

### Noteworthy Decision Summary

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**Decision:** WCAT-2004-06308    **Panel:** Herb Morton    **Decision Date:** November 29, 2004

***Authority to order the Board to pay Legal Expenses of Representatives - Legal Fees – Legal Costs – Van Unen v. WCB decision - Sections 100 and 251(1) of the Workers Compensation Act – Policy Item #100.40 of the Rehabilitation Services and Claims Manual – Section 7 of the Worker’s Compensation Appeal Regulation – Workers’ Compensation Review Board proceeding – WCAT proceeding – Whether Policy is Patently Unreasonable***

In this appeal, the WCAT panel concluded:

- In relation to a Workers’ Compensation Board (Board) matter or a Review Division proceeding, and pursuant to section 100 of the *Workers Compensation Act* (Act) and Board policy item #100.40 of the *Rehabilitation Services and Claims Manual, Volumes I and II* (RSCM), neither the Review Division nor WCAT have the authority to order the Board to pay a party’s legal expenses. In drawing this conclusion, the WCAT panel found that the 2001 decision of the British Columbia Court of Appeal in *Van Unen v. British Columbia (Workers’ Compensation Board)* on this same issue no longer applies to the current statutory scheme.
- Policy item #100.40 of the RSCM is not so patently unreasonable that it is not capable of being supported by the Act or Regulations (section 251(1) of the Act)
- In relation to a WCAT proceeding, section 7 of the *Worker’s Compensation Appeal Regulation* does not authorize WCAT to order the Board to pay a party’s legal expenses.
- If WCAT does not have the jurisdiction under the Act to hear an appeal from a Review Division decision on a particular subject matter (by virtue of section 239(2) (b) to (e)), then WCAT does not have the jurisdiction to consider whether the Review Division erred in refusing to make an order requiring the Board to pay a party’s legal fees.

Policy item #100.40 of the RSCM provides, in part, that “no expenses are payable to or for any advocate. Nor does the Board pay fees for legal advice or advocacy in connection with a claim for compensation”.

At the time of the *Van Unen* decision, policy item #100.40 of the RSCM was not binding on the Board appellate bodies. In *Van Unen*, the court found that section 100 of the Act (which remains unchanged) gave to the Board’s appellate bodies the discretion to order the Board to pay a party’s legal expenses. The court remarked that while policy item #100.40 ensures that such orders are not customary, section 100 “leaves an ample discretion for truly deserving cases without violating the harmony of [the] system”.

In this appeal, the WCAT panel stated that the current Review Division and WCAT are both subject to a statutory requirement to apply an applicable policy of the board of directors (section 99(2) and section 250(2) of the Act). The panel noted that policy item #100.40 is stated as a rule, rather than as a guideline and was therefore unequivocal in its effect. For this reason, the

*Van Unen* decision is no longer applicable. The WCAT panel thus concluded that Board policy no longer permits the Review Division to order the Board to pay legal expenses under any circumstances.

In this appeal, the worker's request for reimbursement of legal expense had been denied by the Review Division and the worker appealed that decision, among others, to WCAT.

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## Introduction

The worker has appealed *Review Decisions #4102, #6168 and #7495* (all dated January 23, 2004). *Review Decisions #4102 and #6168* concerned the May 12, 2003 and July 11, 2003 decisions by officers of the Workers' Compensation Board (Board). These decisions were provided in implementation of the December 18, 2002 Workers' Compensation Review Board (Review Board) finding. *Review Decision #7495* concerned the Board officer's decision of August 13, 2003, to deny the worker's request for commutation of his pension award.

The worker is represented by a lawyer. The employer is not participating in these appeals, although invited to do so.

Other appeals by the worker were assigned to a different Workers' Compensation Appeal Tribunal (WCAT) panel. One involved an appeal of the December 18, 2002 Review Board finding. The worker's appeals were addressed in *WCAT Decisions #2004-03383, #2004-03373, #2004-03346 and #2004-04388*. Consideration of the present appeals was deferred pending the issuance of the other WCAT decisions. Pursuant to section 253(5)(a) of the *Workers Compensation Act (Act)*, the 180-day time frame for issuing this decision was extended by the WCAT chair based on the complexity of the proceedings.

