Noteworthy Decision Summary

Decision: WCAT- 2006-02602 **Panel**: Herb Morton **Decision Date:** June 22, 2006

Reconsideration – Cross-examination – Onus on party to request WCAT to issue subpoenas for witnesses the party wants to cross-examine – Failure to object – Patent unreasonableness – Failure to apply policy of board of directors – New evidence – Section 256 of the Workers Compensation Act – Item #98.27 of the Rehabilitation Services and Claims Manual – Item #8.60 of the WCAT Manual of Rules of Practice and Procedure

Reconsideration of a WCAT decision. Where a party wants WCAT to require adverse witnesses to attend an oral hearing for cross-examination, there is no breach of procedural fairness if the worker did not make an express request that a specific witness be compelled to attend the hearing. Even if a party presents arguments focussing on a particular option under a section of the *Workers Compensation Act* (Act), WCAT has a duty to consider the full range of options permitted by the section and there is no obligation to provide reasons that expressly addressed each of the options.

The worker requested reconsideration of a WCAT decision that dealt with her pension wage rate and her eligibility for a permanent disability award on a loss of earnings basis. The worker requested reconsideration on the basis of new evidence under section 256 of the Act and the common law grounds of an error of law going to jurisdiction and patently unreasonable findings of fact.

The reconsideration panel first decided that there was no jurisdictional error in the original panel not mentioning the worker's appeal of a matter referred to in section 16 of the Act as WCAT had communicated to the worker in a summary decision that it did not have jurisdiction to hear the matter.

The reconsideration panel considered whether there was a breach of natural justice arising from the original panel failing to require the attendance of adverse witnesses for the worker to cross-examine. The worker submitted that the original panel was required to apply item #98.27 of the *Rehabilitation Services and Claims Manual* (RSCM). The reconsideration panel noted it was clear from the introduction to Chapter 12 of the RSCM that the policy-makers did not intend the policy in Chapter 12 to apply to WCAT. Therefore, the reconsideration panel did not rely on this policy. The reconsideration panel noted that item *#8.60* of the *WCAT Manual of Rules of Practice and Procedure*, in effect at the time of the oral hearing, allowed WCAT to issue subpoenas to witnesses on its own initiative or at the request of a party. The reconsideration panel noted that, although the worker had asked for the opportunity to cross-examine the employer, she did not expressly ask the original panel to subpoena any named person for the purposes of cross-examination. The reconsideration panel listened to the audio recording of the oral hearing and noted the worker had not requested an adjournment to compel the attendance of the employer's witnesses. The reconsideration panel concluded there was no breach of procedural fairness as the worker did not make an express request that a specific witness be compelled to attend the hearing.

The reconsideration panel considered whether the original panel made patently unreasonable findings of fact regarding the worker's employability and her long-term wage rate. The reconsideration panel concluded it was open to the original panel to assess the weight to be

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

given to both evidence from the claim file, as well as that given at the oral hearing. The original panel's handling of the evidence before it did not meet the standard of patent unreasonableness as defined in section 58(3) of the *Administrative Tribunals Act*.

The reconsideration panel then considered whether the original panel failed to apply a policy of the board of directors that was applicable to the case, as it is required to do under section 250(2) of the *Workers Compensation Act* (Act). The worker had submitted that item #66.15(1) RSCM I applied. However, the original panel did not refer to item #66.15(1) in its decision but instead referred to RSCM I items #67.20 and #68.00 as providing the basis for its decision regarding the worker's long term wage rate for pension purposes. The reconsideration panel noted that WCAT functions on an inquiry basis. Thus, even if a party presents arguments focussing on a particular option under section 33 of the Act, WCAT has a duty to consider the full range of options permitted by section 33 in determining which best represents the worker's actual loss of earnings. The original panel was not obliged to provide reasons that expressly addressed each of the options set out in section 33. The reconsideration panel also did not accept the worker's argument, that after applying item #66.15 to distinguish the worker from a seasonal or casual worker, the original panel was then not able to evaluate the factual evidence in the worker's case to determine her average earnings and earning capacity at the time of injury. The original panel's decision was not patently unreasonable in connection with the selection and application of the relevant Workers Compensation Board operating as WorkSafeBC (Board) policies.

The reconsideration panel considered whether there was new medical evidence that was not reasonably available at the time of the oral hearing. After the oral hearing, the worker had undergone surgery on her shoulder. The worker's orthopaedic surgeon provided a medical legal report in which he stated the worker was disabled from the date of injury until the date of the surgery. The reconsideration panel noted that the original panel was aware of the surgeon's opinion at the time of the oral hearing that the worker's condition might be improved with further surgery. The original panel had indicated this possibility could be addressed by the Board as involving new issues for adjudication (which is what, in fact, happened) rather than treating it as relevant at the date the Board made its determination of the worker's award. The reconsideration panel concluded the original panel's decision was reasonable and the new evidence concerning the findings at surgery did not constitute new evidence that was substantial and material to the decision. The panel denied the worker's request for reconsideration.

This decision has been the subject of a BC Supreme Court decision on application for judicial review. See 2007 BCSC 1005.

WCAT Decision Number: WCAT-2006-02602
WCAT Decision Date: June 22, 2006
Panel: Herb Morton, Vice Chair

Introduction

The worker seeks reconsideration of the Workers' Compensation Appeal Tribunal (WCAT) decision dated October 20, 2004 (*WCAT Decision #2004-05439-RB*).

By letter dated February 15, 2005, the worker's lawyer advised that the worker would be applying for reconsideration of the WCAT decision. On October 3, 2005, the worker's lawyer provided filed copies of the worker's petition for judicial review and supporting affidavit, requesting that these be considered as the worker's formal application for reconsideration.

By letter dated February 10, 2006, the WCAT appeal coordinator provided an information sheet containing general information about the reconsideration process, including the "one time only" limitation on reconsideration applications. She explained:

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

The worker's lawyer provided written submissions dated March 7, 2006. The worker's application is based on:

- the common law grounds of an error of law going to jurisdiction (involving an alleged breach of natural justice, failure to apply policy, and patently unreasonable findings of fact); and,

- new evidence under section 256 of the Act (a medical report opinion dated May 12, 2005 from Dr. W.D. Regan, orthopaedic surgeon). Subsequent to the WCAT decision, Dr. Regan performed surgery on the worker on December 16, 2004, for an arthroscopic subacromial decompression and distal clavicle excision.

The employer is participating in this application, and is represented by the employers' adviser. The employers' adviser provided a written submission dated April 18, 2006. The worker's lawyer provided a rebuttal submission on May 4, 2006.

The worker has appealed a related Review Division decision (*Review Decision #27617* dated August 24, 2005) to WCAT. That appeal has been assigned to another WCAT panel for consideration.

The worker has not requested an oral hearing. I agree that the issues as to whether the WCAT decision involved an error of law going to jurisdiction, and whether the "new evidence" requirements of section 256 of the Act are met, involve questions of a legal nature 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 WCAT decision involve a breach of natural justice or other error of law going to jurisdiction? Alternatively, has new evidence been provided which meets the requirements of section 256 of the Act?

Jurisdiction

Section 255(1) of the Act provides that a WCAT decision is final and conclusive and is not open to question or review in any court. In keeping with the legislative intent that WCAT decisions be final, they may not be reconsidered except on the basis of new evidence as set out in section 256 of the current Act, or on the basis of an error of law going to jurisdiction. A tribunal's common law authority to set aside one of its decisions on the basis of jurisdictional error was confirmed by the British Columbia Court of Appeal in the August 27, 2003 decision in *Powell Estate* v. *WCB (BC)*, 2003 BCCA 470, [2003] B.C.J. No. 1985, (2003) 186 B.C.A.C. 83, 19 W.C.R. 211. 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* (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.

Section 256 of the Act also permits reconsideration of a WCAT decision on the basis of new evidence, as follows:

(2) A party to a completed appeal may apply to the chair for reconsideration of the decision in that appeal if new evidence has become available or been discovered.

(3) On receipt of an application under subsection (2), the chair may refer the decision to the appeal tribunal for reconsideration if the chair is satisfied that the evidence referred to in the application

(a) is substantial and material to the decision, and

> (b) did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.
>
> (4) Each party to a completed appeal may apply for reconsideration of a decision under this section on one occasion only.

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).

