**DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL**

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| **WCAT Decision Number**: | A2401305 |
| **WCAT Decision Date:** | September 2, 2025 |
| **Panel:** | C.J. Katramadakis |

## Introduction

[1] This is a referral to the chair of the Workers' Compensation Appeal Tribunal (WCAT) under section 304(2) of the *Workers Compensation Act* (Act).

[2] Section 304 of the Act states, in part:

> 304 (1) The appeal tribunal may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by this Act and the regulations under this Act.
>
> (2) If, in an appeal, the appeal tribunal considers that a policy of the board of directors should not be applied, that issue must be referred to the chair and the appeal proceedings must be suspended until the chair makes a determination under subsection (4) or the board of directors makes a determination under subsection (6), as the case may be.[1]

## Issue(s)

[3] Is the January 1, 2024 amended policy item C6-41.00 of the *Rehabilitation Services and Claim Manual II* (RSCM II), and so patently unreasonable that it is not capable of being supported by the Act and *Workers Compensation Amendment Act, 2020 (*Amendment Act)?

## Background

[4] The worker was employed as a licensed practical nurse for 30 years prior to her workplace injury on December 18, 2007. The Workers' Compensation Board[2] (Board) initially accepted the claim for a low back strain and right knee injury.

[1] All quotations are reproduced as originally written, except where noted.
[2] Operating as WorkSafeBC



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[5] The worker attempted on several occasions to return to work on a graduated basis, but she was unsuccessful. In January 2009, she underwent right knee surgery. Further attempts to return to work also failed as she was unable to progress in her duties and hours.

[6] By decision dated March 2, 2010, the Board concluded the worker's entitlement to wage-loss benefits effective February 28, 2010. The Board found that the worker's low back strain had resolved but it accepted iliotibial band syndrome as a compensable consequence of the right knee injury. The Board also accepted a right knee flexion contracture injury with compensable arthroscopic debridement surgery in January 2009 as a permanent condition. Because of this permanent condition, the Board found that the worker had been left with limitations that prevented her from returning to her pre-injury job as a nurse. She was referred to both the Board's Vocational Rehabilitation Services and Long Term Disability Services (formerly Disability Awards) Departments.

[7] The worker requested a review of the Board's March 2, 2010 decision, which was confirmed on review by the Review Division. An appeal to WCAT followed and in decision *WCAT-2011-01041*, a panel confirmed that the worker's low back strain had resolved, and her right knee condition had plateaued by February 28, 2010 but she had remained temporarily partially disabled by her iliotibial band syndrome until at least June 10, 2010.

[8] The Board implemented the WCAT decision by paying a further period of temporary wage-loss benefits up to June 10, 2020. In the same decision, the Board also said that the worker's iliotibial band syndrome had resolved by this date.

[9] By decision dated October 21, 2010, the Board granted the worker permanent disability benefits equal to 6.25% of total disability on a loss of function basis for her right knee injury. The decision also informed the worker that her benefits would be paid until age 65, which was the standard retirement age.

[10] The worker had participated in vocational rehabilitation including, attending job shadow opportunities for a community nursing position; however, she eventually discontinued the vocational rehabilitation process due to reported ongoing right leg symptoms. By decision dated October 18, 2011, the Board denied the worker a loss of earnings assessment based on its findings that her accepted limitations did not preclude returning to work in community nursing. The worker requested a review of this decision, which was confirmed by the Review Division on May 29, 2012. The worker did not appeal to WCAT.

[11] In June 2023, the Board reached out to the worker following amendments to section 201 of the Act related to the determination of retirement dates. The worker sought an extension of her retirement date to age 72.



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[12] In its decision letter dated November 2, 2023, the Board confirmed that the worker's retirement age would remain at 65 (or December 15, 2023). The Board officer focused on the worker's post-injury circumstances stating, in part:

> I place significant weight on the fact that you have not worked following your injury as, although your absence from employment is not voluntary, one cannot retire at a later date if they are not employed. I acknowledge your plan to return to work following knee surgery but find the plan to be speculative as there is no surgery scheduled and you advised that the wait list is very long. There is also uncertainty regarding your capability of a durable return to work beyond the age of 65 following such a significant absence. Whilst I acknowledge your intentions and financial motivations, these are not outweighed by the evidence related to your lack of attachment to employment for the past 13 years.

