Noteworthy Decision Summary

Decision: WCAT-2006-02698 **Panel**: Randy Lane **Decision Date:** June 29, 2006

Reconsideration – Natural justice – Right of party to be heard – Failure of WCAT panel to identify key piece of evidence – Occupationally-induced hearing loss – Item #31.20 of the Rehabilitation Services and Claims Manual

Reconsideration of a prior WCAT decision. Although a panel is not required to identify each piece of evidence considered in reaching a decision, the failure to identify evidence in certain circumstances may be a breach of natural justice.

The worker claimed he had experienced occupationally-induced hearing loss. The Workers Compensation Board operating as WorkSafeBC (Board) denied his claim on the basis that he did not satisfy the requirement of item #31.20 of the *Rehabilitation Services and Claims Manual* of continuous work exposure for two years or more at eight hours per day at 85 dBA. The worker appealed to the former Workers' Compensation Review Board (Review Board). On March 3, 2003, WCAT replaced the Review Board. After an oral hearing, the original panel concluded that the evidence, taken as a whole, did not support the conclusion that the worker met the requirements of item #31.20 and denied the appeal. The worker requested a reconsideration.

The reconsideration panel noted the worker had made a submission to the original panel after the oral hearing that referred to a 2001 inspection report which identified two of three forklifts as having noise exposure levels in excess of 85 dBA. However, only a partial copy of the report was provided along with the submission. The original panel did not refer to the 2001 inspection report in its decision.

The reconsideration panel noted that, although there is no obligation on panels to identify each piece of evidence it has considered, there will be circumstances when a failure to identify a piece of evidence will lead to the conclusion that the evidence was not considered. The panel concluded the original panel's reference to "the evidence, taken as a whole" was not sufficient to address evidence that would raise questions as to the adequacy of the data relied upon by the Board in its decision to deny the worker's claim.

The reconsideration panel concluded the original panel breached a rule of natural justice. The panel did not adequately hear the case before it and thus breached the worker's right to be heard.

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

WCAT Decision Number: WCAT-2006-02698
WCAT Decision Date: June 29, 2006
Panel: Randy Lane, Vice Chair

Introduction

The worker seeks reconsideration of a January 30, 2004 decision by the Workers' Compensation Appeal Tribunal (*WCAT Decision #2004-00562*).[1] The WCAT panel confirmed a January 3, 2001 decision of the Workers' Compensation Board (Board) that the worker's claim for occupationally-induced hearing loss associated with his employment between 1956 and 2000 did not satisfy the requirement of item #31.20 of the *Rehabilitation Services and Claims Manual* (RSCM) that the worker have had continuous work exposure for two years or more at eight hours per day at 85 dBA.

The worker is assisted by Ms. O'Connor Coulter who supplied a July 2, 2004 submission, an August 18, 2004 submission, and a May 12, 2006 submission. WCAT determined that, owing to the Board's method of charging costs with respect to hearing loss claims, the employer for which the worker worked between 1998 and 2000 did not have standing to participate in the reconsideration.

Item #8.90 of the *Manual of Rules of Practice and Procedure* (MRPP) provides that WCAT will normally conduct an appeal on a read and review basis where the issues are largely medical, legal, or policy based, and credibility is not an issue. I find that similar considerations would apply to a reconsideration application. I have reviewed the issues, evidence and submissions on the worker's file and have concluded that this reconsideration may be determined without an oral hearing. The issue before me is primarily legal in nature.

Issue(s)

Does the WCAT decision contain an error of law going to jurisdiction?

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

[1] That decision, along with other WCAT decisions mentioned in this decision is available at WCAT's website on the Internet at http://www.wcat.bc.ca/.

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 *Administrative Tribunals Act* (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 as follows:

> 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 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. Paragraph 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.

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).

