As of April 17, 2015, this decision is no longer considered by WCAT to be noteworthy.

WCAT Decision Number: WCAT-2006-03922
WCAT Decision Date: October 17, 2006
Panel: Jill Callan, Chair

Introduction

The worker, who is represented by counsel, seeks reconsideration of *WCAT Decision #2005-05843*, dated October 31, 2005 (which I will call the Previous WCAT Decision), on common law grounds. In that decision, a panel of the Workers' Compensation Appeal Tribunal (WCAT) determined that section 23.1 of the *Workers Compensation Act* (Act), as amended by the *Workers Compensation Amendment Act, 2002* (Bill 49), was applicable to the worker's eligibility for an increased permanent partial disability pension. As a result, the worker was not entitled to an increase in his pension as he was over the age of 65. The worker had argued that the Act as it existed prior to the Bill 49 amendments should be applied to the adjudication of his increased pension entitlement.

The worker is represented by counsel, Ms. Debra Padron. The employer is no longer registered with the Workers' Compensation Board, operating as WorkSafeBC (Board). WCAT invited an employers' adviser to participate in this application as a deemed employer under section 248(1) of the Act. However, he declined to do so.

Counsel has provided written submissions on behalf of the worker. Given that this application turns on legal issues, I find it can be fully and fairly considered without an oral hearing.

In this decision, where there is potential for confusion, I will refer to sections or provisions of the Act as they existed prior to the amendments that flowed from Bill 49 as "former sections" or "former provisions" and the sections or provisions of the amended Act as "current sections" or "current provisions". If I do not indicate whether a section or provision is a current or a former one, it should be assumed I am referring to a current section or provision.

Issue(s)

The issue is whether *WCAT Decision #2005-05843* should be reconsidered on common law grounds.

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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 Act, or on the basis of an error of law going to jurisdiction, including a breach of natural justice (which would affect the validity of the decision). 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 WCR 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, unless there has been a breach of the rules of natural justice.

Effective December 3, 2004, the provisions of the *Administrative Tribunals Act* (ATA) affecting WCAT were brought into force. Section 58 of the ATA concerns the standard of review to be applied in a petition for judicial review of a WCAT decision. Item #15.24 (Reconsideration on Common Law Grounds) of WCAT's *Manual of Rules of Practice and Procedure*, as amended December 3, 2004, 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. Section 58(2) of the ATA provides:

> (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.

Item #1.03(b)(4) of RSCM I and II

Resolution #2002/10/16-08 (Recurrence of Disability) of the panel of administrators of the Board brought item #1.03(b)(4) of the *Rehabilitation Services and Claims Manual, Volumes I and II* (RSCM I and II) into effect as of October 16, 2002. Until June 17, 2003, item #1.03(b)(4) was numbered item #1.00(4). The operation and application of item #1.03(b)(4) was central to the outcome of the Previous WCAT Decision and the lawfulness of that policy is central to this application.

Resolution #2006/06/20-01 (Re: Transitional Provision regarding Recurrence of Disability), which I will call the "August 2006 Resolution", amended item #1.03(b)(4) effective August 1, 2006. I will distinguish between item #1.03(b)(4) as it existed prior to August 1, 2006 and the version that came into effect on that date by referring to the latter as the "Amended item #1.03(b)(4)". The August 2006 Resolution provides that the amendments to item #1.03(b)(4) "apply to decisions, including appellate decisions, made on or after October 16, 2002".

Pursuant to Bill 49, several of the entitlement provisions of the Act, including those related to permanent disability pensions, were amended effective June 30, 2002. Section 35.1 of the Act is a transitional provision that establishes whether the entitlement of workers to various benefits arises under the former or current sections of the Act. Under section 35.1(8), if on or after June 30, 2002 a worker has "a recurrence of a disability that results from an injury that occurred before [June 30, 2002]", the current sections of the Act apply. Item #1.03(b)(4) states that, for the purposes of section 35.1(8), a reopening of a claim for "any permanent changes in the nature and degree of the worker's permanent disability" constitutes a "recurrence" and, therefore, additional pension entitlement is adjudicated under the current provisions of the Act. Prior to October 16, 2002, the applicable policy distinguished between a recurrence and a deterioration of a permanent disability. Accordingly, from June 30 to October 15, 2002, permanent deteriorations of permanent conditions for which pensions had been granted under the former provisions of the Act were adjudicated under the former provisions. The effect of the August 2006 Resolution was to restore this distinction effective October 16, 2002.