[13] In *Review Reference #R0314687* dated May 24, 2024, the Review Division applied the amended policy C6-41.00 and confirmed the underlying Board decision that found the worker had planned to retire at age 65, but this plan changed after she was injured at work. The Review Division stated that the worker's inability to return to work was due to her compensable injury but her resulting financial need to extend her retirement date was due to post-injury circumstances and therefore not relevant to determining when she would have retired if the injury had not occurred.

[14] It is the worker's position that her circumstances demonstrate the impact of her compensable injury on her retirement plans and the financial need to extend her retirement date to age 72.

[15] She stated she had always loved her job as a nurse, having worked in that capacity for almost 30 years and she had intended to continue working in that capacity until her retirement at age 65, and after maximizing her pension.

[16] At the time of her work injury in 2007, she was a single parent and the sole income earner for herself and to two teenaged children. Her eldest child has special needs and a seizure disorder. Prior to turning 65, her only sources of income were her long-term disability benefits through her employer's private insurer and her CPP disability benefits (the Board had paid her a lump sum for permanent disability benefits totaling $23,089.99). She stated these amounts were insufficient to cover the living expenses for her family, including her mortgage payments. To manage, the worker stated she resorted to using a line of credit and credit cards to cover expenses that would normally have been covered with her employment income. She also remortgaged her home several times to lower the monthly payments and withdraw from her retirement investment account to help make ends meet.



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[17] The worker submitted that there is no dispute her inability to return to work and her resulting financial need to extend her retirement date are "post-injury circumstances that happened only because of the injury" and that, following the amendments to policy item C6-41.00 of the RSCM II that came into effect January 1, 2024, such post-injury circumstances are not relevant to determining when the worker would have retired if the injury had not occurred.

[18] The worker is represented in her appeal by her union.

[19] The employer is not participating in the appeal, although invited to do so.

**Legal Framework**

[20] Section 36 of the Amendment Act states:

> A determination may be made under section 201(3) of the *Workers Compensation Act*, as added by section 18 of this Act, whether or not a determination has been made under section 201(1) of that Act before the date section 18 of this Act comes into force [January 1, 2021].

[21] Section 201 of the Act provides:

> 201(1) Subject to subsection (2), periodic payment of compensation under this Division may be paid to an injured worker only as follows:
>
> (a) if the worker is under 63 years of age on the date of injury, until the later of the following:
>
> (i) the date the worker reaches 65 years of age;
>
> (ii) if the Board is satisfied the worker would retire after reaching 65 years of age, the date the worker would retire, as determined by the Board;
>
> (b) if the worker is 63 years of age or older on the date of injury, until the later of the following:
>
> (i) 2 years after the date of the injury;
>
> (ii) if the Board is satisfied that the worker would retire after the date referred to in subparagraph (i), the date the worker would retire, as determined by the Board.



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> (2) As a restriction on subsection (1), the Board may not make a periodic payment to a worker under this Division if the worker ceases to have the disability for which the periodic payment is to be made.
>
> (3) A determination made under subsection (1)(a)(ii) as to a date on which a worker would retire after reaching age 65 may be made after a worker has reached age 63, and the Board may, when making the determination, consider the worker's circumstances at the time of that determination.

[22] Prior to the Review Division's decision being issued, the Board's board of directors approved amendments to policy item C6-41.00 of the RSCM II - *Duration of Permanent Disability Periodic Payments*. The amended policy applies to all decisions made on or after January 1, 2024, including appellate decisions.

[23] Policy item C6-41.00 of the RSCM II provides that the determination of a worker's retirement date is made once, unless section 36 of the Amendment Act applies. The policy reads:

> Under section 36, another determination may be made after the worker has reached age 63 if:
>
> - the worker was under 63 years of age on the date of injury,
> - a previous determination was made under section 201(1) before January 1, 2021, and
> - the worker has not reached the date of retirement as previously determined by the Board.