Background

In June 2000 the worker applied for compensation with respect to his hearing loss. He completed a form which outlined his employers and employment duties between 1956 and 2000. That form and his testimony at the WCAT oral hearing establish that between 1957 and 2000 his work duties included work with forklifts. He operated a forklift in a produce warehouse for eight to ten years commencing in 1957. There were compressors in the warehouse. From the mid 1960s to the mid 1980s he was involved in maintenance and he worked fewer hours in the produce warehouse. From the mid 1980s to 2000 he drove a forklift and picked orders in a general warehouse.

A Board occupational audiologist prepared an October 20, 2000 noise exposure record which indicated that the worker had no noise exposure in excess of 85 dBA during his employment career. The occupational audiologist provided an October 25, 2000 memorandum which reiterated that conclusion. She considered that the worker's hearing loss was to due to non-occupational etiology.

By decision of January 3, 2001 the worker was advised that his claim did not meet the primary requirement of him having undergone continuous work exposure for two years or more at eight hours per day at 85 dBA or more. He was provided with a copy of the October 25, 2000 memorandum.

The worker appealed the January 3, 2001 decision to the former Workers' Compensation Review Board (Review Board). That appeal was transferred to WCAT as a result of the terms of section 38 of the *Workers Compensation Amendment Act (No. 2), 2002.*

As part of his attempt to determine the evidential basis for the Board's decision, the worker learned that the Board maintained a database of historical noise levels. He was provided with an August 26, 2003 noise exposure data base-industry classification unit report regarding classification unit 742015 which listed 14 measurements of noise levels associated with such matters as the operation of forklifts, older cutting machines, and radios. Noise levels were also supplied for loading areas and the cab of a truck. The measurements were taken between February 1976 and November 2001. The lowest

measurement was 72.2 dBA and the highest measurement was 86.6 dBA; the average measurement was 79.6 dBA. Included were four measurements from November 2001 specific to Raymond forklifts which ranged from 78.7 dBA to 82.6 dBA. As well, there was a November 2, 2001 report which documented that warehouse workers' exposure did not exceed 82 dBA. The noise exposure data base-industry classification unit report regarding classification unit 742015 listed three firm numbers but not firm names.

In her September 5, 2003 letter to the Board Ms. O'Connor Coulter asked to be supplied with the names of the three firms. She also asked to be supplied with the results of any and all measurements taken at the work sites at which the worker worked, the results of any measurements taken in any other produce warehouses (including those taken prior to 1985), and the results of any measurements taken at a worksite where refrigeration compressors were in use. She indicated that pre-1985 data would be especially relevant.

WCAT held an oral hearing on September 17, 2003. Additional time in which to provide written submissions was given.

Ms. O'Connor Coulter provided a December 19, 2003 submission. She noted that in response to her September 5, 2003 letter the only material supplied by the Board pertained to the three numbered companies. She noted that one company appeared to be a warehouse for paper products. The material provided related to a variety of issues and was gathered during 2001. Her submission contained the following passage of interest:

> One issue of note are the noise levels for forklifts set out on the document dated 28 August, 2001. They would appear to fall between 83.6 and 89.9, depending on model.
>
> [all quotations in this decision are reproduced as written, save for changes noted]

She observed that the second firm was a paper products warehouse and the data was gathered between 1988 and 1999. She indicated that none of the material related to the work which the worker performed. She observed that the third firm did not appear to have been a produce warehouse.

Among other matters, she commented that the Board had not obtained any evidence which would support its decision to deny the worker's claim. She cited item #97.00 of the RSCM with respect to the Board's duty to investigate and arrive at a decision supported by evidence. She contended that the worker did not have the means of obtaining the relevant evidence himself and, in view of the fact that the Board did not appear to be in possession of any evidence pertinent to his claim, WCAT should apply the provisions of section 99 of the Act to the evidence before it. She referred to the worker's testimony.

