Noteworthy Decision Summary

Decision: WCAT-2006-02462 **Panel**: Herb Morton **Decision Date:** June 8, 2006

Reasonable Apprehension of Bias - Panel decision in prior Workers' Compensation Review Board appeal involving the same worker and claim

This reconsideration decision is noteworthy because it provides an analysis of the employer's allegation of reasonable apprehension of bias on the part of the original panel because she had been the decision maker on a prior Workers' Compensation Review Board (Review Board) panel involving the same worker and claim. A reasonable person, properly informed and viewing the circumstances realistically and practically, would not conclude that the decision-maker might be prone to bias.

At the oral hearing, the employer had argued that the original panel should recuse herself from the appeal on the basis of a reasonable apprehension of bias because she had been the decision maker on a prior Review Board panel that had rendered a decision adverse to the worker and which had been overturned on appeal.

The original panel rejected the employer's objection and proceeded to hear the appeal and render a decision. She stated that a decision maker must bring an open mind to each issue to be decided. Although she had previously considered other issues on the worker's claim, and her finding on one such issue was overturned, none of the issues she had previously decided were currently before her in this appeal. As these were entirely new issues, she found that a reasonable person, fully informed of the relevant details, would not perceive a likelihood of bias by her proceeding to adjudicate the issues, and thus she declined to step aside. The employer sought reconsideration of her decision.

This reconsideration application was denied. The reconsideration panel observed that, viewed narrowly, the Review Board finding and the original panel's decision involved different facets of the same issue. Viewed more broadly, the issue before the original panel might be seen as involving the same issue addressed by the Review Board panel. While the reconsideration panel found that there was some connection between these issues, he was not persuaded that it was sufficiently close so as to give rise to a reasonable apprehension of bias. The vice chair had not reached a firm conclusion regarding the credibility of one of the parties, for example, which would make it impossible for her to address the issues raised in this appeal afresh.

The reconsideration panel did not consider that a reasonable person, properly informed and viewing the circumstances realistically and practically, would conclude that the decision-maker might well be prone to bias. However, the reconsideration panel felt it would be prudent for the WCAT to refrain from assigning an appeal to a vice chair involving the implementation of a decision which overturned a prior Review Board finding made by the same vice chair on the same claim. It would similarly be prudent for a vice chair to recuse themselves in such circumstances, particularly if this can be done in advance of a scheduled hearing date.

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WCAT Decision Number: WCAT-2006-02462
WCAT Decision Date: June 08, 2006
Panel: Herb Morton, Vice Chair

Introduction

The employer seeks reconsideration of the January 27, 2006 Workers' Compensation Appeal Tribunal (WCAT) decision (*WCAT Decision #2006-00391-RB*, or the 2006 WCAT Decision). The employer requests that the 2006 WCAT Decision be set aside. The employer submits that the 2006 WCAT Decision involved:

- a breach of natural justice (involving a reasonable apprehension of bias);
- jurisdictional error; and,
- an arbitrary use of discretion (i.e. was patently unreasonable).

The employer is represented by a consultant, who initiated this application by a written submission dated February 28, 2006. By letter of March 23, 2006, WCAT's legal counsel advised that the employer's application would be processed as an expedited application for reconsideration. On March 31, 2006, the appeal coordinator wrote to the consultant, providing him with a copy of the "Applications for Reconsideration – WCAT Information Sheet". She advised him of the "one time only" limitation on such applications, and explained:

> It is important that your submission explains how your application meets the requirements for reconsideration (see heading #9 & #10, **New Evidence**, #11, **Common Law Grounds**; and #14, **Law, Policy and Decisions on Reconsiderations**, in the information sheet).
>
> [emphasis in original]

The worker is participating in this application. In a letter received by WCAT on April 11, 2006, the worker advised "I think this is getting out of control and would like to end this for my health is not getting better just worse." Although invited to do so, neither the worker nor the employer provided further submissions. The consultant advised that an oral hearing was not required. I agree that this application involves legal issues which can be properly considered on the basis of written submissions without an oral hearing.

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

Issue(s)

Did the 2006 WCAT Decision involve a breach of natural justice (due to a reasonable apprehension of bias), jurisdictional error, or an arbitrary exercise of discretion?

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 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.

Section 245.1 of the Act provides that section 58 of the ATA applies to WCAT. 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.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> (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* 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.

This application has been assigned to me by the chair on the basis of a written delegation (paragraph 25 of *Decision of the Chair No. 8*, "Delegation by the Chair", March 3, 2006).

Preliminary

In the text *Administrative Law in Canada*, Fourth Edition (Ontario: Butterworths, 2006) Sara Blake states at page 115:

> Bias may be waived. A party who was aware of bias during the proceeding, but failed to object, may not complain later when the decision goes against it. The genuineness of the apprehension becomes suspect when it is not stated right away. An objection must be stated when the bias first comes to the party's attention.
>
> It is unwise and unnecessary to absent oneself from the hearing after the tribunal has ruled against an objection. If the objection is clearly raised and not withdrawn, continued participation will not be interpreted as acquiescence.

I have listened to the initial portion of the audio recording of the December 6, 2005 oral hearing in which the employer's representative expressed his objections to the WCAT vice chair hearing the worker's appeals. I find that the employer's representative raised his objections regarding an apprehension of bias as a preliminary issue at the outset of the hearing. The WCAT vice chair advised that she would address this issue in her decision and that it would be open to the employer to seek reconsideration or judicial review. There is no basis for finding acquiescence or waiver on the part of the

employer, with reference to the continued participation by the employer's representative in the oral hearing after the WCAT panel declined to recuse herself.

Reasons and Findings

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 predispositions.

In *Liszkay v. Robinson* (2003) 232 D.L.R. (4th) 276, [2003] 10 W.W.R. 441, (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 pp. 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. . .

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. S. (R.D.), [1997] 3 S.C.R. 484 at 530, [paragraph] 111, (reasons of Cory J.) and at p. 502, [paragraph] 31 (reasons of L'Heureux-Dubé and McLachlin JJ.), 151 D.L.R. (4th) 193.

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.

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 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]

. . .

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.

The WCAT panel held an oral hearing in Prince George on December 6, 2005. In the 2006 WCAT Decision, the panel addressed the employer's objections to the panel assignment as a preliminary issue (on page 3):

> The employer's representative raised the question of whether I should step aside from this panel, on account of a perception of bias. He pointed out that as a member of the Review Board I issued a decision on March 10, 2003 regarding a number of appeals brought by the worker. I found, in particular, that a two-month period in the year prior to the 1996 re-opening ought to have been excluded from the calculation in determining the long-term wage rate. On appeal a WCAT panel overturned that finding, and agreed with the Board that the two-month period should be included in the calculation.
>
> A decision maker must bring an open mind to each issue to be decided. Although I have previously considered other issues on the worker's claim, and my finding on one such issue was overturned, none of the issues I have previously decided are before me in these appeals. As they are entirely new issues, I find that a reasonable person, fully informed of the relevant details, would not perceive a likelihood of bias by my proceeding to adjudicate the issues in these appeals, and thus decline to step aside.

The 2006 WCAT Decision concerned two appeals by the worker. One of the worker's appeals was from a decision dated September 12, 2002 by the claims adjudicator, Disability Awards Department. That appeal was initially filed to the former Workers' Compensation Review Board (Review Board), and was transferred to WCAT for completion pursuant to section 38 of the transitional provisions contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). The worker's second appeal was from *Review Decision #20620* dated January 10, 2005, which stemmed from a case manager's decision dated July 29, 2004.

The employer's submissions regarding a reasonable apprehension of bias involve two concerns. In Review Board findings dated March 10, 2003, the WCAT vice chair who issued the 2006 WCAT Decision previously heard five appeals by the worker from decisions dated September 22, 2000, October 26, 2000, May 16, 2001, July 11, 2002, and August 9, 2002. The Review Board panel had held an oral hearing on June 6, 2002, and proceeded to issue its findings after March 3, 2003 pursuant to section 38(3) of Bill 63's transitional provisions. That Review Board finding was subsequently appealed to WCAT by both the worker and the employer, pursuant to section 41(3) of Bill 63's transitional provisions.

In the Review Board finding, the vice chair made certain recommendations which appear to have overlooked the September 12, 2002 decision by the claims adjudicator, Disability Awards Department. In addressing the worker's appeal concerning his eligibility for vocational rehabilitation assistance, the Review Board panel reasoned in part:

. . . Based on that evidence, and given the former long term wage rate of $15.90 per hour and the functional award, the worker would not have sustained a loss of earnings as a Partsman. However, as the wage rate must now be changed as ordered above, it appears that indeed the worker would have sustained a loss of earnings as a Partsman.

The latest FCE indicated the worker would have to have light work with flexible hours, alternating positions and appropriate workstations, with no static standing, prolonged sitting, or continuous walking, and with only limited stooping, squatting / crouching and kneeling.