Background

The history of the worker's claim is set out in the Previous WCAT Decision. The worker was born in 1930 and retired from work as an ironworker in 1989. In February 2001, he submitted a claim to the Board, which was accepted for asbestos-related pleural disease (pleural plaques and fibrosis) and rounded atelectasis (see memo #8 dated April 20, 2001). By decision dated May 9, 2001, the Board awarded him a functional pension based on impairment of 20% of total disability effective September 29, 2000.

In a decision dated February 28, 2003, a disability awards officer stated that the worker's claim had been referred to the Disability Awards Department to determine if he was entitled to an increase in his permanent partial disability pension. Pursuant to item #1.03(b)(4), the current provisions of the Act were applied. Although the former section 23(1) of the Act provided that permanent partial disability pensions assessed on a functional basis were payable for life, the current section 23.1 operates to generally end those pensions at age 65 or the date the worker would have retired (if the latter date is beyond age 65). As the worker had retired, the disability awards officer concluded that, as a result of the operation of the current section 23.1 of the Act, the worker could not be granted an increase in his permanent partial disability pension.

In *Review Decision #3773,* dated October 21, 2003, a review officer confirmed the February 28, 2003 decision. The worker appealed that decision to WCAT. Pursuant to section 251(2) of the Act, in the course of considering the appeal the vice chair referred item #1.03(b)(4) to me because he considered that it was so patently unreasonable that it should not be applied to the adjudication of the worker's appeal.

In *WCAT Decision #2005-01710*, dated April 7, 2005, I made a determination under section 251(3) of the Act. I agreed with the vice chair and concluded that item #1.03(b)(4) of RSCM I and II was so patently unreasonable that it was not capable of being supported by the Act.

In accordance with section 251(5), I referred the policy to the board of directors of the Board. By letter dated August 11, 2005, I was informed of the board of directors' decision that item #1.03(b)(4) is rationally supported by the Act and that the matter was referred back to WCAT pursuant to section 251(8) of the Act to apply the policy in adjudicating the worker's appeal.

Accordingly, in the Previous WCAT Decision, the WCAT panel applied item #1.03(b)(4) and determined that the worker was not eligible for a reassessment of his permanent partial disability pension.

On December 29, 2005, the worker applied to the Supreme Court of British Columbia for judicial review of the Previous WCAT Decision and a declaration that the board of directors exceeded their jurisdiction or made a patently unreasonable decision in determining that the policy was not patently unreasonable under the Act. The worker's petition has not been heard by the Court.

Mr. William Cowburn is another worker who sought a reassessment of his permanent partial disability pension after June 30, 2002. The Review Division had applied item #1.03(b)(4) and determined that he was not entitled to a reassessment of his pension. Mr. Cowburn applied to the Supreme Court of British Columbia for an order quashing item #1.03(b)(4) because it involved a patently unreasonable application of the Act. In the May 5, 2006 judgment in *William Cowburn* v. *Workers' Compensation*

Board of British Columbia (2006 BCSC 722), Mr. Justice Maczko held that item #1.03(b)(4) is patently unreasonable.

In the August 2006 Resolution, the board of directors amended item #1.03(b)(4) and directed that the Amended item #1.03(b)(4) "apply to decisions, including appellate decisions, made on or after October 16, 2002". If the worker's entitlement to an increased pension is considered under the Amended item #103(b)(4), the applicable provisions of the Act will be the former provisions rather than the current provisions.

Standard of Review

On August 3, 2006, the judgment in *United Brotherhood of Carpenters and Joiners of America, Local 527* v. *British Columbia (Labour Relations Board)*, [2006] B.C.J. No. 1757, 2006 BCCA 364 was rendered by the B.C. Court of Appeal. That judgment provides that, despite the ATA, the pragmatic and functional approach should be applied to determine whether a question decided by an administrative tribunal is within its jurisdiction. The Court noted that the application of the pragmatic and functional approach requires consideration of "the presence or absence of a privative clause; the tribunal's relative expertise; the purpose of the Act as a whole and the provision in particular; and the nature of the problem".

