Noteworthy Decision Summary

Decision: WCAT-2005-01772 **Decision Date:** April 11, 2005

Three Member Panel: Jill Callan (Presiding Member), Steven Adamson, Michelle Gelfand

Refusal by Workers' Compensation Board (Board) to Make a Decision on Further Relief of Costs – Section 39(1)(e) of the Workers Compensation Act (Act) – Jurisdiction of Review Division and WCAT over Refusal to Make Decision – Meaning of "Should" in Section 246(3) of the Act – Authority of WCAT to compel Board to Make Decisions Generally and Specifically under Section 246(3)

- The Review Division does not have jurisdiction to review a decision by the Workers' Compensation Board (Board) to refuse to make a decision in relation to compensation and assessment matters.

- WCAT does not have the general authority to order the Board to issue decisions. WCAT does have the limited authority provided by section 246(3) of the *Workers Compensation Act* (Act) to require the Board to make decisions in some circumstances, including to make a decision in respect of further relief of costs.

In this case, the Board accepted the worker's claim for a right shoulder injury. The Board determined that that there was no evidence that the worker had a pre-existing condition, disease or disability that enhanced the worker's disability under the claim and therefore decided that the employer is not entitled to relief of costs under section 39(1)(e) of the Act. The employer did not appeal that decision. Some months later the employer contacted the Board to inquire whether the relief of costs provisions were applicable, whether a decision on relief of costs had been made, and if so, to request that the Board reconsider the decision on the basis of new evidence. The Board replied to the employer by letter and declined to issue a further decision regarding relief of costs under section 39(1)(e) because the Board had previously issued a decision. The employer requested a review of the letter but the review officer declined to conduct a review because, in his view, the letter had merely communicated the Board's position that there was no requirement for it to make a further decision.

On the issue of whether the Review Division correctly refused to conduct a review of the Board letter, the WCAT panel concluded that it had. The WCAT panel adopted the analysis in *WCAT Decision #2004-00638* (another three-member panel) and concluded that a refusal to make a decision in a compensation or assessment matter is not reviewable by the Review Division. The panel noted that section 96.2(1) of the Act explicitly provides that the Review Division may review the Board's refusal to make a Board order but does not explicitly provide that the Review Division may review the Board's refusal to make a Board decision respecting an assessment or compensation matter. The presumption of consistent expression in legislative drafting provides that where a different form of expression is used, a different meaning is intended.

On the issue of whether WCAT has the general authority to order the Board to issue decisions, including those in relation to relief of costs, the WCAT panel concluded that WCAT does not have the authority to order the Board to make decisions. The employer argued that WCAT has the inherent jurisdiction to supervise the Board. The WCAT panel disagreed and concluded that section 250(2) of the Act, which provides that WCAT must consider "the merits and justice of the

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case", as well as WCAT's ability to consider whether Board policy is patently unreasonable, has no application to an appeal unless WCAT already has the statutory authority to make the decision being sought. Section 239 of the Act is exhaustive in describing WCAT's authority to review decisions. If the Review Division does not have the authority to review a decision, WCAT does not have the authority to review that decision, unless it can be argued that section 239 gives them the authority. The WCAT panel found that sections 250(2) and 251 do not grant WCAT general supervisory jurisdiction over the Board. Furthermore, if the Legislature had intended WCAT to have the general authority to compel the Board to make decisions, the limited discretionary authority to do so in section 246(3) of the Act would have been unnecessary.

On the issue of whether WCAT can apply section 246(3) to compel the Board to issue a further decision on relief of costs, the WCAT panel concluded that it has the authority to do so. The WCAT panel found that section 246(3) has two elements: (1) that the matter must be one "that should have been determined but that was not determined by the Board"; and (2) WCAT must decide to exercise its discretion to refer the matter back to the Board. The WCAT panel found that the use of the word "should" in section 246(3), rather than a more mandatory term, indicates that WCAT may require the Board to make a determination even if there is no legal obligation for the Board to do so.

The WCAT panel found that there is no requirement under the Act or applicable policies for the Board to render a further relief of costs decision. The WCAT panel rejected the employer's argument that section 96(1), which provides to the Board "exclusive jurisdiction to inquire into, hear and determine all matters", requires the Board to make decisions in relation to relief of costs. Section 96(1) authorizes the Board to make decisions on a range of matters, but does not require the Board to do so in any specific case. The WCAT panel also found that section 96(2) does not authorize the Board to reopen a claim for a further relief of costs decision.

In this particular case, the WCAT panel determined that it was not a situation in which the Board "should" have made a further determination regarding the employer's eligibility for section 39(1)(e) relief of costs under the worker's claim. The employer thus failed the first part of the section 246(3) test. The panel provided the following reasons:

- Finality - If WCAT required the Board to make a further determination under section 39(1)(e) after such a lengthy delay by the employer, the Legislature's goal to increase finality would be thwarted.