If the worker is correct that Partsmen do a considerable amount of bending, stooping and kneeling, then the job was not, and is not, physically suitable. And since Partsmen must warehouse and retrieve parts from shelving at all levels, it follows that there would be quite a bit of bending, stooping and kneeling. I find therefore that the Partsman training that was offered to the worker was not appropriate at the time it was offered as it was physically unsuitable, and in any event is not now appropriate as it would not match his pre injury earnings.

The worker's physician said that due to his medical condition the worker could not participate in vocational rehabilitation, so rehabilitation services and benefits were properly terminated by the May 16, 2001 letter. The Board's mandate is to provide vocational rehabilitation services only to the degree claimants are not only willing but also able to participate[.]

However, the Board has now accepted the claim for a Chronic Pain Disorder.

Dr. Worth said vocational planning and implementation had been significantly impaired by the pain. Dr. Lum was not as definite in that respect, but said the worker displayed symptoms of pain as the predominant focus of his clinical presentation; with ensuing significant distress and impairment in occupational and other areas of functioning.

Neither psychologist was asked whether, and if so when, the worker was or is disabled by the disorder, and what limitations the disorder had and has on the worker's ability to train for, get and keep a job.

The worker may or may not have been or be disabled by the disorder. He may have been temporarily disabled by the disorder for a period before it became permanent, or it may have been permanent from the outset so that no temporary benefits were payable. It may or may not have implications for the types of work that are suitable for the worker.

Under the heading "Conclusion", the Review Board panel found as follows:

> The file is returned to the Board to:
>
> - Adjust the reopening wage rate to exclude the period from November 14, 1995 to January 16, 1996
>
> - Commence a renewed vocational rehabilitation effort, with a view to assisting the worker to re-enter the work force in a suitable and available position that will replace his adjusted earnings
>
> It may be that it was the now accepted Chronic Pain Disorder that prevented the worker from participating in vocational rehabilitation after November 10, 2000. I recommend that as a first step, before beginning the renewed vocational rehabilitation effort, the Board get answers concerning:
>
> - whether, and if so for what period or period the worker was or is disabled as a result of his Chronic Pain Disorder
>
> - for what, if any period the disability would have been considered temporary
>
> - any impact the condition had or has on the types of work the worker could or can be expected to do
>
> If the worker was temporarily disabled as a result of the Pain Disorder in November of 2000, wage loss and other appropriate compensation ought to be paid. Future vocational rehabilitation services will have to take the impact of the Pain Disorder into account.

The employer appealed the Review Board finding with respect to the worker's eligibility for vocational rehabilitation assistance, submitting that the position of service advisor (SA) should be accepted as suitable employment that was reasonably available to the worker and which was capable of restoring his pre-injury wage rate. *WCAT Decision #2004-02886* (the 2004 WCAT Decision) found that this position was not reasonably available to the worker, that this vocational rehabilitation plan had little chance of success, that the Board correctly suspended the worker's vocational rehabilitation benefits on October 23, 2000 on the basis of lack of participation by the worker, and that further rehabilitation assistance should be offered to the worker. The 2004 WCAT Decision noted as follows:

> By decision dated October 29, 2001, the Board advised the worker that his claim had now been accepted for a chronic pain disorder, but no

> further treatment was recommended. The psychological disability awards committee met on May 15, 2002 and offered their opinion that the worker did not suffer from a vocationally disabling degree of psychological impairment and declined to grant an award for a permanent psychological impairment. Finally, on September 12, 2002, the disability awards department advised the worker that there was no objective clinical evidence of a worsening of his pensionable condition since the August 1990 impairment examination, and there would no change in his permanent functional pension.
>
> On March 10, 2003, the Review Board panel directed the Board to determine if the worker's chronic pain disorder prevented him from participating in vocational rehabilitation and what impact, if any, the chronic pain disorder has on his vocational future. The panel also directed the Board to commence a renewed vocational effort once it had answers with respect to the impact of the chronic pain disorder. **It does not appear that the panel was aware of the May 15, 2002 opinion or the September 12, 2002 decision.**
>
> [emphasis added]

With respect to the employer's appeal of the Review Board finding concerning the worker's 1996 reopening wage rate, the 2004 WCAT Decision reasoned in part:

> The Review Board panel decided that if the absences from work stemmed from different causes; since no one cause was likely to be repeated on a recurring basis, the absences could not be viewed as typical or likely to recur. On that basis, the panel concluded that the worker's time loss for a broken needle tip in his great toe was not likely to be repeated and could not be viewed as typical or part of a pattern.
>
> I agree with the Review Board panel that the reasons for the worker's absences between 1991 and 1996 were varied. However, in my view, they show that the worker had a pattern of "frequent" absences from work for illness or other non-compensable disabilities rather than absence due to "occasional" illness. Policy item #66.11 explains that no deduction will be made for non-compensable periods of absence if the worker has a normal work pattern of frequent absences from work, rather than absence due to "occasional illness." The Act and policy do not recognize the reasons for non-compensable absences from work. It is the pattern of absences and not the reasons for the absences that is important. Accordingly, I find that the period from November 14, 1995 to January 18, 1996 should not have been deducted, and allow the employer's appeal on this issue.

> Finally, I note that the worker's long-term wage rate upon reopening ($2,736.00/month) exceeds the long-term wage rate originally set on his claim after indexing ($2,489.00/month). As a result, his long-term reopening wage rate will be based on his earnings at the time of reopening, as set out in policy item #70.20(1)(a), and as calculated by the Board in memorandum #187.

The March 10, 2003 Review Board finding regarding the worker's 1996 reopening wage rate was varied in the 2004 WCAT Decision. In the 2006 WCAT Decision, the WCAT vice chair heard the worker's appeal from *Review Decision #20620*, which related to the July 29, 2004 decision by the case manager concerning implementation of the 2004 WCAT Decision. In other words, the WCAT vice chair proceeded to hear an appeal concerning the implementation of the 2004 WCAT decision, which allowed an appeal from her Review Board finding of March 10, 2003.

The consultant representing the employer submits:

> The employer was successful in their appeal of the WCRB decision to WCAT. The WCAT panel, in the May 31, 2004 decision, overturned the WCRB with respect to the wage rate. Although chronic pain was not a specific issue under appeal, (as it had already been accepted as early as October 29, 2001), it is clear from a simple reading of the WCRB decision that the panel had become fixated on the issue and remained so when she again became involved in the appeal process resulting in her decision of January of 2006.
>
> We find it inconceivable that the panel did not step aside from conducting the appeal based on her earlier involvement in the exact issues while a member of WCRB. She should have recused herself at the outset. At the very least she should have disqualified herself when challenged by the employer's representative at the commencement of the oral hearing. While she briefly discussed the employer's concerns at the oral hearing her subsequent decision, in our opinion, merely served to confirm the employer's concerns. The only difference now was that her decision could not be overturned at a higher level.

The employer cites *WCAT Decision #2006-00816-RB*, which reasoned:

> The rules of natural justice require tribunal members to maintain an open mind and to be free of bias, whether actual or perceived. Bias is a lack of neutrality on the issue to be decided. It is not necessary to show actual bias, because it is difficult to penetrate the state of mind of an individual. A reasonable apprehension of bias is sufficient (Sara Blake, *Administrative Law in Canada*, 3rd ed. (Ontario: Butterworths, 2001),

> p. 94). Procedural fairness requires that decisions be made, free from a reasonable apprehension of bias, by an impartial decision-maker (*Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817). In *Baker,* the Supreme Court of Canada discussed reasonable apprehension of bias, noting that the test widely accepted by the judiciary was that 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. Also, if it was more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly.

The consultant notes that the British Columbia Court of Appeal has recently expressed some doubt about the "more likely than not" test appearing in the final sentence quoted above. In concurring reasons in the case of *R. v. Wolfe*, [2005] B.C.J. No. 1248, leave to appeal to the Supreme Court of Canada (SCC) refused, [2005] S.C.C.A. No. 342, Mr. Justice Lambert reasoned:

> 44 In my opinion the simple question which requires an answer in each case is this: Is there a real possibility that a reasonable person, properly informed and viewing the circumstances realistically and practically, could conclude that the decision-maker might well be prone to bias?
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> 45 I would not like to think that it would be in accordance with natural justice for a decision-maker to be equally likely to be biased as not to be biased. But that is what the test suggests in the words "more likely than not".
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> 46 The statement of the test as more likely to be biased than not simply cannot be right. And, as far as I can tell, it has never been endorsed by the Supreme Court of Canada or by this Court as the correct weighing to give to the respective degrees of likelihood in a reasonable apprehension of bias case.

