Noteworthy Decision Summary

Decision: WCAT-2006-01106 **Panel:** Herb Morton **Decision Date:** March 7, 2006

Reconsideration – Preliminary issue – Natural justice – Reasonable apprehension of bias

The worker's counsel alleged that the vice chair assigned to a reconsideration application was biased. A reasonable apprehension of bias does not arise based on the fact that the worker's lawyer in the current application for reconsideration also represents another client in another case who is seeking reconsideration and judicial review of one of the prior decisions of the same vice chair.

The worker's counsel requested a panel re-assignment in respect of his application for reconsideration of a WCAT decision. He argued that a reasonable apprehension of bias arose from the fact that he represents another worker who is seeking reconsideration and judicial review of a decision rendered by the same vice chair in another case. He was concerned because his submissions in the other case were critical of the vice chair's exercise of jurisdiction and judgment, and asserted that the vice chair's findings of fact were patently unreasonable. The issue in this preliminary decision was whether there was a reasonable apprehension of bias on the part of the vice chair.

The worker's counsel did not suggest that there was personal animosity which would taint this proceeding, nor did he object to the vice chair hearing other appeals or section 257 applications in which he is counsel. He limited his objection to the fact that this was an application for reconsideration, and he was pursing an application for reconsideration and judicial review of another one of the vice chair's prior decisions.

The mere fact that this was an application for reconsideration did not give rise to a reasonable apprehension of bias. In the absence of some particular additional circumstance, the fact that counsel was seeking reconsideration of a vice chair's decision, or was pursuing a petition for judicial review of the vice chair's decision, was not a reason for the vice chair to recuse himself from hearing other appeals or applications involving the same counsel. An analogy may be drawn to the situation in which a lawyer is appealing a court judgment to a higher court; a judge would not decline to hear cases involving the same lawyer, simply by reason of the fact that the lawyer was arguing that the judge had erred in a prior decision. A reasonable apprehension of bias does not arise in this circumstance.

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WCAT Decision Number: **WCAT-2006-01106**
WCAT Decision Date: **March 7, 2006**
Panel: Herb Morton, Vice Chair

Introduction

Counsel for the worker has requested a panel re-assignment, in relation to the worker's application for reconsideration of *WCAT Decision #2005-04150-RB*. Counsel submits that a reasonable apprehension of bias arises from the fact that he represents another worker, in seeking reconsideration and judicial review of a decision rendered by me in another case. Counsel has outlined his concern by letters dated January 27 and 31, 2006 and February 23, 2006.

The employer is no longer registered with the Workers' Compensation Board (Board). The employers' adviser was invited to participate in the application for reconsideration as the deemed employer under section 248 of the *Workers Compensation Act* (Act). By memo of January 27, 2006, I agreed to allow the employers' adviser to participate, even though their notice of participation was received two days after the specified deadline (having regard to item #4.30 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP)). Comments have also been provided by the employers' adviser regarding the bias issue (on February 13, 2006). I find that this preliminary issue involves a legal question which can be properly considered on the basis of written submissions.

Pursuant to MRPP item #23.51, an allegation of a reasonable apprehension of bias will normally be considered by the WCAT panel assigned to hear a case (as a preliminary decision or as part of the decision on the appeal or other proceeding). I have agreed to the request by the worker's lawyer that this issue be addressed in a preliminary decision.

Issues(s)

Does a reasonable apprehension of bias arise, based on the fact that the worker's lawyer also represents another client who is seeking reconsideration and judicial decision of my prior decision in another case?

Jurisdiction

Section 238(3) of the Act provides that the WCAT chair has authority to

(a) terminate an appointment to a panel,
(b) fill a vacancy on a panel, and
(c) refer an appeal that is before one panel to another panel.

Under section 234(2)(d), (e), (f) and (l) of the Act, the chair also has responsibility for establishing and making public WCAT's practices and procedures, and for establishing

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a code of conduct for vice chairs. WCAT's *Manual of Rules of Practice and Procedure* (MRPP) provides, at item #23.51, that an allegation of a real or apparent conflict of interest, including a reasonable apprehension of bias, will be considered by a vice chair as a preliminary issue. The panel's determination may be provided in a separate decision, or as a preliminary determination made as part of a decision on the appeal or other proceeding. In either case, a party has the right to seek reconsideration by the WCAT chair on the basis of an error of law going to jurisdiction (including a breach of natural justice). MRPP item #23.51 states:

> It is expected that parties will make any such allegations at the earliest opportunity after learning the circumstances that give rise to the allegation. The party making the allegation will be required to provide details in writing to the panel of the evidence and argument it relies upon to establish the allegation. At the panel's option, the details may be presented orally. If, after considering that evidence and argument and any evidence and argument the other parties present on the issue, the panel determines a real or apparent conflict of interest exists, the panel will be reconstituted. If the panel concludes neither a real nor apparent conflict of interest exists, the panel must inform the parties in writing and provide reasons. This may be by way of a preliminary decision dealing only with the conflict allegation, or as a preliminary determination made as part of a decision on the appeal or other proceeding.

