

Noteworthy Decision Summary**Decision:** WCAT-2006-03799**Panel:** H. Morton**Decision Date:** October 4, 2006***Reconsideration – Common law grounds- Scope of jurisdiction – Section 246(3) of the Workers Compensation Act***

Reconsideration of a WCAT decision. A WCAT panel may proceed to address a related facet of causation even if it had not been expressly addressed in a prior decision of the Workers' Compensation Board operating as WorkSafeBC (Board), as long as no further evidence was required and there were no natural justice concerns. While a panel may elect to first obtain a determination by a Board officer under section 246(3) of the *Workers Compensation Act* (Act), it is not a statutory prerequisite to the WCAT panel taking jurisdiction.

The worker sought reconsideration of a WCAT decision on the basis that the original WCAT panel exceeded its jurisdiction by considering whether the worker's right wrist problems were causally related to her 2000 compensable injury in the context of an appeal concerning her 2003 claim. The original WCAT panel considered whether the worker's problems and surgery in 2003 were compensable under her 2000 and/or 2003 claims, rather than being limited to the 2003 claim, after providing appropriate notice to the parties and receiving their submissions.

The reconsideration panel found that there had not been an express decision by a Board officer concerning causation in relation to the worker's problems in 2003 in connection with her 2000 claim. The reconsideration panel concluded that, while a WCAT panel may elect to first obtain a determination by a Board officer under section 246(3) of the Act, it is not a statutory prerequisite to the WCAT panel taking jurisdiction to address the related facet of causation (even if it had not been expressly addressed in a prior decision of the Board). The reconsideration panel found that it was not patently unreasonable for the original WCAT panel to proceed to address that issue as no further evidence was required and there were no natural justice concerns.

WCAT Decision Number : WCAT-2006-03799
WCAT Decision Date: October 04, 2006
Panel: Herb Morton, Vice Chair

Introduction

The worker seeks reconsideration of the February 10, 2005 Workers' Compensation Appeal Tribunal (WCAT) decision (*WCAT Decision #2005-00729*). Her application was initiated by a submission dated May 25, 2005 from her union representative. The representative submits that the WCAT panel exceeded its jurisdiction, by considering whether the worker's right wrist problems were causally related to her 2000 compensable injury in the context of an appeal concerning her 2003 claim.

By letter dated July 19, 2005, the WCAT appeals coordinator provided information to the worker regarding the grounds for requesting reconsideration, including the "one time only" limitation on reconsideration applications. She explained:

It is important that your submission explains how your application meets the requirements for reconsideration (see headings #9 and #10, **New Evidence**; #11, **Common Law Grounds**; and #14, **Law, Policy and Decisions on Reconsiderations**, in the information sheet).

[emphasis in original]

The appeal coordinator invited the worker to provide further evidence and argument in support of his application. By letter of July 20, 2006, the worker's representative confirmed that the worker's submissions were complete. A submission dated July 26, 2006 was provided by the consultant representing the employer. The worker's representative provided a rebuttal submission on August 15, 2006.

I find that the issue as to whether the WCAT decision involved an error of law going to jurisdiction involves questions of a legal nature which can be properly considered on the basis of written submissions without an oral hearing.

Issue(s)

Did the WCAT decision involve an error of law going to jurisdiction?

Jurisdiction

Section 255(1) of the *Workers Compensation Act* (Act) provides that a WCAT decision is final and conclusive and is not open to question or review in any court. In keeping with the legislative intent that WCAT decisions be final, they may not be reconsidered except on the basis of new evidence as set out in section 256 of the Act, or on the basis of an error of law going to jurisdiction. 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*, "Reconsideration Application — Whether There Has Been a Breach of Natural Justice Almost Always Depends on All of the Circumstances", 20 W.C.R. 291).

Section 245.1 of the Act provides that section 58 of the *Administrative Tribunals Act* (ATA) applies to WCAT. Section 58 of the ATA concerns the standard of review to be applied in a petition for judicial review of a WCAT decision. This section provides:

- 58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
- (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
 - (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
 - (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and

- (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
- (3) For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion
- (a) is exercised arbitrarily or in bad faith,
 - (b) is exercised for an improper purpose,
 - (c) is based entirely or predominantly on irrelevant factors, or
 - (d) fails to take statutory requirements into account.

Practice and procedure at item #15.24 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) provides that WCAT will apply the same standards of review to reconsiderations on the common law grounds as would be applied by the court on judicial review.

The reconsideration application was assigned to me by the WCAT chair on the basis of a written delegation (paragraph 25 of *Decision of the Chair No. 8*, "Delegation by the Chair", March 3, 2006).

