

**Noteworthy Decision Summary**

**Decision:** WCAT-2006-04061      **Panel:** H. Morton      **Decision Date:** October 30, 2006

***Reconsideration – Common law grounds - Scope of jurisdiction – Distinction between obligation to address issues versus obligation to provide final determination of issues***

Reconsideration of WCAT decision. The obligation for WCAT to address an issue does not require, in all circumstances, that the WCAT decision provide a final resolution of all such issues so as to avoid the need for further adjudication by the Workers' Compensation Board operating as WorkSafeBC (Board) in implementing the WCAT decision.

The worker sought reconsideration of a WCAT decision. The original panel allowed the worker's appeal regarding vocational rehabilitation assistance, but directed that the extent and nature of the additional rehabilitation assistance to be provided to the worker was to be determined by the Board. The worker's representative submitted that the original decision was incomplete or was otherwise patently unreasonable, in not expressly determining the worker's entitlement to retroactive rehabilitation benefits, and further, that the issue of loss of earnings was not addressed by the original panel.

The reconsideration panel concluded that a distinction may be drawn between an obligation to address an issue, and the obligation to provide an express finding which provides a final determination of an issue. The obligation for WCAT to address an issue does not require, in all circumstances, that the decision provide a final resolution of all such issues so as to avoid the need for further adjudication by the Board in implementing the WCAT decision. In the original decision the panel made a finding or decision in respect of all the issues raised in the worker's appeal, including the implied request for retroactive rehabilitation assistance. Accordingly, the original panel did not overlook or fail to address issues. While it is generally desirable to avoid referring a matter back to the Board in such a fashion, the reconsideration panel was not persuaded that this involved a breach of natural justice or other error of law going to jurisdiction. Further, the Board's decision to deny a loss of earnings pension award had not been appealed and was not before WCAT. Accordingly, there was no error of law going to jurisdiction in connection with the fact that the original panel did not address the loss of earnings pension decision.

**WCAT Decision Number :** WCAT-2006-04061  
**WCAT Decision Date:** October 30, 2006  
**Panel:** Herb Morton, Vice Chair

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## Introduction

The worker seeks reconsideration of the May 7, 2004 Workers' Compensation Appeal Tribunal (WCAT) decision (*WCAT Decision #2004-02399-RB*). The WCAT decision concerned the worker's appeal from a decision dated September 19, 2002 by a vocational rehabilitation consultant (VRC), which advised that no further rehabilitation assistance would be provided beyond that previously provided to July 2002. The WCAT panel allowed the worker's appeal, but directed that the extent and nature of the additional vocational rehabilitation assistance to be provided to the worker was to be determined by the Workers' Compensation Board, now operating as WorkSafeBC (Board). The worker's representative submits that the WCAT decision was incomplete or was otherwise patently unreasonable, in not expressly determining the worker's entitlement to retroactive rehabilitation benefits. He further complains that the issue of loss of earnings was not addressed by the panel.

Following the WCAT decision, the worker's representative sent a letter to WCAT on June 9, 2004 requesting clarification from the WCAT panel. On July 8, 2004, WCAT's legal counsel advised that the decision did not appear ambiguous and there was no basis for requesting clarification from the WCAT panel.

On February 22, 2005, the worker's representative requested reconsideration of the WCAT decision. The worker's representative requested that this application be suspended. By submission dated May 19, 2006, he requested that the application be reactivated. In a letter dated July 20, 2006, 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 worker's representative provided a further submission dated August 18, 2006.

The employer is represented by a consultant, who provided a submission dated September 11, 2006. This was disclosed to the worker for rebuttal. The worker's representative provided a rebuttal dated October 6, 2006. The appeals coordinator

advised that as this rebuttal was received after the deadline, it would be referred to the panel for consideration as to whether or not it would be accepted.

No statutory time frame applies to the making of a decision on an application for reconsideration. The October 6, 2006 rebuttal by the worker's representative was provided prior to this application being assigned to me on October 16, 2006. The lateness of the rebuttal in this case does not result in any prejudice to the employer. I exercise my discretion to receive the late rebuttal for consideration together with the other submissions.

WCAT's practice and procedure was initially set out in the March 3, 2003 version of the *Manual of Rules, Practices and Procedures* (MRPP I). This was amended effective March 29, 2004 (MRPP II). Effective December 3, 2004, this was amended and renamed as the *Manual of Rules of Practice and Procedure* (MRPP III). In this decision, I will refer to the MRPP II and MRPP III to distinguish between the version in effect at the time of the May 7, 2004 WCAT decision and the current version.