[24] Policy item C6-41.00 also provides that, as age 65 is the established retirement date under the Act, if a worker is under age 63 on the date of injury, to continue to pay permanent disability benefits after the age of 65, the evidence must support a finding that the worker would work past age 65. Evidence is also required so that the Board can establish the worker's retirement date for the purposes of concluding permanent disability benefits payments. The policy provides a list of examples of the kinds of evidence that the Board may consider.

[25] The amended policy further provides, in part:

> The issue for the Board to determine is whether it is "at least as likely as not" that the worker would have retired after age 65 if the injury had not occurred. The Board considers the worker's statement of intention to retire after age 65, but must determine whether it is "at least as likely as not" that the worker would have retired later than age 65. The Board may consider pre- and post-injury evidence to establish the date the worker would retire.

> **However, post-injury circumstances that happened only because of the injury are not relevant to determining when the worker would have retired if the injury had not occurred.** Post-injury circumstances are relevant if they would have occurred even if the worker had not been injured.
>
> [emphasis added]

[26] It is this highlighted portion of policy item C6-41.00 that the worker submits is so patently unreasonable that it is not capable of being supported by this Act and the regulations under this Act.

**Analysis**

[27] The meaning of "patently unreasonable" for the purpose of section 304 of the Act has been discussed in several decisions of a former WCAT chair. In essence, where a policy is not supported by a rational interpretation of the Act, then it will be found to be patently unreasonable[3].

[28] I note at the outset that I do not suggest the entirety of policy C6-41.00 is patently unreasonable. I find, rather, that the policy is patently unreasonably to the extent that there is no discretion to consider post-injury circumstances other than those that would have occurred even in the absence of the work injury.

A. Interpreting Policy Item C6-41.00

[29] Interpretation of statutes in Canada has long been governed by a "purposive" approach which requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[4] Similarly, the *Interpretation Act* requires that every enactment "must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".[5]

[30] The previous rules for determining retirement age required that the worker demonstrate they had a pre-injury intention to work beyond age 65. This proved to be somewhat problematic particularly for younger workers who generally would not have any firm plans, although they may have expected to work beyond age 65. Similarly, workers who were late to the workforce or

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[3] See, for example, W*est Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal),* 2018 SCC 22 at paragraphs 28 and 32 and *Glover v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2007 BCSC 1878 at paragraph 56.

[4] Elmer Driedger, *Construction of Statutes* (2nd ed. 1983) cited in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27 at para. 21.

[5] *Interpretation Act*, RSBC 1986, c. 238, s. 8.



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otherwise in precarious financial situations may have assumed they would keep working indefinitely but not have the types of verifiable evidence of that intention required by the Board. Then there were the workers whose retirement plans were changed as a result of their injury and could not rely on their post-injury circumstances as evidence that they would continue working beyond age 65.

[31] These post-injury circumstances were considered in a number of analyses of how to approach making changes to the Act and policy. First, in a March 31, 2018 report prepared for the Board's board of directors, *Restoring the Balance – A Worker-Centred Approach to Workers' Compensation Policy*, Paul Petrie stated at page 51 that the former policy "precludes consideration of the possible impact of the injury and resulting permanent disability on the worker's retirement options." Mr. Petrie considered that the intent of the Act was to estimate the impairment of a worker's earning capacity from the nature and degree of the injury and provide compensation for the loss of earnings resulting from that impairment. He wrote:

> The impact of the injury and the resulting disability on earning capacity is at the heart of section 23 of the Act. It is difficult to see how the impact of the injury on the worker's retirement age is not a relevant consideration in determining the worker's date of retirement.

[32] Mr. Petrie cited as an example, a worker whose ability to pay off their mortgage and retire at age 65 might be impaired "as a direct result of the injury." He recommended the board of directors consider amending the policy to allow consideration of "all relevant evidence regarding the actual impact of the injury on the worker's likely retirement date, including relevant evidence after the date of injury."