Background

The worker seeks reconsideration of *WCAT Decision #2005-04150-RB*, dated August 8, 2005. That application was assigned to me by the WCAT chair on the basis of a written delegation (paragraph 26 of *Decision Number 6*, "Delegation by the Chair", June 1, 2004).

By letter dated January 27, 2006, the worker's lawyer submits that a reasonable apprehension of bias may arise from the fact that he, as counsel for another worker in a different case, has filed a petition for judicial review of one of my decisions.

It is the practice of WCAT's tribunal counsel office to notify a vice chair when an application for judicial review has been filed in relation to a decision by the vice chair. Thus, I am aware of the petition for judicial review of *WCAT Decision #2005-03693* (a certification to the court under section 257 concerning the status of parties to a legal action). WCAT's legal counsel may appear for WCAT in the hearing of a petition for judicial review, within the role permitted for administrative tribunals (see *Canadian Association of Industrial Mechanical and Allied Workers Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R 983, at paragraph 35, recently followed by the British Columbia Supreme Court in *Nikolina Basura v. WCB (BC) and WCAT*, 2005 BCSC 407, (2005) 137 A.C.W.S. (3d) 1254, at paragraph 3). A vice chair who issued a decision which is the subject of a petition for judicial review does not appear before the court in the

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hearing of the petition, or have any involvement in the handling or consideration of an application for reconsideration of the decision.

At the time of my appointment to WCAT in March, 2003, section 232(8) provided:

> Before beginning their duties, members of the appeal tribunal must take an oath of office in the form and manner prescribed by the Lieutenant Governor in Council.

Section 3 of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/02 further provided:

> For the purposes of section 232 (8) of the Act, each member of the appeal tribunal must take an oath of office, by oath or solemn affirmation, before a Commissioner for Taking Affidavits in British Columbia, in the following form:
>
> > I, ..., swear (solemnly affirm) that I will faithfully, truly and impartially, to the best of my judgment, skill and ability, carry out my duties as a member of the Workers' Compensation Appeal Tribunal, I will conduct myself with integrity, and I will discharge my duties in accordance with the laws of the Province.

I took this oath of office prior to commencing my duties at WCAT. This oath includes a requirement of impartiality. I must refrain from hearing a case if there is a circumstance giving rise to a reasonable apprehension of bias.

Submissions

By submission dated January 27, 2006, the worker's lawyer advises:

> Mr. Morton is the subject of another application for re-consideration coupled with a Petition for Judicial Review in Supreme Court. I have just completed submissions in the other case, which are critical of his exercise of jurisdiction and his judgement, asserting among other things that his findings of fact were patently unreasonable. With the greatest respect, there is a reasonable apprehension that Mr. Morton may not approach this application for re-consideration with the utmost objectivity, and I respectfully submit that this matter be re-assigned to a Vice Chair against whom I have not filed a Petition for Judicial Review. . . .
> I am not suggesting that Mr. Morton is not in fact capable of objectivity, only that a reasonable person may apprehend that he might not be, which is all the law requires.

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In a further letter dated January 31, 2006, the worker's lawyer explains:

> Please note that there is no objection to Mr. Morton or any other Vice Chair taking conduct of an appeal or Section 257 Determination at first instance. There is likewise no objection to any Vice Chair appearing in Supreme Court should a Petition proceed. The only objection is with respect to an application for re-consideration on the grounds already stipulated.

The employers' advisor comments:

> The worker's representative states . . . that he is not suggesting that Mr. Morton is not in fact capable of objectivity. It would then beg the question as to what bias is? It seems the implication is that a Vice Chair should not hear more than one case involving the same worker's representative. If this is the suggestion it is completely unreasonable as frequently the same representative appears before a Vice Chair on numerous appeals.

In rebuttal, counsel for the worker submits that in law, actual bias is irrelevant. Only the apprehension of bias by an impartial reasonable person is relevant.

