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

WCAT Decision Number: WCAT-2007-00900
WCAT Decision Date: March 16, 2007
Panel: Herb Morton, Vice Chair

Introduction

The worker seeks reconsideration of the October 14, 2004 Workers' Compensation Appeal Tribunal (WCAT) decision (*WCAT Decision #2004-05323*). The worker submits that the WCAT panel made a patently unreasonable decision.

The worker's request for reconsideration was initiated by a submission dated January 3, 2006 addressed to the Workers' Compensation Board, operating as WorkSafeBC (Board), and copied to the WCAT chair. By letter of January 24, 2006, WCAT's legal counsel advised the worker that his letter would be processed as an application for reconsideration of the WCAT decision. He provided the worker with information about the WCAT reconsideration process.

By letter dated September 11, 2006, WCAT's appeal coordinator provided information to the worker regarding the grounds for requesting reconsideration, including the "one time only" limitation on reconsideration applications. She invited the worker's further submissions. That letter was remailed to the worker on October 19, 2006, and he provided a submission dated February 9, 2007. The employer is not participating in this application, although invited to do so. By letter dated February 15, 2007, the appeal coordinator advised that submissions were considered complete.

No oral hearing has been requested. I find that the issue as to whether grounds for reconsideration are established involves questions of a legal nature which can be properly considered on the basis of written submissions without an oral hearing.

Issue(s)

Did the WCAT decision involve an error of law going to jurisdiction? In particular, was the WCAT decision patently unreasonable?

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Jurisdiction

WCAT uses the broad heading of "reconsideration" to include two situations:

- The first is where an applicant seeks to have a decision reconsidered on the basis of new evidence. WCAT's authority to reconsider on the basis of new evidence is defined by section 256 of the *Workers Compensation Act* (Act).
- WCAT also has authority to "reconsider" (i.e. to set aside or void one of its decisions) on the common law ground of an error of law going to jurisdiction, including a breach of natural justice. A tribunal's common law authority to set aside one of its decisions on the basis of jurisdictional error was confirmed by the British Columbia Court of Appeal in the August 27, 2003 decision in *Powell Estate* v. *Workers' Compensation Board*, 2003 BCCA 470, [2003] B.C.J. No. 1985, 186 B.C.A.C. 83 (see *Workers' Compensation Reporter*, *Volume 19*, page 211). This authority is further confirmed by section 253.1(5) of the Act.

These grounds are described at items #15.20 to #15.24 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP), accessible on WCAT's website under "Publications".

This matter has been assigned to me by the WCAT chair for consideration under a written delegation of authority.

Standard of Review

Section 255(1) of the Act provides that a WCAT decision is final and conclusive and is not open to question or review in any court. In keeping with the legislative intent that WCAT decisions be final, they may not be reconsidered except on the basis of new evidence as set out in section 256 of the Act or on the basis of the common law ground of an error of law going to jurisdiction. The question as to whether a decision involves an error of law going to jurisdiction generally requires application of the "patent unreasonableness" standard of review. In other cases the standard is correctness. Further, on a natural justice issue, the question to be addressed is whether the procedures followed by WCAT were fair (see *WCAT Decision #2004-03571*, 20 W.C.R. 291). These different standards of review are also set out in section 58 of the *Administrative Tribunals Act* (ATA).

Background

While working as a carpenter, the worker suffered an injury to his left thumb in an accident at work on October 23, 2002. He received wage loss benefits from October 24, 2002 until February 5, 2003. By decision dated February 5, 2003, the case manager advised the worker:

> …wage loss benefits can be paid only when there is significant medical evidence to support a disability.
>
> Section 21(1) of the Act, states in part, "the Board may pay for medical expenses considered reasonable when related to the injury accepted."
>
> A WCB medical doctor recently reviewed your file and your latest specialist's report of January 10, 2003. The WCB doctor is in the opinion that there are no objective findings of significance demonstrated on your doctor's report, and there are no significant findings to support any ongoing disability in your case.
>
> [Name of worker], based on the medical findings on file at this time, it is, my decision that wage loss and health care benefits will be finalled on your claim February 5, 2003.
>
> There are no further objective medical findings to support any ongoing disability with your thumb. It is expected that you can resume your pre-injury work at this time….
>
> [reproduced as written]

The worker requested review by the Review Division of the February 5, 2003 decision. In his request for review dated May 5, 2003, the worker stated that he was seeking wage loss benefits from February 5, 2003 until March 14, 2003. The Review Division denied the worker's request for an oral hearing, and invited the worker to provide a written submission. No submission was provided by the worker. In his decision of January 29, 2004 (*Review Decision #2742*), the review officer found that the worker's temporary disability ceased as of January 27, 2003. He concluded that wage loss benefits were properly terminated on February 5, 2003, when the worker was notified of the case manager's decision.

The worker appealed the Review Division decision to WCAT. By letter dated March 1, 2004, the workers' adviser forwarded the worker's notice of appeal dated February 24, 2004 to WCAT. In his notice of appeal, the worker requested wage loss benefits from February 5, 2003 to March 14, 2003. He submitted that "New medical evidence by the Board suggests my injury has become a permanent impairment." The worker requested an oral hearing, stating that an oral hearing was necessary "in defence of unforeseen questions." On April 5, 2004, the WCAT appeal liaison advised the worker that based on WCAT criteria, the appeal would proceed by way of written submissions. She invited the worker's submission by April 26, 2004. No objection was made by the worker regarding the determination by the WCAT Registry concerning the method of hearing. By letter dated April 22, 2004, the workers' adviser requested an extension of time to provide a written submission. On April 26, 2004, the appeal liaison advised that additional time was granted until May 10, 2004.

