Noteworthy Decision Summary

Decision: WCAT-2005-05311 **Panel:** Herb Morton **Date:** October 11, 2005

Reconsideration – Common Law Grounds – Breach of Natural Justice – Questioning Sufficiency of Evidence – Patently Unreasonable Error of Law – Weighing of Evidence – New Evidence – Section 256 of the Workers Compensation Act

As a result of the B.C. Court of Appeal's decision in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499, decisions in the Noteworthy Decisions Index that discuss WCAT's jurisdiction to reconsider a prior decision for jurisdictional error are no longer noteworthy for this point. However, this decision remains noteworthy for the other points set out in the noteworthy summary.

Where the issue under appeal is one of causation, a panel does not have an obligation to notify a party regarding any concerns the panel may have regarding the weight to be given to certain evidence. A reconsideration panel cannot reweigh the evidence before the original panel; the inquiry is whether the decision was based on a reasoned consideration of relevant evidence. A medical report which is written subsequent to the decision under reconsideration is not new evidence if it relates to evidence which existed at the time of that decision.

The central issue in the decision under reconsideration was whether the worker's death was causally related to his employment. The worker's widow argued that the original panel denied the appeal on the basis of a new issue, namely the sufficiency of evidence as to causation in a doctor's report, and therefore committed a breach of natural justice. The sufficiency of the evidence in the medical report had also been questioned below by the Workers' Compensation Review Board (Review Board). The worker's widow raised numerous arguments respecting the way in which the original panel dealt with the evidence. She also submitted a new medical report by the same doctor which clarified the earlier report in question.

Since the Review Board had also expressed concern about the weight to be given to the doctor's report, there is no basis for the applicant to allege that she was taken by surprise. More fundamentally, the Workers' Compensation Appeal Tribunal, as an inquiry body, is required to weigh evidence before it in order to decide an appeal. So long as the evidence has been disclosed to the party, and the party has had the opportunity to make submissions regarding the evidence, there is no breach of natural justice when a panel reaches its own conclusions regarding the weight to be given to evidence. It was clear that the decision was based on a reasoned consideration of relevant evidence; therefore, the panel did not commit a patently unreasonable error of law. The new medical report was not new evidence since it was simply clarification of an earlier report.

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Panel: Herb Morton, Vice Chair

Introduction

The widow of the deceased worker seeks reconsideration of the September 9, 2004 Workers' Compensation Appeal Tribunal decision (*WCAT Decision #2004-04744*, or the WCAT decision).

The applicant's lawyer wrote to WCAT on November 23, 2004, requesting reconsideration and advising that further submissions would be provided. By letter dated March 3, 2005, WCAT's legal counsel provided information regarding the grounds for requesting reconsideration, including the "one time only" limitation set out in section 256(4) of the *Workers Compensation Act* (Act).

The applicant's lawyer has provided written submissions dated July 27, 2005. He requests that the WCAT decision be set aside as void, based on the common law ground of an error of law going to jurisdiction. Alternatively, he requests that the WCAT decision be reconsidered on the basis of new evidence under section 256.

At the time of his death, the worker was self-employed with personal optional protection coverage from the Board. Accordingly, there is no employer to notify of this application.

Issue(s)

Did the WCAT decision involve a breach of natural justice or other error of law going to jurisdiction? Alternatively, has new evidence been provided which meets the requirements of section 256 of the Act?

Jurisdiction

Section 255(1) of the Act provides that a WCAT decision is final and conclusive and is not open to question or review in any court. In keeping with the legislative intent that WCAT decisions be final, they may not be reconsidered except on the basis of new evidence as set out in section 256 of the current Act, or on the basis of an error of law going to jurisdiction. 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 W.C.R. 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. On all other matters (i.e. jurisdictional issues), the standard of review is correctness.

Section 256 permits reconsideration of a WCAT decision on the following basis:

> (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.
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> (3) On receipt of an application under subsection (2), the chair may refer the decision to the appeal tribunal for reconsideration if the chair is satisfied that the evidence referred to in the application
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> (a) is substantial and material to the decision, and
>
> (b) did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.
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> (4) Each party to a completed appeal may apply for reconsideration of a decision under this section on one occasion only.

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

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Analysis

A. Common law grounds

An application for reconsideration on the common law grounds concerns whether or not a valid decision has been rendered, or whether the decision should be set aside as void. The applicant's lawyer presents arguments under three separate headings. These are addressed below, using the headings from his submission as (a) to (c).

