Noteworthy Decision Summary

Decision: WCAT-2006-02475 **Panel:** Herb Morton **Decision Date:** June 9, 2006

Reconsideration – WCAT's jurisdiction – Res judicata – Jurisdictional error – Section 96(5)(a) of the Workers Compensation Act – Item #14.30 of the Manual of Rules of Practice and Procedure

This was a reconsideration of a prior WCAT decision. The original panel's use of the term res judicata was not necessary to its conclusion on jurisdiction. The original panel's conclusion is supported by the limits on the authority of the disability awards officer to assess the worker's disability related to the conditions accepted under the claim, and the general 75-day time limit on the reconsideration authority of the Workers' Compensation Board (Board) in section 96(5)(a) of the *Workers Compensation Act* (Act); the conclusion is also consistent with item #14.30 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP). Tribunals are not bound by the concept of res judicata. There was no jurisdictional error in the WCAT decision.

The original panel found that the issue as to whether the worker's injury involved a brain injury was not one addressed in the 2005 decision of the Review Division of the Workers' Compensation Board (Review Division) or the underlying decision by the Board's disability awards officer, and therefore was not one within its jurisdiction to determine. The case manager determined that the only permanent compensable consequence of the injury was post traumatic stress disorder. The panel reasoned that res judicata applied since the issue of brain injury was decided by the Board in 1998 and was never appealed. On reconsideration, the worker alleged the original decision involved jurisdictional error because the original panel concluded it lacked jurisdiction over the issue of possible brain injury, and failed to expressly cite and address sections 21, 23, 250 and 254 of the Act.

The original panel's failure to expressly cite these sections of the Act did not represent a failure to consider their effect. The original panel made clear the basis for its decision by stating that the issue of brain injury was previously decided and never appealed. While it might have provided additional comments regarding the various provisions of the Act, it was evident that the original panel's decision had regard to the relevant statutory framework.

The original panel's reference to res judicata appears to have referred to the fact that the disability awards officer and review officer did not have authority to revisit or reconsider earlier decisions concerning the conditions accepted as permanent consequences of the injury. The use of the term res judicata to explain this conclusion was not necessary to the panel's conclusion regarding its jurisdiction. Tribunals are not bound by the concept of res judicata. The panel's conclusion is supported by the limits on the authority of the disability awards officer to assess the disability related to the conditions accepted under the claim, and by the general 75-day time limit on the Board's reconsideration authority in section 96(5)(a) of the Act. It is also consistent with item #14.30 of the MRPP. There was no jurisdictional error in the WCAT decision.

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WCAT Decision Number: WCAT-2006-02475
WCAT Decision Date: June 09, 2006
Panel: Herb Morton, Vice Chair

Introduction

The worker seeks reconsideration of the December 6, 2005 Workers' Compensation Appeal Tribunal (WCAT) decision (*WCAT Decision #2005-06511*, or the WCAT decision). The worker requests that the WCAT Decision be set aside on the basis of jurisdictional error.

In the alternative, the worker has requested an extension of time to appeal *Review Division Decision #942* dated July 17, 2003. By letter dated March 27, 2006, the worker's lawyer requested that the same panel consider both applications (if necessary), given the intertwined nature of these applications.

The WCAT decision was issued by the WCAT panel to address a preliminary jurisdictional issue. The worker had appealed two Review Division decisions to WCAT (*Review Decisions #23340* dated February 28, 2005 and *#25981* dated May 31, 2005). The worker's representative requested a four-hour oral hearing, so as to permit two expert witnesses to testify as to whether the worker's compensable injuries included an organic brain injury. The panel held a hearing on September 9, 2005, to determine whether the question as to whether the worker suffered a brain injury as a result of his June 7, 1997 work injury was an issue within its jurisdiction to address in these appeals. In its decision, the WCAT panel concluded that this issue was not within its jurisdiction. Consideration by the WCAT panel of the worker's appeals has been deferred pending the outcome of this reconsideration application.

The worker's application for reconsideration was initiated by a letter from his lawyer dated February 14, 2006. This letter enclosed written submissions and a Book of Authorities. On February 20, 2006, WCAT's legal counsel advised that this letter would be processed as an application for reconsideration. A submission dated March 27, 2006 was provided by the worker's lawyer in support of his application for an extension of time to appeal.

The worker's representative has provided written submissions on both applications. Although invited to do so, the employer is not participating on either application. I agree that the worker's applications both concern the application of certain legal tests, and can properly be 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. I will refer to the worker's June 7,

1997 work injury as an electrical injury. As the dictionary definition of "electrocution" indicates that this term is used where an electrical injury causes death, I will not use that term in relation to the worker's injury except where it is contained in a quote (as meaning an electrical injury).

Issue(s)

Did the WCAT decision involve jurisdictional error? Alternatively, are grounds established for granting an extension of time for an appeal to WCAT from the July 17, 2003 Review Division Decision?

Jurisdiction

(i) Reconsideration

The reconsideration application was 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).

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**.

[emphasis added]

Practice and procedure at item #15.24 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) 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.

(ii) Extension of time to appeal

The application for an extension of time to appeal was assigned to me by the WCAT registrar (pursuant to paragraph 18 of *Decision of the Chair No. 8*, *supra*). Section 243(3) of the Act sets out three requirements that must be met in order for an extension of time application to be successful:

- the appellant is required to demonstrate that special circumstances precluded the filing of the notice of appeal on time;
- it must be determined that an injustice would result if the extension of time were not granted; and
- the chair must exercise the discretion to grant the extension of time in favour of the applicant.