Background

The worker suffered a right wrist injury at work on October 25, 2000. Her claim was accepted by the Board and wage loss benefits were paid from October 26, 2000 until February 25, 2001.

The worker suffered a further right wrist injury at work on February 6 or 7th, 2003. Her claim was accepted by the Board and wage loss benefits were paid from February 7, 2003 until June 27, 2003. (For convenience, I will refer to this injury as having occurred on February 6, 2003).

On February 26, 2003, the case manager on the 2000 claim reviewed the information regarding the worker's ongoing right wrist problems and her February 6, 2003 claim. The case manager noted:

I called the worker this date and she advised me that her wrist has bothered her on and off since she returned to work in February 2001 and she will on occasion talk to first aid and take Tylenol #3 to keep her going.

...

I note that a new claim has been accepted for the right wrist, right shoulder and back so the current claim will be finalised as no consideration of a re-opening of the current claim is necessary.

By memo dated June 11, 2003, a Board medical advisor advised the case manager under the 2003 claim in part:

Based on the available information on file, it would appear that the worker had the persistent right wrist pain prior to the February 6, 2003 work incident. Hence, the probability of the worker's current wrist pain being related to the worker's February 6, 2003 work incident is less than 50%. I also reviewed the possibility of the current need for surgery being related to the worker's prior 2000 claim. However, there was no continuity of symptoms between the closure of the 2000 claim and January 20, 2003 when the right wrist pain was noted. Hence the probability of the worker's current wrist symptoms being a result of the 2000 claim is also less than 50%.

By decision dated June 24, 2003, the case manager for the 2003 claim advised the worker that her need for right wrist surgery was not accepted as a compensable consequence of her February 6, 2003 work injury.

In a further decision dated September 30, 2004, the case manager advised the worker that her strain injuries had resolved and no wage loss or health care benefits were payable with regard to her upper and lower back strain and right shoulder strain. She further advised:

The [comprehensive multi-disciplinary pain assessment] report outlined the factors that precipitated your current condition. None of these related to your compensable strain conditions. They indicated the factors that precipitated your current condition were your wrist injury of 2000 (minor contributor), wrist injury of 2003 (minor contributor), mild arthritic change in your right wrist (minor to moderate contributor), perceived negative treatment by the Workers' Compensation Board ("WCB") (moderate contributor), and high dependency on your wrist splint (major contributor).

...

Given the findings of the comprehensive multi-disciplinary pain assessment, I cannot conclude that your chronic pain is related to your compensable injuries. It appears to be primarily related to your right wrist, and as a result, the criteria of Policy item #22.35 RSCM have not been met. Your claim will not be accepted for chronic pain.

The worker requested reviews of the June 24, 2003 and September 30, 2004 decisions.

Review Decision #8085 dated February 11, 2004 concerned the June 24, 2003 decision. The review officer identified the issue in the review as involving “the Board’s decision to disallow the worker’s ongoing wrist complaints and related wrist surgery as a compensable consequence of the accepted injury.”

Under the heading “Reasons and Decision”, the review officer noted on page 6:

I acknowledge that the worker sustained an injury to her right wrist in October 2000. That injury was a soft tissue injury that appears to have resolved early in 2001. The worker’s right wrist was again symptomatic in 2002, at which time she underwent further medical investigation (x-rays and nerve conduction studies).

The worker was diagnosed with a “sprained right wrist” by her AP on January 20, 2003. The worker’s AP examined the worker again on February 3, 2003, and noted “pain in her right wrist remains unchanged...x-ray wrist”. It was four days later, on February 7, 2003 that the worker strained her back and shoulder, and may have aggravated her wrist.

...

The BMA provided an opinion on June 11, 2003. The opinion stated in part:

Based on the available information on file, it would appear that the worker had the persistent right wrist pain prior to the February 6, 2003 work incident. Hence, the probability of the worker's current wrist pain being related to the February 6, 2003 work incident is less than 50%. I also reviewed the possibility of the current need for surgery being related to the worker's prior 2000 claim. However, there was no continuity of symptoms between the closure of the 2000 claim and January 20, 2003 when the right wrist pain was noted. Hence the probability of the worker’s current wrist symptoms being a result of the 2000 claim is also less than 50%.

I agree with the BMA, and conclude that it is unlikely that the worker’s ongoing wrist complaints, and the proposed investigative surgery, could be reasonably related to the work incident of February 7, 2003 (the BMA refers to this as a February 6 work incident, which is incorrect).

The review officer confirmed the June 24, 2003 decision, and the worker appealed the Review Division decision to WCAT. In her notice of appeal dated March 9, 2004, the worker indicated that the Review Division decision was incorrect because "Worker's wrist symptoms and need for surgery in June 2003 were compensable." The worker wrote the 2003 claim number on this form.