- Unfairness to current employers - If relief of costs was now granted on the claim, it would affect the assessments of current employers rather than the assessments of employers that were paying assessments at the time of the injury and the initial relief of costs decision. It could be unfair to current employers if every employer that had previously received relief of cost decisions prior to the termination of temporary disability benefits successfully requested relief of costs years after the period of disability ended.

- The appeal structure - given the Review Division's consistent position that it does not have jurisdiction over appeals of this nature, if WCAT were to compel the Board to make a decision in cases such as this one, the Review Division would simply become a conduit

through which appeals on this issue would come to WCAT, which likely was not the intention of the Legislature.

- Delegation of administrative control - the Board has finite resources and the administration of the Board must set priorities for utilizing those resources. To the extent that multiple decisions are being made under section 39(1)(e), other matters are delayed or cannot be dealt with by the Board. WCAT should not play a role in dictating the manner in which the Board allocates its adjudicative resources.

- Availability of alternative remedy – Pursuant to the transitional provisions in the *Workers Compensation Amendment Act (No.2), 2002 (*Bill 63) the employer may apply to WCAT for an extension of time to appeal the Board's original decision to deny relief of costs.

This decision has been published in the *Workers' Compensation Reporter*: 21 WCR 157, #2005-01772, Review Division and WCAT Jurisdiction - Refusal to Make a Decision

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Introduction

The employer, which is represented by a consultant, appeals a June 13, 2003 Review Division decision (*Review Decision #1786*). In that decision, the review officer declined to conduct a review of a March 26, 2003 letter of a case manager of the Workers' Compensation Board (Board). That letter pertained to relief of costs for experience rating purposes under section 39(1)(e) of the *Workers Compensation Act* (Act) and under item #115.30 (Experience Rating) of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I).

In the March 26, 2003 letter, the case manager declined to issue a further decision regarding relief of costs under section 39(1)(e) of the Act because the Board had previously issued a decision dated August 23, 1999. He noted that the Board makes decisions regarding the other items enumerated in item #115.30 "in the ordinary course of business". He also stated:

> The Board takes the position that it is not required by law or policy to provide decisions on each category in [item #115.30]. Consideration occurs at the appropriate time as per policy and practice and decision letters are provided, when applicable.

In the June 13, 2003 decision under appeal, the review officer declined to conduct a review because, in his view, the March 26, 2003 letter had merely communicated the Board's position that there was no requirement for it to make a further decision.

This appeal is being considered by a three-member panel appointed under section 238(5)(a) of the Act. As the panel has not been appointed under section 238(6), this decision does not constitute a binding decision under section 250(3).

The employer has not requested an oral hearing of this appeal. As the issues on this appeal relate only to law and policy, we find that the appeal can be fully considered without an oral hearing.

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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 the Workers' Compensation Appeal Tribunal (WCAT).

Under section 250(1), WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Board's board of directors that is applicable in the case. Section 254 of the Act gives WCAT exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it.

Issue(s)

The following issues arise on this appeal:

- Whether the Review Division correctly refused to conduct a review of the Board's March 26, 2003 letter;

- Whether WCAT has the general authority to order the Board to issue decisions on relief of costs; and

- Whether to apply section 246(3) of the Act to compel the Board to issue a further decision on relief of costs in this case.

Claim Background

The worker is a registered nurse. On February 10, 1999, she experienced right shoulder symptoms while moving a patient. The Board accepted her claim for a right trapezius strain and paid wage loss benefits to her for 391 days.

A Board medical advisor reviewed the claim and made a note dated June 8, 1999 in the claim log. The medical advisor concluded that the diagnosis was a "soft tissue strain to the right shoulder, largely the trapezius muscle of the neck and posterior shoulder but also indicating the rotator cuff". The medical advisor noted there were pre-existing changes of spondylosis on the CT scan but questioned their significance in respect of the compensable injury. The medical advisor also noted "a history of pre-existing problems in the right shoulder" and noted the worker had seen Dr. McPherson for an orthopaedic consultation in the early 1990's.

By decision dated August 23, 1999, the case manager informed the employer:

> There is no evidence of a pre-existing condition, disease or disability that has enhanced the worker's disability under this claim. Therefore, relief of costs under Section 39(1)(e) of the *Worker's Compensation Act* does not apply.
>
> My review of this claim does not disclose any circumstance that would allow me to grant you relief of costs under any other Section of the *Worker's Compensation Act*. This means that the relief of costs will not be granted.
>
> [reproduced as written]

She noted that her decision could be appealed to the Appeal Division of the Board and that an appeals pamphlet was enclosed.

The employer did not initiate an appeal of the August 23, 1999 decision.

Wage loss benefits under the claim were terminated effective March 22, 2000.

By letter dated February 26, 2003, the employer's representative informed the Board that he was conducting a review of workers' compensation claims on behalf of the employer. He stated it was unclear as to "whether decisions pertaining to the application of Sections 39 and 42 of the … Act have been established on this claim". He asked whether the relief of costs provisions were applicable. He also requested that, if a decision had previously been issued under the claim, the Board consider the question of relief of costs in light of medical evidence received by the Board since the date of that decision.