Background

The following summary of the background evidence focuses on the evidence I consider relevant to the issues raised in these applications. As my decision does not concern the merits of the worker's claim, I did not consider it necessary to refer to all the expert opinions and other evidence relating to the merits of the worker's claim.

The worker suffered an electrical injury on June 7, 1997, while working as an electrician. A site visit was conducted by the case manager on May 31, 1998 to discuss a work assessment. This meeting involved the worker, the union and the employer. The case manager's notes concerning that meeting include the following:

> The meeting went very well, I explained to all the purpose of the meeting was to try to assist [the worker] in his return to gainful employment, and how a work assessment works. [The worker] has a sheet of paper where he had noted his possilbe [*sic*] nervous system damage. I assured him that to date, there was no medical evidence on file to indicate he had sustained any type of permanent damage in these areas. I can't speak for the future, but he was assured that should he notice anything worrisome in the future, he should see his doctor, and we will determine if it makes sence [*sic*] medical [*sic*] that it could be related to his work injury.

By letter dated July 25, 1998, a case manager advised the worker:

> You were injured as a result of electrical burns on June 7, 1997 and a claim was accepted for 2nd degree electrical burns to the right hand and forearm, 3rd degree burns to the soles of both feet and 1st and 2nd degree burns to the right foot. The medical evidence currently on file indicates that you have recovered sufficiently to perform your pre-injury duties as an electrician. Furthermore, there is no indication of any permanent restrictions….
>
> Wage loss benefits will conclude July 25, 1998. It is anticipated that your injury will completely resolve, however, you may continue to experience some symptoms e.g. fatigue which are expected to diminish over time.

The worker returned to work in the fall of 1998. He remained at work as an electrician until, on April 19, 2002, he viewed a safety video that depicted an electrocution and went off work. By decision dated July 4, 2002, a case manager advised the worker that a new claim for post traumatic stress disorder had been accepted based on the April 19, 2002 incident.

[The employer appealed the July 4, 2002 decision to the former Workers' Compensation Review Board (Review Board), and this appeal was transferred to WCAT. By decision dated June 16, 2004 (*WCAT Decision #2004-03134-RB*), the WCAT panel found that the 1997 injury was the primary cause of the worker's PTSD symptoms and behaviours for which the worker went off work in April of 2002. The WCAT panel found that the worker's 1997 claim should have been reopened, and that the video incident should not have been treated as a new claim.]

On July 5, 2002, a Board psychologist prepared a "To Whom it May Concern" letter for the purpose of referring the worker for psychological services. This letter set out the background to the worker's claim and identified the clinical issues to be addressed in treatment as follows:

> [The worker's] claim has been accepted and he now requires treatment of the PTSD symptoms. **Please note that neuropsychological**

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> **assessment has been ruled out at present as the cognitive symptoms [the worker] reports are attributed to his anxiety**. [The worker] may benefit from EMDR [Eye Movement Desensitization and Reprocessing] treatment for his PTSD symptoms.
>
> [emphasis added]

By letter dated July 17, 2002, the Board's clinical services coordinator, Psychology Services, referred the worker to Dr. M. Wilensky for psychotherapeutic treatment, enclosing the referral letter quoted above. In a letter to the Board dated August 21, 2002, Dr. Wilensky described the worker's condition and commented:

> While these symptoms may be related to his Posttraumatic Stress Disorder, I would not rule out neuropsychological damage as well.

In a letter to the Board dated September 11, 2002, Dr. Wilensky advised:

> [The worker] and his wife describe many difficulties of memory, attention, concentration, organization and inappropriate social skills. . . .
>
> We have been working in session on remedial strategies to cope with his impairment. The little EMDR processing that we have attempted has been unusual. This is another indication to me of potential organic difficulties that impair information processing.

Dr. Wilensky enclosed a copy of an article entitled "Behaviour Consequences of Lightning and Electrical Injury", Primeau, Engelstater and Bares, *Seminars in Neurology*, Volume 15, Number 3, September 1995. In a further letter dated October 10, 2002, Dr. Wilensky advised:

> As described in my previous letter, [the worker] is having a variety of difficulties that may not be solely symptoms of Posttraumatic Stress Disorder. These problems date from the time of the electrocution, but he was able to cover. The employer made allowances by having him supervised and reducing his responsibilities.

A team meeting was held at the Board on October 3, 2002. Attendees included the case manager (who was handling the 2002 claim), client service manager, vocational rehabilitation consultant, medical advisor, psychologist and team assistant. The case manager's claim log entry concerning the meeting contains the following under the heading "Issues":

> 1. Further treatment or investigation needed?

- The Psychologist stated that he has reviewed the Consult Reports of 2002/08/21 and 2002/09/11. He stated that he has called and discussed these with the author of these reports. While the worker may be in need of some additional treatment for the Post Traumatic Stress Disorder, he indicated that the worker should be assessed for a possible brain injury. Where previously, the worker's neuro-psychological screening under his previous claim was negative, the Psychologist stated that he intends on review [*sic*] the pending assessment in relation to the worker's previous neuro-psychological assessment to see if the worker has suffered a brain injury under the previous claim.

- Medical Advisor indicated that the "memory, attention, concentration, organization, and inappropriate social skills" could be age related.

- The Vocational Rehabilitation Consultant indicated that the employer had expressed under the previous claim that the worker had some of these issues prior to his electrocution.

- The psychologist will take this into consideration in formulating his opinion.

- He was not able to state how he would disseminate the two possibilities.

