Noteworthy Decision Summary

Decision: WCAT-2006-02830 **Panel**: Jill Callan **Decision Date:** July 11, 2006

Reasonable apprehension of bias – Policy item #23.51 of the Manual of Rules of Practice and Procedure

Reconsideration of a WCAT decision. The fact that a panel has previously decided similar issues raised in an appeal, or has obtained evidence to assist with full consideration of the issues under appeal, does not raise a reasonable apprehension that the panel is biased so long as there is evidence that the panel is approaching the issues with an open mind.

The worker appealed an August 16, 2005 decision of the Review Division of the Workers' Compensation Board, denying his claim for non-Hodgkin's Lymphoma (NHL). The worker contends he developed NHL due to the nature of his employment as a firefighter. A panel (the Assigned Panel) was assigned to hear the appeal. The Assigned Panel previously heard and denied appeals of two other cases involving NHL claims by firefighters. The Assigned Panel advised that it would take one of the previously decided appeals into consideration and provided that decision and some medical evidence to the worker for comment. The worker raised the issue of the existence of a reasonable apprehension of bias. In *WCAT Decision #2006-01852* (the Bias Decision) the Assigned Panel found that there was no reasonable apprehension of bias associated with them deciding the worker's appeal.

Policy item #23.51 of the *Manual of Rules of Practice and Procedure* states that, when a panel provides a preliminary decision concerning a possible apprehension of bias, a party may seek reconsideration by the chair on the basis of an error of law going to jurisdiction. The worker applied for reconsideration of the Bias Decision. The issue is whether grounds for reconsideration of the Bias Decision have been established. More specifically, the question is whether the Assigned Panel erred in determining that there was no reasonable apprehension of bias associated with their deciding the worker's appeal.

The reconsideration panel concluded that grounds had not been established for reconsideration of the Bias Decision for the following reasons: the fact that the decision-makers had previously decided similar or the same issues does not, in itself, create a reasonable apprehension that the panel is biased in favour of a particular outcome; the panel disclosed the previous decision and medical evidence and invited submissions showing it did not have a closed mind to the issues; and, it is open to a panel to obtain information and evidence from sources other than a party to an appeal where it will assist with the full consideration of the issues under appeal, and the mere fact that the panel has provided such evidence does not lead to the conclusion that there is a reasonable apprehension of bias.

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Panel: Jill Callan, Chair

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1. Introduction

Pursuant to item #23.51 of the *Manual of Rules of Practice and Procedure* (MRPP) of the Workers' Compensation Appeal Tribunal (WCAT), counsel for the worker applies for reconsideration of *WCAT Decision #2006-01852*, dated April 27, 2006 (the Bias Decision). In that decision, a WCAT three-member panel comprised of vice chairs Lane (presiding member), Riecken, and Miller (the Assigned Panel) determined there was no reasonable apprehension of bias associated with them deciding the worker's appeal. Item #23.51 of the MRPP states that, when a WCAT panel provides a preliminary decision concerning a possible apprehension of bias, a party may seek reconsideration by the chair on the basis of an error of law going to jurisdiction.

The worker is represented by Mr. Stan Guenther, who has provided submissions dated March 31 and May 11, 2006. Although invited to do so, the employer is not participating in the worker's appeal.

This application has proceeded on the basis of written submissions. Given that the matter under consideration turns on legal issues, I find it can be fully and fairly considered without an oral hearing.

2. Issue(s)

The issue is whether grounds for reconsideration of the Bias Decision have been established. More specifically, the question before me is whether the panel erred in determining that there was no reasonable apprehension of bias associated with their deciding the worker's appeal.

3. Jurisdiction

Section 255(1) of the *Workers Compensation Act* (Act) provides that a WCAT decision is final and conclusive and is not open to question or review in any court. In keeping with the legislative intent that WCAT decisions be final, they may not be reconsidered except on the basis of new evidence as set out in section 256 of the Act, or on the basis of an error of law going to jurisdiction, including a breach of natural justice (which goes to the question as to whether a valid decision has been provided). 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 WCR 211. This authority is further confirmed by section 253.1(5) of the Act.

WCAT has a duty to provide procedural fairness to parties to appeals. That duty is breached if there is a reasonable apprehension of bias. The common law test to be applied regarding the duty of the fairness is whether the procedures followed by WCAT were fair (see *WCAT Decision #2004-03571*, 20 WCR 291[1] (Reconsideration Application – Whether There Has Been a Breach of Natural Justice Almost Always Depends on All of the Circumstances)).

