

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

WCAT Decision Number : WCAT-2009-02136
WCAT Decision Date: August 13, 2009
Panel: Warren Hoole, Vice Chair

Introduction

- [1] The worker applies to the Workers' Compensation Appeal Tribunal (WCAT) for a reconsideration of two decisions: *WCAT-2005-05642-RB*, dated October 24, 2005, (the "2005 WCAT decision"), and *WCAT-2007-02047*, dated July 6, 2007 (the "2007 WCAT decision").
- [2] I will refer to the vice chairs that issued the 2005 WCAT decision and the 2007 WCAT decision as the "2005 panel" and the "2007 panel," respectively.
- [3] The worker's counsel did not request a particular method of hearing the reconsideration applications. I have considered the WCAT's *Manual of Rules of Practice and Procedure* (MRPP), including item #8.90, "Method of Hearing," and I have reviewed the issues, evidence and submissions in this application.
- [4] These applications do not raise issues of credibility, factual complexities, or any other circumstances that indicate an oral hearing is required. On the contrary, counsel alleges a series of legal errors on the face of the record. Because these issues can be fully and fairly addressed by way of written submissions, I am satisfied that an oral hearing is not necessary to resolve the reconsideration applications.

Issue(s)

- [5] The worker's reconsideration applications raise the following issues:
1. What is the standard of review applicable to the worker's reconsideration applications?
 2. Has the worker established common law grounds to reconsider the 2005 WCAT decision?
 3. Has the worker established common law grounds to reconsider the 2007 WCAT decision?
 4. Has the worker established new evidence grounds to reconsider the 2007 WCAT decision?

Jurisdiction

- [6] Section 255(1) of the *Workers Compensation Act* (Act) provides that WCAT decisions are final and conclusive, and are not open to question or review in any court. However, the WCAT may reconsider one of its decisions in certain circumstances.
- [7] First, the WCAT has an implied common law authority to set aside a WCAT decision if that decision reveals a sufficiently serious error of law or fact, a breach of the rules of natural justice, or an improper exercise of discretion.
- [8] The British Columbia Court of Appeal has endorsed this implied common law reconsideration authority in *Powell Estate v. Workers' Compensation Board* 2003 BCCA 470. Further authority for the WCAT to reconsider its decisions on common law grounds is set out in subsection 253.1(5) of the Act.
- [9] Second, the WCAT may reconsider an earlier decision in the face of new evidence pursuant to section 256 of the Act. Each party to a completed appeal may apply for reconsideration of a decision on one occasion only.
- [10] My jurisdiction to hear the worker's reconsideration applications flows from the Chair's delegation of her reconsideration authority pursuant to item 25 of the *Decision of the Chair, Workers' Compensation Appeal Tribunal, No. 12* "Delegation by the Chair," dated January 2, 2009.

Background

- [11] I do not propose to describe the background to the worker's reconsideration applications at length. It will suffice to set out a brief overview of the worker's circumstances. Where necessary, I will address specific evidentiary disputes in more detail during the course of my reasons.
- [12] The worker filed an application for compensation on October 13, 1997. The worker indicated that she was employed as a shipping receiving clerk on October 3, 1997, when she experienced sharp pain in her lower back while unpacking boxes of textbooks.
- [13] The Workers' Compensation Board, now operating as WorkSafeBC (Board), accepted the worker's claim for an L5-S1 disc herniation. The worker underwent a discectomy on January 6, 2000; however, she continued to suffer significant back problems.
- [14] The worker underwent numerous imaging and clinical investigations in relation to her back symptoms. In particular, an MRI investigation of May 8, 2000, revealed a small midline disc herniation at L3-4 and an annular tear at L4-5. An MRI investigation of

November 30, 2000, indicated the worker suffered from a moderate right-sided disc protrusion at T7-8.

- [15] In a decision letter dated January 31, 2002, the Board concluded that the worker's T7-8 disc protrusion was not causally related to her October 13, 1997 work incident. The Board further concluded that the worker's compensable L5-S1 disc herniation had stabilized and became permanent effective February 10, 2002. As a result, the Board terminated the worker's temporary wage-loss benefits and referred her for assessment of a permanent disability award.
- [16] The worker appealed the Board's January 31, 2002 decision to the former Workers' Compensation Review Board (Review Board). As a result of March 3, 2003 amendments to the appellate structure of the workers' compensation system, the worker's appeal was transferred from the Review Board to the WCAT. I will refer to the worker's appeal of the Board's January 31, 2002 decision as the "D" appeal.
- [17] In a decision letter dated February 4, 2002, the Board indicated that the worker was entitled to vocational rehabilitation benefits; however, because the worker was unable to participate in a vocational rehabilitation program due to her back condition, the Board declined to provide vocational rehabilitation benefits at that time.
- [18] The worker appealed the Board's February 4, 2002 decision to the former Review Board. The worker's appeal was transferred to the WCAT and I will refer to it as the "E" appeal.
- [19] In a decision letter dated April 3, 2002, the Board concluded that the worker's L3-4 disc herniation and L4-5 annular tear were not causally related to her October 13, 1997 work incident. The worker's appeal of this decision to the former Review Board was transferred to the WCAT and I will refer to it as the "F" appeal.
- [20] In a decision letter dated April 16, 2004, the Board provided the worker with a permanent disability award on the basis of the worker having a 9.90% permanent functional impairment (PFI). The Board declined to provide the worker with a loss of earnings pension.
- [21] The worker requested a review of the Board's April 16, 2004 decision. In *Review Decision #18582*, dated November 15, 2004, a review officer referred the matter of the loss of earnings pension back to the Board for further investigation and readjudication. The review officer confirmed the bulk of the worker's functional permanent disability award; however, the review officer directed the Board to assess whether the worker was entitled to an increased functional permanent disability award on the basis of chronic pain.
- [22] The worker appealed *Review Decision #18582* to the WCAT. I will refer to this appeal as the "G" appeal.

- [23] Following an August 31, 2005 oral hearing of the D, E, F, and G appeals, the 2005 panel issued the 2005 WCAT decision. The 2005 panel denied the worker's D, E, and F appeals. The 2005 panel allowed the G appeal in part by increasing the worker's wage rate for the purposes on her functional permanent disability award. The 2005 panel confirmed the remainder of the G appeal.
- [24] Pursuant to the directions in *Review Decision #18582*, the Board further investigated the worker's entitlement to a loss of earnings pension. In a decision letter dated February 23, 2006, the Board increased the worker's functional permanent disability award on the basis that she suffered from permanent chronic pain, resulting in a PFI increase of 2.5%. The Board again decided that the worker was not entitled to a loss of earnings pension. The worker requested a review of that decision. In *Review Decision #R0066101*, dated September 21, 2006, a review officer confirmed that the worker was not entitled to a loss of earnings pension.
- [25] The worker appealed *Review Decision #R0066101* to the WCAT. Following an oral hearing on May 31, 2007, the 2007 panel issued the 2007 WCAT decision. The 2007 panel denied the worker's appeal. The 2007 panel confirmed the worker's functional permanent disability award and further confirmed that she was not entitled to a loss of earnings pension.

Submissions

- [26] In brief, counsel argues that the 2005 WCAT decision demonstrates errors of law, fact, and discretion, as well as breaches of procedural fairness. Counsel raises the same errors in relation to the 2007 WCAT decision, as well as arguing the "new evidence" reconsideration grounds.
- [27] As a result, counsel requests that I allow the worker's reconsideration applications and void both the 2005 WCAT decision and the 2007 WCAT decision. I will discuss counsel's submissions at greater length in my reasons.

Reasons and Findings

- [28] Before addressing the merits of the worker's arguments, I will first address the standards of review appropriate to the worker's reconsideration applications. I will then discuss each of the grounds of error alleged by the worker.

1. *Standard of Review*

- [29] Counsel argues that the standard of review for matters other than procedural fairness is found in *Dunsmuir v. New Brunswick* 2008 SCC 9 ("Dunsmuir"). I do not accept counsel's submission on this point.