The Board and WCAT are administrative tribunals with specialized expertise, whose decisions are protected by privative clauses (see sections 96(1) and 255(1) of the Act). The case before the WCAT panel did not involve constitutional or Charter issues. The Previous WCAT Decision required the determination of the worker's entitlement to an increased permanent partial disability pension, which is a matter that was clearly within WCAT's exclusive 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 before the panel support the conclusion that the applicable standard of review is one of patent unreasonableness.

An argument can be made that the question before the WCAT panel was the narrower question of whether the former or current provisions of the Act were applicable to the adjudication of the worker's entitlement to an increased pension. As that question turned on a policy matter that was within the exclusive jurisdiction of the board of directors of the Board, it may be possible to argue that the correctness standard is applicable to the panel's determination that the former provisions of the Act were applicable to the worker's eligibility for an increased permanent partial disability pension. However, in light of my analysis, I find it unnecessary to determine whether the correctness standard is applicable to the worker's application for reconsideration.

Submissions and Analysis

The circumstances of this application are somewhat unique. This is not a situation in which counsel argues that the Previous WCAT Decision is tainted by an error of law going to jurisdiction that existed at the time when the decision was released. However, she contends that the decision ultimately became tainted by a jurisdictional error because the Court in *Cowburn* found item #1.03(b)(4) to be patently unreasonable.

(a) WCAT decisions are final, conclusive, and enforceable

Section 255 of the Act provides:

> 255(1) Any **decision** or action of the chair or [WCAT] under this Part **is final and conclusive** and is not open to question or review in any court.
>
> …
>
> (3) The Board must comply with a final decision of [WCAT] made in an appeal under this Part.
>
> (4) A party in whose favour [WCAT] makes a final decision, or a person designated in the final decision, may file a certified copy of the final decision with the Supreme Court.
>
> (5) **A final decision filed under subsection (4) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court.**
>
> [emphasis added]

Section 255 clearly establishes that WCAT decisions are final, conclusive, and enforceable. However, the finality of WCAT decisions is subject to its reconsideration authority on the basis of new evidence under section 256 of the Act and on common law grounds. Section 253.1(5) of the Act states that provisions regarding the correction or clarification of WCAT decisions do not limit WCAT's "ability, on request of a party, to reopen an appeal in order to cure a jurisdictional defect".

In this case, the WCAT vice chair, who had previously considered under section 251(2) of the Act that item #1.03(b)(4) was patently unreasonable, applied the policy because section 251(8) required him to do so in making his decision. In my view, his decision is unassailable in that regard. However, the Supreme Court of British Columbia has ultimately determined that item #1.03(b)(4) is patently unreasonable and the board of directors has subsequently amended the policy effective October 16, 2002, which is the date item #1.03(b)(4) (then numbered as item #1.00(4)) originally came into force. Accordingly, the policy that formed the foundation of the Previous WCAT Decision has

been invalidated by the *Cowburn* judgment as well as the August 2006 Resolution. At the heart of this matter is the question of whether the Previous WCAT Decision is tainted by a jurisdictional defect because of the Court's conclusion in *Cowburn* and the August 2006 Resolution.

(b) The doctrine of res judicata

I have considered whether the effect of *Cowburn* is to render item #1.03(b)(4) void *ab initio* so that the Previous WCAT Decision can be set aside as void on the basis that it had no foundation. However, my review of the case law reveals that decisions that are made under legislation that is subsequently declared invalid continue to be in effect if all appeal rights have been exhausted. This is due to the doctrine of *res judicata*, which provides that, in the absence of appeal rights, a matter that has been finally determined by a competent court cannot be pursued further by the same parties.

Reference re Language Rights Under the Manitoba Act, 1870, [1985] 1 S.C.R. 721, (1985) 19 D.L.R. (4th) 1 (SCC) is an example of a case in which the doctrine of *res judicata* was applied. That case involved consideration of the effect of sections of the *Manitoba Act, 1870,* and the *Constitution Act, 1867*, which provided that all legislative enactments of the Manitoba legislature must be printed and published in both English and French. In 1890 Manitoba enacted the *Official Language Act* (OLA) which provided that statutes were to be printed and published in English only. Although the OLA was later held to be unconstitutional, the Manitoba legislature continued to enact legislation in English only and the OLA remained on the statute books. In the *Reference Re Language Rights*, the Supreme Court of Canada held that Manitoba statutes and regulations not printed and published in both languages were invalid and had no legal force and effect. However, the Court stated:

> It should be noted that there are other doctrines which might provide relief from the consequences of the invalidity of Manitoba's laws. For example, *res judicata* would preclude the re-opening of cases decided by the courts on the basis of invalid laws….

