Noteworthy Decision Summary

Decision: WCAT-2004-03794 **Panel:** Herb Morton **Date:** July 16, 2004

WCAT Reconsideration of Appeal Division Decision – Allegation of Bias – Breach of Natural Justice – Oral Hearing Denied – Patently Unreasonable Error of Law – Failure to Refer to Evidence – Failure of Appeal Division Panel to Obtain New Evidence

As a result of the B.C. Court of Appeal's decision in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499, decisions in the Noteworthy Decisions Index that discuss WCAT's jurisdiction to reconsider a prior decision for jurisdictional error are no longer noteworthy for this point. However, this decision remains noteworthy for the other points set out in the noteworthy summary.

Reconsideration of a Workers' Compensation Appeal Division (Appeal Division) decision. Bias should not be alleged unless there is a sound basis for the allegation and some evidence to support it. Prior experience in workers' compensation proceedings is an asset for a vice chair, rather than a reason for disqualification. Where credibility is not in issue, and it is possible for the panel to hear the oral evidence given below, an oral hearing is not necessary. A panel does not make a patently unreasonable error of law if it does not refer to every piece of evidence before it as long as it is clear from the decision that it did not ignore important evidence without explanation. While the Appeal Division was an inquiry body, it did not commit an error of law going to jurisdiction by basing its decision on the medical evidence placed before it, rather than requesting new evidence, even though the medical evidence was dated.

The worker requested reconsideration of an Appeal Division decision, which allowed the worker's appeal of his permanent disability award, and increased it from 17% to 40%. The worker objected to the panel assigned for the reconsideration, and raised numerous grounds for reconsideration, including the denial of an oral hearing request, the failure to refer to certain affidavits, the failure to request further medical information, the calculation of loss of earnings, the fettering of discretion in following policy, general errors of fact, and the denial of legal fees. The worker also brought some new medical and financial evidence.

The reconsideration panel reviewed two previous Workers' Compensation Appeal Tribunal decisions relating to allegations of bias, both of which involved the counsel alleging bias in the current reconsideration. The panel did not consider that a reasonable apprehension of bias had been established simply because of the panel's previous employment with the Workers' Compensation Board. With respect to oral hearings, the reconsideration panel reviewed case law and portions of administrative texts and concluded that, while the denial of an oral hearing would constitute a breach of natural justice in some circumstances, it did not in this case because credibility was not in issue and the panel could hear the oral evidence given at the Workers' Compensation Review Board hearing.

With respect to the affidavits that the Appeal Division panel did not address, the reconsideration panel reviewed them and determined that there was nothing particularly relevant in them that the Appeal Division panel ignored. With respect to the duty to inquire, section 96.1 of the *Workers Compensation Act* seems to place an onus on appellants to ensure that the evidence they wish a panel to consider is placed before the panel. Without deciding the matter, the

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reconsideration panel opined that this type of argument would be successful only in the most unusual circumstances.

Regarding the fettering of discretion in following policy, the reconsideration panel accepted that the mechanical or blind application of policy could provide a basis for setting aside a decision. However, in this case the original panel was prepared to consider arguments for departing from policy, but did not find that a basis for departure had been established. Thus there was no unlawful fettering of discretion.

With respect to alleged errors of fact, the reconsideration panel found that there was some evidence before the original panel to supports its findings. Alternatively, the complaints concerned non-essential findings of fact which are not reviewable. Legal fees were properly denied because there was nothing unique in the case, and the new evidence was not new or relevant.

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Introduction

The worker requests reconsideration of *Appeal Division Decision #2002-0594*, dated March 6, 2002. The Appeal Division panel allowed the worker's appeal, in part. The panel found the worker suffers from the conditions of Major Depression and Pain Disorder Associated with Psychological Factors (DSM-IV 307.80), as a result of his work injury in 1992. The Appeal Division panel granted an increase in the worker's functional impairment pension award from 17% to 40%.

The worker is represented by a lawyer, Mr. C. Paterson. Written submissions have been provided dated May 7, 2002, June 18, 2002, August 27, 2002, January 3, 2003, and November 17, 2003.

The worker had personal optional protection (POP) coverage in effect at the time of his 1992 injury. The worker and his wife operated a livestock hauling business as an unincorporated partnership. No separate submissions have been provided on behalf of the partnership, concerning this application.

Mr. Paterson requested an oral hearing. He stated this is necessary for both evidentiary and advocacy purposes. He was provided with a copy of an information sheet concerning applications for reconsideration, which sets out the Workers' Compensation Appeal Tribunal (WCAT)'s general practice of considering whether grounds for reconsideration are established on the basis of written submissions. If grounds for reconsideration are found to have been established, the question as to whether consideration of the merits should be by way of oral hearing or written submissions is determined later. Written submissions were provided by Mr. Paterson from May 2002 until November 2003. I find that the question as to whether grounds for reconsideration are established, which is essentially a legal issue, can be properly addressed in this case on the basis of written submissions without an oral hearing.

Issue(s)

Are grounds established for reconsidering the Appeal Division decision, on the basis of new evidence under section 96.1 of the *Workers Compensation Act* (Act), or on the basis of the common law ground of an error of law going to jurisdiction?

Jurisdiction

Section 96.1 of the Act defined the authority of the Appeal Division to reconsider a decision on the basis of new evidence. The authority of the Appeal Division to set aside one of its own decisions on the basis of the common law ground of an error of law going to jurisdiction was confirmed by the British Columbia Court of Appeal in the August 27, 2003 decision in *Powell Estate v. Workers' Compensation Board*, 2003 B.C.C.A. 470.