The case manager further commented, under the heading "Action Plan" regarding the team meeting:

1. Consult Report pending.
2. Further treatment being considered.
3. When Consult Report is reviewed by Psychologist, this will be reviewed again at time.

Subsequently, in a lengthy memo dated October 17, 2002 to the Board psychologist, the case manager requested advice as follows:

> This memo is with consideration to addressing the consult report of October 10, 2002; **the consideration of either a brain injury under this workers [*sic*] 1997 claim** or an aggravation of his brain injury under his 2002 claim; and, the consideration of further PTSD treatment under the 2002 claim.
>
> [emphasis added]

Following a detailed summary of the background medical and psychological evidence, the case manager inquired:

> ISSUE 1 – POSSIBLE BRAIN INJURY
>
> 1. Was the neuro-psychological examination conducted at VGH in 1997 a valid screening test for brain injury?
> 2. Does that report support that this worker suffered a brain injury in relation to his 1997 work injury?
> 3. Conversely, does the workers [*sic*] memory ability support that the worker in fact did not suffer a brain injury in 1997?
> 4. If the worker were to have suffered a brain injury in 1997, in what time line would you expect symptom onset to be and what symptoms would you have expected?
> 5. What is the current diagnosis supplied in the consult report of August 10, 2002?
> 6. Of these diagnosis [*sic*] provided in the consult report of October 10, 2002, what are some other potential causes or non work related conditions that could be the source of the workers [*sic*] symptoms?
> 7. Do you believe that it is likely that this worker suffered a brain injury under the 1997 work accident?
> 8. If the worker did not suffer a brain injury under his 1997 claim, is there any reason to pursue any further neuro-psychological examinations in relation to his 2002 safety video incident?
>
> ISSUE 2 – POST TRAUMATIC STRESS DISORDER
>
> 9. Of the diagnoses provided in the Consult Report of October 10, 2002, would you relate any of these strongly to the diagnosis of Post Traumatic Stress Disorder?
> 10. Is any further treatment required for this workers [*sic*] post traumatic stress disorder? If so, to what extent is it required?

A Board psychologist provided a detailed memo in response, dated October 18, 2002. The psychologist commented, in part:

> **7. Do you believe that it is likely that this worker suffered a brain injury under the 1997 work accident?**
>
> Common complaints from electrocution victims include the cognitive symptoms displayed by the worker. Disturbances of attention, memory, and problems with fatigue, irritatbility [*sic*] and depression are consistent with a head injurymodel [*sic*] of electrocution victims. PTSD and other disorders related to anxiety are also related to electrocution. The question of whether these symptoms are "organic" or "reactive" is a diffcult [*sic*] one. The research in this area is not unequivacal [*sic*]. Therefore, in answer I would say "possible" head injury, but head injury is not necessary to produce the symptoms displayed by this worker.
>
> **8. If the worker did not suffer a brain injury under his 1997 claim, is there any reason to pursue any further neuro-psychological examinations in relation to his 2002 safety video incident?**
>
> Psychological and medical assessments given to this worker are unable to detect neuro-psychological impairment. However, given the progressive nature of neuro-psychological impairment associated with electrocution, it can not be ruled out, although at five years after the date it becomes very difficult to ascertain the relationship with any degree of certainty. And the issue is also complicated by factors mentioned above such as aging and health issues. There is no reliable way to determine difinitively [*sic*] at this point the etiology of his symptoms. At the present time I do not believe further neuro-psychological assessment is warranted. I would recommend further medical investigation be undertaken regarding his health and behavioural symptoms. I also would support psychological counselling as suggested by Dr. Wilensky. Medical diagnosis related to his cognitive symptoms should offer some clarity. As well, counseling may relieve some of the symptoms this worker is complaining of.

By memo dated October 18, 2002, the case manager noted:

> Thank you for your timely and detailed response. In short, it appears to me that there is no further treatment or investigations in relation to neuro-psychological issues (**in relation to either the 1997 claim or the 2002 claim**).
>
> [emphasis added]

The October 18, 2002 memo by the case manager appears to have addressed both the 1997 and 2002 claim files. No decision letter was issued to the worker under his 1997 claim file in the latter part of 2002, concerning the Board's further inquiry and consideration regarding the question as to whether the worker had suffered a brain injury in 1997. However, by decision dated December 11, 2002 under the worker's 2002 claim file (relating to the video incident, and later consolidated into the worker's 1997 claim), the case manager advised:

> Other issues noted in treatment consult reports [by Dr. Wilensky] included "memory, attention, concentration, organization, and inappropriate social skills." The Medical Advisor indicated in the team meeting of October the 3rd , 2002 that these could be age related. There was some mention that these could be of a psychological origin in nature. The WCB Psychologist reviewed your claim on October 17, 2002. When asked in [*sic*] the neuropsychological examination conducted at VGH in 1997 was a valid screening test for a brain injury, he indicated that it was. He indicated that this report states that, "there were no signs of cognitive impairment". Specifically you displayed no signs of a brain injury. He noted that there was no reference to the etiology, or source of, the mental flexibility, problem solving, and preservation. He noted numerous other potential causes or non-work related conditions that could be the source of your current symptoms. And stated that "there is no reliable way to determine definitively at this point the etiology of [your] symptoms." And that no further psychological assessments were warranted for "memory, attention, concentration, organization, and inappropriate social skills." With respect to the Post Traumatic Stress Disorder, he noted that "if progress is not noted soon with [your] work with Dr. Wilensky, consideration should be given [to] determining that relationship."

