Noteworthy Decision Summary

Decision: WCAT-2005-04726 **Panel:** Herb Morton **Decision Date:** September 8, 2005

Reconsideration – Natural justice – Investigation – Credibility – Whether to reconvene an oral hearing – Panel viewed surveillance videotapes of the worker after the oral hearing

This was a reconsideration of a prior WCAT decision. At the oral hearing, the original panel explained that it had been prevented from viewing video surveillance tapes of the worker due to a failure of the Workers' Compensation Board to furnish them to WCAT prior to the hearing, and that it would be viewing the videotapes after the hearing. The worker addressed this evidence at the hearing and did not at that time request that the hearing be reconvened once the panel viewed the videotapes. While it may be desirable for a panel to inform a worker of its preliminary views regarding this evidence so that he might then respond to them, the failure to do so does not involve a breach of procedural fairness, particularly where the worker was represented and was aware of the evidence. There was no breach of natural justice or procedural fairness in the original panel proceeding to view the videotape evidence subsequent to the oral hearing, and then making a decision without reconvening the hearing.

The worker, who was represented, alleged breach of natural justice because the panel viewed the videotapes after his oral hearing and reached adverse findings on his credibility on the basis of this evidence. He applied for reconsideration of the decision, arguing that the panel should have reconvened the hearing to give him the opportunity to address the relevant issues.

The reconsideration panel rejected the worker's argument that he was entitled to be informed of the panel's preliminary views regarding the video evidence so that he might then respond to these concerns. While such exchange may be useful or desirable, where feasible, the failure to do so does not involve a breach of procedural fairness, particularly where the appellant is represented and is aware of the evidence which led to the adverse decision. The original panel expressly identified the need for the worker to respond to the videotape evidence, so the worker could not reasonably complain that he was taken by surprise that it subsequently considered this evidence and reached a conclusion regarding the weight to be given to it. The worker addressed this evidence at the oral hearing, and at that time did not request that the hearing be reconvened once the panel viewed it.

There is no legal requirement that a panel form preliminary views, or communicate them to the parties, prior to the conclusion of an oral hearing. Although a panel may have an obligation to reconvene an oral hearing after the conclusion of a hearing if it indicated to the parties that a matter was not in issue but later concludes that it should be addressed, this was not the situation in this case. The panel's explanation could not reasonably be interpreted as meaning that it was treating the videotape evidence as irrelevant. The reconsideration panel rejected the worker's assertion that, if a tribunal does not question the appellant, it can properly be assumed that the tribunal accepts the appellant's evidence. A decision-maker might not form a preliminary opinion as to the weight to be given to a piece of evidence until after the hearing is concluded. There was no breach of natural justice or procedural fairness in the original panel proceeding to view the videotape evidence subsequent to the oral hearing, and then making a decision without reconvening the hearing.

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WCAT Decision Number: WCAT-2005-04726
WCAT Decision Date: September 08, 2005
Panel: Herb Morton, Vice Chair

Introduction

The worker requests reconsideration of the May 8, 2003 Workers' Compensation Appeal Tribunal (WCAT) decision (*WCAT Decision #2003-00461-rb*).

The worker alleges a breach of natural justice. The worker's complaint concerns the fact that the WCAT panel viewed video surveillance tapes of the worker subsequent to the hearing, and reached findings adverse to the worker on the basis of this evidence. The worker's representative submits that because the panel concluded that the video had a significant negative impact on the worker's credibility, the panel should have reconvened the hearing to give the worker the opportunity to address the relevant issues. He further argues that the WCAT decision was patently unreasonable in its findings regarding the worker's chronic pain syndrome, and that the panel acted on inadequate materials and ignored relevant considerations in making its decision (the expert medical opinion of specialists in pain medicine who had viewed the videotapes).

Written submissions dated May 21, 2003 and May 21, 2004 have been provided by the worker's union representative. The employer is not participating in this application, although invited to do so. The worker was advised of section 58 of the *Administrative Tribunals Act* (ATA), which came into effect for WCAT on December 3, 2004, but did not provide any additional comments. A memo dated February 17, 2005, which included a partial transcript of excerpts from the April 10, 2003 oral hearing, was disclosed to the worker for comment, and a further submission dated March 16, 2005 was provided by his union representative.