- [30] I note at the outset that an application for reconsideration on common law grounds is a relatively narrow process that, according to item #15.24 of the MRPP, relies on the same principles as judicial review in the superior courts.
- [31] A judicial review is not another level of appeal. Rather, the courts assume a supervisory role to ensure that decisions of administrative tribunals meet the requirements of procedural fairness. The courts will also ensure that a tribunal's findings of fact and law, as well as its exercise of discretion, fall within a range of permissible outcomes.
- [32] In exercising this supervisory role, the courts will generally afford a degree of deference to the administrative tribunal's decision that is the subject of judicial review. The content of that deference will vary and is reflected in the "standard of review" that a court applies to the administrative tribunal decision in question.
- [33] Over time, the courts have developed an extensive body of common law about the different standards of review that are applicable to the various aspects of an administrative tribunal's decision.
- [34] More recently, the BC Legislature enacted the *Administrative Tribunals Act (ATA)* in an effort to simplify and clarify the standard of review that the courts will apply when judicially reviewing the decisions of certain administrative tribunals, including the WCAT.
- [35] In this regard, section 58 of the ATA sets out the following standards of review:
- 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.

[all excerpts reproduced as written]

- [36] On its face then, it would seem that I need look no further than section 58 of the ATA to determine the standard of review appropriate to the worker's reconsideration applications.
- [37] However, counsel says that *Dunsmuir* now provides the proper standards of review. The worker's counsel therefore submits that section 58 of the ATA should be ignored to the extent that it mandates a standard of review different from *Dunsmuir*.
- [38] In essence, *Dunsmuir* removed the "patently unreasonable" standard of review from the common law. Where a court is required to extend deference to an administrative tribunal decision, that deference is now captured in the single standard of review of "reasonableness." The worker's counsel submits that it is the "reasonableness" and "correctness" standards in *Dunsmuir* that apply to the worker's reconsideration applications.
- [39] I agree that *Dunsmuir* mandates different standards of review than the ATA, at least in certain circumstances. In particular, the ATA continues to reference the patently unreasonable standard of review, a standard that *Dunsmuir* has now removed from the common law approach to the standard of review.
- [40] Notwithstanding the Supreme Court of Canada's decision in *Dunsmuir*, it appears that the courts in BC continue to apply the statutory standards of review in the ATA, rather than the recently changed common law standards of review described in *Dunsmuir*.
- [41] In this regard, I note in particular the recent decisions of Blair J. in *Asquini v. British Columbia (Workers' Compensation Appeal Tribunal)* 2009 BCSC 62; Goepel J. in *Tallarico v. Workers' Compensation Appeal Tribunal* 2009 BCSC 49; and Saunders J.A. in *Manz v. Sundher* 2009 BCCA 92 ("Manz").
- [42] Although I am not required to follow precedent, I agree with these recent decisions and I am satisfied that it is section 58 of the ATA and not *Dunsmuir* that sets the appropriate standard of review in judicial review of WCAT decisions.

- [43] I recognize that, just because the ATA applies to a court on judicial review, this does not necessarily mean that it applies to the WCAT when deciding a reconsideration application.
- [44] Indeed, in *Manz*, the Court of Appeal queried without deciding whether WCAT reconsideration panels should follow *Dunsmuir* instead of applying the ATA. At paragraph 48 of her reasons, Saunders J.A. stated:
- [48] Last, I should add this postscript. The standard of review as between the two Tribunal decisions came into question before us. The *Administrative Tribunals Act* does not apply to internal reviews, and application of common law would suggest the *Dunsmuir* “reasonableness” analysis is required. The Tribunal here applied the patently unreasonable standard of review, the same standard required on review of both decisions in court. There is a solid practicality in the Tribunal reviewing the first decision on the same standard as used in court. However, here the question makes no difference because the result on review of the first decision will necessarily determine the fate of the second decision, they having been to the same result. It is for that reason I will say no more on this issue, and leave it for determination on another case in which the question has practical consequences.
- [45] Notwithstanding Saunders J.A.’s “postscript,” I rely on items #15.24 and #15.32 of the MRPP, which specifically state that a WCAT reconsideration panel will apply the same standards of review as the court on judicial review, that is, the standards of review set out in the ATA.
- [46] Until the courts reach a definitive conclusion on this point, I am of the view that the goals of consistency and predictability in the reconsideration process militate in favour of continuing to follow items #15.24 and #15.32 of the MRPP.
- [47] I also note as a practical matter that anomalous results might arise if WCAT reconsideration panels were to apply the *Dunsmuir* standards of review while the Courts continue to apply the ATA standards of review.
- [48] At least in some circumstances, the Court might conclude that an original WCAT decision satisfies the ATA but that the reconsideration panel erred by not finding the original WCAT decision in breach of the *Dunsmuir* standards of review.
- [49] In effect, the Court would be applying *Dunsmuir* indirectly to the original WCAT decision through the WCAT reconsideration of the original decision. Such a result would seem to significantly undermine the jurisprudence indicating that the Courts must apply the ATA rather than *Dunsmuir* to decisions of the WCAT.

- [50] In order to avoid this, and other possible anomalies, it makes sense for the WCAT reconsideration process and the judicial review process to be as congruent as possible. Any incongruence between the two processes has, in my view, a real potential to result in anomalous and confusing situations.
- [51] Because the WCAT's reconsideration authority is of a discretionary nature, I prefer to exercise this discretion in a manner that eliminates or reduces, as much as possible, the opportunity for confusion and inconsistency in an already technical and complex area of law.
- [52] Consequently, although I appreciate that a WCAT reconsideration panel is not required to apply the ATA standards of review, I prefer the ATA standards of review over the standards of review in *Dunsmuir* for the reasons discussed above.
- [53] Having disposed of the general issue of whether the ATA or *Dunsmuir* applies to the worker's applications for reconsideration, I turn now to address the worker's arguments on the merits of her applications.

2. *The Worker's Reconsideration Arguments – The 2005 WCAT Decision*

- [54] The worker filed a December 22, 2005 judicial review of the 2005 WCAT decision. The worker refers me to her judicial review petition, as well as setting out further arguments at paragraphs 19 to 51 of her November 28, 2008 submission.
- [55] Although the worker filed additional submissions, it is the judicial review petition and the November 28, 2008 submission that set out the relevant arguments for her reconsideration application. I will deal with the submissions in the judicial review petition first.

a. *The December 22, 2005 Petition: Paragraph 1*

- [56] In relation to the compensability of the worker's T7-8 (D appeal) and L3-4, and L4-5 (F appeal) disc problems, counsel says that the 2005 WCAT decision contains an "egregious" finding of material fact because it is incorrectly stated that the worker started employment with her accident employer in the late 1990s, rather than in 1989.
- [57] It may well be that the worker started work with the accident employer in 1989 rather than the "late 1990s" as stated in the 2005 WCAT decision¹. However, I see no error because I see no material finding of fact on this point. The date the worker started with the accident employer is simply referred to as background information in the 2005

¹ Indeed, although I need not make a finding on this point, I note that the worker filed an August 30, 2005 affidavit, paragraphs 11 and 12 of which indicate that she worked for the accident employer for eight years "on and off" and that she started work there in 1989.

WCAT decision. This date was not contentious and the 2005 panel's reasoning did not rely in any way on the worker starting work in the late 1990s rather than in 1989.