The December 11, 2002 decision letter advised that the accepted diagnosis under the worker's 2002 claim was post traumatic stress disorder. The case manager terminated wage loss effective December 15, 2002. The case manager advised that no further psychological treatment would be authorized under this claim, stating:

> My reasons are:
> - The consult reports of August 21, 2002 and Sept. 11, 2002 refer to "memory, attention, concentration, organization and inappropriate social skills…"
> - The WCB psychologist has indicated that there is no reliable way to determine definitively at this point of the etiology of these symptoms.
> - He noted that these could be related to aging and health issues unrelated to this claim.
> - **These unknown conditions were not accepted under this claim.**

- The Board psychologist has indicated that the issue of treatment of PTSD has not proceeded and was unlikely to proceed with additional treatment.

[emphasis added]

The worker requested review of the December 11, 2002 decision. *Review Division Decision #942* dated July 27, 2003 identified the issue in the review as concerning the Board's decision to deny further psychological counseling to the worker under the 2002 claim. The review officer allowed the worker's request for review and varied the Board's decision of December 11, 2002. The review officer reasoned in part:

> The Board contracted with Dr. W. to provide treatment for PTSD. Dr. W.'s reports indicated that the worker had additional symptoms and issues that needed to be addressed prior to proceeding with treatment for his PTSD. Dr. F. indicated that the worker would benefit from either additional or alternative counseling in his local region if Dr. W.'s treatment did not result in improvement of the worker's PTSD.
>
> Both Dr. Y and Dr. W. noted the worker was improving in his psychological functioning, however not specifically with his PTSD. Upon questioning by Dr. F., Dr. W. explained that he was very reluctant to address the worker's PTSD, as the worker appeared to be very fragile. Dr. F.'s opinion was that treatment for the worker's PTSD had not occurred and was very unlikely to proceed.
>
> I accept that Dr. W. required a greater amount of treatment time to reach the point where therapy for the worker's PTSD could begin than the Board had initially anticipated.
>
> I place greater weight on the evidence provided by ongoing reports from Dr. Y and Dr. W., who indicated the worker was showing signs of psychological improvement.
>
> I find that the worker must be provided further counseling for his compensable psychological injury. As a result, I allow the worker's request for review.

By decision dated April 27, 2004 (issued under the 2002 claim), the case manager noted that the worker had subsequently participated in 20 additional treatment sessions over a period of six months. The case manager advised that further psychological

treatment was not authorized under this claim, and that the worker's file would be re-referred to the Disability Awards Department. The worker requested review of this decision.

By decision dated July 22, 2004, the disability awards officer granted the worker a pension of 30% of total disability, plus 6% for age adaptability, for a total award of 36% of total disability effective April 20, 2002, with no loss of earnings pension award.

Review Decision #17209 dated October 6, 2004 concerned the worker's request for review of the April 27, 2004 decision. The review officer reasoned in part:

> I find, however, that based on the medical evidence on file, the worker never received the proper prescribed therapy to address his PTSD. As such, I do not find that the Board met a reasonable level of treatment to cure and relieve the worker's PTSD.
>
> Despite the PA's [Board psychology advisor's] October 2, 2003 referral of the worker to Dr. W for PTSD therapy, the evidence supports the conclusion that PTSD therapy was never administered to the worker by Dr. W. On March 12, 2004, the PA noted that regarding treatment for PTSD, Dr. W, despite months of treatment, had not even touched the PTSD and had determined that it would be best to leave the PTSD issues alone. The PA stated that the worker had not received any PTSD treatment from Dr. W, and Dr. W had no plan to include treatment for the worker's PTSD condition in future sessions. This appears to be the second time the worker was not administered PTSD therapy by Dr. W, as prescribed. The PA noted that Dr. W had also avoided dealing with PTSD issues in his treatment of the worker before the October 2, 2003 referral.
>
> I further find that counseling the worker for PTSD remains reasonably necessary, based on the medical evidence on file. . . .

By decision dated November 17, 2004, the case manager advised the worker concerning implementation of the October 6, 2004 Review Division decision. With respect to the worker's treatment by Dr. Wilensky for the period April 27, 2004 to the date of the decision, the case manager found that the treatment provided by Dr. Wilensky "has not been to cure and relieve the effects of the injury under this claim." The case manager denied any retroactive entitlement in relation to these treatment sessions. He authorized 12 weeks of treatment with another psychologist, Dr. Prkachin.

The worker requested review of the July 22, 2004 and November 17, 2004 decisions. *Review Decision #23340* dated February 28, 2005 confirmed the July 22, 2004 decision regarding the worker's pension entitlement. The review officer denied the request for reimbursement of Dr. Kaushanky's 13 page report of October 21, 2004 in support of the

worker's claim that he had suffered a brain injury as well as PTSD, as not having been reasonably obtained.

Review Decision #25981 dated May 31, 2005 granted the worker's request for review in part. The review officer found that the Board's decision to deny retroactive entitlement to the worker for his visits with Dr. Wilensky was unreasonable, as the Board itself originally approved the worker's attendance with Dr. Wilensky on two occasions. He found the worker was entitled to the medical and travel costs to attend treatment with Dr. Wilensky up to November 17, 2004, the date that the Board advised the worker that the treatments provided by Dr. Wilensky were not effective in curing or relieving the effects of the worker's PTSD accepted under the claim. He further found that the Board had now properly offered reasonably necessary PTSD treatment to the worker in the form of 12 weeks of PTSD treatment with Dr. Prkachin. The worker appealed *Review Decision #23340* (dated February 28, 2005) and *Review Decision #25981* (dated May 31, 2005) to WCAT.