Issue(s)

Did the WCAT decision involve an error of law going to jurisdiction? Did the decision involve a breach of natural justice or procedural fairness, or was it patently unreasonable?

Jurisdiction

Section 255(1) of the *Workers Compensation Act* (Act) provides that a WCAT decision is final and conclusive and is not open to question or review in any court. In keeping with the legislative intent that WCAT decisions be final, they may not be reconsidered except on the basis of new evidence as set out in section 256 of the Act, or on the basis of an error of law going to jurisdiction, including a breach of natural justice (which goes

to the question as to whether a valid decision has been provided). A tribunal's common law authority to set aside one of its decisions on the basis of jurisdictional error was confirmed by the British Columbia Court of Appeal in the August 27, 2003 decision in *Powell Estate* v. *WCB (BC)*, 2003 BCCA 470, [2003] B.C.J. No. 1985, (2003) 186 B.C.A.C. 83, 19 WCR 211.

The test for determining whether there has been an error of law going to jurisdiction generally requires application of the "patently unreasonable" standard of review. With respect to an alleged breach of natural justice, the common law test to be applied is whether the procedures followed by WCAT were fair (see *WCAT Decision #2004-03571*).

Effective December 3, 2004, the provisions of the ATA which affect WCAT were brought into force. Section 58 of the ATA concerns the standard of review to be applied in a petition for judicial review of a WCAT decision. Practice and procedure at item #15.24 of WCAT's *Manual of Rules of Practice and Procedure*, as amended December 3, 2004, provides that WCAT will apply the same standards of review to reconsiderations on the common law grounds as would be applied by the court on judicial review. Under section 58(2)(a) of the ATA, questions concerning the WCAT panel's handling of the evidence involve the patent unreasonableness standard, which is defined in section 58(3). Section 58(2)(b) of the ATA provides that questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

This application has been assigned to me for consideration on the basis of a written delegation from the WCAT chair (paragraph 26 of *WCAT Decision No. 6*, "Delegation by the Chair", June 1, 2004).

Background

On December 11, 1997, the worker fell from a ladder and suffered a right calcaneus fracture. The worker appealed six decisions to the former Workers' Compensation Review Board (Review Board). Those decisions were dated June 25, 1999, December 5, 2001, December 18, 2001, January 25, 2002, January 31, 2002, and July 29, 2002. Due to the March 3, 2003 restructuring of the workers' compensation appeal bodies contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), these appeals were transferred to WCAT for consideration.

An oral hearing of the worker's appeal of the June 25, 1999 decision was previously scheduled by the Review Board for May 7, 2001. That hearing was adjourned at the worker's request. It was rescheduled for August 30, 2001, and then suspended at the worker's request. In January, 2003, the worker telephoned the Review Board to request that the hearing of his appeals be expedited. The worker's request for expedited handling was denied. However, with the worker's consent, his appeals were put on a list for scheduling at "short notice" (the worker was ready to proceed with his hearing on

short notice, in the event a hearing date became available due to another appellant not wishing to proceed with a scheduled hearing). On February 6, 2003, the worker's oral hearing was scheduled for April 10, 2003. The appeals were assigned to a WCAT panel on March 21, 2003. By letter dated April 4, 2003, the worker's union representative advised that he would be representing the worker at the hearing. On April 4, 2003, WCAT received materials (by fax) from the worker's representative, including a ten page medical progress report from Dr. David G. Hunt, and ten pages of typewritten clinical records (and consultants' reports) from Dr. B. J. Myhill-Jones. On April 8, 2003, there was a reassignment of the worker's appeal to another WCAT panel (recorded in WCAT's computerized appeal tracking system (CASE)). The CASE entry states: "VC changed to T. Stevens as directed by him." At the April 10, 2003 oral hearing, the worker's representative also provided a written submission dated April 9, 2003. The employer did not attend the oral hearing.

Paragraph 18 of *Decision of the Chair No. 1*, "Delegation by the Chair", March 3, 2003 (accessible on WCAT's website at: http://www.wcat.bc.ca/publications/chair-decisions.htm) provides as follows:

> 18. **Change in panel – section 238(3)**
> I delegate the authority of the chair under section 238(3), to terminate an appointment to a panel, fill a vacancy on a panel, and refer an appeal that is before one panel to another panel, to the following positions:
> senior vice chair, specialized vice chair, deputy registrar.