(a) Breaches of the Rules of Natural Justice

The applicant's lawyer submits that the WCAT panel denied the widow's appeal on the basis of a new issue (namely, the sufficiency of evidence from Dr. Haskins). He submits that raising a new issue at the last level of appeal, outside of the issues stated in the appeal before WCAT, without giving the widow an opportunity to know the issues to be decided and to make full and complete submissions or provide additional evidence, is a breach of the rules of natural justice.

The argument presented by the applicant's lawyer involves a question of natural justice and procedural fairness. The question to be determined, at common law and under section 58(2)(b) of the ATA, is whether, in all of the circumstances, the tribunal acted fairly.

Item #14.30 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) provides in part:

> Where a decision of the Review Division is appealed to WCAT, WCAT has jurisdiction to address any issue determined in either the Review Division decision or the Board decision which was under review, subject to the statutory limits on WCAT's jurisdiction described in item 2.00.
>
> WCAT will generally restrict its decision to the issues raised by the appellant in the notice of appeal and the appellant's submissions to WCAT. The appellant is entitled by right to a decision on the issues expressly raised in the appeal.
>
> Panels may address an issue raised by the respondent in relation to the decision under appeal. To ensure that the panel will address a particular issue which may not be raised by the appellant, the respondent should file a cross-appeal. This may require an extension of time to appeal (see item 5.30).

> **The panel will normally not address issues not expressly raised by the parties, but has the discretion to do so. For example, where the panel considers there may have been a contravention of law or policy in the lower decision, the panel may proceed to address that issue whether or not it was expressly raised by the appellant. However, panels will ensure that notice is given to the parties of the panel's intention to address any issue which was not raised in the notice of appeal or in the parties' submissions to WCAT.**
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> An exception is where the subject of an appeal is a permanent disability award. Panels may address any aspect of the permanent disability award decision (i.e. which was addressed in the Board decision letter, the subject of review by the Review Division, or which was addressed in the Review Division decision) without notice to the parties.
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> [emphasis added]

The applicant's lawyer submits that the WCAT panel erred in proceeding to address a new issue, not raised by a party or expressly identified in the prior decisions which gave rise to the appeal, without giving notice to the widow.

WCAT Decision #2004-05944 dated November 12, 2004 is an example of a case in which a WCAT decision was set aside due to such a breach. The worker's claim had been accepted, and his appeal concerned his request for further wage loss benefits and a pension. The submissions by the worker's lawyer, and the medical reports provided in support of the worker's appeal, concerned the effects of a lifting incident at work on January 5, 2001. The WCAT panel found that the worker developed low back pain in the course of his regular duties, but without a specific injury incident, and that such a back strain should resolve within ten days. None of the prior decision letters or file memoranda from the Board had indicated that the described lifting incident was not accepted as having occurred. To the extent this issue had been previously adjudicated, the file references would seem to show that the occurrence of such an incident had been accepted by the Board. It was found that the worker's representative could not have reasonably anticipated that this would be a matter in dispute in the worker's appeal. The WCAT decision was set aside as void, based on the lack of notice to the parties that the panel would be making its own determination regarding the factual mechanism of the worker's injury.

In the present case, the initial decision to deny the widow's claim for compensation benefits was issued by a case manager, sensitive claims section, on January 10, 2001. He reasoned:

> Having reviewed the contents of the report of the Coroner and the opinion of the Internal Medicine Consultant, it is my decision to disallow this claim for compensation benefits. [The worker's] death appeared to be related to

an underlying cardiac condition, which was unaffected by his work or work activity on or before the date of his death."

The widow appealed to the Review Board, and the Review Board panel began its deliberations prior to the March 3, 2003 changes contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). By finding dated September 5, 2003 (under section 38(3) of the transitional provisions contained in Part 2 of Bill 63), the Review Board panel identified the issue before it as follows: "Was the worker's death causally related to his employment?" In its reasons and findings, the Review Board panel stated:

