Noteworthy Decision Summary

Decision: WCAT-2006-01413 **Panel**: Herb Morton **Decision Date:** March 27, 2006

Reconsideration – Failure to address relevant policy – Plateau date – Transitional provisions – First indication of permanent disability – Prejudgement – WCAT jurisdiction – Global range approach – Alternative reasons – Sections 250(2) and 256 of the Workers Compensation Act – Section 35.1 of the Workers Compensation Amendment Act, 2002 – Section 58 of the Administrative Tribunals Act – Policy item #1.00 of the Rehabilitation Services and Claims Manual, Volume II

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.

The worker requested a reconsideration of a Workers' Compensation Appeal Tribunal (WCAT) decision. The reconsideration was allowed in part. There was no indication the panel had taken a relevant policy into account – policy item #1.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) – in deciding if the current or former provisions of the *Workers Compensation Act* (Act) and related policy applied to the claim. Although the panel's decision on her jurisdiction over lumbar spine impairment was wrong, she provided alternative reasons. The panel did not pre-judge the appeal by alerting the parties to a previous decision she had made on the issue of jurisdiction.

The worker, a self-employed logging contractor, was injured when a log fell on him in 2001. The Workers' Compensation Board (Board) accepted his claim for multiple fractures and granted the worker a permanent disability award (award) of 8.76%. The worker requested a review by the Review Division of the Board (Review Division). The Review Division confirmed the Board's decision and concluded that law and policy that was applicable was the Act as it read immediately after June 30, 2002 (current Act) and the RSCM II. The worker appealed to WCAT. The panel confirmed that the current Act and RSCM II (the current provisions) applied to the claim. The panel also concluded she did not have jurisdiction to consider the worker's award under section 239(2)(c) of the Act as the range of impairment for each individual lumbar spine vertebra was less than 5%. The worker requested a reconsideration of this decision.

The reconsideration panel first considered whether the panel had made an error in determining that the current provisions applied to the claim. The reconsideration panel noted that the *Workers Compensation Amendment Act, 2002* (Bill 49) made substantial changes to the Act. Section 35.1 of Bill 49 states that the current Act applies if a worker's permanent disability first occurs on or after June 30, 2002. Policy item #1.00 of the RSCM II provides that if an injury occurred before June 30, 2002, but the first indication that it is permanently disabling occurs on or after June 30, 2002, the current Act applies to the award. The reconsideration panel noted that the panel did not refer to item #1.00 by number or by reference to the test set out in that item. Rather, the panel's decision appeared to be based on the evidence that the worker's plateau date was November 2002. The reconsideration panel noted that the date of the first indication of permanent disability often occurs earlier in time than the plateau date. The reconsideration panel

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noted that section 58(3) of the *Administrative Tribunals Act* (ATA) provides that a discretionary decision is patently unreasonable if the discretion is based entirely or predominantly on irrelevant factors, or fails to take statutory requirements into account. The reconsideration panel concluded that the panel's failure to take into account a relevant policy breached section 250(2) of the Act.

The reconsideration panel then addressed the panel's decision that its jurisdiction to consider the worker's award for his lumbar spine was governed by the individual ranges specified in relation to the lumbar spine and not the 24% maximum specified as a limit on the total of several ranges. After the WCAT decision, a precedent panel appointed under section 238(6) of the Act determined that WCAT has jurisdiction to consider appeals concerning the lumbar spine based on the maximum of 24%. Thus, the panel erred in deciding she did not have jurisdiction. However, the panel went further, and provided alternative reasons in the event she was wrong on this jurisdictional issue. Accordingly, the jurisdictional error by the panel did not provide grounds for reconsideration of the decision

The reconsideration panel considered whether the panel had made an error in failing to disclose or identify other decisions she relied on in her decision. The reconsideration panel noted that the panel referred to these decisions solely with respect to the jurisdictional issue concerning the lumbar spine. As the panel's conclusion on jurisdiction was set aside for other reasons, it was not necessary to decide this issue.

The reconsideration panel then addressed the issue of whether the WCAT panel had pre-judged the appeal. It was only alleged the panel had pre-judged the jurisdictional issue. As the panel's decision on jurisdiction was set aside for other reasons, the issue of pre-judgment was moot. However, the reconsideration panel went on to conclude the panel had appropriately alerted the parties to the fact that she had provided a prior decision on the interpretive issue regarding WCAT's jurisdiction, for the purpose of eliciting submissions on the issue. This indicated an intent to further consider the matter, rather than indicating that her mind was closed on the issue. The reconsideration panel concluded the panel had not pre-judged the appeal.

The WCAT decision regarding whether the worker's award was governed by the former provisions or the current provisions, was set aside as patently unreasonable under section 58(3)(d) of the ATA. WCAT was to reconsider the worker's appeal on this issue.

WCAT Decision Number: WCAT-2006-01413
WCAT Decision Date: March 27, 2006
Panel: Herb Morton, Vice Chair

Introduction

The worker seeks reconsideration of the May 21, 2004 Workers' Compensation Appeal Tribunal (WCAT) decision (*WCAT Decision #2004-02663-RB*, or the WCAT decision).

The worker is represented by a lawyer (the lawyer), who initiated this application by letter dated June 8, 2004. On July 15, 2005, an appeal coordinator wrote to the lawyer, providing information regarding the grounds for requesting reconsideration, including the "one time only" limitation on reconsideration applications. She explained:

> It is important that your submissions explain how your application meets the requirements for reconsideration (see heading #8, **New Evidence**, #9, **Common Law Grounds**, and #11, **Additional Information**, in the information sheet).
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> [emphasis in original]

Additional written submissions were provided by the lawyer on October 18, 19, and 22, 2004, and November 8, 2004. (He subsequently received updated disclosure of this claim file on December 21, 2005, in connection with the worker's appeal of *Review Division Decision #30716* dated September 27, 2005).

The worker was self-employed, with personal optional protection, at the time of his November 28, 2001 work injury. Accordingly, there is no employer to notify of this application.

In this decision, the *Workers Compensation Act* will be referred to as the Act, and the *Administrative Tribunals Act* will be referred to as the ATA.

Issue(s)

Have grounds been provided for reconsidering the WCAT decision? Did the WCAT decision involve an 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. This authority is further confirmed by section 253.1(5) of the Act.

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. In *Speckling v. British Columbia (Workers' Compensation Board),* (2005) BCCA 80, February 16, 2005, the British Columbia Court of Appeal explained the effect of the "patent unreasonableness" standard of review (at 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.