Paragraph 1 of the delegation decision included the following definition:

> **"specialized vice chair"** means a vice chair/team leader, the vice chair/inventory strategist, and the vice chair/quality assurance;

WCAT's *2003 Annual Report* (accessible at http://www.wcat.bc.ca/publications/pdf/Annual-Report-2003v2.pdf) lists WCAT's team leaders as of December 31, 2003 (at page 11). Anthony F. Stevens was a WCAT vice chair/team leader effective from March 3, 2003. Accordingly, his reassignment of the worker's appeal to himself was pursuant section to section 238(3) of the Act, based on a written delegation of authority from the WCAT chair under section 234(4) of the Act.

The oral hearing of the worker's appeals was held on April 10, 2003, in Richmond, B.C. An audio recording was made of the hearing. A copy of this recording has been provided on a compact disc.

WCAT Decision #2003-00461-rb was issued on May 8, 2003. On May 21, 2003, the worker's representative wrote to the WCAT chair to complain that there had been a breach of natural justice. The worker's representative requested that the WCAT chair

listen to the tape of the hearing, and set aside the WCAT decision as null and void. Further submissions have been provided dated May 21, 2004 and March 16, 2005.

Analysis

A. Breach of Natural Justice

The worker's representative alleges a breach of natural justice. As noted above, the common law test to be applied in relation to such an argument is whether the procedures followed by WCAT were fair. In the text *Administrative Law in Canada*, Third Ed. (Ontario: Butterworths, 2001) at pages 12-13, Sara Blake states:

> …Essentially, the courts require that decisions made in individual cases be made following procedures that are fair to the affected parties. This requirement is called the 'doctrine of fairness' or the 'duty to act fairly'.
>
> At a minimum, the doctrine of fairness requires that, before a decision adverse to a person's interests is made, the person should be told the case to be met and be given an opportunity to respond. The purpose is twofold. First, the person to be affected is given an opportunity to influence the decision. Second, the information received from that person, should assist the decision maker to make a rational and informed decision. A person is more willing to accept an adverse decision if the process has been fair.
>
> A right to be heard does not imply a right to have one's views accepted nor does it encompass a right to be granted the order sought. It is only a right to have one's views heard and considered by the decision maker.

In his letter of May 21, 2003, the worker's representative argued:

> [The worker] believes that there has been a breach of natural justice on the basis that at the oral hearing on April 10, 2003 the Vice Chair advised that the case had just been assigned to him. Furthermore, that he had not yet had a chance to view the video tape which formed a key part of the Board's decisions but that he would do so after the hearings. [The worker's] position was, and remains, that the videotape shows him acting in a manner, which is consistent with his disability. [The worker] submitted that two specialists, Dr[.] Hunt, a consultant in pain medicine, and Dr. W. N. McDonald, a specialist at St. Paul's Pain Clinic, had viewed the tapes and both had stated that [the worker] is totally disabled due to chronic pain syndrome.
>
> However, as the WCAT finding shows, the panel placed **significant** weight on the video tape and relied heavily on the videotape evidence in

> concluding that [the worker] is not disabled as a result of his chronic pain syndrome. [The worker] submits that, as the panel had not viewed the videotape prior to the hearing and because the panel concluded that the video had a significant negative impact on his credibility, the hearing should have been reconvened to give [the worker] the opportunity to address the relevant issues.
>
> [emphasis in original]

By submission dated May 21, 2004, the worker's representative presented further argument concerning the alleged breach of natural justice. He argued:

> We submit that by the panel advising that it had not viewed the videotapes, but would do so subsequent to the hearing, our inference was that the panel had regarded the videotapes as being irrelevant. We inferred that by doing so the panel had reviewed the printed file evidence and had placed more weight on the specialist's opinions. We submit that that was a reasonable conclusion on our part as that was in fact our argument. As the panel had notified us at the beginning of the hearing that he had not seen the tapes, we would have expected that it would have questioned [the worker] vigorously about the videotapes and the Board's comments and conclusions. It would have been a reasonable conclusion on our part that if the panel, having viewed the videotapes and having found them to be of significant evidentiary value, would have reconvened the hearing to address the issues. It, therefore, came as a surprise to us when we received the decision and found the weight the panel placed on that evidence.
>
> In conclusion, [the worker] submits that as the panel had not viewed the videotape evidence prior to the hearing and then placed a great weight on that evidence, without reconvening a hearing to address the issues, he was denied natural justice and the resulting decision was patently unreasonable.

