Noteworthy Decision Summary

Decision: WCAT-2005-04960 **Panel**: Herb Morton **Decision Date:** September 20, 2005

Workers Compensation Board Compliance with Workers' Compensation Appeal Tribunal (WCAT) Decision – Apparent Failure of WCAT Panel to Apply Board Policy – Loss of Earnings Award – Reopening of Claim Over Three Years – Personal Optional Protection – Sections 99, 250, 251, 254, and 255 of the Workers Compensation Act – Policy Items #40.11, #66.20, and #70.20 of Rehabilitation Services and Claims Manual, Volume I

The Workers Compensation Board (Board) must implement a Workers' Compensation Appeal Tribunal (WCAT) decision that appears to have failed to take into account Board policy. The Board cannot purport to exercise a supervisory role over WCAT decision-making which has not been conferred on the Board by the legislature.

The worker suffered a compound fracture of her left leg while working for a trucking company in 1993. The worker received wage loss benefits and was granted a permanent disability award (PDA) of 5.5% of total disability. The Board denied a loss of earnings award. The Workers' Compensation Review Board (Review Board) confirmed the Board's decision to deny a loss of earnings award. The worker further appealed to the Workers' Compensation Appeal Division (Appeal Division). In 1999, the Appeal Division decided that the worker's loss of earnings entitlement should be reassessed based on new evidence of increased pain.

The Board noted that this was a reopening of the claim over three years from the date of injury. This required that the worker's wage rate be recalculated. At the time of the reopening, the worker was self-employed and had personal optional protection (POP) coverage. In 2000 the Board decided the worker's wage rate should be based on her current POP coverage.

In 2002 the Board increased the worker's PDA. A loss of earnings pension was again denied.

The worker appealed the 2000 and 2002 decisions to the Review Board. On March 3, 2003 the appeals were transferred to WCAT pursuant to the *Workers Compensation Amendment Act (No. 2), 2002*. In *WCAT Decision No. 2003-01703*, the panel confirmed the use of the POP amount at the time of reopening. However, a loss of earnings award was granted to the worker.

In its implementation of the WCAT decision, the Board referred to policy item #40.11 of the *Rehabilitation Services and Claims Manual, Volume I* which provided that, when calculating the pre-injury earnings of a person covered by POP, actual pre-injury earnings are to be used. As the worker's actual earnings at the time of the reopening were negative, the Board concluded that there was no loss of earnings on which to base an award. The Board's decision was confirmed by the Review Division. The worker appealed to WCAT.

The panel acknowledged the conundrum faced by the Board. Section 255(3) of the *Workers Compensation Act* (Act) stipulates the Board must comply with a final WCAT decision. However, section 99(3) of the Act provides that the Board must apply a policy of the board of directors that is applicable to the case. Item #40.11 stipulated that when calculating the pre-injury earnings of a person covered by POP, actual pre-injury earnings are used, not the rate of earnings for which coverage was purchased. In this case, the Board was faced with the seeming failure of the WCAT decision to take into account item #40.11.

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The panel made the following findings in reaching its decision:

- This was not a situation in which the previous panel merely made a "recommendation". The WCAT decision was not stated to be contingent on further consideration or decisions by the Board. Nor was the decision ambiguous or unclear.

- With respect to the seemingly competing legal imperatives faced by Board officers, the WCAT panel considered that there was in fact no contradiction. In respect of the Board's own decision-making, it must apply the policies of the directors. In implementing a WCAT decision, however, the Board must give effect to the decision by the external appeal tribunal. The Board officer is not responsible for reviewing the WCAT decision for a possible error of law or contravention of policy, in implementing the WCAT decision.

- In making the recent amendments to the Act, the legislature did not enact a mechanism, as exists in other provinces, for referring a decision of WCAT to the Board on the basis of an alleged error of law or contravention of policy. In the event that some oversight or error occurs, a WCAT decision is subject to being reconsidered, on application by a party, on the common law ground of an error of law going to jurisdiction. A WCAT decision may also be subject to a petition for judicial review in the Supreme Court.

- The Board and WCAT may have erred in using the worker's current POP coverage when determining her entitlement on a reopening of her 1993 claim. Item #66.20 appeared to be silent regarding the situation of a "worker" (injured while working for an employer), whose claim is subsequently reopened during a time period in which the worker is self-employed with POP coverage. One inference from this silence is that the policy-makers never contemplated that a later purchase of POP coverage would have any relevance to the reopening of a claim of a worker who did not have POP coverage at the time of the initial injury.

The panel allowed the appeal. The WCAT decision must be implemented. This conclusion accords with the strong legislative intent evident in the recent amendments to provide for a high degree of finality within the workers compensation system, to not provide a mechanism for the Board to challenge WCAT decisions, and to require the Board to comply with a final decision of the appeal tribunal. The worker was entitled to a loss of earnings award on the terms stipulated in *WCAT Decision #2003-01703*.

WCAT Decision Number: WCAT-2005-04960
WCAT Decision Date: September 20, 2005
Panel: Herb Morton, Vice Chair

Introduction

The worker appeals *Review Decisions #15010* and *#15062* dated December 13, 2004. Her appeals concern the Board's implementation of *WCAT Decision #2003-01703* dated July 25, 2003. The worker's lawyer submits that the Board has failed to give effect to a clear and final WCAT decision. He argues that in refusing to implement the WCAT decision, the Board and Review Division have, in effect, determined that the WCAT decision was contrary to policy and should not be implemented.

The worker's employer at the time of her 1993 work injury is no longer registered with the Board. By memo dated May 17, 2004, the chief review officer exercised his discretion under section 96.2(7) of the Act to deem the employers' adviser to be the employer. Section 248(3) provides that where this has occurred, the employers' adviser is deemed to be the employer for the purposes of appealing the review officer's decision in that matter and participating in the appeal to WCAT.

The appellant requested that her appeals be considered on a "read and review" basis. Written submissions have been provided by a lawyer representing the appellant, and by the employers' adviser. I agree that the issues of law and policy raised by these appeals can be properly considered on the basis of written submissions without an oral hearing.