- [58] Consequently, I see no material finding of fact in the 2005 WCAT decision as to the date the worker started her employment. In the absence of such a finding of fact, I fail to see how the error in question advances the worker's reconsideration application.
- [59] Even if I am wrong, and such a finding of fact could be inferred, that finding of fact was of no relevance to the panel in the 2005 WCAT decision and therefore cannot form a valid basis for voiding that decision.
- [60] For his part, the worker's counsel appears to suggest that the erroneous statement as to when the worker started her employment was significant because it led the panel in the 2005 WCAT decision to ignore the question of whether or not the worker's disc problems at L3-4, L4-5, and T7-8 were due to cumulative occupational exposure over a number of years.
- [61] In my view, the real thrust of the worker's submission is that the panel in the 2005 WCAT decision failed to address a relevant issue, or failed to provide adequate reasons in relation to that issue. The issue in question is whether the worker's L3-4, L4-5, and T7-8 disc problems were due to occupational exposures over time.
- [62] In either case, it is irrelevant that the alleged error flows from an incorrect factual finding about when the worker started her employment. The existence of the error is the key issue, not the explanation for why that error might have arisen.
- [63] The real question raised in paragraph 1 of the judicial review petition is therefore whether the panel in the 2005 WCAT decision fell into reviewable error by failing to consider, or failing to adequately consider, the cumulative cause argument.
- [64] A "missed" issue or a failure to provide adequate reasons about a material issue may result in a reviewable error. However, in my view, the panel in the 2005 WCAT decision did not fall into such error in relation to the cumulative cause issue.
- [65] Simply put, the cumulative cause issue was not properly before the panel in the 2005 WCAT decision. It follows that the 2005 panel was not required to address that issue in the first place. In any event, I note that the 2005 panel advised counsel of her conclusion on this point at approximately 52 minutes and 30 seconds into the oral hearing.
- [66] I say that the cumulative cause issue was not properly before the 2005 panel because I see no suggestion in the claim file or in the decisions in question (January 31, 2002, and April 3, 2002) that the Board had turned its mind to the cumulative cause issue. Rather the Board's decisions were concerned with the role of the October 3, 1997 work incident.

- [67] Indeed, the April 3, 2002 decision in particular was stated to relate to whether or not the worker's L3-4 and L4-5 disc problems were caused by the worker's October 3, 1997 work incident. The worker herself, in her original application for compensation and subsequent requests for adjudication of the L3-4, L4-5, and T7-8 levels, did not suggest cumulative occupational exposure as a possible cause for her pathology at those levels.
- [68] This means that the Board had not turned its mind to the issue of whether cumulative occupational exposure might have caused the worker's L3-4, L4-5, and T7-8 disc problems. It follows that this issue did not form part of the "decision" properly under appeal to the 2005 panel and that it was therefore unnecessary for the panel to address that issue.
- [69] I note that counsel's written submissions of August 31, 2005, expressly raised before the 2005 panel the issue of cumulative occupational exposure as an argument for why the worker's L3-4, L4-5, and T7-8 disc problems should be considered compensable. On this point, counsel also referred the panel to *Plamondon v. British Columbia (Workers' Compensation Board)* (1988), 47 D.L.R. (4th) 114 (B.C.S.C.).
- [70] In these circumstances, it might have been preferable for the 2005 panel to have briefly addressed counsel's arguments for the sake of completeness in her written reasons. However, I am satisfied that, because this issue was not properly before the WCAT, the panel was not obliged to address the issue in her written reasons and her failure to do so therefore does not constitute a reviewable error, particularly in light of her oral ruling on this matter.
- [71] Similarly, the panel in the 2005 WCAT decision was not required to address *Plamondon* because, unlike in *Plamondon*, the first suggestion of long-term exposure as a cause of injury was raised on appeal, rather than being apparent on the face of the claim at the outset.
- [72] If a panel is required to address in its reasons every issue that is not properly before it, and every argument that is largely irrelevant to the key issues in dispute, the efficiency and timeliness, not to mention the comprehensibility, of WCAT decisions would be negatively impacted for little benefit. I note that there is little prejudice to a worker in this circumstance because, if a matter is not properly before the WCAT, it remains open for the worker to seek an original adjudication from the Board on that matter, with further opportunities for review and appeal.
- [73] Consequently, I am not persuaded that the 2005 panel can be said to have either missed or inadequately addressed the issue of whether or not the worker's L3-4, L4-5, and T7-8 disc problems were due to cumulative occupational exposure rather than to the events of October 3, 1997. By limiting herself to the latter issue, the 2005 panel was responsive to the issues properly within her jurisdiction.

[74] It follows that the worker's first argument in her judicial review petition cannot succeed in the context of her reconsideration application.

b. The December 22, 2005 Petition: Paragraph 2

[75] The worker says that she provided the 2005 panel with written evidence from her father, uncle, and former employer in support of her oral evidence that she intended to become a teacher and that she had formed that intent "since childhood."

[76] The worker then alleges that the 2005 panel erred by "failing to refer to and consider" that evidence in determining the worker's wage rate for pension purposes. The worker does not specify the exact consequence of the error alleged; however, I infer that the worker takes issue with the adequacy of the panel's reasons in the 2005 WCAT decision or that the panel failed to consider relevant evidence. In my view, neither argument can succeed.

[77] The thrust of the worker's evidence at the hearing was that she planned on becoming a teacher prior to the October 3, 1997 work incident. I do not read the 2005 panel's reasons as disputing that the worker had the intent of becoming a teacher. I therefore fail to see how additional corroborative evidence regarding this intent assisted the worker's appeal to any material extent.

[78] Indeed, the 2005 panel did not dispute the worker's intention; rather, the 2005 panel simply stated its opinion that, as a matter of common experience, a person's goals may change over time and that the worker's intention of becoming a teacher was therefore somewhat speculative.

[79] Because the evidence from the father, uncle, and former employer only reinforced the issue of intention, which was not in dispute, the 2005 panel did not fall into error by not specifically mentioning this evidence.

[80] Consequently, I am satisfied that the 2005 panel did not ignore relevant evidence and did not provide inadequate reasons in relation to the panel's assessment of the likelihood that the worker would become a teacher.

c. The December 22, 2005 Petition: Paragraph 3

[81] The worker's counsel points out that the worker obtained a BA (History) degree from Simon Fraser University. Counsel says that the 2005 panel failed to attach any or sufficient weight to this fact and made a patently unreasonable finding of fact that the worker's BA degree was not a specific preparation for becoming a teacher.

[82] Counsel's argument on this point is somewhat similar to his second ground of error alleged in the judicial review petition. In essence, counsel appears to state that it was

an error of fact to characterize the worker's plans of becoming a teacher as speculative in the face of the worker having a BA degree.

[83] The 2005 panel's conclusion about the speculative nature of the worker's intended career as a teacher is a finding of fact. The appropriate standard of review in relation to a finding of fact is set out in section 58 of the ATA. In particular, paragraph 58(2)(a) provides that where a tribunal makes a finding of fact within its exclusive jurisdiction, that finding of fact may only be interfered with if it is "patently unreasonable."

[84] The British Columbia Court of Appeal has summarized the concept and meaning of patent unreasonableness in *Speckling v. British Columbia (Workers' Compensation Board)* 2005 BCCA 80. At paragraph 33 of its reasons, the Court stated, in relevant part:

[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):

[...]

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.).

[...]

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.).

[85] I also note the following statement from Mr. Justice Iacobucci in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paragraph 57:

The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is

patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

- [86] In light of the above-noted guidance as to the meaning of “patently unreasonable” I turn now to consider whether the 2005 WCAT decision demonstrates the necessary degree of factual error in relation to the speculative nature of the worker’s goal of becoming a teacher. In my view, it does not.
- [87] The evidence before the 2005 panel indicated that the worker intended to become a teacher. The worker had completed her BA degree, a step that could have various possible consequences, including becoming a teacher.
- [88] However, as pointed out by the 2005 panel, the evidence did not disclose that the worker had taken specific steps in this direction. On the contrary, the evidence showed that, as of October 3, 1997, the worker had completed her BA degree but had not taken any other steps towards becoming a teacher. For example, the worker did not state that she had enrolled in a teaching certification program, pursued teaching-related employment, conducted informational interviewing, or any other factors to show that her intent was crystallizing into concrete action.
- [89] In this context, the mere fact that the worker had completed a general BA degree does not necessarily mean that she would have become a teacher any more than it means that the worker would have pursued some career other than that of a teacher.
- [90] Although it was open to the 2005 panel to accept that the worker’s intent and her BA degree were enough to deem the worker a teacher for pension wage rate purposes, it was also open to the 2005 panel to conclude on the evidence that this career path was nothing more than speculation in the absence of more concrete and specific steps towards this goal.
- [91] In my view, the evidence before the 2005 panel was such that either finding would not have offended the patently unreasonable standard of review.
- [92] My role as a reconsideration panel is merely to assess whether the 2005 panel committed a reviewable error. Because there was some evidence before the 2005 panel on which to base its conclusion that the worker’s career goal of becoming a teacher was too speculative for the purposes of setting her pension wage rate, that finding cannot be said to be patently unreasonable.
- [93] It follows that the third ground advanced in the judicial review petition does not disclose a reviewable error for the purposes of the worker’s reconsideration application of the 2005 WCAT decision.