The employer's representative's letter led to the case manager's March 26, 2003 letter, which the employer sought to have reviewed by the Review Division.

Law and Policy (Relief of Costs)

Pursuant to section 42 of the Act, the Board has created an experience rating system for employer assessments. As a result, the amount of claims costs charged to an employer in a given year may have an impact on the employer's assessment rate. The following explanation of the operation of the experience rating system is set out in item #115.30 of RSCM I:

> The plan compares the ratio between an employer's claim costs and assessable payroll with the ratio between the total claim costs and assessable payroll of the employer's class. Subject to maximums, merits are assigned for favourable ratios and demerits for unfavourable ratios. The merit or demerit takes the form of a percentage increase or decrease

> in the usual assessment rate. Details of ER [the experience rating system] can be found in the *Assessment Policy Manual* (Policy No. 30:50:41).

Item #115.30 provides that generally all claims coded to an employer that are accepted by the Board are taken into account for experience rating purposes. However, the policy also sets out a list of items that the Board will deduct from the employer's claims costs for the purposes of experience rating. The list includes:

- costs recovered through a third party action;
- costs paid out prior to the disallow of a claim or the reversal of a decision to accept a claim;
- costs transferred to the class of another employer under section 10(8) of the Act;
- costs assigned to the funds created under sections 39(1)(d) and (e);
- costs for certain occupational disease claims which do not manifest into a disability without an average exposure of two or more years or a latency period of two or more years;
- costs after 13 weeks where section 5(3) of the Act is applicable;
- costs from accidents caused by personal illness;
- costs for injuries during a retraining program sponsored by the Board's Vocational Rehabilitation Department; and
- costs for the situations covered by items #115.31 and #115.32.

Section 39(1) of the Act sets out the requirement that the Board create and maintain an adequate accident fund. That section provides that the Board must assess, levy on, and collect from employers and independent operators sufficient funds to meet various requirements. The requirement under section 39(1)(e) is to "provide and maintain a reserve for payment of that portion of the disability enhanced by reason of a pre-existing disease, condition or disability".

The board of directors' policies regarding section 39(1)(e) include:

- Items #114.40 to #114.43 of RSCM I; and
- Decision of the Panel of Administrators #98/04/23-03, *Section 39(1)(e)*, 14 WCR 107[1].

Resolution of the Board of Directors 2005/01/18-01 *(Re: Relief of Costs for a Pre-Existing Disease, Condition or Disability)*[2] has resulted in significant changes to the policies of the board of directors relevant to relief of costs under section 39(1)(e). The revised policies are applicable to "all decisions on and after March 1, 2005". As the decision that the employer sought to have reviewed by the Review Division was issued before that date, the new policies do not appear to be applicable to this appeal. In any event, this appeal does not turn on whether the new or old policies apply.

Bill 63, Review Division and WCAT Decisions

Pursuant to the *Workers Compensation Amendment Act (No.2), 2002* (Bill 63), the Act underwent significant amendments that were effective March 3, 2003. Those amendments included the introduction of a new review and appeal system and changes to the provisions related to matters such as reopenings of claims and the reconsideration of prior decisions. In this decision, we refer to sections of the Act as it was prior to March 3, 2003 as "former" sections. Otherwise, all references to the Act should be read as references to the current Act.

Under the former section 96(2), the Board had the broad power to "at any time at its discretion reopen, rehear and redetermine any matter". Accordingly, the Board had broad authority to reconsider its prior decisions. There were some situations in which the Board revisited a decision regarding relief of costs under section 39(1)(e) on one or more occasions (see, for instance, *Appeal Division Decision #2001-0635*, 17 WCR 359, in which the panel set out the history of a claim for which the Board issued a series of decisions regarding relief of costs under section 39(1)(e)).

As a result of Bill 63, the Board's authority to reconsider its decisions has been significantly restricted. In section 1 of the Act, "reconsider" is defined to mean, "to make a new decision in a matter previously decided where the new decision confirms, varies or cancels the previous decision or order". While section 96(4) provides that "the Board may, on its own initiative, reconsider a decision" that it has previously made, section 96(5) limits the Board's reconsideration power by stating that it may not reconsider a decision if "more than 75 days have elapsed since that decision … was made".

[1] Decisions published in *Workers' Compensation Reporter* are available at: http://www.worksafebc.com/publications/wc_reporter/default.asp.
[2] Available at http://www.worksafebc.com/law_and_policy/policy_decision/board_decisions/default.asp.