> As counsel has acknowledged, the possibility of a causal relationship between the work activities and the underlying cardiac problems is not supported by any medical evidence. Instead, the relevant questions are whether the work activities accelerated the onset of the acute episode, and whether the remote location, which included only hourly checking, denied the worker access to medical treatment that could have saved his life.
>
> **Although counsel submitted that the physically demanding nature of the work activities accelerated the onset of the acute episode, and cited the attending physician's letter of March 9, 2002 in support, I find the letter equivocal at best on that point, as he only described such a causal relationship as a possibility**, but also acknowledged that the worker's cardiac condition was stable, and allowed him to perform his regular duties. More significantly, the treating specialists (Dr. Phillips and Dr. Sharif) used words such as "amazing" and "remarkably well", when describing the worker's cardiac performance under physical stress. Nor did any of them suggest that the worker change his occupation from falling to something less physically strenuous. Last, the Board's Internal Medicine Consultant was specifically asked whether work activity on or before October 6, 2000 had played a significant role in the worker's sudden cardiac death, and this was exactly the question that he answered (in the negative). On the basis of all the above I find the overwhelming weight of medical opinion lying against the likelihood that the work activities accelerated the onset of the acute episode.
>
> This still leaves the question of whether the remote location denied the worker the medical treatment that could have saved his life. On this point, the attending physician wrote that if the worker had suffered an acute onset of chest pain or pulmonary edema, prompt attention probably would have been successful. I have thus considered whether the circumstances surrounding this worker's death suggested that he was becoming

> concerned about symptoms such as chest pain or shortness of breath, and was trying to get help.
>
> First, there is no evidence that the worker had expressed any concerns about his health in his radio contacts with co-workers throughout the day. Nor did any of the circumstantial evidence suggest that he had left his worksite in a hurry, or did not expect to be back the next day. Instead, his equipment was all in its proper place, seemingly in preparation for the next day; he was found on his way back to his truck, wearing his backpack and carrying the gas can that needed refilling. If the worker was becoming concerned, one might expect that the equipment would have been left wherever he was last using it; it seems particularly unlikely that he would have bothered to carry out both his backpack and the gas can. Last, but probably most significantly, although his radio was capable of transmitting from that area (as noted by the paramedic later), it was not turned on. All of these facts support the overwhelming likelihood that the acute episode struck so suddenly, and without notice, that the worker lost consciousness before he could even try to call for help. Under those circumstances, I find it extremely unlikely that checking in with co-workers every 20 minutes, or being significantly closer to medical intervention, would have been of assistance.
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> [emphasis added]

At page 1, the WCAT panel identified the general issue before it as follows:

> At issue is whether the worker's death arose out of and in the course of his employment.

At pages 3-4, the WCAT panel made reference to Dr. Haskins' report of March 9, 2002 as follows:

> In support of the Review Board hearing, the representative obtained a March 9, 2002 medical report from Dr. Haskins, who offered the following opinion:
>
> > My long-term prognosis when I saw [the worker] last in March 2000 was that he had a stable cardiomyopathy which enabled him to perform his regular duties. He was likely to have further exacerbations as he had in the past and was instructed to return whenever his shortness of breath became symptomatic. He was a responsible patient and did follow-up when symptoms required it.

> [The worker's] employment as a faller tested his cardiovascular reserve. Unfortunately, it is not conclusively clear as to what exactly happened to [the worker] that day, since no one spoke with him about his medical conditions shortly before he died. **His employment may have contributed to worsening of his symptoms on that particular day.**
>
> If [the worker] had suffered an acute episode of chest pain or pulmonary edema within close proximity to the hospital, he could have been assessed medically and in all likelihood treated successfully given the experience of his treatment of previous episodes.
>
> [emphasis added]

The WCAT panel reasoned, in reference to Dr. Haskins' opinion:

> Dr. Haskins' comment that it is not clear what happened to the worker that day is entirely accurate. For that reason, Dr. Haskins can only state the obvious, namely, that the worker's employment "may" have contributed to a worsening of his symptoms that day. "May" expresses a possibility.
>
> Under section 250(4) of the Act, if the evidence supporting different findings on an issue is evenly weighted in a case, WCAT must resolve that issue in a manner that favours the worker.
>
> I accept that there is a possibility that the worker's employment was of causative significance in his death. The existence of a possibility, however, does not mean that the evidence is evenly weighted.

I have considered the submissions by the widow's lawyer concerning the alleged breach of natural justice. For the two separate reasons set out below, I do not consider that the WCAT panel addressed a new issue on which notice to the appellant was required.

The March 9, 2002 report by Dr. Haskins was submitted by the widow's lawyer in the appeal to the Review Board. The widow's lawyer had the opportunity before the Review Board, and WCAT, to make submissions regarding the significance of this report. The Review Board found that Dr. Haskins' opinion "equivocal at best" on the question as to whether the physically demanding nature of the work activities accelerated the onset of the acute episode. The Review Board panel found that Dr. Haskins' "only described such a causal relationship as a possibility."

In other words, the Review Board had expressed the same concern regarding the weight to be given to Dr. Haskins' opinion on this point. There is, therefore, no basis for the applicant to allege that she was taken by surprise concerning the WCAT decision on this point.