On March 3, 2003, the workers' compensation appeal structures were altered by changes to the Act contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). The Appeal Division of the Workers' Compensation Board (Board) and the Workers' Compensation Review Board (Review Board) were replaced by the WCAT. By letter of February 13, 2003, the secretary to the chief appeal commissioner advised that this application would be transferred to WCAT. Consideration of this application is being completed by WCAT under subsections 39(1)(b) and (2) of the transitional provisions contained in Part 2 of Bill 63.

Grounds / Standard of Review

As this application was initially filed with the Appeal Division, it will be addressed pursuant to the grounds which previously applied for reconsidering Appeal Division decisions. Section 96.1 of the Act provided:

> (1) Subject to this section and sections 58 to 66, a decision of the appeal division is final and conclusive.
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> (2) A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision of the appeal division on the grounds that new evidence has arisen or has been discovered subsequent to the hearing of the matter decided by the appeal division.
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> (3) Where the chief appeal commissioner considers that the evidence referred to in subsection (2)
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> (a) is substantial and material to the decision, and
>
> (b) did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered,
>
> he or she may direct that

(c) the appeal division reconsider the matter, or

(d) the applicant may make a new claim to the board with respect to the matter.

Appeal Division Practice and Procedure Decision #33 is published in *Volume 17* of the *Workers' Compensation Reporter*. *Decision #33* consolidated and replaced prior Appeal Division practice and procedure decisions, effective September 1, 2001. Item #12.2, *Reconsideration on Common Law Grounds*, provided as follows:

(a) Scope of Reconsideration on Common Law Grounds

The chief appeal commissioner has authority to reconsider Appeal Division decisions on the basis of clerical mistakes or omissions, fraud, or an error of law "going to jurisdiction" including a breach of the rules of natural justice. This authority is based upon general common law principles (please see Decision #93-0740, *Right to Reconsider Appeal Division Decisions,* 10 *Workers' Compensation Reporter* 127).

Several published Appeal Division decisions consider how this ground is applicable to the reconsideration of Appeal Division decisions. Comments include:

- the weighing of evidence is generally not a reviewable matter in the reconsideration process. (Decision #96-1627, 14 *Workers' Compensation Reporter* 5 at p. 7)

- a patently unreasonable finding of fact can amount to an error of law going to jurisdiction, and that patently unreasonable finding of fact includes a finding of fact that is not supported by *any* evidence. (Decision #96-1627, 14 *Workers' Compensation Reporter* 5 at p. 6)

- the grounds for reconsideration are strict and the reconsideration process cannot be used simply to continue arguments or strengthen an unsuccessful case. (Decision #96-1628, 14 *Workers' Compensation Reporter* 9 at p. 9)

All Appeal Division decisions may be reconsidered on the common law grounds of mistake, fraud or error of law "going to jurisdiction," including a breach of natural justice.

Appeal Division Decision #96-1627 (14 W.C.R. 5 at p. 6) further explained:

> Appeal Division decisions are "final and conclusive" and can only be reconsidered on very limited grounds. These grounds are new evidence as set out in Section 96.1 of the *Act*, an "error of law going to jurisdiction" (including breaches of the rules of natural justice), clerical mistakes or omissions, and fraud. A patently unreasonable interpretation (or application) of the *Act* amounts to an "error of law going to jurisdiction". The phrase "patently unreasonable" indicates the degree of magnitude of the error that would justify setting aside a decision. A decision may not be set aside simply because there is another preferable interpretation of the relevant statutory provision nor even because its interpretation of the *Act* is flawed. For it to be set aside, the decision must involve an interpretation that is not viable, in light of the legislative text. I note that the phrase "patently unreasonable" may also be used with reference to a finding of fact. A "patently unreasonable" finding of fact (such as a finding that is not supported by *any* evidence) would also amount to "an error of law going to jurisdiction".

Preliminary Issue — Panel Assignment

In a submission dated November 17, 2003, addressed to the WCAT chair, Mr. Paterson writes:

> **Who is the panel**? No WCB careerists like [name of another WCAT vice chair] and Morton please. Someone with a demonstrated capacity for "**independence**", with legal training.
>
> [emphasis in original]

This application was assigned to me by the chair on March 15, 2004.

Mr. Paterson's comments concerning his preferences for panel assignments are not expressly stated as concerning an apprehension of bias. Nevertheless, I have considered, on a preliminary basis, whether I should recuse myself from hearing this application in light of Mr. Paterson's request, as it impliedly raises this concern.

Biographical summaries for all vice chairs are provided on WCAT's website: (http://www.wcat.bc.ca/about-us/). This sets out the particulars of my prior employment with the Board, including the Appeal Division. I do not consider that my prior employment with the Board should give rise to a reasonable apprehension of bias. I also adopt the reasoning I expressed in a prior Appeal Division decision (*Appeal Division Decision #2001-0567*) dated March 23, 2001, concerning a similar allegation by Mr. Paterson:

> I have considered, in this regard, whether there would be benefit to my stepping aside, to avoid any possible apprehension of bias even if it is not a reasonable one. Some apprehension of bias may be held by the worker simply by virtue of his lawyer's allegation of this. Such a course would, at least in this case, seem to have the benefit of avoiding the expressed concern. Should I simply decline to serve on this case? Upon careful consideration, however, I find that to respond in this fashion would in fact be irresponsible. To step aside on the basis of an allegation without any real foundation would simply encourage such allegations in the future. This could lead to "panel-shopping", if counsel could simply allege bias against any panel without foundation. It would lend weight to the kind of baseless accusations sometimes raised against Appeal Commissioners, that they are, for example, by virtue of having previously represented workers or employers, not able to provide fair and unbiased consideration. It is easy to see how the "convenient" response to accommodating counsel's objections could in the long term have the potential to undermine the fair and effective operation of the Appeal Division.