The consultant representing the employer submits that the most applicable statement of the law to the facts of this case comes from the judgment of the Manitoba Court of Appeal in *Re Regina and Nolin*, [1982] 6 W.W.R. 1, leave to appeal to the SCC refused, 1 C.C.C. (3d) 36. In *Nolin*, the accused was charged with possession of drugs for the purpose of trafficking. He pleaded not guilty and elected to be tried by judge alone. During the preliminary inquiry, the Provincial Court judge ruled that inculpatory statements made by the accused were inadmissible as being involuntary. The accused applied to re-elect trial by magistrate alone before the presiding Provincial Court judge. The presiding Provincial Court judge allowed the accused's application, and found that

there was no reason to refer the matter to another judge. The Crown applied for prohibition. This application was granted and it was directed that the charges be remitted for trial before a different judge. An appeal by the defendant was dismissed. The majority of the Court of Appeal reasoned:

> 1. I am satisfied that if the matter were further dealt with by Carr Prov. Ct. J. he would conscientiously steel himself against the danger of bias, and that, in so far as human frailty would permit, his decision would be free from bias. I mention human frailty because it would be idle to deny its existence. What part it would play when Carr Prov. Ct. J. would have to decide whether to admit or exclude the accused's statements to the police must remain a matter of conjecture. At the preliminary inquiry he ruled the statements inadmissible [23 C.R. (3d) 378, [1981] 6 W.W.R. 359]. If at the trial he made the same ruling, is there not a danger that the public might perceive that ruling as one flowing (even if unconsciously) from a desire for consistency, rather than one freely and independently arrived at? And it is well to remember that not only must justice be done but it must manifestly be seen to be done.

The Court of Appeal expressed agreement with the lower court's reasoning, which stated:

> I think that there is a reasonable apprehension that a judge in the same proceedings, involving the same parties, having made a determination of an important issue, might be perceived as not being able to approach it with a totally fresh and open mind, and in that degree and in that degree only do I find that there is a reasonable apprehension of bias.

The consultant representing the employer argues:

> In the case of [the worker], the panel had considered at least some of the issues before and had formed an opinion about those issues, including an opinion and decision about the wage rate, which decision had been disapproved of by another WCAT panel. It was a situation that, in fairness, required the panel to decline to hear the matter and to have it assigned to a different panel.

Sara Blake further states at page 107 (Fourth Edition):

> A tribunal that has decided a previous dispute between the same parties is not considered biased in favour of the winning party. Some tribunals have repeated dealings with the same parties. They are not biased merely because they have previously dealt with the same parties on

> similar matters. However, the courts are divided as to whether there is bias if the previous adverse decision turned on the party's credibility.

In *Re Batorski and Moody* 42 O.R. (2d) 647 150 D.L.R. (3d) 114, the Ontario High Court of Justice Divisional Court considered an application for judicial review of an order by a police superintendent convicting the applicant on a charge of discreditable conduct and sentencing him to be dismissed from the force. The Court reasoned:

> It is apparent, then, that at each level of appeal the appeal is heard on the record only subject to the right of the board "in special circumstances" to hear such evidence as the board or commission considers advisable. There would, therefore, be an onus on the person seeking to introduce that evidence to establish the special circumstances. We have no assurance that the allegation of bias of Superintendent Moody would necessarily move the board in each instance to turn the appeal into a trial de novo. As well, it should be noted that counsel for the appellant, as I indicated earlier, had requested that the board of police commissioners appoint someone else to hear the charge but the board declined to do so.
>
> In our view, it is of fundamental importance that the applicant receive in the first instance what may be perceived as a fair hearing by an impartial adjudicator. He should not begin the appeal process provided by statute with an adverse finding of credibility against him made by a tribunal about which there was a reasonable apprehension of bias.

In *R. v. B.R.B.* [2003] B.C.J. No. 886, B applied for an order prohibiting a certain judge from rehearing his dangerous offender proceeding. The judge had found B to be a dangerous offender. B successfully appealed on a question of law which did not challenge the judge's factual or credibility findings. The British Columbia Supreme Court allowed B's application, reasoning as follows:

> The real question in this case is whether a reasonable and fully informed person would perceive a real likelihood that the evidence heard and findings made at the earlier hearing would unconsciously affect the decision made at the subsequent hearing in spite of the conscientious effort of the judge to guard against that. I am not persuaded that it is any easier to disabuse one's mind of impressions of propensity and tractability gleaned from a prior hearing than it is to disabuse one's mind of impressions of guilt formed at a prior hearing. I think the opposite may well be true.
>
> . . .

> 23 I find that a reasonable and fully informed person viewing this matter realistically would conclude that there is a real possibility of bias of the form dealt with in the authorities referred to by the applicant if this hearing were to be held in front of the same judge, notwithstanding the absence of any suggestion of actual bias.

This reasoning was followed in the case of *R. v. Kelly*, [2004] B.C.J. No. 1664. The Court of Appeal confirmed the decision of the British Columbia Supreme Court, which set aside a judge's ruling refusing to recuse himself from Kelly's dangerous offender proceedings [2005] B.C.J. No. 1559. Mr. Justice Low reasoned:

> 17 The Crown points out that trial judges often are called upon to disregard things they hear during pre-trial or mid-trial enquiries into the admissibility of evidence (confessions for example) without it ever being said that they become biased or that there is a basis for a reasonable apprehension of bias. This point has some merit but it seems to me that there is a substantial difference between disregarding irrelevant or otherwise inadmissible evidence prior to final determination of a case and rehearing the whole case after rendering a decision intended at the time to be final. In the latter situation I think the potential for a reasonable apprehension of bias is greater, perhaps much greater.

A different approach was taken in the older case of *Nord-Deutsche Versicherungs Gesellschaft v. Canada*, [1968] 1 Ex.C.R. 443. In that case, a commissioner appointed under s. 558 of the *Canada Shipping Act* to investigate a collision of ships found that negligence by a ship's pilot was the cause of the collision. That finding was rejected by the court on appeal. A petition was subsequently filed concerning the loss of lives and a ship in the collision. The defence was that the collision was caused by the pilot's negligence. The Crown requested that the case be heard by a judge who had not sat on the appeal which rejected the Commissioner's finding. The Court rejected this motion, reasoning in part:

> 26 In my view the correct view of the matter is that which, as I understand it, was adopted by Hyde J. in Barthe v. The Queen, when he said that "The ability to judge a case only on the legal evidence adduced is an essential part of the judicial process". In my view, there can be no apprehension of bias on the part of a judge merely because he has, in the course of his judicial duty, expressed his conclusion as to the proper findings on the evidence before him. It is his duty, if the same issues of fact arise for determination in another case, to reach his conclusions with regard thereto on the evidence adduced in that case after giving full consideration to the submissions with regard thereto made on behalf of the parties in that case. It would be quite wrong for a judge in such a case to have regard to "personal knowledge" derived from "a recollection of the

> evidence" taken in the earlier cause. . . . It is not reasonable to apprehend that there is "a real likelihood" that a judge will be so derelict in his duty as to decide one case in whole or in part on the evidence heard in an earlier case.

However, the Court further took note of a practical consideration:

> 29 The result, if the Attorney General is correct in his submission that a judge cannot as a matter of law preside in the trial of a case where questions of fact arise that have arisen before him previously, would be to make it very difficult, indeed, to arrange for the due administration of justice in a relatively small court, such as this is. I can illustrate the difficulties that would arise by reference to the particular case. This is one of many claims against the Government of Canada that arise out of the same accident and that are the subject of different proceedings in this Court. . . . I am informed by counsel for the Crown that a substantial part of the evidence will be in French. As a practical matter, the only judges in the Court who are qualified to preside at a trial where there is a substantial body of evidence in French (leaving aside one who is on the verge of retirement) are among those who are the subjects of this application. If none of them is qualified to preside at the trial, it will not be possible to proceed with the trial of this action against the Government of Canada . . . , unless a deputy judge who is qualified is appointed for the particular case by the Governor in Council under section 8 of the Exchequer Court Act, a solution that might be open to misinterpretation. I hope I have not been influenced in my conclusion in this matter by this practical consideration, but I cannot pretend that I have not had it in mind.

In *Liszkay*, the British Columbia Court of Appeal made reference to the “doctrine of necessity” as a factor which may cause a judge to decline to recuse herself or himself. Similarly, Sara Blake reasons at page 115 (Fourth Edition):

> As bias is a rule of common law, it may not be applied to preclude the performance of the statutory mandate. If all tribunal members are subject to the same allegation of bias, out of necessity they will not be disqualified, because the statutory mandate must be carried out. Similarly, if the disqualification of a tribunal member for bias leaves the tribunal unable to provide a quorum, the biased member may serve.

The decision in the *Nord-Deutsche Versicherungs Gesellschaft* case may be viewed as supportable on the basis of the doctrine of necessity. The *Nord-Deutsche Versicherungs Gesellschaft* decision was relied upon by the dissenting judge in the *Nolin* case, but not followed by the majority.