A second Review Division decision was issued on April 25, 2005 (*Review Decision #25620*), in relation to the September 30, 2004 decision. The review officer confirmed the decision not to reinstate wage loss benefits. However, the review officer found that the Board should have accepted the claim for chronic lower back and right shoulder pain and referred the worker to the Disability Awards Department.

In relation to the worker's appeal to WCAT of *Review Decision #8085*, by letter dated November 3, 2004 addressed to the worker's representative the WCAT panel reviewed the background to this matter and commented:

On the basis of this evidence, I find the Board determined that the worker's symptoms in June 2003 were not causally related to either the February 11, 2003 or October 25, 2000 work injuries. Therefore, prior to finalizing my deliberations on the appeal, I invite you to make submissions on the following two points:

1. Whether, in your opinion, you consider that I have jurisdiction to decide the issue of whether the worker's symptoms of June 2003 were causally related to the October 25, 2000 work injury and therefore, whether that claim should be reopened.
2. If so, whether in your opinion, you consider that the worker's symptoms in June 2003 were causally related to her October 25, 2000 work injury and therefore, that claim should be reopened.

By submission dated November 29, 2004, the worker's representative addressed these two questions. She submitted that there had been no primary adjudication by the Board on the issue of whether the 2003 symptoms were related to the 2000 claim. She submitted that the June 24, 2003 decision by the Board officer, and the February 11, 2004 Review Division decision, only concerned the 2003 claim, and did not contain a decision on causation in relation to the 2000 claim. As she responded in the negative to question #1, she advised she would not be providing a submission in relation to question #2.

By submission of November 17, 2004, the employer's representative commented:

. . . while I normally would oppose jurisdiction when a file is not specifically mentioned in a decision letter, in this case I would make an exception and

agree that a decision by the Panel could be rendered on the 2000 claim. The matter was investigated and a medical opinion sought.

The employer's representative also requested a copy of the 2000 claim file be disclosed. The worker's representative similarly requested disclosure of the 2000 claim file on November 30, 2004. On December 6, 2004, copies of the 2000 claim file were sent by the Board to WCAT and the parties to the appeal.

A further submission dated January 24, 2005 was provided by the worker's union representative. She submitted:

2. In the event that it is the Vice-Chair's desire to deal with the issue of causation in a holistic manner by considering both the 2000 and 2003 claims at the same time, then it is submitted that the appropriate solution would be to adjourn the current appeal and refer the issue of causation under the 2000 claim back to the Board for initial adjudication, followed by providing the parties an opportunity for further submissions in relation to the conclusions reached by the Board. (See section 246(3) of the *Workers Compensation Act*, as amended).
3. I will make the following observations, on a without prejudice basis, in relation to the factual issue of whether the worker's 2003 symptoms were related to the 2000 claim.

In her written submission of January 24, 2005, the worker's representative argued in part:

...it would appear that [the worker's] ongoing symptoms and surgery are related to her 2000 claim, which involved a hyperextension injury. This injury resulted in pain over the dorsal aspect of the wrist, as well as the development of a carpal boss which was surgically removed in December 2003. The uncontradicted evidence on file from her doctor is that she had been experiencing ongoing symptoms in relation to the 2000 injury after she had returned to work. This pain worsened following a recurrence of the hyperextension injury in February 2003.

Clearly, it would appear that her ongoing symptoms are related to one of her two wrist injuries, as they both involve the same type of injury in the same area, resulting in the same type of pain.

In the event that the WCAT Panel determines that her ongoing symptoms in July 2003 were not related to the February 2003 claim, then they should be related to her 2000 claim.

In *WCAT Decision #2005-00729*, the WCAT panel reviewed the background of the worker's claim, and found as follows (at pages 2-3):

I find that I have jurisdiction over whether the worker's current symptoms and need for surgery are related to the October 2000 claim. I considered each of the parties' submissions prior to rendering this decision and acknowledge their arguments contained within. **However, I find that the Board made a determination respecting the October 2000 claim, albeit not formally [*sic*] to the worker by way of a specific decision letter solely pertaining to that claim. Nonetheless, I have determined that the Board conducted a thorough review of that claim, enough to conclude that the worker's current symptoms were unrelated to it.**

I also considered whether the appeal should be suspended and referred back to the Board under section 246(3) of the Act for a determination on the matter respecting the October 2000 claim. However, I find that the Board directed its attention to the issue as noted in the Board medical advisor's opinion, and both the client services manager's and review officer's associated decisions.

Consequently, I have assumed jurisdiction over the issue respecting the October 2000 claim and will render a decision on its merits.

