

Noteworthy Decision Summary

Decision: WCAT-2006-03220**Panel:** Deirdre Rice**Decision Date:** August 16, 2006

Jurisdiction – Limits of jurisdiction of WCAT and Review Division of the Workers Compensation Board operating as WorkSafeBC (Board) – Implementation of WCAT decision by the Board – Section 246(3) of the Workers Compensation Act – Item A6.3.2 of the Review Division Practices and Procedures

This decision is noteworthy for its discussion of the limits to the jurisdiction of the Review Division of the Workers Compensation Board (Review Division) and WCAT.

The worker suffered pain and swelling of his fingers. The Workers Compensation Board operating as WorkSafeBC (Board) denied his claims. A WCAT panel determined the worker's symptoms were related to his employment and that his claim had met the requirements of section 6(1) of the *Workers Compensation Act* (Act). The Board implemented the WCAT decision by accepting the worker's claim for bilateral tendonitis. The Board awarded wage loss benefits until September 8, 2003 and provided information regarding the worker's long-term wage rate. The worker requested a review by the Review Division, which determined the worker was entitled to wage loss benefits until November 24, 2003 and referred the question of the worker's wage rate back to the Board. The worker appealed this decision to WCAT.

In *WCAT Decision #2006-00910*, the panel determined that there were matters raised in the appeal that should have been previously determined by the Board but were not, and referred these back to the Board under section 246(3) of the Act. The panel asked the Board to determine two matters: The duration of the worker's temporary disability from work and, whether, at the end of this period of temporary disability, conclusion of wage loss benefits was warranted because the worker had recovered from his compensable injury, because the worker was fit to return to his pre-injury employment, or, because the worker's compensable condition had stabilized.

However, the Board's response addressed matters outside the scope of these two questions. These were the matters of the worker's wage rate, a decision regarding the monetary amounts of the temporary wage loss benefits to which the worker is entitled, and a decision that the worker suffered from chronic pain. The matter of the worker's wage rate was referred back to the Board by the Review Division. The other two matters were not before the Review Division. The panel concluded it did not have jurisdiction to address these issues.

The panel considered the worker's submission that the first WCAT panel had made a binding determination that the worker was entitled to temporary wage loss benefits until November 22, 2004, the date of the decision. The panel concluded the worker's arguments were based on a misunderstanding of the jurisdiction of a WCAT panel when dealing with an appeal from a Review Division decision. The panel reviewed the statutory provisions and policy relevant to both the appeal process and the provision of wage loss, health care, vocational rehabilitation, and pension benefits. The panel further noted that item A6.3.2 of the *Review Division Practices and Procedures* provides that the review officer will generally limit the scope of a review to the decision that is the subject of the request for review. However, it may be reasonable in certain situations to include within the scope of the review issues or decisions not specifically covered by the request for review or decision under review. The review officer did not exercise the

authority identified in item A6.3.2. Instead, the review officer's decision was limited to considering whether the worker's hand and wrist condition was compensable under either section 5 or section 6 of the Act. These were the only decisions before the first WCAT panel. It followed that the Board's decision of the entitlement to benefits that flowed from the first WCAT panel's acceptance of the worker's claim was a proper exercise of the Board's exclusive jurisdiction to determine that entitlement.

The panel confirmed the review officer correctly concluded the worker's condition stabilized by November 24, 2003 and the worker's entitlement to wage loss benefits ended on that date. The panel denied the worker's appeal.

WCAT Decision Number :

WCAT-2006-03220

WCAT Decision Date:

August 18, 2006

Panel:Deirdre Rice, Vice Chair

Introduction

On May 2, 2003, the worker completed an application for compensation for symptoms of pain and swelling in the fingers of both of his hands which he had first noticed on April 14, 2003. On August 6, 2003, the worker completed a second application in which he sought compensation for a right wrist condition which he had sustained on July 17, 2003. The Workers' Compensation Board (Board) denied these claims.

In a November 22, 2004 decision (*WCAT Decision #2004-06106*), a panel of the Workers' Compensation Appeal Tribunal (WCAT) allowed the worker's appeals from a Review Division decision confirming denial of the claims. The WCAT panel determined that the symptoms the worker developed in his right wrist and both hands were related to his employment as a merchandise handler.

In a March 9, 2005 decision, a Board case manager implemented the WCAT decision. The case manager confirmed that the worker's claim had been accepted for bilateral hand and right wrist symptoms described by WCAT as tendonitis. The case manager also advised the worker that wage loss benefits would be paid for the period July 18, 2003 to September 8, 2003, and provided information regarding the long-term wage rate that had been established on the claim.

The worker asked the Board's Review Division to review this decision. In an August 29, 2005 decision (*Review Decision #29284*), a review officer varied the March 9, 2005 decision. The review officer determined that the worker was entitled to wage loss benefits until November 24, 2003. The review officer also referred the question of the worker's wage rate back to the Board so that a full analysis of that matter could be undertaken.

The worker appealed this decision to WCAT with the assistance of his representative, a barrister and solicitor. The employer is participating in the appeal and is also represented.

Issue(s)

The central issue in the appeal is whether the Board properly implemented the panel's decision in *WCAT Decision #2004-06106*.

In a February 24, 2006 decision (*WCAT Decision #2006-00910*), I determined that there was a matter raised in the appeal that should have been determined by the Board, but which was not, and which should be referred back to the Board under section 246(3) of the *Workers Compensation Act* (Act).

For the reasons set out in this preliminary ruling, I suspended the appeal and referred the file back to the Board under section 246(3) of the Act for determination of the following matters:

1. The duration of the worker's temporary disability from work.
2. Whether, at the end of this period of temporary disability, conclusion of wage loss benefits was warranted because the worker had recovered from his compensable injury, because the worker was fit to return to his pre-injury employment, or, because the worker's compensable condition had stabilized.

On April 28, 2006, a Board case manager provided WCAT with a response to this referral. The case manager addressed matters that are outside the scope of the two questions that I referred back, even though I explicitly advised the Board that such matters should be dealt with in separate decision letters. I therefore provided the parties with a May 31, 2006 memorandum in which I expressed my preliminary view regarding the extent of my jurisdiction to deal with the matters that were addressed in the April 28, 2006 response, and allowed them an opportunity to make submissions regarding these preliminary views as to my jurisdiction. I committed to considering any such submissions before making a final decision regarding the extent of my jurisdiction in the appeal.