The worker requested an oral hearing. A staff member in the WCAT registry initially advised the worker that his appeals would proceed by way of an oral hearing. Upon further review, pursuant to item #8.70 of WCAT's *Manual of Rules, Practices and Procedures (MRPP)*, I found that an oral hearing was not necessary to consideration of the issues raised in these appeals. The worker's appeal of the December 18, 2002 Review Board finding was addressed on the basis of written submissions (*WCAT Decision #2004-04388*). I find that the narrower issues regarding the correctness of the interim implementation of the Review Board finding can be properly considered on the basis of written submissions. I similarly find that the issues regarding WCAT's jurisdiction, and the worker's request for legal fees, are not ones requiring an oral hearing. Accordingly, these appeals have proceeded on the basis of written submissions. The worker and his lawyer were advised of the change of hearing method (by memorandum dated September 14, 2004), and a further written submission was provided by the worker's lawyer dated October 12, 2004.

**Issue(s)**

In his appeals, the worker seeks:

- (a) an increase in his long-term wage rate to the Board's maximum wage rate;
- (b) interest on his retroactive pension award;
- (c) full retroactive implementation of his pension award, with no deduction for periods in which wage loss or rehabilitation benefits were previously paid to the worker;
- (d) a 100% loss of earnings pension from at least July 22, 1997, with interest;
- (e) acceptance of his chronic obstructive pulmonary disease (COPD) as compensable;
- (f) a commutation of his pension award; and,
- (g) reimbursement of his legal fees under section 100 of the Act, on the basis that his case is unique, unusual or otherwise truly deserving.

**Jurisdiction**

Under section 239(1) of the Act, a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section, may be appealed to WCAT. WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1) of the Act). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors that is applicable (section 250(2) of the Act).

**Background**

It is useful to summarize the recent decisions on the worker's claim in some detail, as this context has significance in determining the scope of WCAT's jurisdiction in the present appeals.

*Appeal Division Decision #2001-0664* dated April 6, 2001 allowed the worker's appeal in part, finding that the worker's employment was of causative significance in his development of the asthmatic component of his lung condition. The Appeal Division decision found that the component of the worker's COPD related to asthma is compensable. That decision further found that the worker's chronic bronchitis and/or emphysema (the other components of his COPD) were not due to the nature of his employment. Following the Appeal Division decision, decisions dated December 4, 2001, January 2, 2002, and April 18, 2002 were issued by Board officers (and appealed to the Review Board):

- The December 4, 2001 decision by the claims adjudicator, occupational disease services, advised the worker that the compensable asthmatic component of his diagnosed COPD had stabilized or plateaued no later than October 22, 1999, when he last worked. Accordingly, no temporary benefits were payable but his claim would be referred to Disability Awards. The worker's wage rate was set at 75% of \$1,094.23 per week, or \$4,754.69 per month effective October 23, 1999.
- The January 2, 2002 decision concerned the worker's permanent functional impairment award of 13% of total disability, with no loss of earnings award, effective October 23, 1999.
- The April 18, 2002 decision by the medical appeals officer denied the worker's request for examination by a Medical Review Panel (MRP), in connection with the Appeal Division decision, as being out of time.

The worker appealed these three decisions to the Review Board. By finding dated December 18, 2002, the Review Board addressed these appeals as follows:

- December 4, 2001 decision: The Review Board found the worker was entitled to temporary disability benefits for those periods subsequent to July 22, 1997 when he was temporarily disabled due to the exacerbation of his compensable asthma condition caused by exposure to welding fumes.
- January 2, 2002 decision: The Review Board confirmed the worker's disability as being equal to 13% of total disability, with no loss of earnings. The Review Board made the pension award effective from July 22, 1997, and found the worker's wage rate should be based on his one-year earnings from July 1, 1996 to June 30 1997.
- April 18, 2002 decision: The worker's MRP application was denied as being out of time.

The Review Board further concluded it had no jurisdiction to award legal costs.

Following the Review Board finding, Board officers issued the three further decisions, which are at the root of the worker's present appeals:

- May 12, 2003: The claims adjudicator, occupational disease services, found there were no additional periods during which the worker was temporarily disabled by respiratory symptoms after July 22, 1997. The worker had received wage loss benefits under his 1999 claim from September 28, 1999 until October 4, 1999. He also received wage loss benefits under his 1997 back claim from September 7, 1997 until May 24, 1998. He found the worker was not

entitled to interest on his retroactive pension award, as there had been no blatant Board error.

- July 11, 2003: The worker's gross earnings for the period from July 1, 1996 to June 30, 1997 totalled \$46,985.25. These earnings amounted to \$901.08 per week, or \$3,915.00 per month. The worker's pension award was based on 75% of \$3,915.00 per month. The worker's monthly pension award was \$381.71 per month effective July 2, 1997 (adjusted to \$422.14 per month as of July 2003).
- August 13, 2003: The worker's request for a commutation of his pension award was denied.

