Noteworthy Decision Summary

Decision: WCAT-2004-04309 **Panel**: Herb Morton **Decision Date:** August 17, 2004

Reconsideration of WCAT decision – Jurisdiction of WCAT to consider a new diagnosis on appeal, which is different that the one addressed in the decision under appeal - Application for reconsideration denied because the WCAT panel did not exceed its jurisdiction in making a decision on a new diagnosis raised on appeal where the range of symptoms addressed by the two diagnoses are similar in nature

The Workers' Compensation Board (Board) found the worker's back complaints, diagnosed as myofascial pain syndrome, were not causally related to her work injury, but on appeal WCAT concluded that his fibromyalgia symptoms were not causally related to her work injury. The worker requested that the WCAT decision be set aside on the basis of error of law going to jurisdiction because the medical conditions of myofascial pain syndrome and fibromyalgia were different. The issue was whether the WCAT panel exceeded its jurisdiction by addressing a different medical diagnosis than was mentioned in the decision under appeal.

Several options are available to a WCAT panel under the *Workers Compensation Act* (Act) for addressing a new diagnosis presented in an appeal: (a) WCAT can make a section 38(2) referral back to the Board, with or without direction, in appeals initially filed with the former Workers' Compensation Review Board; (b) make a section 246(3) referral of an undetermined matter back to the Board; (c) issue a section 252 suspension of the appeal proceedings if a Board's decision respecting a matter related to the appeal is pending; (d) issue a narrow decision, expressly defining and limiting the scope of what is being addressed; (e) follow the approach taken in *Appeal Division Decision #96-0046* (which found that consideration of a new diagnosis does not automatically constitute an "original decision" especially where the diagnosis has not been settled) and *WCAT Decision #2003-02677* (which found that where a case manager dealt with only one of the two diagnoses on file, the panel has jurisdiction to consider both diagnoses since the worker's symptoms could have been caused by either or both); (f) exercise its authority under section 246(2) of the Act (which says WCAT can receive new evidence, inquire into the matter, and request the Board to investigate further and report back); or (g) request an independent health professional report under section 249. The range of symptoms addressed by the two diagnoses here were similar in nature. Accordingly, this was analogous to a situation where a worker suffers pain in an upper limb, with differing diagnoses being offered to explain the symptoms. This was not a situation of a panel addressing symptoms in a different area of the body, than was addressed in the decision under appeal. The 2002 Winter Report recommended that the review and appeal bodies take a broad approach to jurisdiction. The broad issue raised by the Board's decision was whether the worker continued to be disabled as a result of her 1999 injury. The worker's pain complaints were addressed in the Board decision, in relation to the diagnosis of a myofascial pain syndrome. However, medical advice provided to the Board prior to the issuance of its decision referred to the diagnosis of fibromyalgia, as did a subsequent medical-legal opinion submitted to WCAT. There was no excess of jurisdiction in the WCAT panel's decision regarding the diagnosis of fibromyalgia. In considering the legislative framework and the intent of the Bill 63 amendments, the panel found it was within the jurisdiction of the WCAT panel to address a new diagnosis in its decision. As the option selected by the WCAT panel was permissible under the Act, its choice of option, from the range of approaches permitted by the statute, is entitled to

deference. The worker's application for reconsideration of *WCAT Decision #2004-00356* was denied because the panel did not exceed its jurisdiction in making a decision on a new diagnosis raised in the appeal.

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WCAT Decision Number: August 17, 2004
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Panel: Herb Morton, Vice Chair

Introduction

The worker requests that *Workers' Compensation Appeal Tribunal* (WCAT) *Decision #2003-00356*, dated April 30, 2003, be set aside on the basis of an error of law going to jurisdiction.

The August 8, 2000 decision of the case manager found that the worker's ongoing back complaints and disability, diagnosed as myofascial pain syndrome, were not causally related to her September 26, 1999 work injury. *WCAT Decision #2003-00356* concluded that the worker's fibromyalgia symptoms were not causally related to her September 26, 1999 injury. The workers' adviser submits that the WCAT decision should be voided, on the basis of an error of law going to jurisdiction. He submits that the medical conditions of myofascial pain syndrome and fibromyalgia are clearly different. He submits that the WCAT panel erred in making a decision on a medical issue which had not yet been adjudicated by the Workers' Compensation Board (Board). He argues that the WCAT decision has prejudiced the worker's opportunity to have this issue adjudicated by the Board.