Since March 3, 2003, WCAT panels have decided many appeals involving the following fact pattern:

- The Board issued a decision denying relief of costs under section 39(1)(e).
- Although the decision informed the employer of its appeal rights, the employer did not appeal the decision.
- Following the expiration of the time limit for initiating an appeal, a consultant made a general inquiry with the Board regarding whether a relief of costs decision had been previously issued and requested a further decision.
- In responses issued after March 3, 2003, the Board provided a copy of the earlier relief of costs decision and declined to make a further decision on the basis that, as more than 75 days had passed since the original decision was issued, sections 96(4) and (5) precluded the Board from reconsidering its previous decision. In addition, these decisions expressly or impliedly refused to address the other relief of costs items enumerated under item #115.30 of RSCM I.
- The consultant sought a review of the new letter by the Review Division.
- The Review Division declined to conduct a review on the basis that the letter was informational only in that it merely informed the employer of the existence of the previous decision and the fact that the decision could not be reconsidered because more than 75 days had passed.
- The employer appealed the Review Division decision to WCAT.

In *WCAT Decision #2004-00638*, dated February 5, 2004 (20 WCR 59), a three-member panel considered an appeal to which the scenario set out above was applicable. In discussing the effect of the original decision that had denied relief of costs under the claim (at pages 63 and 64 of the published version of the decision), the panel considered whether the original relief of costs decision was "of a conditional nature, which was intended to be 'time-limited' in its application". In other words, the panel considered whether the decision was limited to considering the claims costs to the date of the decision, in which case the "decision would leave open for future consideration the question as to whether further periods of disability involved prolongation or enhancement on the basis of a pre-existing disease, condition or disability". The panel concluded that the original relief of costs decision in that case constituted "a categorical denial as to the existence of any pre-existing disease, condition or disability". Therefore, the panel concluded that there was no basis on which a further relief of costs decision could be made because more than 75 days had passed and the Board's reconsideration authority was subject to the 75-day limit set out in section 96(5).

At pages 66 to 68 of the published version of the decision, the panel considered the fact that the Board had refused to provide a specific response to the employer's request for relief of costs under the items other than section 39(1)(e) listed in item #115.30 of RSCM I. The panel noted that section 96.2(1)(c) of the Act specifically creates a right of review for a refusal to make a Board order. In contrast, sections 96.2(1)(a) and (b) "do not expressly grant a right to request review of a failure or refusal by the Board to make a decision concerning a compensation, rehabilitation or assessment matter" or the other matters listed under section 96.2(1)(c). The panel concluded:

> The legislature has provided a right of review concerning "a Board decision", "in a specific case", "respecting an assessment or classification matter". All three elements must be present. By logical inference, as set out above, the legislature did not intend to provide a right of review by the Review Division under section 96.2[(1)](b), with respect to the Board's failure to make a decision concerning an assessment matter. The practical impact of these provisions is to allow the Board discretion in assigning resources to various tasks and determining when and if decision letters are required.

The framework developed in *WCAT Decision #2004-00638* has been applied in subsequent WCAT decisions. In some decisions the panel has concluded that the Review Division erred in not determining that another section 39(1)(e) decision should be issued in a case in which the original 39(1)(e) decision amounted to a conditional or time-limited decision (see for example *WCAT Decision #2004-04020*, dated July 28, 2004[3]). However, in other decisions, such as *WCAT Decision #2004-01846*, dated April 14, 2004, the panel has confirmed the Review Division decision but noted it is open to the employer to ask the Board to further consider relief of costs in relation to the time period subsequent to the original relief of costs decision. This has been the approach in recent WCAT decisions, where the original decision was considered conditional or time limited in its application.

If the analysis in *WCAT Decision #2004-00638* were applied to the August 23, 1999 decision that was issued under the claim before us, we might consider the decision on relief of costs under section 39(1)(e) to be a conditional decision which leaves it open to the Board to make a further decision. While the employer's representative has advanced numerous arguments about the application of sections 96(4) and (5) of the Act, the situation before us is not one in which the Board declined to make a further decision due to the operation of those sections — it is a situation in which the Board has simply declined to make a further decision.

[3] WCAT decisions are available at http://www.wcat.bc.ca/research/appeal-search.htm).

In *Review Decision #21260*, dated October 19, 2004[4], a review officer considered a scenario in which the Board refused to make further decisions under section 39(1)(e) and the other items enumerated in item #115.30. The review officer summarized his reasons for declining to conduct a review as follows:

> As a result, I have decided to reject the request for review of the Board's letter of August 10, 2004. This is on the primary ground that section 96.2(1) provides for employers, workers or others to request reviews of refusals to make prevention orders, not requests by workers, their dependants or employers to review refusals to make compensation and assessment (including relief of costs) decisions. This conclusion is supported by the following additional reasons:
>
> - The history of the appeal system, particularly concerning assessment and relief of costs matters, suggests a legislative intent to balance the needs of individuals to have a fair and independent review of decisions against the general need of the Board's administration to efficiently conduct the Board's operations.
>
> - Section 96.2(2) specifically excludes certain assessment and relief of costs decisions from being reviewed, notably any that might be made under section 42 other than in relation to experience rating.
>
> - The history and statutory exclusions suggest a legislative intent that parties who are dissatisfied with certain types of decision or refusals to make decisions must take any complaints to the administrative rather than the appellate part of the system.
>
> - Refusals to make decisions should not be reviewable when there is no clear legal or policy obligation to make a decision at the particular time and administrative factors are significant in determining if and when a new decision should be made.
>
> - The refusal to make new decisions in this case under sections 39(1)(e) and 42 was not reviewable as there was no clear legal/policy obligation to make a new decision and there were significant administrative factors involved in determining whether to make a new decision. These administrative factors arose particularly from the fact that the employer's request for a new decision was a form letter containing no specific supporting reasons as to the circumstances of the claim.