[33] In an October 30, 2019 report prepared for the Minister of Labour entitled, *New Directions: Report of the WCB Review 2019,* author Janet Patterson seconded this recommendation. Ms. Patterson wrote at page 217:

> It is also clear that injury changes everything. A compensable injury may reduce earnings and contributions to retirement benefits and not at all compensate for pension contributions or other ancillary benefits. Retirement plans get altered due to compensable injuries for other reasons as well. The Review heard from several workers that had intended to retire but were unable to because of the financial hardship due to the effects of a compensable injury. This included having to sell assets or losing equity in property or running up credit card debt, with interest, during "gaps" in benefits.
>
> Compensation benefits are intended to compensate for the lost earning capacity resulting from the injury. The earning capacity is not fixed at the date of the injury. …



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[34] The Amendment Act altered the rules relating to the determination of a worker's retirement age under section 201 of the Act. Section 18 of the Amendment Act set out the following revision to section 201 by adding the following subsection:

> (3) A determination made under subsection (1)(a)(ii) as to a date on which a worker would retire after reaching age 65 may be made after a worker has reached age 63, **and the Board may, when making the determination, consider the worker's circumstances at the time of that determination.**
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> [emphasis added]

[35] When section 201(3) of the Act was debated in the legislature, Minister Bains was asked to explain a scenario where it would apply. He stated:

> Member, the situation could be that a worker is 25 and is awarded a [permanent partial disability] award, and the decision of his or her retirement is made at that time. It's very difficult for a worker to convince anybody what would be their age of retirement. It's difficult to explain that they would be retiring at age 65 or 80, 85.
>
> I think that's why those who are injured at age 63 get to make a decision at that time. They are in a better position to decide, based on the job that they're doing, the satisfaction they have at a job, their personal needs at that particular time, why they need to continue to work, their own health. I think all of those different scenarios are taken into consideration when the final decision is made.
>
> So that's why. This will put some fairness into the system that, rather than age 25, that person will now be able to, in real terms, talk about their real retirement age, which could be age 65 or could be past 65. But it will be a better decision, made closer to that retirement age.[6]

[36] Subsequently, the board of directors approved policy changes to reflect the amendments to the Act. Policy item C6-41.00 replaced former policy #41.00 effective January 1, 2021 to allow the Board to consider pre- and post-injury evidence when establishing the date a worker would retire.

[37] Section 319 of the Act provides that the board of directors of the Board must set and revise as necessary its policies, including policies regarding compensation.

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[6] British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 41st Parl, 5th Sess, Committee of the Whole, No 2 (31 July 2020) at 19-20 (Hon H Bains). Accessed online: https://www.leg.bc.ca/hansardcontent/Debates/41st5th/20200731pm-CommitteeWhole-n2.pdf.



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[38] Section 303(2) of the Act provides that WCAT must make its decision based on the merits and justice of the case, but in doing this it must apply any policies of the board of directors that are applicable in that case.

[39] Considering the contextual evidence from the commissioned reports and their recommendations, as well as the Hansard transcript of the legislative debate, the addition of subsection (3) to section 201 of the Act to allow for the consideration of the worker's circumstances closer to the time of retirement was so that permanent disability benefits could better reflect the actual loss of earning capacity suffered by a worker due to their compensable injury. This is consistent with the purposive approach to statutory interpretation and the requirements of the *Interpretation Act*.

B. The Significance of the Policy Change to Workers

[40] The policy change to C6-41.00 of the RSCM II effective January 1, 2024 appears inconsistent with the intention and purpose of the legislation, as it puts a limitation on the impact of a worker's compensable injury on their retirement date which has the potential effect of disadvantaging some of the most serious injured workers.

[41] This problem had been considered in a number of WCAT decisions prior to the policy change. *WCAT Decision A2200207*, for example, involved a worker who was over the age of 63 when injured and the panel found that only their pre-injury intentions were relevant. However, the panel nonetheless provided some comments on how consideration of a worker's compensable post-injury circumstances would apply, describing a potential paradox at paragraph 60:

> … One could, for example, find that an injured worker is so disabled that they need to work longer to retire. Consequently, they would be entitled to an extension of the duration of their permanent disability benefits. But on almost the same evidence, one could find that the injured worker is so disabled that they cannot work beyond the standard retirement date. Consequently and conversely (and arguably, perversely), the worker would be disentitled to any extension of the duration of their permanent disability benefits. The paradox is that, the more severely injured that worker happens to be, the more likely their permanent disability benefits will be reduced/restricted.