This application is being considered on the basis of a written submission from the workers' adviser. The employer was notified of this application, but is not participating. An audio recording (on two discs) is on file of the April 23, 2003 WCAT oral hearing, and I have listened to that recording.

Issue(s)

Did the WCAT panel exceed its jurisdiction, by addressing a different medical diagnosis than was mentioned in the decision under appeal?

Jurisdiction

WCAT uses the broad heading of "reconsideration" to encompass situations both where an applicant seeks to have a decision reconsidered on the basis of new evidence, and where an applicant seeks to have a decision set aside on the basis of the common law ground of an error of law going to jurisdiction. WCAT's authority to reconsider on the basis of new evidence is defined by section 256 of the *Workers Compensation Act* (Act). WCAT also has authority to "reconsider" (i.e. to set aside or void one of its decisions) on the common law ground of an error of law going to jurisdiction, including a breach of natural justice. These grounds are described at items #15.20 to #15.24 of

WCAT's *Manual of Rules, Practices and Procedures* (MRPP). A tribunal's common law authority to set aside one of its decisions on the basis of jurisdictional error was confirmed by the British Columbia Court of Appeal in the August 27, 2003 decision in *Powell Estate v. Workers' Compensation Board*, (2003) BCCA 470, [2003] B.C.J. No. 1985, (2003) 186 B.C.A.C. 83.

This application was assigned to me by the chair, for consideration pursuant to a written delegation (*WCAT Decision No. 1*, "Delegation by the Chair", paragraph 28, and *WCAT Decision No. 6*, paragraphs 26 and 31).

Standard of Review

Section 255(1) of the Act provides that a WCAT decision is final and conclusive and is not open to question or review in any court. In keeping with the legislative intent that WCAT decisions be final, they may not be reconsidered except on the basis of new evidence as set out in section 256 of the Act or on the basis of the common law ground of an error of law going to jurisdiction. The question as to whether a decision involved an error of law going to jurisdiction generally requires application of the "patently unreasonableness" standard of review. On a jurisdictional issue, however, with respect to whether the tribunal had authority to do the act, the decision must be correct.

In the text *Administrative Law in Canada*, 3rd ed. (Ontario: Butterworths, 2001) Sara Blake states at pages 183-184:

> Since a tribunal has only those powers conferred on it by statute, a court may review its constating statute to determine whether it had the power to do what it did. Regardless whether the tribunal's action was desirable or reasonable in the circumstances, if the tribunal lacked power, the act is subject to judicial review and the court will determine whether the tribunal had the power to do the act. No deference is given to the tribunal. A tribunal's decision that it had the statutory power to make the order or decision must be correct.
>
> . . .
>
> Not all interpretations of a tribunal's constating statute relate to its powers to act. Often a tribunal must interpret a provision of its statute so as to apply it to facts and decide the merits of a case. Courts are wary of applicants who, in an attempt to reduce the deference given by the court to the tribunal's decision, label statutory provisions as restricting a tribunal's powers. The tribunal's interpretation of statutory provisions for the purpose of deciding whether an order should be made in the circumstances of the case receives curial deference from the courts. Likewise, the tribunal's choice of orders from a variety of orders permitted by the statute is entitled to deference. Some statutory provisions are

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> difficult to classify as being clearly of one type or the other. It is difficult to decide whether they confer powers upon the tribunal, or whether they are simply the type of provision that must be interpreted to administer the statute.

Background

The worker's claim was accepted for a lumbar strain resulting from a lifting incident at work on September 26, 1999. By decision dated August 8, 2000, the case manager advised the worker that it was considered that her ongoing back complaints and disability were due to a myofascial pain syndrome, which was not accepted as resulting from the 1999 work injury. The worker appealed this decision to the former Review Board. Her appeal was transferred to WCAT for completion based on the March 3, 2003 changes contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). An oral hearing was held by WCAT on April 23, 2003, in which the worker was represented by a workers' adviser.

On page 2 of the WCAT decision, the panel defined the issues raised in this appeal as follows:

> The issues to be determined in this appeal are whether myofascial pain syndrome is a compensable consequence of the worker's injury and whether the worker was temporarily or permanently disabled beyond July 24, 2000 by the compensable effects of the injury she sustained at work on September 26, 1999.