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. 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)
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> (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,
>
> (b) 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, and

(c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

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

(a) is exercised arbitrarily or in bad faith,
(b) is exercised for an improper purpose,
(c) is based entirely or predominantly on irrelevant factors, or
(d) fails to take statutory requirements into account.

Practice and procedure at item #15.24 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP), 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 of the Act 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 was assigned to me by the chair on the basis of a written delegation (paragraph 26 of *Decision of the Chair No. 6*, "Delegation by the Chair", June 1, 2004). This delegation was confirmed in *Decision of the Chair No. 8*, March 3, 2006, at paragraphs 25 and 31.

Preliminary Issues

The lawyer requested a copy of the tape of the April 19, 2004 oral hearing held by the WCAT panel. This was provided to him (on CD), and he provided a further submission dated November 8, 2004.

By submission of October 18, 2004 (paragraph 26), the lawyer requests an oral hearing on this reconsideration application. He submits that the rules of natural justice require it. I find that consideration as to whether the WCAT decision involved an error of law going to jurisdiction involves essentially legal issues, which can be properly addressed on the basis of written submissions without an oral hearing. Similarly, consideration as to whether the "new evidence" requirements of section 256 of the Act are met involves consideration of the tests set out in that section. The rule set out at item #8.90 of WCAT's MRPP states, in part, that WCAT will normally conduct an appeal on a read and review basis where the issues are largely medical, legal, or policy based and credibility is not in issue. I am satisfied that the issues raised in the application (involving the "first stage" consideration as to whether grounds for reconsideration are established), can be properly heard on the basis of written submissions without an oral hearing.

Background

The worker was a self-employed logging contractor, who was injured on November 28, 2001 when a log hit his back and fell on him. He received wage loss benefits from November 29, 2001 until November 24, 2002.

By decision dated November 19, 2002, a case manager advised the worker that his claim was accepted for right rib fractures, fractured left calcaneus and left lateral malleolus, contused kidney and facial lacerations. He advised the worker that wage loss benefits would not be paid after November 24, 2002, but his file would be referred to the Disability Awards Department.

By decision of April 29, 2003, the disability awards officer granted the worker a pension award of 7.96% of total disability, plus age adaptability, for a total award of 8.76% (with no loss of earnings pension entitlement). The April 29, 2003 decision letter did not indicate on its face whether it was being made under the pre-Bill 49 law and policy (the former provisions), or under the post-Bill 49 law and policy (the current provisions). However, it stated that: "The details of how the decision was reached are included on the attached memo of April 24, 2003." That memo, the "Form 24", was marked at the

top: "(Former provisions)". This means that the Board officer rendered the pension decision under the pre-Bill 49 law and policy.

The worker requested review by the Review Division. *Review Decision #3514* dated September 24, 2003 concluded by confirming the Board's decision of April 29, 2003. In fact, however, the review officer appears to have varied the April 29, 2003 decision, as she concluded that the law which applied to the worker's pension award was the Act as it read immediately after June 30, 2002 (the current provisions). The review officer found that there had been no Board decision concerning the worker's claim for bilateral hearing loss, significant sleeping problems, concentration and memory difficulties, numbness of upper and lower extremities, occasional headaches, fractured left hip, right rib fractures, contused kidney and facial laceration, and that the issue of the acceptance of those conditions or injuries was not before her.

The worker appealed the November 19, 2002 decision by the case manager to the former Workers' Compensation Review Board (Review Board). As a result of the March 3, 2003 changes to the appeal structures contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), the worker's appeal was transferred to WCAT for completion. The worker also appealed *Review Decision #3514* to WCAT. These two appeals were heard together by the WCAT panel, by way of an oral hearing on April 19, 2004. *WCAT Decision #2004-02663-RB* confirmed the November 19, 2002 decision by the case manager, and allowed the worker's appeal from the *Review Decision #3514* in part. The WCAT decision included the following findings:

- the worker is credible;
- the current (post-Bill 49) law and policy apply to the worker's pension, as his plateau date is November 2002;
- the WCAT panel's jurisdiction to consider the worker's pension award for his lumbar spine was governed by the individual ranges specified in relation to the lumbar spine and not the 24% maximum specified as a limit on the total of several ranges;
- if the WCAT panel was wrong in her findings regarding jurisdiction, and she did have jurisdiction over the whole of the pension award, her findings would be the same;
- right rib fractures, the fractured left hip, contused kidney and facial laceration were accepted under this claim;
- the worker should be assessed for any permanent disability resulting from the fracture of his hip;

- concentration and memory difficulties, hearing loss, sleeping problems, are matters which had not been adjudicated initially by the Board, and were not properly issues before WCAT;

- the Board should determine if worker's sensory loss in thumbs and first fingers is a result of injury and if accepted under the claim, should assess this condition for disability award purposes;

- the Board should consider the worker's complaints of numbness extending into his fourth and fifth fingers of both hands and pain in his elbows;

- the Board should also adjudicate the worker's complaints regarding tingling in his index fingers and thumbs;

- the worker was fit to return to the occupations specifically identified by the occupational rehabilitation program, bucker, hook tender, yarder operator and rigger. He had recovered sufficiently from his physical injuries to return to his pre-injury occupation which included these more specific jobs;

- not all of the worker's compensable conditions have been assessed for pension purposes yet. When these other conditions were assessed, the Board would again consider whether the worker should be considered for an award under section 23(3) of the Act; and,

- requests for an MRI of the worker's back and hip, claim for a head injury at the time of the accident, and claims regarding the worker's weight gain, and sleeping impairment, could be pursued with the Board.

There have been a number of developments on the worker's claim subsequent to the WCAT decision:

- an electromyographic report dated September 9, 2004 was provided by Dr. L.F. Daly, neurological consultant;

- an MRI of the worker's cervical spine was done on October 25, 2004;

- the worker was assessed by Dr. Fisher, orthopaedic surgeon, on January 28, 2005;

- by decision dated February 3, 2005, the case manager advised the worker that the following conditions were accepted under his claim:
  (i) fractured left calcaneus and fractured left malleolus;
  (ii) fractured right ribs;

(iii) fractures of the transverse process of L3 and L4 on the left;
(iv) fractured left hip;
(v) spinal cord contusion;
(vi) sensory loss in the thumbs and first fingers bilaterally.