The reasoning in *Nord-Deutsche Versicherungs Gesellschaft* was also not followed in the case of *R. v. Downer* [1977] O.J. No. 417. In that case, the Ontario Supreme Court held that the test set out in *Nord-Deutsche Versicherungs Gesellschaft*, "which is almost one of judicial infallibility, is one that can no longer be applied." The Court further reasoned:

> 13 I will concede, of course, that there may be considerations of necessity that would force a judge to adjudicate again upon the same issues of fact. There may, for instance, be only one judge available in a large geographical area and justice may require an immediate disposition of the matter. There may be only a limited number of appellate judges available for the adjudication - a consideration that appears to have been present in the mind of Jackett, P. in reaching the decision in Nord-Deutsche (supra), see [1968] 1 Ex. C.R. p. 459.
>
> 14 There is no such difficulty here. His Honour Judge Hurley is not the judge of the county where the trial is to take place. I see no reason why another judge cannot be designated to take the trial.
>
> 15 For the reasons I have expressed, I would grant both applications and prohibit Judge Hurley from proceeding with the trial upon the indictments against the applicants.

In *R. v. Michell***,** [2002] B.C.J. No. 1378 , Mr. Justice Fraser of the British Columbia Supreme Court expressed disagreement with the reasoning of the majority in *Nolin*, as well as the decision in *Downer*. With reference to the *Nolin* decision, Mr. Justice Fraser reasoned:

> With deference to Freedman, C.J.M., a judge of great distinction, my view is that Huband J.A. offered the better analysis. If the ruling of the Provincial Court Judge was itself proper and sound, how could a second ruling to the same effect indicate bias?

With reference to the *Downer* decision, he further reasoned:

> 36 In Re Downer, Grange J., quoting Kenneth Culp Davis, an American scholar noted for his advocation of litigation-style procedures for resolution of issues to be decided by government agencies, suggested that any but the most rigorous test for bias implied "judicial infallibility". The case before Grange J. was, in my view, an obvious one for disqualification, given that the trial judge had expressed in a previous trial that the testimony of the complainant about the incident complained of was believable. The case in Downer did not require the sweeping

> expressions of Grange J. and I agree with Huband J.A., in Nolin, that Grange J. went "too far".
>
> [footnotes deleted]

In *Michell*, Mr. Justice Fraser declined to recuse himself. The accused had been charged with impaired driving causing death, refusal to comply with a breathalyzer demand and criminal negligence causing death. During the jury selections, the accused entered a plea of guilty to the charge of impaired driving causing death. During the sentencing hearing and after hearing from both counsel, the judge struck the guilty plea, expressing grave doubts concerning the accused's guilt. The judge indicated that he had made no findings, other than that it was inappropriate to accept a guilty plea on the basis of the information provided by the Crown during the sentencing. The court reasoned:

> 40 . . .It is important that litigants, both in the criminal and civil domain, not be able to remove a judge by a mere allegation of bias. The evil is "judge shopping", in which a litigant seeks a favourable result by trying to choose (or to avoid) one judge.
>
> 41 The Crown in this case is concerned that there will be a motion on behalf of Mr. Michell at the end of the evidence put forward by the Crown that there was no evidence worthy of giving to the jury that there was a causal connection between his alleged impairment and the accident which claimed Mr. Dunn's life.
>
> 42 The short answer is that the doubts I had on this score when the guilty plea was spoken to may be displaced by testimony. The "no evidence" motion at trial, if there is one, will be decided according to the evidence led.

In that case, the judge's decision not to accept a guilty plea did not involve a finding on the merits after hearing the evidence.

A prior finding on the merits need not require the appointment of a new panel in connection with the further consideration of the same matter. For example, in the case of *Kovach v. Singh* the British Columbia Court of Appeal issued a judgment dated December 2, 1996 (which relied in part on a decision of the Saskatchewan Court of Appeal in *Pasiechnyk v. Saskatchewan (WCB)*). The SCC subsequently allowed an appeal in the *Pasiechnyk* case on August 28, 1997. On applications for leave to appeal to the SCC in the *Kovach* case, by decision dated October 16, 1997 the SCC ordered that the matter be remanded to the Court of Appeal to be reconsidered and dealt with in accordance with SCC's judgment in *Pasiechnyk*. The matter was then reheard by the same three member panel of the British Columbia Court of Appeal, which issued its

judgment on May 28, 1998. No question as to a possible apprehension of bias arose in those circumstances.

Sara Blake states, in this regard (at page 220):

> In addition to quashing an order, a court may refer the matter back to the tribunal to be reconsidered. . . . It is preferable that the re-hearing be by the same tribunal panel, especially if only one part of the proceeding is quashed and referred back, since it is familiar with matter [*sic*]. If the decision maker who originally heard the matter is no longer in office, the matter must be heard anew by the incumbent. If the tribunal's error would give rise to a reasonable apprehension of bias if the matter were to be re-heard by the same tribunal members, a court may direct that the matter be decided by a different panel, if available. If the court does not specify whether the re-hearing is to be before the same or a different panel, the re-hearing may be before any quorum of the tribunal.

In the text *Bias*, Fourth Edition (Butterworths, 1998) Robert D. Kligman states at page 40:

> The principles of bias do not necessarily preclude a tribunal from adjudicating on a matter which has been remitted back to it after a previous decision has been set aside on appeal or judicial review for breach of the principles of natural justice or fairness. In *N. (R.) v. Edmonton Public School District No. 7*, [1996] 2 W.W.R. 443 (Alta. Q.B.), it was held that the justice who acted as a board of reference was capable of disabusing himself of previous findings of credibility and character and could make a decision on the evidence and the law applicable to the rehearing. Thus, while it may be the preferred practice to reconstitute a different panel for a rehearing, there is no mandatory requirement that this be done. Indeed, in *College of Physicians and Surgeons of Ontario v. Petrie*, (1989), 37 Admin. L.R. 119 (Ont. Div. Ct.), it was held that the advantage of referring back the issue of penalty to the same committee that saw the witnesses and had become familiar with the evidence, even though the earlier decision was tainted by the failure to adhere to the *audi alteram partem* rule, outweighed any possible apprehension of bias.
>
> . . .
>
> However, in *B.C.N.U. v. British Columbia (Labour Relations Board)*, it was held that because the initial decision was based on crucial credibility findings, and a rehearing was ordered on the ground that certain evidence had not been disclosed and considered, a decision by the same panel on

> the rehearing should be set aside. A new tribunal panel would likewise be subject to disqualification if the rehearing is otherwise a sham.

In *British Columbia Nurses' Union v. BC (Labour Relations Board)*, [1995] B.C.J. 2383, Mr. Justice Hall of the British Columbia Supreme Court granted a petition for judicial review of a decision of the Labour Relations Board (LRB). He found that the decision of the LRB, in ordering reconsideration by the original arbitrator rather than a new hearing, was patently unreasonable. He reasoned:

> 17 There is nothing particularly unusual in remitting a case back to the original hearing tribunal for reconsideration or rehearing. Appellate courts, from time to time, refer matters back for further consideration to trial judges and tribunals like the Labour Relations Board also not infrequently may refer matters back to arbitrators for reconsideration. The efficient and timely resolution of disputes, a prime consideration set out in the governing legislation and particularly noted by the panel in this case as applicable in labour relations matters, militate in favour of remission, if feasible. It could, I suppose, be almost always argued by one party or the other that it would be better to start again rather than to remit a matter but considerations of time and cost govern most human affairs and absolute perfection can never be the standard. **If it is likely that a fair result can be reached by remitting the matter to the original hearing tribunal, then usually that is the desirable course. I should think there would be in general a preference for such a course of action, based on the considerations I have mentioned, unless there are compelling reasons to the contrary. The decision to remit or to order a new hearing will, I think, often turn on whether the matter has reached a stage or has a complexion where it is not reasonable to assume that the original tribunal can fairly revisit the matter and do justice between the parties. A consideration to be borne in mind in making such a decision is to endeavour to define the basis for the decision under review. For instance, without being exhaustive, where a wrong legal test has been applied, of if there is material discovered that would fill a gap in a case which has failed for want of proof of an essential issue, then it may be very proper and sensible to refer the matter back to the original tribunal.**
>
> **18 At the upper end of the spectrum of cases where I would find difficulty in asking a tribunal to revisit the matter are cases involving findings of credibility.**
>
> . . .