The worker provided a written submission dated April 29, 2004 (received by WCAT on May 10, 2004) in support of his appeal. The worker did not renew his request for an oral hearing. On page 1, the worker argued:

> Recent and past medical facts and evidence provided by Dr. Boyle and the Board contradict [the Board medical adviser's] assessment that I can return to normal duties **and that no further treatment needed**.
>
> [emphasis added]

On page 3, the worker further argued:

> My employer did not have work for me until April 1, 2003. When I tried to handle some framing material, I experienced extreme pain. I could not do my job. I told my boss I would try again in a couple of weeks.
>
> **I needed medical attention.** The decision letter dated Feb 5, 2003 states that Section 21(1) of the Act states in part, "the Board may pay for medical expenses considered reasonable when related to the injury accepted.["] The decision also stated that **wage loss benefits and health care benefits will be finalled on my claim**.
>
> **I interpreted this to mean that I was responsible to pay any further medical expenses incurred by this injury.** In 1995, I had an injury that was not accepted by the Board. I had to pay my own medical expenses for that injury. I could not afford this medical expense at this time. This is the reason I did not get medical attention.
>
> [emphasis added]

The worker's claim was reopened for further wage loss benefits from October 1, 2003 until November 7, 2003. The worker's request from a further reopening of his claim in September 2004 was denied. By decision dated December 22, 2004, the disability awards officer granted the worker a permanent partial disability award equal to 4.37% of total disability (1.87% for restricted range of movement and sensory impairment and 2.50% for chronic pain). That award was made effective February 6, 2003, following the initial termination of wage loss benefits. On January 3, 2006, the disability awards officer denied an award for disfigurement under section 23(5) of the Act.

The October 14, 2004 WCAT decision reasoned, in part:

> While I understand that the worker experienced sensitivity and pain upon pressure to the area, I do not find that there is medical evidence to support that the pain was so significant that he could not attempt a return to either light duties or commence a graduated return-to-work program effective February 5, 2003. He is right hand dominant and the injury was

> to his left thumb. In December of 2002, the worker was provided with a GEL cap to protect the left thumb.
>
> Although the worker did not have the benefit of a return to work program, he nevertheless did return to work for periods of time. There is [*sic*], in my mind, two opinions regarding the worker's ability to return to work, and that is that of Dr. Boyle and the Board medical advisor who both found him fit for work. I accept these opinions over that of the worker's.
>
> Of note is the fact that the worker did not seek medical attention for a sustained period of time after March 2003 until October 2003, when his nail split. He was able to work off and on during that time period. Accordingly, I deny the worker's appeal.

At the time of the October 14, 2004 WCAT decision, further decisions had been issued by the Board. By decision dated December 18, 2003, the case manager denied the worker's request for reopening of his claim in relation to his nail splitting open which he reported in October 2003. By decision dated February 27, 2004, the case manager advised the worker that his file had been forwarded to the Disability Awards Department. It was considered that he had a permanent functional impairment but that this had not prevented him from returning to work full time in his pre-injury employment. The worker had requested review of those further decisions by the Review Division, and the Review Division issued its decision (*Review Decisions #14567* and *#14569*) on August 5, 2004. The review officer found that the worker was entitled to a reopening of his claim as of October 1, 2003. The review officer returned the matter to Board for further investigation, stating:

> I therefore return the decisions of December 18, 2003 and February 27, 2004 to the Board for further investigation. As part of its investigation the Board should seek a medical opinion which addresses the following questions:
>
> 1) Was the worker temporarily disabled by his compensable nerve branch injury, nail bed irregularity and chronic pain subsequent to February 5, 2003?
> 2) If yes at what point did the worker reach medical plateau status with respect to these injuries?
> 3) Is the worker currently able to meet the critical demands of his pre-injury employment?
>   a. If yes, was the worker ever incapable of meeting those demands? When?
>   b. If no, when did the worker become incapable of meeting those demands?

> Once in possession of an opinion in this regard the Board should issue a new and reasoned decision outlining the worker's entitlement (if any) to additional wage loss and health care benefits. In the event that the worker is not entitled to additional wage loss or health care the Board's letter should explain why this is the case.
>
> **Conclusion**
>
> As a result of this review I return the decision of December 18, 2003 to the Board for further investigation.
>
> As a result of this review I return the decision of February 27, 2004 to the Board for further investigation.

By decision dated September 23, 2004, the case manager advised the worker that he would be entitled to wage loss benefits from October 7, 2003 to November 7, 2003. However, implementation of the Review Division decision would be deferred for 40 days. By decision dated November 18, 2004, the case manager paid wage loss benefits from October 1, 2003 to November 7, 2003.

Later decisions on the worker's claim were the subject of another WCAT decision dated April 3, 2006 (*WCAT Decision #2006-01578*). The 2006 WCAT decision confirmed *Review Division Decisions #29007*, *#25498*, *#27630* and *#28390*.