The case manager also referred the worker's claim back to Disability Awards for assessment. The case manager found that concentration impairment, memory impairment, hearing loss and sleeping problems were not acceptable under this claim;

- the worker requested review of the February 5, 2005 decision. *Review Decision #30716* dated September 27, 2005 confirmed the February 3, 2005 decision;

- the worker appealed *Review Decision #30716* to WCAT, and that appeal has been assigned to a WCAT panel for consideration;

- by decision dated August 19, 2005, the case manager, Disability Awards Department, granted the worker an increased pension award of 15.42% of total disability, plus age adaptability, for a total award of 16.51% of total disability;

- the worker requested review of the August 19, 2005 decision (*Review Division #R0058734*); and,

- by decision dated February 8, 2006, the case manager concluded that depression was not acceptable under this claim.

Reasons and Findings

A. Common Law Grounds

An application for reconsideration on the common law grounds concerns whether a valid decision has been rendered. If a decision involved procedural unfairness, jurisdictional error, or was patently unreasonable, it will be set aside. Submissions have been provided by the lawyer which invoke the common law grounds on a range of points, which are addressed separately below.

(a) Applicable Law and Policy

The lawyer argues that it was an error of law going to jurisdiction for the WCAT decision to hold that Volume II of the *Rehabilitation Services and Claims Manual* (RSCM II) applied to an injury in 2001. He submits that a "plateau date", which is a non-statutory term, is irrelevant. He argues that the statutes do not state that the law changed on the plateau date.

The WCAT decision reasoned (at page 2-3):

> Although the worker's injury occurred before June 30, 2002, his plateau date is November 2002. As a result his pension award is dealt with under the current provisions set out in RSCM, Volume II.

The WCAT decision concerned the worker's appeal from *Review Division Decision #3514* dated September 24, 2003. The Review Division decision found that the applicable policy concerning the assessment of the worker's pension was contained in RSCM II. The review officer reasoned, on page 2, with respect to the assessment of the worker's permanent functional impairment:

> The law that applies to this issue is s. 23 of the *Act,* as it read immediately after June 30, 2002 ("current *Act*") because while the worker's date of injury was November 28, 2001, the first indication of permanent partial disability was November 19, 2002, when the worker's claim was referred to Disability Awards.

The review officer similarly reasoned on page 3, with respect to the worker's request for a loss of earnings pension award:

> The law that applies to this issue is s. 23(3), (3.1) and (3.2) of the *Act,* as it read immediately after June 30, 2002 ("current *Act* ") because while the worker's date of injury was November 28, 2001, the first indication of permanent partial disability was November 19, 2002, when the worker's claim was referred to Disability Awards.

This involved a change from the decision of the Board officer in the April 29, 2003 decision, which incorporated the information in the April 24, 2003 Form 24 (which applied the "Former provisions"). As the review officer stated that the decision by the Board officer was confirmed, the Review Division decision did not acknowledge that the decision by the Board officer was being varied in a significant fashion. (As this information was only provided in the form of a cryptic annotation in the heading of the memo attached to the Board officer's decision without further comment or explanation, it may not have been apparent to the review officer that she was varying the Board officer's decision on this point.)

Substantial amendments to the Act were contained in the *Workers Compensation Amendment Act, 2002* (Bill 49). These changes were largely effective June 30, 2002. Transition provisions were contained in section 35.1 of the Act, which stated (in part):

Transitional

35.1 (1) In this section, **"transition date"** means the date that this section comes into force.

(2) Subject to subsection (7), this Act, as amended by the *Workers Compensation Amendment Act, 2002*, applies to an injury that occurs on or after the transition date.

(3) Subject to subsections (4) to (8), this Act, as it read immediately before the transition date, applies to an injury that occurred before the transition date.

(4) Subject to subsections (5) to (8), if a worker's permanent disability first occurs on or after the transition date, as a result of an injury that occurred before the transition date, this Act, as amended by the *Workers Compensation Amendment Act, 2002*, applies to the permanent disability.

[emphasis added]

At the time of the April 29, 2003 decision by the disability awards officer, policy at RSCM II item #1.00 provided:

#1.00 INTRODUCTION

Effective June 30, 2002, the *Workers Compensation Act* was amended by the *Workers Compensation Amendment Act, 2002* (*"Amendment Act, 2002"*). The amendments changed the law in relation to compensation benefits for injured workers. For convenience, the law and policy as they were immediately before being changed will be called the former provisions and the law and policy after the changes will be called the current provisions. Volume I of this *Manual* sets out the former provisions. Volume II of this *Manual* sets out the current provisions.

Unless otherwise stated in Volume II of this *Manual*, the *"Act"* refers to the *Workers Compensation Act*, as amended by the *Amendment Act, 2002*. The *Interpretation Act*, RSBC 1996, Chapter 238, applies to the *Act*, unless a contrary intention appears in either the *Interpretation Act* or the *Act*.

Section 35.1 of the *Act* contains the following transitional rules:

1. The current provisions apply to an injury that occurs on or after June 30, 2002.

2. Except as noted in items 3, 4, and 5, the former provisions apply to an injury occurring before June 30, 2002.

3. Subject to the transition rule respecting recurrences (item 4), **if the injury occurred before June 30, 2002, but the first indication that it is permanently disabling occurs on or after June 30, 2002, the current provisions apply to the permanent disability award with two modifications:**

(i) 75% of average earnings (former provisions) is used for calculating the award rather than 90% of average net earnings (current provisions); and

(ii) no deduction is made for disability benefits under the Canada Pension Plan (former provisions).

Under this transitional rule, for an injury that occurred before June 30, 2002, where the first indication of permanent disability also occurs before June 30, 2002, the permanent disability award will be adjudicated under the former provisions. Where the first indication of permanent disability is on or after June 30, 2002, the award will be adjudicated under the current provisions, using the modified formula described in items (i) and (ii) above. The determination of when permanent disability first occurs will be based on available medical evidence. An example of when this transitional rule applies is where a worker, injured before June 30, 2002, shows no signs of permanent disability before that date. However, on or after June 30, 2002, the worker has surgery, which first causes permanent disability. The permanent disability award will be adjudicated under the current provisions, using the modified formula.

[emphasis added]

Essentially the same policy was contained in the introduction at item #1.00 in Volume I of the *Rehabilitation Services and Claims Manual* (with minor wording differences).