Two years later, in *Wigman* v. *The Queen*, [1987] 1 S.C.R. 246, (1987) 33 C.C.C. (3rd) 97 (SCC), the Supreme Court of Canada further considered the validity of judgments based on invalid law. That case dealt with the test to be applied to determine when an accused could rely on a subsequent, different interpretation of the law in the *Criminal Code* to challenge his or her conviction and sentence. Although greater protections are often afforded in the criminal law context than in the civil law context, the Court found that, even in the criminal law context, a decision based on an invalid law would stand based on the doctrine of *res judicata* once all appeals have been exhausted. The Court stated:

> The appropriate test is whether or not the accused is still in the judicial system. As expressed in the Crown's factum, this test affords a means of striking a balance between the "wholly impractical dream of providing perfect justice to *all* those convicted under the overruled authority and the practical necessity of having some finality in the criminal process". Finality in criminal proceedings is of the utmost importance but the need for finality is adequately served by the normal operation of *res judicata*: a matter once finally judicially decided cannot be relitigated. Thus a person convicted under *Lajoie* will not be able to reopen his or her case, unless, of course, the conviction is not final. In the *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 757, the Court observed that *res judicata* would even preclude the reopening of cases decided by the courts on the basis of constitutionally invalid laws. The *res judicata* principle would apply with at least as much force to cases decided on the basis of subsequently overruled case law.

In *Wigman* the appellant was still in the judicial system and, therefore, the Court concluded that he was entitled to have his culpability determined on the basis of the judgment on the interpretation of the *Criminal Code* issued after the Court of Appeal's decision, but before his appeal to the Supreme Court of Canada had been heard. This same point about *res judicata,* finality, and the common law limitations on the ability of an accused to challenge a conviction on the basis of subsequent judgments was reiterated and set out more recently in *R.* v. *Sarson*, [1996] 2 S.C.R. 223, (1996) 135 D.L.R. (4th) 402.

In light of the doctrine of *res judicata*, a potential outcome for this application is to conclude that the Previous WCAT Decision, which was grounded in the policy that existed at the time it was released, should not be set aside as void. However, in my view, there are limitations to the application of the doctrine of *res judicata* in the workers' compensation system and other factors are also relevant to the outcome of this application.

(c) Application of the doctrine of res judicata in the workers' compensation system

In the administrative law context, the application of the doctrine of *res judicata* may be affected by the statutory authority to reopen and reconsider previous decisions. Sara Blake's text *Administrative Law in Canada*, 4th ed. (Ontario: Butterworth's, 2006) notes (at page 130):

> Where a court decision changed the interpretation of a statutory provision, previous decisions that were based on an erroneous interpretation may be reopened.

In support of this statement, Ms. Blake refers to *Campbell* v. *Prince Edward Island (Workers' Compensation Board)* (1997), 149 D.L.R. (4th) 378 (PEICA), (1997), 151 Nfld. & P.E.I.R. 157. In that case, the Prince Edward Island Court of Appeal found that a decision of the Board could be reopened based on a change to the law, which resulted from a subsequent Court of Appeal judgment. In *Campbell*, the appellant worker had suffered work-related back injuries in 1967, 1973 and 1981. In 1993 his claim was reopened and compensation of $322 per week was granted based on what he would have been earning as a mechanic in 1993. Subsequently, the Prince Edward Island Court of Appeal judgment reported as *Blue* v. *Workers' Compensation Board (P.E.I.)* (1995), 129 Nfld. & P.E.I.R. 86 held that, in calculating the initial award of compensation, a claimant's earnings and the statutory ceiling in effect at the date of the accident were to be used. The P.E.I. Board applied the judgment in *Blue* to the appellant worker's claim and, therefore, re-calculated and reduced his compensation to $137 per week. The Court of Appeal concluded that the P.E.I. Board had jurisdiction under section 50(1)(e) of the Act to recalculate the appellant worker's compensation. Section 50(1)(e) stated that the P.E.I. Board could reopen, rehear, re-determine, review or readjust any claim, decision or adjustment where the Board considered it necessary to do so to render substantial justice in the circumstances. However, the Court of Appeal found the Board had "erred by failing to properly consider the principles and factors it had to consider in order to arrive at a reasoned decision as to whether it should apply the *Blue* decision retrospectively".