Issue(s)

The specific issue in this appeal is whether the worker is entitled to a loss of earnings pension award, in implementation of the WCAT decision. A related question concerns whether the Board has authority to decline to implement a WCAT decision on the basis of an alleged contravention of policy.

Background

At the time of her 1993 work injury, the worker was employed by a trucking company. (Her self-employment with POP coverage occurred during a later time period). She was standing behind a 48 foot trailer, when her foot got caught between the boards on a wooden pallet. The trailer rolled backwards and pinned her leg between the trailer bumper and pallet. The worker was 53 years of age at the time of her injury. She is currently 65 years of age.

In the June 11, 1993 accident, the worker suffered a compound fracture of her left tibia and fibula. On the same day, she underwent an open reduction and internal fixation of the left tibia and fibula and debridement of the wound. On October 22, 1993, the worker underwent further surgery for the debridement of a chronic wound of her left ankle, with skin grafting. She also underwent surgery on April 7, 1994 for a left tibial bone graft, due to non-union of the bone.

In memo #6 dated August 18, 1993, the claims adjudicator reviewed the worker's employment history for the purpose of establishing her short and long-term wage rate. She had been working with her husband in the truck-driving industry for the past five years. After her youngest son graduated from high school, she got her license and began travelling with her husband as a co-driver. For the first 4.5 years they drove for one company, driving one of the company's trucks. The worker's husband subsequently purchased his own truck, and they began driving for the accident employer.

Under policy at No. 20:30:20 of the former *Assessment Policy Manual*, the term "labour contractor" was used for persons "who may or may not have workers but contract a service including one piece of major revenue-producing equipment to a firm or individual." The policy provided:

> Registration for labour contractors is not mandatory, but is allowed. Those labour contractors who do not elect to be registered, and any help they employ to assist them, which may include paid members of their families, are considered workers of the prime contractor or firm for whom they are contracting, and that firm is responsible for assessments and injury reporting.
>
> If the firm is registered, and therefore considered an independent firm, the proprietor and spouse (see 20:50:10) are not covered unless Personal Optional Protection is in effect.

As the worker had not registered with the Board prior to her 1993 injury, she was considered a worker of the company for which she and her husband were working. The claims adjudicator concluded that the worker's 1992 T4 earnings provided an accurate representation of her loss. Her initial and long-term wage rates were established based on her 1992 taxable earnings of $25,882.00 (gross monthly wage rate of $2,151; compensation wage rate of 75% = $1,613.25).

The worker underwent a medical/PFI examination on May 17, 1995. By decision dated May 26, 1995, the claims adjudicator advised the worker that wage loss benefits had been concluded effective May 21, 1995 and that her claim would be referred to the Disability Awards Department to consider her entitlement to a pension.

By memo dated August 25, 1995, a vocational rehabilitation consultant reviewed the worker's circumstances. She had attempted to return to work driving with her husband. She reported she was unable to operate the clutch with her left leg. She predominantly performed highway driving. She reported having switched places with her husband while the truck was moving, so as to avoid significant clutching. She realized this was not a safe practice. Her husband sold the truck. She asked the Board for assistance in purchasing a new tractor unit with an automatic transmission. The rehabilitation consultant advised that while the worker would be provided with job search assistance, a truck purchase would not be considered. The consultant noted: "…if we would have considered any assistance in this regard, assistance would have been proportional to the cost of modifying the worker's previous truck from a standard to an automatic transmission." The consultant further noted:

> The case will be extremely difficult as this worker has only really held one job as a truck driver for the past five years. Prior to this employment, she was a home maker.

By decision dated September 19, 1995, the vocational rehabilitation consultant advised the worker:

> Based on your WCB wage rate of approximately $500.00 per week, it is clear that an expenditure of over $100,000.00 for the purchase of a truck with an automatic transmission would go significantly beyond what is required to overcome the effects of the injury.
>
> Additionally, it is my understanding that you and your husband sold the truck you were driving previously; this was your personal choice. A reasonable accommodation to return you to truck driving would have been to look at modifying the previous truck to accommodate your work restrictions, however, this is no longer possible.

In a further decision dated February 21, 1996, the vocational rehabilitation consultant advised the worker that her job search benefits would be extended to March 31, 1996, but no further. He further advised the Board would be prepared to provide $4,000 towards the design and installation of a power-assisted clutch for the truck she was driving. By decision dated May 8, 1996, the worker was granted a pension award of 5.55% of total disability for her permanent functional impairment. A loss of earnings pension was denied.

The worker appealed the February 21, 1996 and May 8, 1996 decisions to the Review Board. By finding dated May 15, 1998, the Review Board denied her appeal from the May 8, 1996 pension decision. With respect to the provision of rehabilitation assistance, the Review Board found that future modifications to vehicles might be required from time to time. The worker further appealed to the Appeal Division. By

decision dated March 17, 1999 (*Appeal Division Decision #99-0485*), the panel found as follows:

> The Board paid for the installation of an air-assisted clutch on the basis that the worker would be able to resume her pre-injury work as a team driver with her husband. The worker's evidence at the Review Board was that pre-injury, she shared the driving "50/50" with her husband, whereas at the time of the Review Board oral hearing, she was only able to do 1/3 of the driving, while her husband did the other 2/3. The worker's evidence of her driving limitations has been corroborated by her attending physician, in his reports of September 18 and 22, 1998. I note, in this regard, that Dr. Docherty states that the worker is limited to driving three hours per day, whereas the worker's evidence to the Review Board on March 25, 1998 was that she was able to drive four hours. I also note, however, that Dr. Docherty reported on September 18, 1998 that the worker had increasing pain in her left ankle.
>
> The Review Board noted that the worker had not been able to tolerate full shifts of driving, but found that with improvement in the strength of her left leg, this situation is subject to change. Consequently, they found there was no evidence at that time that she will, in the long term, likely suffer a compensable loss of earnings pursuant to section 23(3) of the *Act*, over and above that represented by the functional award. However, Dr. Docherty's reports, as noted above, provide evidence that the worker has had increasing pain, rather than continued improvement in the function of the left ankle, as envisaged by Dr. H in May, 1995. **It is now almost four years since Dr. H's prediction, and the worker has been driving with her husband, using an air-assisted clutch, since May 1996. It would appear to this panel that this passage of time along with the worker's documented motivation to succeed have provided ample opportunity to determine what the worker is capable of doing, and for how long, with an air-assisted clutch. There has been a reduction of the worker's ability to drive for the same number of hours she did prior to her injury. Whether this reduction of hours has resulted in a loss of earnings between May 22, 1995 and September 18, 1998 will need to be re-determined by the disability awards officer, once the Board has received earnings information from the worker for that period of time**.
>
> The disability awards officer has recognized the worker's permanent subjective complaints of pain and swelling in her left ankle by the awarding of .50% of total. He also concluded that the worker would be able to maintain her pre-injury earning capacity by returning to the truck driving jobs available to her and her husband and by using the air-assisted clutch.