Findings and Reasons

(a) The Fourth Appeal

The cover page to the WCAT decision shows that it concerned three appeals by the worker. These appeals were from decisions dated June 27, 2002 and September 10, 2002 by Board officers, and from a review officer's decision of January 21, 2004 (*Review Decision #3703*). The worker's lawyer submits:

> WCAT had before it four Board decision letters under appeal, the first two of which had been initially appealed to the Review Board but were not decided by them, and the last two of which had proceeded through the Review Division (#'s 3700 and 3703) and then to WCAT.

The worker's January 26, 2004 notice of appeal to WCAT cited both Review Division decisions. *Review Decision #3700* concerned a Board officer's decision of February 28, 2003. The review officer found:

> The VRC [vocational rehabilitation consultant] advised the worker that future income continuity benefits would be adjusted, as the CADA had changed the wage rate that would be used for calculating the worker's permanent partial disability benefits. Normally, income continuity benefits are paid where there is a potential for a loss of earnings, and pending implementation of the worker's permanent partial disability benefits.
>
> The worker's permanent partial disability benefits were implemented prior to any income continuity benefits being issued by the VRC based on the decision contained in the letter of February 28, 2003.
>
> As no benefits were paid, or will be paid, based on the decision of February 28, 2003, I find that the request for review is now moot.

On April 2, 2004, a WCAT assessment officer advised the worker's lawyer that WCAT does not have jurisdiction to hear an appeal respecting a matter referred to in

Section 16 of the Act. She advised, in a provisional decision, that *Review Decision #3700* was not appealable to WCAT. She invited a response within 21 days if the worker disagreed with this provisional decision. On April 7, 2004, the worker's lawyer wrote to the WCAT assessment officer and advised that so long as the worker could proceed with the appeal against the pension portion of the Review Division's decision, he had no objection to her proposal.

By decision dated May 21, 2004, a WCAT vice chair/deputy registrar advised:

> As we have not received a response from you, WCAT will not proceed with [this appeal] regarding the worker's future income continuity.

It is not apparent as to why the April 7, 2004 letter by the worker's lawyer did not come to the attention of the WCAT vice chair/deputy registrar. However, this is a moot issue as the worker's lawyer did not object to the April 2, 2004 provisional decision.

I find no jurisdictional error in respect of the fact that this fourth appeal was not mentioned in the WCAT decision, in view of the May 21, 2004 summary decision of WCAT's vice chair/deputy registrar.

(b) Cross-examination – procedural fairness

The worker's lawyer submits that there was a breach of natural justice. He submits that the worker "requested the presence of adverse witnesses (see the *Notice of Appeal*), but was denied that right." He submits that the right to cross-examine adverse witnesses is trite law and is fundamental to a fair process. He argues:

> ...while the WCAT granted an oral hearing, WCAT refused to require the attendance of adverse witnesses. In particular, no witness with direct knowledge of this case was called on behalf of the employer, yet the panel accepted disputed hearsay evidence.

The worker's complaint may be viewed as raising two issues. The first question is whether there was a breach of procedural fairness or natural justice, which must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly. The second question concerns the panel's handling of the evidence before it, which must be addressed on the standard of patent unreasonableness as defined in section 58(3) of the ATA. This latter question is addressed under a separate heading below.

Written submissions had been presented to the Review Division. The August 29, 2003 submission by the employers' adviser to the Review Division attached as exhibit 3 a statement by X, who had been a supervisor of the worker between August 1999 and October 1999. This was an undated handwritten letter signed by X. X indicated that there had been no intention of having the worker become a full time employee, and that during his time with the employer, "THERE WAS NEVER A FULL TIME EMPLOYEE IN THE MEAT DEPT OTHER THAN MYSELF." [reproduced as written]

The worker's January 26, 2004 notice of appeal to WCAT (completed by her lawyer) concerning *Review Decisions #3700* and *#3703* submitted that the Review Division decision was incorrect or should be changed because:

> - worker entitled to oral hearing; Review Officer made Findings of Fact based on credibility. Worker entitled to cross examine Employer.
>
> [reproduced as written]

In her notice of appeal, the worker stated that an oral hearing before WCAT was necessary because:

> FINDINGS OF FACT BASED ON CREDIBILITY. WORKER MUST CROSS EXAMINE EMPLOYER AND EXTERNAL CONSULTANT.
>
> [reproduced as written]

The worker's lawyer submits:

> The right to cross examine adverse witnesses is trite law and is fundamental to a fair process, as many decisions have found both in the courts and in the compensation system. The Employer did not offer any evidence at the oral hearing, and instead relied on un-tested hearsay evidence in the claim file, which [the worker] disputed under oath.

The worker's lawyer argues that this process was unfair and denied the worker the opportunity to challenge adverse witnesses and present a complete defence in her appeals. He notes:

> It might bear mentioning that a worker has no power or authority to compel the attendance of witnesses to a hearing, but that WCAT does. The fair thing to do was to exercise that discretion judicially to ensure that [the worker] could challenge and respond to the adverse evidence in her claim file.

The employers' adviser submits that WCAT must apply the policy of the board of directors that is applicable in that case, pursuant to section 250(2) of the Act. He cites the policy contained at item #98.27 of the *Rehabilitation Services and Claims Manual*, which provides:

> Under the inquiry system (contrary to the adversary system), there is no right of cross-examination of the parties or witnesses. If, in the process of an inquiry, one of the parties wishes to ask a question of the person whose evidence is being taken, the question should be referred to the interviewer conducting the inquiry who, in turn, can relay the question if it is felt it would be helpful.
>
> Cross-examination may, however, sometimes be permitted.

The employers' adviser submits that since WCAT is bound by such policy, the WCAT panel cannot be compelled to allow cross-examination and that such evidence would be allowed at the discretion of the panel. I note, however, that item #98.27 is contained in Chapter 12 of *Volumes I* and *II* of the *Rehabilitation Services and Claims Manual*. The introduction to that chapter begins as follows, at item #92.00:

> This chapter relates to the roles and responsibilities of workers, employers, physicians, and the Board in the making and adjudicating of compensation claims.

It is clear from the introduction to Chapter 12 that the policy-makers did not intend the policy in this chapter to apply to WCAT. Accordingly, I consider that it would contravene the policy to treat it as applying directly to WCAT. The policy may have relevance to WCAT's review of the actions taken by a Board officer, or may provide a useful analogy, but is not directly applicable to WCAT. Accordingly, I will not rely on this policy in considering the worker's concern. (While I note that the reference by the employers' adviser to *Volume II* of the RSCM was in error, this was not relevant to my decision as these policies are the same in *Volumes I* and *II*).

The WCAT oral hearing was held on September 24, 2004. I have examined the version of the former *Manual of Rules, Practices and Procedures* (MRPP), which was in effect from March 29, 2004 until December 2, 2004. Archived versions of the former MRPP remain accessible on WCAT's website. MRPP item #8.60 provided as follows:

> **8.60 Subpoenas**
>
> Section 247 provides that WCAT:
>
> (a) has the same powers as the Supreme Court to compel the attendance of witnesses and examine them under oath or affirmation, and to compel the production and inspection of books, papers, documents and things;

(b) may cause depositions of witnesses residing in or out of the Province to be taken before a person appointed by WCAT in a similar manner to that prescribed by the Rules of Court for the taking of like depositions in the Supreme Court before a commissioner.

...

A subpoena for the production of documents or things may be issued together with a subpoena compelling the attendance of a witness or it may be issued separately. **A subpoena may be issued by the panel on its own initiative, or at the request of a party. Parties requesting a subpoena will be asked to provide the following information in writing:**

(a) the name and address of the witness or person in possession of the documents or things, and the exact documents or things requested;

(b) the relevance of the evidence to the issue under appeal;

(c) whether the witness is willing to attend, or the person is willing to produce the documents or things and, if not, why not.

The panel assigned to an appeal will decide whether to issue a subpoena. The panel will consider whether there are other means for obtaining the same evidence, the relevance of the evidence, and, if applicable, the reason for the unwillingness of a witness to attend or to provide evidence voluntarily. A subpoena will be drafted in consultation with tribunal counsel or the registrar, and will be signed by the panel and forwarded to the requesting party for service where appropriate. Alternatively, WCAT may arrange for service.

A person served with a subpoena is entitled to conduct money payable by the requesting party at the time of service (British Columbia Supreme Court Rule 40(38)). A witness is not obligated to attend if the conduct money is not paid.