On page 5 of the WCAT decision, the panel noted the April 28, 2000 opinion provided by the Board medical advisor:

> Dr. [S] expressed his concern that the worker was apparently rendered so significantly symptomatic by such a trivial incident, particularly given her young age. He stated that:
>
>> Chronic musculoskeletal pain syndromes that have no identifiable organic cause have perplexed medical observers for years. The term "myofascial pain syndrome" (also known as fibrositis or fibromyalgia), has been used to explain both local and diffuse musculoskeletal pain when organic pathology is not evident.
>
> The Board Medical Advisor stated that myofascial pain syndrome is not considered by either the American Rheumatism Association or the American College of Rheumatology to have an activity-based etiology or to be an industrial disease. He expressed his opinion that the most likely cause of the worker's ongoing back complaints is myofascial pain

> syndrome and stated that there was insufficient evidence to relate these complaints to the injury accepted under the claim.

On page 6 of the WCAT decision, the panel noted that the workers' adviser had provided a letter dated April 12, 2001 from Dr. G. Smart, the worker's attending physician. Dr. Smart clarified a comment he had made in his chart notes on March 30, 1996 in which he said that the worker had "myofascial back pain, likely secondary to prolonged standing". The WCAT decision quoted from Dr. Smart's letter as follows:

> This diagnosis should be distinguished from "myofascial pain syndrome" or "fibromyalgia" and should have been more correctly documented as "mechanical back pain". [The worker] did not have "myofascial pain syndrome" or "fibromyalgia" in 1996. This diagnosis was first considered several months after her right sacroiliac strain, and no longer appears to be a factor impeding her recovery. I maintain that [the worker's] "fibromyalgia" arose as a result of her initial right sacroiliac and lumbar strain.

[I note that on April 21, 2001, the workers' adviser faxed Dr. Smart's April 12, 2001 letter to the Board. The workers' adviser requested that the case manager review this report and reconsider her decision of August 2000, to deny acceptance of myofascial pain being related to the worker's 1999 injury. On August 20, 2001, the client services manager commented:

> Please review and advise the worker and her advisor whether or not there is new evidence that would warrant reconsideration.

It is unclear whether any further action was taken by the Board in this regard. A subsequent entry in the claim log dated April 17, 2003 simply states: "Previous closure status remains unchanged."]

At the oral hearing on April 23, 2003, the workers' adviser submitted a seven page medical-legal report from Dr. Smart dated April 21, 2003 (marked as exhibit #6). The contents of that report are summarized in detail at pages 6-7 of the WCAT decision. The WCAT decision noted, in part:

> Dr. Smart pointed out that in March 2000 Dr. Filbey found classic fibromyalgia trigger points in the lower extremities, but not in the upper extremities and that Dr. Filbey did not say that the worker had fibromyalgia. Dr. Smart concluded that the worker did not have a true generalized fibromyalgia syndrome at that time. However, he acknowledged that the worker did have prominent fibromyalgia symptoms in late February which were present in conjunction with her ongoing low back and right sacroiliac joint symptoms and which responded well and rapidly to Amitriptyline.

The WCAT panel reached two conclusions:

> A causal relationship has not been established between the worker's fibromyalgia and the work incident on September 26, 1999.
>
> Furthermore, I find insufficient medical evidence to connect the worker's ongoing low back/SI discomfort to the injuries sustained by her on September 26, 1999.

Analysis

1. Jurisdiction - general

The central issue raised by this application concerns whether it is open to WCAT, in hearing an appeal, to make a decision concerning a different diagnosis than the one addressed in the decision giving rise to the appeal. I find that this is a jurisdictional issue. I will review *WCAT Decision #2003-00356* on a correctness standard, in relation to the issue as to whether the panel had authority to address the diagnosis of fibromyalgia in its decision.

Item #14.30 of the MRPP indicates that WCAT may address any issue determined in either the Review Division decision or the prior decision by the Board officer which was the subject of the request for review. Item #26.69 of the MRPP provides that in considering an appeal which was transferred to WCAT from the Review Board on March 3, 2003, WCAT will apply the same approach to the "scope of decision" as is set out at item #14.30 (with any necessary changes relating to the fact that the subject of the appeal is a decision by a Board officer with no intervening decision by the Review Division). These provisions do not shed additional light on the question as to whether, in hearing an appeal from a decision concerning a diagnosed condition, WCAT should view the issue narrowly (in relation to the specific diagnosis addressed in the decision) or broadly (in relation to the symptom complex addressed in the decision, including any new diagnosis provided for these symptoms).

