Noteworthy Decision Summary

Decision: WCAT-2004-03646 **Panel**: Herb Morton **Decision Date:** July 8, 2004

Interpreting "must apply" in section 250(2) of the Workers Compensation Act – If a policy contains the words "normally or "usually", it is intended to be applied as a guideline from which a departure may be considered in exceptional circumstances, rather than a rigid rule - If a policy is stated as a set of rigid rules, rather than guidelines, a WCAT panel must either apply those rules or initiate a referral under section 251 of the Act

The worker submitted a medical certificate within the time period for appealing to the Medical Review Panel, but was advised that, pursuant to section 58(5) of the *Workers' Compensation Act* (Act) and policy item #103.40 of the *Rehabilitation Services and Claims Manual* (RSCM), he could submit another certificate within another 90 days. The worker's submission of additional enabling certificates was late and as a consequence his request for examination was rejected. The worker appealed. An issue raised was whether WCAT is bound by the policy item #103.40 of the RSCM with respect to permissible time frames for exercising the discretion under section 58(5) of the Act.

Policy-makers have a range of options in formulating policies, which may have different effect. Some policies are worded as a set of rigid rules; others contain words such as "normally" or "usually" to indicate that they are guidelines which are not intended to be rigidly applied. It would be incongruous to assert that WCAT was bound by policy which is itself phrased as a guideline. If a policy contains the words "normally or "usually", this signals it is intended to be applied as a guideline, while leaving room for consideration of the particular circumstances of individual cases. The wording "must apply" in section 250(2) of the Act would seem to leave room for this type of flexibility, while at the same time admitting of a strict application of policies stated as a rigid criteria. This interpretation may account for the use of the phrase "must apply" in section 250(2), rather than the words "bound by" as used in section 250(1) and section 250(3). This wording appears to leave room for the policy-makers to consider the promulgation of different types of policies for different situations. Thus, where the policy is stated as a guideline, in applying the policy WCAT would treat it as a guideline, and where the policy is stated as a rigid rule, WCAT would treat it as a rigid rule. In the panel's view, this interpretation provides a reasonable explanation for the legislature's choice of the phrase "must apply" in section 250(2), when the stated intent of the legislation provided by the Minister was that policy was to be binding on WCAT. There are illustrations of situations in court decisions where it has been found that a worker's compensation appeal tribunal may treat a policy as binding (i.e. without involving an unlawful fettering), and where the appeal tribunal erred in treating the policy as binding where a proper application of the policy required consideration of the circumstances of the individual case. Having regard to the analysis in the Winter Report, the statements of the Minister in *Hansard* concerning the intended purposes of Bill 63, the deletion of the policy at #96.10 concerning the application of policy as guidelines, the wording of s. 250, the analysis by Sara Blake in her text *Administrative Law in Canada*, and the court cases, the panel considered that to the extent an applicable policy is stated as constituting a set of rules rather than guidelines, a WCAT panel must either apply those rules or initiate a referral under section 251 if the panel considers the policy so patently unreasonable that it is not capable of being supported by the Act and its regulations. The panel read policy item #103.40 as setting out rules rather than a general guideline from which a departure may be considered in exceptional circumstances, and found that it applied in this case, accordingly it was not necessary to

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consider whether a departure from that policy was warranted based on the circumstances of this case.

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WCAT Decision Number: WCAT-2004-03646
WCAT Decision Date: July 08, 2004
Panel: Herb Morton, Vice Chair

Introduction

The worker appeals the February 10, 2004 Review Division decision (*Review Decision #7328*). The review officer confirmed the June 18, 2003 decision by a medical appeals officer, to deny the worker's request for examination by a Medical Review Panel (MRP). The medical appeals officer rejected the worker's request on the basis that the additional enabling certificates submitted by the worker's physicians in May 2003, were out of time.

The worker is seeking examination by a MRP, in connection with the September 30, 2002 Appeal Division decision (#2002-2521) to deny his claim for compensation. The Appeal Division panel did not accept that the worker suffered a compensable low back injury at work on December 6, 2000 or January 2, 2001.

The worker requests an oral hearing, for the purpose of explaining himself and his injuries and answering any questions from the panel. The worker was advised that this appeal would be considered on the basis of written submissions. I find that the issue raised in this appeal can be properly addressed on the basis of written evidence and submissions without an oral hearing.

The employer completed a notice of participation, but has not provided a submission. As no additional submission was provided by the worker, the appeal is being considered on the basis of his notice of appeal and the other documentation on file in accordance with item #10.10(h) of WCAT's *Manual of Rules, Practices and Procedures* (MRPP).

Issue(s)

The worker's appeal raises a question as to whether WCAT is bound by the policy of the board of directors with respect to the permissible time frames for exercising the discretion under section 58(5) of the *Workers Compensation Act* (Act).