The worker requested review of these three decisions. The three Review Division decisions (all dated January 23, 2004), which are the subject of the worker's present appeals, were as follows:

- **Review Decision #4102** (re May 12, 2003 decision): The review officer found no further periods of temporary disability due to the worker's compensable asthma condition. He confirmed the average earnings figure on which the worker's functional impairment award was calculated, at \$3,915.00 per month. He confirmed the denial of interest, on the basis that there had been no blatant Board error regarding the determination of the effective date of the worker's pension award. The worker's request for reimbursement of legal fees was denied.
- **Review Decision #6168** (re July 11, 2003 decision): The review officer noted the worker's disability had been confirmed by the Review Board at 13% of total, with no loss of earnings, and denied the worker's request for an award of 100%. He found the reduction from the worker's retroactive lump sum pension benefits, in connection with the periods during which the worker was in receipt of wage loss, was appropriate, and there were no periods during which the worker was in receipt of rehabilitation benefits. He concluded that interest was not payable on the retroactive pension benefits. The worker's request for reimbursement of legal fees was denied.
- **Review Decision #7495** (re August 13, 2003 decision): The denial of the worker's request for a commutation of his pension award was confirmed. The worker's request for reimbursement of legal fees was denied.

**Other WCAT decisions:** WCAT decisions are final and conclusive under section 255 of the Act. Other WCAT decisions concerning the worker include the following (not a complete listing):

- **WCAT Decision #2004-03346-AD, June 24, 2004:** Under the worker's 1999 claim, the WCAT panel held that the September 1999 inhalation incident was correctly accepted as a temporary aggravation of the asthmatic component of the worker's COPD (with wage loss benefits paid from September 28, 1999 until October 4, 1999, following which the worker returned to work). The worker was entitled to be reimbursed health care expenses related to that asthmatic component. The WCAT panel denied the worker's appeal, and confirmed the December 20, 2002 Review Board finding. The WCAT panel denied the worker's request for reimbursement of legal fees, expressing agreement with the reasoning provided in prior *WCAT Decisions #2003-03162, #2003-03220, #2003-03383, and #2003-03922.*
- **WCAT Decision #2004-03373, June 25, 2004:** This appeal concerned a December 19, 2002 Review Board finding on the worker's 1998 claim for right rotator cuff tendonitis. The WCAT decision concerned the worker's use of Celebrex. With respect to the question of retroactive implementation of the Review Board finding, the WCAT panel adopted the reasoning expressed in *Appeal Division Decision #2002-0453* of February 20, 2002, in finding that the deferral of retroactive implementation of a Review Board finding pending the outcome of the appeal to the Appeal Division was required by section 92(2) of the Act.
- **WCAT Decision #2004-04388, August 23, 2004:** This WCAT decision concerned the worker's appeal from the December 18, 2002 Review Board finding. The WCAT panel concluded as follows:
  - **December 4, 2001 decision:** The WCAT panel found that as the worker had not missed any time from work as a result of the asthmatic component of his COPD prior to September 28, 1999, no compensation other than health care benefits was payable for any period of time prior to that date. The panel concluded that the asthmatic component of the worker's COPD stabilized no later than October 22, 1999.
  - **January 2, 2002 decision:** The WCAT panel concluded that the asthmatic component of the worker's COPD is reversible and does not constitute a permanent disability. Accordingly, no permanent partial disability award is payable. The issue of the worker's wage rate was thus moot. The WCAT panel found that following the September 1999 temporary aggravation to the worker's respiratory condition, he

continued working until a non-compensable accident at home. The panel concluded that the worker did not retire due to his asthma. The WCAT panel found that the issue regarding the compensability of the whole of the worker's COPD had been previously determined (and denied) by *Appeal Division Decision #2001-0664*.

- **April 18, 2002 decision:** The WCAT panel found the worker had not pursued an appeal regarding the decision that his MRP application was out of time.

The WCAT panel denied the worker's request for reimbursement of legal costs.

### Analysis

The worker's present appeals concern the Board's decisions regarding the interim implementation of the December 18, 2002 Review Board finding, pending the outcome of the worker's appeal from that finding. By submission of February 19, 2004, the worker's lawyer argues:

The Review Board's 18 December 2002 findings are not "final" and/or "binding" on the WCAT. No section of the statute states such a thing.