> **20 . . .To me, the more relevant inquiry, especially as in a case like the case at bar, is to ask oneself, what was the basis for the decision and what is the tribunal being asked to do on remission or reconsideration?**
>
> 21 As I have earlier observed, it seems to me that the arbitrator here, after an exhaustive analysis of the evidence, has reached firm findings of credibility concerning the patient Ramsey and the grievor Parhar. **In my judgment, when a decision turns, as the case at bar does, on a disputed issue of credibility, it is approaching the impossible to ask the tribunal of first instance to revisit the matter with a view to possibly reversing those findings and making new findings**. To my mind, it is making a demand upon the original hearing tribunal that verges on the superhuman. Where decisions on credibility have been reached after due consideration and reflection, I should think it could scarcely ever be appropriate that the matter be remitted. It is, I believe, the most difficult situation that will arise to be faced in this area. I have reflected at some length on this troubling matter and I ask myself, how could I fairly again approach a case where I had made those sort of findings? The answer that I come to is that I doubt if I really properly could. Perhaps more importantly, could the notional reasonable observer ever come to believe that the playing field really was level? Here we return to those basic notions of fairness and considerations of the apprehension of partiality. If judicial and quasi judicial proceedings are to continue to enjoy the confidence of the public, it seems to me a sine qua non that they must be perceived as fair. It is in this area that I discern a very real problem in this case were it to be remitted back to the original arbitrator. I do not think such a course of action would be, broadly speaking, in the interests of justice.
>
> 22 . . .Despite all of the valid policy considerations including promptitude of decision, substantial inconvenience to witnesses, cost and the like that militate in favour of remission, I find myself convinced that this is one of those relatively rare cases where remission to the original tribunal is just not feasible. Having reached that conclusion, I order that that aspect of the decision, namely the referral back to the original arbitrator, be quashed.
>
> [emphasis added]

An appeal from this decision was dismissed by the British Columbia Court of Appeal in oral reasons for judgment on March 7, 1997. Mr. Justice Lambert reasoned:

> It is, in my opinion, completely unrealistic to expect a decision maker to free his or her mind from a previous conclusion that someone is in

> essence, lying, and to reach a new and entirely balanced conclusion completely free from that previous settled decision on the basis of new evidence which may do nothing more than add another piece to the total puzzle of credibility and fact finding.

In *Lorna Adams v. BC (WCB)*, (1989) 42 B.C.L.R. (2d) 228, the British Columbia Court of Appeal reasoned:

> 6 The commissioners have, of their own volition, advised the appellant that they will reopen and reconsider their decision. And during the course of the argument before Mr. Justice Cowan counsel for the board confirmed that at the behest of the appellant, and even though not required to do so, they would adopt an oral hearing format. The appellant, through her counsel, declined to take advantage of the opportunity thus made available to her. It is an internal remedy which she has not pursued.
>
> 7 As is the case with the specialized jurisdiction principle, there are numerous reported cases to the effect that unless there are compelling reasons to the contrary, and there are none here, the court will not undertake judicial review until the remedies available under the statute have been exhausted. There is a list of such cases at p. 16 of the respondent's factum.
>
> 8 The reason put to Mr. Justice Cowan for immediate exercise of the *Judicial Review Procedure Act* to review discretion instead of pursuing a re-hearing was that the appellant had a reasonable apprehension of bias in the rehearing panel of the commissioners. The ground for the apprehension was said to be that because of the limited number of commissioners and the statutory quorum, one or more of the commissioners who issued the challenged decision would be likely to sit on the rehearing. Board counsel was unable to give an undertaking that that would not occur.
>
> 9 Mr. Justice Cowan dismissed the reasonable apprehension of bias argument in these words:
>
> > I do not agree with the Petitioner's counsel that a reasonable apprehension of bias exists in relation to the proposed hearing by three commissioners. There is nothing to suggest, in my view, that the commissioners will not in the terms of s.96(2) "rehear and redetermine" the matter in a fair and unbiased manner based on the evidence that will be before them on the rehearing.

> The presumption of the regularity of the acts of public officers expressed in the maxim *omnia praesumuntur rite esse acta* applies in the circumstances of this case.

10 With respect, in my opinion that was an entirely appropriate and proper disposition of the bias allegation. There is no evidence to support the allegation, nothing upon which a reasonable person could reach that conclusion other than a suspicion that a commissioner or commissioners would not bring an impartial mind to bear. I think that it should be understood that in the "prior determination" cases such as *Ctee. for Justice & Liberty v. National. Energy Board*, [1978] 1 S.C.R. 369, relied upon by the appellant, there was more than suspicion, there was evidence which could lead a reasonable person to apprehend bias.

11 I think that it should also be understood that a rehearing is not in the nature of an appeal from the board to itself. It is the kind of reconsideration process undertaken by other members of this court in *Menzies v. Harlos and Devlin* (1989), 37 B.C.L.R. (2d) 249. There the same panel which heard the original appeal heard reargument for the purpose of determining whether evidence had been overlooked or misapprehended such that there was a risk of miscarriage of justice. It appears to me that that is what the commissioners intend on their proposed rehearing. At least that was the message conveyed by the board solicitor in his letter of October 17, 1988 to the appellant's solicitors. He said:

> They are prepared to allow an opportunity for further submissions to be provided on behalf of the claimant, and to reconsider their decision on the basis of such submissions.

12 It would be passing strange if a procedure acceptable in those performing judicial functions were held to be unacceptable for those performing quasi-judicial functions. In my opinion, the maxim applied by Mr. Justice Cowan applies equally forcefully to both. And in *Gray Line of Victoria Ltd. v. Chabot*; (1981) 2 W.W.R. 636, relied upon by the appellant, the present Chief Justice of this court acknowledged its usefulness:

> ... where there is no contrary evidence exciting doubt about the result of applying the maxim.

There is no contrary evidence here. The presumption expressed by the maxim was not rebutted. Suspicion alone will not operate to rebut.

In *R.N. v. Edmonton Public School District #7*, [1996] 2 W.W.R. 443, Alberta Court of Queen's Bench, an application was made for an order that the judge disqualify himself from continuing to act as the Board of Reference in the proceedings. The judge's prior decision had been appealed to the Court of Appeal, which allowed the appeal in part and referred the matter back to the Board for further consideration. This required further consideration as to the credibility of witnesses. The judge dismissed the application. He reasoned:

> 18 Unless there is evidence to the contrary, it is to be presumed that an experienced Justice of the Court of Queen's Bench, sitting as the Board, possesses the mental discipline which will enable him to and will, on a re-hearing, disabuse his mind of any findings of fact and decisions made at the previous hearing and will reach new findings of fact and make decisions based solely on the law and evidence applicable in the re-hearing.
>
> . . .
>
> 21 The Court of Appeal has allowed the appeal in part and has sent the matter back to me for further consideration… There is no doubt that in sending the matter back to the Board of Reference the Court of Appeal carefully considered the matter of any reasonable apprehension of bias on my part…
>
> 22 The Reasons for Judgment of the Court of Appeal have been reduced to an entered judgment and order. The question of whether or not this Board, an administrative tribunal, complies with an order of the Court of Appeal is more than a question of judicial deference. It is my respectful view that I should not easily fail to carry out the directives of the Court of Appeal.

With respect to the significance of findings of credibility, I prefer the reasoning provided by the British Columbia courts in the *B.C. Nurses Union* case.

In *Finch v. Assn. of Professional Engineers and Geoscientists of British Columbia* [1996] 5 W.W.R. 690, (1996) 18 B.C.L.R. (3d) 361, (1996) 38 Admin. L.R. (2d) 116, the British Columbia Court of Appeal considered the situation where the Association had published findings of unprofessional conduct in the association's monthly newsmagazine. The Association's findings were later quashed by the court, and the Association issued a new notice of inquiry to rehear the matter. Finch sought an order prohibiting the Association from proceeding, on the basis that there was now a reasonable apprehension of bias on the part of the members of the panel who participated in the first hearing and on the part of all members of the profession who

were presumed to have read the report. The British Columbia Supreme Court and the Court of Appeal rejected this argument. The Court of Appeal reasoned in part:

> 29 Fortunately, it is of course possible in the case at bar to constitute a tribunal whose members did not sit on the first hearing of the charges against Mr. Finch, so that the "necessity" of risking bias in this manner does not arise. The second panel may proceed free of any taint of bias unless and until such is found or reasonably apprehended on the part of any of them as individuals. I would reject the objection of institutional bias and the charge that bias arises by virtue of the Association's publication, and dismiss the appeal.

It may be inferred from these reasons that a risk or taint of bias might well have arisen had the Association proposed to have the same panel sit on the second hearing of the charges.

In the present case, the WCAT panel found that none of the issues she had previously decided were before her, as the worker's appeals involved entirely new issues. I note, in this regard, the summary provided in the 2004 WCAT Decision regarding the background to the reopening wage rate issue(s) arising before the Review Board panel:

> On September 18, 1999 (memorandum #187), the Board determined that the worker's claim would be reopened for temporary total disability benefits effective October 25, 1996 and the worker's wage rate would be based on his one-year earnings of $32,921.94 between October 25, 1995 and October 24, 1996. The Board did not provide the worker with a written decision reflecting the contents of memorandum #187. The worker asked the Board to explain how it calculated his wage rate, but there is no evidence on file that he was provided with a response.
>
> At the Review Board hearing in relation to the three vocational rehabilitation decisions, the worker raised his reopening wage rate. In a memorandum dated June 14, 2002, the Review Board panel asked the Board to decide whether the worker's absence from work between November 4, 1995 and January 18, 1996 should be taken into account in setting the reopening wage rate. The worker also provided the Board with additional earnings information. The Board then issued the July 11 and August 9, 2002 decisions, which the Review Board panel addressed in the findings presently under appeal.
>
> Since the Board did not provide a written decision to the worker explaining how his reopening wage rate was calculated, but the subsequent decisions in July and August 2002 indicated that no change would be made to the wage rate outlined in memorandum #187, I will assume

> jurisdiction over the decisions in that memorandum with respect to the date chosen for a reopening and the amount of the worker's reopening wage rate. The worker provided submissions to WCAT on these matters, to which the employer has had an opportunity to respond.