I appreciate that where counsel is aware of information which may give rise to a reasonable apprehension of bias, counsel has a duty to bring it forward. That duty is expressly recognized in WCAT's *Code of Conduct for Representatives*, at items #24.00 and #24.20 of the WCAT *Manual of Rules, Practices and Procedures* (MRPP). However, the continuing presentation by counsel of such allegations, without such a basis, serves merely to undermine confidence in the tribunal. Item #24.20(g) of the MRPP provides:

> A representative has a duty to bring forward for consideration by WCAT, at the earliest opportunity, any information which may give rise to a reasonable apprehension of bias or conflict of interest on the part of a WCAT member. However, such allegations should not be made frivolously, or in a fashion which tends to diminish confidence in the integrity of WCAT decision making. Accordingly, if the allegation has been addressed by WCAT and rejected, the representative should not continue to raise similar allegations in other cases.

A review of the decisions posted on the WCAT website shows the following WCAT decisions, in which Mr. Paterson raised allegations of bias which were found to be without merit:

WCAT Decision #2003-01674	-	July 24, 2003
WCAT Decision #2003-01972	-	August 12, 2003
WCAT Decision #2003-03364	-	October 31, 2003
WCAT Decision #2003-03671	-	November 21, 2003

WCAT Decision #2004-01983 - April 21, 2004

The July 24, 2003 WCAT decision (*WCAT Decision #2003-01674*) contained the following enjoinder:

> I would also like to remind Mr. Paterson of comments made by the British Columbia Court of Appeal in *Lorna Adams v. Workers' Compensation Board*, [1989] 42 B.C.L.R. (2d) 228. That case involved an allegation of bias based on a possibility one of the adjudicators might sit on a re-hearing. In that case, the court made the following statement:
>
> > This case is an exemplification of what appears to have become general and common practice; that of accusing persons vested with the authority to decide rights of parties of bias or reasonable apprehension of it without any extrinsic evidence to support the allegation. It is a practice which, in my opinion, is to be discouraged. An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by a general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause. As I have said earlier, and on other occasions, suspicion is not enough.

Mr. Paterson's comments in his letter of November 17, 2003 appear to disregard the enjoinder provided by the panel in the July 24, 2003 WCAT decision (*WCAT Decision #2003-01674*). As well, they do not take heed of the analysis provided by another vice chair in *WCAT Decision #2003-01972*, dated August 12, 2003:

> With respect to past employment with the WCB, D.A. Mullen, in his text on *Administrative Law*, 3rd Edition (Carswell, 1996), states: "What emerges from these statements is that, in general, far from being a reason for disqualification, prior experience with and the expression of views on issues arising in the regulated area is a strong reason for appointment." In *Appeal Division Decisions #99-0054* and *#2001-0567*, similar statements were made by panels. Further, under the *Workers Compensation Act Appeal Regulation*, section 2, requirements for appointment for vice chairs to WCAT provide that the individual demonstrates a knowledge of the workers' compensation system. This requirement lends support to the position that, in some cases, it is to be expected that this knowledge will have been acquired through past

> employment with the Board. I was last employed by the Board in 1986 as a claims adjudicator. Moreover, impartiality is one of the duties that I, as a WCAT member, am bound to uphold under the Act, the Code of Conduct, and the Oath of Office. The worker's counsel has not rebutted this presumption of impartiality, and he has provided no evidence beyond his statement that I was a WCB claims officer for many years.

I agree with the reasoning expressed on this issue in the other WCAT decisions cited above. Accordingly, I will proceed with consideration of this application.

Analysis

I will consider, first of all, the submissions concerning an error of law going to jurisdiction. These arguments concern whether a valid decision was provided by the Appeal Division. If a common law ground is not established, I will then consider whether the requirements of section 96.1 (concerning new evidence) have been met for obtaining reconsideration.

A. Common Law Grounds

(a) *Denial of Oral Hearing Request*

Mr. Paterson submits that the failure to hold an oral hearing involved a breach of the rules of natural justice. He argues:

> In general "**disability**" cannot be properly assessed in secret, with no direct contact with the disabled person. Secrecy and anonymity are more efficient, but they are not fair or accurate methods of adjudication. The rules of natural justice required an oral hearing on facts of this kind.
>
> [emphasis in original]

Mr. Paterson cites several court decisions concerning the requirement for an oral hearing: *Kane* v. *University of British Columbia* (1980), 110 D.L.R. (3d) 311, [1980] 1 S.C.R. 1105 (S.C.C.); *Prevost* v. *WCB (BC)* (1988), 52 D.L.R. (4th) 513 (B.C.S.C), appeal dismissed (1989) 59 D.L.R. 4th 478 (B.C.C.A), and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.).

It is necessary to determine, first of all, the applicable standard of review to apply to consideration as to whether a breach of natural justice occurred. Jones and de Villars, *Principles of Administrative Law*, 3rd ed. (Ontario: Carswell, 1999) at 513-514, contains the following analysis:

(a) The Standard for Determining Whether there has been a Breach of the Principles of Natural Justice and Procedural Fairness

> Neither the "correctness" test nor the "patently unreasonable" test really fits this ground for judicial review. Although a breach of natural justice or procedural fairness has the effect of taking the statutory delegate outside its jurisdiction — and so might at first glance engage the "correctness" test — any student of Administrative Law will quickly reply that there is no mathematical formula for determining whether a particular alleged defect in procedure is sufficient to constitute a breach of natural justice; it almost always depends upon all of the circumstances. . .
>
> Perhaps the better way to look at this question is to articulate a separate test for judicial review of alleged breaches of natural justice: namely, would a reasonable person, reasonably knowledgeable about all the facts, reasonably perceive that the process is unfair? This echoes the way the Rule Against Bias is usually articulated, but it can be generalized to apply to all alleged breaches of natural justice. Of course, the reasonable person is the court. If this question is answered affirmatively, then the standard for review has been tripped, and the delegate's proceedings should be quashed.