The Review Board's findings of December 18, 2002 were appealed to the former Appeal Division, and that appeal was transferred to WCAT on March 3, 2003 for completion pursuant to the transitional provisions contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). Thus, there was a rehearing by WCAT of the Review Board findings (*WCAT Decision #2004-04388* dated August 23, 2004). In the context of that appeal, WCAT had jurisdiction to vary the Review Board findings. I consider, however, that for the purpose of considering whether the Board officers and Review Division correctly implemented the Review Board finding on an interim basis, pending the outcome of the appeal of the Review Board finding, the Review Board finding must be considered binding (see the decision of the British Columbia Court of Appeal in *Guadagni v. WCB (BC)*, [1989] B.C.J. No. 569, (1989) 58 D.L.R. (4th) 1, (1989) 35 B.C.L.R. (2d) 363).

The worker's appeal from the December 18, 2002 Review Board finding was stamped as received by the former Appeal Division on December 31, 2002, within the 30-day time limit. Section 92 of the Act (in effect at that time) provided:

**92** (1) Where a claim is allowed by the review board, periodic payments must commence and a lump sum under section 17 (13) must be paid; and an amount so paid is not, in the absence of fraud or misrepresentation, recoverable from the worker or dependants.



(2) Notwithstanding subsection (1), where a finding of the review board is appealed under section 91 or reopened or reheard under section 96, payment of any compensation that has not yet been paid with respect to the period prior to the finding of the review board must be deferred until the date on which the appeal division makes its decision or redetermination under section 91 or 96, as the case may be.

(3) If the appeal division decision is in favour of the worker or the worker's dependants, interest

- (a) calculated in accordance with the policies of the governors, and
- (b) beginning 31 days after the date on which the review board made its finding or beginning on an earlier day determined in accordance with the policies of the governors

must be paid on compensation that has been deferred under subsection (2).

A similar provision is contained at section 258 of the current Act, regarding interim implementation of Review Division decisions pending the outcome of an appeal to WCAT (see policy #103.83 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I)).

Policy at #105.30 (RSCM I) concerns implementation of Review Board findings. This policy is contained in an appendix to item #C13-104.00. The policy states that any benefits payable from the date of the Review Board finding forward will be paid without delay. Payment of retroactive benefits will be deferred for 30 days, to ascertain whether an appeal or referral to the Appeal Division has been initiated. If there is an appeal to the Appeal Division under section 91, retroactive benefits will not be paid until the Appeal Division has completed its consideration of the matter.

In this case, the worker's appeal of the December 18, 2002 Review Board finding was filed to the Appeal Division within 30 days. I am puzzled by the lack of reference to section 92 of the Act, in the decisions by the Board officers and the Review Division providing retroactive implementation of the Review Board finding. It is not evident whether the decision-makers were unaware that the Review Board finding had been appealed to the Appeal Division, or whether they considered that section 92 only applied in the event of an employer's appeal. I do not read section 92 as being limited to situations where the appeal is filed by the employer. As section 92 refers simply to an appeal being filed under section 91, without limiting its application to situations where the employer filed the appeal, it also applies where the Review Board finding was appealed by a worker or dependant.

The memo of September 14, 2004, which was provided to the worker's lawyer regarding the change in hearing method and the issues to be addressed, noted:

Section 92(2) of the former Act provided that where a Review Board finding is appealed to the Appeal Division, payment of retroactive compensation under the finding must be deferred until the Appeal Division makes its decision.

This issue was also addressed in *WCAT Decision #2004-03373*, which adopted the reasoning expressed in *Appeal Division Decision #2002-0453*. In that decision, a former chief appeal commissioner reasoned:

I find little merit in counsel's protestations that the Board's decision to withhold payment of the retroactive benefits prior to the Review Board finding was "illegal" or "unlawful". In fact, quite the opposite is true. Section 92(2) requires that the retroactive benefits for a period prior to the Review Board finding be deferred until the Appeal Division makes its decision on the appeal. Counsel would have or should have been aware of this fact as soon as the rehabilitation consultant referred counsel to published policy #105.30 in his letter of June 25, 2001 since that policy repeats section 92 of the Act.

In the present appeals, the worker's lawyer has not commented concerning the effect of section 92 in his October 12, 2004 submission.

My consideration of the worker's appeals regarding whether the Review Board finding was correctly implemented is governed by section 92 of the former Act. I find that section 92 precludes consideration of the worker's claim for retroactive entitlement, in relation to the interim implementation of the Review Board finding. The worker's appeal to the Appeal Division of the December 18, 2002 Review Board finding was transferred to WCAT, and was decided on August 23, 2004 (*WCAT Decision #2004-04388*).

Within this framework, I will address the issues raised by the worker's appeals in the same order as they are listed above under **Issue(s)**.