The foregoing provides sufficient basis to reject the application for reconsideration on this point. However, my reasoning set out above should not be read as indicating agreement with the underlying argument, namely, that the WCAT panel would have been obliged to provide notice to the worker if the weakness in Dr. Haskins' report had not been flagged by a prior decision-maker. In my view, there is a second, and more fundamental, basis for rejecting the argument presented on this point.

The central issue addressed in the January 10, 2001 decision of the case manager, the September 5, 2003 Review Board finding, and the September 9, 2004 WCAT decision, was whether the worker's death was causally related to his employment. The reasons provided in each of the decisions addressed this general issue, with reasons to explain the consideration provided to various aspects or facets of this issue.

Decision-makers within the workers' compensation system function on an inquiry, rather than an adversarial, basis. An appeal is by way of rehearing. In order for the WCAT panel to allow the widow's appeal, it needed to satisfy itself that the evidence concerning the cause of the worker's death was at least evenly balanced. It is inherent to the rehearing process that the WCAT panel would be required to weigh the evidence before it, in order to decide the appeal.

Where the issue under appeal is one of causation, I do not consider that a WCAT panel has an obligation to notify a party regarding any concerns the panel may have regarding the weight to be given to certain evidence. No court decisions have been cited in support of such a proposition. So long as the evidence has been disclosed to the party, and the party has had the opportunity to make submissions regarding the evidence, there is no breach of natural justice in the WCAT panel proceeding to reach its own conclusions regarding the weight to be given to the evidence. To conclude otherwise would be to hamstring WCAT decision-making in a fashion inconsistent with the requirements for timely WCAT decision-making set out in section 253 of the Act. I am not persuaded that natural justice and procedural fairness require such a process.

The key question is whether the WCAT decision concerned an issue of a fundamentally different character than the one presented by the widow's appeal, so that it would take the parties by surprise were the decision to address that issue. It is clear that no issue of a different character was raised by the WCAT panel. Causation was the central issue at each level of decision-making. I do not consider that the WCAT panel was obliged to give notice to the widow and her representative regarding its concerns regarding the weight to be given to the evidence provided by Dr. Haskins' report. I find no breach of natural justice or procedural fairness on this basis.

While not necessary to my decision, I note that a similar argument was raised in the context of an appeal by way of an oral hearing. The representative sought reconsideration on the basis that the WCAT panel had not engaged in questioning the worker regarding certain evidence during the oral hearing. He submitted that that in the absence of such questioning by the WCAT panel, it was a breach of natural justice for the panel to rely on that evidence. *WCAT Decision #2005-04726* concluded:

> 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.
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> 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.

I consider that similar reasoning would apply to the complaint by the widow's representative in the present case, regarding the lack of notice to the widow regarding the WCAT panel's consideration of Dr. Haskins' report.

(b) Errors of law with respect to jurisdiction

The widow's lawyer submits that changing the issue at the last level of appeal without giving the widow an opportunity to understand the issue and address it in her appeal, is an error of law going to jurisdiction. I find that this is essentially a restatement of the issue addressed under (a) above. I reject this argument for the reasons provided above.

The widow's lawyer further argues that the panel's findings on two points were patently unreasonable and involved errors of law with respect to jurisdiction. He distinguishes his arguments under this heading from those presented under (c), involving patently unreasonable findings which do not involve jurisdiction. I do not consider, however, that these points involve issues with respect to WCAT's jurisdiction (except insofar as a patently unreasonable decision necessarily constitutes an error of law going to jurisdiction). As the applicant's arguments on these points are presented more fully under (c), I will address them under that heading.

(c) Patently unreasonable errors of fact, law or exercise of discretion that do not involve jurisdiction

The applicant alleges five different errors under this heading, as set out below (with numbering altered):

(i) Finding that the word "may" when used by Dr. Haskins was a "possibility", merely speculative, unsupported by medical evidence.
(ii) Finding that the term "close proximity" used by Dr. Haskins needed further explanation.
(iii) Basing the decision entirely or predominantly on the Vice Chair's definition of the word "may" without regard to the context in which the word was used, and ignoring relevant material.
(iv) Rejecting undisputed medical evidence, namely the records and reports from Dr. Haskins, the criteria established by the American Medical Association and the Board's own *Rehabilitation Services and Claims Manual* and the definitions from the Anatomica Encyclopaedia, which is a consensus of medical opinion from experts in the field.
(v) Failing to find that the evidence supporting different findings on the issue of causation was at the very least evenly balanced so as to apply Section 250(4) of the Act to resolve the issue in a manner that favours the worker.