In a unanimous decision of the Supreme Court of Canada, *Moreau-Bérubé* v. *New Brunswick (Judicial Council)* 2002 S.C.C. 11, [2002] 1 S.C.R. 249 at paras. 74-75, Justice Arbour applied similar analysis on this issue:

> **(3) Procedural Fairness**
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> **74 The third issue requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation.** (See generally *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, and *Baker*, *supra*.)
>
> 75 The duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority (see *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653; *Baker*, *supra*, at para. 20; *Therrien*, *supra*, at para. 81). Within those rules exists the duty to act fairly, which includes affording to the parties the right to be heard, or the *audi alteram partem* rule. The nature and extent of this duty, in turn, "is eminently

> variable and its content is to be decided in the specific context of each case" (as *per* L'Heureux-Dubé J. in *Baker*, *supra*, at para. 21). Here, the scope of the right to be heard should be generously construed since the Judicial Council proceedings are similar to a regular judicial process (see *Knight*, *supra*, at p. 683); there is no appeal from the Council's decision (see D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 1, at pp. 7-66 to 7-67); and the implications of the hearing for the respondent are very serious (see *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113).
>
> [emphasis added]

I find that no standard of review applies to consideration as to whether a breach of natural justice occurred. This question must be evaluated based upon the circumstances of the case. In *Baker*, the Supreme Court of Canada identified the following factors as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances:

- the nature of the decision being made and the process followed in making it;
- the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- the importance of the decision to the individual or individuals affected;
- the legitimate expectations of the person challenging the decision; and,
- the choices made by the agency itself and its institutional constraints.

At paragraph 28 of *Baker*, the Supreme Court of Canada explained:

> 28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

In *Appeal Division Decision #2002-0594*, the panel provided the following reasons for its decision to hear the worker's appeal on the basis of written submissions without an oral hearing (at paragraph 7):

> The appellant's representative filed the notice of appeal on December 11, 2000, and at that time said an oral hearing was not necessary for the appeal. The appellant's representative was then granted several extensions to provide written submissions, the last extension being until October 7, 2001, which resulted in the submission of October 5, 2001. I note that the appellant's representative is a lawyer with considerable experience with workers' compensation appeals, and I would expect him to be able to identify the issues and to marshal the evidence necessary to support his submissions on those issues. The oral evidence of the appellant and his wife was given to the Review Board, and I find the tapes of that hearing are audible. The appellant's representative does not take issue with the general summary of the facts provided in the Review Board findings. I agree with the appellant's representative that the credibility of the appellant and his wife are not in issue. Upon reviewing the evidence on file and the submission of the appellant's representative, I find an oral hearing at the Appeal Division is not required to decide this appeal.

Mr. Paterson submits that the Appeal Division panel did not quote from the Review Board tapes, despite the reference at page 2, paragraph 7. He submits that the lack of quotes undermines the alleged review of the tapes. I note, in this regard, the reasons provided by the Appeal Division panel in paragraph 42:

> The appellant's main complaints at the Review Board were of headaches, nausea, and difficulty with concentration. He certainly presented to the Review Board as a person who was alert and of acute intelligence. However, I was impressed by the evidence of his wife that the appellant essentially did no work around the farm, no parenting, and essentially stayed up all night and slept all morning.

I read that reasoning as demonstrating a familiarity with the evidence provided in the oral hearing before the Review Board.

Mr. Paterson further refers to secrecy and anonymity. The absence of an "in-person" hearing does not mean the decision-making process is secret or anonymous. The appellant had the opportunity to be heard through written submissions, and the decision-maker provided a written decision, with reasons, signed by the appeal commissioner.

In *Kane*, an oral hearing was held, but a breach of natural justice occurred when additional evidence was received following the hearing in his absence. In *Baker*, the

Supreme Court of Canada provided the following reasons concerning the form of hearing required (at paragraphs 33-34):

> 33 However, it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. The Federal Court has held that procedural fairness does not require an oral hearing in these circumstances: see, for example, *Said*, *supra*, at p. 30.
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> 34 I agree that an oral hearing is not a general requirement for H & C decisions. An interview is not essential for the information relevant to an H & C application to be put before an immigration officer, so that the humanitarian and compassionate considerations presented may be considered in their entirety and in a fair manner. In this case, the appellant had the opportunity to put forward, in written form through her lawyer, information about her situation, her children and their emotional dependence on her, and documentation in support of her application from a social worker at the Children's Aid Society and from her psychiatrist. These documents were before the decision-makers, and they contained the information relevant to making this decision. Taking all the factors relevant to determining the content of the duty of fairness into account, the lack of an oral hearing or notice of such a hearing did not, in my opinion, constitute a violation of the requirements of procedural fairness to which Ms. Baker was entitled in the circumstances, particularly given the fact that several of the factors point toward a more relaxed standard. The opportunity, which was accorded, for the appellant or her children to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.