2. Statutory Framework

Several options are available under the current Act, for addressing a new diagnosis presented in an appeal. To assist in considering whether the approach selected by the WCAT panel was permissible, it is useful to review the options available under the Act. These include:

(a) Section 38(2) referral back to the Board, with or without directions

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The decision in this case (*WCAT Decision #2003-00356*) concerned an appeal which was initially filed to the former Review Board. Part 2 of Bill 63 contained transitional provisions, which apply to such appeals. Section 38(2) provides:

> In proceedings before the appeal tribunal under subsection (1), instead of making a decision under section 253 (1) of the Act, as enacted by the amending Act, the appeal tribunal may refer a matter back to the Board, with or without directions, and the Board's decision made under that referral may be reviewed under section 96.2 of the Act, as enacted by the amending Act.

Thus, one option which was available to the WCAT panel was to refer the worker's appeal back to the Board for consideration, having regard to the new medical evidence which had been provided. (Section 39(3) provides similar authority to WCAT in dealing with Appeal Division proceedings which were transferred to WCAT). Section 38(2) and 39(3) provide an additional authority to WCAT, which is only available in connection with appeals filed to the former Review Board or Appeal Division prior to March 3, 2003. An example of a decision in which this authority under section 38(2) was exercised is *WCAT Decision #2003-01132* (identified as a "noteworthy" decision on WCAT's website at http://www.wcat.bc.ca/research/appeal-search.htm). The WCAT panel reasoned in that case:

> In this appeal, WCAT has determined that the matter of acceptance of the worker's claim should be referred back to the Board, with direction to determine whether the worker's diagnosed carpal tunnel syndrome was caused by his employment activities. The information on the claim file indicates the original decision considered the initial diagnosis of bilateral wrist and elbow tendonitis. The decision as to whether the worker's carpal tunnel syndrome is compensable is best suited to the Board's mandate as original decision maker.

It is noteworthy that the power conferred on the internal Review Division under section 96.4(8)(b), to refer the decision or order under review back to the Board, with or without directions, is a power which WCAT does not possess (except as granted by section 38(2) and 39(3) of the transitional provisions with respect to appeals filed before March 3, 2003 to the former Review Board and Appeal Division).

(b) Section 246(3) Referral of Undetermined Matter Back to the WCB

Section 246(3) and (4) of the Act provide:

> (3) If, in an appeal, the appeal tribunal considers there to be a matter that should have been determined but that was not determined by the Board, the appeal tribunal may refer that matter back to the Board for

> determination and suspend the appeal proceedings until the Board provides the appeal tribunal with that determination.
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> (4) If the appeal tribunal refers a matter back to the Board for determination under subsection (3), the appeal tribunal must consider the Board's determination in the context of the appeal and no review of that determination may be requested under section 96.2.

WCAT Decision #2003-04145 (*Referral of Undetermined Matter Back to the WCB*, 19 WCR 451) involved a worker's appeal concerning the duration of disability resulting from the worker's back injury. The WCAT panel received evidence showing that shortly after the appealed decision had been issued, the worker was diagnosed as having an Adjustment Disorder with depressed mood, in the context of a Chronic Pain Disorder. The WCAT panel found that a referral back to the Board was warranted under section 246(3). The WCAT panel reasoned:

> I find that the worker's entitlement beyond June 27, 2001 can not be fully explored without consideration of both his physical and psychological status at that time. Dr. Narang's October 22, 2001 opinion was undertaken shortly after the June 28, 2001 decision was issued. Moreover, there is information in the interdisciplinary pain program reports to suggest that the worker was experiencing psychological distress at that time, although a formal assessment and decision did not occur. In the end, I am inclined to conclude that the matter of the nature of the worker's psychological status and potential entitlement in relation to the worker's psychological status should have been determined prior to the Board terminating the worker's claim.

(c) Section 252 suspension

Section 252(1) of the Act provides:

> On application of the appellant or on the chair's own initiative, the chair may suspend appeal proceedings if a Board's decision respecting a matter that is related to the appeal is pending.

Thus, if an appellant has requested further adjudication by the Board concerning a matter related to the appeal, and the Board's decision is pending, WCAT may suspend the appeal proceedings until the Board had provided its decision. (In that situation, the parties would have the right to seek review by the Review Division of the new decision).

(d) Narrow Decision

Another option available to a WCAT panel is to expressly define and limit the scope of what is being addressed in the decision. In that event, it would be open to the appellant

to request consideration by the Board of any other issues which had not been adjudicated. In some situations, however, this approach may raise questions concerning the scope of the Board's authority to further address the matter. The March 3, 2003 amendments to the Act have imposed certain constraints on the Board's authority, as set out in sections 96(2) and 96(5)(a) of the Act (which define the grounds for reopening a claim, and which impose a 75 day time limit on the Board's reconsideration authority).