**(a) Increase in long-term wage rate to the Board's maximum**

The Review Board found the worker's wage rate should be based on his one-year earnings from July 1, 1996 to June 30, 1997. The Board officer found the worker's gross earnings for the period from July 1, 1996 to June 30, 1997 totalled \$46,985.25. These earnings amounted to \$901.08 per week, and \$3,915.00 per month. The worker's pension award was based on 75% of \$3,915.00 per month. The Review Division confirmed the worker's average earnings at \$3,915.00 per month.

By a written submission dated February 19, 2004, the worker's lawyer argues the worker's long-term earnings should be at the Board's maximum. He provides no evidence or argument to support the contention that the worker's earnings, during the one-year period specified by the Review Board, were calculated in error. It is not evident from the argument provided whether the worker's lawyer is expressing disagreement with the Review Board finding (which would not be an argument I could consider in these appeals), or whether he is disputing the determinations by the Board officers regarding the worker's earnings from July 1, 1996 to June 30, 1997, totalling \$46,985.25. By letter dated April 22, 2003, the employer's payroll administrator stated that the worker's gross earnings for the period of July 1, 1996 to June 30, 1997 were \$46,985.25. No other evidence has been provided to show that this information was in error.

The worker's appeal is denied on this issue. I find that the interim implementation of the Review Board finding was correctly based using the worker's gross earnings in the amount of \$46,985.25, from the one-year period specified by the Review Board.

**(b) Interest on retroactive pension award**

Pursuant to section 92, the Board had no authority to implement the worker's pension on a retroactive basis pending the outcome of the worker's appeal to the Appeal Division. Accordingly, the question as to whether interest was payable did not properly arise, as part of the interim implementation of the Review Board finding (which was limited to prospective periodic payments following the date of the Review Board finding). This issue is therefore moot.

I note, as well, that the worker's appeal to the Appeal Division was transferred to WCAT for completion effective March 3, 2003, pursuant to the *Workers Compensation Amendment Act (No. 2), 2002*. The WCAT panel ultimately determined the worker had no pension entitlement, thus making the issue of interest wholly moot.

The worker's appeal is denied on this issue.

**(c) Full retroactive pension entitlement, with no deductions**

The worker objects to the deduction, from his retroactive pension benefits, of amounts relating to periods during which he was in receipt of wage loss or rehabilitation benefits. (The review officer noted that this only involved periods of wage loss benefits). For the reasons set out above, this issue is moot as the worker had no entitlement to retroactive pension benefits in relation to the interim implementation of the Review Board finding.

**(d) Total loss of earnings pension from at least July 22, 1997, with interest**

The Review Board specified, on page 7, that the worker was not entitled to a loss of earnings pension as he had returned to work at his previous employment without loss of earnings. Accordingly, the worker was not eligible for consideration of a loss of earnings pension, for the purposes of implementing the Review Board finding on an interim basis. The worker's appeal is denied on this issue.

**(e) Acceptance of COPD**

The Review Board noted that pursuant to *Appeal Division Decision #2001-0664*, only the asthma portion of the worker's COPD was compensable. Accordingly, the Board officers could not accept other components of the worker's COPD, in the interim implementation of the Review Board finding. The worker's appeal is denied on this issue.

**(f) Commutation of pension award**

Section 239(2)(d) of the Act provides that a decision respecting commutations under section 35 of the Act may not be appealed to WCAT. No argument has been provided by the worker's lawyer to identify any basis on which WCAT would have jurisdiction to address this issue. I find that WCAT has no authority to consider the worker's appeal from *Review Decision #7495* regarding the worker's commutation request.

**(g) Legal fees**

The worker seeks reimbursement of legal fees. His lawyer relies upon the decision by the British Columbia Court of Appeal in *Van Unen v. WCB (BC)*, 2001 BCCA 262, (2001) 152 B.C.A.C. 13, (2001) 87 B.C.L.R. (3d) 277, 17 W.C.R. 305, leave to appeal to the Supreme Court of Canada denied [2001] S.C.C.A. No. 288. The worker's lawyer argues that the review officer fettered his discretion, and that this involved a clear error of law on the face of the record. He cites the decision of the British Columbia Court of Appeal in *Testa v. WCB (BC)*, (1989) 36 B.C.L.R. (2d) 129, (1989) 58 D.L.R. (4th) 676, which was also considered in the *Van Unen* decision.