[94] Having disposed of the three arguments in the judicial review petition, I turn now to consider the arguments set out at paragraphs 19 to 51 of the worker's November 28, 2008 reconsideration submission.

d. November 28, 2008 Submission: Paragraphs 19 to 22

[95] The worker says that the 2005 panel failed to expressly refer to a number of statutory and policy items. The worker does not explain the consequences of this failure. Because the statutory and policy items refer primarily to general policies relevant to causation and weighing of evidence, I assume that the worker's argument is that the 2005 panel failed to consider relevant statutory and policy factors in addressing the compensability of her L3-4, L4-5, and T7-8 disc problems. I disagree.

[96] It is not necessary for a WCAT panel to cite every potentially relevant policy. It is enough that the 2005 panel turned its mind to the key question of causation. The panel weighed the medical evidence and concluded that causation was not established.

[97] The question of causation ultimately underlies the bulk of the statutory and policy items referred to by the worker. Because the panel addressed this underlying causation issue, I am satisfied that the panel was not required to specifically enumerate the policy and statutory provisions referred to by the worker.

[98] Consequently, in the absence of a more detailed argument on this point from the worker, I am not persuaded that the original panel was required to list every potentially relevant policy and statutory provision in the context of her analysis of the fundamental issue of causation. This aspect of the worker's submission therefore does not demonstrate any reviewable error in the 2005 WCAT decision.

e. November 28, 2008 Submission: Paragraph 23

[99] The worker argues that the 2005 panel "devoted an insufficient two (2) paragraphs" to the compensability of the worker's L3-4, L4-5, and T7-8 disc problems. The worker says that "this cursory approach indicates insufficient analysis." The worker's submission on this point questions the sufficiency or adequacy of the original panel's reasons.

[100] The requirements for procedural fairness are described in paragraph 58(2)(b) of the ATA. This subsection states that, in all the circumstances, a tribunal must act fairly.

[101] It is a well-established principle of the rules of procedural fairness that an administrative tribunal must provide sufficient reasons for its decision. This principle finds explicit expression in subsection 253(3) of the Act, which requires that a WCAT final decision on an appeal be made in writing with reasons.

[102] In her text *Administrative Law in Canada*, 3rd ed., Blake provides a convenient summary of the purpose behind the obligation to provide sufficient reasons, at page 86:

To be of any value to the parties, reasons should explain how the tribunal reached its conclusions, both on fact and on law or policy. The essential findings of fact on which the decision is based should be stated and explanations should be given for rejecting important items of evidence pertaining to the central facts in issue....However, reasons need not be given on every minor point raised during the proceeding nor must reference be made to every item of evidence.

[103] Although not binding upon me, a helpful summary of recent jurisprudence relating to the obligation to give sufficient reasons, including the content of this obligation, is set out in *WCAT-2009-00048*, dated January 8, 2009. I note in particular the following extract from *Baldwin v. Workers' Compensation Appeal Tribunal 2007 BCSC 942*:

[43]...WCAT is required to provide reasons for its decisions, pursuant to s. 253(3) of the [Act]. However, I am unaware of any requirement stating that a tribunal must mention every factor that could possibly influence a decision. In my view, to require endlessly detailed reasons in all situations would ask too much. Reasons must be sufficient to allow the parties involved to understand the decision-maker's reasoning and to provide enough information for an appeal, if one is desired, but should not be held to a standard of perfection.

[104] Turning to the facts of the worker's reconsideration application, the 2005 panel provides specific, although brief, reasoning to explain her conclusion that the worker's L3-4, L4-5, and T7-8 disc problems were not caused by her employment. The 2005 panel referred to the weight of the medical evidence on file and discussed why the opinion of Dr. Lau did not establish the necessary causal relationship.

[105] It is true that the 2005 panel could have provided more detailed reasons; however, that will be the case in virtually every tribunal decision. The standard is not perfection, merely understandability. By referring to the weight of the medical evidence, evidence that the 2005 panel had set out in greater detail earlier in her decision, the 2005 panel provided an intelligible and understandable explanation for her conclusion that the worker's L3-4, L4-5, and T7-8 disc problems were not related to her employment on October 3, 1997.

[106] I am therefore not persuaded that the 2005 panel's reasoning can be said to be inadequate or insufficient for the purposes of complying with the requirements of procedural fairness. This aspect of the worker's submission therefore does not demonstrate any reviewable error in the 2005 WCAT decision.

f. November 28, 2008 Submission: Paragraphs 24 to 28

- [107] The worker disputes the 2005 panel's weighing of the medical evidence in relation to the compensability of the worker's L3-4 and L4-5 disc problems. The worker says the Board physicians' opinions should merit little or no weight and that Dr. Lau's opinions should merit more weight.
- [108] The worker points out that Dr. Lau had the advantage of examining the worker on many occasions. Unlike the Board physicians, Dr. Lau is a specialist and his opinion therefore merits greater weight. The worker also refers to subsection 250(4) of the Act and policy item #97.00 of the Board's *Rehabilitation Services and Claims Manual* in support of her submission.
- [109] The 2005 panel's weighing of the medical evidence is a finding of fact that falls within the WCAT's exclusive jurisdiction under section 254 of the Act. The 2005 panel's finding must therefore be assessed with reference to the patently unreasonable standard of review. I have already described the content of this standard of review earlier in my reasons.
- [110] Simply put, it was open to the 2005 panel to reach the conclusion that the worker complains of. There was evidence on file to support this conclusion. Any argument as to the weight to be assigned to particular medical evidence will generally involve an overly intrusive review, contrary to the significant deference embodied in the patently unreasonable standard of review.
- [111] With respect to the reference to subsection 250(4) of the Act, there is no suggestion in the 2005 WCAT decision that the 2005 panel considered the evidence to be evenly weighted. Subsection 250(4) therefore has no application to the 2005 panel's weighing of the medical evidence.
- [112] Finally, I do not read policy item #97.00 as creating an onus or a "take the initiative" obligation on the 2005 panel to access its discretionary investigative powers before it is entitled to prefer one medical opinion over the other. This is not a case where there was no medical evidence on file. On the contrary, the 2005 panel had the benefit of a wealth of medical evidence on file. I therefore fail to see why the 2005 panel was obliged to seek further medical evidence before reaching the conclusion complained of.
- [113] In light of the high degree of deference due to the 2005 panel's weighing of the medical evidence on file, I am unable to agree that the 2005 panel fell into error in its assessment of this evidence. This aspect of the worker's submission therefore does not demonstrate any reviewable error in the 2005 WCAT decision.

g. November 28, 2008 Submission: Paragraphs 29 and 30

- [114] The worker argues that the 2005 panel rejected Dr. Lau's opinion because the 2005 panel believed the worker's L3-4, L4-5, and T7-8 disc problems were not symptomatic. The worker says the 2005 panel misdirected itself because it should have addressed whether the disc problems were compensable, not whether they were symptomatic.
- [115] I agree that the issue was whether the disc problems were compensable; however, I do not read the 2005 panel decision as misdirecting itself as alleged by the worker.
- [116] The 2005 panel addressed the lack of symptoms at L3-4, L4-5, and T7-8 as a basis for giving limited weight to Dr. Lau's already equivocal opinion that these disc problems might be due to the October 3, 1997 work incident. The 2005 panel was simply pointing out that, as the worker's symptoms were more likely associated with the already compensable L5-S1 disc herniation, the lack of increased symptoms, or any symptoms associated with the other levels of her spine, likely meant that those levels had not been injured at the time of the October 3, 1997 work incident.
- [117] Consequently, the 2005 panel did not wrongly equate the lack of symptoms with a lack of the necessary causation; rather, the 2005 panel referred to this lack of symptoms as one element in its overall reasoning that the L3-4, L4-5, and T7-8 disc problems were not likely compensable. As a result, I fail to see how the 2005 panel misdirected itself in the manner alleged by the worker. This aspect of the worker's submission therefore does not demonstrate any reviewable error in the 2005 WCAT decision.