In his letter of May 21, 2003, the worker's representative requested that the recording of the oral hearing be listened to, and I have done so. The vice chair began the oral hearing by describing the transition provisions under which WCAT was hearing the worker's appeals, identifying the participants in the hearing, inquiring concerning whether any costs were being claimed by the worker, and reviewing the multiple issues raised by the decisions under appeal. He then invited the worker's representative to proceed with presenting the worker's appeal.

The tape of the hearing includes the following exchange:

> Vice Chair (VC): Okay, go ahead, Mr. [name of representative].
>
> Worker's Representative (WR): I intend to limit the questions because the issues are primarily medical.
>
> VC: and I agree.
>
> WR: There's the infamous video tape and we'll address that and a few other things.
>
> VC: I will tell you at the outset that I haven't seen the video. I've only read the comments on file. Disclosure being what it is currently, I never even received the file until late on Tuesday, and it's only the paper documents. The video and the pictures of [the worker's] foot from the evidence sheet, that hasn't been received yet. So, just to let you know that I haven't actually seen the video.
>
> WR: I've watched it all and I'll be addressing it briefly. If anything, I think it supports [the worker] rather than . . . against his case.
>
> WR: Okay, [name of worker], what were you doing prior to going to work for [name of employer]. What was your job and where did you work?

Later in the hearing, the worker's representative directed the worker's attention to the contents of the videotapes. The worker gave evidence in response to various allegations concerning the contents of the video tapes. He explained why he initially used his cane on alternate sides. With respect to the allegation the worker was observed running across or crossing a street, the worker indicated he had difficulty remembering, but indicated he imagined it was to avoid getting hit by a car. The following exchange occurred at that point in the hearing:

> WR: I would point out, Mr. Stevens that the videotape shows that [the worker] was limping throughout. . . . You may wish to watch the tape.
>
> VC: I do intend to watch it. I just wanted to let you know that I hadn't seen it yet. And certainly, that makes it more important for you to deal with it as fully as you can, in terms of the issues that you believe both support [the worker's] point of view, as well as those that may support the Board that you may want to deal with through questions. So, that was the purpose of me telling you that I. .

> WR: Yes, I appreciate that. Again, were you moving faster than normal when you were crossing the street, or do you normally walk across the street like that, to the best of your recollection?

The worker's wife also gave evidence at the oral hearing. In questioning the worker's wife regarding the worker's functioning before and after his work injury, the worker's representative's final question to her was as follows:

> WR: I'm going to cut to the chase on the videotapes and the Board's interpretation of them. In layman's terms, the Board is suggesting that [the worker] is faking it with respect to the pain.
>
> Worker's wife: I wish they would come and live with us. As I've always said to Dr. McDonald, I wish these people would come and live with you and see what you go through, you know, watch somebody suffer, I get choked up, just suffer, you watch them suffer, it's not right.

In his written submission dated April 9, 2003, which was also presented orally in the hearing, the worker's representative submitted as follows:

> Although a Board officer said that videotapes taken when the worker was unaware that he was under surveillance showed that his ankle condition was better than he admitted, in fact the videos, which were done on two days, and which the Board admits were done without the worker's knowledge, clearly show him limping at all times.

The worker's representative further argued that the worker should receive a functional impairment award for Psychological/Chronic Pain Problems, in accordance with policy at item #2.23 of the former *Rehabilitation Services and Claims Manual*. He submitted:

> Both Dr. McDonald and Dr. Hunt were aware of the video surveillance undertaken by the Board and Dr. McDonald actually viewed the tape.

He submitted, in effect, that the medical opinions concerning the worker's diagnosis of chronic pain syndrome were not changed by the information contained in the video surveillance tapes.

At the close of the hearing, the vice chair advised that he would attempt to issue his decision soon after receiving and reviewing the video tape evidence from the Board.