In *WCAT Decision #2005-06511*, the WCAT panel found that the issue as to whether the worker had suffered a brain injury in his 1997 electrical injury at work was not before it. The panel reasoned in part:

> . . .simple *res judicata* does apply to the present appeals (*Review Decisions #23340 and #25981*), since the issue of brain injury was decided under the 1997 claim by a Board officer's decision of July 25, 1998, and was never appealed. The July 25, 1998 decision was the final decision with respect to brain injury.
>
> The only remedy that can now be entertained is for the worker to request an extension of time to appeal the July 25, 1998 decision.

Reasons and Findings

A. Reconsideration Application

The worker's lawyer submits that the WCAT decision involved jurisdictional error, and that the standard of review for such an error is correctness. I agree that the standard of review for a jurisdictional issue is correctness. While the worker's lawyer bases this submission on the common law and submits that section 58(2) of the ATA does not apply, I find that this conclusion is supported by both the common law and section 58(2)(c) of the ATA.

The worker's lawyer submits that the WCAT panel erred by omission, in failing to expressly cite and address sections 21, 23, 250 and 254 of the Act in its decision even though these sections were drawn to the panel's attention. I am not persuaded that the failure to expressly cite these sections of the Act represented a failure by the WCAT panel to consider their effect. I agree with the reasoning in *Appeal Division Decisions*

#97-0083, 14 W.C.R. 37, and *#2001-1794*, 17 W.C.R. 453. *Appeal Division Decision #97-0083* reasoned, at page 44:

> Part of the concept of natural justice is the principle that a person has a right to be heard before a tribunal makes a determination that affects his rights or interests. The right to be heard includes the right to present evidence as well as to submit arguments when all the evidence has been received. It follows that the decision-maker must hear that evidence and those arguments — that is, he must familiarize himself with the evidence and arguments presented. There is a presumption in law in favour of the regularity of the acts of public officials. That presumption applies to decision-makers in administrative tribunals. That presumption is, however, rebuttable. There is no general requirement at common law for members of administrative tribunals, nor for judges for that matter, to give reasons for their decisions. Generally speaking, therefore, the absence of reasons in support of a decision is not a breach of the principles of natural justice. However, inferences adverse to a tribunal may be drawn from the tribunal's failure to give reasons. Moreover, the courts have held that, regardless of whether there is a duty to give reasons, any reasons given must be adequate. To be adequate — that is, of value to the affected parties — the reasons should explain how the tribunal reached its conclusions, both on fact and on law or policy.
>
> **An Appeal Division panel need not acknowledge and address in its decision every point raised by an appellant or an affected party to an appeal. The failure to acknowledge and address every point raised will certainly not constitute a breach of the rules of natural justice**.
>
> [emphasis added]

I find that the WCAT panel made clear the basis for its decision, by stating that the issue of brain injury was decided under the 1997 claim by a Board officer's decision of July 25, 1998, and was never appealed. While the panel might have provided additional comments regarding the various provisions of the Act, including the provisions governing the statutory time limits for appealing and the provisions governing the granting of an extension of time for an appeal, I consider it evident that the panel's decision had regard to the relevant statutory framework.

The written submission provided to the WCAT panel by the worker's lawyer contained the following argument in paragraph 19:

> The only plausible basis for denying jurisdiction over the issue of brain injury is reliance on a version of the principle of *res judicata*. The *res judicata* argument would be that the question of the permanent conditions accepted on the claim was adjudicated in the Board's decision of December 11, 2002. In that decision, the Case Manager found that the only accepted psychological diagnosis on the claim was PTSD. The worker did not appeal that aspect of the decision, so it stands as a final decision.

The decision of the WCAT panel appears to have been provided on this basis, although the WCAT panel found that the relevant prior unappealed decision regarding the absence of a brain injury was dated July 25, 1998.

The worker's lawyer submits that the WCAT panel erred in characterizing the issue as to whether the worker had suffered an organic brain injury as being one involving "simple *res judicata*". The worker's lawyer submits:

> When it was suggested to the undersigned that WCAT may not take jurisdiction over the issue of brain injury in the context of the present appeals, we responded by arguing that the only plausible basis for denying jurisdiction would be by relying on the principle of *res judicata*. The panel apparently agreed with this characterization of the issue.
>
> . . .
>
> The panel incorrectly characterized the principle of *res judicata* and wrongly concluded that, for the purpose of the present appeal, the matter of brain injury is *res judicata*.

The worker's lawyer provides submissions regarding the doctrines of issue estoppel and cause of action estoppel. She submits that these are the only two forms of the doctrine of *res judicata*.

On page 4 of the WCAT decision, the panel concluded that "In this case, issue estoppel does not apply." On page 4, the WCAT panel noted the argument by the worker's lawyer:

> She submits that the issue of brain injury arises directly out of the appealed Review Division decision of February 28, 2005, and that the only plausible basis for denying jurisdiction over this issue is reliance on a version of the principle of *res judicata*.

On page 3, the WCAT panel described the contents of *Review Decision #23340* dated February 28, 2005 regarding the worker's pension entitlement as follows:

> The review officer's decision of February 28, 2005 confirmed the Board's decision dated July 22, 2004 regarding the worker's pension entitlement. In this decision, the review officer determined that PTSD had been accepted as a claim responsibility and recognized as the only permanent condition referred to the Board's Disability Awards Department for assessment. The review officer specifically refers to the case manager's decision of December 11, 2002 as the decision that determined that the only permanent consequence of the injury was PTSD. Although the review officer does not specifically mention "brain injury", it can be easily inferred from his reasons that this decision determined that permanent brain injury was not accepted as a compensable consequence of the workplace injury.