Reasons and Findings

The worker submits that the 2004 WCAT decision was patently unreasonable.

(a) Effect of patent unreasonableness test

In *Speckling v. British Columbia (Workers' Compensation Board),* [2005] B.C.J. No. 270, 2005 BCCA 80, (2005) 46 B.C.L.R. (4th) 77, the British Columbia Court of Appeal found that the applicable standard of review in respect of the Appeal Division decisions in question in that case was the standard of patent unreasonableness. The Court of Appeal reasoned:

> [33] Having confirmed the correctness of the patently unreasonable standard of review, I agree with the chambers judge's summary of the approach to be taken in applying that standard. He noted the following principles (at para. 8):
>
> 1. The standard of review is that of patent unreasonableness: *Canada (Attorney General)* v. *P.S.A.C.* (1993), 101 D.L.R. (4th) 673 (S.C.C.).

2. "Patently unreasonable" means openly, clearly, evidently unreasonable: *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 748.

3. The review test must be applied to the result not to the reasons leading to the result: *Kovach* v. *British Columbia (Workers' Compensation Board)* (2000), 184 D.L.R. (4th) 415 (S.C.C.).

4. The privative clause set out in s. 96(1) of the Act requires the highest level of curial deference: *Canada Safeway v. B.C. (Workers' Compensation Board)* (1998), 59 B.C.L.R. (3d) 317 (C.A.)

5. A decision may only be set aside where the board commits jurisdiction error.

6. A decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not: *Douglas Aircraft Co. of Canada Ltd.* v. *McConnell*, [1980] 1 S.C.R. 245, and *Board of Education for the City of Toronto* v. *Ontario Secondary School Teachers' Federation et al* (1997), 144 D.L.R. (4th) 385 (S.C.C.).

In *Speckling*, the Court of Appeal further explained the effect of the "patent unreasonableness" standard of review (at paragraph 37):

> ...a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable….

In the text *Administrative Law in Canada*, Fourth Ed. (Ontario: Lexis Nexis, 2006) Sara Blake states at pages 213-214:

> Findings of fact are reviewable only if patently unreasonable. An unreasonable finding of fact is one that is not supported by any evidence. A court will not review the evidence considered by the tribunal

> to determine whether there was sufficient evidence to support a finding of fact. A court will go no further than to determine whether there was any evidence, and only essential findings of fact upon which the decision of the tribunal turns will be reviewed in this manner. Non-essential findings of fact are not reviewable.
>
> ...
>
> The weight given to evidence is reviewable only if patently unreasonable. The choice as to which evidence is important and the weight given to each item of evidence is based, in part, on the tribunal's expertise. The failure to mention an item of evidence in the tribunal's reasons is not proof of a failure to consider it but only proof that the tribunal did not regard it as being of sufficient importance as to require mention.
>
> ...
>
> A tribunal may draw inferences from primary facts. An inference may be reviewed if it is not supported by any primary facts. However, any reasonable inference supported by primary facts will be upheld. It may be recognized that some inferences are based in part upon a tribunal's expertise and knowledge in the field.
>
> [emphasis added]

(b) Failure to address November 7, 2003 report

The worker submits that Dr. Boyle's report of November 7, 2003 was not considered, or was disregarded. The 2004 WCAT decision contains no express reference to Dr. Boyle's report of November 7, 2003.

In his April 29, 2004 written submission to the WCAT panel, the worker stated:

> In a Nov 7, 2003 consultation, Dr. Boyle recommended surgery to correct the defective nail that had been causing my pain. This suggests a temporary disability. Frustrated that Dr. Boyle was recommending surgery to alleviate pain from a defective digital nail while board officers maintained that there is no PFI and that I could return to normal duties, I did not schedule the surgery….

The November 7, 2003 report by Dr. Boyle stated:

> The consultation did not go well and he was not particularly pleased with the outcome. I did not think that proximal resection of a nerve would be of significant value to him. I felt that the nail irregularity, if it was catching,

> could be corrected. In the end, we did not particularly finish the complete discussion about various possibilities and [the worker] left.

In his April 29, 2004 written submission to the WCAT panel, the worker further explained:

> On Oct 1, 2003, while watching T.V., there was so much pressure that the nail almost fully grown by now split into 2 pieces, one overlapping the other.

I accept that if the WCAT panel rejected or disregarded important material evidence without explanation, this could provide a basis for setting aside the WCAT decision:

- *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425, (1998) 157 F.T.R. 35;
- *Tryus v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 737, 2004 FC 606, (2004) 15 Admin. L.R. (4th) 238;
- *Lingeswaran v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1282;
- *Stelco Inc. v. British Steel Canada Inc.*, [2000] F.C.J. No. 286, (2000) 20 Admin L.R. (3d) 159.

The WCAT panel noted at page 3-4 as follows:

> In support of this appeal, the worker forwarded a submission to the tribunal dated April 29, 2004. In that submission, the worker indicated that Dr. Boyle's reports were not analyzed properly by Board staff. He submitted that when Dr. Boyle commented on his (the worker's) ability to perform his pre-injury duties, he stated that the worker "still has some deep pain with pressure in this region" and that "unfortunately at this point the only surgical options would be a more proximal resection of the nerve which would produce a greater area of decreased sensation."