[42] The panel concluded at paragraph 71 that, if they were to consider the worker's compensable post-injury circumstances, they would not do so in a "manner that is deleterious to his benefits."



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[43] Other WCAT decisions, such as *WCAT Decision A2102599* and *WCAT Decision A2200704,* have similarly relied upon the reasoning in *WCAT Decision A2200207* to conclude that applying section 201(3) in a manner which limits a worker's benefits due to the effects of their compensable injury is inconsistent with the purpose of the provision and the overall approach of the Act.

[44] It appears the rationale for the policy change was to correct those situations where a worker's inability to work due to their compensable injury would not be considered in a manner that was deleterious to their benefits. However, the policy change takes away the Board's ability to consider the direct impact of the worker's injury on their post-injury circumstances, including for those workers with post-injury deteriorations, including worsening conditions due to compensable consequences, catastrophic treatment side-effects of the injury, and a reopening due to a significant change in the compensable condition.

[45] These circumstances demonstrate the significance to workers who, due to the impact of their compensable injury, have a financial need to work beyond the age of 65 but are unable to rely solely on those circumstances to seek an extension to their retirement age. This appears inconsistent with the overall objectives of the Act—to consider the impact of the injury and the resulting disability on earning capacity. Therefore, the impact of a work injury is central to the consideration of a worker's date of retirement.

C. Fettering of Discretion

[46] The definition of fettering of discretion was considered in *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198. At page 136, JA Evans cited the following passage from the text titled *Administrative Law in Canada* (Flood and Sossin, 2013):

> Fettering occurs when a guideline or policy, because of its language or practical effect, is in effect mandatory or binding on a decision-maker, or treated as such, thus taking away the discretion that has been granted on him/her.

[47] A former chair in *WCAT-2005-06524* discussed fettering of discretion at some length. This decision concerned a referral to the chair under the former section 251 of the Act. The former chair stated in her analysis that in her view "there are circumstances in which the creation of a fixed and inflexible rule through policy would clearly constitute a patently unreasonable application of a provision of the Act."

[48] The chair relied on the reasoning of the Yukon Territory Supreme Court in *Yukon (Workers' Compensation Appeal Tribunal) v. Yukon (Workers' Compensation Health and Safety Board)*, 2005 YKSC 5 (*Yukon*), which considered whether the members of the Workers' Compensation Health and Safety Board had fettered their discretion in establishing a policy.



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[49] Quoting from the court's decision, the chair's decision reads:

> [55] The classic definition of the fettering of discretion can be found in *H.E.U. Local 180 v. Peace Arch District Hospital* (1989), 35 B.C.L.R. (2d) 64 (B.C.C.A.) where the Court quoted S.A. de Smith, *Judicial Review Administrative Action*, 4th ed. at page 311 as follows:
>
> > A tribunal entrusted with a discretion must not, by the adoption of a fixed rule of policy, disable itself from exercising its discretion in individual cases. Thus, a tribunal which has power to award costs fails to exercise its discretion judicially if it fixes specific amounts to be applied indiscriminately to all cases before it; but its statutory discretion may be wide enough to justify the adoption of a rule not to award any costs save in exceptional circumstances, as distinct from a rule never to award any costs at all.
>
> [56] It is my view that the concept of fettering one's discretion is a common law principle that could apply to the board or an appeal committee. Under this Act however, the concept of fettering has a much reduced scope or application. The board is empowered to make policy and the policy is binding upon the appeal committee. In circumstances where there was no statutory authority to make binding policy, it would be appropriate to argue that an administrative policy could result in fettering the discretion of a board or tribunal. The concept of fettering, in my view, cannot apply to the policy itself which is mandated by legislation so long as it is within the objectives of the *Act* or "the margin of manoeuvre contemplated by the legislature". See *Re Lewis and Superintendent of Motor Vehicles for British Columbia*[7] at page 528.
>
> [57] I do not rule out the application of fettering to a board or appeal committee decision but simply state that the board policy itself cannot be a fetter by virtue of its statutory mandate.
>
> [58] In light of this judgment and the board of directors' statutory authority to establish binding policies, a question arises regarding the extent to which the common law principles regarding fettering of discretion are applicable to their policy-making function. Assuming these common law principles continue to apply, the related question that arises is whether a policy that fetters discretion generally would be patently unreasonable under the Act for the purposes of section 251. The court in Yukon appears to accept that the board of directors could establish a policy that is a fixed and inflexible rule that exhausts the