> **The new evidence of Dr. Docherty is that the worker's increased pain, as of September 1998, has limited her driving to three hours per day. This evidence was not available to, or considered by, the disability awards officer. I return the file to the disability awards department to reassess the worker's disability award based on her increased subjective complaints and to conduct an employability assessment with respect to the worker's reduced driving capability, as compared to that pre-injury. As there has been no documentary evidence submitted as to how the reduced driving capability has affected the worker's earnings, this information would need to be obtained**.

[emphasis added]

The Appeal Division panel further urged that the Board give expeditious consideration to the possibility of providing an automatic transmission, "so that if it is decided to provide such a transmission, the worker's husband still has a truck available for its installation."

Under section 96.1(1) of the former Act, the Appeal Division decision was final and conclusive (subject to a Medical Review Panel or reconsideration by the Appeal Division on limited grounds). In memo #64 dated June 10, 1999, the disability awards officer noted that the Appeal Division findings were twofold: a redetermination of the original loss of earnings award would need to be undertaken, and a repeat permanent functional evaluation would need to be undertaken along with a loss of earnings investigation. Any increased award would be effective from September 18, 1998. However, it does not appear that a decision letter was subsequently provided to the worker concerning implementation of the Appeal Division decision.

The worker underwent further surgery on July 28, 1999, for debridement/sequestrectomy, left tibia with removal of hardware. The surgical report noted:

> This included debridement as well as drilling or a forage of the fairly sequestered bone which appeared somewhat avascular being mostly cortical bone in a chalky nature. . . .
>
> Hopefully this procedure will encourage new blood flow to the area of the previous osteomyelitis. . . . If she does have any further problems including the possibility of a pending nonunion presenting itself clinically then a bone graft procedure would be done at that stage…

Due to non-union of the tibia, the worker underwent further surgery on May 10, 2000, for bone grafting of the left tibia. A subsequent x-ray report noted that the position and alignment now appeared to be well maintained by a metallic side plate and multiple

metallic screws. Sclerotic changes at the fracture site with callus formation and fairly marked diffuse osteoporosis were noted.

An evaluation of the worker's earnings was provided by the case manager's decision of December 11, 2000 (which concerned the wage rate used for the July 1999 reopening of the worker's claim). The case manager found as follows:

> In November 1999 the earnings for the 3 years prior to the date of the re-opening were received. These show a business loss with no earnings.

Following the July 1999 reopening of the worker's claim, she initially received wage loss benefits based on the wage rate initially set on this claim, with consumer price index adjustments. However, by decision dated December 11, 2000, the case manager noted that this was a reopening over 3 years from the date of injury. She noted that as the worker was operating at a business loss, it could be argued that she was not suffering a loss of earnings at the time of reopening. She concluded, however, that the worker's wage rate should be based on the worker's current personal optional protection coverage of $1,500 per month. The case manager obtained permission to readjudicate the wage rate set on the claim, based on the worker's personal optional protection coverage of $1,500.00 per month (which equalled a weekly rate of $374.75). She advised the worker that this had resulted in an overpayment of $8,400.75 as of November 3, 2000. However, as this involved a decisional error, it would not be recovered.

The worker's wage loss benefits were suspended from December 18, 2000, when she was hospitalized for treatment of colitis. By decision dated March 15, 2001, the case manager found that the worker had developed pseudomembranous colitis, an antibiotic associated colitis, as a result of being treated with antibiotics for her surgery under this claim.

Under this claim, the worker received wage loss benefits for 1,090 days, and rehabilitation assistance for 270 days, as follows:

Wage loss benefits	June 12, 1993 to May 21, 1995
Work assessment (rehab.)	May 22, 1995 to August 20, 1995
Rehabilitation	August 21, 1995 to March 31, 1996
Wage loss benefits	July 25, 1999 to February 6, 2001

The worker reached 65 years of age on November 7, 2004. Due to medical complications, during the nearly eight years following her injury she was on wage loss or rehabilitation benefits continuously except for a three-year period from April 1996 until the July 1999 reopening for further wage loss benefits.

By decision dated October 10, 2002, the disability awards officer granted the worker an increase in her permanent partial disability award, effective February 7, 2001, of 5.04%,

plus age adaptability of 0.81%. A loss of earnings pension was denied. In calculating the worker's increased pension award, the worker's POP coverage of $1,500 was utilized. The October 10, 2002 decision letter stated, in connection with the worker's assessment on July 31, 2002:

> This evaluation was performed to determine if you have any increased permanent impairment of your left ankle as a result of your injury under this claim. Attached is a copy of a memo dated September 9, 2002. This memo summarizes my assessment and conclusions. The current findings have been compared with those from your previous assessment. The findings indicate that you have an increased disability and are entitled to an additional award.

The attached memo dated September 9, 2002 included the following comments, under the heading "Administrative Data", paragraph 1:

> **Appeal Decision**: There is an Appeal Division decision on file. As a result of the Appeal Division decision of March 17, 1999, it has been determined that a loss of earnings pension should be considered on this claim given that the client has been having increased difficulty driving and operating a power-assisted clutch. It appears that in lieu of an LOA [sic] decision, the Vocational Rehabilitation Consultant had authorized an expenditure of $56,245.32 (the cost of a new automatic transmission). The client and her husband were both in agreement that having a new truck with the automatic transmission would allow the client to drive up to 10 hours per day as is allowed by law. It would allow her to do 50% of the driving duties between their team, and would therefore, eliminate any long-term loss of earnings.