The widow's lawyer provides detailed arguments concerning these points, at pages 5 to 28. I will not recite those arguments. His submissions involve a close examination of the evidence, with arguments as to why the widow's appeal should have been successful. In particular, he objects to the reasoning in the WCAT decision concerning the "speculative" nature of the evidence regarding the cause of the worker's death. The WCAT panel reasoned:

> I find guidance in policy item #97.10 of the RSCM I, which explains that the Board can only be concerned with possibilities for which there is evidential support. **A speculative possibility is not the same as a possibility supported by evidence. Dr. Haskins' opinion is based on speculation without evidential support.** In addition, I cannot ignore that the worker had "significant cardiomyopathy" and had been in congestive heart failure in February and March 2000. He recovered from that episode of heart failure, but was still left with a serious heart disorder. As a result, I do not consider the possibility that the worker's work activities were of causative significance with respect to his sudden cardiac event is equally balanced with the possibility that his work activities were not of causative significance, so as to bring section 250(4) of the Act into play.

I note that Dr. G's opinion on causation relies on the AHA report. As he does not explain how that report supports his opinion, I give little weight to his opinion. The representative provided a copy of the AHA report and highlighted various excerpts, which he submits are supportive of the worker's claim being accepted. Nevertheless, he acknowledges the following statement in the AHA report:

> The variations and individual response to a given stress precludes specific guidelines or causality criteria covering all situations. Each case must be evaluated individually, in the light of all available medical data, including clinical observations, laboratory studies, electrocardiographic and x-ray findings. Based upon these data, a careful reconstruction must be made of the sequence of events likely to have occurred. The stress or stimulus under consideration as a possible etiologic or worsening agent must be fully identified.

I accept that Dr. G did not attempt an analysis, as set out above. **Dr. Haskins, on the other hand, made such an attempt, but recognized the shortcomings in the evidence. This is why he could only speculate on the cause and effect relationship**.

[emphasis added]

The WCAT panel further reasoned:

> After reviewing the evidence, law, and policy, I find that the evidence does not support a conclusion that the worker's employment activities were of causative significance with respect to his sudden cardiac event. His death did not arise out of and in the course of his employment, as required under section 5(1) of the Act. **There is speculation, but no sound evidence, that the worker's cardiac event was from anything other than natural causes, namely, the worker's pre-existing and significant dilated cardiomyopathy**.
>
> [emphasis added]

The WCAT panel concluded:

> In short, the evidence does not persuade me that the possibility that the worker would have survived if support had been more readily available is at least equally balanced with the possibility that he would not have survived. **I find that Dr. Haskins' opinion is, again, based on assumptions that are too speculative for me to reach such a conclusion**.
>
> [emphasis added]

The widow's lawyer submits that when Dr. Haskins' opinion is viewed in the full context of his March 9, 2002 report, it is obvious that he was using the word "may" as meaning likely or probable rather than possible. He points out, as well, other evidence supporting the conclusion the worker's death was causally related to his employment. He also provides a letter of clarification from Dr. Haskins dated January 19, 2005, which is addressed below as new evidence.

In considering the five points set out above, I find that these all involve the panel's evaluation of the evidence which was before it. In the text *Administrative Law in Canada*, Third Ed. (Ontario: Butterworths, 2001), 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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> ...
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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.
>
> [emphasis added]

As the applicable standard of review is patent unreasonableness, a reconsideration panel cannot make its own judgement about how the evidence should be weighed. The Court of Appeal explained the application of this test in *Speckling v. British Columbia (Workers' Compensation Board),* (2005) BCCA 80, (2005) 209 BCAC 86, February 16, 2005, as follows (paragraph 37):

> . . . a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable.

The Court of Appeal decision is accessible at:
http://www.courts.gov.bc.ca/jdb-txt/ca/05/00/2005bcca0080err1.htm

I find that there was evidence to support the WCAT decision. The WCAT panel considered the evidence (both the factual evidence, and the expert medical opinion evidence) which was before it, and provided a reasoned explanation regarding its conclusions with respect to the weight of this evidence. The decision is not openly, clearly, evidently unreasonable. I find no basis for concluding that the WCAT decision was patently unreasonable in its assessment of the evidence which was before it.

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.
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> (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
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> (a) is exercised arbitrarily or in bad faith,
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> (b) is exercised for an improper purpose,
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> (c) is based entirely or predominantly on irrelevant factors, or
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> (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. I do not consider that any of the four criteria set out in section 58(3)(a) to (d) are met in this case.