The general question raised by the worker's appeal is whether he has met the requirements for requesting examination by a MRP in relation to the September 30, 2002 Appeal Division decision, based on additional enabling certificates submitted by the worker's physicians in May 2003. Alternatively, were these certificates provided too late to be considered under section 58(3) or (5) of the Act?

Jurisdiction

This is an appeal by way of rehearing. WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1) of the Act). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors that is applicable (section 250(2) of the Act).

Background

The worker's requests for examination by a MRP were denied by a medical appeals officer (MAO) in three separate decisions (dealing with different enabling certificates which attempted to furnish sufficient particulars to define a bona fide medical dispute):

MAO Decision letter	Date of Physician's Enabling Certificate	Physician's name
December 10, 2002	November 5, 2002	Dr. Wells
March 26, 2003	February 20, 2003	Dr. Maunsell
June 18, 2003	May 20, 2003 May 26, 2003	Dr. Wells Dr. Maunsell

The December 10, 2002 decision by the MAO granted the worker until March 20, 2003 to submit a second certificate, for consideration under section 58(5) of the Act.

The worker's request for review by the Review Division was dated August 18, 2003. That request concerned the June 18, 2003 decision by the MAO. Accordingly, the prior decisions of December 10, 2002, and March 26, 2003 are not before me in this appeal. The central issue in this appeal is whether the May 2003 certificates can be considered in support of the worker's request for examination by a MRP.

Under section 58(3) of the Act, a worker's request for examination by a MRP, and enabling certificate from a physician, must be provided to the Board within 90 days of the medical decision giving rise to the appeal. There is no discretion for extending the time to appeal. However, the Board had a discretion under section 58(5) of the Act to refer a worker for examination by a MRP.

Policy concerning MRP appeals is contained in an Appendix to item C13-103.00 of the *Rehabilitation Services and Claims Manual*, *Volume I* (RSCM I). Policy at #103.40, RSCM I, provides:

> Sections 58(3) and 58(4) require that both the appellant's application and a valid physician's certificate must be received within ninety days of the medical decision being appealed. The *Act* does not specifically permit the

Medical Review Panel or the Board to extend the ninety day period for receipt of the documents. However, section 58(5) of the *Act* does not place any time limit on the Board to bring a matter before a Medical Review Panel. The Board is prepared in some situations to use its powers under section 58(5) to ensure that procedural difficulties related to the commencement of a Medical Review Panel by workers or employers do not preclude access to the Medical Review Panel process for purely technical reasons. The Board's policy is that the Medical Review Panel Registrar will exercise the Board's authority under section 58(5) to have the worker examined by a Medical Review Panel where an appeal does not meet the strict requirements of sections 58(3) and 58(4) but there has been substantial compliance with the requirements. The policy is that substantial compliance occurs when:

(a) one document is received within the ninety day period allowed by sections 58(3) and 58(4) and the other, usually the physician's certificate, within ninety days of the expiry of that period; or

(b) after a decision has been made within the initial ninety day period that the physician's certificate does not contain a bona fide medical dispute, a valid certificate is received within the balance of the initial period or within a period of ninety days from the end of the initial period; or

(c) after a decision has been made following the initial ninety days that the physician's certificate does not contain a bona fide medical dispute, a valid certificate is received within ninety days of the date of that decision.

Subsections 58(3) to (5) of the Act were repealed effective November 30, 2002 (section 7 of the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), brought into force by regulation (*Order in Council No. 1038*, November 28, 2002). However, section 36 of the transitional provisions set out in Part 2 of Bill 63 provided:

Medical review panel proceedings
36 (1) All proceedings pending under sections 58 (3) to (5) and 63 (1) of the Act on the repeal date are to be continued and completed.

(2) The rights and obligations of the parties to a proceeding referred to in this section must be determined in accordance with the law as it was on the date

(a) the party requested an examination under section 58 (3) or (4) or a determination under section 63 (1), or

(b) the board decided that a worker must be examined under section 58 (5),

as the case may be.

(3) If, before the repeal date,

(a) a person has not exercised a right under section 58 (3) or (4) of the Act, and

(b) the time period within which that right must be exercised would not have expired but for the repeal of that right on the repeal date,

that person may exercise that right before the time period referred to in paragraph (b) has expired.

Analysis

I find, first of all, that the worker's request for examination by a MRP was eligible for consideration under subsections 58(3) and (5) after November 30, 2002, notwithstanding the November 30, 2002 repeal of these provisions. I find that this was a proceeding pending under sections 58(3) to (5) on the repeal date, as contemplated by section 36(1) and (2) of the transitional provisions contained in Part 2 of Bill 63.