The WCAT Decision

The worker appealed the December 11, 2000 and October 10, 2002 decisions by Board officers to the former Workers' Compensation Review Board (Review Board). The workers' compensation appeal system was restructured effective March 3, 2003, pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). The former appeal bodies (Review Board, Appeal Division and Medical Review Panels) were replaced by an internal Review Division, and an external WCAT. Section 38 of the transitional provisions contained in Part 2 of Bill 63 provided that all proceedings pending before the Review Board on March 3, 2003 "are continued and must be completed" as proceedings pending before WCAT (except where the Review Board had already completed an oral hearing, or received final written submissions and begun its deliberations, prior to March 3, 2003). Accordingly, instead of being addressed by the Review Board (as the initial level of appeal), the worker's appeals were heard by WCAT (as the final level of appeal).

While *WCAT Decision #2003-01703* was made under Part 2 of Bill 63, rather than involving an appeal filed to WCAT under Part 4 of the Act, section 38(1) provided that such appeals "must be completed as proceedings pending before the appeal tribunal except that section 253 (4) of the Act, as enacted by the amending Act, does not apply to those proceedings." Accordingly, the related provisions regarding WCAT's decision-making authority applied, apart from the time frame for WCAT decision-making.

In its decision, the WCAT panel referred in two places to the role of policy in respect of WCAT's decision-making on the worker's appeals. Under the heading "Jurisdiction", the panel noted in part:

> Under sections 250(1) and (2) of the *Workers Compensation Act* (Act) (effective March 3, 2003) WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. It must make its decision on the merits and justice of the case. **It must apply policies of the Board's board of directors, which apply, to the case, except in exceptional circumstances outlined in section 251 of the Act.**

[emphasis added]

The panel returned to this subject in the first paragraph of its "Findings and Reasons", stating:

> The worker made her application for compensation to the Board prior to June 30, 2002. Her entitlement is therefore adjudicated under the former provisions of the *Workers Compensation Act* (the Act). **The relevant policy is set out in the *Rehabilitation Services & Claims Manual*, *Volume 1* (RSCM). This policy must be used where applicable, and is binding on the Workers' Compensation Appeal Tribunal.**
>
> [emphasis added]

In its decision, the WCAT panel did not refer to section 42 of the transitional provisions contained in Part 2 of Bill 63. This provided:

> As may be necessary for the purposes of applying sections 250 (2) and 251 of the Act, as enacted by the amending Act, in proceedings under sections 38 (1) and 39 (2) of the amending Act, published policies of the governors are to be treated as policies of the board of directors.

The December 11, 2000 decision by the Board officer was addressed in the WCAT decision under the heading "Wage Rate on Re-opening." The WCAT panel found that the use of the $1,500.00 personal optional protection amount at the time of the re-opening was correct. The October 10, 2002 decision by the Board officer was

addressed in the WCAT decision under the heading "The Pension Decisions." The panel reasoned:

> I find the effective date of February 7, 2001 to be the correct implementation date. It is the day following the termination of wage loss benefits and the effective plateau date of the disability as substantiated by medical evidence.
>
> In terms of the question regarding a potential loss of earnings award, the worker and her representative argue that this was not properly investigated at the time of the assessment. The Disability Awards Memo (Form 24) indicates that the disability awards officer reviewed that in 1999 in lieu of a loss of earnings the vocational rehabilitation consultant authorized an expenditure of $56,245.32 (the cost of an automatic transmission) to enable the worker to do 50 percent of the driving. It was thought this would eliminate any long term loss of earnings, therefore the disability awards officer did not further consider a loss of earnings pension.
>
> The worker reported that she is unable to be an equal contributor in terms of the driving. She stated that she advised the Board at the time of the assessment that she was having difficulty driving. A review of the questionnaire completed by the worker at the time of the assessment does confirm that she states she was having difficulty driving.
>
> Both the worker and her husband reported that she is only physically able to drive up to four hours in a 24-hour period, not the ten hours as allowed by law, and that this has dramatically affected their potential income. Additionally they reported that due to the ongoing effects of her disability, the worker is unable to drive for a lengthy period. **The worker's inability to drive for a lengthy period resulted in them losing the truck with the automatic transmission. The current truck they are driving does not have an automatic transmission and the worker's driving hours are reduced. The worker stated that even if they did have a truck with an automatic transmission, she does not feel that she could drive much more than the four hours she is currently driving, due to the pain and swelling in her ankle.**
>
> Based on the above information, the panel has determined that the disability awards officer did not turn his mind to the worker's ability to drive or not drive at the time of the assessment. He assumed that as the Board had purchased an automatic transmission, the worker would be able to drive 50 percent of the time. **The panel has determined the worker is entitled to a loss of earning award. The award is to be based on the**

> **worker's $1,500.00 per month personal optional protection coverage for when she drove 10 hours per day up to six days a week. She cannot drive six of those hours and is to be awarded a loss of earnings based on this.**
>
> [emphasis added]

Under the heading "Conclusion", the WCAT panel further stated:

> **Appeal C**
>
> The appeal is denied. The panel confirms that the use of the $1,500.00 personal optional protection amount to determine the wage rate at the time of the re-opening is correct.
>
> **Appeal D**
>
> The appeal is partially granted. The date of the disability award and the wage rate are confirmed. The award is increased 1 percent for subjective complaints. **The worker is awarded a loss of earnings pension based on the fact she can only drive four hours per day, not 10.**

[emphasis added]

Implementation by the Board of the WCAT Decision

By memo dated November 25, 2003, the claims adjudicator, Disability Awards Department, sought direction from the director, Central Services, concerning implementation of the WCAT decision. Policy at item #40.11 of the RSCM I provided:

> When calculating the pre-injury earnings of a person covered by personal optional protection, a departure is made from the normal rule of using the rate of earnings for which coverage has been purchased. (11) **For the purpose of the projected loss of earnings assessment, actual pre-injury earnings are used**, but the amount of the award can never exceed the amount of earnings for which the coverage was purchased.
> **Note:**
> (11) See #66.20
>
> [emphasis added]

The officer commented:

> The finding suggests that I use the Personal Optional Protection earnings of $1,500.00 and base the loss of earnings on the reduction in hours. I assume using an hourly rate based on the $1,500.00 per month, working 10 hours per day, 6 days per week equals $18,000.00 per year or an hourly rate of $5.75 per hour. Therefore, it would be my rationale that the post-injury earnings would be 5.75 x 24 hours per week = $138.00 per week or $599.64 per month.
>
> As stated above the implementation of the finding directly contravenes policy, and calculating a loss of earnings based on the reduction in hours worked, contravenes the law.
>
> In order to implement the finding without contravening policy I must use the worker's actual pre-injury earnings and determine her post-injury earnings using the same manner.