[4] Review Division decisions are available at http://www.worksafebc.com/review_search/advanced_search.asp.

Employer's Submissions

The employer's representative provided a submission dated June 23, 2004 in which he addressed the merits of the employer's request for relief of costs. He noted that the Board continued to pay the worker temporary disability benefits for a further seven months after the August 23, 1999 decision regarding relief of costs under section 39(1)(e) was issued. He also pointed out that a June 8, 1999 log entry by a Board medical advisor referred to the worker's history of pre-existing right shoulder problems in the early 1990's. He submitted that the worker's disability was enhanced as a result of these pre-existing shoulder problems. He also contended that there is a problem with the August 23, 1999 decision because it did not contain reasons. In this regard, he referred to *WCAT Decision #2003-01234-ad*.

On December 3, 2004, a WCAT appeals coordinator informed the employer's representative that the chair had appointed a three-member panel pursuant to section 238(5) of the Act to consider the appeal. She noted that copies of *WCAT Decision #2004-00638* and *Review Decision #21260* were enclosed. She then stated:

> As the panel understands it, your position is that WCAT ought to compel the Board to issue a further decision on relief of costs under section 39(1)(e) and a decision dealing with the other items listed in policy #115.30. The panel takes the view that WCAT's authority to consider appeals and vary Review Division decisions must come from the Act. In other words, the panel is not of the view that WCAT has the inherent jurisdiction to cause the Board to make a further decision.
>
> Section 246(3) of the Act provides:
>
> > 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.
>
> The panel notes that, in order to refer a matter back to the Board for a determination pursuant to section 246(3), it must be determined that the matter "should have been determined but … was not determined by the Board". As the provision states that WCAT "**may** refer that matter back to the Board for determination" [emphasis added], the WCAT panel has the discretion to determine whether it ought to refer a matter back to the Board for determination.
>
> As the remedy you are seeking on behalf of the employer is a determination by WCAT that the Board ought to make a further decision,

the panel considering the appeal has determined that it is necessary to consider:

- whether the Board should have made a further determination on relief of costs; and

- what criteria and circumstances should WCAT take into account when considering whether to refer a decision regarding relief of costs under section 39(1)(e) or the other items listed in policy #115.30 back to the Board for further consideration.

Accordingly, the panel is requesting your submissions on these questions.

The employer's representative responded in letters of December 10, 2004 and January 4, 2005. The specific submissions set out in those letters are referred to below under the appropriate headings.

In his December 10, 2004 submission, the employer's representative expressed the general concern that WCAT is granting *Review Decision #21260* "the force of a guiding principle; one which WCAT appears to want to use as the underpinning for assessing its' [*sic*] responsibilities on other claims". Accordingly, it seems appropriate to point out that neither *WCAT Decision #2004-00638* nor *Review Decision #21260* has the force of a precedent decision or a policy. However, as both decisions address issues potentially relevant to the issues arising on this appeal, it seems appropriate to consider both of those decisions in the course of our deliberations.

Analysis

Did the Review Division have Jurisdiction over the Review?

Typically, the narrow question that is before WCAT when the Review Division declines to conduct a review is whether the Review Division had jurisdiction over the issue raised by the review and ought to have proceeded with the review.

In this case, as the Board has declined to make a decision at all, the analyses in *WCAT Decision #2004-00638* and in *Review Decision #21260* are relevant. Section 96.2(1)(c) grants the Review Division jurisdiction over "a refusal to make a Board order". However, there is no parallel language under sections 96.2(1)(a) or (b) for situations where the Board declines to issue a decision regarding a compensation or assessment matter.

The presumption of consistent expression is discussed in *Sullivan and Driedger on the Construction of Statutes*[5] (*Construction of Statutes)*. At pages 162 to 163, the authors state:

> It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it then makes sense to infer that where a different form of expression is used, a different meaning is intended.

It is arguable that, in some circumstances, a letter communicating a determination that a further decision will not be issued will constitute a decision. However, when the presumption of consistent expression is applied, the fact that the Legislature specifically provided under section 96.2(1)(c) that a refusal to make a Board order is reviewable, but did not specifically state under sections 96.2(1)(a) and (b) that a refusal to make a decision is reviewable, leads us to conclude that a refusal to make a decision is not reviewable. In making this determination, we have taken into account the fact that there are distinctions to be drawn between an order and a decision. However, we conclude that, had the Legislature intended that a refusal to make a decision would be reviewable, it would have specifically said so.