h. November 28, 2008 Submission: Paragraph 31

- [118] The worker argues that the 2005 panel burdened the worker with an impermissible onus by stating that there was no medical evidence on file to support the proposition that the worker's L3-4, L4-5, and T7-8 disc problems were compensable.
- [119] The worker's argument cannot succeed. The 2005 WCAT decision did not create or rely on an impermissible onus. The 2005 panel simply weighed the evidence on file and found a lack of positive evidence to support the worker's contention.
- [120] In light of the detailed medical evidence on file, this lack of positive medical evidence also did not create an obligation on the 2005 panel to access its discretionary investigative powers in order to develop additional evidence that would support the worker's case.
- [121] In my view, the worker is confusing the role of a worker's advocate with the role of a WCAT vice chair. This aspect of the worker's submission therefore does not demonstrate any reviewable error in the 2005 WCAT decision.

i. November 28, 2008 Submission: Paragraphs 32 to 34

[122] The worker criticizes the following reasoning at page 8 of the 2005 WCAT decision in relation to the compensability of the worker's L3-4, L4-5, and T7-8 disc problems:

I do note that the worker may be undergoing surgery at the L3-4 level in the near future. If this should relieve her symptoms (most of which have been relatively consistent since the start of the claim) it would be compelling new evidence that would justify the Board reviewing such a causal relationship.

[123] The worker says that this reasoning is illogical. I do not agree. I have already discussed why the 2005 panel addressed the lack of symptoms at the L3-4, L4-5, and T7-8 levels as part of her reasoning for why the pathology at those levels was not likely caused by the October 3, 1997 work incident.

[124] In the impugned excerpt, the 2005 panel is simply suggesting that, if the worker's symptoms improved following surgery at the L3-4 level, then such an improvement would suggest that this level was in fact symptomatic and therefore might, with the benefit of hindsight, raise a stronger inference that the pathology at that level was caused by the October 3, 1997 work incident.

[125] I note that the 2005 panel's comments about the Board's ability to "review" the cause of the L3-3 herniation are incorrect. Once the 2007 panel denied compensation for the L3-4 herniation that matter was final and conclusive from the perspective of the Board. Presumably the 2007 panel was referring to the WCAT's ability to reconsider a decision on the new evidence grounds and mistakenly attributed this power to the Board. However, this error is not germane to the issue of causation and I therefore need not discuss it further.

[126] In any event, as already discussed, the standard of review in relation to the 2005 panel's overall conclusion regarding the compensability of the worker's L3-4, L4-5, and T7-8 disc problems is a high one that refers to the conclusions themselves rather than to the reasoning leading to the conclusions. The worker's arguments fall well short of meeting this threshold. This aspect of the worker's submission therefore does not demonstrate any reviewable error in the 2005 WCAT decision.

j. November 28, 2008 Submission: Paragraph 35

[127] The worker says it is "highly relevant" that there are no medical opinions addressing the compensability of the worker's T7-8 disc problem. This is incorrect. A Board medical advisor indicated on November 21, 2001 that the T7-8 pathology identified by an MRI investigation was merely of an incidental nature and was not related to the worker's ongoing complaints.

[128] I consider this evidence sufficient for the 2005 panel to have concluded that the worker's T7-8 disc problem was not causally related to the October 3, 1997 work incident. Again, the 2005 panel's conclusion on this point attracts the greatest degree of deference and I fail to see how the 2005 panel fell into error by accepting and relying on specific medical opinion evidence. This aspect of the worker's submission therefore does not demonstrate any reviewable error in the 2005 WCAT decision.

k. November 28, 2008 Submission: Paragraphs 36 to 41

[129] The worker raises a number of complaints about the 2005 panel's failure to investigate medical issues, including failing to secure an opinion on causation from the radiologist that observed the worker's thoracic disc problems. The worker also complains that the 2005 panel failed to request opinions from Dr. Matishak, Dr. Ong, Dr. Lau, or Dr. McDonald as to the likely cause of the worker's disc problems at L3-4, L4-5, and T7-8. The worker says that the failure to undertake such investigations reflects a "lack of due diligence, a lack of forensic care, and unfairness..." Finally, the worker argues that the panel failed to allow or request Board physicians to attend the oral hearing for cross-examination.

[130] I have already discussed the worker's complaints about the 2005 panel failing to conduct investigations. I would merely repeat that a WCAT panel's investigative authority is discretionary. A WCAT panel is not required to undertake investigations to assist a worker to make his or her case.

[131] The WCAT panel will generally only access its investigative powers when the panel is not satisfied that the evidence on file is sufficient to answer the question at issue. That was not the situation in the 2005 WCAT decision and I do not consider that the 2005 panel was under any obligation to conduct any form of investigation.

[132] I find further support for this conclusion at paragraph 83 of *Schulmeister v. British Columbia (Workers' Compensation Appeal Tribunal)* 2007 BCSC 1589, where Hinkson J. indicated that the WCAT's decision not to access its investigatory powers merits considerable deference and a failure to investigate will only amount to reviewable error if the WCAT failed to investigate "obviously crucial evidence."

[133] Given the extensive medial evidence on file, including opinion evidence, I fail to see how the 2005 panel could be said to have committed any error in failing to undertake the investigations requested by the applicant.

[134] With respect to the issue of cross-examining the Board doctors, this argument is of little merit. At page 17 of *WCAT-2006-03224*, dated August 18, 2006, the Chair of the WCAT addressed at length the right to cross-examine Board physicians. I do not propose to quote the Chair's decision at length; however, I consider that the following passage at page 21 is helpful:

I note Ms. Blake's [*Administrative Law in Canada*, 3rd ed. at page 62] statement that cross-examination is not generally required in proceedings before administrative tribunals that do not operate on an adversarial basis. WCAT hears appeals and applications on the basis of an inquiry model rather than an adversarial process. It is a high-volume tribunal which receives approximately 6,000 new appeals per year. In the course of each appeal, parties receive disclosure of the Board file and are invited to provide new evidence and submissions. A significant number of WCAT decisions are determined on the basis of expert medical reports. If WCAT was required to routinely subpoena the authors of those reports for cross-examination, its decisions would be delayed and its workload would increase. It is possible that some experts would no longer be willing to provide reports for workers' compensation matters and WCAT appeals because of the time required for them to attend oral hearings. I acknowledge that situations may arise in which procedural fairness will require WCAT to subpoena experts for cross-examination by the opposing party to an appeal. However, I do not find that such a circumstance arose in this case.

[135] Although I am not bound to follow the Chair's decision, I agree with and adopt her reasoning with respect to the procedural fairness issue related to the cross-examination of medical experts.

[136] In the circumstances of the 2005 WCAT decision, the worker's counsel was free to adduce evidence contradicting the factual assumptions of the Board medical advisors. Similarly, counsel was free to adduce opinion evidence contradicting the medical opinion of the Board medical advisors. Finally, because the worker received full disclosure of her claim file, the worker's counsel was aware of the case to meet.

[137] Consequently, I see nothing in the circumstances of the 2005 WCAT decision to indicate that a fair hearing required cross-examination of the Board's physicians. This aspect of the worker's submission therefore does not demonstrate any reviewable error in the 2005 WCAT decision.