The officer further noted:

> If the Board implements the decision as directed, the Policy item #40.11 is contravened as we would be using the **Personal Optional Protection Coverage** purchased to calculate the pre-injury earnings as opposed to using the "**actual pre-injury earnings**" as directed by the policy. This would result in the worker receiving a loss of earnings award of approximately $675.00 per month.

[emphasis in original]

By memo dated December 8, 2003, the board officer noted she had received direction from the director. By decisions dated December 16, 2003 and January 12, 2004, the board officer advised the worker regarding the manner in which the WCAT decision would be implemented. She advised:

> As you have pointed out, I must implement the decisions of the Workers' Compensation Appeal Tribunal, however, these must be implemented within the guidelines of published law and policy.
>
> …the WCAT has concluded that you can only drive four hours per day not ten hours per day as you had been able previously.
>
> However, in determining your entitlement to a loss of earnings award, I am bound by the policy which requires a review of your actual earnings at the time of reopening. As your earnings at the time of reopening are negative, the reduction in your hours of driving has not resulted in a loss of earnings

> in excess of the functional award. Therefore, in accordance with Policy item #40.00, your award continues to be paid on a functional basis.

The worker requested review of these decisions by the Review Division.

Review Division Decisions #15010 and #15062

It is evident that the review officer endeavoured to find a manner in which the WCAT decision might be implemented in a fashion which was consistent with policy. He analyzed three possible approaches to interpreting the WCAT decision.

With respect to the literal interpretation of the WCAT decision, the review officer rejected this approach for the following reasons:

> The first possibility is that WCAT intended that the POP rate be used as the preinjury "average earnings" in calculating the applicant's loss of earnings. The difficulty with this interpretation is that it would clearly contradict the Board's policy found in Policies #40.10, *Assessment Formula,* and #40.11, *Average Earnings Prior to Injury,* which govern the calculation of average earnings for the purpose of determining entitlement to loss of earnings awards. These policies state that a departure is made from the normal rule of using the rate of earnings for which the POP coverage has been purchased as the average earnings used to determine the amount of compensation. The "actual pre-injury earnings are used, but the amount of the award can never exceed the amount of earnings for which the coverage was purchased". This rule is also found in Policy #66.20, *Personal Optional Protection.*
>
> Section 250(2) of the *Act* states that WCAT "must apply a policy of the board of directors that is applicable" to a case before it. Section 251 sets out a process under which WCAT may decline to apply a policy. The 2003 WCAT decision specifically mentions these sections in its discussion of its "jurisdiction". Since the process under section 251 was not followed in this case, it must be assumed that WCAT did not intend to contradict the Board's policy. Its decision should, if possible, be interpreted in a way that is consistent with the policy.

Ultimately, the review officer agreed with the decision of the Board officer, stating:

> The Board's authority to use earnings at the time of a reopening after 3 years in connection with permanent disability awards is found in section 32(3), which states:
>
> > Where more than 3 years after an injury a permanent disability or an increased degree of permanent disability

> occurs, the compensation payable for the permanent disability or increased degree of permanent disability may be calculated by reference to the average earnings of the worker at the date of the occurrence of the permanent disability or increased degree of permanent disability.

This was the section specifically applied by WCAT in reaching its decision. This section is concerned with determining the applicant's "average earnings". I consider that the most reasonable interpretation of the WCAT decision is that it was primarily intending to determine the average earnings to be used in calculating the applicant's loss of earnings award. It found that the earnings at the time of the reopening should be used as opposed to the earnings prior to the original injury. The fact that it specifically referred to the POP amount is incidental to its main determination as to the time at which average earnings should be determined. Therefore, the decision under review was reasonable in making the calculation on the basis of the applicant's actual earnings at the time of the reopening and determining on that basis that no loss of earnings award should be made. The applicant's lawyer has not challenged the actual earnings calculations on which this decision was based.

As a result, I deny the applicant's request.

The *Workers Compensation Act*

At the time the WCAT decision was issued, the Act included the following provisions (selected excerpts):

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

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

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

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

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

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

253 (1) On an appeal, the appeal tribunal may confirm, vary or cancel the appealed decision or order.

254 The appeal tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined under this Part, . . .

255 (1) Any decision or action of the chair or the appeal tribunal under this Part is final and conclusive and is not open to question or review in any court.

(2) Proceedings by or before the chair or appeal tribunal under this Part must not

(a) be restrained by injunction, prohibition or other process or proceeding in any court, or

(b) be removed by certiorari or otherwise into any court.

(3) The Board must comply with a final decision of the appeal tribunal made in an appeal under this Part.

256 (1) This section applies to a decision in

(a) a completed appeal by the appeal tribunal under this Part or under Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002,* and

(b) a completed appeal by the appeal division under a former enactment or under Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002.*

(2) A party to a completed appeal may apply to the chair for reconsideration of the decision in that appeal if new evidence has become available or been discovered.

These provisions were subject to the amendments contained in the *Administrative Tribunals Act* (ATA) effective December 3, 2004. Section 254 currently states:

> The appeal tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law **and discretion** arising or required to be determined under this Part and to make any order permitted to be made...

[emphasis added]

For the purposes of my decision, I will refer to the Act as it existed at the time the WCAT decision was issued. I do not consider the changes contained in the ATA significant to the issues raised in this appeal.