The initial appeal to WCAT was from the Review Board finding. The 2004 WCAT panel did not have a broader jurisdiction than the Review Board panel in hearing the worker's appeal regarding his "reopening wage rate" in relation to the October 25, 1996 reopening of his 1977 claim. This concerned two sub-issues, as to whether the time period from November 4, 1995 to January 18, 1996 should be excluded from this calculation, and whether "other income" included in the worker's income tax return should be included. The Review Board panel found that the time period from November 4, 1995 to January 18, 1996 should be excluded from this calculation, but denied the worker's request to include other amounts in the calculation of his earnings. The 2004 WCAT Decision agreed with the Review Board's factual findings regarding the reasons for the worker's absences from work, but concluded that as a matter of law and policy the period from November 4, 1995 to January 18, 1996 should not have been excluded. The 2004 WCAT Decision further directed that the Board recalculate the worker's reopening rate for the first eight weeks between October 25, 1996 and December 25, 1996, once it had gathered additional evidence.

The 2006 WCAT Decision allowed the worker's appeal from the Review Division decision implementing the 2004 WCAT Decision. The 2006 WCAT Decision found the worker's initial reopening rate ought to reflect his earnings at the time of reopening, calculated based on earnings of $8,800 over the three months prior to the reopening.

In both the Review Board finding, and the WCAT decisions, an issue to be considered concerned the worker's reopening wage rate under sections 32 and 33 of the Act as it existed prior to June 30, 2002. The Review Board finding, and both WCAT decisions, all concerned the worker's reopening wage rate in 1996. Viewed narrowly, the Review Board finding and the 2006 WCAT Decision involved different facets of this issue. Viewed broadly, the issue before the WCAT panel in the 2006 decision may be viewed as involving the same issue addressed by the Review Board panel.

Section 33(1) of the former Act provided in part:

> 33 (1) The average earnings and earning capacity of a worker must be determined with reference to the average earnings and earning capacity at the time of the injury, . . ., as may appear to the board best to represent the actual loss of earnings suffered by the worker by reason of the injury...

While an appeal concerning a worker's average earnings may focus on a particular issue, such as the exclusion of a particular time period or certain payments from the calculation, the issue may be viewed in broad terms as involving an exercise of

discretion under section 33 of the Act regarding the amount which best represents the actual loss of earnings suffered by the worker by reason of the injury.

Section 250 of the Act provides, in part, that WCAT must make its decision based on the merits and justice of the case, and that WCAT is not bound by legal precedent. However, this application involves a question about the application of common law rules of natural justice and procedural fairness which must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly. No deference applies to the determination by the WCAT panel on this preliminary issue. As well, my decision is subject to review on the same grounds. Accordingly, I consider it appropriate to take guidance from the decisions of the British Columbia courts.

Upon review of the various court decisions cited above, it is apparent that there is some debate concerning the circumstances in which it is appropriate for a judge to hear a matter following an earlier determination by the judge in respect of the same or a closely related matter. One of the difficulties I encountered in considering this matter was in understanding why a judge could not further consider a matter which he or she had previously addressed in some circumstances, whereas a court or tribunal could reconsider its decision in other circumstances. It seems to me that the best explanation for this is contained in the reasons of Mr. Justice Hall in the *B. C. Nurses' Union* case. I further note that many of the cases which involved the most exacting approach as to when a reasonable apprehension of bias might arise stem from the criminal law context. It may be that the protections afforded an accused in the criminal law context require a more exacting approach than in a civil proceeding.

Notwithstanding the fact that the 2003 Review Board finding and the 2006 WCAT Decision involved different facets or sub-issues, both decisions required a judgment regarding the worker's average earnings and earning capacity under section 33 of the Act concerning the amount which best represented the actual loss of earnings suffered by the worker by reason of the injury. As the WCAT vice chair had previously reached a conclusion on this issue in the Review Board finding (which was overturned by the 2004 WCAT Decision), it may be argued that a reasonable apprehension of bias arises in relation to the vice chair's further consideration of this issue in relation to the appeal stemming from the decision implementing the 2004 WCAT Decision. While the reasoning in *Nolin* was not followed in *Michell*, the judge in *Michell* had not previously provided a finding on the merits. In the present case, the WCAT vice chair had previously addressed an appeal regarding the worker's 1996 reopening wage rate on the merits. By inference, and viewing the issue of the worker's reopening wage rate broadly, the vice chair was not addressing an entirely new issue.

On the other hand, the reasoning contained in the 2003 Review Board finding regarding the worker's reopening wage rate was primarily focussed on the two specific questions as to whether the November 14, 1995 to January 18, 1996 time period should be excluded, and whether certain other income should be included in the worker's

earnings. The panel's findings on these issues did not involve questions of credibility. The Review Board finding on one of these points was overturned by a higher tribunal (WCAT), on the basis of a different interpretation of the policy. The 2004 WCAT panel further directed the Board to recalculate the worker's reopening wage rate for the first eight weeks between October 25, 1996 and December 20, 1996. This required consideration of a different aspect of the worker's reopening wage rate which was not addressed in the prior Review Board finding.

Pursuant to section 255(1) of the Act, a WCAT decision is final and conclusive. The 2006 WCAT panel was bound by the 2004 WCAT decision, which required the vice chair to examine a different facet of the worker's reopening wage rate. As well, *Review Decision #20620* raised a new issue regarding the application of the policy at #66.01(2)(a) of *Volume I* of the *Rehabilitation Services and Claims Manual* concerning the payment of a shift differential. These questions were not addressed in the 2003 Review Board finding.

The vice chair did not see any connection between the issues addressed in the prior Review Board finding, and those raised in the latter appeal to WCAT. While I find that there was some connection between these issues, I am not persuaded that it was sufficiently close as to give rise to a reasonable apprehension of bias. The vice chair has not reached a firm conclusion regarding credibility, for example, which would make it impossible for her to address the issues raised in this appeal afresh. Both the prior Review Board finding, and implementation of the 2004 WCAT decision, involved a focus on particular sub-issues regarding the worker's reopening wage rate. To the extent that broad consideration of the worker's reopening wage rate was required by section 32 and 33 of the Act, this was provided by the 2004 WCAT decision. The task of the panel in the 2006 WCAT Decision was to ensure that the 2004 WCAT Decision was correctly implemented. This raised new sub-issues for consideration, which were largely separate from those addressed in the 2003 Review Board finding. In these circumstances, I am not persuaded that a reasonable apprehension of bias arises in connection with the panel's refusal to recuse herself in the 2006 WCAT Decision. I do not consider that a reasonable person, properly informed and viewing the circumstances realistically and practically, would conclude that the decision-maker might well be prone to bias.

In my opinion, it would be prudent for WCAT to refrain from assigning a case to a vice chair involving implementation of a decision which overturned a prior decision by the vice chair on the particular claim. It would similarly be prudent for a vice chair to recuse himself or herself in such circumstances, particularly if this can be done in advance of a scheduled hearing date. However, on the question as to whether the specific circumstances of this case give rise to a reasonable apprehension of bias, I am not persuaded that this is the case. The employer's application for reconsideration on this issue is denied.

I have further considered what the result would be, if I am wrong on this issue, in relation to the remainder of the 2006 WCAT Decision (concerning the worker's appeal of the September 12, 2002 decision). In some circumstances, a reasonable apprehension of bias would necessitate voiding the entire decision (such as if there was some connection between the decision-maker and one of the parties). In this case, the bias allegation concerned the fact that the WCAT panel had previously rendered a decision regarding the worker's 1996 reopening wage rate. I find that any such apprehension of bias, were one found to exist, would be limited to the 2006 WCAT panel's further consideration of the worker's 1996 reopening wage rate, and would not necessarily extend to unrelated issues. The portion of the 2006 WCAT Decision relating to the worker's appeal of *Review Decision #20620* would be severable from the portion of the decision dealing with the worker's appeal of the September 12, 2002 decision by the claims adjudicator, Disability Awards Department. While those two appeals were addressed together, I consider that the panel's decision on the appeal of the September 12, 2002 decision could stand alone (subject to the further consideration provided below regarding the employer's arguments regarding this latter aspect of the decision).

The Review Board finding made a number of recommendations as to the further adjudication to be carried out by the Board, in connection with its acceptance of the worker's chronic pain. In so doing, the Review Board panel apparently overlooked the September 12, 2002 decision, which became the subject of the 2006 WCAT Decision. I note, in this regard, that the Review Board panel held its oral hearing on June 6, 2002, and subsequently included in its findings the worker's appeals from decisions dated July 11, 2002 and August 9, 2002. The September 12, 2002 decision was obviously issued at a later date. It is possible this later decision was not contained in the records provided to the Review Board panel. Alternatively, this later decision may have simply been overlooked. Upon reading the recommendations of the Review Board panel, I find no hint of prejudgment in its comments identifying further issues for adjudication by the Board. I do not consider that the panel's action of flagging issues for adjudication by the Board may be viewed as giving rise to a reasonable apprehension of bias.