Legal test for a reasonable apprehension of bias

The text *Administrative Law* (Ontario: Irwin Law, 2001), by David J. Mullan, explains (at pages 321-322):

> The second limb of the traditional natural justice rules requires that decisions not be tainted by bias. The Latin phrase used to express this concern was *nemo judex in sua causa debet esse* or "no one should be a judge in her or his own cause." The clearest manifestation of this principle (applicable to both regular courts and administrative tribunals) is in situations where an adjudicator has a direct stake in the outcome of the proceedings in the manner of a litigant. . . .
>
> . . . the concern of the courts has been with not only demonstrable financial interests . . . but also attitudes and relationships to both the parties and the relevant issues such as would create in a reasonable observer serious qualms or misgivings as to whether the decision maker will approach and determine the matters in issue in a sufficiently dispassionate or disinterested way.
>
> In their reflection of these principles, the courts have also indicated frequently that they are more concerned with the appearance of bias than with the actual existence of bias. Two justifications are generally

> advanced for this posture. First, the courts recognize the difficulty of determining in any satisfactory manner whether a person is actually biased in the sense of being unable to put any potentially illegitimate interests out of her or his conscious or subconscious mind. Second, the aphorism that it is as equally important that justice be seen to be done as that justice actually be done has been adopted specifically as a governing policy in this domain. The reputation of the justice system for integrity and impartiality is diminished in a way that is contrary to the public interest if the participants and the public generally have grounds for believing that an adjudicator may be subject to illegitimate influences or predisposition.

In the case of *Liszkay v. Robinson* (2003) 18 B.C.L.R. (4th) 82, the British Columbia Court of Appeal described the applicable test for a reasonable apprehension of bias as follows:

> 49 Counsel are in agreement that the test for reasonable apprehension of bias is that set out by de Grandpré J. in his dissenting reasons in Committee for Justice and Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369 at 394-95:
>
> > . . . . the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. ... that test is "what would an informed person, viewing the matter realistically and practically-and having thought the matter through-conclude. . . .”
> >
> > . . . The grounds for this apprehension must, however, be substantial
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> 50 Although said in dissent, the test as stated by de Grandpré J. was adopted by the majority in Committee for Justice and Liberty and has been endorsed by the Supreme Court of Canada in subsequent cases: see R. v. R.D.S., [1997] 3 S.C.R. 484 at 530, [paragraph] 111, (reasons of Cory J.) and at 502, [paragraph] 31 (reasons of L'Heureux-Dubé and McLachlin JJ.).
>
> 51 In this case, unlike many of the authorities to which we were referred, it was the adjudicator himself who raised the apprehension of bias issue and the question of whether recusal was necessary.
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> 52 The Canadian Judicial Council published Ethical Principles for Judges (Ottawa: Canadian Judicial Council, 1998), for the assistance and guidance of judges. The principles or standards contained in that

publication are a useful reference in this case. The following principles appear under the heading "Conflicts of Interest" at p. 29:

> 1. Judges should disqualify themselves in any case in which they believe they will be unable to judge impartially.
>
> 2. Judges should disqualify themselves in any case in which they believe that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest ... and a judge's duty.
>
> 3. Disqualification is not appropriate if: (a) the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification, or (b) no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a miscarriage of justice.

53 We agree with the appellant that recusal is not warranted merely by a trial judge raising the possibility of an apprehension of bias. For a judge to disqualify himself on trifling or invalid grounds obviously raises concerns about wasted resources and delay with the attendant risk of injustice.

[Footnotes omitted]

. . .

57 American Jurisprudence also contains this observation, at s. 195, p. 282:

> Observation: In some jurisdictions, a judge has an affirmative duty not to disqualify himself or herself unnecessarily. In accord with that view, it has been said that there is as much an obligation upon a judge not to disqualify himself when there is no occasion as there is for him to do so when there is.
>
> [Footnotes omitted]

. . .

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> 63 The test for determining whether there is a reasonable apprehension of bias is set out in Committee for Justice and Liberty v. Canada (National Energy Board), supra. The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is "what would an informed person, viewing the matter realistically and practically-and having thought the matter through-conclude....": Committee for Justice and Liberty v. Canada (National Energy Board), supra. Moreover, the grounds for reasonable apprehension of bias must be "substantial". The interest the judge has in the case before him or her cannot be "trifling" (p. 29, Ethical Principles for Judges, supra), nor can it be one shared by every member of the community for it to warrant his or her recusal from the case.

