Noteworthy Decision Summary

Decision: WCAT-2006-03001 **Panel**: Herb Morton **Decision Date:** July 27, 2006

Reconsideration – Bias – Waiver based on absence of timely objection – Exclusion of witness from oral hearing – Failure to provide reasons – Item #9.32 of the Manual of Rules of Practice and Procedure

Reconsideration of a WCAT decision. A party that alleges bias on the part of a WCAT panel must communicate its objection as soon as practicable or WCAT will consider the party has waived its right to object on this basis.

The worker sought reconsideration of a WCAT decision based on the common law grounds of an error of law going to jurisdiction, including a breach of natural justice. The worker presented a range of objections, including allegations of a reasonable apprehension of bias and a breach of the worker's right to be heard.

The worker's position before the original panel was that his condition had stabilized or plateaued during a three-year interval. The worker sought a loss of earnings award for these three years.

The worker alleged that the original panel asked him numerous questions before the start of the oral hearing and that she made statements that made it appear she had already made up her mind. The worker said there appeared to be animosity between the panel and her lawyer arising from her lawyer's past employment. The worker stated the panel had asked a question during the hearing that indicated she had already decided the worker had either recovered or plateaued. The worker also complained that his wife had been excluded during the initial part of the hearing.

The reconsideration panel noted the worker's lawyer did not make an objection regarding the pre-hearing comments once the hearing commenced. The panel considered a number of court cases and administrative law texts on the issue of implied waiver of the right to object to a decision of an administrative tribunal on the ground of bias. The panel concluded that, as the worker's objection was not made until the original panel had issued its decision, the failure to raise a timely objection meant the worker was considered to have waived any objection to the panel's pre-hearing comments.

The panel, after listening to the audio recording of the hearing, concluded it was the worker's lawyer who had asked the question to which the worker objected. The panel further concluded the original panel's decision to exclude the worker's wife while the worker was giving evidence was aimed at enhancing the credibility of the testimony of the worker's wife by ensuring her evidence was not influenced by hearing the evidence provided earlier in the hearing. This procedure is consistent with item #9.32 of the *Manual of Rules of Practice and Procedure*. The panel concluded there was no reasonable apprehension of bias, and hence no breach of natural justice.

The panel allowed the reconsideration on another ground. The original panel had failed to provide reasons for her conclusion that the worker's functional award reflected the worker's long-term loss of earnings.

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WCAT Decision Number: WCAT-2006-03001
WCAT Decision Date: July 27, 2006
Panel: Herb Morton, Vice Chair

Introduction

The worker seeks reconsideration of the April 7, 2005 Workers' Compensation Appeal Tribunal (WCAT) decision (*WCAT Decision #2005-01742-RB*). His application is brought on the common law grounds of an error of law going to jurisdiction, including a breach of natural justice.

The worker's application for reconsideration was initiated by a written submission dated January 5, 2006 from his representative (an articled student with a law firm, of which the worker's former lawyer is an associate counsel). He presents a range of objections, including allegations of a reasonable apprehension of bias and a breach of the worker's right to be heard. Pursuant to WCAT's usual practice, the appeal coordinator provided the worker's representative with general information about the reconsideration process, including the "one time only" limitation, and invited any further evidence or argument in support of his application. The worker's representative confirmed that the worker's submissions were complete.

As the employer is no longer active, the employers' adviser was invited to participate as the deemed employer. The employers' adviser provided a submission dated April 12, 2005, and the worker's representative provided his rebuttal on May 3, 2006.

An oral hearing has not been requested. I agree that this application raises 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?

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.

The test for determining whether there has been an error of law going to jurisdiction generally requires application of the "patently unreasonable" standard of review. With respect to an alleged breach of natural justice, the common law test to be applied is whether the procedures followed by WCAT were fair (see *WCAT Decision #2004-03571*).

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.
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> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
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> (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.

This application was assigned to me by the WCAT chair on the basis of a written delegation.

Preliminary

To assist in considering this application, I listened to the partial recording of the December 13, 2004 oral hearing (contained on two discs). Disc one was largely complete, but appeared to have some type of malfunction near the end. On disc two, the vice chair made reference in the hearing to the tape not having clicked over, with the result that half the hearing was not recorded. The remaining portion of the recording was not affected. Accordingly, a complete recording of the oral hearing was not available.

MRPP item #9.40 provides:

> **9.40 Record of the Hearing**
>
> WCAT is authorized to tape record or transcribe its hearings [s. 35(1), ATA]. Where practical, WCAT will record oral hearings. The recording constitutes part of the record of the proceeding. After the decision has been issued, WCAT will forward the recording to the Board for storage as part of the Board's file. If a recording is destroyed, interrupted, or incomplete the validity of the proceeding is not affected [s. 35(3), ATA]. Where an oral hearing is adjourned for a lengthy time, WCAT will, on request, ask the Board to provide a copy of the recording to the parties. Written transcripts are not provided, except where the panel determines that a transcript of specific evidence is necessary. In that case, WCAT will provide transcripts to all parties.

Section 245.1 of the Act lists the provisions of the ATA which apply to WCAT, including subsections 35(1) to (3). Section 35 of the ATA provides:

> **35** (1) The tribunal may transcribe or tape record its proceedings.
>
> (2) If the tribunal transcribes or tape records a proceeding, the transcription or tape recording must be considered to be correct and to constitute part of the record of the proceeding.
>
> (3) If, by a mechanical or human failure or other accident, the transcription or tape recording of a proceeding is destroyed,

> interrupted or incomplete, the validity of the proceeding is not affected.

No objections have been presented regarding the recording of the hearing. Pursuant to section 35(3) of the ATA, the incompleteness of the recording does not affect the validity of the proceeding. The information regarding the incompleteness of the audio recording of the hearing is noted simply as background information.

Analysis

The worker's representative raises a range of objections to the WCAT decision. I will address these objections under separate headings, as set out below, beginning with the concerns which involve questions of procedural fairness and natural justice. Such questions must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

(a) Reasonable Apprehension of Bias

The worker was represented by a lawyer at the December 13, 2004 oral hearing. An articled student has taken over from her as the worker's representative in this application, as explained in the lawyer's January 6, 2006 statement. His current representative submits that there is a reasonable apprehension of bias based on the WCAT vice chair's conduct before and during the oral hearing. He submits that it is reasonably apprehended that the vice chair had a closed mind towards the worker's claim before the hearing began. Signed statements have been provided by the worker, the worker's wife, and the worker's former lawyer in support of this argument.

In a statement dated November 3, 2005, the worker states in part:

> 3. ...We were not yet in the hearing room and my counsel had not yet even taken off her coat, when [the vice chair] began peppering her with questions and making statements which made it appear as if I had lost my appeal before we had even begun. Frankly, I thought there must have been some "bad blood" between her and my lawyer, from my lawyer's days as a WCB appeal commissioner. At that point, I honestly believed that I had already lost my appeal. I was intimidated by her and felt we were wasting our time by participating in the hearing.
>
> 4. The vice-chair seemed particularly bothered by the fact that we had not appealed a decision concerning the plateau of my condition and kept suggesting that we were too late. These statements were made before we were settled in the hearing room and the audio tape was running. Again, it made me think there was no point in

> proceeding with my appeal as the vice-chair's mind was already made up.

