more the legislation approximates a conventional judicial paradigm involving a pure *lis inter partes* determined largely by the facts before the tribunal, the less deference the reviewing court will tend to show.

33 The final factor is the nature of the problem. In appellate review of judicial decisions, the nature of the question is almost entirely determinative of standard of review: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. For example, as the *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, and *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114, line of cases has made clear, judicial decisions of first instance on factual issues will only be interfered with where the appellate court can identify a "palpable and overriding error" or where the finding was "clearly wrong": *Kathy K*, at pp. 806 and 808. But the conceptual foundation of review of administrative decisions is fundamentally different than that of appeals from judicial decisions. Consequently, in the context of judicial review of administrative action, the nature of the question is just one of four factors to consider when determining standard of review.

34 When the finding being reviewed is one of pure fact, this factor will militate in favour of showing more deference towards the tribunal's decision. Conversely, an issue of pure law counsels in favour of a more searching review. This is particularly so where the decision will be one of general [page242] importance or great precedential value: *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 23. Finally, with respect to questions of mixed fact and law, this factor will call for more deference if the question is fact-intensive, and less deference if it is law-intensive.

> 35 Having considered each of these factors, a reviewing court must settle upon one of three currently recognized standards of review: see *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, released concurrently. Where the balancing of the four factors above suggests considerable deference, the patent unreasonableness standard will be appropriate. Where little or no deference is called for, a correctness standard will suffice. If the balancing of factors suggests a standard of deference somewhere in the middle, the reasonableness *simpliciter* standard will apply.

In *Ontario Public Service Employees Union v. Seneca College of Applied Arts & Technology*, [2006] O.J. No. 1756, (2006) 147 A.C.W.S. (3d) 737, May 4, 2006, the Ontario Court of Appeal recently reasoned:

> 29 Unfortunately, in its decision, the Divisional Court did not undertake this pragmatic and functional analysis. Instead, it seemed to take the view that because the question in issue was, in its opinion, a question of jurisdiction and a question of law, the standard of review must be correctness.
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> 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."
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> 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. 226 at para. 21; *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.J. No. 4, 2006 SCC 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.
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> 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.
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> 33 In my opinion, the interplay of the four contextual factors points to a high degree of deference to the Board of Arbitration's decision. The question of the Board's remedial authority to award aggravated and punitive damages is a question that the legislature intended the arbitrators to decide. Their decision must stand unless it is patently unreasonable.

In *United Brotherhood of Carpenters and Joiners of America Locals 527, 1370, 1598, 1907, and 2397 v. Labour Relations Board,* [2005] B.C.J. No. 3019, 2005 BCSC 1864, the British Columbia Supreme Court similarly reasoned as follows:

> [6] Essentially, in this application before me, argument was made as to whether or not this review falls under s. 58(2)(a) of the ***Administrative Tribunals Act*** or under 58(2)(c), whether or not the standard of review is one of the decisions being patently unreasonable, or whether the standard of review is that the decision is correctness.
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> [7] Patently unreasonable appears to be the standard of review when a board such as the Labour Relations Board is acting in an area in which it has the discretion to act, and paragraph 58(2)(c) applying the correctness standard appears to be applicable when the courts determine that the tribunal has gone beyond its jurisdiction or has done something so as to lose jurisdiction and thus the standard of review is correctness.
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> [8] I should note that I have not considered s. 58(3) because that does not appear to apply to a review of the Board decisions.
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> [9] The Petitioners argue that the provisions contained in s. 18 of the Code are jurisdictional in nature; that they are fundamental to the Board's operation; that they are reviewable on the level of correctness. I should note that the issue of correctness, both under the ***Administrative Tribunals Act*** as well as common law, is the standard of review when a jurisdictional issue is raised.
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> …
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> [15] If a pragmatic and functional approach is applied to the decision in ***Zero Downtime***, the decision in dispute before me, I have concluded after

reviewing relevant sections of the Code, and after reviewing the cases which been provided before me, that it is the legislature's intent that the Board decide the issue raised in s. 18(4)(b), not the courts. Applying the pragmatic and functional approach I have determined, essentially, that the standard of review is one of being a "patently unreasonable" test. The decision does not raise the spectre of a "preliminary or collateral question governing the assumption of jurisdiction", to use the language of Lambert, J.A. in the ***Machinists*** case.

[16] The decision in ***Zero Downtime***, in my view, is really one which is fundamental to the operation of the Board. This is really a certification issue. It is a question of who is to be certified in certain circumstances. It is of note that the battle before me when this matter was heard, as I earlier mentioned, is not a battle between the usual protagonists, labour and management, but it in fact appears to be a battle between competing unions. The Board operates under the Code, and has the authority and the duty to make the type of decisions it did in the ***Zero Downtime*** decision. It has the background, it has the experience, it has the expertise, it knows who the players are, and it knows the consequences of its decisions. Reviewing the ***Act*** as a whole, I cannot help but conclude that this is the type of a decision that is exactly what the legislature wanted the Board to decide. It is not the legislature's intention, in my view, to leave this type of statutory interpretation in its practical application to the courts who do not have the expertise that the Board does.

[17] The decision in ***Zero Downtime*** is a finding of fact and law which the legislature clearly intended the Board to determine exclusively. At common law and under the ***Administrative Tribunals Act***, the standard of patent unreasonableness is the standard to be applied to any judicial review of this type of decision. In my view, to view this decision as one going to jurisdiction, to apply to this review the standard of correctness, ignores the pragmatic and functional approach developed at the Supreme Court of Canada and in the British Columbia Court of Appeal and applied on a number of occasions by our Court of Appeal. This decision is not so fundamental to the operation that it is jurisdictional. This decision cannot be viewed as the Board taking onto itself something, or acting in an area, that the legislature did not intend it to do. Those are true jurisdictional disputes for which the court has an obligation to review on a standard of correctness.

Determinations regarding the interpretation and application of a prior Review Board finding, and regarding a worker's eligibility for rehabilitation assistance, would appear central to the scheme established under the Act. The Board and WCAT are

administrative tribunals with specialized expertise, whose decisions are protected by privative clauses (section 96(1) and section 255(1) of the Act). This was not a case involving constitutional or *Charter* issues. The WCAT decision involved the determination of the panel's jurisdiction under the Act. I find that the privative clause, the expertise of the tribunal, the purposes of the Act, and nature of the question under review lead to a conclusion that the applicable standard of review is one of patent unreasonableness.

Section 58(2)(a) of the ATA provides that 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. I find that the decision of the WCAT panel concerning the scope of its jurisdiction, and concerning the effect of the 2001 Review Board finding, were matters over which the WCAT panel had exclusive jurisdiction. I do not consider that the approach of the WCAT panel was patently unreasonable, in finding that the Board officer was bound to comply with the directions provided in the 2001 Review Board finding regarding the further rehabilitation assistance to be provided to the worker. I do not consider that the decision of the WCAT panel was clearly irrational. It was one which had a clear logical basis, in terms of its analysis as to the interpretation and effect of the prior Review Board finding.

Conclusion

The worker's application for reconsideration of *WCAT Decision #2004-00557-RB* is denied on the common law grounds. No error of law going to jurisdiction has been established in relation to the WCAT decision. The decision did not involve a breach of natural justice or procedural fairness with respect to the worker's right to be heard. Nor did the WCAT decision involve an error of law going to jurisdiction, in the panel's finding that it was bound by the unappealed 2001 Review Board finding. The WCAT decision stands as "final and conclusive" under section 255(1) of the Act.

Herb Morton
Vice Chair

HM/ec