The worker's representative did not file any further submissions. The employer's representative advised in an August 3, 2006 submission that he agreed with my preliminary determinations regarding jurisdiction and, further, that the employer has no quarrel with the decisions rendered by the Board in the April 28, 2006 decision.

In accordance with the preliminary views that I set out in the May 31, 2006, I conclude that:

- The matter of the worker's wage rate, which was addressed in the Board's April 28, 2006 response, is outside the scope of this appeal. This matter was referred back to the Board in the August 29, 2005 Review Division decision that is under appeal and, as I stated in *WCAT Decision #2006-00910*, is a matter that cannot be appealed to WCAT.
- The case manager's April 28, 2006 decision regarding the monetary amounts of the temporary wage loss benefits to which the worker is entitled, including set-offs and overpayments, involved matters that were not dealt with in either the March 9, 2005 Board decision that was before the Review Division or in the Review Division

decision which has been appealed to WCAT. Further, the determinations made in this regard were not made in response to either of the two issues I referred back to the Board. Consequently, these matters are outside the scope of the appeal.

- The case manager's decision in the April 28, 2006 response that: the worker had ongoing, chronic bilateral wrist/hand complaints following November 24, 2003; these complaints meet the Board's definition of chronic pain; and, these complaints resulted in the biologically plausible limitation of avoiding repetitive hand activities is outside the scope of the appeal. Neither the Board's March 9, 2005 decision nor the August 29, 2005 Review Division decision considered whether a chronic pain condition should be accepted under the claim, nor did either of these decisions address whether the worker had ongoing limitations or restrictions resulting from his compensable condition beyond November 24, 2003.
- The following matters are within my jurisdiction:
 1. Whether the Board officer correctly concluded that the worker ceased to be temporarily disabled as of November 24, 2003;
 2. If the worker's temporary disability continued beyond November 24, 2003, whether it was a partial temporary or total temporary disability;
 3. Whether the worker is entitled to further temporary disability benefits and, if so, until what date; and,
 4. The reason that the worker's entitlement to temporary disability benefits ended.

My decision is limited to addressing these issues.

Jurisdiction

This appeal was filed with the WCAT under section 239(1) of the Act. The worker's compensable condition arose after June 30, 2002. His entitlement to benefits is to be determined under the provisions of the Act as amended by the *Workers Compensation Amendment Act, 2002*. WCAT panels are bound by published policies of the Board pursuant to the *Workers Compensation Amendment Act (No. 2), 2002*. Policy relevant to this appeal is set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

Background and Evidence

The worker is currently 38 years old and had been doing his job in the employer's warehouse for approximately two years at the time he developed his bilateral hand symptoms. Following the onset of his bilateral hand symptoms in April 2003, the worker went off work due to a non-compensable shoulder condition. He returned to work on

July 15, 2003 but went off work again after July 17, 2003 because of his compensable condition. Since that time, he has not returned to his pre-injury employment.

As set out in the panel's decision under the bolded heading "Issue(s)," the issues to be determined by the panel in *WCAT-2004-06106* were as follows:

- 1) Whether the worker's bilateral hand symptoms were compensable.
- 2) Whether the worker's right wrist tendonitis was compensable.
- 3) Whether the Board's decision of July 14, 2003 (a reconsideration of an earlier decision) was void.

The WCAT panel confirmed that the Board's July 14, 2003 decision was void. Since section 96(5) of the Act states that the Board may not reconsider a decision if a review has been requested in respect of that decision, and since the worker had requested a review of the decision prior to July 14, 2003, the Board had no jurisdiction to reconsider the decision.

In relation to the two remaining issues, the panel determined that it was appropriate to adjudicate the claim under section 6(1) of the Act rather than under section 5(1). After reviewing and analyzing the evidence, the panel stated:

Based on the ergonomic assessment, which reveals moderately forceful and relatively constant and repetitive motions of both hands, combined with the fact that the worker was unaccustomed to the job after five months off due to his shoulder injury, I conclude that his condition was due to the nature of his employment. There may be other factors which made him more vulnerable to developing the condition. However, it appears to me that without the employment activity, his bilateral hand and right wrist symptoms would not have appeared at the time that it did. I find the preponderance of evidence supports a conclusion that the worker's claim has met the requirements of section 6(1) of the Act.

[all quotations typed as written unless otherwise indicated]

The panel set out her conclusion regarding these issues as follows:

I allow the worker's appeals and vary the review officer's decisions #4069 and #7813 dated February 6, 2004. I find the worker's symptoms of both hands and right wrist were related to his employment. No appeal-related expenses were identified and none are awarded.

The panel's order did not include the usual direction that the Board determine the extent of the worker's entitlement to benefits that flowed from acceptance of the claim. Nevertheless, that direction was implicit and the Board proceeded on that basis.

However, in the March 9, 2005 decision, the only benefit entitlement considered was the worker's entitlement to wage loss benefits for temporary disability. The reasons the case manager provided in relation to this issue are as follows:

Wage loss benefits under Section 29 and Section 30 of the *Act* are payable based on objective medical evidence of disability. To assist me in determining the period of disability your claim has been reviewed by a Workers' Compensation Board medical advisor.

Taking into consideration all of the information on file including the wage loss information provided by your accident employer, the opinion of the Workers' Compensation Board medical advisor and the medical information on file I have authorized wage loss benefits from July 18, 2003 to September 8, 2003. This is the period of which there is objective medical evidence of disability. Your accident employer was reimbursed for sick days July 18 to the 21, 2003 and the balance was forwarded to you.

....

I am advising you that many of the consultation reports received from specialists indicate that you describe a number of subjective complaints related to your hands but clinical examination does not demonstrate any specific objective findings. Medical information indicates that they were unable to identify a specific objective abnormality which would substantiate a continuing impairment related to your work activity. Another specialist has indicated that your bilateral hand and wrist pain is not yet diagnosed and there is no definite explanation for your bilateral hand or wrist area pain. Accordingly benefits have been paid only for the period that there is a compensable injury and medical evidence of disability.