A similar statement was provided by the worker's wife dated November 7, 2005. A statement dated January 6, 2006 was also provided by the worker's former lawyer. She states:

> 3. Both [the worker] and [his wife] described their reaction to the WCAT appeal process, when the vice-chair, ..., began peppering us with questions while we were in the hallway, and long before we were settled in the hearing room and before I had taken off my coat. The vice-chair did nothing to put them at ease but instead launched right into her concerns on the file and began putting questions to me before I had had an opportunity to get out my file. I was surprised by her rudeness.... She was well into the merits of the case before the we [*sic*] were seated and before the recording equipment was turned on.
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> ...
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> 4. [The WCAT vice chair] repeatedly brought up the issue of the plateau date and about [the worker's] failure to appeal that issue. In fact, there was no decision letter sent to [the worker] concerning a plateau date so that he appealed the only decision he could. Nevertheless, [the vice chair] appeared to have disposed of this question in advance of the hearing, regardless of the representations I could make on that issue….
>
> ...
>
> 6. Both [the worker and his wife] told me that they felt there must have been some "bad blood" between myself and the [the vice chair] as a result of my tenure as an Appeal Commissioner, where I had an opportunity to hear appeals from some of [the vice chair's] decisions. I have no memory of overturning any particular decision made by [the vice chair] and was never advised of any animosity on her part. I do not know her socially and the first personal contact with her that I recall was at [the worker's] oral hearing.

The worker's current representative submits:

> While [the vice chair's] questioning became more polite as the hearing progressed, this did not reverse the loss of jurisdiction caused by her initial attitude and bias. This was the conclusion of the court in *Citynski Hotels Ltd. v. Saskatchewan (Liquor and Gaming Licensing Commission)* (2003), 236 Sask. R. 161:

> By the time the questioning was concluded, in a more conciliatory manner, the damage had already been done; a reasonably informed bystander could justifiably perceive the possibility of bias on the part of the commissioner. (Westlaw paragraph 34)

…

> While less hostile questioning was recorded during the hearing, there are examples indicating that the Vice-chair still comported herself in a manner giving rise to a reasonable apprehension of bias. At one point, she demanded of the worker, "Why didn't you return to the film industry after you recovered from you – or, after you plateaued?" Considering that the WCAT Vice-chair took for granted that worker [*sic*] had indeed recovered, or if not, plateaued, while that was the very issue being disputed by the worker, creates a reasonable apprehension that the Vice-chair had already determined the outcome of that issue.

The worker and his wife also complain of the exclusion of the worker's wife during the initial part of the hearing, up to the point at which she was called to give evidence. The worker's wife states:

> Toward the end of the hearing, once I was allowed back in the room to answer some questions, [the vice chair's] attitude seemed to improve somewhat, but after I read the reasons for her decision, I believe that nothing we said in the hearing was considered by her. Her attitude from the beginning seemed to indicate she had made up her mind on at least one of the issues before anybody was even seated.

In rebuttal, the worker's representative comments:

> ...the Vice-Chair's conduct while the hearing was being recorded was much improved over her aggressive questioning prior to the proceedings being recorded. . . The unrecorded questioning by the Vice-Chair is sufficient grounds to reconsider the decision at issue.

In his submissions, the worker's representative submits that the test for reasonable apprehension of bias remains as set out by the Supreme Court of Canada in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394-95:

> ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would a informed person, viewing the matter realistically and practically--and having thought the matter through--conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."
>
> I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

This test was recently applied by the British Columbia Court of Appeal in the case of *Liszkay v. Robinson* (2003) 18 B.C.L.R. (4th) 82. The Court of Appeal noted:

> 50 Although said in dissent, the test as stated by de Grandpré J. was adopted by the majority in Committee for Justice and Liberty and has been endorsed by the Supreme Court of Canada in subsequent cases: see R. v. R.D.S., [1997] 3 S.C.R. 484 at 530, [paragraph] 111, (reasons of Cory J.) and at 502, [paragraph] 31 (reasons of L'Heureux-Dubé and McLachlin JJ.).

I agree that the passage cited by the worker's representative correctly states the test to be applied.

The worker's representative further cites the decision of the Supreme Court of Canada in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at 636:

> 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.

A major basis for the worker's complaint regarding a reasonable apprehension of bias concerns, on the evidence presented, comments or questions posed by the vice chair prior to the commencement of the hearing proper. As the audio recording of the hearing had not commenced at that point, I cannot listen to that portion. I note, however, that no

objection was raised by the worker's lawyer regarding these pre-hearing comments, once the hearing commenced.

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

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

In *ECWU Loc. 916 v. Atomic Energy of Canada Ltd.*, (1985) 24 D.L.R. (4th) 675, Justice MacGuigan of the Federal Court of Appeal reasoned:

> At common law, even an implied waiver of objection to an adjudicator at the initial stages is sufficient to invalidate a later objection: Re Thompson and Local 1026 of International Union of Mine, Mill and Smelter Workers et al. (1962), g 35 D.L.R. (2d) 333 (Man. C.A.); Rex v. Byles and others; Ex parte Hollidge (1912), 108 L.T. 270 (Eng. K.B.D.); Regina v. Nailsworth Licensing Justices. Ex parte Bird, [1953] 1 W.L.R. 1046 h (Eng. Q;B.D.); Bateman v. McKay et al., [1976] 4 W.W.R. 129 (Sask. Q.B.). The principle is stated as follows in Halsbury's, Laws of England (4th ed.), volume 1, paragraph 71, page 87:
>
> > The right to impugn proceedings tainted by the participation of an adjudicator disqualified by interest or likelihood of bias may be lost by express or implied waiver of the right to object. There is no waiver or acquiescence unless the party entitled to object to an adjudicator's participation was made fully aware of ,'" the nature of the disqualification and had an adequate opportunity of objecting. Once these conditions are present, a party will be deemed to have acquiesced in the participation of a disqualified adjudicator unless he has objected at the earliest practicable opportunity.
>
> Cartwright J. put the rule as follows, by way of dicta, in delivering the judgment of the Supreme Court in Ghirardosi v. Minister of Highways for British Columbia, [1996] S.C.R. 367, at page 372:

> There is no doubt that, generally speaking, an award will not be set aside if the circumstances alleged to disqualify an arbitrator were known to both parties before the arbitration commenced and they proceeded without objection.
>
> [reproduced as written]