The April 29, 2003 decision by the disability awards officer granted the worker a pension award for permanent functional impairment of his left ankle and lumbosacral region. Following the worker's injury on November 28, 2001, by letter dated November 30, 2001 Dr. C. J. Parfitt advised:

> In regards to his x-rays he does have some fractured ribs as you know. On the x-rays of his lumbar spine he has probably some fractures of the transverse processes of L1, 2 3 on the left….
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> In terms of his left lower limb he has a lot of swelling in his whole left foot. He has a fracture blister over the lateral calcaneus. X-rays have been done here including x-rays of the ankle and the foot. On the x-rays of the ankle there is some small fragments off the end of the fibula. There may be some possible fragments on the lateral process of the talus and lateral aspect of the calcaneus here as well.
>
> X-rays of the foot confirm this, that in this area there is a fracture of the calcaneus at least and there maybe as well of the lateral process of the talus.
>
> There is also a small fragment torn off the base of the fifth metatarsal….

In the WCAT decision, the panel found that the worker's pension award was governed by the current provisions (the post-Bill 49 law and policy). The WCAT panel stated that the worker's plateau date was November 2002, and as a result his pension award was dealt with under the current provisions. It is not apparent from the reasoning provided in the WCAT decision that the panel took into account the policy of the board of directors concerning the interpretation of section 35.1(4) of the Act. The WCAT decision did not refer to the policy by number, or by reference to the test set out in policy (concerning the date of the first indication of permanent disability).

It is possible that the WCAT panel found that the plateau date represented the first indication of permanent disability. However, the reasoning provided by the WCAT panel appears to suggest that the plateau date was determinative. It is not evident from the reasoning provided by the WCAT panel whether the panel applied the appropriate test contained in the policy of the board of directors at item #1.00 of Volumes I and II of the *Rehabilitation Services and Claims Manual*. In many cases, the date of the first indication of permanent disability will occur earlier in time than the plateau date. Inasmuch as the wording utilized by the WCAT panel appears to indicate, on its face, that it treated the plateau date as determinative, I do not consider that I have sufficient basis on which to infer that the panel was referring to the applicable test contained in policy.

WCAT Decision #2005-01290 dated March 15, 2005 reasoned, in another case:

> There is no indication from the panel's reasons that it gave consideration to the policy at #21.30, or in *Decision No. 2*. Those policies would appear material to the issue which was being addressed by the panel. The failure

to give consideration to the policy would appear to be a breach of the panel's obligation under section 250(2) of the Act.

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. I find that this occurred in this case. This situation is distinguishable from the situation addressed by the chair in *WCAT Decision #2004-04764* dated September 10, 2004, in which she reasoned:

> I acknowledge that the employer's representative has raised a number of valid concerns about the quality of the impugned decision, and I am of the view that the quality of the decision would have been enhanced by more comprehensive consideration of the evidence and the factors outlined in the relevant policies. However, as the panel took the relevant policies into account, and there was evidence to support the panel's conclusion, I do not find the panel's determination of the plateau date to be patently unreasonable.

I find the breach of section 250(2) of the Act, with respect to the failure to apply a relevant policy, constitutes an error of law going to jurisdiction which requires that the WCAT decision be set aside. The worker's appeal will, therefore, be considered afresh.

Section 250(2) of the Act provides:

> 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.

Section 58(3) of the ATA provides that a discretionary decision is patently unreasonable if the discretion is based entirely or predominantly on irrelevant factors, or fails to take statutory requirements into account. For similar reasons to those expressed in *WCAT Decision #2005-01290*, I find that the panel's failure to take into account a relevant policy amounted to a breach of section 250(2) of the Act. This involved a failure to take

a statutory requirement into account. Accordingly, the WCAT decision regarding whether the worker's pension award is governed by the former provisions or the current provisions, must be set aside as patently unreasonable pursuant to section 58(3)(d) of the ATA. The worker's appeal will be considered afresh on this issue.

(b) Local range or global range approach to jurisdiction

The WCAT panel found that its jurisdiction to consider the worker's pension award for his lumbar spine was governed by the individual ranges specified in relation to the lumbar spine and not the 24% maximum specified as a limit on the total of several ranges. However, the panel further reasoned (on page 5):

> If I am wrong in my findings concerning my jurisdiction and I do indeed have jurisdiction over the whole of the pension award, my findings would be the same. I see no reason to interfere with the calculations.

Subsequent to the WCAT decision, this jurisdictional issue was considered in another case by a "precedent panel" appointed by the WCAT chair under section 238(6) of the Act. In *WCAT Decision #2005-06624* dated December 13, 2005, the panel found that the "global range" interpretation is correct. The panel found that in applying items 75 and 76 of the Schedule in the RSCM II concerning the lumbar spine, WCAT has broad jurisdiction to consider the worker's appeal based on the maximum of 24% (the global range interpretation).

Section 250(3) of the Act provides:

> (3) The appeal tribunal is bound by a decision of a panel appointed under section 238 (6) unless
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> (a) the specific circumstances of the matter under appeal are clearly distinguishable from the circumstances addressed in the panel's decision, or
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> (b) subsequent to the panel's decision, a policy of the board of directors relied upon in the panel's decision was repealed, replaced or revised.

WCAT Decision #2005-03622 dated July 8, 2005 discussed the effect of a decision by a precedent panel under section 238(6) of the Act as follows:

> A precedent panel decision is binding in relation to future decision-making by WCAT. However, it will normally not provide a basis for reconsideration of a prior WCAT decision given the high level of deference to be accorded to a WCAT decision. The fact that prior

> decisions have reached differing conclusions on an interpretive issue does not mean they were "patently unreasonable". Differing interpretations may be possible or viable under the Act (see *Appeal Division Decision #00-1596*, "Reconsideration of an appeal division decision – consistency and 'Hallmarks of Quality Decisions'", 16 W.C.R. 349, and *WCAT Decision #2004-04221*). A decision which is a possible or viable interpretation (i.e. not patently unreasonable) is not subject to reconsideration simply because it took a different approach.

In the present case, however, the issue is a jurisdictional one, rather than involving an interpretive issue to which the "patent unreasonableness" standard applies. As this is a jurisdictional issue, no deference applies in relation to the review of the WCAT decision in this application for reconsideration. The decision must be correct. The decision of the precedent panel is binding upon me, as to the correct interpretation of this jurisdictional question. Accordingly, I find that the WCAT decision erred in applying the local range interpretation. The worker's application for reconsideration is allowed on this issue.