In *WCAT Decision #2006-00910*, I reviewed the statutory and policy provisions relevant to the payment of temporary disability benefits and then stated as follows:

While objective evidence of disability and specific objective findings are clearly relevant to the determination of the duration of a worker's temporary disability, none of the policies in the RSCM II specify that wage loss benefits must be concluded where there is no longer objective evidence of disability. Instead, wage loss benefits are to be concluded where: the worker has recovered from the compensable injury; although not recovered from the injury, the worker is fit to return to his or her pre-injury employment and so no longer suffers any wage loss; or, the worker's compensable condition has stabilized, in which case there may be an entitlement to a pension and vocational rehabilitation benefits.

In the March 9, 2005 decision, the case manager did not identify which of these factors was the basis upon which wage loss benefits were terminated as of September 8, 2003. I consider that the case manager should have made a decision in this regard, particularly in light of the evidence that the worker has ongoing chronic pain complaints and had no pre-existing condition of relevance to his compensable condition.

In the April 28, 2006 response, the case manager wrote:

The Review Board considered the opinion of a WorkSafeBC Medical Advisor and based on this opinion held that you were temporarily disabled until November 24, 2003 only. The medical evidence thereafter was supportive that your ongoing bilateral wrist/hand complaints were chronic.

I accept that your bilateral hand and right wrist complaints stabilized or plateaued as of November 24, 2003. I also accept that your complaints thereafter meet the WorkSafeBC definition of chronic pain and that these chronic pain complaints resulted in the biologically plausible limitation of avoiding repetitive hand activities.

On appeal your representative presented only one medical report in support of your claim that you were disabled beyond September 8, 2003. In his report of May 13, 2005 Dr. Chow wrote to your private disability insurers stating that you:

“Remain totally disabled from any occupation. The extent of his symptoms even limits his activities of daily living. He describes pain from his finger IP joints and his right wrist. He experiences symptoms with writing for short periods of time and also with day to day activities at home.”

I did refer this issue to a WorkSafeBC Medical Advisor and he noted that you have in fact continued working part-time moving rental cars and have also been able to complete a training program as a family counselor. Both of these contradict Dr. Chow’s statement that you were totally disabled from any occupation. The medical advisor also points out that the fact that you experience pain with activities of daily living and writing does not imply that you are unable to perform these activities - only that you have pain when doing so.

I agree that there is no new medical evidence beyond that considered by the Review Board that would justify a finding of temporary disability beyond November 24, 2003. I accept the WorkSafeBC Medical Advisor’s

opinions and accordingly, accept that your temporary disability ended November 24, 2003.

I also accept that your compensable condition stabilized or plateaued (not recovered) as of November 24, 2003 and that you would have been unable to return to your merchandising position with [the employer] on plateau due to an inability to perform repetitive hand activities.

....

As I am accepting that you were unable to return to your pre-injury occupation as a merchandiser with [the employer], I will be referring your claim file to a WorkSafeBC Vocational Rehabilitation Consultant to determine your entitlement to benefits after November 24, 2003.

I will also be referring your claim file to our Disability Awards Department for pension considerations in view of my acceptance of permanent chronic pain.

Submissions

In the notice of appeal, the worker's representative advised that the worker is seeking: an order directing that the worker be paid wage loss benefits to November 22, 2004, and that his entitlement to benefits (including wage loss, rehabilitation and permanent partial disability pension) thereafter be determined by the Board; and, costs and interest for blatant Board error.

In support of the appeal, the worker's representative filed two new submissions dated September 28, 2005 and December 15, 2005, as well as a final rebuttal dated January 17, 2006. In addition, the representative relied on the May 16, 2005 submission that was filed in support of the request for review.

The crux of the position taken by the worker's representative is that, in *WCAT Decision #2004-06106*, the panel made a binding determination that the worker was entitled to temporary wage loss benefits until November 22, 2004, the date of the decision. He noted that all of the evidence heard by the WCAT panel was about disability to the date of the hearing, and that the WCAT panel found that the worker's condition was, on the day of the hearing, compensable. In the Review Division proceeding, the representative argued, among other things, that the case manager: engaged in an unauthorized reassessment of issues that had already been determined; rendered an "egregiously poor decision, premised on findings that clearly exceeded [her] mandate" and is an example of blatant Board error that caused the worker to have to appeal; and, based the decision on an "improper and deficient medical statement."

In *Review Decision #29284*, the review officer concluded that the WCAT decision dealt only with the issue of the compensability of the worker's bilateral hand symptoms and right wrist tendonitis. The review officer noted that there was no reference or instruction to the Board regarding an appropriate date on which to conclude wage loss benefits.

In his September 28, 2005 submission, the worker's representative characterized the review officer's conclusions in this regard as "a contrivance," "ignoring what is obviously there," and, "fatuous." The representative said that the meaning of the WCAT panel's decision,

... is so profoundly inferential that it was not necessary further to specify her order. Nor would it have dawned on her to articulate the direction of compensability to the date of her judgment because of the clarity of her findings of fact on compensability at the hearing, including her observation of the Worker demonstrating his limitations. The Vice-Chair made the decision and the Board has to live with it, they can't send in their revisionists to undo what she has said. She had all the evidence before her, including the Worker's direct evidence and she decided after a careful review of all of it, including the Worker's evidence, that his condition was compensable on the day of hearing.

The representative submitted that wrongdoing is not required to satisfy the policy in item #50.00 of the RSCM II, which deals with entitlement to interest. Instead, he said that, "simple incompetence is more than sufficient if it leads to blatant error as it clearly does here." The representative argued that, if the case manager had known that she was not to re-evaluate the evidence that the WCAT panel "had already decided and directed her to be governed by, then, she could not have made the erroneous decision she did" in the March 9, 2005 decision. Further, the fact that the review officer insisted on engaging in the same re-evaluation, "contrary to the decision of the Vice-Chair," did not make the case manager's error any less blatant.