In *Eckervogt v. British Columbia (Minister of Employment and Investment)*, (2004) 241 D.L.R. (4th) 685, [2004] 10 W.W.R. 439, (2004) 30 B.C.L.R. (4th) 291, the British Columbia Court of Appeal considered the situation in which a member of an expropriation panel left the board to take a position as a Crown counsel after a hearing was completed but remained involved until the decision was handed down. The parties were aware of this but took no action at the time. When a decision was issued that was unfavourable to the appellants, they appealed on the basis that the board erred in not disqualifying itself on the ground of reasonable apprehension of bias created by the member's continuing participation after he had applied for and accepted a Crown counsel position. That decision reasoned in part:

> [46] I do not wish to leave these reasons without commenting on what I see is the most unsatisfactory course these proceedings took on the question of apprehension of bias. This is the second time in recent years (***Golden Valley*** was the other) we have had to grapple with such an allegation in the first instance. Our primary mandate is to correct error and develop the law on the record of a prior proceeding -- not to make original findings of fact or mixed fact and law.
>
> [47] If, during the course of a proceeding, a party apprehends bias he should put the allegation to the tribunal and obtain a ruling before seeking court intervention. In that way the tribunal can set out its position and a proper record can be formed. This, of course, would not apply when the ground of disqualification is discovered after the tribunal has completed the case and rendered a decision on the merits of the dispute. There is, however, a more fundamental problem with the approach taken by the appellants.
>
> [48] I do not think it is proper for a party to hold in reserve a ground of disqualification for use only if the outcome turns out badly. Bias allegations have serious implications for the reputation of the tribunal and in fairness they should be made directly and promptly, not held back as a tactic in the litigation. Such a tactic should, I think, carry the risk of a finding of waiver. Furthermore, the genuineness of the apprehension becomes suspect when it is not acted on right away.
>
> [49] On the subject of waiver, Brown and Evans, ***Judicial Review of Administrative Action in Canada*** (Toronto: Canvasback Publishing, looseleaf, 2003) said this at 11:5500:

> A leading English text expresses the general principle as follows:
>
> > a party may waive his objections to a decision-maker who would otherwise be disqualified on grounds of bias. Objection is generally deemed to have been waived if the party or his legal representative knew of the disqualification and acquiesced in the proceedings by failing to take objection at the earliest practicable opportunity. But there is no presumption of waiver if the disqualified adjudicator failed to make a complete disclosure of his interest, or if the party affected was prevented by surprise from taking the objection at the appropriate time, or if he was unrepresented by counsel and did not know of his right to object at the time. [439]
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> ....
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> [439] S.A. de Smith, Lord Woolf & J. Jowell, Judicial Review of Administrative Action, 5th ed. (London: Sweet & Maxwell, 1995) at 542.

> See also Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892, 75 D.L.R. (4th) 577, where the court rejected the bias allegation as not having been raised in a timely way.

In this case, whatever comments were made prior to the commencement of the hearing proper were known to the worker and his lawyer, and no objection was raised once the hearing had commenced. The worker's objection was not made until the WCAT panel had issued its decision to deny his appeal. I find that the failure to raise any timely objection means that the worker and his representative may be considered to have waived any objection to the panel's pre-hearing comments.

With respect to the conduct of the recorded portion of the oral hearing, I find no valid concern as to a reasonable apprehension of bias. Following the examination of the worker by his representative, the WCAT panel chair posed a series of questions to the

worker which sought to elicit additional information from him concerning the nature of his condition during the time period in issue. It is evident from the questions of the vice chair that she was seeking to obtain information to assist in considering whether the worker's condition was temporary or permanent in nature, during the time period prior to the reopening of the worker's claim for further surgery. If the vice chair's mind had been made up, as alleged, the vice chair would not have found it necessary to seek information from the worker regarding the nature of his condition and whether there were any changes in his condition, during the time period in issue.

The worker's current representative cites one of the questions posed by the WCAT vice chair as giving rise to a reasonable apprehension of bias. The vice chair is alleged to have stated: "Why didn't you return to the film industry after you recovered from you – or, after you plateaued?" Upon listening to the audio recording of the oral hearing, I find that this particular question was posed to the worker by his own lawyer, not by the WCAT vice chair (at approximately 24:00). The WCAT vice chair posed some additional questions following this exchange beginning with the question "Fifty-two weeks a year?", but did not ask the question which appears central to the worker's complaint. It appears that the worker's current representative has confused the voices of the worker's former lawyer and the WCAT vice chair.

The worker and his wife have also complained regarding the exclusion of the worker's wife from the oral hearing. MRPP item #9.32 provides:

> Panels can place greater weight on the evidence of a witness if they did not hear the evidence of other witnesses. If a person was present in a hearing while another witness gave evidence, the panel may give less weight to their evidence.
>
> Panels will normally exclude witnesses in order to prevent them from being influenced by the evidence of other witnesses. In deciding whether to exclude witnesses, the panel may consider whether there is an actual risk of this occurring, whether the evidence is relevant to a contentious issue, and whether there are good grounds for allowing the witness to remain in attendance (i.e. moral support for the appellant).

The procedure followed by the WCAT panel in excluding the worker's wife while the worker was giving evidence was aimed at enhancing the credibility of the testimony of the worker's wife (i.e. so that her evidence was not subject to being influenced by hearing the evidence provided earlier in the hearing).

In *Lorna Adams v. Workers' Compensation Board*, [1989] 42 B.C.L.R. (2d) 228, the British Columbia Court of Appeal stated the following in relation to allegations of bias:

> This case is an exemplification of what appears to have become general and common practice; that of accusing persons vested with the authority to decide rights of parties of bias or reasonable apprehension of it without any extrinsic evidence to support the allegation. It is a practice which, in my opinion, is to be discouraged. An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by a general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause. As I have said earlier, and on other occasions, suspicion is not enough.

A similar allegation was recently considered by the British Columbia Supreme Court in the case of *Walter L.M. Speckling v. Labour Relations Board of B.C. et al.*, 2006 BCSC 285, [2006] B.C.J. No. 361. The court reasoned, in part:

> [81] Mr. Speckling asserts that the Vice-Chair who made the decision in B334/2003 reverse engineered her decision and was thus biased. He says it is evident from a review of the law and the evidence that the Vice-Chair knew she was making decisions that are not supported in law and findings of fact that were not supported by the facts before her.
>
> [82] This is a serious allegation which requires proof. Mr. Speckling states in his argument that a decision which includes as many errors of law and patently unreasonable findings of fact must have been reverse engineered. He asserts that the Vice-Chair ignored relevant evidence and consistently favoured the Union and the employer.
>
> [83] There is no extrinsic evidence to support the allegations of bias. Mr. Speckling simply asserts that the Vice-Chair made errors in her interpretation of the law and drew improper inferences from the evidence.
>
> [84] An allegation of bias ought not be made unless there is sufficient evidence to demonstrate that there is a sound basis for apprehending that a person who has been appointed to an administrative board would not bring an impartial mind to bear on the case. Suspicion is not enough. Adams v. British Columbia (Worker's Compensation Board) (1989), 42 B.C.L.R. (2d) 228 (C.A.).