The Policies

Policy at RSCM I item #40.11 is quoted above. This policy references RSCM I item #66.20, which further provides:

> In the case of a reopening of a claim over three years from the date of injury **and the claimant had personal optional protection when initially injured**:
>
> 1. Where the worker has maintained personal optional protection coverage at the time of reopening, the Board will pay the claim on the basis of the current rate of optional coverage.
>
> 2. Where the worker is still employed in a capacity requiring optional protection and has no active personal optional protection coverage at the time of reopening, the Adjudicator will use the initial personal optional protection rate plus the appropriate Consumer Price Index increases.
>
> 3. Where the claimant is now employed in circumstances where there is compulsory coverage for workers, the rate on reopening will normally be the claimant's current earnings rate subject to an evaluation of the question of any impact of the original injury on these current earnings should they be lower than that ACTUALLY EARNED (not the personal optional protection rate) at the time of the injury. (10)
>
> [emphasis added]

Submissions

The worker's lawyer submits that WCAT has clearly directed the Board to pay the worker a pension of 60% of her personal optional protection amount of $1,500.00. He argues:

> In refusing to implement the decision of WCAT…, both the Board and the Review Division have, in effect, determined that the WCAT decision was contrary to policy and should not be implemented.

The worker's lawyer further points out that the worker's pension entitlement has been at large since February 1996, the date of the original pension assessment. He argues that the WCAT decision complied with policy, as the panel knew that the worker's pre-injury earnings exceeded her personal optional protection rate, and it set a pension which was no greater than her personal optional protection rate. He concludes:

> The Worker, prior to her original injury was able to earn in excess of $2500 per month. Her injury was severe. She has lost income since she is no longer able to be an effective team driver. At her age, taking into account the extent of her disability, there is an obvious loss of earnings. It is a complicated case, but WCAT, in our submission, in a clear fashion, set out what the Worker's loss of earnings pension should be. The Board did not seek judicial review of the decision. The decision is not only final, but is also reasonable in the circumstances.

The employers' adviser expresses agreement with the December 16, 2003 and January 12, 2004 decisions, and with the December 13, 2004 Review Division decisions. He submits that the WCAT panel was likely unaware of the worker's actual pre-injury earnings at the time and the implications it would have in this matter. He submits the Board has implemented the WCAT decision "in accordance with the guidelines of published law and policy." He submits that the WCAT decision prevents the worker from arguing that this was not a reopening. He submits:

> …the Workers' Compensation Board has followed proper procedure, policy and law in implementing the prior WCAT finding and in correctly determining the worker[']s increased entitlement to a permanent partial disability award.

Reasons and Findings

An advisory notice attached to the WCAT decision advised the worker:

> The enclosed WCAT decision is final and conclusive pursuant to section 255 of the Workers Compensation Act. It cannot be appealed. The Workers' Compensation Board must comply with a final decision of WCAT made under Part 4 of the Act.

I acknowledge, at the outset, the distress evidently experienced by the worker, in receiving a purportedly "final and conclusive" WCAT decision which "awarded a loss of earnings pension based on the fact she can only drive four hours per day, not 10", only to be told by the Board that she was not eligible for a loss of earnings pension.

At the same time, I acknowledge the dilemma faced by the Board officers. Section 255(3) stipulates that the Board must comply with a final WCAT decision. However, section 99(3) also provides that the Board must apply a policy of the board of directors that is applicable in that case. The conundrum faced by the Board officer was how to reconcile these apparently contradictory legal imperatives, given the seeming failure of the WCAT decision to take into account or address the policy at RSCM I item #40.11.

The Board officer focused on the apparent specific breach of policy at RSCM I item #40.11. In reviewing the background to this claim, I would question whether a more fundamental error may have occurred. While I hesitate to put forward a different analysis in the face of a final WCAT decision, I am inclined to the view that the worker's status as a worker of the accident employer was established at the time of her injury in 1993. At the time of her 1993 injury, she was not a self-employed person who had purchased POP coverage. Arguably, there is a different bundle of rights possessed by such a worker, as compared to a person who becomes a worker by virtue of purchasing POP coverage.

Persons with POP are only granted the benefits for which coverage has been purchased from the Board. They are thus not entitled to the same protections granted to workers under the Act (see *Appeal Division Decision #99-1232*, "Section 96(4) Referral – Whether Personal Optional Protection (POP) entitles operator to minimum compensation under Sections 22 and 29", 15 W.C.R. 647). This raises a question as to whether the worker (who did not have POP coverage at the time of her 1993 injury) loses the benefit of her status as a worker under the Act in respect of any subsequent reopening of her claim, as a result of her purchase of POP coverage in her attempts at re-employment. Alternatively, does the POP coverage only apply to the determination of her entitlement to benefits in relation to any new injury? For the purposes of this decision, I consider it sufficient to pose this as a question, without determining the matter.

Appeal Division Decision #99-0485 found that there had "been a reduction of the worker's ability to drive for the same number of hours she did prior to her injury." *WCAT Decision #2003-01703* similarly concluded that the worker cannot work six of the ten hours she previously worked, six days a week. Both decisions found the reduction in the worker's ability to drive for the same number of hours she did prior to her injury was a result of her compensable injury and resulting surgeries.

Policy at RSCM I item #66.20 deals with a number of ways of determining average earnings in the case of a reopening of a claim over three years from the date of injury, where the claimant had personal optional protection when initially injured. The policy appears to be silent regarding the situation of a "worker" (injured while working for an employer), who subsequently has a reopening during a time period in which the worker is self-employed with POP coverage. One inference regarding this silence is that it was never contemplated by the policy-makers that a later purchase of POP coverage would have any relevance to the reopening of a claim by a worker who did not have POP coverage at the time of the initial injury.