Section 253.1(5) of the Act recognizes WCAT's common law authority "on request of a party, to reopen an appeal in order to cure a jurisdictional defect". Accordingly, I find the doctrine of *res judicata* is not a conclusive bar to reconsidering the Previous WCAT Decision. In addition, given WCAT's common law authority to reconsider its decisions and the ability of parties to WCAT decisions to apply for judicial review of those decisions, it is arguable that this matter is still within the "judicial system" as was the case in *Wigman*. That argument would support the conclusion that the worker's application in this case should not fail on the basis of *res judicata*.

(d) The principles of good public administration

In the recitals to the August 2006 Resolution, the board of directors considered *Decision #36* of the former governors, "Retroactivity of Policy Changes" (1993), 9 W.C.R. 147. It provides that when a policy change is required because a court has decided that the policy is unlawful, the needs of good public administration will be considered in determining whether the policy change will be applied retroactively. *Decision #36* goes on to say:

> **4. Good public administration involves a balance between fairness and the practicality of undoing prior transactions.**

5. Good public administration will normally require that the new policy apply to any specific case which led to the decision to make the change, as well as to all other cases currently under adjudication or appeal. Otherwise, decision makers might be faced with having to make decisions on the basis of policy which is known to be unlawful.

6. Good public administration may also require that the governors set a prior date for the general commencement of the changed policy. **Retroactivity will then apply to cases not currently under adjudication where the issue in question arose after that date.**

…

8. In claims matters, regard must be had to the effect on workers in terms of benefits they may have lost or excess benefits they may have received which they might now be expected to repay. Regard must also be had to the effect on employers in terms of possibly having to pay increased assessments or fund benefits which should not have been paid.

[emphasis added]

In *Decision #28*, "Approval of Retroactive Implementation of Changes in W.C.B. Policy Necessitated by Appeal Division Decision No. 91-0850 and Appeal Division Decision No. 92-1210" (1992), 8 W.C.R. 691, the former governors made retroactive policy changes as a result of Appeal Division decisions that found the policies in question to be unlawful.

In this case, the August 2006 Resolution made the amendments to item #1.03(b)(4) retroactive to the date the policy came into existence (October 16, 2002). The Board has placed a notice on its website notifying workers that claims to which the policy was applied will be readjudicated by the Board so that the Amended item #1.03(b)(4) can be applied. It has also made efforts to contact the affected workers. Thus, in this case, the Board has recognized that fairness and good public administration require the readjudication of decisions affected by item #1.03(b)(4).

(e) Purpose of the workers' compensation system

One of the fundamental purposes of workers' compensation is to provide compensation to injured workers quickly and without court proceedings (see *Pasiechnyk* v. *Saskatchewan (WCB)*, (1997) 149 D.L.R. (4th) 577 (S.C.C.)). In this case, it seems that this purpose would be thwarted if WCAT required parties to WCAT decisions in which the application of item #1.03(b)(4) was determinative to attempt to seek redress in the courts. WCAT's reconsideration process can provide a procedure for dealing with the change in the policy that is fair and is quicker and more cost effective than court proceedings.

In addition, one cannot ignore the fact that the Board is readjudicating all decisions where item #1.03(b)(4) was applied if the decision was not appealed to WCAT. In my view, it would be fundamentally unfair if those workers who exercised their rights to appeal to WCAT are disadvantaged compared to those who did not appeal to WCAT when the Board applied item #1.03(b)(4) in adjudicating their entitlement to an increased permanent partial disability pension.