[emphasis added]

The WCAT panel found that the worker's ongoing right wrist symptoms were not causally related to either the October 2000 or February 6, 2003 work injuries. The panel found the worker was not entitled to wage loss or health care benefits beyond June 27, 2003.

Submissions

By submission of May 25, 2005, the worker's representative argues that the WCAT decision was patently unreasonable in taking jurisdiction over the issue as to whether the worker's 2003 symptoms were related to her earlier 2000 claim. She submits that the basis for the WCAT decision "cannot withstand any type of scrutiny at all as there is no evidence on which to base her conclusions." She submits there is no evidence the Board had conducted a thorough review under the 2000 claim in relation to whether the worker's 2003 right wrist symptoms were related to the 2000 claim. She argues that the WCAT panel acted *ultra vires* in respect of the issue as to whether the 2003 symptoms were related to the 2000 claim.

By submission of July 26, 2006, the employer's representative comments in part:

The Panel exercised an occasionally used provision to consider a decision made by the Board through a log entry as opposed to a formal decision

directed to the worker. I have seen WCAT start appeals on a log entry. I have also seen WCAT include prior claims in their decision making based on the requirement in Board policy to give consideration to prior claims. Knowing this, the Panel concluded she had jurisdiction. The test as outlined in the handout for reconsideration is whether or not the decision to assume jurisdiction was patently unreasonable. That is a stringent test and one not met in this case.

Where the decision might have been patently unreasonable would have been if there had been absolutely no evidence regarding the prior claim available for consideration at either level of appeal or by the original decision-maker. Available to the Panel were chart notes going back to the date of the 2000 claim. There was a medical opinion on file. There was a history, all be it brief and not particularly probing, about her medical history....

By rebuttal of August 15, 2006, the worker's representative submits that the June 24, 2003 decision letter only dealt with the 2003 claim. She further submits:

The employer's representative erred in stating that the Board had made a decision through a log entry as opposed to a formal decision in relation to [the worker's] 2000 claim. No such log entry exists. There are only two references to the 2000 claim in the log entries under the 2003 claim, and neither constitutes a "decision". The June 13, 2003 entry merely copies the February 26, 2003 log entry from the 2000 claim (which clearly states that no consideration of a re-opening of the 2000 claim was being considered at that time because of the acceptance of the 2003 claim); the June 11, 2003 entry contains the medical Advisor's opinion, which, by virtue of law and policy, in particular policy item #97.30, does not constitute a decision. That policy provides that it is the Claims Adjudicator or Claims Officer who is responsible for the decision-making process, and for reaching the conclusions on the claim, although, at times this will require an input of medical evidence.

Reasons and Findings

Under section 255 of the Act, a WCAT decision is "final and conclusive." Unless the strict grounds for obtaining reconsideration are met, a reconsideration panel is not empowered to engage in a fresh exercise of discretion.

I have considered, first of all, the question as to the applicable standard of review. Did the decision by the WCAT panel regarding the scope of its jurisdiction concern a finding of fact or law or an exercise of discretion by the WCAT panel in respect of a matter over which it had exclusive jurisdiction, so as to make the test one of patent unreasonableness under section 58(2)(a) of the ATA? Alternatively, did the WCAT decision regarding the scope of its jurisdiction concern a matter not coming within section 58(2)(a) or (b), to which the standard of review to be applied is correctness? Additionally, did the WCAT decision involve any breach of procedural fairness or natural justice (having regard to whether, in all of the circumstances, the tribunal acted fairly)?

In *Ontario Public Service Employees Union v. Seneca College of Applied Arts & Technology*, [2006] O.J. No. 1756, (2006) 147 A.C.W.S. (3d) 737, May 4, 2006, the Ontario Court of Appeal reasoned:

29 Unfortunately, in its decision, the Divisional Court did not undertake this pragmatic and functional analysis. Instead, it seemed to take the view that because the question in issue was, in its opinion, a question of jurisdiction and a question of law, the standard of review must be correctness.

30 That is not a sound view. **Simply because the court labels an issue “jurisdictional” does not automatically mean that the standard of review of a tribunal’s decision on that issue is correctness.** As Evans J.A. pointed out in *Via Rail Canada Inc. v. Cairns* (2004), 241 D.L.R. (4th) 700 at para. 33 (F.C.A.), “Conceptual abstractions, such as ‘jurisdictional question’, now play a much reduced role in determining the standard of review applicable to the impugned aspect of a tribunal’s decision.”