I. November 28, 2008 Submission: Paragraphs 42 to 48

[138] The worker says that the 2005 panel failed to refer to policy item #14.20 of the *Rehabilitation Services and Claims Manual, Volume II* and *Plamondon* and therefore failed to consider whether the worker's L3-4, L4-5, and T7-8 disc problems could have come on over time. As a result, the 2005 panel wrongly failed to address the argument that the worker's disc problems were the result of cumulative occupational trauma over time.

[139] I have already addressed the cumulative trauma issue. I found that this issue was not properly before the 2005 panel because it had not been considered in the underlying decisions on appeal. I agreed that it would have been convenient had the 2005 panel explicitly mentioned that this issue was not before it; however, I have pointed out that a panel's reasons need not address every minor issue raised by a party, particularly those issues that were not properly within the scope of the appeal.

[140] This aspect of the worker's submission therefore does not demonstrate any reviewable error in the 2005 WCAT decision.

m. November 28, 2008 Submission: Paragraphs 48 and 49

[141] The worker argues that the 2005 panel also failed to consider whether the worker's L3-4 and L4-5 disc problems could have been compensable consequences of her L5-S1 disc herniation. The worker refers me to "vast literature on adjoining segment disability."

[142] As with the cumulative trauma issue, the compensable consequence issue was not properly before the 2005 panel because the decision letter under appeal (i.e., the F appeal) was limited to the question of whether the worker's L3-4 and L4-5 disc problems were caused by the work incident of October 3, 1997.

[143] The worker was raising for the first time before the 2005 panel the new and different question of whether the L3-4 and L4-5 disc pathology might instead be caused by the L5-S1 disc injury and its sequelae.

[144] Because I do not consider that the compensable consequence issue was properly before the 2005 panel, it was not necessary for the 2005 panel to explicitly address this issue in its reasons.

[145] As already mentioned, for the sake of completeness, it might have been preferable for the 2005 panel to have briefly mentioned that it did not intend to address the compensable consequence issue because it was outside the scope of the appeal; however, the 2005 panel's failure to provide perfect reasons cannot detract from my conclusion that the 2005 panel's reasons were nevertheless adequate. This aspect of the worker's submission therefore does not demonstrate any reviewable error in the 2005 WCAT decision.

n. November 28, 2008 Submission: Paragraph 49

[146] The worker complains that, in light of the medical complexity associated with the compensable consequences issue this was another reason why the 2005 panel should have accessed its investigatory powers to inquire into the likely causal link, if any, between the L5-S1 disc herniation and the adjoining disc problems at L3-4 and L4-5.

[147] I have already found above that this issue was not properly within the scope of the 2005 WCAT decision. It need hardly be said that a WCAT vice chair is under no obligation to investigate issues that fall outside the scope of the appeal. In any event, I also fail to see how the investigation in question could be considered as “obviously crucial” given the significant volume of medical evidence and opinion evidence already on file regarding the worker’s pathology at L3-4 and L4-5.

[148] For these reasons, I disagree that the 2005 panel was required to access its discretionary investigative powers in relation to the compensable consequences issue. This aspect of the worker’s submission, therefore, does not demonstrate any reviewable error in the 2005 WCAT decision.

o. November 28, 2008 Submission: Paragraphs 50 and 51

[149] The worker’s final argument is that the 2005 panel failed to take into account the definition of “accident” in section 1 of the Act, as well as subsection 5(4) of the Act. The worker says that these sections create a presumption of compensability for injuries such as the L3-4, L4-5, and T7-8 disc problems that arise by “accident.”

[150] Because the worker suffered an accident on October 3, 1997, it is said that the presumption of compensability applies to her L3-4, L4-5, and T7-8 disc problems and that the 2005 panel’s failure to address this presumption reflects inadequate reasons or a failure to take into account relevant statutory factors.

[151] The worker’s argument misconstrues subsection 5(4) of the Act. This subsection is not engaged simply by the presence of an “accident.” As a threshold matter, the presumption of compensability arises only where the injury in question is caused by the work accident in question. If this threshold issue is satisfied, then the presumption of compensability may arise.

[152] However, in the 2005 WCAT decision, the 2005 panel clearly concluded that the October 3, 1997 work accident did not cause the worker’s L3-4, L4-5 and T7-8 disc problems. It follows that the presumption was not relevant because the condition precedent for its operation had not been satisfied.

[153] In the absence of a causal relationship between the accident and the worker’s L3-4, L4-5, and T7-8 disc pathology, the presumption in subsection 5(4) was simply irrelevant and the 2005 panel cannot be said to have committed an error by not referring to an irrelevant statutory provision. This aspect of the worker’s submission therefore does not demonstrate any reviewable error in the 2005 WCAT decision.

[154] In summary, I conclude that the 2005 WCAT decision does not demonstrate the degree of error necessary to allow the worker’s reconsideration application. I therefore deny the worker’s application for reconsideration of the 2005 WCAT decision on common law

grounds. The 2005 WCAT decision remains final and conclusive pursuant to section 255 of the Act.

3. *The Worker's Reconsideration Arguments – The 2007 WCAT Decision*

[155] The worker has filed an August 31, 2007 judicial review of the 2007 WCAT decision. The worker refers me to her judicial review petition, as well as setting out further arguments at paragraphs 52 to 103 of her November 28, 2008 submission.

[156] For the reasons set out below, I find that the 2007 panel breached the requirements of natural justice in the context of its analysis of the worker's entitlement to a loss of earnings pension. This part of the 2007 WCAT decision must be voided and reheard.

[157] Many of the worker's arguments were directed at the loss of earnings issue and are therefore now moot in light of my voiding of this aspect of the 2007 WCAT decision; however, because the worker's submissions also impugn other aspects of the 2007 WCAT decision, I will consider those submissions to the extent that they are unrelated to the loss of earnings issue.

[158] I will first set out my reasons in relation to the breach of procedural fairness. I will then address those of the worker's remaining arguments that impugn aspects of the 2007 WCAT decision other than the loss of earnings issue.

a. *Breach of Procedural Fairness – Dr. Matishak's July 5, 2007 Opinion*

[159] At the May 31, 2007 oral hearing, counsel advised the 2007 panel that it had sought an opinion from Dr. Matishak, a neurologist, about the worker's degree of disability and employability. Counsel advised that he "hoped" Dr. Matishak would complete the opinion within a couple of weeks and requested that the 2007 panel delay issuing the 2007 WCAT decision until after receiving and considering Dr. Matishak's opinion.

[160] At approximately the 33-minute mark of track 2, CD 2 of the oral hearing, the 2007 panel confirmed that she would wait for Dr. Matishak's opinion. The 2007 panel notified counsel that the 2007 WCAT decision was due on July 23, 2007; however, that this deadline could be extended if necessary.

[161] I have been unable to locate in the documentary evidence, or after listening to the recording of the hearing, any indication that the 2007 panel set a deadline for receipt of Dr. Matishak's opinion.

[162] Counsel wrote to Dr. Matishak on June 1, 2007, repeating his request for a medical opinion and indicating his understanding that the 2007 panel had agreed to give the worker "some time" to file Dr. Matishak's opinion. Counsel repeated that he hoped Dr. Matishak could complete his opinion by mid-June 2007; however, counsel noted

that the 2007 WCAT decision was not “due” until July 23, 2007. Counsel’s June 1, 2007 letter was copied to the 2007 panel.