In *Van Unen*, the Court of Appeal considered Appeal Division decisions which denied payment of legal fees. The Appeal Division panels considered the policy which appeared to prohibit the payment of legal fees. In those cases, however, the Appeal Division panels considered whether there were circumstances justifying a departure from the policy. The Court of Appeal reasoned, in this regard:

28 Those two sets of reasons reflect an application of the reasoning set out in the "generic" decision No. 93-1687. In my opinion, applying the standard of correctness, coupled with appropriate deference to the Appeal Division's expertise in relation to the objects and practical

application of the legislation, the interpretation of s. 100 which allows it to apply to claims for legal expenses, but does not require that they be paid in any case or class of cases, (with the possible exception of unusual cases where the claiming party was subjected to abuse of process or otherwise became subject to unique considerations), is an interpretation that meets the standard which I have described. **It is an interpretation which rises above the Rehabilitation Services and Claims Manual by allowing for exceptions not indicated in the Manual.**

29 The interpretation I have described was actually applied in the passages from the two relevant decisions which I have quoted. In my opinion, **it leaves an ample discretion for truly deserving cases without violating the harmony of a system that the Board has decided should be conducted without any customary liability of the Board to pay legal fees** from the accident fund to every successful claimant who retains a lawyer.

30 In my opinion the Appeal Division did not improperly fetter its discretion in the two relevant decisions refusing the payment of legal expenses, did not act in a way that was patently unreasonable, and did not violate the principles of natural justice. I would not accede to the first ground of appeal.

[emphasis added]

In *Van Unen*, the Court of Appeal commented at paragraph 25 that:

The Board cannot give itself a jurisdiction it does not possess, or deny a jurisdiction given to it by the Legislature, by misinterpreting its constating statute.

Having regard to this latter statement by the Court of Appeal, it is necessary to re-examine the “legal fees” issue in the context of the March 3, 2003 changes to the Act.

The three decisions by the Board officers which are at the root of the current appeals were dated May 12, 2003, July 11, 2003 and August 13, 2003 (all subsequent to the March 3, 2003 changes to the Act contained in Bill 63). The worker’s current appeals are from the subsequent decisions of the Review Division. The Review Division, and WCAT, are both subject to new statutory requirements to apply an applicable policy of the board of directors.

Effective March 3, 2003, section 99 of the Act was amended to provide:

**99** (1) The Board may consider all questions of fact and law arising in a case, but the Board is not bound by legal precedent.

(2) The Board must make its decision based upon the merits and justice of the case, **but in so doing the Board must apply a policy of the board of directors that is applicable in that case.**

(3) If the Board is making a decision respecting the compensation or rehabilitation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the Board must resolve that issue in a manner that favours the worker.

[emphasis added]

Section 250 of the Act now provides:

**250** (1) The appeal tribunal may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent.

(2) The appeal tribunal must make its decision based on the merits and justice of the case, **but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.**

(3) The appeal tribunal is bound by a decision of a panel appointed under section 238(6) unless

(a) the specific circumstances of the matter under appeal are clearly distinguishable from the circumstances addressed in the panel's decision, or

(b) subsequent to the panel's decision, a policy of the board of directors relied upon in the panel's decision was repealed, replaced or revised.

(4) If the appeal tribunal is hearing an appeal respecting the compensation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the appeal tribunal must resolve that issue in a manner that favours the worker.

[emphasis added]

Section 251 sets out a process for WCAT panels to raise issues as to the lawfulness of policy, for resolution by the WCAT Chair or board of directors. Section 251 provides, in part:

**251** (1) The appeal tribunal may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

(2) If, in an appeal, the appeal tribunal considers that a policy of the board of directors should not be applied, that issue must be referred to the chair and the appeal proceedings must be suspended until the chair makes a determination under subsection (4) or the board of directors makes a determination under subsection (6), as the case may be.

In making its decision to deny payment of legal fees, the Review Division applied the policy of the board of directors. Policy item #100.40, RSCM I, provides:

**#100.40 Fees and Expenses of Lawyers and Other Advocates**

No expenses are payable to or for any advocate. Nor does the Board pay fees for legal advice or advocacy in connection with a claim for compensation. (41) The Board will not pay the legal costs of a claimant or employer in connection with court proceedings to challenge a Board decision beyond what it may become subject to pay following the court's decision under the general law of costs.

Item B4.5 of the Review Division *Practices and Procedures* currently provides:

It is not necessary for a party to be represented during a review. If a party chooses to retain a representative for the purposes of review, they do so at their own expense. The Review Division is bound by the Board's policy respecting fees and expenses of lawyers and other advocates. As stated in Policy #100.40 of the *Rehabilitation Services & Claims Manual*, "No expenses are payable to or for any advocate. Nor does the Board pay fees for legal advice or advocacy in connection with a claim for compensation".

This item was previously set out as #2.6.11, as indicated in the Review Division decisions.