31 **In other words, a court’s finding that an issue has a jurisdictional aspect does not obviate the court’s obligation to do a pragmatic and functional analysis.** See *Voice Construction*, *supra* at paras. 20-22; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 21; *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.C. 4 at paras. 22-23. The “jurisdictional” nature of the issue is but a factor in that analysis, or more often, the characterization of the outcome of that analysis. See *Via Rail*, *supra* at para . 36 and *Pushpanathan*, *supra* at para. 28.

32 **The purpose of the pragmatic and functional analysis - of considering the four contextual factors - is to ascertain the legislature’s intent. See *Dr. Q*, *supra* at para 26. Did the legislature intend that a reviewing court give deference to the Board’s decision,**

and if so, what level of deference? Or, put in terms of jurisdiction, did the legislator intend this issue to be exclusively within the Board's jurisdiction to resolve? See *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1089-1091.

33 In my opinion, the interplay of the four contextual factors points to a high degree of deference to the Board of Arbitration's decision. The question of the Board's remedial authority to award aggravated and punitive damages is a question that the legislature intended the arbitrators to decide. Their decision must stand unless it is patently unreasonable.

[emphasis added]

In *United Brotherhood of Carpenters and Joiners of America Locals 527, 1370, 1598, 1907, and 2397 v. Labour Relations Board*, [2005] B.C.J. No. 3019, 2005 BCSC 1864, the British Columbia Supreme Court similarly reasoned as follows:

[6] Essentially, in this application before me, argument was made as to whether or not this review falls under s. 58(2)(a) of the **Administrative Tribunals Act** or under 58(2)(c), whether or not the standard of review is one of the decisions being patently unreasonable, or whether the standard of review is that the decision is correctness.

[7] Patently unreasonable appears to be the standard of review when a board such as the Labour Relations Board is acting in an area in which it has the discretion to act, and paragraph 58(2)(c) applying the correctness standard appears to be applicable when the courts determine that the tribunal has gone beyond its jurisdiction or has done something so as to lose jurisdiction and thus the standard of review is correctness.

[8] I should note that I have not considered s. 58(3) because that does not appear to apply to a review of the Board decisions.

[9] The Petitioners argue that the provisions contained in s. 18 of the Code are jurisdictional in nature; that they are fundamental to the Board's operation; that they are reviewable on the level of correctness. I should note that the issue of correctness, both under the **Administrative Tribunals Act** as well as common law, is the standard of review when a jurisdictional issue is raised.

...

[15] If a pragmatic and functional approach is applied to the decision in ***Zero Downtime***, the decision in dispute before me, I have concluded after reviewing relevant sections of the Code, and after reviewing the cases which been provided before me, that it is the legislature's intent that the Board decide the issue raised in s. 18(4)(b), not the courts. Applying the pragmatic and functional approach I have determined, essentially, that the standard of review is one of being a "patently unreasonable" test. The decision does not raise the spectre of a "preliminary or collateral question governing the assumption of jurisdiction", to use the language of Lambert, J.A. in the ***Machinists*** case.

[16] The decision in ***Zero Downtime***, in my view, is really one which is fundamental to the operation of the Board. This is really a certification issue. It is a question of who is to be certified in certain circumstances. It is of note that the battle before me when this matter was heard, as I earlier mentioned, is not a battle between the usual protagonists, labour and management, but it in fact appears to be a battle between competing unions. **The Board operates under the Code, and has the authority and the duty to make the type of decisions it did in the *Zero Downtime* decision. It has the background, it has the experience, it has the expertise, it knows who the players are, and it knows the consequences of its decisions. Reviewing the *Act* as a whole, I cannot help but conclude that this is the type of a decision that is exactly what the legislature wanted the Board to decide. It is not the legislature's intention, in my view, to leave this type of statutory interpretation in its practical application to the courts who do not have the expertise that the Board does.**

[17] The decision in ***Zero Downtime*** is a finding of fact and law which the legislature clearly intended the Board to determine exclusively. At common law and under the ***Administrative Tribunals Act***, the standard of patent unreasonableness is the standard to be applied to any judicial review of this type of decision. In my view, to view this decision as one going to jurisdiction, to apply to this review the standard of correctness, ignores the pragmatic and functional approach developed at the Supreme Court of Canada and in the British Columbia Court of Appeal and applied on a number of occasions by our Court of Appeal. This decision is not so fundamental to the operation that it is jurisdictional. This decision cannot be viewed as the Board taking onto itself something, or

acting in an area, that the legislature did not intend it to do. Those are true jurisdictional disputes for which the court has an obligation to review on a standard of correctness.

[emphasis added]

An appeal from this decision was dismissed by the British Columbia Court of Appeal on August 3, 2006 [2006] B.C.J. No.1757, 2006 BCCA 364.