For the above reasons, we adopt the analysis in *WCAT Decision #2004-00638* and conclude that a refusal to make a decision is not reviewable by the Review Division. Accordingly, we confirm the review officer's decision that the Review Division did not have jurisdiction to conduct the review.

Does WCAT have the General Authority to Compel the Board to make a Decision?

The employer's representative contends that WCAT has the power and authority to compel the Board to provide a further relief of costs decision. It appears to be the employer's position that WCAT can and should do so even if the Review Division lacks jurisdiction over the review. The employer's representative advances a series of arguments in support of this position.

[5] Sullivan, Ruth, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: The Butterworth Group of Companies, 2002).

The employer's representative submits the employer's position is supported by section 250(2) of the Act, which states:

> 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.

The employer's representative argues that, as WCAT must consider "the merits and justice of the case", WCAT must consider evidence that supports granting relief of costs and must compel the Board to make a decision. He also notes section 251 of the Act sets out a role for the WCAT chair in determining whether policies of the board of directors of the Board are patently unreasonable under the Act. It appears from these arguments that the employer's representative takes the view that WCAT has the inherent jurisdiction to supervise the Board. However, in our view, section 250(2) has no application unless WCAT already has the statutory authority to make the decision being sought. The process outlined in section 251 is limited to the question of whether a policy is patently unreasonable and does not confer any general supervisory authority on the chair. In any case, when the WCAT chair makes a determination under section 251(3), the final determination is made by the board of directors under section 251(6).

Superior courts, such as the Supreme Court of British Columbia, have the inherent jurisdiction to review the legality of actions of administrative bodies. Accordingly, they generally have supervisory jurisdiction to review all administrative decisions. In contrast, the jurisdiction of administrative tribunals, such as WCAT, is limited to the jurisdiction expressly granted to them by statute. WCAT's jurisdiction to hear appeals from the Review Division arises out of and is limited by section 239 of the Act. The jurisdiction of the Review Division arises out of and is limited by section 96.2(1) of the Act. We do not interpret sections 250(2) and 251 as granting WCAT supervisory jurisdiction over the Board. If the Legislature had intended WCAT to have the general authority to compel the Board to make decisions, the limited discretionary authority in section 246(3) would have been unnecessary.

Accordingly, we find that WCAT does not have the general authority to compel the Board to make a further decision.

Should this Matter be Referred Back to the Board under Section 246(3)?

We agree with the submissions advanced on behalf of the employer to the extent that we find under section 246(3) that WCAT has the statutory authority to compel the Board to make decisions in some circumstances. We interpret section 246(3) as having two elements:

- the matter must be one "that **should** have been determined but that was not determined by the Board" [emphasis added]; and

- since the section states "the appeal tribunal **may** refer the matter back to the Board for a determination" [emphasis added], WCAT is not required to refer matters back to the Board for a determination, but merely has the discretion to do so. In this regard, we rely on the fact that the Legislature used the word "may" rather than the more mandatory terms "shall" or "will" in section 246(3).

Section 246(3) allows WCAT to refer a matter back to the Board where WCAT considers "there to be a matter that should have been determined but was not determined by the Board". In interpreting this provision, we have considered the meaning of the word "should". The *Concise Oxford English Dictionary* (10th ed. revised), sets out a variety of definitions of the word "should". The most applicable definition in this case is "used to indicate obligation, duty, or correctness". In the *Construction of Statutes*, the authors provide the following discussion regarding "should" at page 65:

> Some courts have held that "should" imposes a legal obligation. However, this holding is hard to accept because it is inconsistent with the ordinary meaning of "should". In ordinary usage, "should" indicates a preferred course of action but it does not make that preference binding. The holding also ignores the well established convention of using "shall" to impose legally binding obligations or requirements.

The employer's representative submits that, as section 96(1) grants the Board "exclusive jurisdiction to inquire into, hear and determine all matters" including "the existence and degree of disability by reason of an injury", the Board is required to make a further decision on relief of costs. However, we interpret section 96(1) as a provision that confers jurisdiction rather than a mandatory provision requiring the Board to adjudicate certain matters. Accordingly, while we find section 96(1) authorizes the Board to make decisions on a range of matters, it does not require the Board to do so in any specific case. Therefore, this is not necessarily a situation in which the Board "should" have determined a matter in the sense of being legally obliged to do so.

The employer's representative submits that the original August 23, 1999 decision was "unreasoned". The employer appears to be arguing that this is a further reason for concluding both that the Board should have issued a decision when asked to do so in February 2003 and that we should now compel the Board to issue a reasoned decision based on all available evidence.