With respect to expenses incurred for the purpose of pursuing an appeal to WCAT under Part 4 of the Act, section 7 of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/02 (Appeal Regulation), provides:

7. (1) Subject to subsection (2), the appeal tribunal may order the Board to reimburse a party to an appeal under Part 4 of the Act for any of the following kinds of expenses incurred by that party:

(a) the expenses associated with attending an oral hearing or otherwise participating in a proceeding, if the party is required by the appeal tribunal to travel to the hearing or other proceeding;

(b) the expenses associated with obtaining or producing evidence submitted to the appeal tribunal;

(c) the expenses associated with attending an examination required under section 249(8) of the Act.

(2) 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.

WCAT has no authority to order the Board to reimburse legal fees in relation to the appeal to WCAT. In relation to the review by the Review Division, the Review Division and WCAT are both subject to a statutory requirement to apply an applicable policy of the board of directors. Policy at #100.40 is applicable, and provides that such expenses will not be paid.

At the time of the *Van Unen* case, item #96.10 of the former *Rehabilitation Services and Claims Manual* provided:

In the adjudication of individual claims, the Board is not "bound" by either internal policy directives or by external authorities in the field of compensation, at least not in the sense of the word "bound" as understood at common law. However, in issuing internal directives, the Board gives general indications of how it will act when certain circumstances come before it. When these circumstances arise, the applicable directive will normally be followed. It is recognized that there is an infinite variety of circumstances that can arise and that it is not possible to lay down in advance policies to finally determine every conceivable situation. Furthermore, there is the obligation on the Board to decide each case in accordance with its merits and justice and the right of individual persons affected under the rules of natural justice to present argument and evidence on their own behalf. Therefore, regard must always be had to the particular circumstances of each claim to determine whether an existing policy should be applied or whether there are grounds for a change in or departure from a policy. There will also be situations arising from time to time which are not covered by existing policy.



By resolution dated January 21, 2003, the board of directors amended the policy at #96.10 to delete the above wording concerning how policy is to be applied, effective March 3, 2003. Accordingly, the provisions of the Act, and policy, have changed since the *Van Unen* decision was issued.

The approach described in the *Van Unen* decision was based upon both the prior Act and policy, and the common law prohibition on fettering a statutory discretion. A question arises, therefore, whether the changes to the Act have the effect of overriding this common law requirement. I do not propose to address that larger question beyond the extent necessary to decide this case.

Under the current statutory framework, a review officer has a responsibility to determine whether a policy is applicable. If the review officer finds the policy to be applicable, the decision-maker must apply the policy pursuant to section 99(2) of the Act. In the case of WCAT vice chairs, the vice chair is subject to a similar obligation under section 250(2) of the Act, but has the additional option of initiating a referral to the chair under section 251 regarding the lawfulness of the policy (if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations). *WCAT Decision #2004-03646* reasoned:

Having regard to the analysis in the Winter Report, the statements of the Minister in Hansard concerning the intended purposes of Bill 63, the deletion of the policy at #96.10 concerning the application of policy as guidelines, the wording of section 250, the analysis by Sara Blake, and the various Court decisions discussed above, I consider that to the extent an applicable policy is stated as constituting a set of rules rather than guidelines, a WCAT panel must either apply those rules or initiate a referral under section 251 if the panel considers the policy so patently unreasonable that it is not capable of being supported by the Act and its regulations. While different wording is used in subsections 250(2) and 250(3) of the Act, these subsections may be viewed as complementary provisions setting out a changed statutory framework under which policies, and decisions of WCAT precedent panels, may be binding on WCAT. This interpretation is also consistent with items #1.20 and #14.10 of WCAT's MRPP which refer to the binding nature of the policies of the board of directors.

The policy of the board of directors at #100.40 is stated as a rule, rather than as a guideline. It is unequivocal in its effect. It does not contain words such as "usually" or "generally", which would support applying the rule as a guideline. This language cannot be read as being tempered by the policy at #96.10, as that policy has been deleted. WCAT is a creature of statute, and its authority is defined by the Act. I find that the legislative intent of sections 99 and 250, regarding the application of policy, must be respected. Accordingly, I agree with the decisions by the review officer, which denied

the worker's request for payment of legal fees. I do not view the policy at #100.40 as a patently unreasonable limitation on the authority contained in section 100 of the Act, so as to warrant a referral to the WCAT chair under section 251 of the Act. The worker's appeal on this issue is, therefore, denied.

While not necessary to my decision, I do not consider that the worker's legal fees would be payable under the former framework in any event. That framework was described in *Appeal Division Decision #93-1687*, "Legal Fees", 10 WCR 211, and *Appeal Division Decision #2001-1902*, "Payment of Legal Fees", 17 WCR 595. I do not consider that the worker's appeals concerning the narrow issues regarding implementation of the Review Board finding involved unique considerations which would, under the former framework, warrant a departure from the general policy.