Effective December 3, 2004, the provisions of the *Administrative Tribunals Act* (ATA) which affect WCAT were brought into force. Section 58 of the ATA concerns the standard of review to be applied in a petition for judicial review of a WCAT decision. Practice and procedure at item #15.24 of WCAT's MRPP, as amended December 3, 2004, provides that WCAT will apply the same standards of review to reconsiderations on the common law grounds as would be applied by the court on judicial review. Section 58(2)(b) of the ATA provides that questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

In considering whether there will be a breach of the duty of fairness if the Assigned Panel decides the worker's appeal, I will consider the legal principles and case law regarding reasonable apprehension of bias.

4. Background

The worker has appealed an August 16, 2005 decision of the Review Division of the Workers' Compensation Board (Board), which denied his claim for non-Hodgkin's Lymphoma (NHL). The worker contends that he developed NHL due to the nature of his employment as a firefighter. This reconsideration application arises out of counsel's objection to the Assigned Panel. Counsel's objection is based on the fact that in *WCAT Decision #2006-00857* dated February 22, 2006, the Panel had previously decided another appeal (the Previous Appeal) regarding a firefighter's NHL claim in conjunction with the fact that the Assigned Panel disclosed to counsel documents from the record in the Previous Appeal and invited his submissions on those documents in relation to the worker's appeal.

[1] WCAT decisions published in the *Workers' Compensation Reporter* are available at: http://www.worksafebc.com/publications/newsletters/wc_reporter/default.asp.

The relevant chronology in this matter may be summarized as follows:

- On November 23, 2005 I assigned panels comprised of vice chairs Lane (presiding member), Riecken, and Miller to decide the Previous Appeal and another appeal in which a firefighter sought compensation for NHL that he contended arose due to the nature of his employment. I made the assignments under section 238(5) of the Act. As I did not assign the panels under section 238(6) of the Act, the decisions in those appeals do not constitute precedent decisions within the meaning of section 250(3) of the Act.

- On January 4, 2006, I assigned the worker's appeal to the Assigned Panel under section 238(5).

- By memorandum dated January 13, 2006, vice chair Lane instructed the appeal coordinator assigned to the worker's appeal to disclose various documents to counsel. Those documents were subsequently considered by the panel in the course of rendering their decision on the Previous Appeal. The documents included various medical opinions regarding the relationship between NHL and employment as a firefighter and *Review Decision #10802* (which was the subject of the Previous Appeal). The memo also directed the appeal coordinator to inform counsel that the panel would be considering a discussion paper and literature assessment available on the Board's website in considering the worker's appeal.

- On February 22, 2006, *WCAT Decision #2006-00859* was issued as well as the decision on the Previous Appeal. The subjects of those decisions were the two appeals that I had assigned on November 23, 2005. In both decisions, the panel concluded that there was insufficient evidence to link the appellant's NHL to his employment as a firefighter.

- In accordance with a second memorandum from vice chair Lane, on March 1, 2006, the appeal coordinator forwarded a copy of the decision in the Previous Appeal to counsel and informed him that "the panel intends to take [the decision issued in the Previous Appeal] into account…as part of its analysis of the issues in the [worker's] appeal".

- On March 31, 2006, counsel objected to the hearing of the worker's appeal by vice chair Lane on the following basis:

> WCAT-2006-00857 [the decision under the Previous Appeal] is also a decision by a panel chaired by Vice Chair Lane. In its reasoning, the panel reviews and assesses the evidence submitted on that case, and makes a decision adverse to the worker on that case based on that body of evidence, and in the process generally rejects a number of items of

> Dr. Guidotti's analysis, as contained in the various documents authored by him and now in our possession also.
>
> In other words, Vice Chair Lane as the chair of this panel has rejected arguments and evidence in that other appeal, and has accepted other evidence on that appeal, and intends to consider the same body of evidence in the instance appeal.
>
> Further, he has taken steps to ensure that the same evidence on the earlier appeal is the same evidence on the instant appeal, although he has already rejected any of the elements of that evidence that favoured the worker's position. Further, he has now advised us that the panel in the instant case intends to take into account the decision in WCAT-2006-00857.
>
> All of this has occurred before we have had any opportunity to present evidence or make any submissions in the instant case.
>
> **Under these circumstances, how could any reasonable and informed person, viewing the matter realistically and practically and having thought the matter through, possibly conclude that the issues arising on the instance appeal could possibly be decided differently? The reasonable apprehension is that the issues on the instant appeal have been prejudged.**
>
> [emphasis added]

- On April 4, 2006, the appeal coordinator informed counsel that the entire composition of the panel was the same as that of the panel for the Previous Appeal.