The WCAT panel cited Dr. Boyle's report of January 10, 2003, regarding the surgical option of a proximal resection of the nerve (which Dr. Boyle described as seeming rather excessive as the worker would likely gradually improve over time). In his November 7, 2003 report, Dr. Boyle indicated that "I did not think that proximal resection of the nerve would be of significant value to him." With respect to the consideration of this possible surgical treatment, it is not apparent that the evidence in the November 7, 2003 report differed significantly from the evidence provided in Dr. Boyle's report of January 10, 2003, in any event. While Dr. Boyle also noted in his November 7, 2003 report that "the nail irregularity, if it was catching, could be corrected", this concerned his findings on examination on November 7, 2003.

The worker also submits that the November 7, 2003 report was significant, as Dr. Boyle noted some irregularity of the worker's nail bed. Dr. Boyle also noted:

> On examining him today, in his left thumb, the ulnar quarter of the nail is irregular. In fact a small part of the nail sticks up and does not grow beyond the proximal third of the nail bed because of the underlying nail bed irregularity….

Again, however, these findings concerned the worker's condition on examination on November 7, 2003, following the reopening of the worker's claim in October 2003. In this context, Dr. Boyle's report had limited relevance to the initial termination of wage loss benefits in February 2003.

While it is true that the WCAT decision contained no express reference to Dr. Boyle's report of November 7, 2003, this must be viewed in the context of the surrounding circumstances. The central issue raised by the worker's appeal to WCAT concerned the February 5, 2003 initial termination of wage loss benefits. The worker had reported a change in his condition on October 1, 2003, involving the splitting of his nail. Further decisions had been provided concerning the reopening of the worker's claim in October 2003 which were not part of the appeal before the WCAT panel. Accordingly, subsequent medical examinations, and consideration of surgical options to address the worker's condition, were more relevant to the further adjudication of the worker's claim following the October 2003 reopening. Those reports had limited relevance to the initial termination of wage loss benefits in February 2003. While it would have been helpful had the WCAT panel provided some explanation regarding the limited focus of its decision, in this context, I am not persuaded that it was legally necessary to its decision. Given the limited scope of the issue under appeal to the WCAT panel, I do not consider that it was incumbent on the WCAT panel to expressly acknowledge all of the further medical reports received following October 2003. Accordingly, I do not consider that the WCAT decision was patently unreasonable, or that there was any breach of natural justice in relation to the fact the WCAT panel did not expressly refer to the November 7, 2003 report. I am not persuaded that the November 7, 2003 report provided important material evidence, so as to require express acknowledgment and consideration in the WCAT decision.

(c) Misattribution of report

Upon reviewing the medical records, it appears that the WCAT decision contained an error. The WCAT decision correctly cited the initial reports by Dr. Boyle, a specialist in plastic, reconstructive and hand surgery, as being dated November 8, 2002, November 22, 2002, December 12, 2002, January 10, 2003 and March 14, 2003. However, the decision then refers to Dr. Boyle's report of October 13, 2003, and summarizes the findings from that report. The decision states:

> In his October 13, 2003 report, Dr. Boyle noted that the worker had been unable to work doing heavy lifting due to pain on the left thumb when pressure was put on it. He noted the worker had worked full time in April and May, but had difficulty with the lifting and renovations. The worker was off work for June and July. He had returned to work, but was finding it difficult due to pressure on the thumb causing pain. On examination, Dr. Boyle noted that there was gross deformity and atrophy on the involved lacerated side tender to touch in certain areas. He indicated that the worker was not medically capable of working full duties, full time.

I am unable to locate a report by Dr. Boyle dated October 13, 2003. The summary of findings corresponds to those contained in a report by the worker's attending physician, Dr. Emilia Bordalba. The date of service was October 7, 2003, and the report was received electronically by the Board on October 15, 2003.

I do not consider, however, that the error in attributing this report to Dr. Boyle, rather than acknowledging that it was provided by the worker's attending physician, involved an essential finding of fact upon which the WCAT decision turned. Accordingly, I do not consider that this error provides grounds for reconsidering the WCAT decision.

(d) Conclusion regarding termination of wage loss benefits

The central issue for the WCAT panel to determine was whether the worker's condition remained one of "temporary" disability after February 5, 2003 (for which wage loss benefits would be payable), or whether the worker's residual problems had stabilized and become permanent.

It would appear from the worker's submissions that he viewed the decision to terminate wage loss benefits as meaning that he had completely recovered from his work injury. Accordingly, he appears to view the subsequent developments on his claim, involving the reopening in October 2003 and the granting of a permanent partial disability award, as proof that the decision to terminate wage loss benefits was in error. This argument appears to involve a misunderstanding on the part of the worker concerning the meaning of a finding that a worker's condition is no longer temporary in nature. The WCAT decision contained detailed reasons on this point, with reference to the applicable policies at *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), item #34.50 (which refers to item #35.30) and #95.31, at pages 4 and 5.

The WCAT panel took into account the various reports from the specialist, Dr. Boyle, the opinion of the Board medical advisor, the worker's own evidence, and the report of the worker's attending physician (albeit attributed to Dr. Boyle). The WCAT panel found the opinions by Dr. Boyle and the Board medical advisor to be more persuasive, on the issue as to the time by which the worker's condition had stabilized. It is clear that there was evidence before the WCAT panel to support its decision. The worker's

disagreement with the decision by the WCAT panel concerns the WCAT panel's weighing of the evidence.