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In the WCAT decision, the panel noted the following oral hearing evidence under the heading "Background and Evidence":

> In terms of the video surveillance, the worker explained that he used the cane in both hands because he was not instructed in its proper use, and also, that he would switch sides when the upper extremity he used the cane with became tired. He also said that he ran across the street because he did not want to get hit by a vehicle. The worker nevertheless also disputed the suggestion that he was running at the time.
>
> The worker's wife also presented oral evidence. She said that she was in attendance at the various medical examinations that her husband participated in and the doctors were interested in alleviating his pain complaints. She said that she has observed a dramatic change in her husband to the extent that he has had constant pain since his injury and that, in turn, has changed their lives.
>
> The worker's representative submitted that the videotape established that irrespective of the activity observed, the worker had at all times limped throughout the surveillance. The representative argued that clinical examination would not reflect the effects that activity would have on the worker's right foot and ankle. He submitted that the evidence establishes that the worker has, and continues to have, CRPS.

Under the heading "Reasons and Findings", the WCAT panel stated the following:

> The issues before me are, in the main, centered on medical opinion. As such, the outline of the evidence did, of necessity, include a significant recitation of the medical evidence regarding investigations and the etiology of the worker's complaints…
>
> ...Although I acknowledge the opinions of Dr. McDonald and Dr. Ong that the worker had CRPS, I note that Dr. McDonald subsequently questioned the accuracy of that particular diagnosis. Moreover, I prefer the other opinions of Dr. Shojania and Dr. Hunt, who are quite clear in stating that subjective portrayal alone is not sufficient to diagnose CRPS, and that objective findings are necessary to support the existence of such a diagnosed condition. Dr. Hunt specifically referred to the fact that there were diagnostic criteria instituted by the International Association for the Study of Pain in 1994.
>
> . . .
>
> With regard to the worker's claim, I have no hesitation in concluding that he did not likely have CRPS in 1999 or subsequently. The medical

> opinion and known diagnostic protocol simply do not support the argument that the worker had CRPS. As a result, I conclude that the worker did not have CRPS consequent to his compensable injury.
>
> . . .
>
> I am also cognizant of the video surveillance and find that it supports a conclusion that the worker self-limits his abilities. My review of the videotape confirmed the comments on file that the worker walked far beyond the time limits he indicated he could not surpass. He also drove, being an activity he indicated that he could not do at all. I accept that the worker did not "run" across the road and instead would characterize that observed movement as more of an ambling gait. The worker nevertheless was quite mobile, he at times stepped down off curbs onto his right lower extremity rather than onto his uninjured left side, he alternated the cane between his right and left hands, and there were times that he did not use his cane at all. Those comments aside, I also observed on the videotape an occasion where the worker walked fairly briskly and without difficulty when he was in a more secluded location. There were also other times when his ambulation varied in terms of speed, limp, and use of the cane dependent, it seemed, on whether he was more in the public eye or not. Taken together, I was left with the distinct impression that the worker was purposely self-limiting his abilities, and that he is not likely disabled by the intractable pain that he states continues to severely limit all of his activities.
>
> As such, and because there is no known objective impairment and his subjective presentation is particularly inconsistent, I confirm the December 18, 2001, January 25, 2002, and January 31, 2002 decisions of the Board.

A further submission dated March 16, 2005 was provided by the worker's representative, following disclosure of the February 17, 2005 memorandum containing notes regarding selected passages from the oral hearing concerning the video tape. The representative submits:

> I am not sure why Mr. Morton has provided certain parts of the hearing conversation and some of his comments. I can only assume that he has done so to point out that the vice chair at the hearing advised that he had not seen the video tape evidence and stated that, as he had not yet viewed the videotapes, it made it more important for me to deal with the tape fully in terms of issues which I believed supported both the worker's and the Board's points of view and deal with those through my questions….

> I respectfully submit that I addressed the issues which I believed were important, and I could not have presumed as to what the vice chair, who was presiding over the hearing, could believe to be important, especially since he had not seen the tapes. I refer the reader to my May 21, 2004 submission as to how I believe the matter should have been dealt with after the vice chair had viewed the videotapes.
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> We note that one of the principles of natural justice/administrative law is that if an appellant does not address any adverse evidence, it can properly be assumed that he accepts that evidence as being factual. **Conversely, however, if a tribunal does not question the appellant, it can properly be assumed that the tribunal accepts the appellant's evidence**.
>
> [emphasis added]

By submission dated May 21, 2004, the worker's representative argued:

> We further submit that the panel failed to fulfill the Procedural Requirement of Fairness and Natural Justice as set out in the Blanchard v. Millhaven Institution case. In that decision the courts determined that a tribunal must conduct a full and fair inquiry, which may oblige it to ask questions of the person concerned; the answers to which may prove exculpatory. The courts stated that that is the way in which the tribunal examines both sides of the question.