However, the WCAT panel went further, and provided alternative reasons regarding the worker's appeal in the event it was wrong on this jurisdictional issue. The lawyer has not presented any argument that these additional reasons involved an error of law going to jurisdiction. Accordingly, the jurisdictional error does not provide a basis for reconsideration of the WCAT decision (apart from the setting aside of the WCAT decision on the first basis, with respect to the application of the local range approach).

(c) Failure to disclose other WCAT decisions

The lawyer submits that it was an error of law going to jurisdiction for the WCAT panel to rely on other WCAT decisions which were not disclosed to him, with an opportunity provided to reply. As this concerns a question of natural justice and procedural fairness, the issue to be considered is whether the procedures followed by the WCAT panel were fair.

The WCAT decision made express reference to only one other WCAT decision. On page 3, she noted:

> The interpretation of this provision is subject to debate, currently, among members of WCAT. I have set out my interpretation of section 239(2)(c) in decision #2004-01848.

The panel further commented, on page 5:

> I have given the question of jurisdiction more thought as a result of other decisions made by other vice chairs of WCAT. I am still of the view that

> the individual ranges specified in relation to the lumbar spine are the ones which govern my jurisdiction and not the maximum specified as a limit on the total of several ranges.

At the time the May 21, 2004 WCAT decision was issued, the March 29, 2004 version of the *Manual of Rules, Practices and Procedures* stated:

> **12.10 Prior Decisions**
>
> WCAT panels, in making their decisions, may refer to past Review Board, Appeal Division, WCAT, or former commissioners' decisions accessible on an internet website or published in the Workers' Compensation Reporter, without first disclosing such decisions to the parties and inviting further submissions. If a WCAT panel wishes to cite a decision which was not publicly accessible at the time the parties were providing their submissions, the panel will normally disclose the prior decision (without identifiers) for comment. While not required, it remains open to a panel to invite comments concerning a publicly accessible decision, if the panel considers this helpful to the submissions process.

A difficulty presented by the WCAT panel's reference to "other decisions made by other vice chairs of WCAT", without providing the decision numbers for reference, is that this makes it difficult to assess whether those decisions were publicly accessible on an internet website.

Other WCAT decisions which addressed a similar jurisdictional issue (prior to *WCAT Decision #2004-02663* dated May 21, 2004) included the following:

- *WCAT Decision #2004-00820*, February 18, 2004
- *WCAT Decision #2004-02087*, April 23, 2004
- *WCAT Decision #2004-02317*, May 4, 2004
- *WCAT Decision #2004-02464*, May 12, 2004
- *WCAT Decision #2004-02626*, May 19, 2004

All five decisions supported the position of the lawyer that a global range interpretation should be applied. It is not clear whether these were the decisions reviewed by the WCAT panel. Only one of these decisions was issued prior to the April 19, 2004 oral hearing in this case. For the purposes of my decision, I will assume the panel included one or more of these decisions in her review, which was issued after the April 19, 2004 oral hearing. Accordingly, the lawyer would not have had an opportunity to comment on these decisions at the oral hearing, for the purpose of arguing that the WCAT panel should follow the reasoning provided in these other cases.

It is clear, however, that the panel's review of these other WCAT decisions was solely in reference to the jurisdictional issue as to whether a local or global range approach should be applied. The panel's conclusion regarding this jurisdictional issue has been set aside, for the reasons set out above under (b). Accordingly, it is not necessary that I further consider the objection presented concerning the panel's reference to other WCAT decisions on this topic. I would, however, comment that it would be preferable that a panel provide specific decision numbers in referring to other WCAT decisions, so that it is possible to review these to ensure that there was no breach of procedural fairness (in accordance with the guidance provided by MRPP item #12.10). The current version of MRPP item #12.10 similarly states:

> Panels may refer to past Review Board, Appeal Division (www.worksafebc.com), WCAT (www.wcat.bc.ca), or former commissioners' decisions accessible on an internet website or published in the *Workers' Compensation Reporter* (www.worksafebc.com) without first disclosing those decisions to the parties and inviting further submissions. If a WCAT panel wishes to cite a decision which was not publicly accessible at the time of the oral hearing, or when the parties were providing their written submissions, the panel will normally disclose the prior decision (without identifiers) for comment. Panels may also invite comments concerning a publicly accessible decision.

(d) Pre-judgment

By submission dated November 8, 2004, the lawyer advises that he has listened to the recording of the April 19, 2004 oral hearing. He submits:

> 4. The Vice-Chair initially focused on "**limits**" of jurisdiction. She clearly stated that each range of spinal motion measurement was a separate issue for determining appeal jurisdiction. She said she thought the statute was "**clear**". I said it was "**clear as mud**": that 24% is the potential range of impairment for appealing lumbar spinal pensions. "
>
> 5. The Vice-Chair tries to give the impression of being "**open**" on the "jurisdiction" issue but a careful listening, respectfully, indicates otherwise, in the first 10 minutes of hearing tape #1, particularly ±5 minutes and ±10 minutes. If anything is clear, it was that there was "**pre-judgment**".
>
> [emphasis in original]

At page 3 of the WCAT decision, the panel reasoned:

> The interpretation of this provision is subject to debate, currently, among members of WCAT. I have set out my interpretation of section 239(2)(c) in decision #2004-01848.
>
> I asked counsel for the worker for any submissions he wished to make. He stated that simply raising the question indicated a presumption against the worker. Since this is a matter of jurisdiction, I do not consider that it raises any presumption one way or the other.

As noted previously, the WCAT panel further reasoned at page 5:

> I have given the question of jurisdiction more thought as a result of other decisions made by other vice chairs of WCAT. I am still of the view that the individual ranges specified in relation to the lumbar spine are the ones which govern my jurisdiction and not the maximum specified as a limit on the total of several ranges.

The allegation of pre-judgment was raised solely in regard to the jurisdictional issue. In view of my conclusion set out above under (b), it would appear that the objections raised by the lawyer on this point are moot. Accordingly, it is not necessary that I address the arguments raised by the lawyer on this point.

I have, however, listened to the initial portion of the hearing tape cited by the lawyer. In the course of that discussion concerning the jurisdictional issue, the vice chair explained that she was raising this issue so that it was so that it was "on the table". She further stated she was "raising the concern." The lawyer indicated he was unclear what this meant, as to whether this involved a presumptive judgment against the worker if there was no dialogue. The vice chair explained that "I'm suggesting that there be a dialogue."