> [85] In R. v. R.D.S., [1997] 3 S.C.R. 484 impartiality was defined as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and arguments. In contrast bias connotes a state of mind that is predisposed to a particular result or is closed to particular issues at [paragraph] 104 and 105. The test for bias is a two-fold objective test: the person considering the alleged bias must be reasonable and the apprehension of bias must be reasonable in the circumstances at [paragraph] 111. The onus of demonstrating bias is on the person alleging the bias and the determination of whether there is a reasonable apprehension of bias will depend on the facts of the case at [paragraph] 114. There is a presumption in the case of judges that they will carry out their oaths of office at [paragraph] 117.
>
> [86] Section 129 of the Code requires that Vice-Chairs take an oath of office that they will faithfully, truly and impartially perform the office of Vice-Chair.

Following a detailed review of the various allegations of bias in that case, the court found that the petitioner had failed to satisfy the onus upon him to establish bias on the part of the vice chair.

Both on the grounds of waiver, and on the basis of listening to the recording (albeit incomplete) of the oral hearing, I find that the allegation of a reasonable apprehension of bias is not supported. I find that the accusations in this case, as to whether the WCAT panel had prejudged the case, and as to whether there was some personal animosity between the WCAT vice chair and the worker's lawyer based upon her past employment, involved speculative assertions which lack any real foundation. I find no breach of natural justice on this basis.

(b) Right to be heard – loss of earnings pension

Section 253(3) of the Act provides:

> The appeal tribunal's final decision on an appeal must be made in writing with reasons.

The worker's representative submits that the WCAT decision:

> ...fails to address any entitlement to a pension award on a projected loss-of-earnings basis or what the correct percentage of the worker's PFI is, both of which that very decision identifies those as issues to be

> considered. The failure to provide any discussion on those issues before dismissing the worker's appeal constitutes an error of law that is incorrect to the point of being patently unreasonable.

The worker's former lawyer provided written legal argument at the December 13, 2004 oral hearing. She stated, in connection with the January 19, 1998 decision which was the subject of the worker's appeal (at page 2):

> It is respectfully submitted that the type of pension (functional versus loss of earnings) and its commencement date are issues which arise out of this decision letter. As such, they are properly before this panel of the WCAT.

The worker's representative identified the relief sought in the worker's appeal as follows (at page 6):

> **Relief Sought**: We respectfully request that [the worker] be awarded a loss of earnings pension equal to the difference between his actual loss of earnings for the period of March 31, 1997 until April 2, 2000 when the claim was reopened for wage loss benefits.
>
> In the alternative, we respectfully request a finding that the effective date of the pension, March 31, 1997 is incorrect and that the matter be returned to the Board for a redetermination of benefits, including partial wage loss benefits until the reopening date of April 2, 2000.
>
> [emphasis in original]

In sum, the worker's first position in the appeal appears to have been that his condition had stabilized or plateaued in relation to the time period between the termination of wage loss benefits, and the reopening on April 2, 2000 and his surgery in October 2000. The worker sought a loss of earnings pension award in respect of this interval (most of 1997, 1998 and 1999). The argument that his condition continued to be one which was of a temporary nature during this three-year interim period was presented as an alternative position.

During the oral hearing, the WCAT vice chair flagged a concern regarding the request for consideration of a "short-term" loss of earnings pension (at 14:40). The worker's representative explained that she was asking that the assessment of the worker's loss of earnings pension entitlement be based on a long-term projection, as to what the worker's entitlement would have been had the later surgery (which resulted in a significant improvement it the worker's condition) not occurred. She submitted, in effect, that a loss of earnings pension should have been awarded, which was subject to being redetermined as part of the reassessment of the worker's pension following his surgery. The worker's lawyer confirmed that she was presenting alternative submissions regarding the worker's request for a loss of earnings pension, or wage loss benefits, during the interval in question.

The WCAT panel noted on page one that the worker requested that his appeal of the September 30, 2002 decision (regarding the reassessment of his pension following his surgery) be withdrawn. The panel accepted the worker's request for withdrawal. The WCAT decision identified the four issues arising in relation to the worker's appeal of his earlier pension award (January 19, 1998 decision) as follows:

> The issues in the remaining appeal are as follows:
>
> 1. What is the percentage of the worker's permanent functional impairment?
>
> 2. Is the worker entitled to a pension award on a projected loss-of-earnings basis?
>
> 3. What is the long-term wage rate to be used to calculate the worker's pension?
>
> 4. What is the effective date of the pension award?
>
> The worker does not take issue with the percentage of functional impairment or the wage rate used to calculate his pension. However, as noted in item #14.20 of the *Manual of Rules of Practice and Procedure* (MRPP) of the Workers' Compensation Appeal Tribunal (WCAT), a WCAT panel may address any aspect of an appealed pension decision.

Accordingly, the WCAT noted at the outset that while it had jurisdiction to address all aspects of the worker's pension award, the worker's appeal was being pursued in relation to the 2nd and 4th issues listed above.

Under the heading "Background and Evidence", the WCAT panel noted the following:

> In a letter dated July 26, 2000 the worker advised his case manager that:
>
> > As far as jobs I have been unable to do, the number of jobs turned down while I have been unable to get out of bed are too numerous to count. Also, the length of time it takes me to complete the jobs I do is severely affected by the fact that I end up in bed for several days at a time. There have been some fairly large jobs which I have also turned down because they were too big for me to handle with my back

> being the way it is i.e. the outdoor patio/smoking area at the [Hotel], a very large sailboat (including all canvass, sail covers, cushions, etc. at the [local] Sailing Club, replacing all awnings at our local strip mall…etc.
>
> Attached to this letter are copies of the worker's income tax returns showing gross business income of $20,777.61 and no net income for 1997; gross business income of $32,899.03 and $1,237.04 net income for 1998; business income of $39,152.02 and $572.00 net income for 1999. Subsequent information provided to appeal show business income of $39,596.16 and -$5,562.27 net in 2000.
>
> [reproduced as written]

Under the heading "Decision and Reasons", the WCAT decision began by noting:

> Section 23(1) of the Act provides in part that "Where permanent partial disability results from the injury, the impairment of earning capacity must be established from the nature and degree of the injury."
>
> Board policy item #39.00 of the RSCM I describes this method of assessing permanent partial disabilities as the "loss of function/physical impairment" method. This is opposed to the "projected loss of earnings" method under section 23(3) of the Act.
>
> The worker claims that his pension was prematurely determined and he continued to be in a state of temporary disability until surgery alleviated most of the symptoms resulting from the compensable injury.