The December 10, 2002 decision by the MAO advised the worker that his appeal documents were received on November 13, 2002, within the 90 day time period for appealing the September 30, 2002 Appeal Division decision. The worker was advised in the December 10, 2002 decision that under section 58(5) and the Board's policy, he could submit a further medical certificate but that any further certificate must be received "within 90 days from the date of this letter or no later than March 20, 2003."

The worker provided a second medical certificate on February 24, 2003. That certificate was rejected by decision dated March 26, 2003. No additional time was granted for filing another certificate (beyond the March 20, 2003 deadline). The consideration of the further certificate dated February 20, 2003, within an additional 90 days of the December 10, 2002 decision, was in accordance with the policy set out at #103.40 of the RSCM I. No additional period was granted beyond March 20, 2003 for consideration of a third enabling certificate.

However, the worker's physicians furnished two additional certificates dated May 20 and May 26, 2003. These were received on May 30, 2003, approximately, eight months after the September 30, 2002 Appeal Division decision. By letter dated May 27, 2003, the worker explained that the delay in providing these certificates was due to circumstances beyond his control (his lack of money, and the fact his doctors did not know or understand what was required by the Board).

The review officer concluded that paragraphs (a), (b) and (c) of #103.40 RSCM I are alternatives, and only one can apply in any case. The review officer found that the additional time granted under section 58(5) for submitting a medical certificate concluded when the second certificate was provided in February 2003.

The British Columbia Court of Appeal has upheld the Board's use of its discretion under section 58(5) to prevent a request for examination by a MRP from failing solely by reason of a technical defect (see *Caputo* v. *WCB (BC)*, (1987) 13 BCLR (2d) 145, 38 DLR (4th) 458). In *Caputo*, the British Columbia Court of Appeal reasoned:

> In my opinion, the "plenary and independent power" granted to the Board in s. 58(5) was a very necessary power to enable the Board to grant relief in respect of technical defects in applications made pursuant to ss. 58(3) and 58(4).
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> I do not agree that the effect of the interpretation placed by the Board on s. 58(5) was to amend the Act. In my opinion, it would not be open to the Board in the exercise of its discretion under s. 58(5) to appoint a medical review panel, solely for the purpose of avoiding substantial compliance with the procedural requirements of ss. 58(3) and 58(4). For example, if a worker or an employer attempted to appeal after more than a year had elapsed, it would not be open to the Board to have the worker examined by a medical review panel solely for the purpose of relieving the worker or the employer from substantial compliance with the mandatory requirements of ss. 58(3) and 58(4). So to do would be to render ss. 58(3) and 58(4) meaningless and, in effect, to amend the statute. That is not what the Board has done in this case. The Board has acted under s. 58(5) by referring the matter to a medical review panel in order to prevent an appeal failing by reason of a technical defect in the procedure followed by the employer. Thus the Board has not flouted the legislative mandate contained in s. 58(4) but has used the remedial powers granted under s. 58(5) so as to avoid an appearance of injustice which might now from a rigid and overly technical approach.

The policy at #103.40 provides direction concerning the exercise of the Board's discretion under section 58(5) of the Act, to prevent requests for examination by a MRP from failing due to technical defects while at the same time respecting the legislative intent in establishing a 90 day time frame for a worker or employer to initiate a request for examination by a MRP. The worker received the benefit of the additional 90 days permitted under section 58(5) of the Act, and the policy at #103.40, in connection with the consideration provided to the second enabling certificate (addressed in the March 26, 2003 decision).

I have questioned whether the policy at #103.40 should be viewed as a general guideline, which would permit the exercise of the section 58(5) statutory discretion in

exceptional circumstances which might warrant a departure from the policy. Section 250 of the Act provides:

> **250** (1) The appeal tribunal may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent.
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> (2) The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.
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> (3) The appeal tribunal is bound by a decision of a panel appointed under section 238 (6) unless
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> (a) the specific circumstances of the matter under appeal are clearly distinguishable from the circumstances addressed in the panel's decision, or
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> (b) subsequent to the panel's decision, a policy of the board of directors relied upon in the panel's decision was repealed, replaced or revised.
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> (4) If the appeal tribunal is hearing an appeal respecting the compensation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the appeal tribunal must resolve that issue in a manner that favours the worker.

Section 251 of the Act concerns the application of policies of the board of directors. It provides (in part):

> **Application of policies of board of directors**
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> **251** (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 the Act and its regulations.
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> (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.