- [163] Counsel wrote to the WCAT Registry on June 4, 2007. Counsel confirmed that he hoped for Dr. Matishak’s opinion to be ready by mid-June 2007 and noted the 2007 panel’s statement that the 2007 WCAT decision was due on July 23, 2007, but that this date could be extended.
- [164] In a letter dated July 6, 2007, the WCAT Registry wrote to the worker’s counsel and confirmed that the worker’s counsel had estimated Dr. Matishak’s opinion would be received by the middle of June; however, nothing had been received as of July 6, 2007. The July 6, 2007 letter therefore advised the worker’s counsel that the 2007 WCAT decision would be completed that day. The July 6, 2007 letter appears to have been mailed to the worker’s counsel, but not faxed.
- [165] According to the worker’s statement of July 12, 2007, Dr. Matishak completed his opinion on July 5, 2007, and delivered the letter, by hand, to the worker. The worker immediately mailed the opinion letter to her counsel. The worker’s counsel advises that he received Dr. Matishak’s opinion on July 9, 2007, and faxed this document to the WCAT the same day. The WCAT Registry date stamp confirms that counsel’s fax was received on July 9, 2007.
- [166] In my view, the unusual circumstances set out above created a legitimate expectation on the part of the worker that Dr. Matishak’s opinion would be accepted by the 2007 panel after the hearing.
- [167] Unfortunately, the 2007 panel does not appear to have limited the worker’s expectations in this regard, other than possibly by referring to July 23, 2007, as the date by which the Act required the 2007 panel to complete the worker’s appeal. However, even then, the 2007 panel suggested that this date was flexible and could be extended if necessary.
- [168] Similarly, the worker’s counsel wrote two letters shortly after the May 31, 2007 oral hearing from which it was evident that counsel did not understand there to be any particular deadline for Dr. Matishak to complete his opinion.
- [169] I note counsel’s comments that he was hopeful of a response by mid-June 2007. It might be that these comments were interpreted by the 2007 panel as a commitment from counsel and that the 2007 panel therefore need not wait for Dr. Matishak’s opinion after mid-June 2007.
- [170] However, in all the circumstances, I am unable to find that counsel’s “hope” of a mid-June response from Dr. Matishak can be equated with a commitment to a firm deadline. In my view, the 2007 panel’s comments at the oral hearing and her silence in

response to counsel's June 1, 2007, and June 4, 2007 letters can only be reasonably interpreted as agreeing to a deadline on or near July 23, 2007, at the earliest.

[171] I am satisfied that the 2007 panel's actions in accepting counsel's request to file post-hearing evidence therefore created a legitimate expectation on the worker's part that the 2007 panel would accept Dr. Matishak's evidence, at least until July 23, 2007.

[172] I emphasize that a WCAT panel is not generally obliged to accept post-hearing evidence. The parties to an appeal are expected to bring their best evidence and put forward their best case at the appeal. The appeal process is not an ongoing dialogue once a hearing is completed and any conclusion to the contrary would seriously undermine the important goals of timeliness and efficiency that are fundamental to a high-volume administrative tribunal such as the WCAT.

[173] However, despite my conclusion that, as a general matter, a WCAT panel is normally under no obligation to accept post-hearing evidence, an exception may arise where, as here, a WCAT panel creates a legitimate expectation that post-hearing evidence will be accepted.

[174] In other words, a legitimate expectation arising from a WCAT panel's advice about a procedural matter may create a procedural fairness obligation that is not otherwise present. Indeed, at pages 22 and 23 of her text, Blake states:

If a tribunal has promised that it will consult certain persons before a decision is made, those persons have a legitimate expectation that they will be consulted, even if there is no statutory or other right to be consulted in the circumstances. A legitimate expectation may arise from either an express undertaking to consult a particular party or a past practice or consultation.

[175] Prior WCAT decisions also suggest that a legitimate expectation may arise as a result of a WCAT panel's conduct and that such legitimate expectations may necessitate increased or additional procedural steps than would otherwise normally be required. In this regard, I note *WCAT-2006-03626*, dated September 22, 2006; and *WCAT-2006-03530*, dated September 12, 2006.

[176] I must therefore find that the 2007 panel breached the requirements of procedural fairness by failing to accept Dr. Matishak's opinion into evidence, or at least clearly establishing and communicating (with a suitable opportunity for the worker to respond) a deadline after which the opinion would not be accepted and the decision would be issued.

[177] Finally, I am satisfied that Dr. Matishak's July 5, 2007 opinion was sufficiently material and relevant to the loss of earnings issue under appeal before the 2007 panel that it

cannot be said that the breach of procedural fairness was of such a trifling, technical nature that the 2007 panel's conclusion in relation to the loss of earnings issue should nevertheless stand.²

[178] In summary, I find that the circumstances surrounding Dr. Matishak's July 5, 2007 opinion demonstrate a breach of procedural fairness. This breach of procedural fairness relates only to the loss of earnings issue and the 2007 WCAT decision is therefore only voided with respect to that issue.

[179] I see no need to address the worker's remaining arguments relating to the loss of earnings pension issue because those arguments are now effectively moot. I will instead address the worker's remaining submissions to the extent that those submissions impugn the 2007 decision on issues other than the loss of earnings pension issue.

[180] I see nothing of relevance in the November 28, 2008 submission that materially adds to the judicial review petition. I will therefore confine the remainder of my reasons to addressing the arguments in the judicial review petition that are unrelated to the loss of earnings issue. Where I omit reference to a paragraph of the worker's judicial review petition this means that I consider that paragraph to relate to the loss of earnings issue and therefore to be moot.

b. The August 31, 2007 Petition: Paragraphs b, l, and y

[181] The worker argues that the 2007 panel took "an unnecessarily narrow jurisdictional view" contrary to the common law rules of statutory interpretation of social welfare legislation and contrary to subsection 250(2) of the Act.

[182] In this regard, the 2007 panel stated at page 4 of her reasons:

In oral and written submissions, the worker's representative asked me to increase the worker's functional pension, change her wage rate, award interest on the pension, change the effective date on the pension award to the date of injury, and find that the problems at T8 and L3 to L5 were caused by her injury or by her occupation.

I can do none of these things. All of the pension issues, save the loss of earnings and chronic pain matters, have been decided by another panel. This decision was not reconsidered and although the worker has filed an

² A breach of procedural fairness may be so trifling and technical that the Courts will not quash the offending decision: see *Westfair Foods Ltd. v. United Food and Commercial Workers' Union, Local 401* 2007 ABCA 167; and *Compass Group Canada (Health Services) Ltd. v. Hospital Employees' Union* 2007 BCCA 237.

application for judicial review of that decision, this was done two years ago. Until that decision is changed, it is binding on all decision makers, including me.

[183] The 2007 panel pointed out that the 2005 WCAT decision had already reached final decisions in relation to the issues described in the first paragraph of the excerpt set out above. In light of section 255 of the Act, the 2007 panel was correct to conclude that it was therefore precluded from addressing those issues.

[184] In my view, the 2007 panel's conclusion involved little or no scope for "statutory interpretation" and to the extent such interpretation was possible, the 2007 panel reached the correct conclusion regarding her jurisdiction.

[185] The worker's counsel does not explain how subsection 250(2) of the Act is relevant to his jurisdictional argument. I assume, without the benefit of direction from counsel, that the reference to subsection 250(2) relates to the requirement that the WCAT consider the "merits and justice of the case." This general provision cannot overcome the clear and specific wording of section 255 of the Act, which states that decisions of the WCAT are final and conclusive.

[186] I therefore do not consider that subsection 250(2) of the Act assists the worker in her argument that the 2007 panel erred in limiting her jurisdiction to the loss of earnings and chronic pain issues. This aspect of the worker's submission therefore does not demonstrate any reviewable error in the 2007 WCAT decision.

c. The August 31, 2007 Petition: Paragraph g

[187] The worker complains that the 2007 panel failed to address the question of whether the worker suffered from epidural fibrosis as a consequence of the October 3, 1997 work incident and L5-S1 disc herniation. I addressed a similar argument earlier in my reasons in relation to the 2005 decision. The epidural fibrosis issue was not properly before the 2007 panel because the issue had not been addressed in the Board and Review Division decisions underlying the 2007 WCAT decision.