Under the heading "Decision and Reasons", the WCAT decision found in part:

> Considering the nature of the worker's back condition prior to the injury, that of undergoing previous back surgery as well as significant severe degeneration, and the medical opinions from the worker's treating physicians, as well as Board medical specialists, I find no reason to change the effective date from that of March 31,1997. The permanent functional impairment examination report of August 7, 1997 notes the conclusions of treating specialists that back fusion surgery was not a viable option. The DAMA [disability awards medical advisor] did not find nerve root compression symptoms and his recommendation of 4.8% of total disability award, for the worker's subjective complaints, confirms acceptance that the worker suffered quite severe pain symptoms from degenerative disc disease causing an inability to return to his pre-injury occupation. Even though the DAMA recommended that the worker undergo further treatment, the file evidence shows that these spasms had

> been present since the injury date and at the time of the previously determined medical plateau date of March 1997.
>
> I have not been presented with evidence or arguments regarding the percentage of functional impairment determined by the DAMA and, as a result, have no reason to alter it. **I also find that this award reflected any long-term loss in the worker's earnings and was calculated on the appropriate pre-injury average earnings**.
>
> [emphasis added]

The reasons provided in the WCAT decision focussed primarily upon the alternative position presented on behalf of the worker, concerning whether or not the worker's condition had stabilized and the effective date of the worker's pension award. With respect to the worker's request for a loss of earnings pension award, the decision to deny the worker's appeal on that issue was stated in the form of a conclusion, without reasons. The panel's consideration of this issue was essentially in the same form as the panel's consideration of the other two aspects of the worker's pension award, on which the worker was not pursuing any objection (the percentage of functional impairment, and the worker's average earnings).

The cursory or brief reference to the percentage of functional impairment, and the worker's average earnings, is not problematic given that the worker was not pursuing an appeal on either of those issues. However, the same cannot be said in relation to the lack of reasoning in regard to the worker's request for a loss of earnings pension award, set out in the written argument by the worker's lawyer as the first basis for his appeal. There was no indication in the recording of the oral hearing (which although incomplete, included the first half of the hearing, and the concluding portion), that the worker's appeal was not being maintained on this basis. The worker's lawyer maintained the request for a loss of earnings pension award in the oral hearing.

The WCAT decision identified the worker's request for a loss of earnings pension as one of the issues on which the worker was pursuing his appeal. However, under the heading "Decision and Reasons", the WCAT decision referred only to section 23(1) of the Act. No reference was made to the law and policy regarding loss of earnings pension awards. Apart from the stated conclusion that the worker's appeal was denied on this basis, there is nothing in the reasons provided by the WCAT panel to show the consideration provided to this issue. While the WCAT decision referred to the withdrawal of the worker's appeal of the September 30, 2002 decision, there was no reference in the WCAT decision to the worker having modified his request for a loss of earnings pension award.

WCAT Decision #2004-05728 also concerned a situation in which a worker sought reconsideration on the basis that the reasons provided by the WCAT panel did not expressly address certain arguments presented on his behalf. That decision reasoned in part:

> The worker's complaint is that the panel failed to expressly acknowledge and respond to his arguments, concerning the fact that his appeal to have a reopening of his left arm complaints under his 1994 claim had been successful....
>
> I agree that it would have been desirable for the WCAT panel to expressly acknowledge and respond to the worker's arguments on this basis. This was more than an incidental reference in the worker's submissions. To the extent this involved one of the worker's central arguments, the concern that the panel failed to expressly comment on the worker's submission has some force.
>
> ...
>
> I am satisfied that the reasons provided in the WCAT decision explained how the panel reached the decision it did. The reasons set out the facts, law and reasoning which formed the basis for the decision reached. The reasons were sufficiently clear, precise and intelligible to enable the worker to know why the panel decided as it did....
>
> It would have been preferable for the WCAT panel to address the argument raised by the worker, even if only briefly for the purpose of explaining why the panel did not consider the argument relevant or persuasive. However, in the context of the panel's reasons as a whole, I consider that it may reasonably be inferred that such was the case....
>
> Upon consideration of the foregoing, I am not persuaded that the failure by the WCAT panel to expressly comment concerning the argument raised by the worker, regarding the precedent provided by the decisions concerning the reopening of his 1994 claim for his left arm problems, involved a breach of natural justice which requires the WCAT decision to be set aside. On balance, I consider that the circumstances presented by the worker's application are fundamentally more similar to those addressed in *Appeal Division Decision #2001-1794*, than those addressed in *Appeal Division Decision #97-0083.* The worker's application for reconsideration is, therefore, denied.

In this case, however, the WCAT decision does not reveal the consideration given to the worker's request for a loss of earnings pension award. The reasons provided by the WCAT panel do not show that the arguments of the worker's lawyer were heard on this issue. As well, the WCAT panel did not explain the basis on which it reached its conclusion on this issue. There is nothing in the "Decision and Reasons" portion of the WCAT decision to show that the WCAT panel gave more consideration to the worker's request for a loss of earnings pension, than it gave in relation to the two other issues on which the worker was not pursuing an appeal. In the circumstances, I find that there was a breach of natural justice with respect to the worker's right to be heard. Accordingly, I set aside the conclusion of the WCAT panel on this issue. In view of my conclusion on this basis, I will not refer in this decision to any of the other arguments presented by the worker's representative to the WCAT decision regarding the loss of earnings pension issue.

(c) Unappealed issues: percentage of impairment and average earnings

The worker's representative further complains regarding the failure of the WCAT decision to provide reasons or discussion concerning the correct percentage of the worker's functional impairment pension award, and the failure to cite policy regarding the establishment of the worker's average earnings. While MRPP item #14.30 provides that a WCAT panel may address any aspect of a pension award without notice to the parties, I do not consider that the panel had an obligation to provide reasons concerning those aspects of the worker's pension award on which the worker was not appealing. I consider that the consideration given to these issues was at the panel's discretion.

(d) Requesting submissions regarding the plateau date

The worker's representative submits:

> According to Policy item #15.24 of the MRPP, "[w]here an applicant is successful in impugning a WCAT decision, WCAT has the responsibility to complete its task of providing a valid decision." At the hearing leading to the WCAT decision to be reconsidered, the Vice-chair repeatedly requested submissions from the worker's counsel on a suggested plateau date for the worker. This is in violation of policy item #15.24 of the MRPP, as the Vice-chair was attempting to place the obligation of the WCAT by virtue of that policy onto the worker's counsel.
>
> This is a breach of Policy item #15.24 of the MRPP, immediately evident upon consideration of the policy and the repeated insistencies of the Vice-chair, so incorrect that it should be deemed patently unreasonable.

In the workers' compensation system, authority to provide "policy" rests with the Board of Directors under section 82 of the Act. While the rules and practice directives

contained in WCAT's MRPP might be loosely characterized as "WCAT's policy", it is preferable that the term "policy" not be used in this context.

The employers' adviser submits:

> ...the panel was offering [the worker] and his representative the opportunity to submit evidence that could then be considered in the panel's eventual determination of the plateau date. Since [the worker] stated that he believed that his condition had not plateaued by March 1997, it was completely reasonable for the panel to enquire as to what date [the worker] believed would be correct.