In consideration of all of the foregoing, I find that the common law ground of an error of law going to jurisdiction, including a breach of natural justice, is not established. The WCAT decision will not be set aside as void.

B. New Evidence – Section 256

The worker's lawyer has provided a letter dated January 19, 2005 from Dr. Haskins, in support of a request for reconsideration under section 256 of the Act. The letter states, in full:

> [The worker] was a patient of mine for a number of years. He had a pre-existing medical condition of cardiomyopathy. Unfortunately he succumbed to cardiomyopathy while working as a faller.
>
> In my previous correspondence, I outlined that the work of that day exacerbated his symptoms such that he died.
>
> It is therefore probable that his exertion on his last day of employment resulted in worsening of his cardiomyopathy such that he succumbed to his illness.

The worker's lawyer submits this letter is substantial and material to the decision, and did not exist at the time of the appeal hearing. On this latter point, he argues:

> The evidence did not exist previously. Earlier Appeals were denied on other grounds. Sufficiency of evidence provided by Dr. Haskins was not addressed previously. It was brought up by the Vice Chair at the WCAT Appeal which is the last stage in the Appeal process. The effect of the Vice Chair…raising the issue for the first time at such a late stage in the proceeding denied the Applicant an opportunity to address the issue of sufficiency of evidence as set out in Dr. Haskins' report, earlier.

WCAT Decision #2005-03300 dated June 23, 2005 reasoned as follows:

> In *WCAT Decision #2003-01120* dated June 25, 2003 (flagged as a noteworthy decision on WCAT's website at: http://www.wcat.bc.ca/research/noteworthy_decisions.htm_), the WCAT chair addressed an application for reconsideration of a 1998 Appeal Division decision based on new evidence contained in a statement by a witness dated March 25, 2002. While the statement was new in the sense that it was prepared after the Appeal Division decision was issued, the chair found that the information contained in it was not new. The chair reasoned:

> The information contained in the March 25, 2002 witness statement existed at the time of the Appeal Division hearing. Accordingly, the question is whether the due diligence requirement has been met. Given the numerous conflicts in the evidence, the concerns regarding the worker's credibility, and the history of the claim, I find that a reasonable appellant would have marshalled all available evidence that supported the worker's assertion that he had sustained a compensable shoulder injury on June 17, 1996 and presented that evidence to the Appeal Division panel. Accordingly, I find that the due diligence test as described in *Appeal Division Decision #91-0724* has not been met.

In *WCAT Decision #2003-01116* dated June 25, 2003 ("Application for Reconsideration", 19 W.C.R. 163, accessible at: http://www.worksafebc.com/publications/wc_reporter/default.asp), the WCAT chair discussed the requirements of the former section 96.1 of the Act as follows:

> In order for an Appeal Division decision to be reconsidered on the basis of new evidence, the new evidence must be "substantial and material to the decision" as required by paragraph 96.1(3)(a). I consider that "material" evidence is evidence with obvious relevance to the decision of the Appeal Division panel. I consider that "substantial" evidence is evidence which has weight and supports a conclusion opposite to the conclusion reached by the panel. In addition to being material and substantial, the new evidence must either be evidence that "did not exist at the time of the hearing" or evidence that meets the due diligence requirement outlined in paragraph 96.1(3)(b).

The reasoning in *WCAT Decisions #2003-01116* and *#2003-01120* concerned the requirements of the former section 96.1 of the Act which involved similar requirements to those contained in the current section 256 (although the term "reasonable" diligence has replaced the term "due" diligence). Other Appeal Division and WCAT decisions have similarly found that a report prepared subsequent to the appeal decision is not necessarily "new" evidence as contemplated by section 96.1 (of the former Act) or section 256 (of the current Act).

Appeal Division Decision #2002-0764 dated March 27, 2002 (accessible at: http://www.worksafebc.com/appeal_decisions/appealsearch/advance

search.asp#) addressed the effect of the similar wording of the former section 96.1 as follows (at paragraphs 26 to 27):