In the text *Administrative Law in Canada*, Third Ed. (Ontario: Butterworths, 2001), Sara Blake explains that a tribunal member must be independent of the parties (at pages 98-99):

> A tribunal member may be perceived as biased if a party or witness is a relative, friend or business associate. It is feared that a decision maker may favour persons with whom there is an emotional attachment. If the tribunal member previously acted in an adversarial role against the party in a related proceeding, there may be a reasonable appearance of bias. Likewise, a member may be perceived as biased if associated with a competitor of a party where there is a possibility that the competitor may gain an advantage if the decision is against the party. However, the fact that a spouse of a member may have a business relationship may not give rise to a reasonable apprehension of bias on the part of the member.
>
> However, neither a past and distant connection with a party nor a business connection before the party had any interest in the matter at hand, need give rise to a reasonable apprehension of bias. Members of tribunals that deal with complex matters are often drawn from among the experts in a field who, before their appointment, may have appeared before the tribunal on behalf of a party. The prior professional association alone does not give rise to a reasonable apprehension of bias unless the member, before being appointed to the tribunal, had some involvement in the matter now before the tribunal.

Blake states, at page 100:

> A tribunal that has decided a previous dispute between the same parties is not considered biased in favour of the winning party for that reason alone. Some tribunals, particularly those that regulate business activities, have repeated dealings with the same parties. They are not held to be biased

> merely because they have previously dealt with the same parties on similar matters. However, there may be a reasonable apprehension of bias if the panel had previously decided against one party on the basis of credibility.

Blake states, at page 101:

> Decision makers must not allow their personal interests and beliefs to influence them in the exercise of their statutory powers, but must exercise those powers impartially.

Blake further states, at page 104:

> Even for adjudicators, unbiased does not mean uninformed. It means only that the decision maker should be open to persuasion.

In *Adams v. B.C. (W.C.B.)* (1989), 42 B.C.L.R. (2d) 228, the British Columbia Court of Appeal stated: (at pages 231 and 232):

> This case is an exemplification of what appears to have become general and common practice, that of accusing persons vested with the authority to decide rights of parties of bias or reasonable apprehension of it without any extrinsic evidence to support the allegation. It is a practice which, in my opinion, is to be discouraged. An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by a general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause. As I have said earlier, and on other occasions, suspicion is not enough.

A recent decision of the British Columbia Supreme court which illustrates the application of the test for a reasonable apprehension of bias is *Speckling v. Labour Relations Board et al*., [2006] B.C.S.C. 285, accessible at: http://www.courts.gov.bc.ca/jdb-txt/sc/06/02/2006bcsc0285.htm.

Reasons and Findings

The question for consideration is not whether actual bias exists, but whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that there was a reasonable apprehension of bias.

It is appropriate and desirable that a concern regarding a reasonable apprehension of bias be presented for consideration at the earliest opportunity. WCAT's "Code of Conduct for Representatives", contained at item #24.00 of the *Manual of Rules of Practice and Procedure* (MRPP), states in part:

> (g) A representative has a duty to bring forward, at the earliest opportunity, any information which may give rise to a reasonable apprehension of bias or conflict of interest on the part of a WCAT member.

WCAT's "Code of Conduct for WCAT Members" similarly provides, at MRPP item #23.50:

> It is the responsibility of each member to actively inquire into and consider any circumstance which might suggest a possible conflict of interest or raise a perception of bias regarding any of the member's responsibilities. On recognizing a possible conflict or an issue of bias, the member should consider whether it would be appropriate to withdraw.

MRPP item #23.50 further states:

> Members must exercise their duties and responsibilities in a neutral, impartial manner. Members must avoid all real or apparent conflicts of interest and must arrange their private affairs in a manner intended to avoid the possibility of a real or apparent conflict of interest arising in their role with WCAT.
>
> . . .
>
> (b) an "apparent conflict of interest" exists when a reasonable, well-informed person could have a reasonable perception or apprehension that the existence of a personal attitude, interest (either pecuniary or non-pecuniary) relationship or association (past or present) could impair the member's ability to discharge their duties fairly and impartially;

With respect to the concern raised in this case, I note that a party to a WCAT decision has the rights to apply to have a WCAT decision set aside on the basis of the common law grounds of an error of law going to jurisdiction (including a breach of natural justice), to seek reconsideration on the basis of new evidence under section 256 of the Act, and to file a petition for judicial review in the British Columbia Supreme Court under the *Judicial Review Procedure Act*. The grounds for pursuing a petition for judicial review are set out in section 58 of the *Administrative Tribunals Act* (ATA). In most cases, this necessarily involves an allegation that the tribunal's decision was patently unreasonable (i.e. unless the allegation concerns a breach of natural justice or jurisdictional error).

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Similar arguments are brought in connection with applications for reconsideration by WCAT of its decisions. Practice and procedure at MRPP item #15.24 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. The fact that such arguments are being made by the worker's lawyer in the context of an application for reconsideration or for judicial review is, therefore, not unusual. A petitioner must establish such grounds if they wish to succeed in their application.