The decision as to whether or not to issue a subpoena rests with the WCAT panel. However, where the panel decides to grant a party's request that WCAT issue a subpoena, the panel may direct that the party requesting the subpoena be responsible for arranging for service of the subpoena, and for providing conduct money to the witness. In that event, the party may request reimbursement of these

> **expenses in the appeal. Alternatively, WCAT may undertake service of the subpoena**.
>
> If the witness fails to attend, the onus is on the requesting party to take the necessary steps to enforce the subpoena through the Supreme Court. Alternatively, WCAT may take such steps. The panel may adjourn the hearing to allow for this.
>
> [emphasis added]

MRPP item 9.32 further provided:

> **If a party is not participating in an appeal, another party may ask the panel to subpoena him or her as a witness**. Where the employer is a limited company, an officer or representative of the company may be required to give evidence on behalf of the company. If any person (including the worker or an employer representative) attends an oral hearing as an observer, the panel may require them to answer questions if the panel considers this necessary or helpful to the panel's inquiry.
>
> [emphasis added]

The worker's notice of appeal did not expressly ask that WCAT subpoena any named person for the purposes of cross-examination by the worker. It might be read as asserting the worker's right to cross-examine any witnesses presented on behalf of the employer at the oral hearing.

The worker was previously represented by a workers' adviser, in connection with the filing of appeals to the former Workers' Compensation Review Board (Review Board) from decisions by Board officers dated June 27, 2002 and September 10, 2002. Those appeals were transferred to WCAT on March 3, 2003 for completion, as a result of the changes to the workers' compensation appeal structures contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). By decision dated September 29, 2003, a WCAT vice chair denied the worker's applications for extensions of time to appeal decisions by Board officers dated May 29, 2001, June 22, 2001, October 11, 2001 and December 17, 2001.

On review of the claim file, I note the following correspondence sent to WCAT by the worker or her lawyer in 2004 prior to the oral hearing on September 24, 2004:

- on January 16, 2004, the worker's lawyer advised that he had been retained on behalf of the worker, and requested a two-week extension of time to file written submissions;

- on January 24, 2004, the worker's lawyer requested an extension of time for submissions in relation to the appeals of the decisions dated June 27, 2002 and September 10, 2002. He advised he was awaiting instructions regarding an appeal of the January 21, 2004 Review Division decision;

- on January 26, 2004, the worker's lawyer requested an oral hearing. He further stated:

> It is respectfully submitted that all of these appeals should be heard and considered at the same time by the same panel, **and that [the worker] be afforded the opportunity to cross examine the Employer**, and present her evidence in person.
>
> In the alternative, kindly extend the time for filing submissions by at least three months....
>
> [emphasis added]

- on March 4, 2004, the worker's lawyer sent a follow-up letter requesting a response to his January 26, 2004 letter;

- on March 16, 2004, the worker's lawyer advised that the worker was scheduled to see Dr. Regan on April 7, 2004. He requested that all of the worker's appeals proceed as one, and the time for filing submissions for all of them be extended by at least one month beyond the April 6, 2004 deadline set on the prior appeals;

- on April 7, 2004 the worker's lawyer wrote to the WCAT assessment officer to advise that he did not object to her provisional decision that *Review Decision #3700* was not appealable to WCAT;

- on June 2, 2004, the worker's lawyer requested an adjournment of the July 14, 2004 oral hearing date until September 2004. He enclosed a letter from the worker which explained that her birthday was on July 13 and her family was planning a catered event in Manitoba;

- on June 17, 2004, the worker's lawyer forwarded a functional capacity evaluation report dated June 2, 2004 (and account for $1,908.00);

- on July 30, 2004, the worker's lawyer forwarded a copy of an undated witness statement; and,

- on August 25, 2004, the worker wrote to WCAT to enclose a copy of a witness statement dated August 20, 2004.

By letter dated May 21, 2004, the WCAT appeal liaison advised the worker's lawyer that the oral hearing was scheduled for July 14, 2004. On June 2, 2004, the worker's lawyer requested an adjournment of the oral hearing. MRPP item #9.20 and #9.21 provided that the parties would not be consulted regarding the scheduling of the oral hearing date, but would have an automatic right to rescheduling if they objected to the proposed date within 14 days. By letter dated June 10, 2004, the WCAT supervisor, scheduling, advised the worker's lawyer that his request to reschedule the hearing was granted and the oral hearing would now be held on September 24, 2004. She advised the worker's lawyer:

> The employer representative, [A], will attend the hearing via a conference call at [telephone number].

By letter of June 16, 2004, the employers' adviser objected to this postponement of the oral hearing:

> The employer is concerned the multiple delays in this matter, the decision to require an oral hearing, the decision to hold that hearing in Richmond when both the employer and worker are located on Vancouver Island and now the decision to defer that oral hearing an additional 2 months to accommodate the workers' lawyer are all leading to a perception that this process is designed to prejudice the employers ability to participate in this appeal. In fact, due to these multiple delays the employer contact who has been actively involved in the workers several previous appeals/reviews will no longer be with this company after the time of the originally scheduled July 14, 2004 hearing and will now have to familiarize another employer contact to attend this latest hearing.
>
> To clarify the information in your letter, both the employer (whomsoever that will be) and the Employers Adviser would like to participate in this hearing by way of a conference call....
>
> [reproduced as written]

On June 21, 2004 and August 4, 2004, the appeal liaison wrote to the employer [Mr. A] to disclose additional evidence provided by the worker's lawyer. These letters were copied to the worker and the worker's lawyer, as well as the employers' adviser.

By letter dated August 18, 2004, the employers' adviser further stated:

> Further to my previous fax to WCAT on June 16, 2004 (to which we have yet to have a response), please be advised that the new employer contact regarding these cited appeals is Mr. [B].
>
> Mr. [B] has just recently been hired to replace Mr. [A], the previous employer contact, who retired in July 2004. Accordingly, Mr. [B] is new to

> the WCAT appeal process as well as all WCB related issues. Furthermore, Mr. [B] has just begun to review the voluminous information associated with this workers' present and previous WCB appeals.
>
> As a result, please accept this as a formal request for a postponement of the scheduled oral hearing in keeping with the substantial EOT granted to this workers' lawyer regarding this same case. It remains my opinion, as expressed in my previous fax, that this employer has been placed at a significant disadvantage in this appeal as the employer who was most familiar with this workers' claim had been prepared to participate in an oral hearing prior to his retirement which should have occurred has the workers' lawyer not been granted a 2 months delay in these proceedings.
>
> As well, it remains unclear to the employer was to why this hearing must be conducted in Richmond when both the worker and the employer are located on Vancouver Island. This appears to be an unnecessary inconvenience which will make it impossible for the employer to attend a hearing in person and, as previoulsy indicated, the employer will be compelled to be involved by way of teleconferencing.
>
> [reproduced as written]

On August 26, 2004, the appeal liaison wrote to Mr. B to disclose evidence provided by the worker. Her letter was copied to the worker and the worker's lawyer, as well as the employers' adviser.

By letter dated September 2, 2004, a WCAT vice chair/deputy registrar wrote to the employers' adviser to confirm that the September 24, 2004 oral hearing would not be postponed. He advised:

> This will also confirm that the Employers' Adviser and employer will be participating in the appeals via telephone conference call. The panel assigned to this appeal will contact you and the employer at [telephone number] and request that they speak to Mr. [B].

This letter was marked as having been copied to Mr. B, without any copy being sent to the worker or the worker's lawyer.

Upon review of this sequence of events, I had a concern regarding the faxes sent by the employers' adviser to WCAT concerning the scheduling of the oral hearing. These faxes concerned the oral hearing scheduling arrangements, and did not contain evidence regarding the merits of the worker's appeals. It is not WCAT's general practice to disclose such communications for reply, prior to determining whether a hearing will be postponed. However, these faxes also contained information regarding Mr. A's retirement, the fact that Mr. A would not be participating in the oral hearing, and the fact that the employer would be represented at the hearing by Mr. B who was not

familiar with this case and would only be participating by telephone conference call. This information was germane to the request by the worker's lawyer that the worker be able to cross-examine "the employer." In view of this concern, I considered it necessary to listen to the audio recording of the oral hearing (contained on two discs), to better appreciate how this issue was addressed at the hearing. (I have also noted, however, that the August 26, 2004 letter by the appeal liaison which was addressed to Mr. B was copied to the worker and her lawyer. That would have served as a flag regarding the involvement of another person for the employer).