When WCAT was established on March 3, 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.

WCAT vice chairs took this oath of office prior to commencing their duties at WCAT on March 3, 2003.

MRPP item #23.00 contained a code of conduct for WCAT members. This included the following:

> **23.30 Decision-Making Responsibilities**
>
> Members must make their decisions based on the merits and justice of the case, and must apply the law and policy to the evidence in good faith and to the best of their ability. Members must approach the hearing and determination of every appeal or application with a mind that is genuinely open with respect to every issue, and open to persuasion by convincing evidence and argument. WCAT members must avoid doing or saying anything that would cause a reasonable, well-informed individual to think otherwise.

In *Administrative Law in Canada*, Third Ed. (Ontario: Butterworths, 2001), Sara Blake states at page 104:

> Even for adjudicators, unbiased does not mean uninformed. It means only that the decision maker should be open to persuasion. Members of a tribunal may review the files and hold tentative views on the matters at issue. Provided they are open to hearing and considering the information and submissions of the parties, a statement of preliminary findings is not objectionable….
>
> It may be impossible to determine the precise state of mind of an adjudicator. Evidence of prejudgment is usually found in statements made by the member. Statements are rarely as blatant as, "[I] thought this was the most clear-cut case of disbarment [I have] ever seen and [I] thought so from the outset of the case". It is unwise for a tribunal member to express opinions on the merits of the case before and during a proceeding (for example, to comment that there is little point in a

> respondent attempting to rebut a *prima facie* case). A notice of hearing or a temporary order indicating that the tribunal has come to certain adverse conclusions about a respondent's conduct, may give rise to a reasonable apprehension of bias. A statement that the outcome of a proceeding is a foregone conclusion indicates the existence of impermissible bias.

Vice chairs must decide interpretive issues. It is certainly appropriate for a vice chair to continue to hear cases which involve similar issues, and to refer to the reasoning provided in prior decisions. The reasoning may be persuasive. The vice chair may find a flaw in the prior reasoning and conclude that this provides a basis for reaching a different conclusion. The vice chair may find that the some circumstance of the other case was important to the reasoning provided, which makes the reasoning inapplicable to the present case. Reference to the reasoning provided in prior decisions assists in promoting fairness and consistency. Action by a WCAT panel to flag a prior decision and to invite comments allows the parties the opportunity to address the specific concern. It is important, however, that this be done in a way which makes it clear that although the vice chair may have reached a particular conclusion in a prior case, he or she is open to re-examining the matter afresh in the context of the new matter before them.

It appears to me that the vice chair was, quite appropriately, flagging the fact that she had provided a prior decision on the interpretive issue regarding WCAT's jurisdiction, for the purpose of eliciting submissions on the issue. This is indicative of an intent to further consider the matter, rather than indicating that the vice chair's mind was closed on the issue. In substance, I am not persuaded this involved prejudgment.

(e) Section 239(2)(c) – Policy and Jurisdiction

Section 239(2)(c) of the Act provides:

> (2) The following decisions made by a review officer may not be appealed to the appeal tribunal:
>
> …
>
> (c) a decision respecting the application under section 23 (1) of rating schedules compiled under section 23 (2) where the specified percentage of impairment has no range or has a range that does not exceed 5%;

Section 23(2) of the Act provides that the Board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases. The permanent disability evaluation schedule contained at Appendix 4

of the *Rehabilitation Services and Claims Manual*, Volumes I and II, is part of the published policy of the board of directors.

By submission of June 8 2004, the lawyer sets out one of the grounds for the worker's application for reconsideration as follows:

> It is wrong, in principle, for the WCAT to allow the WCB to define the nature and scope of its jurisdiction. Any "decision" by the WCB gives the WCAT the authority to make any decision it thinks ought to have been made by the WCB. Otherwise, the WCB can easily defeat the purpose of the statute by not addressing issues or by chopping up the disabled worker into piece meal bits and defeating by costs, delay and bureaucracy.

In the WCAT decision, the panel acknowledged the argument by the lawyer concerning the effect of section 239(2)(c) of the Act as follows (at page 3):

> Counsel made a point which I consider important. That is, the jurisdiction of WCAT is determined by policy of the Board under this provision. If the Board amends the schedule, which it did recently, this impacts on the jurisdiction of WCAT to hear appeals concerning pension awards. The *Permanent Disability Evaluation Schedule* can be amended by resolution of the board of directors and is not even a matter which must be prescribed by regulation. I note that this is an unusual means of prescribing the jurisdiction of an appellate tribunal, though this is clearly what the legislation has done.

I consider that the WCAT panel correctly analyzed the effect of section 239(2)(c), in this regard. I find no jurisdictional error, or other error of law going to jurisdiction, in relation to the panel's analysis on this issue. In any event, it is not apparent that this aspect of the WCAT panel's decision involved any separate decision from the one addressed under (b) above.

(f) Other conditions

The lawyer submits that it was an error of law going to jurisdiction for the WCAT panel to refuse to address the acceptance of other conditions under the claim. The WCAT panel reasoned, on page 6:

> I agree with the review officer that the acceptance of other conditions under the claim are not before me. That is, concentration and memory difficulties, hearing loss, sleeping problems, are matters which have not been adjudicated initially by the Board. As a result they are not properly issues before me.

At the time of the WCAT decision, MRPP item #14.30 provided:

> 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 prior decision by the WCB officer which was the subject of the request for review by the Review Division. This is, of course, subject to the general limits on WCAT's jurisdiction described in item 2.00.

MRPP item #26.69 further provided:

> **26.69 Scope of Decision**
>
> In considering an appeal which was transferred to WCAT from the WCRB on March 3, 2003, WCAT will apply the same approach to the "scope of decision" as is set out at item 14.30 (with any necessary changes relating to the fact that the subject of the appeal is a decision by a Board officer with no intervening decision by the Review Division).

Were WCAT to address an issue which had not previously been adjudicated by the Board, this would have the effect of pre-empting the multi-level consideration which would otherwise be available under the Act (consisting of the initial adjudication, review by the internal Review Division, and then an appeal to the external WCAT, if necessary). It may be appropriate to take a broad view of jurisdiction where the issue is whether symptoms in an affected area of the worker's body are the result of a work injury, but there are differing diagnoses (see *WCAT Decision #2004-04309*). In this case, however, the worker's concerns appear to have involved questions as to the cause of a different set of symptoms in a different part of the body.