The employer's representative submits the panel became fixated on the chronic pain issue and remained so. I do not find this submission persuasive. I do not consider it untoward for the Review Board panel to have flagged apparently outstanding issues for adjudication. The fact that this was done does not, in my view, give rise to any reasonable apprehension of bias in respect of the Board's determinations on those issues subsequently coming before the same vice chair in a later appeal.

In some circumstances, a finding on credibility may give rise to a reasonable apprehension of bias. It may be considered that the Review Board panel's acceptance of the worker's evidence regarding the physical demands and unsuitability of the Partsman position involved a finding of credibility. However, I read the portion of the 2006 WCAT Decision under the heading "Award for Psychological Condition", at

pages 14 to 22 (which appears to be the focus of the employer's objections), as primarily involving questions of policy and medical evidence. I do not consider that the circumstances of this case required the WCAT vice chair to recuse herself on the basis of a prior finding of credibility with respect to one of the parties.

B. Outside jurisdiction

The consultant representing the employer submits:

> The panel took great pains to ensure the worker would receive an increased award in order to qualify for a fresh Section 23(3) evaluation. She was outside her jurisdiction, however, when she ruled on the issue of permanent psychological impairment.

The first sentence of this quote, and other passages in the submission by the employer's representative, appear to allege actual bias on the part of the WCAT panel. To the extent this is so, I find that this accusation is without foundation. In *Adams*, *supra*, the British Columbia Court of Appeal reasoned:

> 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 similar allegation was recently considered by the British Columbia Supreme Court in the case of *Walter L.M. Speckling v. Labour Relations Board of B.C.* et al., 2006 BCSC 285. The court reasoned in part:

> [81] Mr. Speckling asserts that the Vice-Chair who made the decision in B334/2003 reverse engineered her decision and was thus biased. He says it is evident from a review of the law and the evidence that the Vice-Chair knew she was making decisions that are not supported in law and findings of fact that were not supported by the facts before her.

> [82] This is a serious allegation which requires proof. Mr. Speckling states in his argument that a decision which includes as many errors of law and patently unreasonable findings of fact must have been reverse engineered. He asserts that the Vice-Chair ignored relevant evidence and consistently favoured the Union and the employer.
>
> [83] There is no extrinsic evidence to support the allegations of bias. Mr. Speckling simply asserts that the Vice-Chair made errors in her interpretation of the law and drew improper inferences from the evidence.
>
> [84] An allegation of bias ought not be made unless there is sufficient evidence to demonstrate that there is a sound basis for apprehending that a person who has been appointed to an administrative board would not bring an impartial mind to bear on the case. Suspicion is not enough. ***Adams v. British Columbia (Worker's Compensation Board)*** (1989), 42 B.C.L.R. (2d) 228 (C.A.).
>
> [85] In ***R. v. R.D.S.***, [1997] 3 S.C.R. 484 impartiality was defined as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and arguments. In contrast bias connotes a state of mind that is predisposed to a particular result or is closed to particular issues at ¶ 104 and 105. The test for bias is a two-fold objective test: the person considering the alleged bias must be reasonable and the apprehension of bias must be reasonable in the circumstances at ¶ 111. The onus of demonstrating bias is on the person alleging the bias and the determination of whether there is a reasonable apprehension of bias will depend on the facts of the case at ¶ 114. There is a presumption in the case of judges that they will carry out their oaths of office at ¶ 117.
>
> [86] Section 129 of the ***Code*** requires that Vice-Chairs take an oath of office that they will faithfully, truly and impartially perform the office of Vice-Chair.

Following a detailed review of the various allegations of bias in that case, the court found that the petitioner had failed to satisfy the onus upon him to establish bias on the part of the vice chair. To the extent the employer may be alleging actual bias on the part of the vice chair in the present case, I similarly find that this is without foundation.

The WCAT panel concluded at pages 21-22:

> On the basis of Dr. Lum's narrative I conclude the worker suffers a degree of disability greater than 0% of total as a result of his compensable psychological disorder. However, since Dr. Lum did not complete the

> evaluation form, and the PDAC apparently did not actually consider making an award, there is insufficient information on which to determine the appropriate rating to be assigned.
>
> . . .
>
> The appeal of the Board officer's decision of September 12, 2002 is allowed in part only. I find:
>
> - the worker was not entitled to have his low back impairment reassessed in 2002, nor is he entitled to any additional award for his physical impairment;
> - he is not entitled to an additional award for his subjective complaints;
> - he suffers from a disability greater than 0% of total as a result of his diagnosed Pain Disorder Associated With Both Psychological Factors and a General Medical Condition; and,
> - the question of entitlement to a loss of earnings award should be addressed once the impairment related to the worker's permanent psychological condition is assessed.

The employer's representative submits, in connection with the panel's finding that the worker suffers from a psychological disability greater than 0%:

> A reasonable action might have been for her to refer the entire matter back to the Board for further evaluation. That would have been within her jurisdiction. Her conclusion, however, only serves to reinforce our view that she was biased against the employer at the outset.

For the purposes of my decision, I consider it useful to quote a passage from the 2006 WCAT Decision as illustrative of the evidence which was before the panel (at pages 6-7):

> A psychological assessment in September 2001, by Dr. Worth, psychologist, diagnosed a Pain Disorder Associated With Both Psychological Factors and a General Medical Condition, with moderate to severe impairment in occupational and social functioning, as well as depressive symptoms that were not at a clinical level. Dr. Worth said that vocational planning and implementation had been significantly impaired by the worker's chronic pain and depressive symptoms. He said that although pain disorders and depressive symptoms were usually temporary and treatable, in the worker's case the length of time since his injury, combined with the limited treatment efficacy from the pain program, suggested that permanent recovery and / or remission was unlikely.

In October 2001, the worker's case manager accepted a Pain Disorder Associated With Both Psychological Factors and a General Medical Condition under the claim and referred the file to Disability Awards. As Dr. Worth's assessment had addressed diagnosis, etiology, and treatment, not impairment, the CADA arranged for the worker to be referred for a current DSM-IV psychological assessment for pension purposes.

The worker saw Dr. Lum, psychologist, for assessment on April 29, 2002. In his summary Dr. Lum said, concerning social functioning, that there was evidence of an ongoing ability to communicate appropriately with other individuals, ask simple questions, interact with co-workers and supervisors, maintain socially appropriate behaviour, and adhere to basic standards of neatness. Concerning concentration, persistence and pace, he said there was continuing ability to focus attention for common work tasks, carry out instructions, be punctual, maintain an ordinary routine independently, work with others without being distracted, and make simple work-related decisions, but noted that, on account of the worker's pain, there might be problems concentrating for extended periods, performing within a schedule, maintaining regular attendance, completing a normal work day, and functioning at a consistent pace. Concerning activities of daily living, Dr. Lum said there was ongoing capacity in the performance of self-care, personal hygiene, and hand and sensory functions, as well as understanding and remembering work procedures and instructions; but the pain impacted the worker's ambulation, physical activity, travel, sexual function, sleep, and basic social and recreational activities.

Dr. Lum concluded, as had Dr. Worth, that the worker met the criteria for a diagnosis of Pain Disorder Associated With Both Psychological Factors and a General Medical Condition, secondary to his claims injuries and sequelae. Although the worker still had some depressive features, they continued at a sub-clinical level, and did not warrant any mood disorder diagnosis or rating for pension purposes. The worker displayed symptoms of pain as the predominant focus of his clinical presentation; with ensuing significant distress and impairment in occupational and other areas of functioning. However, Dr. Lum stated that the diagnosed pain disorder was deemed "an ambiguous and vague biopsychosocial dysfunction, and unratable from a medial or psychological perspective for pension purposes."

Dr. Lum commented that "analogous to the claims consideration for subjective complaints, adjudicative consideration should be given to this pain disorder, in terms of its intensity, the emotional distress related to the pain, and the deficits in activities of daily living secondary to the pain."

There was expert evidence before the WCAT panel concerning the worker's psychological condition, as provided by Dr. Worth and Dr. Lum. The employer's disagreement with the panel's decision concerns its conclusion that the worker had a psychological disability greater than 0% of total as a result of his diagnosed Pain Disorder Associated With Both Psychological Factors and a General Medical Condition. The employer's representative submits:

> The panel admitted that although she disagreed with the decision, she was unable to assign a percentage of impairment but rather stated that it must be greater than 0%. That statement alone is sufficient to conclude her decision was outside her ability to determine. If the panel is competent to determine the worker suffers from a permanent psychological impairment she would surely be competent enough to determine, based on the file information, the extent of that impairment.