In addition, the representative said that, in *Review Decision #29284*, the review officer: had unjustifiably attempted to limit the WCAT panel's finding that the worker's evidence was credible; was engaging in the same unjustified re-evaluation of the evidence that the case manager attempted when he limited the worker's entitlement to wage loss benefits; misunderstood and misapplied policy item #35.50 of the RSCM II by finding that the fact that the worker's condition was chronic meant that the condition was no

longer temporary; was clearly wrong in determining that November 24, 2003 was the proper day to conclude benefits; and, should have dealt with the issue of the worker's entitlement to vocational rehabilitation benefits and a pension assessment.

In his December 15, 2005 submission, the representative submitted that this was a case where a directive order and costs and interest are justified. The representative wrote:

The aspect of the appeal we wished to underline ... is the danger and disincentive to workers in the implementation process if you, as the WCAT, do not enforce the certainty of your decisions on those at WCB who think they know better than you and can rationalize and revise your decision on the basis of their "analysis".

The weakness in their ability at "analysis" is why you corrected their decisions in the first place. It is alarming and unjustified, in our submission that a Worker, having won what he was entitled to in the first place, by prosecuting two appeals, now has the expense and anxiety of prosecuting 2 more appeals to retain what he won in the first instance. Not only that but your next decision will be thrown back into the WCB hopper to be misinterpreted and misapplied yet again by an unskilled C.M. and an indiscriminating R.O.

This is the system, we understand but it underlines the importance of clear, directive instructions to WCB in your order and also the awarding of interest and costs for blatant board error where such has clearly occurred. The latter is the only effective way that the Board will understand there is an incentive for them to get it right.

In a January 5, 2005 submission the employer's representative submitted that there was a fundamental flaw in most of the argument the worker's representative had made regarding the case manager's jurisdiction to implement the WCAT decision. In particular, the representative said that the sole issue of substance before the WCAT panel was whether or not the worker's condition was compensable. He argued that the WCAT panel did not turn her attention to the extent of benefits and, since the Board had not made a decision regarding the extent of benefits, could not take jurisdiction over that issue. The employer's representative said that he agreed that the case manager did a poor job of implementing the WCAT decision because the decision did not address the worker's entitlement to rehabilitation benefits or referral to the Board's Disability Awards Department. The representative submitted that there may not be sufficient evidence to make a referral for a pension assessment, but that there may be justification for a referral to the Board's Vocational Rehabilitation Department. Such a referral, which the representative submitted should be made by this panel, would be for preventive rehabilitation. The representative also submitted that the worker may not have a functional impairment and, instead, may have developed only a vulnerability to repetitive activities. He argued that further investigation of the worker's capabilities should be

undertaken as part of the vocational rehabilitation process and, following that investigation, the Board should provide the worker with a decision regarding his entitlement to a referral to the Disability Awards Department.

In his submissions to the Review Division, the employer's representative agreed with the February 24, 2005 opinion of a Board medical advisor upon which the case manager relied in reaching the conclusion that the worker's entitlement to temporary wage loss benefits should end on September 8, 2003. However, the representative also said that a case could be made to extend benefits to November 24, 2003, at which time the worker was seen by Dr. S. Brady, a hand surgeon. The representative did not pursue that position in this appeal. Instead, based on the medical evidence he summarized in his submission, the representative said that there was a strong argument for reversing the conclusions reached by the review officer in *Review Decision #29284* and the case manager in the March 9, 2005 decision and instead finding that the worker's entitlement to temporary wage loss benefits ended on June 23, 2003.

In his January 27, 2006 rebuttal, the worker's representative argued, among other things, that:

- There was no flaw in his earlier submissions.
- The WCAT decision was binding on all issues arising out of the appeal, one of which was duration of benefits; the panel not only took jurisdiction over the extent of benefits, but found compensability as of the date of the WCAT hearing.
- The fact that the case manager made a "clumsy decision" to deny entitlement did not mean that the WCAT panel did not have jurisdiction to deal with the duration of benefits: "You can not allow a system which is intended to provide fairness to workers where C.M.s, miffed over a decision of a WCAT Panel, refuse to implement the decision because they disagree with it."
- The case manager had "misconducted" herself and the review officer acknowledged this.
- The comments of the employer's representative regarding the extent of benefits were irrelevant as that matter was decided by the WCAT panel. Further, the representative's discussion of the medical evidence prior to November 22, 2004 is moot since the WCAT panel had found compensability and entitlement as of November 22, 2004.
- The notions of the employer's representative about occupational medical realities were not germane to the issue in the appeal.

- A referral to the Disability Awards Department should have been made but, if there is doubt in that regard, the Board should at least be directed to make the necessary investigations to determine if such a referral is justified.
- The panel may choose to return the worker's claim to the Board for various purposes, including referral to vocational rehabilitation, but "must direct that the original WCAT decision be properly implemented – benefits being paid to November 22, 2004 and a determination of entitlement to further benefits thereafter directed."

The representative concluded as follows:

The Board must understand its role. A WCAT decision is to be implemented not quibbled with – they do not have an adjudicative function once the WCAT has made its decision. This is fair, it is reasonable and it is also in accordance with the Act and the Policies.

Reasons and Findings

In the notice of appeal, the worker's representative requested an oral hearing on the basis that the worker "is entitled to give evidence as to his continuing disability and the fact that it has varied and had not plateaued since the date of injury." WCAT advised the representative that, based on a preliminary review of the appeal, the appeal would proceed by way of written submissions. The issues in this appeal turn on the interpretation of *WCAT Decision #2004-06106*, the application of law and policy to facts that are fully documented in the worker's claim and appeal files, and the medical evidence. I am satisfied that a further explanation of the worker's understanding of his condition would not assist in determining the issues in the appeal, and that the relevant facts are established in the documents contained in the worker's claim and appeal files. I have reviewed all of the documents, including the submissions, in those files. Based on this review and the guidelines for considering an oral hearing in item #8.90 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP), I conclude that an oral hearing is not required to ensure a full and fair consideration of the issues in this appeal. I have based my decision on the materials in the worker's claim and appeal files.