In *Blanchard v. Millhaven Institution* [1983] 1 F.C. 309, (1982) 69 C.C.C. (2d) 171, the Federal Court Trial Division considered the case of an inmate charged with an offence under the Penitentiary Service Regulations. The court found that the duty to act fairly did not include the right for the inmate to be represented by legal counsel. Where the inmate was unrepresented, however, the court found the person conducting the hearing might be obliged to ask questions of the inmate and to permit the inmate to provide his explanation of the events in question. The court reasoned:

> There is, however, an overall duty to act fairly in administrative matters and, when applied to an administrative hearing or enquiry, the duty to act fairly translates into one of ensuring that the enquiry is carried out in a fair manner and with due regard to natural justice. This duty to act fairly where the conduct of a person who might be subject to some penalty is being examined, requires that the person be aware of what the allegations are, of the evidence and the nature of the evidence against him **and be afforded a reasonable opportunity to respond to the evidence and to give his version of the matter.** In order to achieve this, wherever evidence is being given orally, the prisoner should be present and also be afforded the opportunity of cross-examining or questioning any witness, unless there are exceptional circumstances which would render such a

> hearing practically impossible or very difficult to conduct, such as deliberately obstructive conduct on the part of the party concerned.
>
> There is no general right to have the proceedings transcribed verbatim but, where such a transcription exists, as in the present case, it may be used to enable the reviewing court to come to its conclusions on the merits of the application.
>
> **Although the hearing is not to be conducted as an adversary proceeding but as an inquisitorial one, there is no duty on the person responsible for conducting the hearing to explore every conceivable defence or to suggest possible defences to the prisoner, although there is a duty to conduct a full and fair enquiry which, of course, might lead to the obligation of asking questions of the prisoner or of any witness, the answers to which might prove exculpatory in so far as the prisoner is concerned. He must, in other words, examine both sides of the question.**
>
> There is no right to counsel; whether counsel representing the prisoner is to be allowed to be present is a matter for the discretion of the chairman conducting the enquiry. Occasions might possibly arise where matters are so complicated from a legal standpoint that the duty to act fairly might require the presence of counsel, but I cannot at the moment envisage such a situation, especially where the person conducting the enquiry is a legally qualified barrister and solicitor, as in the present case….
>
> [emphasis added]

In the present case, the worker was represented by his union representative, and was given a full opportunity to present his case. The panel made it clear in the hearing that it had not yet had the opportunity to view the videotape, but that it intended to do so prior to making its decision. It is evident that the worker and his representative were aware that the videotape evidence was relevant to the decision under appeal, and that it was necessary to address this evidence in the appeal.

In my view, the *Millhaven* decision simply stands for the proposition that administrative fairness requires that a person charged with an offence has the right to be aware of what the allegations are, of the evidence and the nature of the evidence against him, and be afforded a reasonable opportunity to respond to the evidence and to give his version of the matter. In the case of person who is not represented, this may require the decision-maker to pose questions to the person, so as to elicit their explanation of the events. In the present case, the worker was represented, and his representative had full opportunity to pose such questions to the worker and his witness, so that their explanations could be considered by the panel. Accordingly, I need not consider the extent to which the *Millhaven* decision (which concerned an offence provision) would

apply in relation to a hearing in the workers' compensation context involving an unrepresented appellant.

I do not accept the assertion that if a tribunal does not question the appellant, it can properly be assumed that the tribunal accepts the appellant's evidence. Indeed, the decision-maker may well not form a preliminary opinion regarding the weight to be given to various items of evidence, and whether or not such evidence will be accepted as persuasive, until after the hearing has been concluded. In this case, the vice chair expressly identified the need for the worker to respond to the videotape evidence, so the worker cannot reasonably complain that he was taken by surprise that the panel would subsequently consider this evidence and reach a conclusion regarding the weight to be given to this evidence.