The WCAT panel flagged these questions for further adjudication by the Board. By decision dated February 3, 2005, the case manager found that concentration impairment, memory impairment, hearing loss and sleeping problems were not acceptable under this claim. That decision was confirmed by the Review Division, and the worker has appealed *Review Decision #30716* to WCAT. In my view, the WCAT panel took a correct approach regarding its jurisdiction in relation to these other conditions. To the extent this might be viewed as involving an exercise of discretion, I consider that the panel's decision was not patently unreasonable. I find no error of law going to jurisdiction in the WCAT decision on this basis.

(g) MRI

The lawyer argues that the WCAT panel erred in not doing an inquiry by way of an MRI prior to adjudicating the sufficiency of the worker's section 23(1) lumbar pension award. The WCAT panel reasoned, at page 11:

> Counsel requested the worker be referred for an MRI of his back and hip for legal purposes. I do not agree to this request. This is not an issue before me.

The reasoning set out above under (f) would similarly apply to the WCAT decision in relation to this issue.

I note, as well, that an MRI is primarily a diagnostic tool. For example, it may provide evidence of a disc protrusion or disc degeneration. However, where the worker's disability has been accepted as compensable, the measurement of the worker's physical restrictions is based on the worker's actual abilities. Different workers may have different levels of restriction or limitation, following similar surgeries. The relevance of an MRI to the assessment of the worker's current impairment of function is not apparent.

The question as to whether the panel considered it necessary to obtain additional medical evidence for the purpose of making its decision may be viewed as a discretionary one which involved the panel's weighing of the evidence. I do not consider that the WCAT panel was unreasonable, much less patently unreasonable, in proceeding with its decision on the basis of the evidence before it without awaiting or pursuing further medical investigations.

(h) Section 99

In paragraph 25 of his October 18, 2004 submission, the lawyer cites section 99 of the Act. I adopt, in this regard, the reasoning provided by the British Columbia Supreme Court in *Basura v. B.C. (WCB) et al.*, 2005 BCSC 407, (2005) 137 A.C.W.S. (3d) 1254:

> 36 The petitioner submits that the WCAT failed to apply the standard under s. 99 of the ***Workers Compensation Act*** but I do not see any merit to this argument. Section 99 requires that an issue be resolved in favour of the worker where the disputed possibilities are evenly balanced. In the present case, there is no indication the WCAT found the disputed possibilities to be evenly balanced. Dr. Kokan may have stated an opinion to that effect, but it was open to the WCAT to reach a different conclusion in light of the evidence as a whole. In particular it was open to the WCAT to find the evidence tendered by the petitioner to be less persuasive than the evidence tendered by the WCB and to reach the conclusion it did.
>
> [emphasis in original]

In any event, WCAT applies section 250 of the Act, in its decision-making. This provides:

> **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.
>
> (3) The appeal tribunal is bound by a decision of a panel appointed under section 238 (6) unless
>
> (a) the specific circumstances of the matter under appeal are clearly distinguishable from the circumstances addressed in the panel's decision, or
>
> (b) subsequent to the panel's decision, a policy of the board of directors relied upon in the panel's decision was repealed, replaced or revised.
>
> (4) 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.

It was not necessary for the WCAT panel to cite section 250(4), unless the panel found that the evidence was evenly weighted on an issue. I find no basis for concluding that the WCAT decision was patently unreasonable, or otherwise involved an error of law going to jurisdiction, in respect of the fact that it did not cite sections 99 or 250(4) of the Act.

(i) Oral Hearing Tape or Transcript

At paragraph 29 of his October 18, 2004 submission, the lawyer submits:

> It is also a breach of the rules of natural justice for the WCAT Vice-Chair not to have provided a copy of the tape nor make a transcript of the April 19, 2004 oral hearing on a case involving both disputed facts and credibility and two (2) appeals, including his pension for life.

At the time of the April 19, 2004 oral hearing, MRPP item #9.40 provided:

> **9.40 Record of the Hearing**
>
> WCAT hearings will be recorded where practicable. If recording equipment is unavailable or malfunctions, a WCAT panel may proceed with an oral hearing and the absence of a recording does not affect the validity of the hearing. The WCAT recording of a hearing becomes part of the evidence on the Board file. **Where an oral hearing is adjourned for a lengthy time, on request, WCAT will ask the Board to provide a copy of the recording to the parties. Written transcripts are not provided, except where the panel determines that a transcript of specific evidence is necessary. If a transcript is prepared, a copy will be provided to the parties.** After the decision has been issued, WCAT will forward the voice recording to the Board for storage as part of the Board's file.
>
> [emphasis added]

However, this was not a case in which the oral hearing had to be adjourned and then continued at a later date. No transcript was prepared of the hearing.

The worker and his lawyer were in attendance at the oral hearing, and had the opportunity to provide oral submissions in the hearing. No other party participated in the hearing. No court decisions or legal authority has been cited to support the proposition that a tribunal must furnish a copy of a recording of an oral hearing, or provide a transcript of the hearing, before proceeding to issue a decision. I find no unfairness in the WCAT panel proceeding to issue its decision without first disclosing a recording of the hearing.

(j) Summation on Common Law Grounds

The worker's application for reconsideration is allowed, on the issue as to whether the worker's pension award is governed by the former provisions or the current provisions. The worker's appeal will be considered afresh on this issue.

While the WCAT panel erred in applying the "local range" approach to jurisdiction, the panel also considered the worker's appeal under the "global range" approach (in case it was wrong on the jurisdictional issue). Accordingly, the reasoning of the WCAT panel in connection with the "local range" approach is set aside. This means that the panel's reasons under the "global range" approach become the WCAT decision regarding the worker's appeal on this issue.

No other error of law going to jurisdiction has been established in relation to the remainder of the WCAT decision.