In the British Columbia Supreme Court decision in *Prevost*, Madame Justice Southin reasoned:

> As to the second ground, the statute does not require the commissioners to hear oral submissions on an appeal. The concept of natural justice or procedural fairness does not itself require oral hearings in every instance.
>
> In this case, the facts concerning the date of injury, the length of the shut-down and the date of the petitioner's recovery, were clear and the real issue was the lawfulness of the policy which itself turns on the meaning of s. 5(2). While, in my own view, a tribunal is wise to give itself even in such a case as this, the benefit of the cut and thrust of oral

> debate, I know of no authority concerning the concept of procedural fairness which requires it to do so.

Macaulay and Sprague, *Hearings Before Administrative Tribunals*, 2nd ed. (Ontario: Carswell) at 12-1, states:

> There are many forms of hearing. Some hearings need not even be oral. They may, depending on the statutory mandate being performed, be conducted in writing or through electronic means, or they might be any combination of oral/written/electronic proceedings. For example, in proceedings which are essentially conducted through the exchange of written documents information may be sought by a decision-maker on some point over the telephone, or at an oral hearing argument might be received after the hearing only in written form with no reconvening of the hearing for its presentation orally. At common law there is no magic to the term "hearing" and no absolute rules as to the form such a proceeding must take. At its essence a "hearing" is a proceeding permitting communication between decision-makers and others. The form such communication should take is directed either by statutory requirement or, failing that, by the demands of the thing the decision-maker has to do. Within these parameters there is a great deal of leeway bound only by imagination and technology. The best decision-makers and administrative law practitioners always keep this in mind rather than being constrained by tradition.

Similarly, at page 9-20.13, Macaulay and Sprague state:

> "Hearing" does not always mean "oral hearing". Natural justice and fairness do not require an oral hearing in all cases. There may be instances where written proceedings are quite sufficient to allow the individual to *adequately* be able to adequately present the case necessary to protect his or her interest at stake.
>
> There may be instances where written hearings are perfectly adequate to present a case. There may also be cases where written proceedings are not adequate.

In *Singh* v. *Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177, 12 Admin. L.R. 137, 17 D.L.R. (4th) 422 at p. 465, Madam Justice Wilson cautioned that a hearing based upon written submissions will not be satisfactory for all purposes. She wrote:

> In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing.

Macaulay and Sprague identify four factors as important in determining the form of hearing to be granted (at page 9-20.16):

> i. the goal of the state hoped to be accomplish and the importance of that goal;
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> ii. the degree to which the procedure asserted by the state is necessary to effectively and efficiently accomplish that goal;
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> iii. the interest of the individual at stake and its importance; and
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> iv. the degree to which the procedure asserted by the individual is necessary in order to adequately protect that interest.

Arguments concerning an alleged breach of natural justice due to the lack of an oral hearing were similarly presented by Mr. Paterson in the context of a petition for judicial review in the case of *Van Unen v. WCB (BC)*. That petition was dismissed in the British Columbia Supreme Court on August 5, 1999. An appeal to the British Columbia Court of Appeal was dismissed on April 6, 2001, 17 W.C.R. 305, also (2001) B.C.L.R. (3d) 277, leave to appeal to the Supreme Court of Canada denied [2001] S.C.C.A. No. 288. The British Columbia Court of Appeal provided the following reasons for its decision:

> [40] Section 90 of the ***Workers' Compensation Act*** deals with appeals from an officer of the Workers' Compensation Board to the Review Board. Section 91 deals with appeals from the Review Board to the Appeal Division. There is nothing in s.91 to indicate that what is contemplated is something other than a true appeal. A hearing *de novo* is not specifically required by the statute. In the absence of such a requirement, and in circumstances where oral evidence is given before the Review Board, and in circumstances where it is possible for a member of the Appeal Division to review that evidence, and in circumstances where the Review Board made findings of fact on the very issue raised by the worker, it is my opinion that it is not a breach of natural justice for the findings of fact based on credibility, veracity of testimony, and expert opinion, to be assessed by the Appeal Division without the requirement of an oral hearing.
>
> [41] We were told, during the course of argument, by counsel for the Board that, for example, decisions were issued by the Appeal Division

> in 1,768 cases in 1997 of which 130 were issued after oral hearings. There is no question before this Court about the circumstances in which an oral hearing ought to be ordered by the Chief Appeal Commissioner. We are required only to decide whether, in the very circumstances of this case, it was a breach of the rules of natural justice to refuse an oral hearing when one was requested. It is clearly not intended to be the function of the Appeal Division to repeat precisely the work of the Review Board. Instead, the Appeal Division is required to assess the correctness of that work and to decide whether it is flawed. That determination must be conducted in the usual way of a true appeal. But, of course, the Appeal Division may choose to hear oral evidence if it seems to it to be right and fair to do so. The Appeal Division decided not to do so in this case. In my opinion it was not in breach of natural justice in reaching that decision, in the circumstances that I have described.

Upon consideration of the foregoing, I am not persuaded that an oral hearing before the Appeal Division was a legal necessity in this case. Detailed reasons were provided by the appeal commissioner as to why an oral hearing was not required in this case. I find that the circumstances of this case are not distinguishable from those addressed by the Court of Appeal in the *Van Unen* case. I accept that a denial of an oral hearing could, in some circumstances, constitute a breach of natural justice, particularly where credibility is in issue. However, having regard to the various authorities cited above, I am not persuaded that the denial of an oral hearing before the Appeal Division involved a breach of natural justice in the circumstances of this case.

(b) Failure to Mention Affidavits

By submission of August 27, 2002, Mr. Paterson requests reconsideration on the basis that none of the contents of the worker's affidavits of May 11, 1999 and February 1, 2000 were referred to in the Appeal Division decision, nor were the affidavits mentioned. He submits these omissions involved an error of law going to jurisdiction. He further submits the decision omitted to consider relevant factual evidence.