(f) Legislative intent that WCAT not apply patently unreasonable policies

While section 250(2) of the Act requires WCAT to "apply a policy of the board of directors that is applicable in that case", section 251(1) provides that WCAT may refuse to apply a policy that is "so patently unreasonable that it is not capable of being supported by the Act and its regulations". Section 251 outlines a scheme for the determination of whether a policy is patently unreasonable. Section 251(5) provides:

> If the chair determines under subsection (3) that the policy should not be applied, the chair must
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> (a) send a notice of this determination, including the chair's written reasons, to the board of directors, and
>
> (b) **suspend any other appeal proceedings that are pending before the appeal tribunal and that the chair considers to be affected by the same policy until the board of directors makes a determination** under subsection (6).
>
> [emphasis added]

Sections 251(1) and (5) indicate a legislative intent that WCAT not apply a policy when the lawfulness of that policy has been called into question. The circumstances of this application are not addressed in section 251. However, in my view, the logical extension of section 251 would require WCAT to set aside as void a decision that was determined by a policy that was ultimately found to be patently unreasonable by the courts and was amended by the board of directors with retroactive application to that policy's original effective date. This can only be accomplished through WCAT exercising its common law reconsideration authority.

(g) The application statement in the August 2006 Resolution

The August 2006 Resolution provides that the Amended item #1.03(b)(4) is to be applied to "decisions, including appellate decisions, made on or after October 16, 2002". It reflects the conclusion of the board of directors that good public administration requires that the amended policy have retroactive application and that claims to which item #1.03(b)(4) was applied be readjudicated. When the language in the application statement for the August 2006 Resolution is contrasted with the application statements

for other policy changes, it is evident that the board of directors viewed the circumstances under consideration to be extraordinary.

For instance, in *Resolution #2005/10/06-03* (Re: Changes to the Casual Workers Policy In the *Rehabilitation Services & Claims Manual*), the directors set a future effective date of January 1, 2006 and determined that the new policy "applies to all decisions made on or after" that date. *Resolution #2005/07/19-03* (Re: Changes to Average Earnings Policies In the *Rehabilitation Services & Claims Manual,* Volume II) provided that it "applies to injuries that occur on or after October 1, 2005".

In contrast, in *Resolution #2005-12/13-03* (Re: Benefits for Dependent Children), the application statement provides:

> Amendments to policy item #55.40 of the *RS&CM* Volume I, attached as Appendix A, are approved and apply to claims adjudicated on or after January 1, 1984.

In that case, the policy amendment flowed from my determination under section 251(3) that item #55.40 was patently unreasonable under the Act (see *WCAT Decision #2005-04492-rb*). As a result of the resolution, the Board readjudicated the entitlement to benefits that had been granted under the impugned policy retroactively to the date the policy came into effect.

In the August 2006 Resolution, the Board clearly stated that the Amended item #1.03(b)(4) applies to appellate decisions made on or after October 16, 2002. As a result of the Resolution, the Board is readjudicating all of the decisions in which item #1.03(b)(4) has been applied. This approach is consistent with that of the governors in *Decision #28*. It appears that the board of directors intended that the policy change would apply to WCAT decisions in which item #1.03(b)(4) had been determinative.

While the board of directors does not have the authority to determine that a WCAT decision is not final and conclusive, WCAT has the authority to set aside as void and reconsider a patently unreasonable WCAT decision. In light of *Cowburn* and the intended retroactive application of the August 2006 Resolution, I am persuaded by counsel's argument that the Previous WCAT Decision must be set aside as void because these subsequent events have rendered the decision patently unreasonable.

Conclusion

I am mindful of the finality of WCAT decisions and the doctrine of *res judicata*. I recognize that WCAT's authority to reconsider its previous decision is not clear cut in this case. However, in all of the circumstances of this case and the compelling reasons for setting aside the Previous WCAT Decision as void, I find it appropriate to exercise my authority to do so.

WCAT Decision #2005-05843 is set aside as void. I recognize that the decision was correct at the time that it was released. However, in light of the unique circumstances of this case and, in particular, *Cowburn* and the retroactive amendment of item #1.03(b)(4) of the RSCM I and II, I find that the decision must be set aside because it is tainted by the application of a patently unreasonable policy, resulting in an error of law going to jurisdiction.

The WCAT Registry staff will invite any further submissions the worker may wish to make on the merits of his appeal. The appeal will then be assigned to either the original WCAT vice chair or another vice chair for reconsideration on the merits.

Jill Callan
Chair

JC/hb