(e) Decision on New Diagnosis

In *Appeal Division Decision #96-0046* (*New diagnoses on appeal*, 12 WCR 25, January 12, 1996), the panel addressed a similar issue as follows (in relation to the statutory framework which existed prior to March 3, 2003):

> The worker's representative seeks a finding from the Appeal Division that the Review Board acted without jurisdiction in finding the worker has fibrositis and that fibrositis was not caused by her work. The submission requests the matter be referred to the adjudicator for an original decision while the current appeal be "suspended".
>
> When a worker makes a claim for compensation, it is not necessary that the correct diagnosis be written on the application form. That is a matter requiring medical expertise, and not generally within the knowledge of lay persons. A diagnosis is defined in Dorland's Pocket Medical Dictionary as "determination of the nature of a cause of a disease". The diagnosis helps in selecting appropriate treatment and predicting the outcome. It can also help determine the compensability of the injury or disease. Consideration of a new diagnosis does not automatically constitute an "original decision" especially where the diagnosis has not been settled.

The Appeal Division panel found that the issue on appeal concerned the worker's entitlement to compensation for personal injury or occupational disease, and that the new diagnosis of fibrositis was one of the considerations in the appeal.

Subsequent to March 3, 2003, a published WCAT decision addressed a similar issue. In *WCAT Decision #2003-02677* (*Jurisdiction to Consider New Diagnosis of Appeal*, 19 WCR 439, accessible at: http://www.worksafebc.com/publications/wc_reporter/default.asp), a WCAT panel was considering an appeal from a decision to deny the worker's claim for right shoulder tendonitis/bursitis, on a personal injury or occupational disease basis. At page 442, the WCAT panel found:

> The panel notes that, in the decision letter, the case manager dealt with only one of the diagnoses on file. The case manager did not address the matter of cervical radiculopathy secondary to degenerative disc disease. The panel considers that WCAT has jurisdiction to consider not only the condition of bursitis/tendonitis but also cervical radiculopathy, since the

> worker initiated a claim for a symptom complex that could have been caused by either condition or both in combination, and the medical reports clearly identified both conditions.

The WCAT panel found that the work conditions described by the worker in her application for compensation were sufficient to aggravate the worker's underlying degenerative disc disease and to provoke cervical radiculopathy. The worker's appeal was allowed in part, on the basis of that new diagnosis for the worker's symptoms.

I will include the approach taken in *WCAT Decision #2003-00356* and *WCAT Decision #2003-02677* as part of this list of options, subject to the consideration below as to whether this approach is permitted under the Act. In addition to the foregoing, section 246(2) provides WCAT with a range of powers, including the authority to:

> (b) receive new evidence;
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> (c) inquire into the matter under appeal and consider all information obtained;
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> (d) request the Board to investigate further into a matter relating to a specific appeal and report in writing to the appeal tribunal;

As well, section 249 of the Act provides WCAT with authority to obtain a report from an independent health professional, in deciding an appeal. (These latter powers provide support to WCAT in making decisions under the Act, rather than defining the scope of the issues which are properly before WCAT for decision).

The purpose of setting out the list above is not to point to any one of them as a correct or preferred option. Rather, it is to illustrate that a range of options is available under the Act, in dealing with the not uncommon situation of new evidence becoming available during the course of an appeal which involves a different diagnosis. The question for consideration in this application is whether the particular option selected, of proceeding with a decision on the new diagnosis raised in the appeal, was permissible under the Act. If so, the panel's choice of that option, from the range of approaches permitted by the statute, is entitled to deference (as explained in the second paragraphed in the quotation from Blake, above).

3. Winter Report / Legislative Intent

Given the range of other options available under the Act, as set out above, the question may be posed whether the particular route taken by the panel in this case (of proceeding with a decision on the new diagnosis raised in the appeal) was permissible under the Act. As the answer to this question is not clear from a reading of the statutory provisions alone, it is useful to review the relevant background materials to the March 3, 2003 statutory changes for evidence which may shed additional light on the legislative intent.