In the text *Administrative Law in Canada*, 3rd ed. (Ontario: Butterworths, 2001) at page 191, Sarah Blake states:

> A patently unreasonable rejection of evidence or a refusal in bad faith to consider relevant evidence may be grounds for review. If a tribunal, without explanation, completely ignores important evidence, its decision may be set aside.

I note, however, that the two affidavits were not originally submitted to the Appeal Division. The February 1, 2000 affidavit was found at Tab 6 of the worker's *Review Board Hearing Submission Book*. It was provided to the Review Board in connection with its oral hearing on February 1, 2000. The May 11, 1999 affidavit of the worker was submitted to the disability awards claims adjudicator by Mr. Paterson on May 14, 1999, in support of the worker's request for a commutation of his pension (which was not an issue in the appeal before the Appeal Division).

It is true that these affidavits were not expressly mentioned in the Appeal Division decision. However, it is not necessary that every piece of evidence, and every submission, be recorded in a decision.

In this case, the May 11, 1999 affidavit was submitted in support of an application for a pension commutation. The February 1, 2000 affidavit contained, among other things, corrections to evidence provided in the first affidavit. In paragraph 5 of the Appeal Division decision, the panel noted:

> The appellant's representative also seeks the remedies with regard to acceptance of a hiatus hernia condition, reimbursement of medications and commutation of his pension. This appeal is a rehearing of the issues arising from the Review Board findings, authorized by ss. 91 and 96(3) of the *Workers Compensation Act*. Those matters have not yet been originally adjudicated and are not issues arising from the Review Board findings, and they are therefore not properly issues in this appeal.

In this context, it is not apparent that the content of the affidavits was necessarily relevant or important to the issues under appeal. Much of the content appears to be of borderline, or questionable, relevance or importance, such as the fact that the worker (who suffers a psychological disability) would like his WCB pension paid out in a lump sum so he would not feel so dependent on the WCB, and that the worker is unaware of the meaning of the terms "dysphoria" and "conversion mechanism".

Section 96.1(1) of the Act provided that Appeal Division decisions are final and conclusive. In view of the legislative intent, I would not readily infer that important evidence was overlooked simply because every piece of evidence on the file was not recited in the decision. The decision-maker's task is to evaluate all the evidence, and attempt to provide meaningful reasons to explain the basis for the panel's decision. That requires reasons which respond to the central arguments raised by the parties, as well as identifying the arguments and evidence the panel found most significant or compelling.

I have reviewed Mr. Paterson's submission dated October 5, 2001 to the Appeal Division. The worker's affidavits were not expressly mentioned in that submission. It is not evident that the appellant was relying on that evidence as important and significant

to the appeal. Furthermore, Mr. Paterson has not identified any particular evidence contained in those affidavits as being necessary to the panel's decision, and which was not taken into account.

In consideration of the foregoing, I am not able to find that the panel ignored important evidence without explanation. I do not consider that the Appeal Division decision involved a patently unreasonable rejection of evidence or a refusal in bad faith to consider relevant evidence.

(c) Inquiry Process

Mr. Paterson submits that a new MRI is needed as part of the inquiry process. He notes that the last MRI was performed over ten years ago, on October 19, 1993, and submits that crucial medical evidence was "stale". He submits that the Appeal Division's failure to ask itself that question was an error of law going to jurisdiction. He submits that the Appeal Division erred in law when it failed to note that an August 23, 1994 functional capacity evaluation was not a reasonably timely evaluation upon which to base its decision in 2002. He submits that the Appeal Division made an error of law going to jurisdiction when it made its decision on a psychological assessment that was "6.5 years out of date". He argues that the Psychological Disability Awards Committee and the claims adjudicator did not talk to or meet with the worker. He further submits the Appeal Division "erred, fatally, in not considering this fundamental procedural error", in relation to the section 23(3) issue.

No authority is provided by Mr. Paterson to support his arguments concerning an obligation of the tribunal to pursue further investigations. Indeed, this argument appears to conflict with the effect of section 96.1 of the Act, which seems to place some onus on an appellant for ensuring that the evidence they wish a panel to consider is placed before the panel. The Appeal Division was an inquiry body, and it was open to the panel to pursue further inquiries if the panel considered it necessary. However, I do not consider that the appellant can complain if the panel failed to do so, as it was open to the worker to himself seek out that further evidence and submit it to the panel. If the worker's treating doctors considered a further MRI necessary to the medical investigation of the worker's condition, this could have been done. Similarly, the worker's lawyer could have obtained further medical reports or investigations, if required. The mere lapse of time is not, by itself, a reason to repeat medical investigations. Without deciding the matter, it seems to me that it would only be in the most unusual circumstance where an argument could arise that a panel's failure to further investigate might amount to an error of law going to jurisdiction. The circumstances of this case do not support such a finding. I would note, as well, that section 91(3) of the Act required the Appeal Division to issue its decision within 90 days of the commencement of the appeal (although this time could be extended by the chief appeal commissioner, where necessary, because of an act or omission of the appellant or because of the complexity of the matter under appeal).

With respect to the procedures followed by the Psychological Disability Awards Committee and the claims adjudicator, it is not apparent how the question as to whether they met with or talked to the worker has any bearing on the issue as to the legal validity of the Appeal Division decision. Even if a procedural error occurred at an earlier stage, the rehearing before the Appeal Division would normally provide a remedy so as to cure the procedural defect at the earlier stage of adjudication.

I find no error of law going to jurisdiction in the fact the Appeal Division made its decision based on the evidence which was before it, without pursuing further inquiries.