In rebuttal, the worker's representative further argues that the vice chair was asking the worker's former lawyer to decide the ultimate issue before the vice chair, and that the worker's lawyer declined to decide the matter for the vice chair. He submits:

> ...it is possible to conclude that the Vice-chair denied the worker's Appeal because the Worker's Representative would not propose a strategy outlining the details of how to adjudicate the matter for the Vice-Chair. Regardless of whether the Vice-Chair's decision was based on such an error, the violation of MRPP policy item #15.24 is sufficient reason to reconsider the WCAT's decision.

I do not consider MRPP item #15.24 directly relevant to the nature of a WCAT panel's jurisdiction in hearing an appeal in the first instance. That item concerns the basis for WCAT's assumption of authority to "reconsider" its decision on the common law grounds. I see nothing wrong with a WCAT panel asking a representative for particulars regarding the appellant's position in the appeal. This would normally be part of a panel's inquiry, to ensure that the appellant was "heard". This case was unusual in that the worker's representative was presenting "alternative" and opposite positions. In this case, the WCAT panel asked for particulars of the worker's position but did not press the point. The fact that the panel asked to hear the worker's position did not have the effect of shifting any obligation to the worker's counsel. The responsibility for making a decision stayed with the WCAT panel. In my view, it is entirely appropriate and customary for a WCAT panel to make enquiries regarding the position being articulated on behalf of an appellant, while remaining cognizant of its responsibility to make its own decision in the appeal. I find no error of law going to jurisdiction on this basis. The suggestion that the worker's appeal may have been denied due to the refusal of the worker's representative to propose a strategy outlining the details of how to adjudicate the matter for the vice chair, as some sort of punitive response, is the sort of inappropriate speculation critiqued by the Court of Appeal in *Adams*.

(e) Failure to consider the worker's statement

The worker's representative submits that according to policy at item #97.32 of the *Rehabilitation Services and Claims Manual* (RSCM), the worker's statement should have been considered as far as it related to matters within his knowledge. He submits that although the worker testified at length regarding his medical condition at the WCAT hearing, no mention of his testimony was made in the WCAT decision. He submits that this "amounts to an incorrect failure to apply RSCM #97.32, so obvious on its face that it should properly be considered patently unreasonable."

As noted by the employers' adviser, under the heading "Background and Evidence", the WCAT panel stated on page 4:

> At the oral hearing the worker argued that his condition had not plateaued in March 1997. He argues that his condition continued to worsen and did not plateau until after his recovery from fusion surgery.
>
> The October 2000 back surgery has made him "like a new man." He can now feel the bottoms of his feet and he lives without ingesting significant amounts of pain medication. He has been able to perform all aspects of his pre-injury occupation, as well as run his fishing charter business, among other activities.

In this case, the question as to whether the worker's condition was temporary in nature, and whether his condition stabilized on March 31, 1997 or some later date prior to the reopening in 2000, was one on which the worker's evidence was relevant. However, the WCAT panel did make reference to the worker's evidence under the heading "Background and Evidence". The worker's representative does not point to any particular evidence from the worker which should have been acknowledged in the "Decision and Reasons" portion of the WCAT decision. The question as to whether the worker's condition was temporary or permanent was one on which the medical evidence was also relevant. I note, as well, that the argument that the worker's condition was of a temporary nature was only presented as an alternative position to the argument that the worker should have been awarded a loss of earnings pension. I find that the reasoning of the WCAT panel was adequate to show that the worker was heard in his appeal regarding the effective date of his pension award. I do not consider that the WCAT decision was patently unreasonable in failing to expressly cite the worker's evidence on this issue, in the "Decision and Reasons" portion of its reasons.

While not necessary to my decision, I note the recent decision of the British Columbia Supreme Court in *Geronazzo v. British Columbia (Workers' Compensation Board),* 2006 BCSC 1086. Mr. Justice Rogers reasoned:

> [17] …As to whether the worker had the requisite intention to appeal, the Officer said in both of his decisions that there was "no evidence" that

> Mr. Geronazzo had formed the requisite intention within the 90-day period. The officer did not write something like: "Mr. Geronazzo's evidence does not satisfy me on this point". The Officer simply stated that there was no evidence from Mr. Geronazzo at all on the issue.
>
> [18] …the Officer was obliged to treat Mr. Geronazzo's evidence before him as evidence. It was not open to the Officer, while acting judicially, to simply declare that Mr. Geronazzo's assertions were not evidentiary in nature. At the very least it was incumbent on the Officer to articulate his reasons for not according Mr. Geronazzo's story the status of evidence.

The Court concluded that the Review Division decision was patently unreasonable in stating that there was no evidence on a point when the record clearly showed that there was, in fact, such evidence. In the present case, however, there was no such error in the panel's analysis.

(f) Decision based on irrelevant factors

A key sentence in the reasoning of the WCAT panel with respect to its decision regarding the effective date of the worker's pension award was as follows:

> **Considering the nature of the worker's back condition prior to the injury, that of undergoing previous back surgery as well as significant severe degeneration**, and the medical opinions from the worker's treating physicians, as well as Board medical specialists, I find no reason to change the effective date from that of March 31,1997
>
> [emphasis added]

The worker's representative submits that the worker's back condition prior to the injury was irrelevant. He notes that at no point was it suggested that the worker returned to a pre-injury state of health with respect to his back. In *Service Employee's International Union v. Nipawin Union Hospital*, [1975] 1 S.C.R. 382, the Supreme Court of Canada reasoned:

> A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exer cise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, **basing the decision on extraneous matters**, failing to take relevant factors into account, breaching the provisions of

> natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.
>
> [reproduced as written, emphasis added]

Sara Blake (*supra*) states at page 96:

> Discretionary decisions should be based primarily upon a weighing of factors pertinent to the policy and objects of the statute. "**A public authority in the exercise of its statutory powers may not act on extraneous, irrelevant and collateral considerations.**" Nor may the public authority ignore relevant considerations. It should consider all factors relevant to the proper fulfillment of its statutory decision-making duties.
>
> [emphasis added]

I agree that the relevance of the worker's prior back condition (to the question as to whether the worker's condition was temporary or permanent in nature at the time wage loss benefits were terminated on March 31, 1997), is not immediately apparent. I note, however, that the following sentence in the WCAT decision made reference to the August 7, 1997 permanent functional impairment examination by the disability awards medical advisor. That report stated in part:

> Taking into account the long-standing nature of the degenerative disease of the lumbar spine which had preceded the May, 1996 work-related injury and the subsequent percutaneous discectomies, it is doubtful that he will ever recover a better range of movement although he is only 43 year [*sic*] of age.

The expert medical opinion by the disability awards medical advisor regarding the assessment of the worker's permanent functional impairment made reference to the worker's prior degenerative disease and prior surgeries, in advising that it was unlikely that the worker would ever recover a better range of movement. In this context, the relevance of the panel's reference to these prior problems is apparent, in connection with the panel's consideration as to whether the worker's condition was temporary in nature or whether it was subject to some further degree of recovery after March 1997. While it might have been helpful had the panel explained its reasoning in some additional detail, I am not persuaded that the panel's decision was based on irrelevant considerations. I do not consider that the WCAT decision should be set aside as being based upon extraneous considerations.

