This decision was the subject of a BC Supreme Court decision. See 2012 BCSC 1820.

Under MRPP item #19.2.11, this decision has been summarized to enable public access in a manner that protects the privacy of the parties to the proceedings.

**WCAT Decision Number**: WCAT-2010-02235 (Summary)
**WCAT Decision Date:** August 18, 2010
**Panel:** Randy Lane, Vice Chair
Nora Jackson, Vice Chair
Guy Riecken, Vice Chair

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A three-person WCAT panel, appointed under subsection 238(5) of the *Workers Compensation Act* (Act), denied the worker's appeal of a decision by a review officer with the Review Division of the Workers' Compensation Board, operating as WorkSafeBC (Board). The review officer determined that the worker did not suffer mercury poisoning as a result of exposure to mercury as part of the worker's employment.

The worker was one of six workers whose claims for mercury poisoning were considered at the same time by WCAT. At the four-day initial stage of the oral hearing, the panel heard testimony from the six workers, a janitor, a former co-worker, a professional engineer/certified industrial hygienist/industrial ventilation engineer retained by the workers, and the employer's transportation and safety supervisor. The panel also visited the workers' workplace. At the four-day second stage of the oral hearing the panel heard testimony from a physician retained by the workers, a physician retained by the employer, and a Board medical consultant. At that second-stage oral hearing the panel also received oral submissions.

The workers contended they were exposed to mercury as a result of spills of elemental mercury in a workplace served by a ventilation system that was ineffective in removing mercury vapour. They linked various symptoms reported by them to mercury exposure.

The panel found the workers were exposed to mercury. It accepted their exposure was greater than the background level of mercury to which all inhabitants of Canada are exposed. The panel had concerns, however, regarding the accuracy of testimony as to the estimated volume of mercury spilled in the workplace over a number of years, the accuracy of figures estimating the amount of mercury released into the workplace over a number of years, and the reliability of the opinion of the engineer retained by the workers, including his estimates of the amount of mercury vapour to which the workers had been exposed. The concerns included the reliability of such matters as memories of amounts of mercury spilled or lost years earlier, estimates as to the amount of mercury in certain objects, estimates as to the amount of mercury released when such objects were broken, and estimates as to the effectiveness of clean-up efforts. The

panel did not accept that the workers had been exposed to the level of mercury stated by the engineer.

The panel noted that the interaction between subsection 6(3) of the Act and Schedule B of the Act is such that if a worker's disease is listed in the first column of Schedule B and, at or immediately before the date of the disablement, the worker was employed in a process or industry mentioned in the second column of Schedule B, the disease is deemed to have been due to the nature of that employment, unless the contrary is proved. The panel observed that the first column of Schedule B of the Act contains item #1(b): "Poisoning by…Mercury." The second column of Schedule B provides, "Where there is an exposure to mercury or mercury compounds."

The panel did not consider that the terms "process" and "industry" in the second column of Schedule B somehow mean that Schedule B and subsection 6(3) are inapplicable to a worker's claim for mercury poisoning if exposure to mercury or its compounds is not typical of the industry in which that worker works or is not inherent to employment in that industry. It did not consider that a reasonable interpretation of the terms "process" and "industry" involved such a narrow interpretation. Such an interpretation would unduly narrow the application of Schedule B and subsection 6(3). It would mean that, for the purposes of Schedule B and subsection 6(3), it would not matter that a worker actually used mercury in the course of his or her employment. The panel considered it is the actual exposure that matters rather than some categorization of the nature of the industry.

Owing to the terms of the entry for mercury poisoning in the second column of the Schedule B, the panel found it was not necessary to engage in an analysis of such words as "prolonged" and "excessive." The panel observed it was difficult to separate a diagnosis of mercury poisoning from an evaluation of whether a worker has been exposed to mercury. Evidence that establishes a person has symptoms consistent with mercury poisoning would be insufficient to support a finding that person has mercury poisoning, if the evidence also establishes the person has had no exposure to mercury. If there has been no exposure to mercury, the symptoms cannot be the result of mercury poisoning.

The panel observed that the initial issue of whether a worker has mercury poisoning is not divorced from an evaluation of whether the worker has been exposed to mercury. Insufficient evidence of exposure to mercury means it is quite likely the presence of symptoms consistent with mercury poisoning fails to establish the existence of mercury poisoning. If a worker has had exposure to mercury, and it is accepted he or she suffers mercury poisoning, it is still necessary to consider whether the terms of the second column of Schedule B have been satisfied. It is true that a conclusion a worker has mercury poisoning involves a further conclusion that he or she had mercury exposure, which makes it likely a decision-maker will find the terms of the second column of Schedule B have been met. The panel noted that a determination



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that the worker has mercury poisoning incorporates a finding that the worker has had exposure to mercury.

As part of determining whether workers had mercury poisoning, the panel considered the "Case Definitions for Chemical Poisoning" published by United States Centers for Disease Control and Prevention. It was not persuaded by the opinion of the physician who testified on behalf of the workers that the case definition set out the diagnostic criteria for mercury poisoning.

The panel considered the arguments of the workers that diagnostic certitude must only be established at the level of 50%. Their submissions were to the effect that, in the workers' compensation system, the evidence concerning a diagnosis must only satisfy the language of subsection 250(4) of the Act, which provides that WCAT must resolve the issue in a manner that favours the worker where evidence supporting different findings is evenly weighted. The panel noted the testimony of two of the medical experts to the effect that, as clinicians, they would not make a diagnosis unless they were certain. Their level of diagnostic certitude was higher than 50%.

The panel found that using subsection 250(4) in the manner urged by the workers could put decision-makers at significant odds with matters of medicine. As an example, using subsection 250(4) in the manner urged by the workers could result in a decision-maker finding that a worker has cancer even though no physician would likely make such a diagnosis.

The panel found that adjudication of matters of diagnosis does not require it to ignore levels of certitude that clinicians bring to such assessments. The panel stated that its task was not to inject subsection 250(4) into matters of diagnosis in such a fashion that it would attach little significance to whether, as a matter of medicine, a physician would find that a worker had a particular condition or disease.

The panel found that its task included critically evaluating medical evidence in the manner in which it evaluated all forms of evidence and ascertaining whether evidence is evenly weighted. But, that assessment of whether evidence is evenly weighted with respect to diagnosis does not involve applying subsection 250(4) in the manner submitted by the workers. The panel found that the issue before it was whether evidence was evenly weighted that the workers have mercury poisoning as that diagnosis is made by physicians. Subsection 250(4) does apply in some fashion to matters of diagnosis, but not in the manner urged by the workers.

The panel found that the evidence was insufficient to establish that the workers suffered from mercury poisoning. As a result, the terms of subsection 6(3) and Schedule B of the Act were not met and subsection 6(3) of the Act was inapplicable. The panel's finding that the workers did not have mercury poisoning meant it did not need to consider subsection 6(1) of the Act. It found that the workers did not have an occupational disease due to the nature of their employment.