There is a possible ambiguity in these provisions. The requirement that WCAT apply the policies of the board of directors might be read as meaning that WCAT cannot question the lawfulness of policy except by invoking the process and standard set out in section 251. However, that does not necessarily provide direction as to what it means to apply the policies. Would it suffice to accept (subject to a referral under section 251)

the policy as lawful, and then to apply the policy as a general guideline admitting of exceptions (bearing in mind the common law requirement that a tribunal not fetter a discretion conferred by statute)? Alternatively, has the statute overridden the common law by requiring that policy be applied as establishing the parameters for the exercise of the statutory discretion?

In *Skyline Roofing Ltd.* v. *Alberta (Workers' Compensation Board*), [2001] 10 W.W.R. 651, (2001) 34 Admin. L.R. (3d) 289, July 23, 2001, the Alberta Court of Queen's Bench reasoned at paragraph 83:

> The particular issue here is whether a statutory policy can narrow or foreclose or "fetter" a discretion conferred by the statute. If the statute creates a discretionary power, can the policy specify some or all of the circumstances in which the discretion must be exercised in a particular type of case? As has been seen, an informal policy cannot fetter a discretion granted by statute. Does the fettering rule apply to policies authorized by statute? A policy could potentially operate in a number of ways:
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> (a) The policy could be a fixed and inflexible rule that applies in every case. The policy exhausts the discretion.
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> (b) The policy creates a presumption, but each Applicant could argue why the policy should not apply in a particular case.
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> (c) The policy could be a summary and weighing of factual and discretionary factors that apply in most cases, but in each particular case the decision-maker must decide if the policy should be applied, an exception should be made, or the policy should be modified.
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> (d) The policy could be considered along with all other relevant factors, but it should not be given special weight in individual cases.

In the text *Administrative Law in Canada*, 3rd ed. (Ontario: Butterworths, 2001) at page 92, Sara Blake states:

> . . . care must be taken so that guidelines formulated to structure the use of discretion do not crystallize into binding and conclusive rules. If discretion is too tightly circumscribed by guidelines, the flexibility and judgment that are an integral part of discretion may be lost. A balance must be struck between ensuring uniformity and allowing flexibility in the exercise of discretion. The tribunal cannot fetter its discretion by treating

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> the guidelines as binding rules and refuse to consider other valid and relevant criteria. "The discretion is given by statute and the formulation and adoption of general policy guidelines cannot confine it". In the circumstances of each individual case, the tribunal should consider whether the policy may be fairly applied. . .

Blake further notes at page 93:

> However, if a statute requires the application of policies or directives established by the Minister or by another tribunal, then they must be applied. However, the decision maker retains discretion to consider whether the policy applies in the circumstances of the case before it.

The March 3, 2003 revisions to the Act contained in Bill 63 followed on, and incorporated in large measure, the recommendations contained in the March 11, 2002 *Core Services Review of the Workers' Compensation Board* (the Winter Report, accessible at: http://www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf). Caution must be exercised in using the core reviewer's report as a basis for interpreting the legislative changes brought into force by Bill 63. Not all the recommendations contained in the Winter Report were adopted by the legislature. Where, however, a new statutory provision mirrors a recommendation provided in the Winter Report, it may assist in understanding the background to the legislative changes. The Winter Report reasoned, at pages 87-88:

> **D. Are the Published Policies of the Board of Directors "Binding"?**
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> The existing policy of the WCB, as found in Section #96.10 of the Claims Manual, would suggest that decision-makers are not "bound" by published policy when adjudicating individual claims. The following is stated on pages 12-19 and 12-20 of the Claims Manual:
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> > In the adjudication of individual claims, the Board is not "bound" by either internal policy directives or by external authorities in the field of compensation, at least not in the sense of the word "bound" as understood at common law. However, in issuing internal directives, the Board gives general indications of how it will act when certain circumstances come before it. When these circumstances arise, the applicable directive will normally be followed. It is recognized that there is an infinite variety of circumstances that can arise and that it is not possible to lay down in advance policies to finally determine every conceivable situation. Furthermore, there is the obligation on the Board to decide each case in accordance with its merits and justice and the right of individual persons affected under the rules of

> natural justice to present argument and evidence on their own behalf. Therefore, regard must always be had to the particular circumstances of each claim to determine whether an existing policy should be applied or whether there are grounds for a change in or departure from a policy. There will also be situations arising from time to time which are not covered by existing policy.
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> Board officers making decisions on claims are generally required to follow Board policies which are applicable to a claim before them. If they feel that a change in, or departure from a policy would be desirable, or they can find no applicable policy, they may refer the matter, with the approval of their Manager, to the Director of their department or the Director's delegate.

In my opinion, the above excerpt is confusing with respect to whether or not published policy should be considered as "binding". On the one hand, the opening sentence states that the WCB is not "bound" by its internal policy directives when adjudicating individual claims. On the other hand, the opening sentence to the second paragraph specifies that WCB Officers making decisions on claims are generally required to follow WCB policies which are applicable to a claim before them.