- By letter dated April 18, 2006, counsel communicated his position that a reasonable apprehension of bias existed in relation to the entire panel.

- On April 27, 2006, the Assigned Panel issued the Bias Decision, which stated in part:

> We consider that appeals involving complex issues around the causation of disease are more fully adjudicated when they are informed by consideration of the available body of relevant scientific and medical information, including the general body of scientific and medical evidence referred to in previous appellate decisions. As noted by Mr. Guenther, prior to "January 17, 2006", the expert opinion evidence on the claim file associated with the present appeal consisted of a September 30, 2004 claim log entry of a Board medical advisor and Dr. Guidotti's March 26,

2003 report. That there is other relevant scientific evidence which would assist decision-makers considering the issue of whether a firefighter's NHL is due to the nature of his employment is demonstrated by the other relevant evidence referred to in other appeal decisions which was disclosed to the worker in the present appeal. **That disclosure ensured the worker is aware of additional relevant scientific evidence and that he has had an opportunity to address all of the evidence.**

… Alerting the worker as to the existence of [the decision in the Previous Appeal] gives him the opportunity to provide submissions which address the panel's analysis of the evidence on that appeal. His opportunity to provide a thorough and informed submission in this appeal is enhanced by his being alerted as to the existence of that WCAT decision and to perceived weaknesses in that evidence.

We have considered Mr. Guenther's submission that the panel has predetermined principal issues arising on the present appeal to the point that any representations made on behalf of the worker are unlikely to be effective. However, Mr. Guenther has failed to take into account that the worker was given several months in which to gather new evidence and provide a submission. Should Mr. Guenther provide a submission and/or a new expert opinion, the material before this panel will significantly differ from material which was before it in connection with the earlier appeals regarding NHL and firefighting.

Should there be no submission and no expert opinion submitted to WCAT, a result similar to that found in earlier cases could follow. **That, in the absence of new evidence or persuasive arguments pointing out errors in earlier WCAT decisions, this panel might reach conclusions in the present appeal with respect to any link between NHL and firefighting similar to those conclusions found in earlier WCAT decisions is not problematic. We consider it reasonable that similar conclusions would be reached in appeals which involved similar evidence and the same law and policy.**

[emphasis added]

- The Assigned Panel concluded that a reasonable apprehension of bias had not been established. The panel emphasized that it remained open to persuasion in respect of its analysis and open to receiving new evidence.

- By letter dated May 11, 2006, counsel initiated this reconsideration application.

5. Preliminary Matter

As counsel's bias application is, in part, based on the fact that the Assigned Panel was the same as the panel that had decided the Previous Appeal, I directed the appeal coordinator to inform counsel that I had assigned the two previous NHL appeals as well as the worker's appeal and invite his comments on whether I should recuse myself from deciding this application. In his response dated May 16, 2006, counsel stated that he did not object to my deciding this application. He explained that the worker did not object to the process of panel assignment "but rather the process by which the panel, after assignment, made the evidence from another case evidence on the instant case and then decided the other case adversely to the [worker], without providing the [worker] the opportunity to comment on that evidence or make submissions".

Counsel has not requested that I recuse myself and, in my view, the circumstances do not require me to do so. Accordingly, I will proceed to decide this application.

6. Is there a reasonable apprehension of bias?

I will consider the general principles regarding reasonable apprehension of bias and then turn to the specific elements of the application before me.

(a) General test for reasonable apprehension of bias

The test for bias was set out by the Supreme Court of Canada in *Newfoundland Telephone Co. Ltd.* v*. Board of Commissioners of Public Utilities,* [1992] 1 S.C.R. 623, as follows:

> The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. **The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.**
>
> [emphasis added]

The B.C. Court of Appeal in *Finch* v. *The Association of Professional Engineers and GeoScientists* (1996), 18 B.C.L.R. (3d) 361 (B.C.C.A.) also noted that an objective test applies. The court stated:

> The word "reasonably" in this context has been interpreted as fixing a factual standard --- i.e., as requiring a "probability or a reasoned suspicion" of biased judgment (per Laskin, C.J.C. for the majority in Committee for Justice and Liberty, supra, at 733), or a "real likelihood of bias" (per de Grandpré, J., supra, at 736.) Thus the question is largely factual and objective.