(g) Inadequate consideration of evidence

The background to the worker's appeal to WCAT is unfortunate. The worker had previously appealed the January 19, 1998 pension decision to the former Workers' Compensation Review Board (Review Board). The worker attended an oral

hearing on August 25, 1999. The worker's attending physician travelled to Victoria for the purpose of attending that hearing. In its finding dated September 24, 1999, the Review Board panel reasoned:

> At the hearing, we discussed with [the worker] the fact that in April 1999 his orthopaedic specialist, Dr. A. Wahl, had proposed back surgery and, as may be seen from memo #56 on the claim file, the Board had agreed to accept such surgery. Accordingly, it is clear in our view that [the worker] will have to have his level of disability and his disability entitlement reassessed following surgery and recovery therefrom. As a result, we saw little point in dealing with the question of his disability entitlement, which will have to be considered afresh following his surgery. In the end, we agreed his appeal on the issue would be suspended, expecting the matter will never be heard because he will obtain a new decision which will be appealable.

The reassessment of the worker's pension following his surgery gave rise to the September 30, 2002 decision (on which the worker's further appeal was withdrawn). Unfortunately, the worker's physician had since died. The failure of the Review Board panel to hear the oral evidence of the worker's physician meant that this evidence was no longer available.

Section 38 of Bill 63's transitional provisions provided as follows:

> **38** (1) Subject to subsection (3), all proceedings pending before the review board on the transition date are continued and must be completed as proceedings pending before the appeal tribunal except that section 253 (4) of the Act, as enacted by the amending Act, does not apply to those proceedings.
>
> (2) In proceedings before the appeal tribunal under subsection (1), instead of making a decision under section 253 (1) of the Act, as enacted by the amending Act, the appeal tribunal may refer a matter back to the Board, with or without directions, and the Board's decision made under that referral may be reviewed under section 96.2 of the Act, as enacted by the amending Act.
>
> (3) If, in a proceeding pending before the review board on the transition date, the review board has
>
> (a) completed an oral hearing, or

> (b) received final written submissions and begun its deliberations, the review board must continue and complete those proceedings, acting with the same power and authority that the review board had under the Act before the provisions of the Act granting that power and authority were repealed by the amending Act.
>
> (4) The appointments of the members of the review board who are sitting on proceedings described in subsection (3) are continued until those proceedings are completed.

The prior Review Board finding was stated to be a suspension, with the agreement of the worker. The Review Board panel did not commence the hearing of evidence on the appeal of the January 19, 1998 decision. Accordingly, the worker's suspended appeal was treated as having been transferred to WCAT for completion effective March 3, 2003.

The worker's representative notes that the worker's physician was turned away by the former Review Board panel. He submits:

> As [the worker's physician] has since died, his oral evidence in favour of the worker cannot be put before the WCAT. Due to that Board decision, the best available evidence of the worker's day-to-day medical condition is now [the deceased physician's] medical records. These records were not adequately considered by the Vice-chair in denying the worker's appeal, as it is impossible to determine what entries were considered, how they were weighed against and alongside other pieces of medical and non-medical evidence. This lack of adequate consideration was incorrect, and given the absence of better evidence as a result of the Board's prior activities, patently unreasonable.

The worker's representative further submits that given the strength of the medical evidence supporting that the worker's condition had not reached a state of plateau, including all of the medical evidence arising from assessments of the worker, it is incorrect to the state of patent unreasonableness to conclude that the worker's condition had stabilized. He submits that "The only medical evidence in support of that conclusion is the flawed or without explanation and seemingly in opposition to the objective findings of innumerable physicians and the subjective statements of the worker." [Reproduced as written.] He argues that considering policy items #34.10 and #34.54 of the RSCM, the correct conclusion is that the worker's condition had not stabilized in the relevant time period. He submits that "Given the familiarity of the worker's physician had with the worker's compensable injury, it was an incorrect finding of fact to prefer the medical advisor's opinions to the worker's physician's." [Reproduced as written.]

In written argument presented at the oral hearing, the first position presented by the worker's lawyer was that the worker's condition was stable, and that he was entitled to a

loss of earnings pension award. The argument that the worker's condition remained temporary from 1997 to 2000 was presented as an alternative position.

The policy in the RSCM in 1997 provided, at item #34.10, that:

> A "temporary" physical impairment is one which is likely to improve or become worse and is therefore not stable. Realistically speaking, ongoing change is a natural feature of human physiology. Impairments resulting from an injury commonly deteriorate or improve over a period of years. However, an impairment is not considered temporary simply because it is possible that, as the worker becomes older, the condition may change or the worker may have to undergo further treatment. It only remains temporary when such a change can reasonably be foreseen in the immediate future. (1)

Policy at RSCM item #34.12 provided:

> With regard to the latter situation, it is recognized that no condition is ever absolutely stable or permanent; there will commonly be some degree of fluctuation. Nevertheless, a pension will be awarded when, though there may be some changes, the condition will, in the reasonably foreseeable future, remain essentially the same. The fluctuations in the condition of a worker receiving a pension may be such as to require the worker to stay off work from time to time. The question then arises whether wage-loss benefits should be paid for these periods. If the fluctuations causing the disability are within the range normally to be expected from the condition for which the worker has been awarded a pension, no wage loss is payable. The pension is intended to cover such fluctuations. Wage loss is only payable in cases where there is medical evidence of a significant deterioration in the worker's condition which not only goes beyond what is normally to be expected, but is also a change of a temporary nature. If the change is a permanent one, the worker's pension will simply be reassessed.

The WCAT decision cited policy at RSCM item #34.54. That policy provided, in full (with bolding added to the sentence quoted in the WCAT decision):

> When a worker is medically examined to assess the degree of impairment, the examining doctor must first determine whether the worker's condition has stabilized. The examining doctor will decide whether:
>
> (a) the condition has definitely stabilized;
> (b) the condition has definitely not yet stabilized;
> (c) he or she is unable to state whether or not the condition has definitely stabilized and

(i) there is a likelihood of minimal change; or
(ii) there is a likelihood of significant change.

Having regard to the examining doctor's report and any other relevant medical evidence, the Claims Adjudicator will then decide whether or not the worker's condition is permanent to the extent that a pension should be assessed. In the case of (a), the condition is considered permanent and the pension is immediately assessed. A condition will be deemed to have plateaued or become stable where there is little potential for improvement or where any potential changes are in keeping with the normal fluctuations in the condition which can be expected with that kind of disability. In the case of (b), the condition is still temporary and the claimant will be maintained on temporary wage-loss benefits under Section 29 or 30 of the Act.

In the situations where the examining doctor in (c)(i) above feels there is only a potential for minimal change, the condition will usually be considered as permanent and the pension established immediately on the basis of the prognosis. This approach will be particularly helpful where the disability is itself minor. Pensions established in this way will not be subject to automatic review.

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.