In its January 30, 2004 decision the WCAT panel denied the worker's appeal. The panel noted that the four forklift measurements from November 2001 ranged from 78.7 dBA to a high of 82.6 dBA. It noted the worker's testimony with respect to the noise levels associated with his employment environment. The panel made the following comments with respect to the December 19, 2003 submission:

> After the hearing, the worker's counsel attempted to obtain further data from the Board regarding the warehouse operations used in its noise exposure database, and any noise measurements taken at any of the worker's actual worksites, another produce warehouse, or worksite with refrigerator compressors. The only information provided indicated that the warehouse operations in the Board's noise database related to paper products and a glass container manufacturer. The November 2001 personal dosimetry and spot noise level measurements for forklift operators at a paper products warehouse were reported as 81 dBA. The Board's freedom of information officer confirmed that no documents were withheld from disclosure.

While the panel did not question the worker's credibility, it determined that his recollection of exposure to noise in the various jobs performed since 1957 did not persuade it that it was at least 50% likely that the worker had two years of continuous work exposure of eight hours a day, at 85 dBA. The panel indicated that there were "obvious deficiencies" in the exposure record used by the Board. It noted that the Board used the occupational classification of security guard/watchman for his first year of labouring work as a railway engine watchman. It determined that, even assuming the noise level at that job had been 85 dBA or more, employment would not have met the two-year threshold requirement as the worker worked in that job for only a year.

The panel made the following determinations of note with respect to the worker's operation of a forklift in a warehouse which contained compressors:

> I accept that the warehouse data for forklift operators in the Board's noise database (78.7 dBA to 82.6 dBA) were not necessarily representative of the specific warehouses where the worker had been employed. It appears that this historical data does not exist. However, the worker's evidence regarding the noise level of the forklifts and electric pallet movers he operated for many years does not persuade me that he was exposed to noise levels above the 85 dBA threshold for eight hours a day over a continuous two year period. While he described the lift pump motor on one forklift as extremely noisy (and thus possibly above 85 dBA), he was only intermittently exposed to its noise for about two to three hours a shift, for a period of a year and a half.

> The worker testified that his exposure to the noise from the compressors in the produce warehouse varied depending on how near or far he was to them in the vast warehouse. He said that when he was close to the compressors, he had to raise his voice a bit to talk to a co-worker. That evidence is not sufficient to support an inference that it was 50 percent likely that he had exposure to levels of noise in excess of 85 dBA for eight hours a day for two consecutive years while he worked as a forklift operator in the produce warehouse.

The panel made the following determinations regarding the worker's other employment exposure:

> Finally, the worker's evidence regarding the potentially hazardous levels of noise to which he was intermittently exposed when he worked in equipment/building maintenance did not satisfy the eight hour a day two year threshold requirement of exposure in the Board's policy. I am not persuaded that the estimated 77 dBA noise level for a building maintenance engineer, which the Board used in his noise exposure record, was inappropriate in the circumstances.

The panel summed up its conclusion as follows:

> I find that the evidence, taken as a whole, does not support a conclusion that the worker met the minimum requirement of two years continuous work exposure to 85 dBA or more for eight hours a day.

In her July 2, 2004 submission Ms. O'Connor Coulter made a number of arguments which I have summarized as follows:

- the WCAT panel acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction when, in arriving at its decision, it failed to apply the provisions of item #97.00 of the RSCM;

- the panel failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe by failing to apply the evidentiary test set out in policy #97.00;

- the panel erred in law in making its decision, by failing to apply that test; and

- the panel's decision that the evidence taken as a whole did not support a conclusion that the worker met the minimum requirement of two years continuous work exposure to 85 dBA or more free hours a day was made in a perverse or capricious manner, without regard to the material before it.