In *R.* v. *S. (R.D.),* [1997] 3 S.C.R. 484, the Supreme Court of Canada emphasized that the threshold for finding bias is high, stating:

> Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. **It is a finding that must be carefully considered since it calls into question an element of judicial integrity.** Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.
>
> [emphasis added]

(b) The presumption of impartiality

In *Administrative Law in Canada*, 4th ed. (Ontario: Butterworths, 2006), S. Blake notes (at page 115) that "[t]here is a presumption that a tribunal member will act fairly and impartially, in the absence of evidence to the contrary." (In this decision, I will cite Ms. Blake's text as *Administrative Law in Canada*.) The British Columbia Court of Appeal recognized the presumption in *Adams* v. *B.C. (W.C.B.)* (1989), 42 B.C.L.R. (2d) 228 and took it into account in considering a bias allegation.

Section 30 of the *Administrative Tribunals Act* requires WCAT vice chairs to perform their duties impartially and section 232(8) of the Act requires them to take an oath of office prior to beginning their duties. The oath of office, which is found in section 3 of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/2002, requires vice chairs to carry out their duties impartially and conduct themselves with integrity.

(c) The application of the law to the circumstances of the worker's appeal

The thrust of counsel's submissions is that there is a reasonable apprehension of bias because the Assigned Panel has decided the same issue in the Previous Appeal and has indicated that they will consider the evidence from the record in the Previous Appeal in deciding the worker's appeal. In his view, these factors support the

conclusion that the panel has prejudged the question at the heart of the worker's appeal.

In his March 31, 2006 submission, counsel referred to *Energy Probe* v. *Canada (Atomic Energy Control Board*) (1984), 11 Admin. L.R. 287, a case of pecuniary bias, in support of the allegation that there is a reasonable apprehension of bias. He provides the following quote from *Energy Probe*:

> … there are many interests other than pecuniary which may affect the impartiality of a decision-maker, emotional type interests one might say (see Pepin and Ouellette, Principes de contentieux administratif (2nd Ed.) p. 253), such as kinship, friendship, partisanship, particular professional or business relationship with one of the parties, animosity towards someone interested, predetermined mind as to the issue involved, etc.

Counsel also referred to the following quote from the text *Judicial Review of Administrative Action in Canada (Brown and Evans)*, at pages 11 to 48:

> Since "prejudgment" of the issues in dispute can impair the effectiveness of the participation of the parties in an adjudicative decision-making process, it will lead to disqualification unless the legislation has "built in" that particular form of bias. Accordingly, to succeed the applicant must produce evidence from which it can reasonably be inferred that the decision-maker had so made up her mind that any representations at the hearing were unlikely to be effective.

In *Administrative Law in Canada*, Ms. Blake states (at page 110):

> Tribunal members should not prejudge a case. They should not make up their minds so strongly in advance that they cannot be influenced at the hearing to decide another way. They should not hold predetermined views, regardless of the merits of the case.

Examples of cases in which the courts have found a reasonable apprehension of bias because the panel has appeared to approach the matter under consideration with a closed mind include *Concordia Hospital* v. *Concordia Nurses Manitoba Nurses' Union, Local 27* (2004), 25 Admin. L.R. (4th) 58 (Man. Q.B.). In that case, an employer hospital applied for judicial review of an award of an arbitrator, which upheld the grievance of a nurses' union. The court found there was a reasonable apprehension of bias because the arbitrator indicated that he had made up his mind in advance to the extent that it

was unlikely he could be influenced at the hearing to decide another way. The arbitrator made the following statement in a letter during the deliberative process:

> **My view from the outset** and one can even refer to questions I posed during the hearing, was that the position of the Nurses in this situation should be protected properly. I am willing to meet and discuss matters even though **I am fixed in my opinion**.
>
> [emphasis added]

If the circumstances support the conclusion that the Assigned Panel has predetermined the outcome of the worker's appeal and the panel members have closed their minds to the evidence and submissions that may be presented on behalf of the worker, a reasonable apprehension of bias will be established. Therefore, the essence of the question before me is whether there is evidence that the Assigned Panel holds a pre-determined view so strongly that they cannot be influenced by the evidence and submissions that are brought in the worker's appeal. I will first consider the fact that the Assigned Panel decided the Previous Appeal and then consider that fact in conjunction with the panel's statement that it will consider the decision in the Previous Appeal along with evidence from the record in that appeal in deciding the worker's appeal.