It is evident from reading the WCAT decision as a whole that the panel did not accept that the issue of brain injury was one determined in the February 28, 2005 Review Division decision (or underlying decision by the Board officer of July 22, 2004), so as to provide a basis for the WCAT panel to take jurisdiction over that issue. Rather, the WCAT panel read the Review Division decision as meaning that there had been a prior unappealed determination that a permanent brain injury was not accepted as a compensable consequence of the workplace injury.

In the context of this case, the panel's reference to *res judicata* appears to have referred to the fact that the disability awards officer who rendered the July 22, 2004 decision regarding the worker's pension entitlement (and hence, the review officer who rendered the February 28, 2005 Review Division decision regarding the worker's pension entitlement) did not have authority to revisit or reconsider earlier decisions by the case manager concerned the conditions accepted as a permanent consequence of the worker's 1997 work injury. The use of the term *res judicata* to explain this conclusion does not appear to have been necessary to the panel's conclusion. The panel's conclusion regarding its jurisdiction is supported both by the limits on the authority of the disability awards officer to assess the disability related to the conditions accepted under the claim, and by the general 75-day time limit on the Board's reconsideration authority which applied subsequent to the statutory amendments which took place effective March 3, 2003.

Section 96(5)(a) of the Act provides that the Board may not reconsider a decision if more than 75 days have elapsed since that decision was made. The WCAT panel found that the issue of brain damage was adjudicated in the July 25, 1998 decision. Accordingly, the Board officer who rendered the July 22, 2004 decision (which gave rise to the February 28, 2005 Review Division decision) would not have had authority to reconsider the July 25, 1998 decision. In that sense, the July 25, 1998 decision was a final decision, as the disability awards officer did not have authority to address the

acceptability of aspects of the worker's condition which had previously been found to be non-compensable. I find no error in the conclusion by the WCAT panel that it did not have jurisdiction over the issue of a possible brain injury, based on the worker's appeal of *Review Decision #23340* (dated February 28, 2005) and *Review Decision #25981* (dated May 31, 2005).

The conclusion provided by the WCAT panel was consistent with the general approach set out in MRPP item #14.30 concerning WCAT's jurisdiction or scope of review. This begins by stating:

> Where a decision of the Review Division is appealed to WCAT, WCAT has jurisdiction to address **any issue determined in either the Review Division decision or the Board decision which was under review**, subject to the statutory limits on WCAT's jurisdiction described in item 2.00.
>
> [emphasis added]

Pursuant to section 250(1) of the Act, WCAT "may consider all questions of fact and law arising in an appeal." However, the question must be one arising in the appeal. MRPP item #14.30 provides guidance as to the scope of this review.

In paragraph 20(d) of the written submission by the worker's lawyer to the WCAT panel, she reasoned:

> Finally, application of the doctrine of *res judicata* is incompatible with the very nature of the WCB process, which is inquisitorial (rather than adversarial), opened textured and poly-centric. The nature of that process demands that new facts about a worker's condition be considered as they arise.

To my mind, the appellant's argument did not take into account the legislative intent evidenced by the provision of statutory time limits for requesting review and appeal, the 75-day time limit on the Board's reconsideration authority, and the stringent statutory requirements for obtaining an extension of time to appeal. The fact that an appeal is brought to WCAT does not give WCAT jurisdiction to inquire into and determine other issues which were the subject of prior unappealed decisions, simply on the basis that these issues are important to the appellant or impact the decision under appeal. While WCAT takes a broad approach to jurisdiction, this is reasonably limited (as set out in MRPP item #14.30) to those issues addressed in the particular decision under appeal, and the initial Board decision which was the subject of review by the Review Division.

It is evident that the WCAT panel found that the issue as to whether the worker's 1997 injury involved an organic brain injury was not one addressed in the February 28, 2005 or May 31, 2005 Review Division decisions (*Review Decisions #23340* and *#25981*), or the underlying decisions by Board officers dated July 22, 2004 and November 17, 2004,

and that this issue was therefore not one within its jurisdiction to determine. Applying a correctness standard, I find no error in the WCAT decision on this jurisdictional issue.

In the text *Administrative Law in Canada*, Fourth Ed. (Ontario: Butterworths, 2006) Sara Blake states at page 133:

> When parties appear before a tribunal with a new case raising legal or policy issues similar to those decided in a previous case between the same parties, the tribunal is not bound by the concept of *res judicata*. This flexibility enables a tribunal to continue its pursuit of the public interest, to consider and apply changes in policy and to effectively regulate dynamic and ongoing relationships between parties. A tribunal may permit re-litigation and may come to a different conclusion without risk of court interference. However, the importance of stability in an industry requires that a tribunal have good reason for reversing its decisions.

On reading the decision by the WCAT panel, it appears to me that the panel's use of the term "simple" was used in the sense of meaning "straightforward" or not complex. I find, in any event, that the basis for the panel's decision is evident from the reasoning which follows its use of this term. I do not consider the panel's use of the term *res judicata* (in response to the arguments by the worker's lawyer regarding this term), to be necessary to its conclusion. Accordingly, I do not consider it necessary to further address the arguments by the worker's lawyer regarding the use of this term, apart from noting that the use of such legal doctrines from the common law may be unnecessary and inappropriate as a basis for defining WCAT's jurisdiction.