Scope of the Appeals Considered in WCAT Decision #2004-06106

The appeal before the panel in *WCAT Decision #2004-06106* was taken from the February 6, 2004 decision of a review officer (*Review Decisions #4069, #6225 and*

#7813), which considered three decisions that had been made by a Board case manager. The Board decisions at issue and the review officer's conclusions in relation to each of them are as follows:

1. The case manager's May 28, 2003 decision

The case manager considered two issues: whether the strains to the worker's fingers resulted from a personal injury which occurred at work while the worker was doing work duties and was caused by work; and, whether the strains to the worker's fingers was an occupational disease that arose as the result of exposure to occupational work risk factors and was caused by the type of work done. The case manager concluded that a "strain diagnosis" was not on the list of diagnoses that current Board policy accepts under section 6 of the Act or Schedule B to the Act as a gradual onset occupational disease. Therefore, he said that he was unable to investigate this diagnosis under either section 6 or Schedule B. The case manager also concluded that the worker's claim did not meet the criteria for acceptance under section 5(1) of the Act and, therefore, disallowed the claim under this section as well.

The review officer concluded that the worker did not sustain a compensable strain to his hands.

2. The case manager's July 14, 2003 decision

The case manager confirmed that he had not found sufficient evidence to change his May 28, 2003 decision to disallow the worker's claim.

The review officer cancelled the July 14, 2003 decision. Although the case manager had reconsidered the May 28, 2003 decision within 75 days of having made it, the worker requested a review of that decision on May 28, 2003. Since section 96(5) of the Act states that the Board may not reconsider a decision if a review has been requested in respect of that decision, the review officer concluded that case manager did not have jurisdiction to issue the July 14, 2003 decision.

3. The case manager's August 12, 2003 decision

In this decision, the case manager noted that recent medical reports confirmed a diagnosis of right wrist tendonitis. The worker claimed that this condition resulted from his work duties on July 17, 2003, at which time he returned to work on light duties. The case manager determined that the claim did not meet the criteria for acceptance under section 5(1) of the Act as a new personal injury to the worker's right wrist and stated that he had disallowed the worker's claim for a traumatically induced right wrist tendonitis. The case manager stated that the worker's claim had been well investigated for ergonomic risk factors that could cause a repetitive strain. Further, he noted that, as set out in the May 28, 2003 and July 14, 2003 decisions, it was determined that the ergonomic risk factors were not sufficient to meet the criteria for accepting that the

worker's work would cause a wrist, hand or finger tendonitis, and the claim was disallowed for, among other things, a bilateral wrist tendonitis. Since the worker was performing similar duties on July 17, 2003, the case manager disallowed the claim under sections 6(1) and 6(3) of the Act.

The review officer confirmed this decision. The review officer concluded that the worker's tendonitis/tenosynovitis was not due to the nature of his employment and that the requirements of section 6(1) of the Act had not been met.

These were the only decisions before the panel in *WCAT Decision #2004-06106*.

The arguments presented by the worker's representative are based on a misunderstanding of the jurisdiction of a WCAT panel when dealing with an appeal from a Review Division decision. It is therefore appropriate to review the statutory provisions and policy relevant to both the appeal process and the provision of wage loss, health care, vocational rehabilitation, and pension benefits.

Section 96(1) of the Act provides that, subject to the rights of appeal set out in sections 239 and 240, the Board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising relevant to an application for compensation, including:

- (a) the question whether an injury has arisen out of or in the course of an employment within the scope of [Part 1 of the Act];
- (b) the existence and degree of disability by reason of an injury;
- (c) the permanence of disability by reason of an injury;
- (d) the degree of diminution of earning capacity by reason of an injury;
- (e) the amount of average earnings of a worker, whether paid in cash or board or lodging or other form of remuneration, for the purpose of levying assessments, and the average earnings of a worker for purposes of payment of compensation

Section 5(1) of the Act provides that, where personal injury arising out of and in the course of employment is caused to a worker, compensation must be paid. Section 6 of the Act establishes an equivalent entitlement to compensation where the worker suffers from an occupational disease, including activity-related soft tissue disorders (ASTDs) such as tendonitis or tenosynovitis, that is due to the nature of the worker's employment.

Once a worker's claim has been accepted as compensable under one or the other of these provisions (and assuming that the worker complies with the reasonable

recommendations for treatment, vocational rehabilitation plans, and reporting requirements imposed by the Board), the worker will be entitled to certain benefits.

The worker's entitlement to wage loss benefits will be determined under sections 29 and 30 of the Act, which provide that such payments will be paid for so long as a worker's compensable condition remains "temporary." Section 29 allows for payment of wage loss benefits if the worker is totally disabled from working; section 30 provides for payment where the worker is partially disabled.

Where a worker sustains a permanent functional impairment as a result of the condition accepted under the claim, the worker's entitlement to a permanent disability pension will be determined under sections 22 and 23 of the Act.

A worker's entitlement to vocational rehabilitation assistance will be determined in accordance with the policy that relates to section 16 of the Act. Section 16 provides that the Board may make expenditures from the accident fund to "aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap". Vocational rehabilitation services are available to: assist the worker to return to the pre-injury employment or other occupation comparable in earning capacity; to provide the assistance reasonably necessary to overcome the immediate and long-term vocational impact of the compensable injury; and, to provide reassurance, counselling and encouragement to assist the worker in maintaining a positive outlook and to remain motivated. The provision of these benefits is discretionary.

Decisions regarding a worker's entitlement to health care benefits are made pursuant to section 21 of the Act, which provides that the Board may furnish or provide for the injured worker any medical, surgical, hospital, nursing and other care or treatment, transportation, medicines, crutches and apparatus, including artificial members, that it may consider reasonably necessary at the time of the injury, and thereafter during the disability to cure and relieve from the effects of the injury or alleviate those effects. As stated in item #73.00 of the RSCM II, health care benefits are provided even though the worker is not disabled from earning full wages at the work at which he or she is employed. Item #73.20 of the RSCM provides that necessary health care continues to be the responsibility of the Board for as long as the worker continues to experience the effects of a compensable injury, even if that worker is not disabled from working or is retired from the work force.

In the May 28, 2003 and August 12, 2003 decisions, the case manager exercised the Board's exclusive jurisdiction to determine whether the worker's hand and wrist condition was compensable under either section 5 or section 6 of the Act. The case

manager limited his consideration to this issue and, having concluded that the condition was not compensable, did not address the worker's entitlement to health care, wage loss or other benefits.