I have summarized as follows her other arguments that the evidence disclosed that the WCAT panel:

- assumed that the burden of proof was on the worker, in that the panel noted that he had not been able to provide it with evidence of the level of his exposure to occupational noise at various sites;

- failed to factor in the measurements set out in an August 28, 2001 inspection report which contained decibels measurements for three different forklifts which ranged between 83.8 dBA and 89.9 dBA;

- provided no rationale for disregarding what were probably the most relevant figures provided by the Board in arriving at her decision; and

- failed to note that the evidence provided by the Board was irrelevant to the worker's work sites and to remit the matter back to the Board for production of relevant and probative data.

Among other matters, she submitted that if the panel did not have before it sufficient relevant evidence, the panel was under a positive duty to take the initiative in seeking further evidence such as readings taken in present-day products warehouses, readings taken in warehouses with at least three cooling compressors in operation, and readings taken on the specific forklift models driven by the worker.

Following WCAT's receipt of the July 2, 2004 submission, legal counsel at WCAT asked Ms. O'Connor Coulter to provide a copy of the August 28, 2001 report to which she referred in her July 2, 2004 submission. By letter of August 18, 2004 Ms. O'Connor Coulter's office provided a copy of the two-page August 28, 2001 report. That August 28, 2001 report concerns the same warehouse for paper products that was the subject of assessment in the November 2, 2001 dosimetry report noted by the WCAT panel in its decision.

In her May 12, 2006 submission Ms. O'Connor Coulter submitted that the panel fettered its discretion by (1) failing to take into account the August 28, 2001 report and failing to note that the material relied on by the Board was irrelevant to the worker's case and (2) not remitting the matter back to the Board pursuant to subsection 246(3) of the Act with an order/request that the Board provide relevant and probative data. She also submitted that the panel failed to give the Act a large and liberal interpretation when (1) it assumed that the burden of proof was on the worker and noted his inability

to put before evidence of the occupational noise to which he had been exposed and (2) it interpreted the words "evidence is provided of continuous work exposure to two years or more at eight hours per day at 85 dBA or more" as meaning conclusive evidence thereof.

She noted that the worker's evidence before the panel was that he had driven a forklift in the produce warehouse between "1957 and 1958." She observed that apparently there was no information available from the Board for the noise levels generated by a forklift truck or cooling compressors and food warehouses during those years; the data had simply not been collected. She emphasized that there was the worker's evidence as to what he did, how what he did it, and in what conditions. There was evidence as to the decibels limited by Raymond forklift trucks in 2001. She asserted that there was "... nothing in the impugned decision that indicates that the panel herein considered those two pieces of evidence in determining whether it was as likely as not that [the worker] had been exposed to two years continuous exposure to 85 dBAs for more than eight hours."

She contended that there was some evidence, perhaps not conclusive evidence, that the provisions of item #31.20 had been met; that was all that the law required. She contended that to make a conclusion with respect to the "evidence as a whole" was insufficient when the Act affords WCAT the power to refer questions back to the Board under subsection 246(3); such a failure to make a referral constituted a fettering of discretion, particularly where the evidence supplied by the Board was "totally irrelevant" to the issues before WCAT.

Reasons and Decision

I note at the outset that Ms. O'Connor Coulter's December 19, 2003 submission to the prior WCAT panel was not accompanied by a complete copy of the August 28, 2001 inspection report to which she referred in that submission. A review of the Board's e-file establishes that only the first page of that report was included. Thus, the WCAT panel did not have an inspection report before it which identified decibels levels of between 83.6 and 89.9 regarding three Raymond forklifts. However, the panel did have the submission which referred to that inspection report.

There is no indication that the WCAT panel ascertained that the December 19, 2003 submission was incomplete. The absence of the second page of that August 28, 2001 inspection report appears to have been what prompted WCAT legal counsel to write her July 27, 2004 letter to Ms. O'Connor Coulter. The August 18, 2004 response by Ms. O'Connor Coulter's office to the July 27, 2004 letter and her subsequent May 12, 2006 submission do not reveal that she was aware that her December 19, 2003 submission was not accompanied by a complete copy of the August 28, 20001 report.