The submission by the employer's representative appears to combine questions of jurisdiction and expertise.

The worker appealed the September 12, 2002 decision that no pension award would be granted "with regards to your Psychological and/or subjective complaints despite the acceptance of a 'Chronic Pain Disorder' under claim [*sic*]". I find that the issue as to whether the worker was entitled to a pension award for his psychological disability was properly before the WCAT panel for determination. I do not consider that the WCAT panel was bound to accept the conclusion of Dr. Lum and the Board's Psychological Disability Awards Committee on the question as to whether the worker was entitled to a pension award. This involved issues regarding the weight of the medical evidence and the interpretation and application of policy. These issues were within the jurisdiction of the WCAT panel to determine. I consider that it was open to the panel to deny to worker's appeal, or to allow the worker's appeal by fixing an award of a particular percentage, or specifying a range, or by finding that the worker was entitled to an award of more than 0%. In considering the scope of the WCAT panel's jurisdiction in addressing the worker's appeal on this issue, I find (on a correctness standard) no basis for concluding that the panel exceeded its jurisdiction. I find that the decision was one within the range of possible findings on the issues raised in the worker's appeal, which was within the jurisdiction of the WCAT panel to make.

C. Arbitrary use of discretion

The consultant representing the employer further submits that the WCAT panel's exercise of discretion was patently unreasonable, as being arbitrary, improper and based on irrelevant factors.

In *Bernardus Speckling v. British Columbia (WCB),* (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.

In *Administrative Law in Canada*, Third Ed. (Ontario: Butterworths, 2001), Sara Blake states at page 191:

> Findings of fact are reviewable only if patently unreasonable. An unreasonable finding of fact is one that is not supported by any evidence. A court will not review the evidence considered by the tribunal to determine whether there was sufficient evidence to support a finding of primary fact. A court will go no further than to determine whether there was any evidence, and only essential findings of fact upon which the decision of the tribunal turns will be reviewed in this manner. Non-essential findings of fact are not reviewable.

The same passage (with the word "primary" deleted) appears at page 213 of the Fourth edition of this text.

Pursuant to section 58(3) of the ATA, a discretionary decision is patently unreasonable if the discretion is exercised arbitrarily or in bad faith, is exercised for an improper purpose, is based entirely or predominantly on irrelevant factors, or fails to take statutory requirements into account. I find, however, that there was evidence before the WCAT panel to support its conclusion. The panel provided detailed reasons to explain its interpretation of the policy (in particular, at pages 16-21). As well, at page 21 the panel adopted by reference the reasoning expressed in *WCAT Decisions #2003-03993* (a decision of the same panel dated December 4, 2003, which in turn cited *Appeal Division Decision #2003-0576*), *#2004-03099* (June 11, 2004) and *#2005-00355* (January 25, 2005).

WCAT Decision #2004-03099, by a different WCAT panel, explained:

> I find quite compelling the following comments by the panel in *WCAT Decision #WCAT-2003-03993-RB*:

> . . .
>
> Item #22.33 has since been changed. Item #39.01 has also been changed. As well, item #22.35 dealing with pain and chronic pain has been added to the RSCM. I do not consider that those amendments are relevant to the case before me. I note that the amendments emerged from *Resolution 2002/11/19-04* of the panel of administrators. That resolution, which was effective on January 1, 2003, "applies to new claims received and all active claims that are currently awaiting an initial adjudication." I consider that, in the claim before me, the issue of pain problems underwent initial adjudication well before January 2003. The worker's subjective complaints were accepted well before that date, as was the worker's pain disorder.
>
> While the February 24, 2003 decision was rendered after January 1, 2003, I do not consider that policy in effect at the time the decision was issued was applicable. I have not turned my mind to determining whether the result in this case would be different had the revisions to items #22.33 and #39.01 and the new item #22.35 been applicable.

While not necessary to my decision, I note that the reasoning contained in *WCAT Decisions #2003-03993* has been cited with approval in a number of other decisions (*WCAT Decisions #2004-04097*, *#2005-02625*, *#2005-05003*, *#2005-00620*, *#2005-06874* and *#2006-01524*). In particular, I note that *WCAT Decision #2004-04097* was issued by a panel of three vice chairs (not including the vice chair who issued the decision which is the subject of this application) appointed under section 238(5) of the Act. The three member "non-precedent" panel reasoned in that case:

> We find the appropriate method for determining the worker's psychological PFI is found in item #38.10 of the RSCM I. With reference to *WCAT Decision #2003-03993* (published at www.wcat.bc.ca) we note that panel's discussion of whether a DSM-IV diagnosed Pain Disorder causing permanent impairment was properly rated under the subjective complaints (now chronic pain) provisions of #39.01 and item #22.33 (post 2001 amendment). **We find that panel's analysis regarding the distinction between a DSM-IV diagnosed Pain Disorder and other forms of chronic pain, at pages 13 to 15, persuasive and adopt it as our own. This panel concludes the worker's Pain Disorder is not simply "chronic pain", as contemplated by RSCM I policy #39.01 and #22.33, but a distinct clinical entity constituting a psychological impairment. The Board should, therefore, determine the worker's Pain Disorder PFI entitlement according to the AMA Guides as**

> **adopted in the psychological disability section of the PDES in the RSCM I**.
>
> The panel notes Dr. Lum's assessment declines to provide a rating for the worker's Pain Disorder. As discussed above, however, he does state the main reason for the worker's inability to return to work was his Pain Disorder and attitudinal/motivational factors. We have considered our ability to assess the percentage of total disability associated with the worker's Pain Disorder under the PDES and find insufficient evidence to reach conclusions as to the appropriate percentage. Without expert evidence assigning the worker to a class and level of impairment, this panel is unable to determine the percentage of impairment associated with his Pain Disorder. We do note, however, that the worker was entitled to a 5% PFI for his compensable Major Depressive Disorder and the evidence indicates this condition was much less of an impact on his level of disability. As such, it would not be possible for the worker to receive less than 5% PFI for his compensable Pain Disorder.
>
> [emphasis added]

The three member panel similarly refrained from reaching a conclusion as to a specific percentage of disability associated with the worker's pain disorder. In that case, the panel found that the award would have to be at least 5%. In the present case, the panel found that the award would have to be more than 0%.

The employer's representative submits:

> The panel seems to think she is more professionally qualified to make recommendations with respect to psychological impairment than the psychologist recognized by the Board. Dr. Lum has extensive training and experience to qualify him for this role. We don't believe the panel has any specific training as a psychologist or has the ability to overrule the professional opinion of a psychologist. . . .
>
> The panel presents her decision in such a way as to illustrate impartiality and a sense of deep reflection and consideration of the policies. We submit that she lacks the clinical expertise to conduct a comprehensive and complex evaluation. She concedes the worker is not entitled to further consideration for chronic pain. She has arbitrarily turned her focus to psychological issues that are clearly not relevant to the worker's entitlement to benefits under the Act.

The employer may disagree with the panel's analysis, but that does not mean the panel's decision was arbitrary or based on irrelevant factors. While the employer's representative argues that the panel's decision was patently unreasonable, he does not

acknowledge or address the reasoning contained in the other WCAT decisions cited by the WCAT panel (accessible on WCAT's website). I find that the 2006 WCAT Decision contained detailed reasoning to explain its conclusions, and that there was evidence before the panel to support its conclusions.

With respect to the complaint that the WCAT vice chair lacks clinical expertise, I find that this involves a misapprehension or misunderstanding regarding the role of a quasi-judicial decision-maker in an administrative tribunal. This complaint is similar to the question sometimes expressed by workers, as to how a WCAT vice chair could decline to accept the opinion of the worker's physician when the vice chair is not a doctor.

WCAT vice chairs are not appointed on the basis of clinical expertise in various medical specialties. Rather, they are appointed to hear and weigh lay and expert evidence, for the purpose of making decisions based on the evidence with reference to the applicable law and policy. This role may be compared to that of a judge in the court system (although the workers' compensation system functions on an inquiry basis rather than an adversarial basis). Judges similarly evaluate the evidence of expert witnesses, rather than being clinical experts in all the various fields of speciality relevant to the range of cases coming before them for decision.

In consideration of the foregoing, I find no basis for concluding that the 2006 WCAT Decision involved an exercise of discretion which was arbitrary or involved an improper purpose, was based on irrelevant factors, failed to take statutory requirements into account, or was otherwise "openly, clearly, evidently unreasonable."

Conclusion

The employer's application for reconsideration of *WCAT Decision #2006-00391-RB* is denied, on the common law grounds. No error of law going to jurisdiction has been established. The 2006 WCAT Decision did not involve a breach of natural justice (involving a reasonable apprehension of bias). It did not involve jurisdictional error. Nor was the decision patently unreasonable, as involving an arbitrary use of discretion.

The 2006 WCAT Decision stands as final and conclusive. Implementation of that decision remains before the Board.

Herb Morton
Vice Chair

HM/cda/jd