The worker and her lawyer attended the oral hearing in person. The employer participated by teleconference. Mr. B (as the employer) and the employers' adviser (as the representative) were at the same location in participating by telephone.

No objection was expressed by the worker's lawyer at the outset of the oral hearing, to the hearing proceeding in this fashion. No request was made (either at the outset of the hearing or during the hearing) that the WCAT panel subpoena any witness to attend the hearing.

At the outset of the hearing, the new documentary evidence being provided by the worker was faxed to the employer. The worker was sworn. At the close of the worker's evidence (near the end of disc one), the worker confirmed she knew who Mr. B was and advised that he was not present during her period of employment. The worker was cross-examined (briefly) by the employer's representative.

The employer's representative advised that the employer was presenting no evidence in the hearing. The worker's lawyer then provided oral argument (beginning of disc two). He noted that no evidence had been presented by the employer in the hearing to contradict the worker's evidence. The worker's lawyer expressly noted in his argument that it would have been helpful if a certain witness (X) had been produced by the employer, but as X was not at the hearing the worker's lawyer could not cross-examine him. The worker's lawyer then provided oral argument regarding the weight of the evidence before the WCAT panel regarding the circumstances of her hiring and the circumstances of her employment. He noted that he wished X had been present at the hearing. He argued that the panel should not rely on X's letter which had been provided to the Review Division.

The employers' adviser provided a brief submission on behalf of the employer. In respect of the submissions by the worker's lawyer, the employers' adviser noted that the worker's lawyer had provided four letters from witnesses who were not present at the hearing (and not available for cross-examination). He submitted that in light of the argument by the worker's lawyer, the evidence provided by these witnesses should similarly be given little weight.

The worker's lawyer provided a rebuttal submission. He noted that the unavailability of the employer's witness (X) for cross-examination only came up because there was

evidence to the contrary. He submitted that as no evidence had been presented by the employer to contradict the statements submitted on behalf of the worker, then those statements stand on their own and this concern (regarding the non-attendance of the these witnesses at the oral hearing) did not apply to them.

At the close of the WCAT oral hearing, the panel advised the parties that she would consider the evidence and submissions provided in the hearing together with the information on file, in making her decision. No request was made by the worker's lawyer or the employer's representative to the WCAT panel in the oral hearing that the panel adjourn the hearing for the purpose of compelling the attendance of any witness for cross-examination.

In the text *Administrative Law in Canada*, Fourth Ed. (Ontario: Butterworths, 2006) Sara Blake discusses a tribunal's authority to permit cross-examination (at page 63-64):

> Unless required by statute, **a tribunal may refuse to permit cross-examination of witnesses except when necessary for a fair hearing. Refusal to permit cross-examination does not constitute a denial of fairness, if equally effective methods of responding are available. All that is necessary is a fair opportunity to correct or controvert any relevant and prejudicial statement**.
>
> **Where issues of credibility arise with respect to a key witness whose evidence is of vital significance, fairness may require the tribunal to permit some cross-examination.** Where only the credibility of the party affected is in issue, that party should be heard orally, even though the rest of the hearing may be conducted in writing.
>
> ...
>
> While cross-examination should be permitted to controvert prejudicial evidence on a vital issue, repetitious cross-examination on matters of doubtful relevance need not be permitted. A tribunal should prohibit excessive cross-examination that strays into collateral and private matters not relevant to the subject matter of the hearing.
>
> A tribunal may require the party seeking to cross-examine a witness to state what evidence the party hopes to gain and, if no useful purpose will be served, may refuse permission. A tribunal may, with advance notice, impose time limits on cross-examination, provided it is willing to grant extensions of time where necessary for a fair hearing. This may have the salutary effect of encouraging counsel to focus the cross-examination on matters that are truly important.

> In multifaceted and multiparty public hearings into questions of policy and the public interest, cross-examination may be unsuitable, unwieldy and lead to disturbance, disruption and delay. The tribunal may refuse to permit cross-examination. Similarly, in a proceeding which is informal in nature and is conducted before a tribunal of non-lawyers, a request to cross-examine witnesses may be refused because the use of cross-examination techniques by counsel inevitably leads to a more formal process which a lay tribunal may have difficulty presiding over.
>
> **If cross-examination is desirable but the witness to be examined is not present, a tribunal may compel the attendance of the witness if it has power to do so.**
>
> [emphasis added]

With respect to the use of subpoena powers to compel the attendance of witnesses, Blake states, at page 77:

> Parties who cannot compel the attendance of witnesses depend on the tribunal to require unwilling witnesses to testify. A tribunal has a discretion whether to subpoena witnesses but should issue subpoenas where necessary to ensure a fair hearing. **If a party shows that the witness' evidence is reasonably relevant to the subject matter of the proceeding and can be obtained in no other way, that witness should be summoned**. Some tribunals screen requests by parties for witness subpoenas to prevent abuse of the subpoena power by ensuring that subpoenas are issued only to witnesses who have relevant evidence to give. Other tribunals issue all subpoenas requested by parties and address questions of relevance at the time each witness attends in response to a subpoena. Whether to screen requests for subpoenas is at the discretion of the tribunal.
>
> [emphasis added]

At page 235, Blake discusses the effect of a party's failure to object promptly to some procedural impropriety in the conduct of a hearing:

> If a tribunal commits a procedural error or demonstrates an appearance of bias, no party should sit silently and permit the tribunal to continue unaware of any objection. **Objections should be stated to the tribunal immediately upon discovery of the impropriety to permit the tribunal to make appropriate corrections. Failure to object promptly may be interpreted as acquiescence and may cause a court to refuse a remedy**.... Acquiescence cannot confer on a tribunal powers it does not otherwise have, but it can forgive procedural errors.
>
> [emphasis added]

I find that no clear request was made by the worker's representative to WCAT, in advance of the oral hearing, that WCAT exercise its subpoena powers to compel the attendance of any of the employer's witnesses at the oral hearing (for the purposes of cross-examination). Similarly, when the worker's lawyer discovered at the oral hearing that the employer did not intend to present any evidence or call any witnesses, he did not request that the panel adjourn the hearing for the purpose of compelling the attendance of the employer's witnesses. The worker's lawyer provided arguments regarding the weight of the evidence before the panel.

The submissions by the worker's lawyer as to the worker's evidence being "uncontradicted" appear to have focussed on the evidence presented in the oral hearing itself. However, WCAT functions on an inquiry basis. The written evidence contained in the Board's records (which was disclosed to WCAT and the parties in advance of the oral hearing), was part of the evidence to be considered in the appeal. The WCAT panel advised the parties that she would be considering the oral hearing evidence together with the information on file in making her decision.

I find that there was no breach of procedural fairness. As no express request was made to the WCAT panel that a specific witness be compelled to attend the hearing, the worker cannot complain regarding the failure of the WCAT panel to ensure that the witness attended the hearing. The MRPP provides information regarding the procedures for making such a request. No such request was made in the oral hearing, and the worker's lawyer did not object in the hearing regarding the fact that no witness was produced by the employer. While the worker's lawyer stated in the hearing that he wished one of the employer's witnesses (X) had been present for cross-examination, he did not ask the WCAT panel to compel X to attend the hearing. The references in the worker's notice of appeal to her right to cross-examine the employer were ambiguous, and might have been read as concerning her right to cross-examine any witnesses produced on behalf of the employer in the hearing. In any event, even if there was some procedural defect (in respect of WCAT's failure to expressly respond to the comments contained in the worker's notice of appeal regarding the worker's right to cross-examine the employer's witnesses), I find that the worker and her lawyer must be considered to have acquiesced by proceeding with the hearing without noting any objection or making an express request to the WCAT panel for the panel's consideration. The worker was given full opportunity in the oral hearing to provide evidence to respond to the evidence contained in the claim file, to correct or controvert any relevant and prejudicial statement.

I find that the procedures followed by the WCAT panel were fair. I find no breach of natural justice or procedural fairness in connection with the fact the panel took into account the evidence previously presented in writing on behalf of the employer without compelling the attendance of any of the employer's witnesses at the oral hearing. I find no breach of procedural fairness or jurisdictional error in connection with the fact that the WCAT panel made its decision on the basis of all the evidence which was before it

(including the written evidence in the claim file), and did not restrict its consideration to the evidence presented in the oral hearing.