The March 11, 2002 *Core Services Review of the Workers' Compensation Board* (the Winter Report) is accessible on the Internet at: http://www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf. The recommendations in the Winter Report provided the basis for many of the statutory amendments contained in Bill 63. At the Second Reading of Bill 63 in the Legislature on October 22, 2002, the Minister of Skills Development and Labour commented concerning the purposes of the statutory amendments as follows (*Hansard*, 3rd Session, 37th Parliament (2002), at page 3935):

> **Hon. G. Bruce:** With this bill we aim to make the appeal process more responsive to injured workers and employers alike. In developing the new system, the ministry took into consideration the recommendations of the 1999 royal commission report on workers compensation and the 2001-02 WCB core services review conducted by Mr. Allan Winter. The changes that we are introducing will accomplish three main goals: first, limit the amount of time that it takes to reach a decision; second, improve the quality and consistency of decision-making; and third, end the cyclical nature of the current process.

The Winter Report recommended that the review and appeal bodies take a broad approach to jurisdiction. The core reviewer commented at page 28, with respect to the internal review body (Review Division):

> The subject matter of the internal review should not be limited to what the initial decision-maker actually dealt with in the four corners of the decision letter. Rather, the review would encompass any issue which the Review Manager believes should have reasonably been dealt with by the initial decision-maker in his/her letter. My reasoning for this broader scope is to avoid the delay and frustration which will often arise when the matter is referred back to the initial decision-maker to determine the additional issue(s), which could then become the subject of a further application for internal review.

At pages 33-34, Winter recommended that the internal review process should be conducted on a substitutional basis, so that an appellant would have the opportunity to submit any new medical information, such as a medical report from a specialist, which is relevant to the issue in dispute. He reasoned, at pages 34-35:

> Since the internal review would generally be conducted on a substitutional basis, the parties of interest would be entitled to present new evidence to the Review Manager which had not been brought to the attention of the previous decision-maker. In these circumstances, a question arises as to whether the Review Manager should refer new evidence, which is substantial and material to the decision under review, back to the initial decision-maker for his/her further consideration and determination.

> In my opinion, the answer to this question is no. The referral of the matter back to the initial decision-maker would often result in a further delay to the overall completion of the adjudication process with respect to the issue in question. In those cases where either the appellant or the respondent is unhappy with the "new" decision of the initial decision-maker, another application for an internal review would be brought. Since the internal review process will be conducted on a substitutional basis, the Review Manager will be in at least as good a position as the initial decision-maker to consider the new evidence and to make a determination.

With respect to the external appeal tribunal (WCAT), the core reviewer commented at pages 49-50:

> Once again, the subject matter of the appeal should not be limited to what the Review Manager actually dealt with in the four corners of his/her decision letter. Rather, the appeal would encompass any issue which the Appeal Tribunal believes should have reasonably been dealt with by the initial decision-maker in his/her decision letter, or by the Review Manager during the subsequent internal review process.

The core reviewer further reasoned, at page 50:

> As was the case with respect to the internal review process, it is my recommendation that the appeal should be conducted on a substitutional basis, whereby the Appeal Tribunal would have the discretion to confirm, vary or cancel the decision which is the subject matter of the appeal. Since this stage of the appeal process will be the first (and only) opportunity for the appellant to express his/her dissatisfaction with a WCB decision to a body which is external from the WCB, it is imperative that the appellant has (and, as importantly, perceives he/she has) a full opportunity to have an independent tribunal conduct a broad review of the disputed issue, and render its final decision on the matter.
>
> As was the case with the internal review process, since the external appeal would be conducted on a substitutional basis, the parties of interest would be entitled to present new evidence that had not been brought to the attention of the previous decision-makers. This new evidence would be considered by the Appeal Tribunal itself, and would not be referred back to either the initial decision-maker or the Review Manager for their consideration prior to the Appeal Tribunal rendering its decision in the matter.

At page 34 of the Winter Report, the core reviewer also commented:

> . . . I will be recommending significant restrictions to the ability for a worker or an employer to seek a retroactive "reconsideration" of a previous decision rendered by the WCB/Appeal system. It is therefore imperative that the WCB and the appellate system are provided the widest latitude to ensure that the "correct" decision is made before the matter has been finalized.

In fact, the legislative changes provided by Bill 63 went beyond the recommendations of the core reviewer, in terms of the increased finality of decision-making and the absence of a power of "reinquiry" after 75 days. This makes the reasoning of the core reviewer all the more compelling, as to the importance of providing the review and appeal bodies with the widest latitude to ensure that the "correct" decision is made before the matter has been finalized.