It appears that the worker is seeking to pursue arguments which were presented to the prior WCAT panel in his appeal. For the reasons set out in the *Speckling* decision, an application for reconsideration does not provide an opportunity for a reweighing of the evidence. I am satisfied that there was evidence before the WCAT panel to support its decision, and the decision was not openly, clearly, evidently unreasonable.

(e) Health care benefits – Adequacy of reasons

It is evident that the subsequent decisions on the worker's claim concerning a reopening, and permanent partial disability award, were of potential relevance to the decision to terminate health care benefits effective February 5, 2003. While not expressly identified as an issue in the worker's notice of appeal, it is evident from the worker's written submission to WCAT dated April 29, 2004 that the worker was also disputing the termination of health care benefits on his claim effective February 5, 2003. As well, the fact that the worker was seeking additional wage loss benefits (i.e. on the basis that he continued to be disabled by his work injury), implicitly contained an argument that the worker's continuing symptoms were causally related to his work injury.

At the time the WCAT decision was issued on October 14, 2004, MRPP item #14.30 provided:

> Where a decision of the Review Division is appealed to WCAT, WCAT has jurisdiction to address any issue determined in either the Review Division decision or the prior decision by the WCB officer which was the subject of the request for review by the Review Division. This is, of course, subject to the general limits on WCAT's jurisdiction described in item 2.00.
>
> However, WCAT will generally restrict its decision to the issues raised by the appellant in the appellant's notice of appeal and submissions to WCAT. The appellant is entitled by right to a decision on the issues expressly raised in the appeal.

The February 5, 2003 decision addressed the termination of health care benefits as a separate issue. This issue was raised by the worker's submissions to WCAT. Accordingly, I find that it was incumbent on the WCAT panel to address that issue.

Under the heading "Introduction", the WCAT panel noted that the February 5, 2003 decision by the Board officer advised the worker "that temporary wage loss and health care benefits would be concluded as of February 5, 2003, as it was found that the worker had recovered from the laceration to his left thumb." Under the heading

"Issue(s)", the WCAT panel identified the issues raised by the worker's appeal as follows:

> Whether or not, as a result of his compensable injury, the worker continued to be temporarily totally or temporarily partially disabled **and what, if any, benefits was he entitled to after February 5, 2003**.
>
> As provided by item #14.30 of the Workers' Compensation Appeal Tribunal's (WCAT) *Manual of Rules, Practices and Procedures*, WCAT will generally restrict its decision to the issues raised in the appellant's notice of appeal and submissions.
>
> [emphasis added]

While not expressly stated to concern the worker's eligibility for health care benefits, the phrase "and what, if any, benefits was he entitled to after February 5, 2003" would seem to encompass the worker's request for health care benefits.

Under the heading "Reasons and Findings", the WCAT panel cited the policies concerning the provision of wage loss benefits for temporary disability (RSCM II items #34.50 and #95.31). No policies were cited from chapter 10 of the RSCM II in relation to the provision of health care benefits. For example, RSCM II item #73.20 provided:

> **#73.20 Duration of Medical Assistance**
>
> Coverage for necessary health care continues for as long as the worker continues to experience the effects of a compensable injury or occupational disease, notwithstanding that he or she may not be disabled from working or may be retired from the workforce.

On page 5, the WCAT panel noted:

> In the claim log of January 27, 2003 the Board medical advisor stated there was "no objective contraindication to return to normal duties." **The Board medical advisor noted that no further treatments were necessary.**
>
> **I prefer the medical opinion of Dr. Boyle, the hand specialist who examined and treated the worker on an ongoing basis, and that of the Board medical advisor, over that of the worker**. Dr. Boyle's opinion is persuasive and consistent with the evidence on the file. In the December 12, 2002 report, Dr. Boyle was of the opinion that the worker could return to work on a light duty or graduated return-to work-basis, not on a full-time no restrictions basis. The medical advisor made her

> determination as a result of reviewing Dr. Boyle's last report, and indicated she could see no objective contraindication to return to work
>
> [emphasis added]

On page 6, the WCAT panel further reasoned:

> Of note is the fact that the worker did not seek medical attention for a sustained period of time after March 2003 until October 2003, when his nail split. He was able to work off and on during that time period. Accordingly, I deny the worker's appeal.

The WCAT panel concluded its decision by stating "I deny the appeal and confirm the January 29, 2004 decision of the Review Division."

Upon review of the foregoing, I consider it unclear whether the WCAT panel addressed the worker's eligibility for health care assistance after February 5, 2003 as a separate issue. If the panel failed to do so, I find that this was a missed issue which remains to be addressed by WCAT. If the WCAT decision is read as having addressed that issue, and as having denied the worker's appeal on that issue, I find that the WCAT decision must be set aside on that issue as patently unreasonable. On page 3, under the heading "Background and Evidence", the WCAT panel had noted:

> The December 17, 2003 claim log entry, as completed by the Board medical advisor, indicated that at that time, the worker appeared to have ongoing pain due to the compensable nerve injury, for which there was no treatment. The worker had a known injury in this area for which he was treated by means of physiotherapy for desensitization. The medical advisor noted that this was a chronic condition and that the worker would have fluctuations of pain in keeping with the normal expected course of the condition.
>
> The February 5, 2004 claim log entry, as completed by the Board medical advisor, noted that it was reasonable to assume that the worker did have a permanent functional impairment, which would be in addition to the permanent functional impairment already established for chronic pain. The Board medical advisor stated that the restrictions would be limited gripping, pinch gripping and lift with the left hand, and lifting in the light range only. However, she stated the worker would not be prevented from working full time at his pre-injury job.