(d) Loss of Earnings

Mr. Paterson submits it was patently unreasonable for the Appeal Division to deny a loss-of-earnings pension award on the basis of only one year's positive net income. He submits that no reasons were given to justify why the 1997 tax year was indicative of the long-term potential of the business. He submits it is trite law that a failure to give reasons implies there were no reasons sufficient to justify the decision. He further argues that it was a patently unreasonable finding to treat the $2,852.46 profit in an entire year (meaning a monthly net income of $237.71) as indicative of no section 23(3) entitlement for the long term.

The worker's request for a loss-of-earnings pension was addressed at paragraphs 45 to 52 of the Appeal Division decision. The worker had POP coverage of $1,000.00 per month. Policy at item #66.20 provides that for the purposes of considering a loss of earnings pension, actual pre-injury earnings are used, and the level of POP coverage constitutes a maximum loss of earnings for which an award may be made. In terms of the worker's actual earnings (from the cattle-hauling operation prior to his work injury), his reported taxable income was as follows:

1989 - loss of $3,320.67
1990 - $5,985.40
1991 - $4,249.75
1992 - $2,249.60

With respect to the worker's post-injury computer business, the Appeal Division panel found the worker's 1997 net income, based upon his income tax records, was $2,852.46. There was a loss of $3,986.03 in 1998 and a loss of $3,122.14 in 1999.

The Appeal Division panel reasoned at paragraghs 50 and 51:

> The 1997 net income is $2,852.46. The difference between the 1991 net income and the 1997 net income is $1,397.29, or $116.44 per month. That is less than the functional award, and indicates the functional award is more appropriate than a loss of earnings award.

> I acknowledge that subsequent years have not been as profitable as 1997, which was one of the first years of his business. However, I do find the 1997 year is indicative of the long-term potential of the business, and I do not find the profitability in subsequent years is because the appellant's condition had worsened due to the compensable conditions. The appellant is not inclined to pursue other jobs, and is rightly optimistic about his ability to be successful in his chosen field.

In other words, the worker had been successful in one year in generating sufficient profit (post-injury) to avoid a loss of earnings which would exceed his functional award. The panel took into account that the following years were not profitable. However, in considering the worker's employability over the long term, the panel considered that the worker's success in 1997 supported a projection that the worker would be capable of obtaining such earnings over the long term.

An important factor limiting consideration of a loss-of-earnings pension award was the worker's low pre-injury earnings. The level of the functional impairment award obviated the need for a section 23(3) award, as the functional award was greater. I find that there was evidence before the Appeal Division panel to support the decision which was made. This is not a case where the Appeal Division decision was based on no evidence, or ignored important evidence without explanation. Accordingly, I do not find that the decision was patently unreasonable on this basis.

(e) Fettering of Discretion

Mr. Paterson submits that the Appeal Division "erred in law going to jurisdiction when it mechanically applied Policy #66.20, at p. 9, para. #44. That was a breach of s. 99."

I accept that the mechanical or blind application of policy could provide a basis for setting aside a decision, as was the case in *Testa v. WCB (BC)*, (1989) 58 D.L.R. (4th) 676, 36 B.C.L.R. (2d) 129 (B.C.C.A). That decision concerned a situation where the Board committed a jurisdictional error by "blindly following a policy laid down in advance" and failing to exercise its discretion under section 33 of the Act.

In this case, the issue concerned the determination of the worker's average earnings, based on the level of his POP coverage. The Appeal Division panel reasoned in paragraph 44:

> The appellant's representative submits that the Review Board should not have limited the appellant's entitlement to 75% of his Personal Optional Protection of $1,000.00, in light of his income for the last three years. He is not clear whether, in this context, he considers the appellant's income over that period to be high or low (in the context of loss of earnings, he submits it has been low). The appellant's representative has not provided

> a basis for departing from the #66.20 [*sic*], and I find that policy for applying Personal Optional Protection for the calculation of the appellant's pension should be applied in this case. As such, I find the wage rate is correct.

The particular issue in this case does not appear to have concerned the general exercise of discretion under section 33 of the Act. It concerned the interpretation of the terms and conditions under which POP coverage was purchased. As explained in a prior published decision (*Appeal Division Decision #99-1232*, *Section 96(4) Referral — Whether Personal Optional Protection (POP) entitles operator to minimum compensation under Sections 22 and 29,* 15 W.C.R. 647), the phrase "terms and conditions" in subsection 3(4) of the Act empowers the Board to attach very broad conditions to the power to admit independent operators.

In any event, the panel was prepared to consider the arguments for departing from the policy, but did not find that any basis for such a departure was established. I find no unlawful fettering of discretion on this issue.

(f) Errors of Fact and Omissions

Mr. Paterson states that, according to the worker, the Appeal Division decision contains several factual errors or omissions. Upon reviewing the list provided, I note that many of these comments are simply observations concerning the panel's findings or submissions about the evidence.

In the text *Administrative Law in Canada*, 3rd ed. (Ontario: Butterworths, 2001) at page 191, Sarah Blake states:

> Findings of fact are reviewable only if patently unreasonable. An unreasonable finding of fact is one that is not supported by any evidence. A court will not review the evidence considered by the tribunal to determine whether there was sufficient evidence to support a finding of primary fact. A court will go no further than to determine whether was any evidence, and only essential findings of fact upon which the decision of the tribunal turns will be reviewed in this manner. Non-essential findings of fact are not reviewable.