A similar confusion is contained in the *Act* itself. Section 99 provides that the WCB is not bound to follow legal precedent, and its decision must be given according to the merits and justice of the case. This provision leaves the impression that decision-makers are not bound to follow WCB policies when determining the "merits and justice of the case".

On the other hand, one of the grounds of appeal specified in Sections 96(4), 96(6) and 96(6.1) is "a contravention of published policy of the governors". If decision-makers were not "bound" to apply the WCB's published policies, why would the contravention of such a policy justify an appeal being brought to the Appeal Division?

In my opinion, all decision-makers within the workers' compensation system in BC must consider and apply the published policies of the Board of Directors which are applicable to the determination of the matter before them. Otherwise, why have such policies in the first place? The impediment to achieving this objective would appear to be the requirement in Section 99 of the *Act* that the decision of the WCB "must be given according to the merits and justice of the case". Accordingly, it is my recommendation Section 99 be revised to clearly specify that all decision-makers within the WCB must, when determining the merits and justice of

> the case, consider and apply the published policies of the Board of Directors which are applicable to the matter before them.

The Winter Report recommended statutory amendment to require that the appeal tribunal "consider and apply" policy of the board of directors. The Winter Report appears to have used the word "apply" in the sense of being binding upon the decision-maker, as evidenced by the analysis concerning whether decision-makers are "bound" by published policy when adjudicating individual claims.

Statutory changes to the Act were contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). At the time Bill 63 was introduced in the legislature for First Reading, the Minister of Skills Development and Labour, Graham Bruce, summarized the key purposes of the changes. This included the following comments concerning the new external appeal tribunal (*Hansard*, 3rd Session, 37th Parliament, October 10, 2002, page 3864:

> It will also establish a new appeal tribunal independent of the Workers Compensation Board. This tribunal serves as the final level of appeal for workers and employers on the majority of workers compensation matters. It will make WCB policy, as set by the board of directors, binding on the workers compensation system.

At the Second Reading of Bill 63, the Minister further explained (*Hansard*, October 22, 2002, pages 3935-3943):

> This legislation puts an emphasis on improving the consistency of decision-making throughout the system by making Workers Compensation Board policy binding across all levels of the system. That means no matter where you are in the process, you can be assured that consistent criteria are being used in making a decision. This will restore the integrity of the system and build confidence among its users.
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> . . .
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> Workers compensation appeals are complex by nature, and we want to ensure that quality and efficiency are assured through an appeal body that is external to WCB and at arm's length from government. While it will be independent of the WCB, the appeal tribunal will be bound by board policy. That provision ensures that each person responsible for making decisions — whether on the WCB front line, in the internal review group or in the appeal tribunal — is making those decisions based on the same set of rules. Consistency of decision-making across all levels reinforces the quality assurance that we aim to build into the system.

> In addition, the tribunal will be able to set certain decisions as precedents, thus reinforcing consistency.
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> . . .
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> By just fair justice there needs to be an external appeal by a body that has no ties to the WCB system. Then at that point, that body — as is the internal review, as are those when they make the decisions in the first instance — is bound by the policies of the board. There is consistency in fairness in how decisions are rendered to people who have found themselves injured or to others in the employers' instance who have found themselves in front of a situation that requires an appeal to the board.

During the Committee Stage of Bill 63, the Minister provided additional explanation concerning the manner in which the policies of the board of directors would be applied by WCAT (*Hansard*, October 28, 2002, pages 4113 to 4121, and October 29, 2002, pages 4123 to 4129):

> In each of the instances of review, be it the internal review or the appeal tribunal, both will be required to report back to the board if there seem to be inconsistencies. We want consistency of decision-making taking place here. They are required to adhere to the policy of the board. They can't make decisions outside the policy of the board, but if they're finding that, in fact, there are changes that the board needs to re-address not on the individual case but in respect to the policy, they can send that back to the board and require the board to look at it. The board, in the end, makes that final decision relative to policy. There is still the ability for medical evidence to be heard and the appropriate use of medical people, but the decision is binding and final when one gets to the Workers Compensation Appeal Tribunal.
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> . . .
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> Workers Compensation Appeal Tribunal must, in the determinations, pay attention to the policy of the Workers Compensation Board, and they must be consistent with a policy that's set. By our belief of that, we will get better quality decisions made. As I was mentioning, there still then is a reporting process.
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> If the Workers Compensation Appeal Tribunal is finding that they're having difficulty dealing with that policy in their determinations of the board, then those matters can flow back to the board for the board to review its policies. But the board's policies are final. All of the adjudication must be undertaken in the context of the policies that were set by the board.

It would be hoped that if there were inconsistencies in this, the board would look closely at their decision, at the policies they put in place, and may effect a change. But, ultimately, the board determines the policies.