The January 30, 2004 WCAT decision is notable for the fact that there is no acknowledgement in it of Ms. O'Connor Coulter's reference to the August 28, 2001 inspection report which identified, with respect to two of three Raymond forklifts, noise exposure in excess of 85 dBA. There was no discussion by the panel as to the relevance of measurements taken at that August 28, 2001 inspection to the worker's exposure. The panel did not make any explicit statements that measurements taken in 2001 would not be relevant to an assessment of the worker's noise exposure. It noted that the Board's database with respect to forklifts included measurements as of 2001 (those measurements obtained on November 2, 2001), and it did not make a statement that such measurements were not relevant. Had it done so that might have been taken as an implied dismissal of the relevance of the measurements taken in August 2001. It did not acknowledge that the Board's database measurements regarding forklifts did not incorporate data from the August 28, 2001 inspection. It did not acknowledge that there were forklift measurements in the Board's possession that exceeded 85 dBA.

What is the relevance of the panel's failure to address the August 28, 2001 report?

There is no obligation on a decision-maker to identify each piece of evidence it has considered. I consider that there will be circumstances however where a failure to identify a piece of evidence will lead to the conclusion that the evidence was not considered.

In the case before the WCAT panel the issue was the noise level to which the worker had been exposed. The Board relied on data that indicated that the worker had not been exposed to noise that exceeded 85 dBA. The worker's representative had submitted evidence to WCAT that the Board had measurements that exceeded 85 dBA. That evidence would raise questions as to the adequacy of the data relied upon by the Board in its decision to deny the worker's claim. That a reading exceeded 85 dBA is of considerable interest given an August 28, 2003 claim log entry from a Board occupational audiologist who noted that a 3 dBA increase represents a doubling of sound energy; 4 hours of exposure at 88 dBA delivers as much energy as eights hours of exposure at 85 dBA.

One would expect a decision-maker to address such evidence as part of its analysis as to the adequacy of the evidential basis for the Board's decision and to determine whether that evidence was relevant and had probative value. One would not consider that a statement by a decision-maker as to the "evidence, taken as a whole" would be sufficient to address that evidence.

In *Appeal Division Decision #97-0083*, "Reconsideration of an Appeal Division decision — natural justice — the right to be heard", 14 *W.C.R.* 37[2], the panel stated as follows at pages 43-44:

> 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….
>
> In sum, natural justice requires providing those individuals who may be affected by a decision with the opportunity to present their point of view. Providing them with that opportunity is not sufficient. They must also be genuinely heard.

The Appeal Division panel concluded, at page 44:

> ...the issue is whether the employer appears to have been heard. Unfortunately, on its face, the impugned decision does not convey the impression that he was heard.
>
> I have decided, therefore, to set aside the decision on the grounds that it involves a breach of the rules of natural justice and, therefore, involves an "error of law going to jurisdiction." Appeal Division Decision No. 93-1486 is consequently of no force or effect.

WCAT Decision #2006-01867 (April 28, 2006) concerned a case where a reconsideration panel reviewed a worker's complaint that critical evidence was ignored or not considered in an earlier WCAT decision. It noted several relevant court cases, and I refer the interested reader to that decision.

After reviewing the matter, I find that the WCAT panel breached the rules of natural justice. In the present case, I conclude that the WCAT panel breached the worker's right to be heard. The WCAT panel's decision did not adequately hear the case before it. I determine that the WCAT panel did not act fairly (as that term is used in paragraph 58(2)(b) of the ATA) possibly due to inadvertence. In light of that conclusion, I do not need to consider Ms. O'Connor Coulter's other arguments regarding the WCAT decision.

[2] That decision is available on the Internet at the Board's website at www.worksafebc.com.

Conclusion

The January 30, 2004 WCAT decision is set aside as void. That decision involved a breach of natural justice with respect to the worker's right to be heard. The WCAT Registry will contact the worker concerning the further conduct of his appeal.

Randy Lane
Vice Chair

RL/gw