> The examining doctor may be unable to fit the claimant's condition exactly into one of the categories discussed above. In such a case, the doctor should simply state the findings in terms of the categories as well as possible and the question whether the condition is temporary or permanent will have to be dealt with by the Claims Adjudicator on the merits of the case.

Policy provided that where there was a potential for significant change in a worker's condition, but this was likely to be protracted (generally over 12 months), the condition would 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. In this case, the time frame in issue from 1997 to 2000 was well in excess of 12 months.

By report dated January 6, 1997, the worker's attending physician indicated the worker should undergo retraining. By report dated February 24, 1997, the worker's attending physician again noted: "Patient should be retrained in automotive + boat upholstery - which he has some knowledge of already." In memo #26 dated March 5, 1997, the Board medical advisor commented: "I think this man has indeed reached a plateau, and should be assessed for a PFI examination…" On page 2 of the WCAT decision, the panel noted:

> Prior to termination of wage loss benefits on March 30, 1997, a vocational rehabilitation consultant, in memos #21 and #28 dated February 1997 and March 10, 1997, agreed to the worker's request that the Board provide rehabilitation assistance to upgrade/restart his ten-year upholstery business. On May 15, 1997 the Board, in accordance with Board policy item #88.51 as set out in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I), provided the worker with a $34,425.07 budget for the period March 31, 1997 until January 4, 1998, to cover what the Board considered the worker would need to return him to a suitable occupation, broken down as follows: 20-week job search, 16-week orientation on hire, an orthopaedic chair and cordless tools.

In *Speckling v. British Columbia (Workers' Compensation Board),* (2005) BCCA 80, February 16, 2005, the British Columbia Court of Appeal explained the effect of the "patent unreasonableness" standard of review (at paragraph 37):

> ...a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable….

Sara Blake (*supra*) states at page 213-214:

> 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.
>
> ...
>
> The weight given to evidence is reviewable only if patently unreasonable. The choice as to which evidence is important and the weight 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.
>
> ...
>
> A tribunal may draw inferences from primary facts. An inference may be reviewed if not supported by any primary facts. However, any reasonable inference supported by primary facts will be upheld. It may be recognized that some inferences are based in part upon a tribunal's expertise and knowledge in the field.

The WCAT decision included the following summary regarding the medical evidence before it:

> Medical reports contained on the claim file record, in part, that the worker's pain symptoms progressed "down to his knees" in November 1997 and that the worker would never be able to work more than part time. A January 8, 1998 report from his attending physician prescribed "MS Contin" for the worker because he was in such "acute pain" and unable to get up due to back pain and muscle spasm. Further reports in 1998 document that the worker was unable to sleep because of back pain and in October 1998 the doctor decided that the worker was totally disabled from work.
>
> On January 3, 1999 an orthopaedic surgeon examined the worker and after several diagnostic procedures the doctor was not prepared to proceed with surgery at that time. The worker's claim was then reopened

> for the payment of temporary wage loss benefits from April 2 to 14, 2000 based on the attending physician's report that the worker's back pain was so severe that he had been unable to get out of bed for two weeks. A subsequent visit to the orthopaedic surgeon on June 9, 2000 resulted in the setting of a date for low back fusion surgery.

I do not consider that the WCAT panel was obliged to specifically cite every report and explain the consideration provided in respect of each item of evidence. The objections under this heading concern the panel's evaluation of the evidence which was before it. There was evidence before the WCAT panel to support its conclusion that the worker's condition had stabilized. I do not consider that the decision of the WCAT panel was patently unreasonable, in respect of its handling of the evidence and the conclusion which it reached.

(h) Nature of the worker's injury

The worker's representative complains that the WCAT decision stated that the worker's claim was initially accepted for low back strain, which ultimately caused a permanent impairment. He submits:

> …This is incorrect. The Board has accepted the worker's injury as being an aggravation of his pre-existing degenerative disc disease. This misunderstanding is all the worse when one considers that the WCAT decision relies on the worker's pre-existing back condition as a basis for rejection of his appeal. Misunderstanding what the worker's accepted injury is constitutes an error of fact so evident and so fundamental to an understanding of the worker's case that it would correctly be characterized as patently unreasonable.

The employers' adviser submits that the WCAT panel's presentation of the history and evidence demonstrates accuracy and appropriate consideration.

Upon review of the claim file, I also note that in memo #15 dated November 15, 1996, the claims adjudicator requested a medical opinion, noting:

> You may recall [the worker], a carpenter who had an injury in May of this year, causing pain in his lower back. He has been diagnosed to have a lower back strain, considered to be an aggravation of an underlying, non-compensable condition.

The WCAT decision began by stating:

> The worker is appealing a decision set out in letter dated January 19, 1998 by an officer of the Workers' Compensation Board (Board). This letter set out the particulars regarding the worker's pension award resulting from a back injury sustained on May 16, 1996, **which was accepted by the Board to have caused permanent aggravation to the worker's underlying pre-existing non-compensable severe degenerative disc disease**.
>
> [emphasis added]

I do not consider that the WCAT decision was patently unreasonable in its handling of the evidence regarding the history regarding the initial adjudication of the worker's claim or in relation to the status of the worker's claim as it came before the WCAT panel.

(i) Expenses

The worker's representative submits that: "Given the number of errors detailed above and in the original assessments of his claim, the worker seeks his costs in bringing the appeal leading to the decision that is to be reconsidered, as well as this application for reconsideration, in addition to interest on moneys owed by the Board." In rebuttal, the worker's representative further requests costs in bringing the application for reconsideration "due to the myriad of complex legal issues involved."

Section 7(2) of the *Workers Compensation Act Appeal Regulation*, B.C. Regulation 321/02, provides:

> The appeal tribunal may not order the Board to reimburse a party's expenses arising from a person representing the party or the attendance of a representative of the party at a hearing or other proceeding related to the appeal.

These requests may be considered by the WCAT panel which deals with the 2nd stage of the worker's application for reconsideration.

Conclusion

The worker's application for reconsideration of *WCAT Decision #2005-01742-RB* is allowed, in part, on the common law ground that there was a breach of natural justice with respect to the worker's right to be heard. This concerns the lack of reasoning in the WCAT decision (apart from a conclusion) regarding the worker's request for a loss of earnings pension award. I find that the identification of this question as an issue in the appeal, and the provision of a bare conclusion, without more, does not show that the worker's position was "heard" in the panel's consideration of this issue.

The panel's decision on this issue is severed, and considered void. The worker's appeal on this issue will be considered afresh by WCAT. The WCAT Registry will contact the worker concerning the further handling of his appeal on this issue.

With respect to the WCAT panel's consideration of the worker's alternative position, that the worker's condition had not stabilized by March 31, 1997 (the effective date of the pension award), I find that no error of law going to jurisdiction was established. The WCAT decision stands as "final and conclusive" under section 255(1) of the Act, with respect to the March 31, 1997 effective date of the worker's pension award.

Herb Morton
Vice Chair

HM/gw