The Board and WCAT are administrative tribunals with specialized expertise, whose decisions are protected by privative clauses (section 96(1) and section 255(1) of the Act). This was not a case involving constitutional or *Charter* issues. The WCAT decision involved the determination of the panel's jurisdiction under the Act, to address the compensability of the worker's right wrist problems under both her 2000 and 2003 claims. I find that the privative clause, the expertise of the tribunal, the purposes of the Act, and nature of the question under review lead to a conclusion that the applicable standard of review is one of patent unreasonableness under section 58(2)(a) of the ATA.

In the British Columbia Supreme Court decision in *Plamondon v. BC (WCB)*, (1988) 47 D.L.R. (4th) 114, (1988) 21 B.C.L.R. (2d) 261, Mr. Justice Shaw noted in part:

Again it is apparent that the scope of the inquiry on the 1977 claim focused solely on whether Mr. Plamondon suffered an injury at work on February 7, 1977. It did not address the question of whether his continued work in a job that was more than his back was fit to handle caused injury to his back culminating in his having to cease work on February 7, 1977.

Mr. Justice Shaw concluded:

From the foregoing it is my view that Mr. Plamondon has never obtained a decision on the fundamental issue relating to his 1977 claim: did the work he carried out from July of 1976 through to February 7, 1977 cause personal injury superimposed on his pre-existing spinal fusion disability. In my opinion he is entitled to have his claim for compensation adjudicated upon this issue. Without this, Mr. Plamondon will have been denied his claim without the proper issue ever having been addressed. For a claim to be disposed of in that manner is in my view patently unreasonable.

It is apparent from the Court decision in *Plamondon* that an appellate decision-maker has a certain responsibility for ensuring that appropriate consideration is given to issues of causation. Where various facets or aspects of possible work causation have been addressed in the lower decision(s) giving rise to the appeal, and there has been an opportunity for the participating parties to provide submissions, the appellate body clearly has jurisdiction to address such issues. The matter is more complicated,

however, where the prior decisions have failed to expressly address an issue of possible work causation (i.e. such as a prior claim), or where the appellant does not raise that issue in his or her appeal to WCAT.

MRPP item #14.30 provides:

The panel will normally not address issues not expressly raised by the parties, but has the discretion to do so. For example, where the panel considers there may have been a contravention of law or policy in the lower decision, the panel may proceed to address that issue whether or not it was expressly raised by the appellant. However, panels will ensure that notice is given to the parties of the panel's intention to address any issue which was not raised in the notice of appeal or in the parties' submissions to WCAT.

...

Where a decision denying acceptance of a claim adjudicated under section 6 (occupational diseases) is appealed to WCAT and the panel concludes that it should have been adjudicated under section 5 (personal injury), or vice versa, the panel may address the issue if no further evidence is required and there are no natural justice concerns.

Where a WCAT panel considers there to be a matter that should have been determined but that was not determined by the Board, the panel may refer the matter back to the Board for determination and suspend the appeal proceedings until the Board provides WCAT with that determination [s. 246(3)] (see item 5.52).

[emphasis added]

It is clear from MRPP item #14.30 that a WCAT panel must ensure compliance with the requirements of procedural fairness and natural justice. Accordingly, if a WCAT panel is contemplating addressing an issue of causation which has not been raised by a party in the appeal, it is necessary that the panel provide notice to the parties, with an opportunity for submissions (so that the parties are not taken by surprise by the decision of the panel on that issue). The parties have a right to be heard in relation to the additional consideration to be given to causation on some different basis than was raised by the parties' submissions.

The absence of a prior express decision on point by the Board, the need to obtain additional evidence and submissions, the wishes of the parties, and the need for timely decision-making by WCAT within a statutory time frame for decision-making pursuant to section 253 of the Act, are all factors which might cause a WCAT panel to decide to restrict its decision to one aspect of the issue of causation, and to simply flag to the parties the fact that an initial adjudication could be requested from the Board on some related issue of causation.

In this case, the WCAT panel provided notice to the parties, and received their submissions regarding both the extent of its jurisdiction, and regarding the merits in the event the WCAT panel found it had jurisdiction to proceed to address the 2000 claim. I find there was no breach of procedural fairness or natural justice in the decision-making process followed by the WCAT panel. The sole issue raised by this application is whether it was within the jurisdiction of the WCAT panel to proceed to address the 2000 claim, after providing appropriate notice to the parties and receiving their submissions.