MRPP III Rule #8.90 provides that WCAT will normally conduct an appeal on a read and review basis where the issues are largely medical, legal, or policy based, and credibility is not an issue. Similar considerations apply to a reconsideration application. 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)**

Was the WCAT decision incomplete, or did it otherwise involve an error of law going to jurisdiction, in not expressly determining whether the worker was entitled to retroactive rehabilitation benefits? Did the WCAT decision involve an error of law going to jurisdiction in not addressing the worker's "loss of earnings"?

### **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.

MRPP III item #15.24 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 has a non-functional right arm with amputation of the right hand from a prior non-work injury. During his employment as a sandblaster, the worker developed problems with his left shoulder over time. His claim was initially accepted for a left shoulder tendonitis.

By decision dated August 22, 2001, the VRC advised the worker that vocational job search allowances would come to an end on September 9, 2001. He advised the worker that "you were formally retrained in your preference for a coating inspector and this work is physically suitable. There is no further vocational rehabilitation assistance...." The worker appealed the August 22, 2001 decision to the Workers' Compensation Review Board (Review Board).

By decision dated September 5, 2001, the case manager advised the worker that his claim had originally been accepted for a left shoulder tendonitis only but his claim for a thoracic outlet syndrome was also accepted.

On January 8, 2002, a manager, Internal Review, conducted a review of the August 22, 2001 decision by the VRC. (This review was conducted under the Board's authority under the former section 96(2) of the Act, prior to the March 3, 2003 changes to the Act which created the Review Division). In a memo dated January 8, 2002, the manager noted:

I talked to the worker at some length on December 19, 2001, and there is no doubt that he was enthusiastic about acquiring certification as a Coating Inspector, and considered that this program presented an attractive opportunity for potential re-employment. By all accounts, he achieved good results, both in the academic and practical components of the program. He also appears to have been diligent in job search following completion of the program, but has not been able to secure any meaningful work thus far. As well, he states that he underestimated the amount of climbing involved, and is deeply concerned about his ability to negotiate ladders, bridges and other hazardous areas that require inspection. This is a matter of increasing concern, in view of the added difficulties with the compensable Thoracic Outlet Syndrome, a factor that was not fully apparent, when the training was initiated. The worker readily stated that he was capable of performing ground inspections, but apparently this only accounts for a relatively small percentage of the work available, and is unlikely to provide a reasonable wage.

In a letter to the worker dated January 8, 2002, the manager advised:

...you and the WCB entered into a plan during November 2000 to train you as a NACE (National Association of Corrosion Engineers) certified Coating Inspector on the understanding this position would maximize your earnings and was considered physically suitable and reasonably available. In the intervening period, however, the WCB has accepted responsibility for a Thoracic Outlet Syndrome that is causing additional difficulties with your left shoulder and arm, thus resulting in a referral to our Disability Awards Department for assessment of further impairment. This, together with the concerns that inspection duties evidently involve more climbing in potentially hazardous circumstances than originally anticipated, raises serious questions about the suitability of the position. This is particularly so, given the implications associated with the non-compensable loss of your right hand.

It is my conclusion that the decision of August 22, 2001 should be modified to the extent that the Vocational Rehabilitation Consultant is asked to conduct a full review of the current circumstances and reconsider the following:

1. Determine whether the position of Coating Inspector is a suitable position, in light of the cumulative effects and restrictions associated with your compensable and non-compensable disabilities, and, if so, whether such employment is reasonably available.
2. In the event the position of Coating Inspector is suitable, but with limitations, that is, restricted to ground inspections, to determine whether employment is reasonably available at or near pre-injury earnings.
3. Determine if there is a basis for implementing additional and immediate financial assistance in the form of job search or other rehabilitation benefits. This includes the question of retroactive benefits dating from September 2001.
4. Depending on the results of Items 1 and 2 above, the Vocational Rehabilitation Consultant is also asked to determine the nature and extent of any additional assistance that may be required to initiate a successful return to work, pursuant to the principles and service objectives outlined in Items 85.30 and 85.40 of the Rehabilitation Services and Claims Manual.

The manager advised the worker that it would be appropriate for him to ask the Review Board to suspend his appeal, pending implementation by the Board of the manager's recommendations.

By decision dated January 23, 2002, the VRC advised the worker that retroactive vocational allowances would be provided from the date that vocational benefits ended. He advised:

My decision was based on your documented efforts to continue to look for employment and my experience in dealing with you previously.

By letter dated February 5, 2002, the Review Board senior vice chair, Registrar's Office, granted the worker's request for a suspension of his appeal from the August 22, 2001 decision. The Review Board senior vice chair advised the worker that unless he advised otherwise within six months, the appeal would be considered abandoned. The senior vice chair advised that any new decision made by the Board officer would be appealable separately.