Policy at RSCM I item #70.20 concerns reopenings over three years. One of the options identified in this policy is as follows:

> (i) **Reduced Earnings Due to Effects of the Injury or Disease Accepted On the Claim**
>
> If it is determined that the reduced earnings level is due to the effects of the injury or disease accepted on the claim, the rate originally set on the claim (or 8-week review rate, if applicable) plus applicable Consumer Price Index adjustments will be used on the reopening…

Having regard to the factual conclusions provided in *Appeal Division Decision #99-0485* and *WCAT Decision #2003-01703* regarding the reduction in the number of hours the worker was able to drive (with either an air/power assisted clutch or an automatic transmission), it might be argued that there is a strong case for finding that the worker's wage rate on reopening should have been determined based on her initial 1993 wage rate with consumer price index adjustments, and that her eligibility for a loss of earnings pension should have been similarly determined. It may be argued that the Board, and WCAT, erred in having regard to the worker's current POP coverage, when determining her entitlement on a reopening of her 1993 claim.

It would normally not be appropriate that I suggest a WCAT decision may have been in error, except where required for the purpose of deciding a matter properly before me for decision. In the circumstances of this case, however, I consider this serves to illustrate the problem of other persons (and I include myself in the context of this decision), who are not charged with statutory authority to do so, asserting that the prior WCAT decision was based on a contravention of policy.

The Board has declined to grant the worker a loss of earnings pension in implementation of the WCAT decision, on the basis this would over-compensate the worker based on a breach of policy at RSCM I item #40.11. It may equally be argued, however, that the calculation of a loss of earnings pension award on the basis directed in the WCAT decision would under-compensate the worker, and contravened policy by applying the POP rate in a reopening of a claim which was not founded on POP coverage. In the face of such possible arguments, my response must be the same. The Act provides that the WCAT decision is final and conclusive and that the Board must comply with a final WCAT decision.

This was not a situation in which the WCAT panel merely made a "recommendation". I agree, in this regard, with the reasoning recently expressed in *WCAT Decision #2005-03521* regarding the non-binding effect of a recommendation:

> Although there is nothing to prevent a WCAT panel from making a recommendation, there is no provision for giving it legal effect. There is no obligation, under section 255(3) of the Act, for the Board to comply with a recommendation.
>
> I also note that this conclusion is consistent with the decision of the Supreme Court of British Columbia in *Cosimo Candeloro v. Workers' Compensation Board* [1988] B.C.J. No. 1574 (Candeloro). That case involved an application for judicial review on several issues, including an allegation that the Board had failed to implement findings of a Board of Review. The court noted that recent amendments to the Act provided that a Board of Review finding was binding on those affected by it.
>
> The worker had appealed decisions relating to his permanent disability award to a Board of Review, which allowed his appeal in part. The Board of Review set out a series of four statements at the conclusion of its decision. These statements included the following:
>
> > 2. The counter sales job was not suitable or reasonably available position to the Worker. We recommend the Workers Compensation Board look at this claim with a view to upgrading and retraining the Worker to enable him to carry out any positions which are felt to be potentially suitable or reasonably available.
> >
> > [reproduced as written]
>
> Under the subsequent heading "Findings", the Board of Review stated: "It is the unanimous finding of this Review Board that the Worker's appeal should be allowed to the extent set out above." [reproduced as written.]

The Board did not provide any training to the worker and the worker's representative petitioned the court for a judicial review of the Board's actions. At page 8 of the case, which is accessible on *Quicklaw*, the court addressed the Board of Review's statements regarding training, the court stated, "But that is not a finding. It is a recommendation only. It is not a recommendation that the Board re-train and upgrade, it is a recommendation that the Board consider upgrading and re-training".

The court went on state:

> Review board decisions define rights and obligations. Findings must be implemented. There is a limited right of appeal from the decisions. For these reasons it is incumbent upon a review board to be precise in its use of language. If this Review Board intended to bind the Board to provide upgrading and retraining, it did not say so. I find that the Board has not failed to implement the findings of the Review Board or acted in a manner contrary to those findings…

Although WCAT is not bound by legal precedent, I have found it useful to consider the decision in Candeloro with respect to the legal effect of a recommendation. Although the legislation has changed since Candeloro was decided, the Act retains a provision imposing a duty on the Board to comply with appellate decisions. At the time of Candeloro, the Board was required to implement "findings" of the Board of Review. Accordingly, the court found that the Act did not impose any obligation to implement statements made by the Board of Review which were characterized as a "recommendation."

Similarly, section 255(3) of the Act requires the Board to comply with a final "decision" of WCAT. It is consistent with the analysis and conclusions in Candeloro to find that the Board is not obliged to comply with a statement which has been characterized as a recommendation by a WCAT panel.

In the present case, the WCAT decision was not stated to be contingent on further consideration or decisions by the Board. Nor was the decision ambiguous or unclear. The Board officer who had responsibility for implementing the decision has already performed the calculations (which I have not reviewed) to arrive at the value of the loss of earnings award which would be payable to the worker, were the WCAT decision to be implemented at face value.

With respect to the seemingly competing legal imperatives faced by Board officers (identified at the outset of these reasons and findings), I consider that there is in fact no contradiction. In respect of the Board's own decision-making, it must apply the policies

of the directors. In implementing a WCAT decision, however, the Board must give effect to the decision by the external appeal tribunal. The Board officer is not responsible for reviewing the WCAT decision for a possible error of law or contravention of policy, in implementing the WCAT decision.

In making the statutory amendments to the Act contained in Bill 63 (effective March 3, 2003), the legislature made major changes to provide increased finality within the workers' compensation system. The legislature would no doubt have been aware of statutory provisions in the workers' compensation legislation of other Canadian provinces, which contain a mechanism for the Board to refer a decision of the final external appeal body to the board of directors on the basis of an alleged error of law or contravention of policy. The legislature did not choose to adopt such a model in British Columbia. In many cases, the increased finality provided by Bill 63 may appear to be to the detriment of particular workers or employers. In other cases, the Board may object to the WCAT decision. However, the intent of the legislature must be respected.