. . .

[Opposition Question] J. MacPhail: The reason why I ask this is because there are two parts to that section. One is that the decision has to be made on the merits and justice of a case. In any case, everything has to be decided according to board policy.

There could be a situation where there's breakthrough medical evidence that would influence the outcome of a decision based on merits and justice of a case, but the board policies haven't caught up to that. What happens in a case like that? If there's a conflict between merit and justice and board policy, just by virtue of timing in terms of breakthrough evidence, what prevails?

Hon. G. Bruce: Kind of in the pristine of a decision that's made by the board and then goes to the Workers Compensation Appeal Tribunal…. There is inconsistency in the application. The Workers Compensation Appeal Tribunal can put it back to the board for the board to review that policy, and the board has 90 days to reflect on that and either offer a change or stand by its own policy. More to the example of what you brought forward there, where there's new evidence and perhaps the board's policies are lagging that new evidence, it would be expected that they would review that and bring forward a new decision.

Again, as we were mentioning to begin with, we're dealing with individual situations. The board policy…. As they develop policy, we would hope that within that policy there would be a degree of discretion. At the same time, we're trying to bring consistency into the decision-making process, knowing full well that other things become evident, particularly in occupational disease. What we didn't know of today, we may know of two or three years from now, or whenever that time may occur.

We think there's enough room. I understand what you're concerned about. I'm confident that in the process we have here, the board would act in a diligent and thoughtful manner in respect to that type of evidence being presented and would reflect on their policy and make sure that if it was lagging because of the example that was offered, they would update that policy.

. . .

> Although the Workers Compensation Appeal Tribunal is external to the board, they also have a process of reporting back to the board if there are apparent inconsistencies in respect of the policy that's been set. Ultimately, the Workers Compensation Appeal Tribunal could return an issue of policy to the board relative to a case, but the board's decision in respect to policy would be final. The appeal tribunal would then have to, if that was the case, live within the policy as it had been set out by the Workers Compensation Board.
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> . . .
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> Also, probably more important is the aspect of consistency of decision-making, in that we've made it clear through this legislation that the policy of the board, the Workers Compensation Board, must be followed and adhered to at either of the review processes, the appeal processes — either the internal review or the Workers Compensation Appeal Tribunal. The Workers Compensation Appeal Tribunal must be consistent in their decision-making with the policies set by the board.
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> As I've mentioned earlier, there is a flowback process in which the Workers Compensation Appeal Tribunal can report back to the Workers Compensation Board where they feel there are inconsistencies coming forward in the workplace or in the policy that was developed by the board and that the board should reconsider their policies. But at the end of the day, the board's policies are the overriding basis of how decisions are made and how appeals are heard.
>
> [reproduced as written]

It is plain from the statements of the Minister in *Hansard* that a key feature of the legislative amendments to the Act involved a change to make policy binding on the Board, the internal review body (Review Division), and the external appeal tribunal (WCAT), for the purpose of promoting increased consistency in decision-making.

This statutory amendment to require that WCAT apply the policies of the board of directors appears to have been based upon the recommendation in the Winter Report. The board of directors exercised their policy-making authority under section 82 of the Act to delete the policy formerly set out at #96.10 concerning the application of policy as guidelines from which a departure may be considered. This background provides very strong evidence that the legislative and policy intent was to make policy binding on WCAT. This is, of course, subject to WCAT's consideration as to whether the policy is applicable, or whether a referral is warranted under section 251 concerning the lawfulness of the policy. As well, WCAT has authority to interpret inconsistent or ambiguous policies. With respect to the interpretation of policy, current policy at #96.10 RSCM I provides that WCAT decisions are published in the *Workers' Compensation Reporter* to provide guidance on the interpretation of the Act, the Regulations and Board

policies, practices and procedures. As well, the chair of WCAT has authority (section 238(6) and section 250(3) of the Act) to establish a precedent panel, and WCAT is "bound" by the decision of the precedent panel in deciding future cases (unless the specific circumstances of the matter under appeal are clearly distinguishable, or a policy relied upon in the decision is repealed, replaced or revised).

While the intent of the legislative changes may be clear, the question may still be posed as to whether the wording of subsection 250(2) suffices to make policy binding on WCAT. Subsections 250(1) and (3) of the Act contain the phrase "bound by", while subsection 250(2) uses the term "must apply". Normally, the use of different wording by the legislature signals a different meaning or intent. This tends to undermine the interpretation set out above, i.e. that the use of the term "must apply" would have a similar meaning as the phrase "is bound by". Accordingly, it is necessary to consider whether some different meaning was intended by the phrase "must apply". Does this wording leave more room for flexibility in the application of a policy than the phrase "is bound by"?