Counsel appears to concede that the mere fact that the panel has previously decided a similar appeal does not, in the absence of other factors, support a reasonable apprehension of bias. There are numerous examples of judgments in which, in the absence of circumstances such as a relevant previous finding on credibility, the court has determined that the fact that the decision-maker had previously decided similar or the same issues does not create a reasonable apprehension that the panel is biased in favour of a particular outcome.

The judgment in *Bennett* v. *British Columbia (Superintendent of Brokers)* (1994), 30 Admin. L.R. (2d) 283 (B.C.C.A.) arose in the administrative law context in British Columbia. In that case, the Court was considering whether a reasonable apprehension of bias arose because a panel, which was reconstituted to hear a matter, included some of the members who had sat on the previous panel that had considered that matter. The court stated, in part:

> Other things apart, it is, of course, reasonable to apprehend that a decision-maker presented for a second time with the same question on the same evidence and argument will be likely to decide that question in the same way.
>
> But does this have anything to do with bias?
>
> The answer surely must be that if the decision-maker has decided the matter properly in the first place, that is to say free from extraneous or

> other improper influence-- and in light of the previous decision of this court there can now be no suggestion here to the contrary--then **the fact that the second decision turns out to be the same as the first will show no more than that the decision-maker continues to take the same view as before of the law and evidence. That surely has nothing to do with bias.** There may well be an apprehension of consistency of judgment when the same matter is raised for the second time before a judicial or quasi-judicial decision-maker, and the party against whose interest the first decision went will understandably prefer for that reason that the matter be considered the second time by someone else, but **surely it is impossible that a reasonable apprehension of consistency in judgment on the part of a decision-maker in dealing with the same matter a second time can be equated with reasonable apprehension of bias.** The first is an apprehension that the decision-maker will again see the law and evidence in the same way as on a previous occasion; the second is an apprehension that the decision-maker will ignore law or evidence and decide instead on the basis of extrinsic and improper considerations.
>
> [emphasis added]

While *Bennett* involved decision-makers rehearing the same matter, the statements appear to be equally applicable to cases where a decision-maker is deciding an issue that he or she has previously determined in a similar appeal.

In *R.* v. *Truong* (2000), 258 A.R. 276 (Alta. Q.B.), the accused objected to a judge hearing his bail application because the judge had previously denied bail to several of his co-accused. The court stated:

> There is no authority in Canadian or foreign jurisprudence that results of judicial decisions alone are ever indicative of an apprehension of bias.
>
> Such an argument is based on a false premise that prior decisions were in error; in other words, merely because a number of prior decisions were made does not mean that there was anything improper about how the decisions were arrived at or that the decisions were not legally sound.
>
> In argument before me, **Mr. Beresh asserted that he is not seeking recusal on the basis of results, but rather on the basis that he alleges he would be unable to persuade me to accept a different interpretation of case law pertinent to a bail review decision.**

> This is a distinction without meaning. Dissatisfaction with a judge's interpretation of case law is synonymous with dissatisfaction with the results of an adjudication.
>
> **In my view, the appropriate remedy for any litigant who is dissatisfied with the legal interpretation adopted by a presiding judge is to pursue appellate remedies and not to pursue an application for recusal.**
>
> [emphasis added]

I am satisfied that the fact that the panel has made two previous decisions regarding claims for NHL due to the nature of employment as a firefighter, does not, in and of itself, lead to the conclusion that there is a reasonable apprehension of bias in this case. In fact, in my view, fairness requires that like cases be treated alike provided that the merits of individual cases are taken into account by decision-makers. In addition, I view a decision-maker's previous experience with substantive issues to be beneficial. I note that in *Adams* v. *B.C. (W.C.B.)* (cited earlier) the Court found that there would not be a reasonable apprehension of bias if a panel reheard the same worker's compensation case. It follows that, in light of the fact that the Assigned Panel is hearing an appeal that is not a rehearing of the Previous Appeal, there is a stronger case for finding no reasonable apprehension of bias.