That evidence would appear to be inconsistent with the February 5, 2003 decision by the case manager to terminate health care benefits on the worker's claim, on the basis that the worker had recovered from the laceration to his left thumb. There is, as well, a lack of reasons in the WCAT decision to adequately explain the basis on which it

confirmed the denial of health care expenses after February 5, 2003, in the context of the later medical evidence which had been received concerning the worker's condition.

A decision of the British Columbia Supreme Court in *Harley v. BC (Employment and Assistance Appeal Tribunal)*, [2006] B.C.J. No. 2119, 2006 BCSC 1420, September 20, 2006, found that the question as to whether adequate reasons were provided is one which is subject to review on a correctness standard under section 58(2)(c) of the ATA. In *Harley*, the court reasoned:

> [54] This is simply stating a conclusion. The panel's reasoning process is not set out; the critical findings of fact are not set out; the conclusion does not reflect a consideration of the main relevant factors. The evidence before the Tribunal "pointed" as well of course to the "fact" that the petitioner and her daughter claimed the daughter was the beneficial owner of at least $4,000 of the total monies. As this evidence was not expressly rejected by the Tribunal, it is misleading to suggest that the evidence "pointed" only one way.
>
> [55] I underline that I am not parsing the reasons of the Tribunal to improperly substitute my view of the evidence for that of the Tribunal. **I am doing so simply to test the adequacy of those reasons against the Tribunal's statutory duty to provide reasons.**
>
> [56] The respondents place significant reliance on Justice McEwan's decision in ***Serebrova v. British Columbia (Employment and Assistance Appeal Tribunal)***, 2006 BCSC 213, a case which considered an issue similar to that in the case at bar. But Justice McEwan characterized (at ¶ 24) the case before him as "a case about the sufficiency of proof".
>
> [57] Here, on the contrary, the petitioner has attacked the sufficiency of the Tribunal's reasons in the context of the ***Regulation*** and the common law.
>
> [58] In my view, the Tribunal has failed to provide, as required by s. 87(1)(c) of the ***Regulation***, a written determination which "sets out the reasons on which the panel based its determination".
>
> [59] As to what adequate "reasons" consist of for the purpose of this direction, I adopt the Federal Court of Appeal's analysis in paragraph 22 of ***VIA Rail***.

> [60] This failure represents non-compliance with a statutory direction. It falls under s. 58(2)(c) of the ***Administrative Tribunals Act*** and the standard of review is that of correctness.
>
> [61] The decision of the Tribunal is set aside and the matter is remitted to a fresh panel for consideration of the petitioner's appeal.
>
> [emphasis added]

In *Harley*, the court noted:

> [21] With respect to the duty to provide reasons, s. 87(1) of the ***Employment and Assistance Regulation***, B.C. Reg. 263/2002 provides that the Tribunal's "written determination" must:
>
> (a) specify the decision under appeal,
>
> (b) summarize the issues and relevant facts considered in the appeal,
>
> (c) set out the reasons on which the panel based its determination, and
>
> (d) specify the outcome of the appeal.

In this case, section 253(3) of the Act provided that:

> The appeal tribunal's final decision on an appeal must be made in writing with reasons.

A recent WCAT reconsideration decision (*WCAT Decision #2007-00756*, March 2, 2007) distinguished the decision in *Harley* and approached the question as to the standard of review to apply regarding the adequacy of reasons on a slightly different basis. The panel reasoned:

> The tribunal, in the case before Mr. Justice Bauman, has more specific statutory directions about the required contents of its reasons than does WCAT. Mr. Justice Bauman found that the tribunal had breached a statutory requirement and, as such, the standard of review of correctness set out in section 58(2)(c) of the ATA applied. I have assessed the adequacy of the reasons in face of the duty of fairness and the standard of review requiring that in all the circumstances the tribunal act fairly (section 58(2)(b) ATA).

> Counsel has also referred to *Garcia v. Canada (Attorney General)*, [2001] F.C.J. No. 1001, a decision of the Federal Court of Appeal. In this case the court analyzed the adequacy of reasons as an aspect of the duty of fairness, as have I. The court referred to a statement of Justice L'Heureux-Dubé in *Baker v. Minister of Citizenship and Immigration,* [1999] 2 S.C.R. 817, at paragraph 43 to the effect that it would be unfair for a person subject to a decision which is critical to their future not to be told why the result was reached. The court in *Garcia* noted that it is not sufficient to quote evidence and then make a conclusion. An explanation for the conclusion must be expressly stated. There must be acceptance, rejection or analysis of the evidence.
>
> Although I appreciate the employer's representative's concern that WCAT decisions not become overly lengthy, the requirements of the duty of fairness must be met. This requires, as the quotations and references above show, that the reasons of the panel explain a conclusion when there is a dispute as to the evidence and its meaning….