> The original panel had other medical evidence before it which it preferred over that submitted by the employer. Reconsideration is not available as a means to add further supporting evidence to that submitted to the original Appeal Division panel. The employer seems simply to be suggesting that the employer's original evidence should have been given greater weight since two doctors now share the same view. I note in passing that the "new evidence" is from the same occupational health service provider as the August 10, 2000 report. Such evidence which merely confirms evidence placed before the original panel cannot be considered substantial and material to the Appeal Division decision.
>
> In any event, **any new evidence submitted at this stage of the process must meet the due diligence test [section 96.1(3)(b)]. That test is applicable in these circumstances since the information that underlay the new medical opinion was available to the employer prior to the Appeal Division decision and therefore could have been the subject of this doctor's opinion prior to the Appeal Division decision being issued.** The employer does not provide an explanation as to why this evidence was not available to the original Appeal Division panel.
>
> [emphasis added]

Similarly, in *Appeal Division Decision #2002-3201* dated December 27, 2002, the panel reasoned at paragraph 29:

> ...I consider there are further significant problems with the opinions of Drs. B and A. **Strictly speaking, their opinions did not exist at the time of the Appeal Division's hearing of the matter. However to the extent that they in some manner address the state of the worker's condition in 1997, they express opinions that are based on information that existed at the time of the hearing.** By that I mean that information about the worker's condition in 1997 existed in 1997 and thus existed before the June 9, 2000 decision. Therefore, I am not prepared to accept the reports as meeting the requirement set out in paragraph 96(1)(3)(b) on the basis that they did not exist at the time of

> the hearing. Such an approach would undermine the intent behind section 96.1, namely, that Appeal Division decisions be final. Were I to accept the reports as new evidence on the basis that they did not exist at the time of the hearing, I would be opening the door to the reconsideration of Appeal Division decisions simply on the basis that additional evidence may cast a different light on the issues dealt with in the decisions. **Therefore, even though strictly speaking the reports did not exist at the time of the June 9, 2000 decision, I find that the "due diligence" test in paragraph 96.1(3)(b) must be met before I could direct the reconsideration of the impugned decision.** In accordance with this provision, if the evidence presented did not exist at the time of the hearing, the due diligence test does not come into play; if it did exist, the due diligence test applies.
>
> [emphasis added]

Accordingly, a medical report which is prepared subsequent to a WCAT decision is not considered evidence which "did not exist at the time of the appeal hearing", if it is simply additional opinion evidence based upon the medical findings and evidence which were available prior to the WCAT decision. Such further opinion evidence could have been obtained and submitted to WCAT for consideration in the appeal, by the exercise of reasonable diligence, and accordingly does not meet the requirements of section 256.

In some circumstances, the reasonable diligence requirement may be tempered on the basis of the reasoning expressed in *Appeal Division Decision #91-0724*, "Section 96.1", 7 W.C.R. 145. In that decision, a former chief appeal commissioner reasoned, in connection with the "due diligence" requirement contained in section 96.1 of the former Act:

> It is important to note, however, that the test of "due diligence" includes a concept of reasonableness as to the nature and scope of the inquiries an appellant is expected to have pursued. The fact that information previously existed and could have been obtained upon inquiry is not conclusive as to whether it could through the exercise of "due diligence" have been discovered. The circumstances of the particular case must also be considered, with regard to the extent of the inquiries which due diligence would have required.
>
> The question is not simply whether the appellant could have obtained the particular information if they had made diligent

> inquiries for the purpose of obtaining it. The requirement of "due diligence" is more properly interpreted as referring to the degree of care which a prudent and reasonable appellant would have exercised in ensuring that the Appeal Division had all relevant information necessary to the proper consideration of their appeal. If, for example, certain information existed, but it was not reasonably foreseeable that it would be germane to the Appeal Division's consideration, "due diligence" would not have required the appellant to search it out.

In *WCAT Decision #2003-01120*, the WCAT chair adopted the above-quoted analysis from *Appeal Division Decision #91-0724*.

Applying this analysis to certain evidence which had been provided in support of the application for reconsideration, *WCAT Decision #2005-03300* reasoned:

> A significant issue in the worker's appeal concerned his use of pain medication. Reasonable diligence would have required that the worker provide the WCAT panel with any updated or current evidence available from Dr. Squire subsequent to her 2002 report. I do not see anything in Dr. Squire's report which concerns a medical development subsequent to the WCAT hearing in January 2004 (i.e. which could not have been provided to WCAT for consideration in the appeal).
>
> Dr. Squire's report of May 3, 2004 is provided in response to the WCAT decision. **If there was a further avenue of appeal from the WCAT decision, her report would provide useful evidence for consideration in the appeal. However, a WCAT decision is "final and conclusive" under section 255 of the Act, and is not subject to further consideration on the basis of new evidence unless the requirements of section 256 are met. Section 256 does not provide a mechanism for additional medical reports to be considered to rebut a WCAT decision, if it was reasonably foreseeable that the matter would be in issue before the WCAT panel and the appellant could have obtained the report for consideration by the WCAT panel by the exercise of reasonable diligence**. I find that Dr. Squire's opinion of May 30, 2004 could, by the exercise of reasonable diligence, have been obtained and submitted for consideration by the WCAT panel. Accordingly, it does not now provide a basis for reconsidering the WCAT decision.
>
> [emphasis added]