Effective March 3, 2003, the workers' compensation appeal structures were amended pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). These amendments were based in large measure on the recommendations contained in the March 11, 2002 *Core Services Review of the Workers' Compensation Board* (the Winter Report). At page 26, the core reviewer concluded there was "an overwhelming need for the current appeal processes and structures within the workers' compensation system to be reformed." One of the reasons listed in support of this conclusion was as follows:

Fourth, the existing multiple levels of appeal on claims issues foster a lack of finality with respect to a worker's claim. There are many examples where, after going through one or more levels of appeal, a worker's claim is referred back to the WCB for further adjudication – which then leads to the potential of further appeals. This process has been referred to as the "treadmill" effect.

[emphasis in original]

At pages 49-50, the core reviewer made the following recommendation concerning the proposal for an external appeal tribunal:

Once again, the subject matter of the appeal should not be limited to what the Review Manager actually dealt with in the four corners of his/her decision letter. Rather, the appeal would encompass any issue which the Appeal Tribunal believes should have reasonably been dealt with by the initial decision-maker in his/her decision letter, or by the Review Manager during the subsequent internal review process.

Section 246(3) and (4) of the Act provided, as amended March 3, 2003, provided:

- (3) If, in an appeal, the appeal tribunal considers there to be a matter that should have been determined but that was not determined by the Board, the appeal tribunal may refer that matter back to the Board for determination and suspend the appeal proceedings until the Board provides the appeal tribunal with that determination.
- (4) If the appeal tribunal refers a matter back to the Board for determination under subsection (3), the appeal tribunal must consider the Board's determination in the context of the appeal and no review of that determination may be requested under section 96.2.

The authority provided to WCAT by section 246(3) permits WCAT to go beyond simply rehearing the matters previously decided by the Board. It also provides a means for addressing those related matters which should have been addressed by the Board but were not. Subsection 246(4) provides that in the event of a referral to the Board under subsection 246(3), the parties have no right to request review by the Review Division, as the matter automatically comes back before WCAT for consideration in the context of the appeal. It would seem that the legislative intent which lay behind this provision was that there be a mechanism for ensuring the timely resolution of disputes on workers compensation claims, so as to avoid the so-called "treadmill effect" in appropriate circumstances.

By submission of January 24, 2005 to the WCAT panel, the worker's representative had argued that if it was the WCAT panel's desire to deal with the issue of causation in a holistic manner, then the appropriate solution would be to refer the issue of causation under the 2000 claim back to the Board for initial adjudication, followed by an opportunity for further submissions in relation to the conclusions reached by the Board. I agree that with the worker's representative that there had not been an express decision by a Board officer concerning causation in relation to the worker's problems in 2003 in connection with her 2000 claim. At most, the claim log entries and reasoning in the Review Division decision may be viewed as implicitly addressing the question of causation in relation to the 2000 claim (inasmuch as the Board directed its attention to this issue as evidenced by the reasoning in the Board medical advisor's opinion and the Review Division decision). I further agree with the worker's representative that a referral back to the Board under section 246(3) was one way in which this issue could have been addressed, for the purpose of obtaining a formal decision letter expressly addressing this issue.

This brings into focus, therefore, the question as to whether the WCAT panel was legally obligated to make a referral under section 246(3), and to await the Board's determination, as a prerequisite to assuming jurisdiction to addressing causation under the 2000 claim. This relates to an ambiguity in the wording of section 246(3) of the Act, where it indicates that "If, in an appeal, the appeal tribunal considers there to be a

matter that should have been determined but that was not determined by the Board, the appeal tribunal **may** refer that matter back to the Board for determination....” [emphasis added]. Does the use of the word “may”, rather than “must” or “shall”, indicate that the WCAT panel has discretion to refer the matter back to the Board or to proceed to address the issue without such a prior determination? Alternatively, does the use of the word “may” simply indicate that the panel has a discretion as to whether or not to address the undetermined issue (i.e. as opposed to indicating to the worker that it would be open to the worker to request further initial adjudication by the Board), but that if the panel elected to include that issue in its determination, it would first be necessary to make a referral to the Board under section 246(3) of the Act?

MRPP item #14.30 provides, on a closely related point, that where a decision denying acceptance of a claim adjudicated under section 6 (occupational diseases) is appealed to WCAT and the panel concludes that it should have been adjudicated under section 5 (personal injury), or vice versa, the panel may address the issue if no further evidence is required and there are no natural justice concerns. This practice and procedure guidance provided by the WCAT chair in the MRPP supports interpreting section 246(3) of the Act as not requiring a referral to the Board under section 246(3) of the Act, as a prerequisite to a WCAT panel assuming jurisdiction to address another issue or facet of causation (if no further evidence is required and there are no natural justice concerns).

Having regard to the guidance provided by MRPP item #14.30, I find that while a WCAT panel may elect to first obtain a determination by a Board officer under section 246(3), it is not a statutory prerequisite to the WCAT panel taking jurisdiction to address the related facet of causation (even if it had not been expressly addressed in a prior decision of the Board). I consider that this interpretation accords with the reasoning provided in the *Plamondon* decision, and in the Winter Report, which support taking a broad approach to jurisdiction in order to ensure that important issues of possible work causation are addressed in a timely manner.