In *Garcia*, the court reasoned:

> [16] …I am of the view that the decision of the Board contains another procedural defect. It merely quotes from the three medical reports of Dr. Havens and that of Dr. Munro. It then cites the brief oral opinion given by Dr. Howell. It goes on to note the finding of the BCWCB that its compensation was based on partial disability. It does not accept, reject, or analyse any of this evidence, but simply concludes that in its opinion the applicant does not meet the strict requirements of the Act. No explanation for the conclusion is expressly stated.
>
> ...
>
> [18] Having reviewed these submissions, I am of the view that **the Board's failure to provide a full written explanation for its decision breaches the Board's duty of procedural fairness owed to the applicant and constitutes a reviewable error** (see Baker v. Minister of Citizenship and Immigration, [1999] 2 S.C.R. 817). In the present circumstances, the Board's reasoning leading to the final disposition must be fully explained because of its importance to the applicant. As was observed by L'Heureux-Dubé in the Baker decision (at paragraph 43):
>
> > It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.
> >
> > [emphasis added]

In *Canada (Minister of Human Resources Development) v. Bartelds*, [2006] F.C.J. No. 466, 2006 FCA 123, the Federal Court of Appeal reasoned:

> [3] Counsel for the Minister says that the Board's finding that Ms Bartelds was disabled from work was patently unreasonable, and that it erred in law by failing to provide adequate reasons for its decision as required by subsection 83(11) of the *Plan*. He argues that the Board's brief reasons do not address important items of evidence that would appear to be inconsistent with its conclusion that Ms Bartelds' disability precluded her from employment.
>
> [4] In particular, the Board's reasons do not mention the fact that she was working in the 11 months following the end of her minimum qualifying period in December 1997. In addition, while the Board relied on a report from a Dr Witt, a neurologist, to support its decision, it did not mention two letters by the same doctor, to the effect that Ms Bartelds was capable of desk work, and that he denied having said that she was totally disabled.
>
> [5] We agree with these submissions. Given the above evidence, it is simply impossible to tell from the Board's reasons why it reached the decision that it did. **It is well established by the jurisprudence of this Court that, as a matter of procedural fairness, parties are entitled to know on what basis the Board resolved serious conflicts in the evidence**: see, for example, *Garcia v. Canada (Attorney General)*, [2001] F.C.J. No. 1001, 2001 FCA 200. This is not to say, of course, that the Board must address every piece of evidence that is inconsistent with evidence that it accepts. In this case, however, the omitted evidence was of such importance that the Board erred in law in not discussing it.
>
> [emphasis added]

In *Thornton v. Canada (Minister of Social Development)*, [2007] F.C.J. No. 200, 2007 FCA 65, February 15, 2007, the Federal Court of Appeal further reasoned:

> [6] It is argued for Mr. Thornton that the Board failed to engage in a meaningful analysis of certain evidence favouring Mr. Thornton's claim, indicating that it either disregarded relevant evidence or failed to provide an adequate explanation of why it did not find that evidence to be determinative in Mr. Thornton's favour.
>
> [7] According to the jurisprudence of this Court, the Board's obligation is to reach its conclusion on the basis of all of the evidence, and to provide reasons that are sufficient to permit meaningful judicial review. That does not imply that the Board is necessarily obliged to address every piece of evidence that might be inconsistent with the evidence it accepts: see

> *Palumbo v. Canada (Attorney General),* [2005] F.C.J. No. 557, 2005 FCA 117, *Canada (Minister of Human Resources Developments) v. Bartelds*, [2006] F.C.J. No. 466, 2006 FCA 123, *McKerrow v. Canada (Minister of Human Resource Development)*, [2002] F.C.J. No. 1561, 2002 FCA 433, *Kellar v. Canada (Minister of Human Resources Development)*, [2002] F.C.J. No. 732, 2002 FCA 204.

Blake, *supra*, summarizes the law concerning "Sufficiency of Reasons" at pages 90 and 91, as follows:

> Regardless of whether there is a duty to give reasons, any reasons given must be adequate. It is not sufficient simply to outline the evidence and argument and to state the tribunal's conclusion. Nor is it sufficient merely to repeat the applicable statutory provisions. That does not reveal the rationale for a decision. With respect to each important conclusion of fact, law and policy, the reasons should answer the question, "Why did the tribunal reach that conclusion?"
>
> Reasons should state the findings of fact that support the conclusions and identify the evidence on which they are based. The rejection of important items of evidence and findings of credibility should be explained. If an application is dismissed by reason of insufficient evidence, the material deficiencies in the evidence should be identified. If a statute requires the consideration of certain factors, they should be discussed in the reasons. If several incidents of misconduct were alleged in the notice of hearing, the reasons for decision should identify which incidents are proven and the reasons for the disciplinary order.
>
> However, reasons need not be given on every minor point raised during the proceeding nor must reference be made to every item of evidence. Tribunals that consider many applications on similar issues may use standard form reasons or follow precedents provided each decision is based on the facts in each case.

For the purposes of my decision regarding the adequacy of the reasons provided by the WCAT panel concerning the worker's eligibility for health care benefits, I do not consider it necessary to determine whether a "correctness" standard applies under section 58(2)(c) of the ATA, or whether this involves an issue of fairness under section 58(2)(b) of the ATA. In either case, I would find that the panel's reasons on this issue were not adequate to explain the basis for its decision with reference to the evidence which was before the WCAT panel. Accordingly, I find that the WCAT decision on this issue (if there was one) must be set aside due to the absence of reasons to provide a meaningful explanation for the panel's conclusion on this issue.