WCAT Decision #2004-03885 commented concerning section 246(3) and (4) as follows:

> I read subsections 246(3) and (4) as confirming the broad nature of WCAT's jurisdiction, which extends to include matters which should have been determined but which were not determined by the Board. I further read subsections 246(3) and (4) as providing WCAT with a discretion to refer a matter back to the Board in such circumstances, rather than requiring that WCAT do so as a prerequisite to addressing the undetermined matter. Subsection 246(3) uses the permissive "may", rather than "must" or "shall", in connection with the option of referring an undetermined matter back to the Board. Thus, so long as the requirements of procedural fairness and natural justice are met, in terms of notice to the affected parties, WCAT may proceed to address the matter which should have been addressed in the first instance (with or without a referral back to the Board under section 246(3) of the Act).

I find that the analysis in the Winter Report, and the statements of the Minister in the Legislature, provide very strong support for WCAT taking a broad approach to jurisdiction. This supports the approach taken by the WCAT panel in the present case.

4. Hallmarks of Quality Decision-Making

The WCAT chair has responsibility under section 234(2)(b) for establishing quality adjudication standards for WCAT members. The chair has established *Hallmarks of Quality Decision-Making*, at item #14.10 of the MRPP. Item (f) on the list of hallmarks states that a good decision is consistent with previous (non-precedent) WCAT decisions published in the *Workers' Compensation Reporter* unless the inconsistency is identified and the reasons for the departure clearly articulated.

Item (f) was not contained in the March 3, 2003 version of the MRPP, but was added in a revision dated March 29, 2004. In any event, the WCAT decision in this case was

dated April 30, 2003, and preceded *WCAT Decision #2003-02677* (dated September 25, 2003).

In addressing this application for reconsideration, I consider it appropriate to take into account the subsequent published WCAT decision. The publication of *WCAT Decision #2003-02677* provides support for WCAT panels taking a broad approach to jurisdiction, in respect of the consideration of a new diagnosis presented in an appeal. That decision was published concurrently with *WCAT Decision #2003-04145*, which referred an undetermined matter back to the Board. I read the concurrent publication of both decisions as providing support for a range of approaches under the Act (rather than identifying one approach as a preferred option).

While *WCAT Decision #2003-02677* was not made by a precedent panel under section 238(6) of the Act, and is thus not binding on me pursuant to section 250(3), it supports the approach taken by the WCAT panel in this case. This does not relieve me of addressing the issue raised in this application on a correctness standard. In the event I find that this approach involves jurisdictional error, I am obliged to clearly articulate reasons for departing from the approach set out in published *WCAT Decision #2003-02677*.

5. Findings

In this case, the WCAT decision was rendered nearly three years after the case manager's decision of August 8, 2000. One of the reasons for the restructuring of the workers' compensation appeal system concerned a backlog of appeals. The *Chair's Message* in the *WCAT 2003 Annual Report* (accessible at: http://www.wcat.bc.ca/publications/) explains:

> The Workers' Compensation Review Board (Review Board) and the Appeal Division of the Workers' Compensation Board (Appeal Division) ceased operations on February 28, 2003. Over 22,400 outstanding appeals were transferred from them to WCAT on March 3, 2003. Approximately 10% of the transferred appeals were from the Appeal Division inventory and the balance of over 20,000 were from the backlog that had developed over a number of years at the Review Board. Our goal is to complete all of the backlog appeals by February 28, 2006, the end of our third year of operations.

In the context of a long delay between the Board's decision, and the appellate decision, workers commonly continue to receive medical treatment or see new specialists. It is often the case that new evidence (which sometimes contains new diagnoses), is submitted in support of an appeal.

With respect to the different diagnoses in this case, of myofascial pain syndrome and fibromyalgia, I note that the range of symptoms addressed by the diagnoses are of a

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similar nature (i.e. involving the same symptom complex). Accordingly, this appears analogous to the situation where, for example, a worker is suffering from pain in an upper limb, with differing diagnoses being offered to explain the symptoms. This is not the situation of a panel addressing symptoms in a different area of the body, than was addressed in the decision under appeal.

The April 21, 2003 medical-legal report from Dr. Smart concerning the diagnosis of fibromyalgia (among other things), was submitted by the workers' adviser on behalf of the worker. Upon listening the audio recording of the April 23, 2003 oral hearing, I note the workers' adviser did not make any specific requests or submissions to the WCAT panel in relation to this additional evidence concerning the diagnosis of fibromyalgia. She did not request that the panel refrain from addressing the diagnosis of fibromyalgia in its decision.