WCAT has a statutory obligation to apply the policies of the board of directors, subject to invoking the process established by section 251 of the Act. In the event that some oversight or error occurs, a WCAT decision is subject to being reconsidered, on application by a party, on the common law ground of an error of law going to jurisdiction. *WCAT Decision #2005-01290* set aside a prior WCAT decision as being patently unreasonable, in its failure to consider the application of a relevant policy. *WCAT Decision #2005-01290* reasoned:

> Caution must be exercised in considering whether a decision should be set aside due to a panel's failure to apply policy. On issues concerning the scope of employment, there are a broad range of policies which may apply. Under section 250(2), a WCAT panel must apply a policy that is applicable in that case. In so doing, the panel may determine which policy or policies are applicable in that case. The panel need not cite every policy which might be relevant, no matter how tangential or peripheral it may be in terms of its relevance to the issue being determined by the panel. However, if the issue being addressed by the panel is one to which a policy has obvious application, or is central to the issue framed by the panel, the panel cannot ignore (or overlook) the policy, or fail to apply it without explanation.

Section 253.1 of the Act, as amended December 3, 2004, sets out certain constraints on WCAT's authority to amend a final decision. However, subsection 253.1(5) further states:

> This section must not be construed as limiting the appeal tribunal's ability, on request of a party, to reopen an appeal in order to cure a jurisdictional defect.

A WCAT decision may also be subject to a petition for judicial review in the British Columbia Supreme Court. Thus, notwithstanding the high degree of finality imposed by Bill 63, there are certain remedies for addressing an error of law going to jurisdiction in a WCAT decision, should such occur.

With respect to the responsibilities of a Board officer to apply Board policy, and to implement a WCAT decision, I consider that the officer must distinguish between those matters which are properly before the officer for decision, and those matters which have already been decided in the WCAT decision. If the matter has already been decided in the WCAT decision, the Board officer has no authority under the Act to decline to implement the WCAT decision on the basis that the WCAT decision involved a possible error of law or contravention of policy. The Board cannot purport to exercise a supervisory role over WCAT decision-making, which has not been conferred on the Board by the legislature.

I agree with the reasoning of the review officer (provided in the context of analyzing the first possible interpretation of the WCAT decision), where he found that the WCAT decision should, if possible, be interpreted in a way that is consistent with the policy. For the reasons set out above, however, I find that if such an interpretation is not reasonably possible, the Board officer has no authority to pick and choose which parts of the WCAT decision will be implemented, and to disregard specific findings, on the basis of a possible contravention of policy.

No party has requested reconsideration of the WCAT decision. Irrespective of the assertions that the WCAT decision over-compensates the worker (by granting a loss of earnings pension in contravention of the policy regarding POP coverage and the use of actual earnings for determining loss of earnings pension entitlement) or the contrary assertion that the WCAT decision under-compensates the worker (by applying policies regarding POP coverage to the reopening of a claim by a worker who did not have POP coverage at the time of the initial work injury), I find that the WCAT decision must be implemented. This conclusion accords with the strong legislative intent evident in the Bill 63 amendments, to provide for a high degree of finality within the workers' compensation system, to not provide a mechanism for the Board to challenge WCAT decisions, and to stipulate that the Board must comply with a final decision of the appeal tribunal made in an appeal under Part 4 of the Act.

In reaching this conclusion, I have taken into account the British Columbia Court of Appeal decision in *Guadagni v. BC (WCB)*, (1989) 35 B.C.L.R. (2d) 363, (1989) 58 D.L.R. (4th) 1. That decision concerned the Board's obligation to commence periodic payments of compensation in implementation of Review Board findings, pending the outcome of an appeal or referral to the former commissioners. A similar provision is currently contained in section 258 of the Act, concerning the interim implementation of a Review Division decision pending the outcome of an appeal to WCAT. Under the former section 92 and current section 258, the Board was/is not required to pay retroactive benefits pending the outcome of the further proceeding, but was required to

commence current payments of compensation (notwithstanding an alleged error of law or contravention of policy). Pursuant to the *Guadagni* decision, the Board had no authority to decline to implement a Review Board finding on an interim basis due to an alleged error of law or contravention of policy. The former section 92, and current section 258, concern the Board's legal obligation to implement Review Board findings, and Review Division decisions, on an interim basis, pending the outcome of the further proceeding provided for by the legislation. In connection with WCAT decisions, however, the Act provides a legal obligation to implement the WCAT decision, but this implementation is not limited to current benefits as there is no further pending proceeding. Accordingly, although provided in a different statutory context, the *Guadagni* decision may be viewed as being relevant to the Board's statutory obligation to implement WCAT decisions.

The worker's appeal is, therefore, allowed. I find the Board is required to implement the WCAT decision, which stated: "the worker is entitled to a loss of earning award. The award is to be based on the worker's $1,500.00 per month personal optional protection coverage for when she drove 10 hours per day up to six days a week. She cannot drive six of those hours and is to be awarded a loss of earnings based on this." As the WCAT decision is final and conclusive and must be implemented by the Board, it is not for the Board, or for me, to assert that the decision may have involved a contravention of policy. While there are certain mechanisms for addressing situations involving a possible error of law going to jurisdiction (by way of an application for reconsideration, or a petition for judicial review), no such application has been brought. Accordingly, the WCAT decision is final and conclusive and must be implemented.

While not necessary to my decision, I note that the Board does not appear to have provided decision letters to the worker regarding implementation of *Appeal Division Decision #99-0485*. In memo #64 dated June 10, 1999, the disability awards officer noted that the Appeal Division findings were twofold: a redetermination of the original loss of earnings award would need to be undertaken, and a repeat permanent functional evaluation would need to be undertaken along with a loss of earnings investigation. Any increased award would be effective from September 18, 1998. However, the subsequent decision letters dealt with a later reopening of the worker's claim. While I recognize that a memo attached to the October 10, 2002 decision contained discussion of the Appeal Division decision under the heading "Administrative Data", with the statement "It appears that in lieu of an LOA [*sic*] decision…", I would not view such a comment as a decision. As the Appeal Division decision was similarly final and conclusive under section 96.1(1) of the former Act, the Board has a legal obligation to implement the Appeal Division decision through the provision of decisions to the worker.

Conclusion

Review Decisions #15010 and *#15062* are varied. The worker must be granted a loss of earnings pension on the terms stipulated in *WCAT Decision #2003-01703* dated July 25, 2003.

Herb Morton
Vice Chair

HM/cd