Many representatives appear frequently before WCAT. A vice chair may have issued prior decisions involving issues similar to those raised in an appeal or other proceeding. While a vice chair is currently subject to a statutory requirement to apply policy (to the extent set out in section 250(2) and 251 of the Act), a vice chair must approach the hearing with a mind that is genuinely open. Consideration must be given to whether a policy is applicable to the circumstances of a particular case, and decisions must be based on the merits and justice of the case. WCAT members are not bound by prior WCAT decisions, except in the case of precedent panel decisions as set out in section 250(3) of the Act.

The circumstances of this case do not raise any issue regarding independence from the parties. In this case, there is no connection between the worker seeking reconsideration of *WCAT Decision #2005-04150-RB*, and the parties to the judicial review of *WCAT Decision #2005-03693*. The only connection between these cases is that counsel for the worker in this case also represents the worker in that case, and that I was assigned to hear both matters. There is no suggestion of some personal animosity which would taint this proceeding. Counsel for the worker does not object to my hearing other appeals or applications under section 257 in the first instance, in which he is counsel. The objection is limited to the fact that this is an application for reconsideration, and he is pursuing an application for reconsideration (and judicial review) of one of my prior decisions.

Perhaps the concern is that I would, in addressing this application for reconsideration, have the opportunity to address similar arguments he may be making in that case. To my mind, that concern is too remote to give rise to a reasonable apprehension of bias. I have not seen counsel's petition for judicial review, nor any submissions he may be providing in his application for reconsideration of my decision. The chance that similar questions may arise for consideration is equally present in respect of applications for reconsideration made by other workers or employers. Counsel does not suggest that I should refrain from addressing any application for reconsideration, simply by reason of the fact that one of my own decisions is the subject of such a proceeding.

There is a substantial body of legal authority regarding the application of the test of patent unreasonableness (as well as the other grounds for having a decision set aside as void, due to jurisdictional error or a breach of procedural fairness). Various court and tribunal decisions have addressed these tests in a range of circumstances. I have, in prior decisions, also had to address the application of these tests in a variety of

circumstances. I see no reason for considering that my proceeding to address the application for reconsideration in this case would somehow give rise to an apprehension of bias, based simply on the fact that one of my own decisions is subject to an application for reconsideration, and a petition for judicial review (in which the worker is represented by the same counsel).

There is little authority to indicate that a reasonable apprehension of bias may result from counsel appearing before a tribunal in relation to multiple proceedings. In the absence of some particular additional circumstance, I do not consider the fact that counsel is seeking reconsideration of a vice chair's decision, or pursuing a petition for judicial review of the vice chair's decision, would be a reason for the vice chair to recuse himself or herself from hearing other appeals or applications involving the same counsel. Indeed, counsel for the worker in this case does not argue that this would be the case. He limits his objection to the fact that this is an application for reconsideration. I do not consider, however, that the mere fact that this also is an application for reconsideration gives rise to a reasonable apprehension of bias. While not precisely the same, an analogy may be drawn to the situation in which a lawyer is appealing a court judgment to a higher court. A judge would not decline to hear cases involving the same lawyer, simply by reason of the fact that the lawyer was arguing that the judge had erred in a prior decision.

The worker's lawyer requests that this matter "be re-assigned to a Vice Chair against whom I have not filed a Petition for Judicial Review." This flags another risk, namely, that where a particular lawyer practices extensively before the tribunal there is a potential for the lawyer to file multiple petitions for judicial review. Given the 60-day time limit for filing a petition for judicial review set out in section 57(1) of the ATA, in some situations a petition may be filed for the purpose of preserving the client's right to pursue this option. It might lead to an inappropriate constraint on WCAT's ability to assign cases in the fashion in which WCAT would otherwise consider appropriate, were panels to decline to hear cases solely because a petition for judicial review had been filed by counsel in relation to a prior decision. Thus, while it might be convenient to have the application re-assigned to avoid any concern even if not required, it may also be considered that a decision-maker has an obligation not to disqualify himself or herself when there is no occasion to do so.

I respect the rights of a party to seek reconsideration, to pursue a petition for judicial review, and to be represented by counsel. I do not consider that the fact that the worker's lawyer in the current application for reconsideration also represents another client who is seeking reconsideration and pursuing a petition for judicial review concerning a prior decision which I have rendered provides any reason for me to decline to hear this application.

Conclusion

I find that a reasonable apprehension of bias does not arise, based on the fact that the worker's lawyer also represents another client who is seeking reconsideration and judicial decision of my prior decision in another case. Accordingly, I will proceed to consider the worker's application for reconsideration of *WCAT Decision #2005-04150-RB*.

Herb Morton
Vice Chair

HM/cda

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