(c) Patent Unreasonableness

A further question arises as to whether the decision of the WCAT panel was patently unreasonable, in relation to its findings regarding the weight of the evidence. The worker's lawyer argues that the decision of the WCAT panel was patently unreasonable, both in connection with the panel's assessment of the worker's employability and in relation to the determination of the worker's long-term wage rate for pension purposes. At pages 6 to 9 of his March 7, 2006 submission, he argues that the WCAT decision involved patently unreasonable findings of fact.

In *Speckling v. British Columbia (WCB),* 2005 BCCA 80, (2005) 46 B.C.L.R. (4th) 77, 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.

Sara Blake states at page 213:

> 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 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.
>
> It is rare for a court to set aside a finding on credibility, because the tribunal, having heard the witnesses, was in the best position to assess credibility.
>
> The weight given to evidence is reviewable only if patently unreasonable. The choice as to which evidence is important and the weight to be given to each item of evidence is based, in part, on the tribunal's expertise. The failure to mention an item of evidence in the tribunal's reasons is not proof

of a failure to consider it but only proof that the tribunal did not regard it as being of sufficient importance as to require mention.

On page 12, the WCAT panel provided the following reasoning regarding its assessment of the worker's credibility (in connection with the worker's appeal which had been transferred to WCAT from the former Review Board concerning her income continuity benefits):

> The worker has not retired. **Her oral testimony, which I find credible, is that she considers herself to be totally unemployable. This is consistent with the evidence on file.** 0n considering this issue, I note paragraph #89.11 of the RSCM I provides that prior to implementing income continuity benefits, the VRC must have considered and offered the worker all the rehabilitation measures that are reasonable and offer assistance to the worker. The evidence is that the Board offered assistance towards the worker's return to suitable work for work assessment or a training-on-the-job program with a suitable employer.
>
> Item #89.12 of the RSCM I provides that the Board may adjust the income continuity rate to the rate that best reflects the conclusions contained in the employability assessment. The employability assessment concluded that the worker was capable of working on a part-time basis in a number of occupations such as clerk/receptionist and guest service/front desk agent on a part-time basis, and the estimated gross weekly wages in these occupations were $256.18. I have insufficient evidence that the worker was willing to participate in the rehabilitation process. **The worker considers herself competitively unemployable due to her physical limitations, her age, her locality as well as her long absence from the workforce.**
>
> **With respect, I disagree. The preponderance of medical evidence clearly established that the worker was capable of working in a sedentary fashion on a part-time basis.** In reaching this conclusion, I refer to Dr. L's opinion of August 31, 2001 as well as the discharge report from the ORP [occupational rehabilitation program] in May 2001 and the FCE [functional capacity evaluation] dated April 27, 2004. I find no significant differences between the worker's functional capacities as noted by both reports in various activities such as lifting, carrying, standing, walking and sitting, although the analyst in the later report concluded that the worker was competitively unemployable.
>
> My review of both reports does not persuade me to reach the same conclusion. I do not accept that the worker's right shoulder symptoms limit her sitting, standing or walking tolerance. Accordingly, I find that the

> Board has the authority to reduce the worker's income continuity benefits based on the worker's deemed earning capacity at the time until the implementation of her loss of earnings pension, due to her refusal to actively participate in the rehabilitation process. I find the positions suggested by the VRC were both physically suitable and reasonably available to the worker. I find no evidence to the contrary is submitted as the worker has made no attempts to explore the job market in her locality. I find insufficient evidence that the worker was willing to continue with her rehabilitation process.
>
> [emphasis added]

The WCAT panel denied the worker's appeal on this issue.

It is evident from the foregoing that the finding by the WCAT panel (that the worker's oral testimony was credible and consistent with the evidence on file) did not involve an acceptance of the worker's evidence in its entirety. I interpret the reasoning of the WCAT panel as meaning that it found the worker to be frank, straightforward and genuine in respect of the evidence she provided to the panel. However, the panel found that the worker's evidence regarding her unemployability to be inconsistent with the other evidence on file (the medical evidence regarding her physical limitations, and other expert evidence regarding the suitability and availability of employment). It is evident, therefore, that the WCAT panel used the term "credible" in a narrow fashion as meaning she did not consider the worker to be untruthful, and that she did not consider the worker intended to deceive the panel. However, it is evident the panel did not find the worker's evidence to be persuasive, as the panel found the worker's evidence regarding her employability to be inconsistent with the expert evidence on file. I infer that the panel accepted that the worker had no intent to mislead the panel, but was mistaken as to the significance of her impairment regarding her employability (i.e. an issue on which expert evidence was before the WCAT panel). I do not consider that the panel's decision was patently unreasonable on this basis.

With respect to the finding by the WCAT panel regarding the worker's employability (in relation to the income continuity benefits and in relation to the denial of a loss of earnings pension), the worker's lawyer submits (at page 4):

> [The worker] also testified that [name] told her that he did not believe she was employable, as he had concluded in his *Employability Assessment*. Yet, Board Officers changed that assessment without asking him, and without the proper foundation. The *Log* entry dated February 14, 2003 purported to "correct" the *Employability Assessment* without input from the author, solely on the basis of the *Form 24* dated January 13, 2002 (Log entry dated January 14, 2003).
>
> Board Officers failed to follow the recommendations of their own expert, did not have any expert evidence to the contrary, and substituted their

> non-expert opinions for the expert opinion of [name]. The "evidence" of employability was no more than a simple statement by the CADA, adopted by the VRC, without appropriate expert evidence to support it, and in contradiction to the expert evidence that the Board had commissioned. The panel had no viable evidence on which to conclude that [the worker] was employable, and that finding is patently unreasonable.
>
> [The worker] also disagreed with the Kinesiologist's conclusions in the *PFI* [permanent functional impairment] assessment dated October 25, 2002, and testified that no doctor examined her and that she had not seen or spoken to Dr. Bland. There is no evidence to the contrary. Further, the testing done at this *PFI* assessment lasted one and a half hours, but the testing done by Ms. Quastel lasted 6 hours. Yet the panel gave more weight to the *PFI* without giving [the worker] the opportunity to cross examine the Kinesiologist.

Further submissions to similar effect were provided by the worker's lawyer at pages 6-9. He submitted (at page 8):

> ...whether or not [the worker] could be said to have been capable of some part time sedentary occupation is not determinative. The overriding issue, as required by Board policy, is whether [the worker] was competitively employable, that is, whether she could get a permanent full time job and keep it for the foreseeable future. The experts said that she could not; there is no expert evidence to the contrary. The panel was not entitled to find that [the worker] could have obtained and kept a job in the face of this evidence, and thereby find that she was not entitled to full continuity of income benefits, and further that she was not entitled to a re-assessment of her pension on a loss of earnings basis.

On page 16 of the WCAT decision, the panel concluded:

> As indicated previously, I find the weight of the evidence shows that the worker was capable of returning to some form of light employment. In reaching this conclusion, I refer to Dr. L's opinion of August 2001 as well as the discharge summary report from the ORP dated May 4, 2001 and the FCE report submitted by the worker dated April 27, 2004. Therefore, I am not persuaded that the worker was competitively unemployable.

By report dated August 28, 2001, Dr. S. Leete, orthopaedic surgeon, advised:

> I think it is extremely unlikely that she is going to improve sufficiently to return to her previous employment....
>
> I would suggest that the Board give consideration to retraining her to a more sedentary form of occupation.

The May 4, 2004 discharge summary report from the Occupational Rehabilitation Program recorded the physical findings noted on the worker's physical assessment. Her admission to the program was withheld based on the recommendation of her attending physician.

An employability assessment dated April 21, 2002 contained the following conclusion:

> Although [the worker] has not yet been assessed for permanent functional impairment, based on treatment program results, she is unable to return to her pre-injury occupation. The Vocational Rehabilitation Consultant feels she could physically handle part-time LIMITED strength employment. Based on information available on the claim file, I would agree with this option.
>
> Considering [the worker's] age, time since injury, and geographic location, there are few opportunities available within her physical abilities. She would require Board assistance by way of direct placement with an accommodating employer. A work assessment and potential training on the job program would be required. If successful, [the worker's] employment potential could be determined by the actual position secured. If the Board is unable to find a suitable employer, then I believe [the worker] is unemployable in today's labour market.