A natural justice issue might arise concerning whether a party had sufficient notice and an opportunity to respond in relation to new evidence submitted at an oral hearing. WCAT's MRPP provides, at item #8.51(e) concerning the rules for expert evidence, and item #9.60 concerning *New Documentary Evidence*, that any expert's report must be provided to WCAT a minimum of 21 days prior to an oral hearing. However, a WCAT panel has the discretion to receive new evidence at an oral hearing, in which case the panel will determine what steps are necessary to ensure the other party is given an adequate opportunity to respond. In this case, the April 21, 2003 medical-legal report from Dr. Smart was presented at the oral hearing on behalf of the worker. In the circumstances, I do not consider that there is any basis for finding a breach of natural justice in relation to the WCAT panel's consideration of that evidence.

With respect to the scope of WCAT's jurisdiction, the core reviewer recommended that the internal review and external appeal bodies take a broad approach to jurisdiction. He recommended that the external appeal process be conducted on a substitutional basis, in which the parties of interest would be entitled to present new evidence that had not been brought to the attention of the previous decision-makers. He specifically noted that this new evidence would be considered by the Appeal Tribunal itself, and would not be referred back to either the initial decision-maker or the internal review body prior to the Appeal Tribunal rendering its decision in the matter. He considered this appropriate, to avoid the delay and frustration which will often arise when the matter is referred back to the initial decision-maker. In introducing Bill 63 for second reading, the three main goals identified by the Minister for the changes to the appeal structures under the Act included limiting the amount of time that it takes to reach a decision, improving the quality and consistency of decision-making, and ending the cyclical nature of the current process. To interpret the Act as requiring WCAT to take a narrow approach to jurisdiction, to preclude WCAT from considering a new diagnosis raised by the evidence presented in support of the appeal, would have a contrary effect. It would contribute to the cyclical nature of the appeal process, and prolong the time taken to reach a final decision concerning whether a worker is suffering a disability due to a work injury or disease. This background supports taking a broad approach to jurisdiction. I do not

consider that the wording of the Act is such as to require a narrow approach to jurisdiction.

In the circumstances of this case, the broad issue raised by the August 8, 2000 decision of the case manager, concerned whether the worker continued to be disabled as a result of her 1999 injury. The worker's pain complaints were addressed in the August 8, 2000 decision, in relation to the diagnosis of a myofascial pain syndrome. However, the medical advice provided by the Board medical advisor also contained reference to the diagnosis of fibromyalgia. A medical-legal report concerning this diagnosis was submitted to the WCAT panel by the workers' advisor on behalf of the worker. An April, 2001 request for reconsideration by the Board of its decision appears to have gone unanswered. I do not consider that there was any excess of jurisdiction in relation to the panel's decision regarding the diagnosis of fibromyalgia, stemming from the panel's consideration of the medical-legal opinion presented on behalf of the worker in this appeal.

In considering the legislative framework and the intent of the Bill 63 amendments, I find that it was within the jurisdiction of the WCAT panel to address a new diagnosis in its decision. I find that this did not involve any jurisdictional error. As the option selected by the panel was permissible under the Act, the panel's choice of that option (from the range of approaches permitted by the statute) is entitled to deference. I find no basis for concluding that the panel's choice was patently unreasonable. I further find that there was no breach of natural justice on the part of the panel in proceeding to address this diagnosis, as this was undertaken in connection with the evidence submitted on behalf of the worker.

While not necessary to my decision, I would also note that the WCAT panel found no specific organic pathology had been identified to account for the worker's ongoing symptoms. The panel found that in the absence of a cogent medical opinion to explain how the worker's current symptoms were causally related to the original incident on September 26, 1999, the worker was not entitled to further benefits. Implicitly, the panel found that Dr. Smart's medical-legal report of April 21, 2003 did not provide sufficient medical evidence to support a different conclusion. The panel's finding on this issue concerns the weighing of the evidence. In that respect, the panel's decision must be given deference. In *Administrative Law in Canada*, Sara Blake states at page 191:

> 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.

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> . . .
>
> 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 do not consider that the panel's decision was patently unreasonable in respect of its weighing of the medical evidence. In any event, the workers' representative has not disputed the WCAT panel's decision on this basis.

Conclusion

The worker's application for reconsideration of *WCAT Decision #2003-00356* is denied. The WCAT panel did not exceed its jurisdiction, in making a decision on a new diagnosis raised in the appeal. The WCAT decision is final and conclusive pursuant to section 255(1) of the Act.

Herb Morton
Vice Chair

HM/dc

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