WCAT Decision #2005—03300 concluded:

> . . . all of the new reports provided in support of the worker's application for reconsideration were provided by physicians who were involved in the worker's prior treatment, and whose previous reports were considered by the WCAT panel in deciding the worker's appeal. The additional explanations and reasons provided in support of the worker are largely ones which could have been submitted in support of the worker's appeal, and are not based upon new medical information which came to light following the WCAT decision. I do not interpret section 256 as providing a mechanism for receiving additional expert opinions to counter a WCAT decision, unless these constitute new evidence which did not exist at the time of the WCAT hearing (or evidence which did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered).

The worker had been a patient of Dr. Haskins prior to the worker's death on October 6, 2000. The appeal to WCAT was from a Review Board finding dated September 5, 2003. There was ample time during the years preceding the September 9, 2004 WCAT decision to assemble the factual and medical evidence concerning the cause of the worker's death, for consideration by the WCAT panel. I adopt the reasons set out above from *WCAT Decision #2005-03300*, in finding that Dr. Haskins' report involves evidence which existed at the time of the WCAT appeal hearing (even though it was written after the WCAT decision was issued).

Accordingly, the further question which must be considered under section 256(3)(b) is whether Dr. Haskins' January 19, 2005 report involves evidence which "was not discovered and could not through the exercise of reasonable diligence have been discovered." The widow's lawyer has argued that the WCAT vice chair raised the issue regarding the meaning of the word "may", in connection with the sufficiency of the evidence provided by Dr. Haskins' report, for the first time without notice to the widow. I consider this argument relevant to the requirement of reasonable diligence. This concerns the degree of care which a prudent and reasonable appellant would have exercised in ensuring that WCAT had all relevant information necessary to the proper consideration of their appeal. If, for example, certain information existed, but it was not reasonably foreseeable that it would be germane to WCAT's consideration, "reasonable diligence" would not have required the appellant to search it out.

The Review Board panel expressly noted that Dr. Haskins' report was "equivocal at best", in referring to a causal relationship as a possibility (i.e. that the physically demanding nature of the work activities accelerated the onset of the acute episode). To the extent the wording of the March 9, 2002 report required amendment, clarification or explanation, reasonable diligence would have required that this be provided in support of the widow's appeal to WCAT.

I find that Dr. Haskins' report of January 19, 2005 does not fulfill the requirements of section 256 of the Act. This evidence previously existed, and could through the exercise of reasonable diligence have been discovered and provided to WCAT.

C. January 20, 2005 letter

On August 31, 2005, the widow's lawyer forwarded an additional letter in support of the widow's application. This was a letter dated January 20, 2005, prepared by a retired attorney with 30 years' experience. He critiques the WCAT panel's handling of the evidence in its decision, and the lack of an oral hearing. He submits, in connection with the Review Board finding and the WCAT decision, that: "Both of the Board's decisions of September 5th, 2003 and September 9th, 2004 were so lengthy and prolix that it would be easily possible for a reader to get lost in the verbiage and fail to see the essentials of what the WBC [*sic*] was doing." He complains that the Board seems to have developed "the first clear chance" doctrine of finding ways to avoid paying claims. He argues the WCAT panel both ignored and violated the requirement of section 250(4), which provides:

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

I find that this letter of January 25, 2005 essentially involves the expression of disagreement with the decision reached by the WCAT panel. This does not provide a basis for setting aside the WCAT decision. In its decision, the WCAT panel expressly acknowledged the effect of section 250(4), and provided reasons concerning its weighing to the evidence to explain why this standard (of being at least evenly weighted) was not reached. For similar reasons to those set out in the first part of this decision, I find no error of law going to jurisdiction, including a breach of natural justice, in the WCAT decision.

Conclusion

The widow's application for reconsideration of *WCAT Decision #2004-04744* is denied on both the common law and "new evidence" grounds. 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, and was not patently unreasonable with respect to its weighing of the evidence. No new evidence has been provided which meets the requirements of section 256 of the Act. The WCAT decision stands as "final and conclusive" under section 255(1) of the Act.

Herb Morton
Vice Chair

HM/cd