I am, in any event, inclined to agree with the reasoning provided in *WCAT Decision #2007-00756.* 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.

Under section 58(2)(c), the correctness standard only applies in relation to matters not identified in section 58(2)(a) and (b). Decisions of the courts have identified the lack of reasons for a decision as a procedural fairness issue, which would be addressed under section 58(2)(b).

In summary, given the lack of clarity in the WCAT decision regarding the worker's appeal for health care expenses, alternative analyses may apply. One possibility is that it was a missed issue, which remains to be addressed. The other possibility is that the worker's appeal on this issue was considered and denied. On this latter basis, I find that there was a lack of adequate reasons to explain the basis for the panel's decision, which requires that the decision on that issue be set aside as involving a breach of procedural fairness.

(f) Fitness to return to employment

A third issue in the February 5, 2003 decision concerned the worker's fitness to return to work. With reference to the worker's submissions on that issue, the WCAT panel found:

> While I understand that the worker experienced sensitivity and pain upon pressure to the area, I do not find that there is medical evidence to support that the pain was so significant that he could not attempt a return to either light duties or commence a graduated return-to-work program effective February 5, 2003. He is right hand dominant and the injury was

> to his left thumb. In December of 2002, the worker was provided with a GEL cap to protect the left thumb.
>
> Although the worker did not have the benefit of a return to work program, he nevertheless did return to work for periods of time. There is, in my mind, two opinions regarding the worker's ability to return to work, and that is that of Dr. Boyle and the Board medical advisor who both found him fit for work. I accept these opinions over that of the worker's.
>
> Of note is the fact that the worker did not seek medical attention for a sustained period of time after March 2003 until October 2003, when his nail split. He was able to work off and on during that time period. Accordingly, I deny the worker's appeal.

The worker objects to the panel's reference to his being right hand dominant while the injury was to his left thumb. He points out that while a carpenter may hold a hammer, nail gun or power tool in his right hand, it remains necessary to use the left hand for gripping, lifting, aligning and holding materials in the proper position while being nailed or sawn. I note, however, that the panel also referred to the worker having been provided with a GEL cap to protect the left thumb. I consider that the significance of the worker's continuing left thumb problems to his employment was an issue which was considered by the WCAT panel, and that the worker's objections concern the weighing of the evidence by the WCAT panel. I find that there was evidence before the WCAT panel to support its conclusion, and its decision was not openly, clearly, evidently unreasonable.

The fact that the worker was later awarded a permanent partial disability award, and that his claim was reopened in October 2003, is not inconsistent with the WCAT decision that the worker's condition had stabilized by February 5, 2003 and was no longer one of temporary disability after that point. The question as to the effect of the worker's permanent condition, and its significance to his employment activities, was one which was further addressed in later decisions dealing with the worker's permanent partial disability award.

(g) New evidence (obiter)

Subsequent to the October 2003 reopening, additional reports were provided by Dr. Boyle. By report of January 9, 2004, Dr. Boyle noted that the worker "was extremely angry". He advised:

> In terms of his hand, he continues to complain of ongoing pain in his thumb that he feels prevents him from working at this point. I listed my assessments in the past and at this time, I cannot add anything further. That is to say, I do not have any further recommendations for specific treatment regarding his hand at this point. He needs to see a psychiatrist.

On April 16, 2004, Dr. Boyle described his findings on examination and commented:

> There is however nothing further that I can offer him from a surgical point of view.

On October 15, 2004, Dr. Boyle noted that he had nothing further to offer the worker in terms of treatment. The worker was referred to another specialist, Dr. R. Mian. By report of January 6, 2005, Dr. Mian noted that interventions which might help the worker included transposition of the neuroma more proximally and deeper to see if this would reduce his pain. He also could have ablation of the ulnar most aspect of the nail fold to eliminate the re-growth of the bothersome section of the nail. In a further report of January 14, 2005, Dr. Boyle advised:

> I do not think that surgery would benefit the patient I would not personally undertake to do surgery. [The worker] has a protective gel cap and he has numerous troubles with this.
>
> [reproduced as written]

The worker's application for reconsideration has been presented on the common law grounds. Accordingly, I am not making a decision regarding new evidence under section 256 of the Act. I would comment, however, that it does not appear that the further reports added to the worker's claim file subsequent to the WCAT decision would constitute substantial and material new evidence to show that the worker's condition had not stabilized by February 5, 2003.

Conclusion

The worker's application for reconsideration of *WCAT Decision #2004-05323* is allowed in part, on the common law grounds, in relation to the February 5, 2003 termination of health care benefits. This was either a missed issue in the WCAT decision, or one on which the panel failed to provide adequate reasons to explain the basis for its decision. The worker's eligibility for health care benefits will be further addressed by WCAT. In relation to the other issues addressed in the WCAT decision, the decision stands as "final and conclusive" under section 255(1) of the Act,

For the purposes of my decision, I have not attempted to assess whether the issue of health care benefits has become moot in light of subsequent developments on the worker's claim. The worker may notify the WCAT Registry whether he wishes to proceed with his appeal on this issue.

Herb Morton
Vice Chair

HM/gw