In this case, a medical opinion had been provided by a Board medical advisor concerning the worker’s problems in 2003 in connection with her 2000 claim. It would have been open to the Board officer under the 2000 claim to issue a decision letter under the 2000 claim at that time. It might be considered that by choosing not to issue a decision letter regarding the 2000 claim, the Board officers implicitly accepted the medical advice that the worker’s problems were not due to that prior claim (even if no formal decision was made on that basis). The WCAT panel elected not to make a referral back to the Board on the basis that the Board had directed its attention to the issue.

This was a situation in which there was no formal decision regarding an aspect of causation, similar to that addressed in MRPP item #14.30. In keeping with the guidance provided in MRPP item #14.30, I consider that it was open to the WCAT panel to proceed to address that issue (as no further evidence was required and there were no natural justice concerns). In other words, it was open to the WCAT panel to view the

worker's appeal as raising the broader question as to whether the worker's problems and surgery in 2003 were compensable under her 2000 and/or 2003 claims, rather than being limited to the 2003 claim (bearing in mind the attention given to the 2000 claim in the Review Division decision, as well as the medical advice received by the case manager concerning the 2000 claim even though the initial decision of June 24, 2003 by the case manager did not mention the 2000 injury).

I consider that it was within the jurisdiction of the WCAT panel to consider the following options in connection with the question as to whether the worker's 2003 problems were due to her 2000 injury:

- (a) flag this as an issue which had not been adjudicated, and recommend to the Board that it proceed to adjudicate that issue, or advise the worker that it was open to her to request an initial adjudication from the Board on that issue;
- (b) refer the issue back to the Board under section 246(3), and then invite submissions from the parties regarding the Board's determination under section 246(4), before proceeding to address the issue in the WCAT decision;
- (c) request that the Board investigate further into a matter relating to the appeal and report in writing to WCAT, with disclosure to the parties and an opportunity for submissions prior to the WCAT decision;
- (d) request independent assistance or advice from a health professional under section 249(6), with disclosure to the parties and an opportunity for submissions prior to the WCAT decision; or,
- (e) proceed to address the issue of causation under the 2000 claim in the WCAT decision, after providing notice to the parties with an opportunity for submissions.

Under section 96.4(8) of the Act, the review officer had a discretion to refer the decision of the case manager back to the Board with the direction that it provide the worker with a formal decision dealing expressly with the 2000 claim. Pursuant to section 239(2)(a) of the Act, and section 4 of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/02, a decision by a review officer to refer a decision back to the Board is not appealable to WCAT. Accordingly, if the review officer had made such a referral, the WCAT panel would have been precluded from proceeding to address the 2000 claim while that issue remained before the Board. However, there was no such referral back to the Board by the review officer in this case.

I do not consider that the WCAT decision was patently unreasonable, in taking jurisdiction to address the issue of causation under both the worker's 2000 and 2003 claims in connection with the worker's appeal regarding the compensability of her right wrist problems and surgery in 2003. I consider that this was within the jurisdiction of the WCAT panel, to ensure that an important aspect of possible work causation was not

overlooked or left unaddressed. In this case, the issue had been touched on by the Board officers, inasmuch as a medical opinion had previously been provided by a Board medical adviser on this issue. The issue had received at least indirect attention by the Board officers, even if they had not proceeded to issue a formal decision letter on point. No further evidence was required and there were no natural justice concerns (given the steps taken by the WCAT panel to obtain submissions from the parties). Had the WCAT panel found the worker's symptoms in 2003 to be compensable under her 2000 claim, I similarly do not consider that the WCAT decision would be subject to being set aside at the request of the respondent as being outside the jurisdiction of the WCAT panel.

In the event that I am wrong in concluding that the applicable standard of review in this case is one of patent unreasonableness, then I would also uphold the decision on the WCAT panel on a standard of correctness. I do not consider that the decision by the WCAT panel involved an error of law going to jurisdiction.

Conclusion

The worker's application for reconsideration of *WCAT Decision #2005-00729* is denied, on the common law grounds. No error of law going to jurisdiction has been established in relation to the WCAT decision. The decision did not involve a breach of natural justice or procedural fairness, and was not patently unreasonable. If I am wrong regarding the applicable standard of review, I further find (on a correctness standard) that the decision did not involve jurisdictional error. The WCAT decision stands as "final and conclusive" under section 255(1) of the Act.

Herb Morton
Vice Chair

HM/jm