Section 96.2(1)(a) of the Act provides that, with certain exceptions, a worker may request a review officer to review "a Board decision respecting compensation or rehabilitation" under Part I of the Act. The requests for review that led to *Review Decisions #4069, #6225 and #7813* were made pursuant to this provision.

Section 96.4 of the Act provides that, subject to any Board practices and procedures for the conduct of a review, a review officer may conduct a review as the officer considers appropriate to the nature and circumstances of the decision or order being reviewed. This provision grants the review officer the authority to "make a decision (a) confirming, varying or cancelling the decision or order under review, or (b) referring the decision or order under review back to the Board, with or without directions." *Review Decisions #4069, #6255 and #7813* were made pursuant to this authority.

Item A6.3.2 of the *Review Division Practices and Procedures* (RD Practices) (a document that may be viewed on the Board's internet website) provides that the review officer will generally limit the scope of a review to the decision that is the subject of the request for review. However, the item goes on to acknowledge that it may be reasonable in certain situations to include within the scope of the review issues or decisions not specifically covered by the request for review or decision under review. Where the review officer becomes aware of such an issue, item A6.3.2 sets out four factors that the review officer is to consider in determining whether to deal with the issue as part of the review. Item A6.3.2 also requires that the review officer advise the parties of any new issue he or she proposes to deal with.

In *Review Decisions #4069, #6225 and #7813*, the review officer did not exercise the authority identified in item A6.3.2 of the RD Practices. Instead, the review officer's decision was limited to considering whether the worker's hand and wrist condition was compensable under either section 5 or section 6 of the Act.

Section 239(1) of the Act provides that, subject to the exceptions set out in section 239(2), "a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section, may be appealed to the appeal tribunal." The worker's appeal to WCAT from *Review Decisions #4069, #6225 and #7813* was made pursuant to this provision.

Section 253(1) of the Act provides that, on an appeal, WCAT may confirm, vary or cancel the appealed decision or order.

WCAT was created by statute and, as such, can only act pursuant to powers expressly conferred by statute, powers necessarily or fairly implied by statute, and ancillary powers indispensable to carrying out its purpose: *R. v. Sharma*, [1993] 1 S.C.R. 650, p.

668; *Nova Scotia (WCB) v. Martin*, [2003] 2 S.C.R. 504, para. 33. The authority of the panel in *WCAT Decision #2004-06106* was limited to dealing with an appeal from “the decision” in *Review Decisions #4069, #6225 and #7813*, that is, whether the worker’s hand and wrist condition was compensable under either section 5 or 6 of the Act. Pursuant to section 246(3), the panel also had authority to require the Board to make a determination regarding any matter that she considered the Board should have determined and, after receiving a further Board decision, would have had authority to address this additional matter. However, this authority was not exercised.

The “decision” from which the appeal was taken, and the “decision” which the panel had jurisdiction to confirm, vary or cancel, was the decision made by the review officer in review of the “decisions” of the case manager. These prior decisions did not address the worker’s entitlement to benefits under sections 16, 21, 22, 23, 29, or 30 of the Act, and so there was no “decision” in relation to benefit entitlement under these provisions that could be confirmed, varied or cancelled.

I am unable to accept the position of the worker’s representative that it is “profoundly inferential” that the panel addressed the worker’s entitlement to wage loss benefits in *WCAT Decision #2004-06106*. Rather, I find it clear that the panel properly confined her decision to the matters within her jurisdiction, in light of: the narrow scope of the issues she framed; the portions of the decision quoted above; the fact that the statutory and policy references in the decision are confined to those relevant to the initial determination of compensability under the Act; and, the complete absence of any reference or discussion in the decision to wage loss benefits, benefit entitlement, plateau date or other related subjects that would indicate that the panel had turned her mind to benefit entitlement.

It follows from this conclusion that the case manager’s examination in the March 9, 2005 decision of the entitlement to benefits that flowed from the panel’s acceptance of the worker’s claim was a proper exercise of the Board’s exclusive jurisdiction to determine that entitlement. It also follows that the review officer acted within the scope of his jurisdiction in addressing the correctness of the case manager’s conclusion in that regard.

Entitlement to Wage Loss Benefits

As noted above, section 29 of the Act provides for the payment of temporary wage loss benefits where a worker has a total temporary disability and section 30 of the Act provides for the payment of temporary wage loss benefits where the worker has a partial temporary disability.

In the March 9, 2005 decision, the case manager concluded that the worker’s entitlement to temporary wage loss benefits was from July 18, 2003 to September 8, 2003. The reason for this was that was the period during which the case manager considered there was objective medical evidence of disability. In his submission to the

review officer, the worker's representative was critical of the case manager's reliance on the objective medical evidence. In addition to his central position that the case manager had no jurisdiction to determine the extent of the worker's entitlement to benefits, the representative quoted from the policy in item #97.32 of the RSCM II, which provides that a statement of a worker is evidence, should not be rejected simply because of assumption of bias, and need not be corroborated. The representative submitted that, before determining when the worker's wage loss benefits should be concluded, the case manager had an obligation to seek out medical evidence and other evidence, including the worker's own statement, as to when and if his disability ceased.

Policy item #97.32 of the RSCM II must, of course, be read in conjunction with the more applicable policy set out in item #95.31 of the RSCM II. Item #95.31 provides that wage loss compensation is normally paid on the basis of medical evidence supporting a disability. Although the policy recognizes that on some occasions evidence from the worker or from other sources may be sufficient to establish the existence and continuation of the disability, it notes that the best evidence that a worker is disabled is almost always medical evidence. Thus, notwithstanding that a worker may honestly believe that he or she is disabled from working, the medical evidence will be the most reliable basis upon which to determine whether that is in fact the case. Both the case manager and the review officer properly relied on the medical evidence in reaching their conclusions.

Policy item #34.10 of the RSCM II provides that a temporary physical impairment is one which is likely to improve or become worse and is therefore not stable. It remains temporary only when a change can reasonably be foreseen in the immediate future.