### **Legal fees — commutation appeal**

There is a further issue which arises concerning the scope of my decision to deny payment of legal fees. As set out above, I found that WCAT has no authority to consider the worker's appeal from *Review Decision #7495* regarding the denial of his commutation request. A question for consideration is whether, if the central subject matter is outside WCAT's jurisdiction, WCAT has jurisdiction to consider the worker's appeal regarding the denial of legal fees in connection with that appeal. In view of my conclusion above regarding the worker's request for legal fees, this additional reasoning is obiter (not necessary to my decision).

Under section 239(1) of the Act, a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review, may be appealed to WCAT. This is subject to section 239(2), which lists types of decisions by review officers which may not be appealed to WCAT (such as a decision respecting a commutation under section 35, or respecting vocational rehabilitation under section 16 of the Act). Section 239(2)(a) further provides:

(2) The following decisions made by a review officer may not be appealed to the appeal tribunal:

- (a) a decision in a prescribed class of decisions respecting the conduct of a review;

Section 224(2)(j) of the Act provides that the Lieutenant Governor in Council may make regulations as follows:

- (j) prescribing any decisions or orders under this Act or the regulations that may be appealed to the appeal tribunal under Part 4, prescribing who may appeal those decisions or orders and prescribing classes of decisions for purposes of section 239(2)(a); ...

Section 4(e) of the Appeal Regulation provides:

**4** For the purposes of section 239(2)(a) of the Act, the following are classes of decisions that may not be appealed to the appeal tribunal:

- (e) decisions respecting the conduct of a review if the review is in respect of any matter that is not appealable to the appeal tribunal under section 239(2)(b) to (e) of the Act.

I am inclined to the view that the decision on the worker's request for legal fees, in connection with his request for review of the decision to deny his commutation request, was a decision respecting the conduct of the review. I note, in this regard, that under section 7 of the Appeal Regulation, WCAT's authority to order the Board to pay expenses (such as the reimbursement of medical legal reports) is limited to situations where the evidence was submitted to WCAT. If the subject matter of the appeal cannot be appealed to WCAT, there would be no opportunity to submit the evidence to WCAT. As well, section 7(2) of the Appeal Regulation provides that WCAT cannot order the Board to pay legal expenses, and the policy of the Board of Governors also provides that legal expenses will not be paid by the Board. To the extent the phrase "conduct of a review" is ambiguous, I interpret this as extending to consideration of issues relating to the costs and expenses associated with the review. Alternatively, the decision regarding the worker's request for legal fees may simply be viewed as part of the decision regarding the commutation request, which is not appealable to WCAT.

On the basis of this reasoning, an appeal cannot be brought to WCAT regarding a request for reimbursement of legal fees or other expenses, if the subject matter addressed in the Review Division decision is not appealable to WCAT under section 239(2)(b) to (e) of the Act. I find that as the Review Division decision concerning the worker's commutation request was not appealable to WCAT, it is not within WCAT's jurisdiction to hear the worker's appeal on the issue of legal fees alone.

## Conclusion

I find that WCAT has no jurisdiction to consider the worker's appeal from *Review Decision #7495* concerning the denial of his commutation request.

I vary *Review Decisions #4102* and *#6168*, in finding that the decisions of the Board officers, and of the Review Division, erred in implementing the Review Board finding on a retroactive basis while the worker's appeal of the Review Board finding was pending before the Appeal Division (and WCAT), contrary to section 92 of the Act. With respect to the requests made by the worker in his appeals, I find that the worker has no additional entitlement with respect to the interim implementation of the December 18, 2002 Review Board finding. In relation to the issues raised by the worker, I find (for the purposes of the interim implementation of the Review Board finding):

- (a) the worker's long-term wage rate was correctly determined;
- (b) as the worker was not entitled to retroactive pension benefits, in implementation of the Review Board finding while it was under appeal, the issue of interest was moot;
- (c) the worker was not entitled to full (or any) retroactive implementation of his pension award;
- (d) the worker was not eligible for consideration of a loss of earnings pension;
- (e) consideration of acceptance of other components of the worker's COPD, apart from his asthma, was correctly denied;
- (f) WCAT has no jurisdiction to consider the worker's appeal regarding the denial of his request for a commutation of his pension award; and,
- (g) the worker's requests for reimbursement of his legal fees under section 100 of the Act were correctly denied.

Herb Morton  
Vice Chair

HM/jkw