The June 26, 2002 log entry by the vocational rehabilitation consultant contained the following explanation:

> The Board does not have the resources to take ultimate responsibility for finding her a job. Although she moved to [name of town] in 1976, is

> approaching 58 years of age and has no desire to relocate, I would consider her to be eligible for various vocational rehabilitation benefits to help her get placed in a suitable job. These would potentially include work assessment, training on the job and, if needed, moving expenses. I will include this information in my letter to [the worker].

The WCAT panel reviewed this evidence on page 4, and further noted:

> In the log entry of June 26, 2002 the VRC documented that various vocational rehabilitation benefits could be considered to assist the worker being placed in a suitable job. Examples of such employment included part-time work as a front desk clerk, receptionist, or a counter person such as at an auto rental agency or a hotel. The VRC provided examples of starting weekly wages as well as long-term weekly wages for these positions. The VRC also documented an opinion that the best time to obtain work in the hotel industry was in the fall, when students had returned to college, and workers who obtain employment in the fall then have an opportunity to become full-time employee.
>
> The VRC wrote to the worker on June 26, 2002 and offered assistance towards the worker's return to suitable work, in the form of benefits for a work assessment or training-on-the-job program with an interested employer. The VRC also advised the worker that the department was willing to consider assisting her with moving expenses, if she found suitable, permanent employment in another locality. A copy of the employability assessment was also provided for the worker.
>
> Based on the employability assessment, the VRC estimated that the worker's post-injury earning capacity on a part-time basis would be $244.26 per week in 1999 dollars.
>
> [reproduced as written]

Apart from the passage previously cited, the WCAT decision did not otherwise refer to the worker's credibility. With respect to the setting of the worker's long-term wage rate for pension purposes, the WCAT panel reasoned (at pages 14-15):

> There is no dispute that the worker was hired on a part-time basis, and worked full-time hours plus overtime during the months prior to the work injury in August 1999. The worker indicated that she was extremely busy during the summer of 1999, and had to hire another worker in June 1999. The employer provided evidence that the possibility of lay-offs existed. The worker asserted that she did not anticipate that her hours would be reduced drastically. However, considering the worker's past employment history with the injury employer, and the locality of the business, I find it highly unlikely that the worker's employment pattern over three months

> prior to injury was going to continue into the future. Although the worker conceded that she was a part-time employee, she worked full-time hours plus overtime at the time of the injury, and anticipated long-term part-time employment with the injury employer as she was a senior worker and a skilled employee. The evidence is that the worker worked full hours plus overtime during those three months. To calculate a wage rate based on three months of full-time employment plus overtime leading up to the injury would not recognize the part-time nature of her employment, and possible periodic layoffs associated with employment in a tourist area.
>
> I find, therefore, that the worker's wage rate is not best represented by using her earnings in the three months leading up to the date of injury. Although I accept that it was a fixed change in the worker's employment pattern when she began her employment with the injury employer, I am not persuaded that her three months earnings pattern was going to continue into the future, notwithstanding her skills and position. **I accept that the worker was an outstanding and hard-working employee, and I do not doubt her willingness to continue working hours that were available to her from the employer; however, I accept the employer's argument that her hours would have been reduced with the winter months.** The worker's own evidence confirmed her status as a part-time employee. On balance, I conclude that the review officer's decision is in accordance with policy items #67.20 and #68.00 of the RSCM I in determining the worker's long-term wage rate for pension purposes.
>
> [emphasis added]

The worker's lawyer submits (at page 5) that in view of the "panel's refusal to require [X] to attend the oral hearing," any statement made by him should have been given no weight, especially in the face of the evidence presented by the worker and her witnesses. This argument has been addressed above. I find there was no specific request (and therefore no refusal by the WCAT panel), to compel X's attendance at the oral hearing.

The worker's lawyer submits that as the employer did not present any evidence to the contrary, the panel's finding was speculative. This argument ignores the fact that there was evidence contained in the claim file (which was also set out in detail in *Review Decision #3703*).

The worker's lawyer also submits (at page 4) that "the panel must have decided that the worker's evidence, which she had just found to be credible, was not credible, and did so without giving [the worker] the opportunity to test [X's] evidence." As set out above, I find it clear that the panel was using the term "credible" in a very limited sense of the term. It is evident, in relation to the panel's findings regarding the worker's employability, and the worker's wage rate, that the panel did not find the worker's

evidence persuasive (notwithstanding the genuineness of the worker in her oral hearing testimony). I find that it was open to the panel to assess the weight to be given to the evidence contained in the claim file, as well as that provided in the oral hearing.

Upon consideration of the foregoing, I find that there was some evidence before the WCAT panel to support its decision regarding the worker's long-term wage rate and concerning her employability. I consider that the submissions of the worker's lawyer, regarding the alleged patently unreasonable findings of fact, are directed to the panel's weighing of the evidence. With respect to the tests set out in section 58(3) of the ATA, I find no basis for considering that the WCAT decision involved an exercise of discretion which was arbitrary or in bad faith, involved an improper purpose, was based predominantly on irrelevant factors, failed to take statutory requirements into account, or was otherwise "openly, clearly, evidently unreasonable."

(d) Contravention of policy

The worker's lawyer also submits that the WCAT decision was patently unreasonable, as involving a contravention of policy. For convenience, I have considered this argument under a separate heading although it also relates to the arguments addressed above.

Section 250(2) of the Act stipulates that WCAT must apply a policy of the board of directors that is applicable in that case. At the top of page 10 of the WCAT decision, the panel noted:

> Counsel for the worker argued that the worker was hired as a cutter and relied on the worker's evidence and the statements from the witnesses. He referred to policy item #66.15(1) of the *Rehabilitation Services and Claims Manual*, *Volume I* (RSCM I), and submitted that the worker worked full time and this fixed change in her employment was expected to continue into the future.

The worker's lawyer submits that while the panel acknowledged the existence of RSCM I item #66.15(1), the panel did not refer to it again in its decision. The panel referred to RSCM I items #67.20 and #68.00 as providing the basis for its decision regarding the worker's long term wage rate for pension purposes. The worker's lawyer submits (at page 6):

> Even if the panel were right to accept [X's] evidence that [the worker] was subject to lay-offs, Board policy expressly states that the Employer's terminology does not affect the decision as to whether or not a worker should be considered to be working full time. This policy has no criterion as *Item #67.20* regarding the likelihood that the change was permanent. The relevant policy deals specifically with [the worker's] situation, and provides the answer to the question about her wage rate. The relevant

> policy requires the conclusion that [the worker] must be treated as a full time worker. It was not open to the panel to reach any other conclusion.

The worker's lawyer submits that there was a failure of jurisdiction to apply appropriate policy and an excess of jurisdiction to apply inappropriate policy.

The issue before the WCAT panel in the worker's appeal concerned the calculation of her long-term earnings for pension purposes. Policy in Chapter 9 of the RSCM I concerns the calculation of average earnings. The major headings in this chapter are as follows:

#64.00	INTRODUCTION
#65.00	AVERAGE EARNINGS
#66.00	WAGE-LOSS RATES ON NEW CLAIMS
#67.00	WAGE-LOSS RATE CHANGES
#68.00	PERMANENT DISABILITY PENSIONS
#69.00	MAXIMUM AMOUNT OF AVERAGE EARNINGS
#70.00	AVERAGE EARNINGS ON REOPENED CLAIMS
#71.00	COMPOSITION OF AVERAGE EARNINGS

The worker's lawyer cites policy at #66.15. #66.00 has several sub-headings, including:

#66.10	Use of Long-Term Earnings
#66.11	Computation of Long-Term Earnings
#66.12	Provisional Rate
#66.13	Casual Workers
#66.14	Seasonal Workers
#66.15	Part-Time and Temporary Workers

These sub-headings relate to the general heading regarding the setting of wage loss rates on new claims. The particular policy at #66.15 follows the policies concerning casual and seasonal workers. The policy stipulates that regardless of the terminology used, the Board must decide whether the worker is really a full-time worker, a casual worker, or a seasonal worker. For the purposes of setting the initial wage rate on a claim, these policies distinguish between these three categories.

Policy at #66.10 concerning the use of long-term earnings in connection with the setting of the initial wage rate on the claim notes that:

> Alternatively, information available at the outset of a claim may indicate that a worker's earnings over a longer period prior to the injury are significantly greater or less than the earnings at the time of the injury. The Claims Adjudicator should investigate the claimant's earnings over the longer period (usually the one-year period prior to the injury), and determine the reasons for the difference.

The fact that a worker is classified as a "full-time" worker rather than a casual or seasonal worker does not limit the consideration to be given to their actual earnings history (even in connection with the initial wage rate on the claim).