I agree that, where feasible, it is desirable for a panel to make known its concerns to the parties, and obtain their response to evidence which is adverse to the position being presented by the parties. Such exchange contributes to making the oral hearing more meaningful. I am not persuaded, however, that the failure to do so involves a breach of procedural fairness, particularly where the appellant is represented and is aware of the evidence which lead to the adverse decision under appeal.

The worker's representative appears to be arguing, in effect, that an appellant is entitled to be informed of a panel's preliminary views regarding the evidence, so that he might then respond to these concerns. I do not accept this argument. While such an exchange may be useful or desirable, where feasible, I do not consider that there can be any legal requirement that a panel form such views, or communicate these to the parties, prior to the conclusion of the oral hearing.

In the circumstances of this case, I find that the worker was aware of the need to address the evidence contained in the videotapes, and provided his explanations in the oral hearing. The worker's representative did not, at the time of the hearing, request that the oral hearing be reconvened for the purpose of providing further evidence or submissions after the panel had viewed the videotape evidence. I find no breach of natural justice or procedural fairness, in the panel proceeding to view the videotape evidence subsequent to the oral hearing (as it had advised the parties it would do), and then making a decision.

The worker's representative also argues that the courts have determined that when an administrative tribunal changes its mind and treats an issue as relevant, which it had previously treated as irrelevant, there will normally be an obligation to allow those who have already completed their evidence and arguments a further participatory right to deal with the newly emerging concerns. I agree that a WCAT panel has a discretion to reconvene an oral hearing after the conclusion of a hearing, and may have an obligation to do so if it had indicated to the parties that a matter was not in issue before it but later concludes that the matter should be addressed. I agree that a panel is not *functus* in respect of such interim procedural determinations, and may reconvene a hearing where

necessary before proceeding to issue its decision. I do not consider, however, that this has any relevance to the circumstances of its case. The WCAT panel did nothing to indicate to the parties that it viewed the videotape evidence as irrelevant. Indeed, the WCAT panel expressly explained that it had been prevented from viewing the videotape evidence due to the Board's failure to furnish this to WCAT prior to the hearing. The panel expressly explained to the worker and his representative that it would be viewing the videotape evidence subsequent to the hearing. I do not consider that such explanations could give rise to any reasonable misunderstanding regarding the panel's intentions. The panel's explanations could not reasonably be interpreted as meaning that the panel was treating the videotape evidence as irrelevant. I find no breach of natural justice or procedural fairness on this basis.

The worker's representative further argues that the WCAT decision was patently unreasonable in its findings regarding the worker's chronic pain syndrome, and that the panel acted on inadequate materials and ignored relevant considerations in making its decision (the expert medical opinion of specialists in pain medicine who had viewed the videotapes).

In *Administrative Law in Canada*, Sara Blake further states at pages 191-192:

> Findings of fact are reviewable only if patently unreasonable. An unreasonable finding of fact is one that is not supported by any evidence. A court will not review the evidence considered by the tribunal to determine whether there was sufficient evidence to support a finding of primary fact. A court will go no further than to determine whether there was any evidence, and only essential findings of fact upon which the decision of the tribunal turns will be reviewed in this manner. Non-essential findings of fact are not reviewable.
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> ...
>
> A patently unreasonable rejection of evidence or a refusal in bad faith to consider relevant evidence may be grounds for review. If a tribunal, without explanation, completely ignores important evidence, its decision may be set aside. However, it is rare for a court to set aside a finding on credibility, because the tribunal, having heard the witness, was in the best position to assess credibility.

Section 58 of the ATA provides:

> 58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

(a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable, . . .

(3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

It is evident that the WCAT decision was based on a reasoned consideration of all the evidence, including the medical reports, the worker's own evidence, and the videotapes. I find that there was evidence before the WCAT panel to support its decision. I do not consider that any of the four criteria set out in section 58(3) are met in this case. I do not consider that the WCAT decision was patently unreasonable in respect of its weighing of the evidence.

Conclusion

The worker's application for reconsideration of *WCAT Decision #2003-00461-rb* is denied. No error of law going to jurisdiction has been established in relation to the WCAT decision. The decision did not involve a breach of natural justice or procedural fairness in relation to the hearing process, and was not patently unreasonable with respect to its weighing of the evidence concerning the worker's appeal. The WCAT decision stands as "final and conclusive" under section 255(1) of the Act.

Herb Morton
Vice Chair

HM/pm

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