I further note that certain passages in the WCAT decision were not necessary to its decision. The WCAT panel reasoned:

> I agree with counsel that neither the decision letter of December 11, 2002 nor the review of this decision (*Review Decision #942* dated July 17, 2003) draws any conclusions as to whether the worker suffered a brain injury as a consequence of the 1997 accident. That review only dealt with the consequences of the 2002 injury in the context of what was then a discrete claim which was only accepted for PTSD, since that review was undertaken prior to the WCAT decision (*WCAT Decision #2004-03134-RB*) that resulted in the amalgamation of the 2002 claim with the 1997 claim for only PTSD. The December 11, 2002 decision letter simply cites the evidence of the Board medical advisor and the Board psychologist.
>
> . . .
>
> The only remedy that can now be entertained is for the worker to request an extension of time to appeal the July 25, 1998 decision.

Review Decision #942 dated July 17, 2003 had not been appealed to WCAT, and the worker had not requested an extension of time to appeal this decision. I find that the reasoning by the WCAT panel regarding *Review Decision #942* (and the underlying Board officer's decision of December 11, 2002), and concerning the "only remedy" which remained open to the worker, was provided as *obiter* (reasoning which was not necessary to its decision). Accordingly, that part of the panel's reasoning has no legal effect. This *obiter* is not binding in relation to the consideration to be provided below concerning the worker's application for an extension of time to appeal *Review Decision #942* dated July 17, 2003.

The worker's application for reconsideration of the WCAT decision is, therefore, denied. I find no jurisdictional error in the WCAT decision, so as to require that it be set aside.

B. Extension of Time to Appeal

The worker has also requested an extension of time to appeal *Review Decision #942* dated July 17, 2003 (which concerned the case manager's decision letter of December 11, 2002). The worker seeks an extension of time to appeal this decision, for the purpose of bringing the issue as to whether he suffered a brain injury in 1997 before WCAT. The worker's lawyer submits:

> For the purposes of this application for an EOT to appeal RD #942, I will assume that the [December 11, 2002] Decision Letter decided that brain injury was not accepted as part of [the worker's] claim.

In the site visit by the case manager on May 31, 1998 to discuss a work assessment, the case manager advised the worker that there was no medical evidence on file to indicate he had sustained any type of permanent damage but that if new medical evidence arose in the future, this could be further considered. This was followed by the case manager's July 25, 1998 decision, in which she found that the worker had recovered sufficiently as to be able to return to work and that there was no indication of any permanent restrictions.

The WCAT decision found that the issue of brain injury was decided under the 1997 claim by a Board officer's decision of July 25, 1998. However, prior to March 3, 2003,

the Board had a discretion under section 96(2) of the Act to reconsider its decisions. Section 96(2) previously provided:

> (2) Notwithstanding subsection (1), the board may at any time at its discretion reopen, rehear and redetermine any matter, except a decision of the appeal division, which has been dealt with by it or by an officer of the board.

The worker was referred by the Board to a psychologist, Dr. Wilensky, for treatment. Following Dr. Wilensky's initial sessions with the worker, he raised with the Board the question as to whether the worker had suffered a brain injury. The background evidence summarized above quotes from Dr. Wilensky's reports of August 21, 2002, September 11, 2002 and October 10, 2002 raising this issue. (A series of reports was subsequently provided by Dr. Wilensky, to similar effect).

A team meeting was held at the Board on October 3, 2002. Attendees included the case manager for the 2002 claim, the client services manager (for the case managers in the area office under both the 1997 and 2002 claims), and the team assistant who appears to have been assisting the case managers in the area office under both the 1997 and 2002 claims. The notes from that meeting appear to indicate that a determination was reached that an expert opinion was required from the Board psychologist regarding the reports provided by Dr. Wilensky, in connection with the possibility that the worker had suffered a brain injury. The case manager under the 2002 claim subsequently pursued this request, by forwarding a list of ten specific questions to the Board psychologist. Eight of these ten questions were contained under the heading "possible brain injury". I am satisfied that these records establish that the Board officers embarked on a re-examination of the question concerning whether the worker's 1997 work accident resulted in a brain injury (notwithstanding the seeming lack of involvement by the case manager under the 1997 claim file). I consider that it would have been open to the Board officers who attended the team meeting to determine that this important issue should be revisited, and that an expert opinion should be requested from the Board psychologist. The client services manager for the case managers under both the 1997 and 2002 claim files was part of the team meeting. As well, the October 18, 2002 memo by the case manager found that no further treatment or investigations in relation to neuro-psychological issues were required in relation to either the 1997 claim or the 2002 claim.

The worker had been advised that the issue as to whether he had suffered any neurological injury could be revisited if new medical evidence was provided. New medical (psychological) evidence was provided by the worker's treating psychologist, and the Board embarked on a detailed re-examination of the question as to whether the worker's 1997 injury involved a brain injury. The results of that reconsideration were communicated to the worker in the December 11, 2002 decision.

A WCAT panel later concluded (*WCAT Decision #2004-03134-RB* dated June 16, 2004) that the worker's 1997 claim should have been reopened and that the video incident should not have been treated as a new claim. To the extent there is any question as to the authority of the Board officer who issued the December 11, 2002 decision to have addressed the brain injury issue, I consider it appropriate to take into account the subsequent WCAT decision that no new claim should have been established. In this context, I do not consider it useful to attach significance to the fact the December 11, 2002 decision was issued under the 2002 claim rather than the 1997 claim. The December 11, 2002 decision letter may also be viewed as communicating the determination in the October 18, 2002 memo, which expressly addressed both the 1997 and 2002 claims.