The worker's objections concern the fact that her wage rate for pension purposes was based on her earnings for the one year prior to her injury. Policy at #67.20 concerning the eight-week rate review provides that earnings in the one-year period prior to the injury are normally used. A three-month period prior to injury may be used, but this is generally limited to situations where there is a relatively fixed change in the worker's earning pattern which is deemed likely to continue into the future. The policy also describes some additional options, such as the use of three- or five-year period prior to the injury. Policy at #68.00 concerning the setting of a wage rate for pension purposes provides that this is normally based on the long-term wage rate for wage loss purposes, but that a different rate may be used if there are valid reasons for this.

The fact that a worker may be classified as a "full time" worker, as opposed to being categorized as a casual or seasonal worker for the purposes of setting the initial wage rate, does not limit the application of the policy at #67.20. I do not accept the argument by the worker's lawyer, that the application of the policy at #66.15 to distinguish the worker from a casual or seasonal worker means that the WCAT panel would thereby be constrained from evaluating the factual evidence in the worker's case to determine her average earnings and earning capacity at the time of injury. I do not find the panel's decision in this regard to be unreasonable, much less patently unreasonable.

WCAT functions on an inquiry basis. Even if the arguments presented on behalf of the parties focus on a particular option under section 33, the Board and WCAT have a duty to consider the full range of options permitted by section 33 for the purpose of determining the approach which best represents the actual loss of earnings suffered by the worker by reason of the injury. This does not mean, however, that a panel is obliged to provide reasons which expressly address each of the options set out in section 33 of the Act.

On page 14, the WCAT panel noted:

> At the relevant time section 33(1) of the Act sets out a variety of methods for calculating the worker's average earnings and earnings capacity. The section stated that the method chosen to calculate should be the one that best represents the actual loss of earnings suffered by the worker by reason of his/her injury.

The reasons provided by the panel explained the basis for its decision (as well as showing that it heard the arguments presented by the parties). I do not consider that the WCAT decision was patently unreasonable in connection with the panel's selection and application of the relevant policies in this case.

(e) New Evidence

The worker also seeks reconsideration of the WCAT decision on the basis of new evidence under section 256 of the Act. The worker's lawyer submits that Dr. Regan's May 12, 2005 report provides new medical evidence that was not reasonably available at the time of the WCAT oral hearing, which bears directly on the main issue in this application.

In his May 12, 2005 medical legal report, Dr. Regan advises in part (under the heading "Opinion as to etiology":

> It is clear that her condition stems back to her work-related slip and fall injury, which occurred in 1999. The surgery that she underwent in 2001 failed to help her problem, likely due to post-operative scarring, adhesive capsulitis, and the fact that she had unresolved acromio-clavicular arthritis. This has been resolved following her December 16, 2004 surgery that was approved by the Workers Compensation Board on November 16, 2004.
>
> I do feel she would have been disabled from working as a result of her 1999 accident, and she would only be able to return to work at approximately 5 months following her surgery completed on December 16, 2004.
>
> If the Workers Compensation Board accepted this claim from 1999, then I would assume that they would accept that she had a poor surgical result following her 2001 acromioplasty. There are many factors that may have contributed to this; however, one factor could well be the ongoing acromio-clavicular arthritis that was not managed operatively until December 16, 2004, when she underwent an arthroscopic distal clavicle excision. That was a new finding not managed in 2001, and clearly the distal clavicle was arthritic.
>
> The proof that this was significant is the fact that she has done so well following her December 16, 2004 surgery, and that she could go back to a light to medium manual labour job, an occupation that she could not have considered prior to this latter surgery.
>
> I continue to feel she was disabled following her 1999 injury until 4 months following her December 16, 2004 surgery.

The worker's lawyer submits (at page 10):

> This is not a case in which [the worker] had recovered, and was seeking to re-open her claim three years later. This is a case in which the first surgery failed, and in which the Board failed to provide appropriate treatments, resulting in, as Dr. Leete has stated, a frozen shoulder, and as the medical history shows, flare ups during the course of treatments, and a steady pattern of a continuity of symptoms. This is akin to a misdiagnosis, which the Board routinely accepts.
>
> Thus, the Board did not "re-open" the claim; that characterization is a misnomer. Rather, the Board accepted responsibility for the failed surgery, and approved corrective surgery. The Board should likewise accept responsibility for wage loss benefits throughout.

As noted above, by decision dated September 29, 2003, a WCAT vice chair denied the worker's applications for extensions of time to appeal decisions by Board officers dated May 29, 2001, June 22, 2001, October 11, 2001 and December 17, 2001. The May 29, 2001 decision by the case manager stated:

> It has been determined that the medical condition resulting from your working injury to your right shoulder has stabilized to the point that significant further improvement is not anticipated and no additional treatment recommended.
>
> ...As your disability is no longer considered to be of a temporary nature, wage loss benefits are not longer payable and have been brought to a close effective June 10, 2001.
>
> ...Your claim has also been referred to the Disability Awards Department of the Workers' Compensation Board for assessment as to any remaining permanent impairment.

The December 17, 2001 decision by the case manager concerned the worker's request for a further MRI of her right shoulder. In denying that request, the case manager reasoned in part:

> It was the opinion of the Board Medical Advisor, with which I concur, that your condition is deemed to have been plateaued, or stabilized.

By decision dated March 6, 2003, the disability awards officer granted the worker a pension award of 19.82% of total disability effective June 11, 2001. The worker requested review of the March 6, 2003 decision. In *Review Decision #3703* dated January 21, 2004, the review officer reasoned in part:

> The CADA's decision regarding the worker's permanent partial disability benefit, implemented under the loss of function method, contained various

> components that resulted in the final calculation of the worker's benefits. No submissions have been made with respect to the percentage of disability or the effective date of the worker's award. Following my brief review, I find no error in the CADA's decision on these aspects.

The worker appealed *Review Decision #3703* to WCAT. On page 13 of the WCAT decision, the WCAT panel noted:

> The worker did not dispute the percentage of disability or the effective date of the worker's award. My cursory review of the evidence does not persuade me to disturb the review officer's findings on these two issues. The bulk of what the worker seeks involves the pension wage rate, and her eligibility for a loss of earnings benefit under section 23(3) of the Act.

The WCAT panel's examination of the effective date of the worker's pension award (notwithstanding the absence of any dispute by the worker on this basis) was in accordance with MRPP item #14.30. The March 29, 2004 version of the MRPP explained:

> ...A WCAT panel may address any aspect of the pension decision (i.e. which was addressed in the Board decision letter which was the subject of review by the Review Division, or which was addressed in the Review Division decision) without the need to provide notice to the parties. For example, where an appeal is brought concerning the percentage of impairment on which the pension was based, it is open to the panel to proceed to address the effective date and average earnings aspects of the pension decision, without notifying the parties of its intention to do so.

The WCAT decision confirmed the effective date of the worker's pension award, in denying the worker's appeal. It seems to me, however, that the panel's consideration as to the effective date of the worker's pension award must be viewed in the context of the fact that the worker had not appealed the May 29, 2001 decision concerning the termination of wage loss benefits on the basis that the worker's condition was no longer temporary.

In arguing that the worker is entitled to uninterrupted wage loss benefits from 2001 until sometime after her December 2004 surgery, the worker's representative appears to be disputing the May 29, 2001 case manager's decision regarding the termination of wage loss benefits. I have some doubt as to whether this was an issue decided in the WCAT decision.

Even if this was an issue addressed in the WCAT decision, I am not persuaded that Dr. Regan's report constitutes new evidence which is substantial and material to the WCAT decision. "Material" evidence is evidence with obvious relevance to the prior decision. "Substantial" evidence is evidence which has weight and supports a conclusion opposite to the conclusion reached by the panel.

Policy at RSCM I item #34.54 provided the following guidance regarding the consideration to be given in determining whether a worker's condition had stabilized:

> The following guidelines operate in (c)(ii) above where there is a potential for significant change in the condition.
>
> 1. If the potential change is likely to resolve relatively quickly (generally within 12 months), the condition will be considered temporary and the worker maintained on temporary wage-loss benefits under section 29 or section 30 of the *Act*, and a further examination will be scheduled.
>
> 2. If the potential change is likely to be protracted (generally over 12 months), the condition will be considered permanent and the pension assessed and paid immediately on the worker's present degree of disability and the claim scheduled for future review.