[188] Because the issue of the worker's epidural fibrosis was not properly before the 2007 panel, it follows that the 2007 panel cannot have erred by failing to address Board policy or medical literature that might be relevant to the adjudication of that issue. This aspect of the worker's submission therefore does not demonstrate any reviewable error in the 2007 WCAT decision.

d. The August 31, 2007 Petition: Paragraph k

- [189] The worker submits that the 2007 panel erred by failing to find that the worker was 100% disabled, despite a Federal agency and a Provincial agency considering the worker to be 100% disabled.
- [190] It is not clear to me whether this argument is intended to relate to the quantum of the worker's functional permanent disability award; however, assuming that it does, the argument is of no value. It matters not whether another agency considers the worker to be disabled.
- [191] Indeed, the WCAT cannot delegate to other agencies its obligation to resolve appeals under the Act and applicable policies. Whether the result of a WCAT decision is consistent or not with the decision of other agencies is simply irrelevant. This aspect of the worker's submission therefore does not demonstrate any reviewable error in the 2007 WCAT decision.

e. The August 31, 2007 Petition: Paragraph m

- [192] With respect to her permanent disability award for chronic pain, the worker says that the 2007 panel erred in limiting her award to a PFI rating of 2.5%. The worker argues that nothing in the Act requires such a result and that the mandatory 2.5% rating represents an unlawful fettering of discretion, particularly in light of subsection 250(2) of the Act requiring that each appeal be resolved with regard to the merits and justice of the case. This argument cannot succeed.
- [193] In my view, the 2007 panel was correct to conclude that it was bound to apply the Board's policy on chronic pain, a policy that mandated a PFI rating of 2.5%. The only option open to the 2007 panel was to either apply the policy or to engage in a section 251 referral to the Chair on the ground that the policy was patently unreasonable.
- [194] In *WCAT-2005-06524*, dated December 7, 2005, the Chair specifically considered the fettering of discretion issue in relation to the chronic pain policy and concluded that the policy was not patently unreasonable. Consequently, it would have been pointless for the 2007 panel to engage in the section 251 process.
- [195] This means that the 2007 panel had no reasonable course available to her other than confirming the 2.5% PFI rating for the worker's chronic pain. The 2007 panel correctly reached exactly this conclusion. This aspect of the worker's submission therefore does not demonstrate any reviewable error in the 2007 WCAT decision.

f. The August 31, 2007 Petition: Paragraph n

[196] At page 5 of the 2007 WCAT decision, the 2007 panel noted that the policy in relation to chronic pain was amended effective January 1, 2003. This amended policy is stated to apply to all “initial adjudications” of chronic pain.

[197] The 2007 panel pointed out that the Board had not initially adjudicated the chronic pain issue until after January 1, 2003, and that the amended policy therefore applied to the worker’s circumstances. The 2007 panel stated, again at page 5:

The phrase “initial adjudication” has been widely interpreted by the [WCAT] to mean the first adjudication with respect to the development of chronic pain as a consequence of the compensable injury.

[198] The worker complains that the 2007 panel did not refer to any WCAT or Court decisions supporting her assertion that the phrase in question had been “widely interpreted.”

[199] In my view, the 2007 panel was not required to do so. The 2007 panel was correct in its statement and indeed, I consider this assertion to be so uncontroversial as to not require any further explanation, or indeed any analysis at all.

[200] The worker argues in the alternative that the 2007 panel ignored the statement in subsection 250(1) of the Act that WCAT panels are not required to follow precedent. By following the interpretation of other WCAT decisions when she was not required to do so, the worker states that the 2007 panel fell into error.

[201] I do not interpret the 2007 WCAT decision as reflecting a mistaken belief that the 2007 panel was required to follow precedent. On the contrary, it is implicit in the 2007 panel’s reasons that she simply agreed with and endorsed the common understanding developed over the course of time in the workers’ compensation system as to the application of the amended chronic pain policy.

[202] Given the entirely uncontroversial nature of the application of the amended chronic pain policy, I am unable to accept the worker’s argument that the 2007 panel fell into error in her assessment of the application of the chronic pain policy and this aspect of the worker’s submission therefore does not demonstrate any reviewable error in the 2007 WCAT decision.

g. The August 31, 2007 Petition: Paragraph x

[203] The worker argues that the 2007 panel failed to find that the Board had committed an abuse of process due to its delay in adjudicating various aspects of her claim. It is not clear to me what remedy the worker expected to gain from the 2007 panel in relation to this allegation. Similarly, as the reconsideration panel, I fail to see the relevance of this argument in the context of the current reconsideration application. This aspect of the worker's submission therefore does not demonstrate any reviewable error in the 2007 WCAT decision.

h. The August 31, 2007 Petition: Paragraph bb

[204] Counsel argues that the 2007 panel erred in not reimbursing the worker's expenses. The awarding of expenses is a discretionary matter pursuant to the *Workers Compensation Act Appeal Regulation*. The MRPP provides guidance to vice chairs in exercising this discretion. The 2007 panel referred to the MRPP and noted as a general proposition that expenses generally follow the event.

[205] In the absence of any persuasive argument from the worker to depart from this general guidance in the MRPP, and because the worker had not succeeded in her appeal, the 2007 panel therefore concluded that the worker was not entitled to reimbursement of expenses.

[206] The 2007 panel's conclusion on this point was, as already noted, a discretionary matter. Paragraph 58(2)(a) of the ATA states that a discretionary decision must not be interfered with unless it is patently unreasonable. Subsection 58(3) of the ATA gives content to the phrase "patently unreasonable" in the context of discretionary decisions.

[207] With this standard of review in mind, I fail to see how the 2007 panel's decision reveals any reviewable error. The 2007 panel considered the relevant factor of the worker's lack of success on her appeal. The 2007 panel pointed out that there were no other reasons advanced by the worker why she should depart from the general position in the MRPP that expenses followed the event. The 2007 panel therefore properly recognized that the MRPP merely provides guidance and is not binding.

[208] Consequently, the 2007 panel cannot be said to have improperly fettered its discretion, exercised this discretion arbitrarily, in bad faith, or for an improper purpose. Similarly, the 2007 panel did not base its decision on irrelevant factors or fail to take statutory requirements into account.

[209] Simply put, this means that the 2007 panel's exercise of discretion in relation to expenses does not reveal the degree of error required by the ATA. This aspect of the worker's submission therefore does not demonstrate any reviewable error in the 2007 WCAT decision.

[210] The worker has not raised any other relevant arguments in relation to the 2007 WCAT decision. I need not address the worker's "new evidence" reconsideration application because that application is now moot in light of my earlier conclusion that the 2007 panel's failure to accept Dr. Matishak's July 5, 2007 opinion breached the requirements of procedural fairness.

[211] As a result, I allow in part the worker's reconsideration application of the 2007 WCAT decision on the common law grounds of breach of procedural fairness. I find that the 2007 WCAT decision is void in relation to the issue of the worker's entitlement to a loss of earnings pension. In all other respects, I find that the 2007 WCAT decision remains final and conclusive pursuant to section 255 of the Act.

Conclusion

[212] The worker's application for reconsideration of the 2005 WCAT decision is denied.

[213] The worker's application for reconsideration of the 2007 WCAT decision is allowed in part on the common law grounds. Accordingly, I set aside the 2007 WCAT decision in relation to the issue of the worker's entitlement to a loss of earnings pension. The remainder of the 2007 WCAT decision continues to be final and binding pursuant to section 255 of the Act.

[214] The WCAT Registry will contact the worker regarding the further handling of her appeal of the loss of earnings issue.

[215] The worker requested reimbursement for the expense of providing Dr. Matishak's July 5, 2008 opinion. I have already referenced section 7 of the *Workers Compensation Act Appeal Regulation* and the MRPP as relevant to this request.

[216] Item #13.23 of the MRPP states that the WCAT will normally reimburse the expense of obtaining written evidence where the evidence is useful or it was reasonable for the party to have sought such evidence. The WCAT will generally limit the amount of reimbursement for medical evidence to the rates or tariff established by the Board for this purpose.

[217] I am satisfied that it was reasonable for the worker to have provided the medical evidence in question. Although the evidence in question might also be capable of reimbursement at the rehearing of the worker's loss of earnings pension appeal, this evidence was also relevant to the worker's reconsideration application of the 2007 WCAT decision.

[218] I therefore order the Board to reimburse the worker for the \$150 expense of Dr. Matishak's July 5, 2008 opinion. No other expenses were requested or apparent and I therefore make no order for the reimbursement of expenses other than the one noted above.

Warren Hoole
Vice Chair

WH/jd/gl