B. New Evidence

By submission of June 8, 2004, the lawyer initiated the worker's application for reconsideration, on the basis of the common law grounds of an error of law going to jurisdiction. By submission of October 18, 2004, he provided a copy of Dr. Daly's report of September 9, 2004, stating that "this report may provide evidence relevant to this reconsideration application." At paragraphs 4 to 13 of that submission, under the heading "'REAL WORLD' OCCUPATIONAL AND ECONOMIC FACTS" he described the worker' current personal, financial and occupational situation. At paragraph 14, he states:

> **SECTION 256**
>
> 14. **Section 256** is relevant. Dr. Daly's additional medical evidence – perhaps especially the forthcoming MRI – will undoubtedly be relevant to a reconsideration **"on the basis of new evidence"**, particularly to ground (b) on page 1 of the 8 June 2004 application. See, e.g. WCAT -2004-05167.
>
> (**emphasis added**)

By submission dated October 22, 2004, the lawyer submits:

> **NEW EVIDENCE**
>
> 2. Enclosed as new evidence is a copy of Dr. Lyle F. Daly's **9 September 2004** letter. It states, in part, under "**Examination**":
>
> > **Examination does show sensory loss in both hands involving thumb and index finger. It is on the apposing surfaces….He has brisk but normal reflexes in both the arms and legs…**
> >
> > **(emphasis added)**
>
> 3. It states, in part, under **"Discussion"**:
>
> > **The history of spinal trauma and sudden paralysis suggest a spinal cord contusion in the cervical region**. If he was unable to feel or move anything for the first 20 minutes there must have been an injury of the cervical spinal cord. Fortunately that proved to be completely reversible, **except for some residual paraesthesias in the thumb and index finger**.
> >
> > ...**There is degenerative change with disc space narrowing**…

> **However, I suspect that [the worker] must have suffered a hyperextension injury of the neck with spinal cord contusion.**
>
> **He does have some persistent numbness in his left buttock. I suspect that is probably related to the local back injuries**…he is noting that **it seems to be worsening lately**…but spinal cord injuries can be associated with **cystic degeneration** and delayed progression.
>
> **(emphasis added)**

4. Also enclosed is a 9 September 2004 report concerning [the worker's] "Motor Nerve Conduction" and "Sensory Nerve Conduction".

[reproduced as written]

I infer that the reference by the lawyer to this new evidence is for the purposes of a "new evidence" application under section 256 of the Act. I accept that Dr. Daly's report constitutes new evidence which did not exist at the time of the WCAT hearing. The further questions to be addressed under section 256 of the Act are whether this new evidence is substantial and material to the WCAT decision. "Material" evidence is evidence with obvious relevance to the WCAT decision. "Substantial" evidence is evidence which has weight and supports a conclusion opposite to the conclusion reached by the WCAT panel.

Dr. Daly's report is relevant to the issues which the WCAT flagged for adjudication by the Board. By decision dated August 19, 2005, the Board granted the worker an increased pension award consisting of the following:

Lumbar impairment	4.21%
Left ankle impairment	3.25
Left ankle and lumbar spine fatigue and cold intolerance	0.50
Left hip impairment, with devaluation	0.86
Enhancement	2.10
Sensory loss in the C6 nerve root distribution	4.50
Age adaptability	1.09
Total	16.51%

No explanation has been offered as to the relevance of Dr. Daly's report to the issues decided by the WCAT panel. I do not find Dr. Daly's report relevant to the assessment of the worker's impairment of function of his lumbar spine.

I have considered whether Dr. Daly's report is relevant to the assessment of the worker's fitness for employment in various occupations. The WCAT panel noted, at page 10:

> The most relevant evidence is that set out in the reports from the occupational rehabilitation program. These reports carefully detailed tasks required in each of the several occupations which the worker undertook as part of his supervisory role as owner-operator of his logging business. I acknowledge that the worker himself indicates that he considers himself unable or unsafe to do some of the tasks involved in the more physically-demanding jobs of faller, bucker, chaser, chokerman. His attending physician records this evidence and supports the worker's contentions in his report prepared for Canada Pension purposes on June 3, 2003. However, the evidence of the occupational rehabilitation program is much more complete and detailed. The staff of that program had the opportunity to observe the worker over a period of several weeks. They noted that he continued to progress during his time in the program. At the time of discharge they found he was fit to return to his former occupation without limitation. I note that the conditions of hip fracture and numbness in the first finger and thumb in both hands have not been assessed for pension purposes. However, these conditions were known to the occupational rehabilitation team according to the documents on file. So in advising that the worker was fit to return to his pre-injury occupation, these factors were taken into account.

Dr. Daly advises that the cervical spine cord contusion "proved to be completely reversible, except for some residual paraesthesias in the thumb and index finger". He advises that the nerve conduction velocity study was "a normal study for the median and ulnar nerves."

I am not persuaded that evidence regarding the diagnosis of a spinal cord contusion, by itself, constitutes substantial and material new evidence to the WCAT decision. The WCAT decision took into account the worker's demonstrated physical abilities and limitations, as they existed at that time. In the absence of evidence concerning a change in the worker's physical function, it is not apparent as to how this new evidence has obvious relevance to the WCAT decision, or as to how it has weight and supports a conclusion opposite to the conclusion reached by the WCAT panel. Similarly, I do not find that the evidence concerning the worker's "persistent numbness in his left buttock", and concerning the nerve conduction velocity study, has weight and supports a conclusion contrary to the WCAT decision.

In the event of any deterioration in the worker's permanent functional impairment, that would be a new matter for assessment by the Board under section 96(2) of the Act.

In consideration of the foregoing, I find that the requirements of section 256 are not met. While the new evidence was relevant to the issues which were the subject of further adjudication of the worker's claim by the Board, it is not substantial and material to the WCAT decision.

Conclusion

The worker's application for reconsideration of *WCAT Decision #2004-02663-RB* is allowed in part.

The WCAT decision was patently unreasonable, in failing to apply an applicable policy of the board of directors in its determination that the worker's pension is governed by the current provisions of law and policy (post-Bill 49) rather than the former provisions (pre-Bill 49). This involved a failure to address the application of a policy of the board of directors (i.e. either by citing the number of the applicable policy or using reasoning which referenced the applicable test contained in the policy). The worker's appeal will be considered afresh on this issue.

The WCAT decision involved a jurisdictional error in its application of a "local range approach", and its finding on that basis is set aside. However, the WCAT panel provided alternative reasons, using the "global range" approach. No error of law going to jurisdiction has been established in relation to the decision by the WCAT panel on this latter basis, or in relation to the remainder of the WCAT decision. No new evidence has been provided which meets the requirements of section 256 of the Act.

Accordingly, the worker's appeal will be considered afresh on the issue as to whether the worker's pension is governed by the former or current provisions. The WCAT Registry will contact the worker concerning the further handling of this matter.

Herb Morton
Vice Chair

HM/ec