Policy item #35.50 of the RSCM II provides that temporary disability wage loss benefits will be terminated when a worker's physical impairment resulting from the injury ceases to be temporary; that is, when it either resolves entirely or stabilizes as a permanent impairment. Once the worker's condition has stabilized, further wage loss benefits are payable only if the condition again becomes temporary because the worker suffers a further work injury or a natural relapse in the condition.

Policy item #34.54 of the RSCM II deals with whether a worker's condition is permanent to the extent that a pension should be assessed. If a condition has definitely stabilized, it is considered permanent. If a condition has definitely not stabilized, the worker will be maintained on temporary disability wage loss benefits. If there is a likelihood of minimal change, the condition will be considered permanent. If there is a likelihood of significant change, the condition will be considered temporary if the potential change is likely to resolve relatively quickly (generally within 12 months); the condition will be considered permanent if the potential change is likely to be protracted (generally over 12 months).

Policy item #34.12 of the RSCM II notes that no condition is ever absolutely stable or permanent and, where a worker has a permanent partial disability for which there is entitlement to a pension, there will commonly be some degree of fluctuation. The policy

provides that, 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.

These policies govern the determination of whether the worker's compensable condition stabilized in June 2003, as proposed by the employer in this appeal, on November 24, 2003, as found by the review officer and by the case manager in the April 28, 2006 response, on September 8, 2003, as found by the case manager in the March 9, 2005 decision, or on some other date.

In beginning my analysis, I note that when the WCAT panel accepted that the worker's right wrist and hand symptoms are compensable under the claim, the panel did not specify the precise medical diagnosis of the cause of these symptoms. However, the panel did refer to the diagnoses of "repetitive strain syndrome", "tendonitis of the right wrist," and "mild to moderate chronically flaring tenosynovitis of hands and wrist." Moreover, the panel's determination that the claim should be accepted was based on the conclusion that the worker's condition was due to the repetitive use of his hands and right wrist while employed. In light of these factors, I find that the condition accepted by the panel under the claim was a repetitive strain injury to the worker's right wrist and both hands, an occupational disease that is compensable under section 6 of the Act.

In the case manager's April 28, 2006 response to my section 246(3) referral, the case manager determined that the reason for which wage loss benefits were terminated was that the worker's condition had stabilized. The employer has not challenged this conclusion. I am satisfied that the worker has ongoing symptoms as a result of his compensable condition and did not recover completely from that condition. As noted above, I do not consider that the decision to accept chronic pain under the claim is a matter over which I have jurisdiction. However, the parties have not argued that any

additional conditions should be accepted as permanent under the claim, and I find that the medical evidence does not support acceptance of any additional permanent conditions.

Following July 17, 2003 when the worker stopped working, he saw Dr. Chao, his family doctor, on a regular basis, and was also examined by: two rheumatologists, Dr. A. Verdejo and Dr. B. Koehler; hand surgeon Dr. Brady; and two orthopedic surgeons, Dr. P. Gropper and Dr. K. Favero. Most of the medical evidence relating to the medical attention the worker received following July 2003 is summarized in the claim log entry containing the February 24, 2005 opinion of a Board medical advisor who reviewed the claim file. This opinion was a central consideration in both the case manager's March 9, 2005 decision and in *Review Decision #29284*. The details of this summary need not be repeated here, as the parties have received full disclosure of the claim file. Based on his review of this medical information, the medical advisor concluded as follows:

In summary, the WCAT has determined that the worker developed bilateral hand/wrist tendonitis as a result of repetitive work activities. This condition would normally be expected to resolve within a short time of discontinuing the repetitive activities which are claimed to have caused it and although the worker has continued to complain of pain there have been no specific objective findings present since the attending physician's office note of Sept. 8, 2003. I would consider his current complaints of chronic pain in excess of normal recovery for the condition accepted under the claim. There are currently no objective findings on examination of a permanent functional impairment apart from the ongoing subjective complaints of chronic pain.

The Board medical advisor's opinion was based on an accurate review of the same medical evidence that is available in this appeal. I accept that opinion.

The case manager also concluded in the April 28, 2006 response to my section 246(3) referral that November 24, 2003 was a more appropriate date on which to consider that the worker's condition had reached a medical plateau than the original date of September 8, 2003 that was identified in the March 9, 2005 decision. I agree that November 24, 2003 is the date on which the worker's condition ceased to be temporary.

In reaching this conclusion, I note that I agree with the worker's representative that the fact that a condition is characterized as "chronic" does not necessarily mean that it is no longer temporary for purposes of wage loss entitlement under the Act. The word "chronic" does mean the opposite of "temporary" where "temporary" is used to infer that something is of short duration. However, temporary does not have this meaning in sections 29 and 30 of the Act. Rather, as set out in the Board policy relevant to these provisions, "temporary" refers not to the duration of the compensable condition, but instead to its status. Nevertheless, on reviewing the reasons provided by the review

officer and the evidence, I am satisfied that the review officer made no error in relying on the date on which the worker's condition was first identified as "chronic" as the date on which the condition had plateaued.

As noted by the review officer, in a September 8, 2003 (date of service is 2003/08/09) report to the Board, Dr. Chao, the worker's family doctor advised that it would be greater than 20 days before the worker could return to work. [I note that the review officer understood this report to relate to an August 9, 2003 consultation. However, Dr. Chao's chart notes confirm that the findings reflected in this report to the Board were made on September 8, 2003 and that the worker was not seen on August 9, 2003. The review officer was therefore wrong in this regard, and the case manager was correct in identifying the date of this report as September 8, 2003 in the September 9, 2003 decision.] This is some indication that it was still expected, at least by the worker's primary treating physician, that improvement in the worker's condition could still be expected. Further, there were still objective indications of injury at this time, including swelling over the extensor carpi radialis. However, any prospect that the worker's condition would improve to the point where he could return to his pre-injury job was gone by the time the worker saw plastic surgeon Dr. Brady on November 24, 2003. Dr. Brady advised that the worker had a mild to moderate chronically flaring tenosynovitis of his hands and wrist, based on repetitive strain, and recommended that the worker seek another job that did not involve repetitive strain on his hands. He did not make any additional recommendations for treatment, and found no outward signs of any joint problem. There was no swelling and the worker had full range of motion of his digits and hands and wrists.