I now turn to the question of whether the fact that the panel decided the Previous Appeal together with other factors raised by counsel establishes that the Assigned Panel members will not have open minds when deciding the worker's appeal. Counsel submits that the Assigned Panel, by their stated intention to consider the medical reports from the record for the Previous Appeal, creates the impression that they have made up their minds without considering the evidence and submissions that will be before them in the worker's appeal, thus resulting in a reasonable apprehension of bias.

In Jones and de Villars, *Principles of Administrative Law, 4th* ed. (Ontario: Carswell, 2004) at page 366, the authors note that decision-makers must "be seen to be basing their decisions on nothing but the relevant law and the evidence that is properly before them." Thus, a question that arises in this case, is whether the decision in the Previous Appeal and the evidence from the record in that appeal is properly before the Assigned Panel.

In reference to the Assigned Panel's stated intention to consider the decision in the Previous Appeal, I note that MRPP item #12.10 provides that panels may refer to previous WCAT decisions. Specifically, it states:

> Panels may refer to past Review Board, Appeal Division (www.worksafebc.com), WCAT (www.wcat.bc.ca), or former commissioners' decisions accessible on an internet website or published

> in the Workers' Compensation Reporter (www.worksafebc.com) without first disclosing those decisions to the parties and inviting further submissions.

The Assigned Panel determined that it would consider the decision in the Previous Appeal. While not required by the MRPP to do so, they disclosed that decision to counsel and invited submissions on it. In my view, the fact that they disclosed the previous decision reflects their desire that counsel have the opportunity to make submissions regarding that decision. In other words, it appears to promote procedural fairness rather than detract from it.

The panel also provided medical evidence from the Previous Appeal to counsel resulting in that evidence becoming part of the record for the worker's appeal. This is not a regular practice of WCAT. However, as the workers' compensation system functions on an inquiry basis rather than on the adversarial model used in the court system, it is open to a panel to obtain information and evidence from sources other than a party to an appeal, where it will assist with the full consideration of the issues under appeal. The mere fact that the panel has provided such evidence does not lead to the conclusion that there is a reasonable apprehension of bias. In addition, it is notable that the evidence disclosed by the panel included evidence that supports the worker's appeal. Counsel has the opportunity to provide submissions as to why the panel should place greater weight on that evidence in deciding the worker's appeal.

In my view, the Assigned Panel disclosed the decision and evidence from the Previous Appeal in order to approach the adjudication of the worker's appeal in an informed fashion and to ensure that the process was fair to the worker.

Counsel contends that vice chair Lane's memoranda reflected that the minds of the members of the Assigned Panel were closed. However, I do not find the wording of the memoranda indicates that the panel members held a fixed view of the worker's appeal. The panel invited counsel to advance arguments and provide further evidence. The panel demonstrated a willingness to consider the possibility of re-evaluating the evidence from the Previous Appeal in the context of the worker's appeal. In this regard, the panel not only invited submissions on the evidence from the Previous Appeal thus indicating that it was open to persuasion, but also stated in the Bias Decision that their intention in providing the evidence was to allow counsel to comment on the weaknesses in that evidence and to provide additional evidence to support a different conclusion.

Counsel has the opportunity to point out the weaknesses in the panel's analysis in the decision in the Previous Appeal and to question the evidence that formed the basis for the decision. Counsel may also submit further evidence. There is a presumption in law that the panel will take such submissions and evidence into account in deciding the worker's appeal.

The test for the determination of whether is there is a reasonable apprehension of bias is an objective test rather than a subjective one. The determination is not based on the perceptions of the parties to the appeals, but rather the perspective of an impartial detached reasonable observer who is cognizant of the tradition of tribunal impartiality. I conclude that in the circumstances of this case, a reasonably informed person would not find that the members of the Assigned Panel will approach the adjudication of the worker's appeal with closed minds or that there is a reasonable apprehension of bias. Accordingly, I find no error in the Bias Decision.

7. Conclusion

Grounds have not been established for the reconsideration of *WCAT Decision #2006-01852* (the Bias Decision). The decision stands as "final and conclusive" in accordance with section 255(1) of the Act. I will return the file to the Assigned Panel to decide the worker's appeal following completion of submissions.

Jill Callan
Chair

JC/hb