We are not persuaded that the analysis regarding unreasoned decisions set out in decisions such as *WCAT Decision #2003-01234-ad* applies to the circumstances of this appeal. In contrast to the current provisions of the Act, the former sections 96(6) and 96(6.1) of the Act required an employer to establish an error of fact or law or a contravention of published policy in order to successfully appeal a decision regarding relief of costs. It is in this context that *WCAT Decision #2003-01234-ad* concluded it was an error of law not to provide reasons. Even if we accepted that the August 23,

1999 decision did not include adequate reasons, we would not find that the Board "should" provide a further decision as a result.

The employer's representative contends that the request for a further decision amounts to an application for reopening under section 96(2) of the Act and that the Board therefore "should" make the requested decision under that provision. Sections 96(2) and (3) Act provide:

> (2) Despite subsection (1), at any time, on its own initiative, or on application, the Board may reopen a matter that has been previously decided by the Board or an officer or employee of the Board under this Part if, since the decision was made in that matter,
>
> (a) there has been a significant change in a worker's medical condition that the Board has previously decided was compensable, or
>
> (b) there has been a recurrence of a worker's injury.
>
> (3) If the Board determines that the circumstances in subsection (2) justify a change in **a previous decision respecting compensation or rehabilitation**, the Board may make a new decision that varies the previous decision or order.
>
> [emphasis added]

The effect of a decision to relieve costs under section 39(1)(e) of the Act or under item #115.30 of RSCM I is to reduce the claims costs that will be taken into account in determining the employer's experience rating under the assessment policies established under section 42 of the Act. While we acknowledge that decisions on relief of costs are made by Board officers who are also involved in the adjudication of workers' benefits under claims, we do not find that, in and of itself, is enough to lead us to characterize such decisions as compensation decisions. Given that decisions regarding relief of costs have no effect on the entitlement of workers to benefits and that they potentially affect the experience rating of employers, we find them to be assessment decisions rather than decisions "respecting compensation or rehabilitation". Accordingly, we do not find that section 96(2) authorizes the Board to reopen a claim for a further relief of costs decision.

We now turn to the question of whether there is any other basis in law or policy on which to conclude that the Board should have made a further decision under section 39(1)(e) or made a determination related to the other items enumerated in item #115.30.

In *Appeal Division Decision #95-0062*, "Section 39(1)(e) Policies" (11 WCR 295), a chief appeal commissioner considered the language of section 39(1)(e) and commented (at pages 296 and 297):

> [Section 39(1)(e)] clearly requires the Board to accumulate a reserve for the broad purpose of relieving employers of the costs of claims of workers suffering enhanced disabilities. The provision is silent, however, on how the reserve is to be administered.
>
> To require the Board to accumulate a reserve for a broad purpose is a different matter from requiring it to accomplish the purpose in specific ways. Subsection 39(1)(e) states the broad purpose for which the reserve is intended but provides no guidance as to the implementation of that purpose. It provides no guidance as to how the provision is to be applied to individual cases. It would appear that the provision calls for policies regarding the manner in which it is to be applied to individual cases. Subsection 39(1)(e) may be interpreted, therefore, as leaving implicitly a substantial amount of discretion for policy making as regards its potential application to individual cases. The history behind the provision reinforces that interpretation.

Item #114.40 of RSCM I contemplates that relief of costs decisions most frequently relate to permanent disability pensions. However, the policy also provides that relief of costs under section 39(1)(e) will apply to temporary disability benefits but will not be invoked until the worker has been disabled for at least 13 weeks.

There is nothing in the policies that indicates that further decisions under section 39(1)(e) will be issued when temporary disability benefits continue past the point at which the Board makes the relief of costs decision. However, the fact that it is open to the Board to make a further decision was recognized in various decisions of the Appeal Division and in *WCAT Decision #2004-00638*.

If there were a statutory provision or a policy requiring the Board to render a further decision in the circumstances of this case, it would be clear that the first aspect of section 246(3) had been met and the question would be whether we ought to exercise our discretion to refer this matter back to the Board for a further section 39(1)(e) decision. In this case, we find there is no requirement under the Act or applicable policies for the Board to render a further relief of costs decision. However, as stated above, the use of the word “should” in section 246(3) rather than a more mandatory term appears to mean that WCAT may require the Board to make a determination even if there is no legal obligation to do so.

We conclude that this is not a case in which the Board "should" have rendered a further decision, even within the more expansive meaning of "should" discussed above. In reaching this conclusion, we have considered the following factors:

- **Finality**

  If WCAT required the Board to make a further determination under section 39(1)(e) after such a lengthy delay, it seems that increased finality, which was one of the Legislature's goals in enacting Bill 63, would be thwarted. At the second reading of Bill 63 in the Legislature on October 22, 2002, the Minister of Skills Development and Labour commented on 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**.
  >
  > [emphasis added]

- **Unfairness to current employers**

  If relief of costs were now granted on the claim, it would affect the assessments of current employers rather than assessments of employers that were paying assessments in 1999 and 2000. There would, admittedly, be virtually no impact if relief of costs were granted after the fact on one claim. However, it could be unfair to current employers if every employer that had previously received relief of cost decisions prior to the termination of temporary disability benefits successfully requested relief of costs years after the period of disability.