[7] [1980] B.C.J. No. 1433

> discretion granted by the Act, provided the policy is "within the objectives of the Act or 'the margin of maneouver contemplated by the legislature'".

[50] It appeared to the chair that the court in *Yukon* accepted that the board of directors could establish policy that has a fixed and inflexible rule that exhausts the discretion granted by the Act so long as the policy "is within the objectives of the Act or 'margin of maneouver contemplated by the legislature'".

[51] The former chair's analysis is directly relevant to this case. Accordingly, I rely on it in coming to my findings and adopt her reasoning as it relates to the concept of fixed and inflexible rules within the objectives of the legislative intent.

[52] For the following reasons, I am unable to conclude that the established policy is within the objectives of the Act or "margin of maneouver contemplated by the legislature". There is no discussion in the legislative debates of how section 201(3) of the Act would apply to the circumstances of workers I have listed above. It cannot be the intent of the legislature that the amended policy is meant to disenfranchise those workers who suffer the most significant financial harm as a result of their injuries by precluding an extension of their retirement age because "post-injury circumstances that happened only because of the injury are not relevant to determining whether the worker would have retired if the injury had not occurred." Section 201(3) gives a discretion to consider a worker's post-injury circumstances without any express constraint on the cause of those circumstances, but the amended policy effectively constrains (or fetters) that discretion by excluding from consideration circumstances that happened only because of the injury.

[53] Accordingly, I conclude that the statement in policy C6-41.00 that "**post-injury circumstances that happened only because of the injury are not relevant to determining when the worker would have retired if the injury had not occurred**"[8] and are only relevant if they would have occurred even if the worker had not been injured, fetters the Board's discretion found in section 201(3) of the Act. This fettering of the Board's discretion has particular significance on severely injured workers and those who are in receipt of 100% loss of earnings. It may also have the unintended consequence of marginalizing those injured workers whose claims are subsequently reopened for a significant change in the permanent conditions or who have subsequent conditions accepted as compensable consequences of the original injuries after the retirement date for permanent disability benefits has been determined.

[8] Emphasis added



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[54] While not raised by the worker, it strikes me that this statement may also raise a jurisdictional question of whether the board of directors of the Board can, through policy, determine what evidence is or is not relevant in a specific case and particularly, in relation to WCAT appeals. Section 298(1) of the Act gives WCAT authority to receive and accept any information it considers relevant, necessary and appropriate. Additionally, section 303 of the Act gives WCAT the power to consider all questions of fact and law arising in an appeal. To the extent the relevance of information is a question of law, WCAT has the authority to consider it; however, policy item C6-41.00 purports to usurp that authority.

**Conclusion**

[55] I find policy item C6-41.00 with respect to the portion that reads "**post-injury circumstances that happened only because of the injury are not relevant to determining when the worker would have retired if the injury had not occurred. Post-injury circumstances are relevant if they would have occurred even if the worker had not been injured**" is patently unreasonable to the extent that it has the effect of fettering the discretion found in section 201(3) of the Act.

[56] I consider that this portion of policy item C6-41.00 should not be applied to the current appeal and in accordance with subsection 304(2) of the Act, I refer to the chair of WCAT for further consideration. In accordance with item 8.4.3 of the WCAT *Manual of Rules of Practice and Procedure* the appeal is now suspended. The process for WCAT's actions, notifications, and further submissions is set out at item 10.1 of the *Manual of Rules of Practice and Procedure*.

C.J. Katramadakis
Vice Chair



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