In the medical evidence that post-dates Dr. Brady's report, there is no indication that the worker's condition fluctuated to any significant degree. On June 3, 2004, the worker told hand surgeon Dr. Gropper that, over time, he had noted no improvement with his symptoms despite the period of rest and time away from his work. Dr. Gropper made no recommendations for further treatment. Orthopedic surgeon Dr. Favero concluded in a September 7, 2004 consultation report that the worker's complaints were non-surgical and he also had no recommendations for further treatment. I acknowledge that, in the chart notes that Dr. Chao provided to the Board, it is clear that the worker suffered flare-ups in his condition from time to time following November 24, 2003. However, the relevant notes confirm that these flare-ups were directly related to specific activities the worker undertook, such as typing, lifting milk, turning a facet, writing, painting his daughter's room, helping his daughter to paint her desk, throwing a ball, cleaning glass, wringing out a rag, lifting a cylinder of propane, and a host of other activities. There is no medical evidence that these flare-ups were beyond the fluctuations that are normally to be expected of the worker's condition.

I find that the review officer correctly concluded that the worker's condition stabilized by November 24, 2003. Consequently, the worker's entitlement to temporary wage loss benefits concluded on that date.

Disability Award and Vocational Rehabilitation

In view of the case manager's confirmation in the April 28, 2006 response to my section 246(3) referral that the worker's claim had been referred to the Board's Disability Awards and Vocational Rehabilitation Departments, and given that neither party has challenged this aspect of the response, it is no longer necessary to deal with the submissions the parties made in relation to these matters.

Interest

Policy item #50.00 of the RSCM II restricts the payment of interest to situations where there is a blatant Board error that necessitated the retroactive payment of wage loss benefits. A "blatant" error is described as follows in item #50.00:

For an error to be "blatant" it must be an obvious and overriding error. For example, the error must be one that had the Board officer known that he or she was making the error at the time, it would have caused the officer to change the course of reasoning and the outcome. A "blatant" error cannot be characterized as an understandable error based on misjudgment. Rather, it describes a glaring error that no reasonable person should make.

The worker's representative has argued that the worker is entitled to interest on his entire retroactive wage loss payment on the basis that the case manager and review officer made a blatant error by not understanding that, in *WCAT Decision #2004-06106*, the panel made a binding decision that the worker was entitled to such benefits up until November 22, 2004. For the reasons set out above, I find that this position is not well-founded. The case manager and review officer did not make a blatant error by adjudicating the extent of the worker's entitlement to temporary wage loss benefits.

I have agreed with the review officer's conclusions regarding the extent of that entitlement. This raises the question of whether the fact that the case manager concluded in the September 9, 2003 decision that the worker's condition ceased to be temporary as of September 8, 2003 constitutes a blatant Board error. The review officer did not think so, and I agree with this conclusion.

In view of the limited medical evidence that is available about the worker's condition between July and November 2003, I do not consider that the selection of September 8, 2003 as the date of plateau can be characterized as a "glaring error that no reasonable person should make." That evidence is: Dr. Verdejo's July 17, 2003 consultation report, in which Dr. Verdejo advised that there was no easy way to deal with the worker's problem and that he did not consider that any other investigations were needed; Dr. Chao's July 25, 2003 report to the Board, in which he advised that the worker had developed pain in his right wrist while at work on July 17, 2003 and that he would be off work for more than 20 days; Dr. Chao's September 8, 2003 report to the

Board, in which he advised that the worker still had pain in his right wrist, with symptoms including swelling over the extensor carpi radialis; Dr. Chao's chart notes, which confirm that, following September 8, 2003, the worker was not again seen until December 2003; and, Dr. Brady's November 24, 2003 consultation report, in which Dr. Brady reported that there were no outward signs of any joint problem, there was no swelling, and the worker had full range of motion of his hands and wrists, with mild discomfort on the right dorsal first wrist compartment. In reality, the worker's condition appears to have reached a plateau at some point between September 8, 2003, when there were still objective signs of injury, and November 24, 2003, when there were no longer any such signs. It is impossible to precisely identify the date of plateau, and the fact that the review officer and I consider it more appropriate to find that the worker's condition stabilized on November 24, 2003 is nothing more than an exercise in judgement based on a reweighing of the evidence.

Such a reweighing is common in the worker's compensation system, where the exercise of judgement is required and decision-makers must apply law and policy that is open to interpretation, particularly in the context of an individual worker's circumstances. There is consequently scope for differences of opinion, and such a difference of opinion cannot be called a blatant error as such is defined in policy item #50.00 in the RSCM.

On that basis, I find that the worker is not entitled to interest on the retroactive payment made to implement the Review Division findings of August 29, 2005.

Costs

The worker's representative requested reimbursement of the worker's legal costs. Section 6 of the *Workers Compensation Act Appeal Regulation* (B.C. Reg. 321/2002) (Appeal Regulation), authorizes WCAT to award costs in certain circumstances. I do not consider such circumstances exist here. Specifically, the employer has not caused costs to be incurred or conducted itself in a vexatious, frivolous or abusive manner. Further, I do not consider that the issues in the worker's appeal are sufficiently distinct from other appeals considered by WCAT to conclude that exceptional circumstances exist that make it unjust to deprive the worker of his costs.

Section 7 of the Appeal Regulation provides that the tribunal may not order the Board to reimburse a party's expenses arising from a person representing the party. I have no authority to order the Board to reimburse the worker for legal expenses incurred.

Conclusion

The appeal is denied. I find that the review officer properly determined that the worker's entitlement to wage loss benefits concluded on November 24, 2003 on the basis that his compensable condition had reached a medical plateau. The worker is not entitled to reimbursement for his legal costs, nor is he entitled to the payment of interest on the

retroactive wage loss payments that resulted from the March 9, 2005 and August 29, 2005 decisions. The Review Division's August 29, 2005 decision is confirmed.

On reviewing the file, it does not appear that there were any reimbursable expenses associated with the appeal. I therefore make no order for reimbursement of expenses.

Deirdre Rice
Vice Chair

DR/dw