The ground of clerical mistakes or omissions provides authority for a panel to correct an erroneous reference in a decision, without involving a reconsideration of the substantive merits of the decision. If the decision as written does not reflect the intentions of the panel, the panel may simply proceed to issue a correction. This commonly takes the form of an amendment (corrigendum) to correct a typographical error in a decision. However, if a party seeks to have the decision set aside or reconsidered on the basis of factual error, it is necessary to consider whether there was an error of law going to

jurisdiction (i.e., such as a finding of fact that is not supported by any evidence). As the worker is seeking a substantive reconsideration of the Appeal Division decision, I consider it appropriate to assess these concerns on this latter basis.

I do not consider it necessary to recite each of the points alleged to involve an error of fact or omission. On the various points listed, I find that there was some evidence before the panel to support its findings. Alternatively, the complaints concern non-essential findings of fact which are not reviewable. I do not consider that grounds for reconsidering the decision are established on this basis.

(g) Legal Fees

Mr. Paterson argues that the Appeal Division panel erred in applying a "flagrant abuse" test, in considering whether to depart from the general policy of not paying legal fees. Mr. Paterson notes "to this experienced counsel – 27 years – I rarely see s.23(1) eligibility increased, so dramatically, from 17% to 40%." He submits the Appeal Division panel failed to note that mental disabilities are unique and exceptional, especially where there are both multiple physical and mental disabilities.

This issue was addressed at paragraphs 53-55 of the Appeal Division decision. The Appeal Division panel took note of both the British Columbia Court of Appeal decision in *Van Unen*, as well as *Appeal Division Decision #2001-1902* in which legal fees were awarded to a worker with a 100% permanent functional impairment due to a head injury. In the present case, the Appeal Division panel reasoned, in part (in paragraph 55):

> Although representation would certainly be helpful to the appellant, considering his psychological impairment, I do not find there are unique considerations such that this appeal could not have been presented as well by the free Workers' Advisers service. I do not find this case is so exceptional that the general policy should not be applied.

I see no error of law going to jurisdiction, in the Appeal Division panel's reference to the lack of "unique considerations" to warrant a departure from the general policy against payment of legal fees.

Upon consideration of all of the foregoing (under the subheadings (a) to (g) above), I find that *Appeal Division Decision #2002-0594* did not involve an error of law going to jurisdiction.

B. New Evidence (Section 96.1)

Mr. Paterson submits an affidavit from the worker, dated August 26, 2002 (i.e., five months following the March 6, 2002 Appeal Division decision). Attached, as

exhibits to this affidavit, are copies of medical reports dated May 2, 2001 and November 6, 2001. The worker also submits a copy of his T1-2001 *Five Year Comparative Review*, showing the following earnings from his computer business:

	1997	1998	1999	2000	2001
	+$2,852	-$1,340	-$3,122	-$1,387	+$1,687
AD	+$2,852	-$3,986	-$3,122	?	?

In comparing these figures with the information contained in the Appeal Division decision, it may be observed these figures would suggest the worker's loss was not as great in 1998 as was understood by the panel. The evidence for the years 2000 and 2001 appear to show the business heading in the direction of profitability, with a reduced loss in 2000 and profit in 2001.

In order for an Appeal Division decision to be reconsidered on the basis of new evidence, the new evidence must be "substantial and material to the decision", as required by paragraph 96.1(3)(a). The evidence with respect to the worker's post-injury earnings is material, in the sense that it has relevance to the decision to deny a loss-of-earnings pension award. I do not consider, however, that this new evidence is substantial, in terms of being evidence which has weight and supports a conclusion opposite to the conclusion reached by the panel.

This information largely pre-dates the March 6, 2002 Appeal Division decision. No explanation has been provided as to how it may be concluded that this evidence did not exist at the time of the hearing, or did exist at that time, but was not discovered and could not, through the exercise of due diligence, have been discovered. I appreciate, however, that the deadline for filing a tax return for 2001 was the end of April 2002, so that the worker's 2001 tax return was not available at the time of the Appeal Division decision. An unsigned copy has been provided, which bears the date of April 24, 2002 (marked as having been prepared without audit from information supplied by the taxpayer). As noted above, even if this is new evidence which was not previously available, it does not meet the test of being substantial.

Also submitted as new evidence is a copy of Dr. J. Tjaden's letter dated September 25, 2002. That letter records the following impression, with respect to the worker's eye examination on September 4, 2002:

1. Presbyopia.

2. History of ocular hypertension. Normal intraocular pressures today.

For similar reasons as expressed above, I am not persuaded that this report constitutes substantial new evidence.

In sum, the new evidence which has been provided does not meet the requirements of section 96.1(3) of the Act. The new evidence is either not substantial, or previously existed and could have been discovered by the appellant through the exercise of due diligence.

C. Legal Fees

Mr. Paterson requests a finding that the worker's legal costs since 1999 must be reimbursed by the Board. As grounds for reconsideration of the Appeal Division decision have not been established, there is no basis for addressing this request. In terms of this present proceeding, WCAT has no jurisdiction to direct the Board to pay legal fees. Section 7(2) of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/02, provides:

> The appeal tribunal may not order the Board to reimburse a party's expenses arising from a person representing the party or the attendance of a representative of the party at a hearing or other proceeding related to the appeal.

The request for reimbursement of legal fees is denied.

Conclusion

The worker's application for reconsideration of *Appeal Division Decision #2002-0594* is denied. A common law ground for reconsideration has not been established, and the new evidence requirements of section 96.1 of the Act are not satisfied. The Appeal Division decision stands as final and conclusive.

The WCAT Registry will contact the worker concerning the further handling of his "C" appeal from the May 3, 2002 decision regarding implementation of the Appeal Division decision.

Herb Morton
Vice Chair

HM/jy