- **The appeal structure**

  Given the Review Division's consistent position that it does not have jurisdiction over appeals of this nature, if WCAT were to compel the Board to make a decision in cases such as this one, the Review Division would simply become a conduit through which appeals on this issue would come to WCAT. There are some appeals and applications that are made directly to WCAT. However, it seems unlikely that the Legislature intended that WCAT could compel the Board

to make decisions on matters arising out of appeals of Review Division decisions when the Review Division does not have jurisdiction over those matters. Similarly, it is unlikely that the Legislature intended that the Review Division's statutory authority to review relief of costs decisions would be bypassed, which would be the result if WCAT referred these decisions back to the Board. Although we recognize that many section 246(3) referrals will, in effect, result in a direct appeal to WCAT of the newly issued decision, the new decision generally raises an issue similar to the one already under appeal. In the case before us, the issue under appeal is jurisdictional, whereas the new decision requested by the employer would relate to the merits of granting relief of costs, which is an entirely different issue.

- **Delegation of administrative control**

  The Board has finite resources and the administration of the Board must set priorities for utilizing those resources. To the extent that multiple decisions are being made under section 39(1)(e), other matters are delayed or cannot be dealt with by the Board. Section 82 of the Act sets out the powers and duties of the board of directors of the Board. Section 82(1)(b) requires the board of directors to "set and supervise the direction of the Board". WCAT has not been granted a similar power or duty under the Act. Accordingly, WCAT should not play a role in dictating the manner in which the Board allocates its adjudicative resources.

- **Availability of alternative remedy**

  The employer's representative raises the concern that, when significant new evidence is discovered after the relief of costs decision is issued, the employer is without a remedy. However, pursuant to the transitional provisions in Part 2 of Bill 63, the employer may apply to WCAT for an extension of time to appeal the August 23, 1999 decision. Item #5.31 of WCAT's *Manual of Rules of Practice and Procedure*, which deals with the "special circumstances" requirement of section 243(3), provides that the following factor "may be considered in deciding whether special circumstances precluded the filing of an appeal on time":

  > (d) whether the applicant has obtained significant evidence which, at the time the decision was issued, either did not exist or existed but was not discovered and could not through the exercise of reasonable diligence have been discovered (see *WCAT Decision #2004-00433*); and, …

In light of all of these factors, we conclude that this is not a situation in which the Board "should" have made a further determination regarding the employer's eligibility for section 39(1)(e) relief of costs under the worker's claim. In reaching this conclusion, we note that the general factors set out above could, in the appropriate circumstances, be

outweighed by the specific factors associated with an individual case and lead to a different conclusion regarding whether the Board "should" have made a determination. Factors such as the diligence of the employer in pursuing the original decision, and the reasonableness of the delay in requesting the subsequent decision, could lead to a different outcome. In this case, however, we find the lack of diligence on the employer's part in pursuing the original decision and the lengthy delay in requesting the subsequent decision support the conclusion that the general reasons for not referring this matter back to the Board apply.

In this case, we have not concluded that this matter should have been determined by the Board. As a result, we do not find it necessary to consider the second aspect of section 246(3) regarding the circumstances in which it would be appropriate for WCAT to exercise its discretion to refer a matter back to the Board.

We recognize that situations arise where a pre-existing condition that was not enhancing or prolonging the disability at the time when a decision under section 39(1)(e) was made may subsequently be viewed as prolonging or enhancing the disability under the claim if temporary wage loss benefits continue for a protracted period. In our view, the March 1, 2005 version of item #114.40 will enable the Board to address many of these situations by delaying the decision on relief of costs under section 39(1)(e). The revised version of the policy provides:

> 5. Timing of Cost Relief Decisions
>
> Where an employer is eligible for cost relief consideration on a claim, the decision is made at the earliest of:
>
> a) there being sufficient evidence to make a determination on whether the compensable disability was enhanced by reason of a pre-existing disease, condition or disability; or
>
> b) the conclusion of temporary disability compensation; or
>
> c) after six months of wage loss has been paid.
>
> Cost relief decisions may be deferred beyond six months of wage loss payment when the impact of the pre-existing disease, condition or disability on the compensable disability is not yet clear, or major diagnostic procedures have been scheduled that would clarify the existence, and/or extent of any pre-existing disease, condition or disability.

Finally, as the employer's representative did not provide specific arguments regarding other cost relief items set out in item #115.30, we have not found it necessary to address those items.

Conclusion

The appeal is denied and the June 13, 2003 Review Division decision is confirmed. We find the review officer correctly declined to conduct a review. In addition, we find that WCAT does not have the general authority to order the Board to issue a decision. Finally, we find that this is not an appropriate case in which to compel the Board, under section 246(3), to make a further determination on relief of costs.

Jill Callan, Chair

Steven Adamson, Vice Chair

Michelle Gelfand, Vice Chair

JC/dlh