Policy-makers have a range of options in formulating policies, which may have different effect. Some policies are worded as a set of rigid rules. Other policies contain words such as "normally" or "usually" to indicate that they are guidelines which are not intended to be rigidly applied.

It would be incongruous to assert that WCAT was bound by a policy which was itself phrased as a guideline. For example, a policy may contain the words "normally" or "usually" to signal that it is intended to be applied as a guideline, while leaving room for consideration of the particular circumstances of individual cases. The wording "must apply" would seem to leave room for this type of flexibility, while at the same time admitting of a strict application of policies stated as rigid criteria (so long as the expression of such rigid criteria is not patently unreasonable under the Act).
This interpretation may account for the use of the phrase "must apply" in subsection 250(2), rather than the phrase "bound by". This wording appears to leave room for the policy-makers to consider the promulgation of different types of policies for different situations. Thus, where the policy is stated as a guideline, in applying the policy WCAT would treat the policy as a guideline, and where the policy is stated as a rigid rule, WCAT would treat the policy as a rigid rule. I consider that this interpretation provides a reasonable explanation for the legislature's choice of the phrase "must apply" in subsection 250(2), when the stated intent of the legislation provided by the Minister was that policy was to be binding on WCAT.

In the *Skyline* case, the court reasoned at paragraph 86:

> It is probably neither desirable nor possible to state as a fixed rule that statutorily-authorized policies can always fetter discretions contained in statutes. Such a rule may not even be possible with respect to any particular statu[t]e, as some discretions may be capable of being fettered

> by policies, where others cannot. In each case, the statutory wording must be reviewed.

The *Skyline* case concerned the Board's exercise of its authority to deem a person to be an employer, and to declare a particular worker to be the worker of one principal rather than another. The court found (in paragraph 88):

> To allow a tribunal to "deem" something to exist is one of the strongest forms of discretion that can be granted. A deeming power involves an inherent admission that the state of affairs deemed to exist does not really exist, and only exists because of the deeming power. I note that s. 11(2) allows the Board to deem "classes of persons", which implies that the discretion can be exercised at large. I have accordingly concluded that the Act does allow the Board, in this particular case, to fetter the discretion that it is otherwise granted under the Act.

In the case of *Northern Transportation Co.* v. *Northwest Territories (Workers' Compensation Board),* (1998) 5 Admin. L.R. (3d) 11, the Northwest Territories Supreme Court was dealing with a workers' compensation statute which provided in subsection 7.7(1) and (2):

> (1) The appeals tribunal shall, in determining an appeal, apply the policy established by the Board.
>
> (2) Where the Board considers that the appeals tribunal has failed to properly apply the policy established by the Board, or has failed to comply with the provisions of this Act or the regulations, the Board may, in writing, direct the appeals tribunal to rehear the appeal and give fair and reasonable consideration to that policy and those provisions.

The court reasoned at paragraph 29:

> These provisions make clear that while the Tribunal must apply the Board's policies, it is not an instrument of the Board. It is not under the "direction" of the Board (save and except the limited authority of the Board to direct a rehearing). The Tribunal must make its own decisions on the matters before it. It must make those decisions having regard to the legislation, the Board's policies, and the principles of natural justice. The policies of the Board, however, do not replace the decision-making by the Tribunal. It is the Tribunal that must decide whether a policy applies and, if so, how it applies. It cannot abdicate that responsibility to the Board itself or to some automatic application of any policy.

The court further reasoned at paragraphs 36-37:

> Much of the argument before me related to the effect of s. 7.7(1) whereby the Appeals Tribunal is bound to apply policies established by the Board. As I stated previously, this proviso does not make the Tribunal subject to the direction of the Board. To do so, and especially to do so with respect to an individual case before the Tribunal, would mean that the appeal procedure is a complete sham. That cannot be the intent of the legislation.
>
> Counsel for NTCL made the point, one with which I agree, that the terminology employed in s. 7.7(1) - "policy established by the Board" - implies established policies, not ad hoc decisions made in response to a specific case. The policy decisions, formulated with respect to the governance responsibilities of the Board, must be applied by the Tribunal. But, whether any particular policy is relevant to an appeal, and if it is what effect it has on the appeal, is strictly up to the Tribunal to decide on a case-by-case basis.

In another case under the same workers' compensation legislation, *Braden-Burry Expediting Services Ltd.* v. *Northwest Territories (Workers' Compensation Board)*, [1998] N.W.T.J. No. 174, (1998) 13 Admin. L.R. (3d) 232, the court similarly noted at paragraph 17:

> The interplay of policy setting and adjudication by tribunals is frequently the source of controversy in the administrative law field. In many cases it is a question of a tribunal applying its own policies to an issue before it. In others, as in this case, it is a question of a tribunal applying a policy set by an external body. The benefits of establishing policies to guide administrative bodies in specialized and busy areas, such as workers' compensation, are undoubted. Consistency is much to be preferred over ad hoc measures. The critical point, however, is that, notwithstanding the existence of a policy, the tribunal must still maintain its focus on a consideration of each case on its merits.