Approximately 3.5 years elapsed between the time wage loss benefits were terminated, and the worker's surgery in December 2004. The fact that the worker's condition was one which was capable of being improved with further surgery does not mean the worker's condition continued to be temporary for the intervening 3.5 years (having regard to the applicable policy). Indeed, to the extent the worker remained disabled following June 2001, Dr. Regan's report confirms that her condition remained largely unchanged until surgery was performed in December 2004. Accordingly, even if this was an issue determined in the WCAT decision, I do not find that Dr. Regan's May 12, 2005 report provides substantial and material evidence to show that the WCAT decision was in error in respect of the granting of a pension award effective June 11, 2001.

I further note that while Dr. Regan's report provides an additional diagnosis which assists in understanding the basis for the worker's prior physical limitations, this does not mean that the worker's disability was greater than was assessed. I do not consider that Dr. Regan's May 12, 2005 report provides substantial and material new evidence which is germane to the previous assessment of the worker's pension award, based on her assessed level of disability prior to her surgery.

I also note that one of the reports submitted to the WCAT panel was Dr. Regan's April 7, 2004 consultation report. On page 10 of the WCAT decision, the panel noted:

> [The worker's lawyer] indicated that in the future the worker might improve with surgery, and the file should be returned to the Board for further consideration of Dr. R's letter of April 7, 2004.

On page 11, the panel reviewed Dr. Regan's April 7, 2004 report as part of the evidence submitted at the oral hearing:

- Dr. R's letter dated April 7, 2004. In this letter, Dr. R indicated that the worker reported pain in her right shoulder particularly moving it above shoulder height. He did not note any evidence of shoulder instability, and he felt that the rotator cuff strength was normal. He also stated that her elbow, wrist and hand functioned normally. Dr. R provided the following opinion:

  > She has chronic pain syndrome plus [an] element of impingement and acromioclavicular arthritis. I have cautioned her that further surgery may not help her in the way she hopes. I feel it is about a 60% chance of helping her with this condition.
  >
  > She is interested in proceeding to get rid of some of her pain. Clearly we would like to help her with all her pain but I do not think that is possible.
  >
  > We have gone over the risks and benefits of surgery including that of infection, stiffness and on going pain, neurovascular compromise. We will proceed with this at our next available booking.

On page 16, the panel noted:

> With regard to Dr. R's letter, I suggest that the worker may wish to pursue it at the Board level.

I consider it appropriate to take note of the subsequent developments on the worker's claim subsequent to the WCAT decision. By letter dated November 24, 2004, a Board medical advisor wrote to Dr. Regan to provide authorization to proceed with surgery on the worker's right shoulder. The December 16, 2004 operative report from Dr. Regan shows that he performed an arthroscopic subacromial decompression, and an arthroscopic distal clavicle excision, on the worker's right shoulder.

By decision dated January 5, 2005, the case manager concluded that the worker was not eligible for wage loss benefits in relation to the reopening of her claim for surgery as she had withdrawn herself from the workforce based on her belief she was unemployable.

By report dated March 11, 2005, Dr. Regan advised:

> She has done extremely well following surgery. Her pain is under control. She has regained 95% of her motion. She still has night pain...

> With respect to her right shoulder, there is no crepitation. There is an excellent ROM [range of motion]. She is delighted with the overall result.

By decision dated May 19, 2005, the case manager noted that the worker's right shoulder condition had again plateaued following her surgery. He advised the worker that her claim had been referred back to Disability Awards for reassessment.

By letter of June 7, 2005, the case manager requested further information from the worker, noting that the Disability Awards Department had requested the worker's long-term wage rate be converted under new rules to 90% net. By decision dated September 12, 2005, the disability awards officer advised the worker that as the recurrence of her disability occurred on or after June 30, 2002, the provisions of the amended Act had been applied. She concluded that no change would be made to the worker's existing disability award as it was considered to accurately reflect the worker's disability.

The worker requested review of the January 5, 2005 decision. By decision dated August 24, 2005 (*Review Decision #27617*), the review officer found that the Act as it read after June 30, 2002 applied to the worker's claim for temporary disability benefits in relation to her surgery on December 16, 2004. The review officer confirmed the Board's decision of January 5, 2005, to deny wage loss benefits. The worker has appealed *Review Decision #27617* to WCAT.
On September 28, 2005, Dr. Regan advised:

> She is still a lot better than she was prior to surgery, but she has had some recurrence of pain.
>
> Her pain appears to be in the posterolateral aspect of her neck. Her shoulder has a full ROM with no evidence of pain on palpation today.

The worker requested review of the May 19, 2005 decision. By decision dated January 4, 2006 (*Review Decision #R0054554*), the review officer found that the worker's condition had stabilized on or before May 19, 2005.

The worker requested review of the June 7, 2005 decision. By decision dated January 4, 2006 (*Review Decision #R0054555*), the review officer found that the current provisions of the Act (as amended June 30, 2002 by the *Workers Compensation Amendment Act, 2002* (Bill 49)) applied to the reassessment of the worker's pension. She denied the worker's request to apply the former provisions to the calculation of her long-term wage rate. However, she varied the June 7, 2005 decision, stating:

> I note that at the worker was not working in December 2004. However, policy item #70.20 subparagraph 3 [*Reopenings Over Three Years – Permanent Disability Occurring or Increasing More Than Three Years After Injury*] states in part that even though a person is unemployed at the

> time of a section 23(1) assessment, and does not now foreseeably have an actual loss of earnings, it does not mean that the person should not receive an award under section 23(1). A permanent disability award assessed on a loss of function basis under section 23(1) of the *Act* should, however, be paid in that situation and (subject to any appropriate wage rate review being carried out) calculated on the basis of the wage rate originally set on the claim plus applicable cost of living adjustments. Based on my analysis, I am satisfied that this is what the Board has done, although it was done to the wrong rate.
>
> I find that the Board calculated the worker's wage rate incorrectly. The worker's wage rate should be based on the wage rate originally set on the claim, for the purposes of the disability award. As the original wage rate was set before June 30, 2002, the wage rate must be reset in order to convert it from a rate based on 75% of gross average earnings to a rate based on 90% of average net earnings. This conversion will involve using information from the time of the original injury plus applicable cost of living adjustments, and the relevant tax provisions at the time of the recurrence.
>
> [reproduced as written]

The worker also requested review of the September 12, 2005 decision regarding her pension reassessment, but subsequently withdrew that request (*Review Reference #R0058754*).

Upon consideration of the foregoing, I note that the WCAT panel was aware of Dr. Regan's opinion as to the possibility of improving the worker's condition by further surgery. The WCAT panel indicated that this possibility could be addressed by the Board as involving new issues for adjudication, rather than treating it as relevant to the assessment of the worker's pension award effective June 11, 2001. I find that the WCAT decision was reasonable (certainly not patently unreasonable) in its handling of this new evidence. I find that the further new evidence which has been provided concerning the findings at surgery, and the improvement in the worker's condition, do not constitute new evidence which is substantial and material to the WCAT decision.

Accordingly, the worker's application for reconsideration on the basis of new evidence under section 256 of the Act is denied.

Expenses

The worker's lawyer requests reimbursement of the cost of Dr. Regan's May 12, 2005 medical-legal report, in the amount of $2,675.00. I do not consider that this new evidence was helpful or reasonably obtained in connection with this application for reconsideration of the WCAT decision, bearing in mind the analysis provided above, as well as:

- the other reports on file by Dr. Regan;
- the Board's acceptance of the worker's further surgery and ongoing adjudication of the worker's claim in relation to that surgery; and,
- the fact that the worker had not appealed the termination of wage loss benefits effective June 10, 2001.

This finding is limited to this particular proceeding, and does not limit the consideration which may be provided by the Board or WCAT to a request for reimbursement of that report in any other proceeding (including the appeal to WCAT from *Review Decision #27617*, which also denied reimbursement of that report).

Conclusion

The worker's application for reconsideration of *WCAT Decision #2004-05439-RB* dated October 20, 2004 is denied on both the common law and new evidence grounds. No error of law going to jurisdiction has been established in relation to the WCAT decision. The decision did not involve a breach of natural justice or procedural fairness, and was not patently unreasonable. No new evidence has been provided which meets the requirements of section 256 of the Act. The WCAT decision stands as "final and conclusive" under section 255(1) of the Act.

Herb Morton
Vice Chair

HM/gw