In *obiter*, the WCAT panel found that the December 11, 2002 decision could not have addressed the brain injury issue, as that issue was not before the case manager responsible for the 2002 claim. I appreciate the basis for that reasoning. However, I consider it clear from the evidence that the Board officers embarked on a reconsideration regarding the brain injury issue, and that the results of this reconsideration were communicated to the worker in the December 11, 2002 decision.

Section 250(2) of the Act provides that WCAT must make its decision based on the merits and justice of the case. Given the very specific questions posed to the Board psychologist in the latter part of 2002 concerning whether the 1997 injury resulted in a brain injury, I find that it would be contrary to the merits and justice of the case to conclude that this issue was not re-examined in 2002, or to find that the worker had no right of review or appeal because the results of that redetermination were communicated by the case manager under the 2002 claim (which was ultimately found to have been established in error, in any event). I find that the merits and justice of the case support a conclusion that the December 11, 2002 decision contained the Board's reconsideration (and confirmation) of its earlier decision of July 25, 1998, which found the worker did not suffer brain damage in his 1997 work injury.

In consideration of the foregoing, I accept that the question as to whether the worker suffered a brain injury was addressed in the December 11, 2002 decision. If grounds are established for granting an extension of time to appeal to WCAT from *Review Decision #942* dated July 17, 2003 (which concerned the case manager's decision letter of December 11, 2002), I accept that this issue would be properly before WCAT for determination.

(i) Special circumstances

The first question to be determined is whether there were special circumstances which precluded the worker from filing a timely appeal to WCAT of the Review Division decision. To my mind, a key factor is that at the time the December 11, 2002 and July 17, 2003 decisions were issued, the worker's PTSD (diagnosed following his viewing of a safety video on April 19, 2002) was being treated by the Board as involving

a new claim in 2002. Even though the wording of the December 11, 2002 decision appeared to address the question as to whether the worker suffered a brain injury, this was not identified as an issue in the Review Division decision. In the 2005 WCAT decision, the panel reasoned that the case manager dealing with the 2002 claim could not have made a determination as to whether the 1997 claim involved a brain injury. As well, the Review Division decision allowed the worker's appeal and varied the case manager's decision. I find that the presence of all these factors would have operated so as to preclude the worker from filing a timely appeal to WCAT from the Review Division decision. In particular, as the question as to whether the worker suffered a brain injury was not identified as an issue in the Review Division decision, I consider that this factor alone could well have precluded the worker from recognizing that it would be necessary to appeal the Review Division decision for the purpose of seeking further consideration on this issue.

The worker's lawyer further advises that throughout the worker's claim, the Board refused to refer the worker for a psycho-neurological assessment. As a result, there was no expert psycho-neurological evidence to support an appeal of *Review Division #942* until Dr. Kaushansky evaluated the worker in autumn 2004. She cites Dr. Kaushansky's 13 page report of October 21, 2004, which was submitted to the Review Division in connection with *Review Decision #23340*. Dr. Kaushansky expressed the opinion that although the worker's PTSD may have impacted on his cognition and behaviour, the sequelae with which he presents is probably related to both the electrical injury and the PTSD. Dr. Kaushansky noted that electrical injury typically has a propensity to result in central nervous system dysfunction and this must be considered a prominent feature in the worker's presentation. In view of my conclusion on the basis set out above, it was not necessary that I consider the additional arguments advanced concerning the provision of significant new evidence, the worker's psychological condition, and the worker's reliance on his prior representative.

(ii) Injustice

The question as to whether the worker suffered a brain injury, or whether his symptoms are due to PTSD alone, is an important one to the worker. As the Board's decision letters dealing with this issue did not clearly address this question as a discrete issue, this may have adversely affected the worker's opportunity to consider an appeal. Due to the 75-day time limit on the Board's reconsideration authority, the Board cannot further examine this question. I find that an injustice would result if an extension of time were not granted.

(iii) Exercise of discretion

The worker and his treating psychologist have in one form or another sought consideration (over a long period of time) as to whether the 1997 injury involved a brain injury. As well, the worker has provided additional expert evidence, contained in Dr. Kaushansky's report of October 21, 2004. I consider it appropriate to exercise the chair's discretion contained in section 243(3) of the Act, to grant an extension of time for the worker's appeal. Accordingly, the worker is entitled to obtain a determination on the merits as to whether his 1997 injury involved a brain injury.

Conclusion

The worker's application for reconsideration of *WCAT Decision #2005-06511* is denied. Applying a correctness standard, I find no error in the panel's decision regarding its jurisdiction to hear the worker's appeals. While I have disagreed with certain reasoning expressed by the WCAT panel in *obiter*, that reasoning was not necessary to the panel's decision and has no legal effect.

The worker's application for an extension of time to appeal *Review Decision #942* dated July 17, 2003 (which concerned the case manager's decision letter of December 11, 2002), is allowed. As the December 11, 2002 decision represented the Board's communication to the worker regarding its reconsideration and confirmation of the Board's earlier decision that the worker's 1997 injury did not involve a brain injury, this issue is appropriately included in the issues raised by the worker's appeals. The WCAT registry will contact the parties concerning the further handling of the worker's appeal of *Review Decision #942* dated July 17, 2003 (as well as his appeals of *Review Decision #23340* dated February 28, 2005 and *Review Decision #25981* dated May 31, 2005).

Herb Morton
Vice Chair

HM/cda