In a 1999 decision [1999] N.W.T.J. No. 84, (1999) 19 Admin. L.R. (3d) 208), the Northwest Territories Court of Appeal upheld the decision of the trial judge in the *Braden-Burry* case on the basis of the following reasoning:

> The trial judge held that the Appeal Tribunal erred in applying as a policy the Operating Procedure requirement that an employer whose operations encompass only two industries must classify it according to the higher risk operation so long as the higher risk operation exceeds 25% of its operations. The trial judge pointed out that this was not an invariable rule since the same Operating Procedure provided that such a classification would be "usually" made so that the Appeal Tribunal must therefore have

some discretion to determine in any particular case whether the "usual" classification would apply.

This is what we understand that the chambers judge meant in paragraph 29 of his Reasons;

> "In every case the Tribunal must consider the merits of the particular application. It must have regard to any policies of the Board. But a policy (such as the 25% threshold) is only a factor for the Tribunal's consideration. The Tribunal may, in the end, consider it to be the most important factor but it is not the only factor. If a case warrants deviation from a policy the Tribunal should be prepared to justify it. In any case the Tribunal should identify the factors it relied on in coming to its decision. But in this case, the Tribunal said it was obliged to follow and was bound by the policy. This indicates that the policy was applied without regard to the merits of the applicant's case. That amounts to a fettering of discretion."

We agree that the Appeal Tribunal made a patently unreasonable interpretation of its empowering statute and in the application of the policy. However, given the directions of the chambers judge for a new hearing, it should be consistent with these reasons and in particular consistent with paragraph 29 of the reasons of the trial judge.

The NWT Court of Appeal decision did not endorse the seemingly more sweeping comments of the trial judge in characterizing the policy as only one factor to be considered. Rather, the decision of the Appeal Tribunal was found to be patently unreasonable in that it failed to recognize that the policy contained the word “usually”, thus requiring consideration of the merits of the individual case.

These court decisions provide illustrations of situations within the workers’ compensation context in which it has been found that a workers’ compensation appeal tribunal may treat a policy as binding (i.e. without involving an unlawful fettering), and where the appeal tribunal erred in treating the policy as binding where a proper application of the policy required consideration of the circumstances of the individual case.

Having regard to the analysis in the Winter Report, the statements of the Minister in *Hansard* concerning the intended purposes of Bill 63, the deletion of the policy at #96.10 concerning the application of policy as guidelines, the wording of section 250, the analysis by Sara Blake, and the various Court decisions discussed above, I consider that to the extent an applicable policy is stated as constituting a set of rules rather than guidelines, a WCAT panel must either apply those rules or initiate a referral under

section 251 if the panel considers the policy so patently unreasonable that it is not capable of being supported by the Act and its regulations. While different wording is used in subsections 250(2) and 250(3) of the Act, these subsections may be viewed as complementary provisions setting out a changed statutory framework under which policies, and decisions of WCAT precedent panels, may be binding on WCAT. This interpretation is also consistent with items #1.20 and #14.10 of WCAT's MRPP which refer to the binding nature of the policies of the board of directors.

I read the policy at #103.40 concerning the use of the Board's discretion under section 58(5) as setting out rules rather than a general guideline from which a departure may be considered in exceptional circumstances. I find that the policy at #103.40 is applicable to the circumstances of the worker's case and the worker's appeal is appropriately decided within the terms of this policy. Accordingly, it is not necessary that I consider whether a departure from the policy at #103.40 is warranted based on the circumstances of this case.

The additional 90 days permitted under the Act and policy expired in March 2003, and the third set of additional certificates was not received until May 2003. I agree with the decision of the review officer, in concluding that the certificates provided in May 2003 were too late. Policy at #103.40 does not contemplate use of the discretion under section 58(5) to grant a third period of 90 days, beyond the 90 day time period contemplated in section 58(3) and one further 90 day period under the policy concerning use of the Board's discretion under section 58(5) of the Act. I find that the June 18, 2003 decision by the MAO correctly denied further consideration of the worker's request for examination by a MRP, on the basis that the third set of certificates provided in May 2003 was out of time. The worker's appeal from the February 10, 2004 Review Division decision is denied.

Conclusion

The February 10, 2004 decision by the review officer is confirmed. The June 18, 2003 decision by the MAO was correct in rejecting the third set of enabling certificates on the basis that they were out of time.

Herb Morton
Vice Chair

HM/dc