On May 17, 2002, the VRC approved a training on the job program for the worker in the Yukon. The decision noted:

The training on the job in the Yukon will allow you to gain work experience thus making you more marketable in the field of coating inspection. A decision will be made upon your return whether further vocational rehabilitation assistance is required.

The May 17, 2002 letter noted that the worker would be working together with another individual who had agreed to do all work that involved ladder climbing, allowing the worker to do the work at ground or lower levels.

The WCAT decision concerned the worker's appeal from a VRC's decision dated September 19, 2002. The VRC advised the worker:

...you are considered to have returned to work and no further vocational rehabilitation assistance is warranted....

...you were provided with formal retraining and training on the job to help you secure employment. By securing the Yukon contract and your current employment with [name], you have shown that employment is available for coating inspection work. The vocational mandate has been met.

The worker appealed the September 19, 2002 decision to the Review Board. Effective March 3, 2003, the worker's appeal from the September 19, 2002 decision by the VRC was transferred to WCAT for completion based on the transitional provisions contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63).

By decision dated January 17, 2003, a disability awards officer granted the worker a permanent partial disability award of 40.50% of total disability (27% of total disability for left arm and shoulder impairment and thoracic outlet syndrome, plus 13.5% of total disability for bilateral enhancement), with no loss of earnings pension award. "Admin. Data #9" in the attached memo of January 13, 2003 explained:

Loss of earnings: No long-term loss of earnings greater than the functional assessment is indicated and the award will be paid on a functional basis. [The worker] had been provided with vocational rehabilitation assistance and was considered capable of performing suitable alternative employment over the long-term as a coating inspector.

The worker did not request review of, or appeal, the January 13, 2003 decision to deny a loss of earnings pension award.

In considering the worker's appeal from the VRC's September 19, 2002 decision, the WCAT panel held an oral hearing on November 14, 2003. In its decision of May 7, 2004, the WCAT panel defined the issue(s) to be addressed in the worker's appeal as follows:

Is the worker entitled to further vocational rehabilitation assistance from the Board?

Under the heading "Background and Evidence", the WCAT panel set out the background and relevant evidence in detail. Under the heading "Reasons and Findings", the WCAT panel found as follows:

In the worker's case I conclude there has been a failure by the Board to fully address the worker's limitations and their impact on his ability to succeed as a NACE certified inspector. In particular, I conclude there is a need to address the issues raised by the worker of improving his computer skills, possible equipment needs, and his need to hire others for above ground level work. **The evidence upon which the VRC relied to conclude that vocational rehabilitation assistance should be brought to an end is, with the worker's further explanation, not sufficient in my view to conclude that physically suitable work as a coating inspector is reasonably available to the worker and that further vocational rehabilitation assistance is therefore not warranted.**

I conclude the worker's opportunity to participate in the contract in the Yukon by joining with another individual who already had a company with appropriate insurance and other coverages in place, but who himself lacked completion of his NACE certification, was a single fortuitous event.



...

... while the worker continues to pursue his career as an NACE inspector, the evidence is that physically suitable work is hard to come by despite the worker's ongoing efforts. In this regard, I note the supporting evidence of the worker's mentor to this effect.

While I agree with the employer's representative's submissions that getting established in a new business takes time and money and that it is not up to the Board to entirely offset all losses of earnings while the worker establishes his business as an independent NACE inspector, I conclude that because of his fairly severe compensable injuries, in combination with his previous non-compensable injuries, **some further assistance is required to assist the worker in overcoming the long-term vocational impact of the compensable injuries. However, the precise nature and extent of the further assistance required must be left for the Board's further decision since the situation is not static.**

[emphasis added]

Under the heading "Conclusion", the WCAT panel found:

The worker's appeal is allowed. I find the worker is entitled to additional vocational rehabilitation assistance, the extent and nature of such further assistance to be determined by the Board.

The Board's decision of September 19, 2002 is varied to that extent.

Following the WCAT decision, the worker was provided with vocational rehabilitation benefits from May 17, 2004 until March 24, 2005, and from January 16 to 20, 2006.

In a memo dated September 9, 2004 entitled "Recommendation for Expenditure" for budget sheet #14, the VRC noted:

I met with [the worker] and his representative [name] on two occasions and spoke to them on the phone on several occasions to develop a vocational rehabilitation plan. . . .it was eventually established that with additional formal training to diversify and enhance [the worker's] skills and financial assistance to purchase the necessary equipment to conduct inspections, he would possess the skills and means to secure employment that was within his physical restrictions with no loss of earnings in the long term. [The worker] assured me that with additional training and the provision of required equipment he would be able to secure suitable employment that would meet or exceed his pre injury earnings.

By letter of July 19, 2004, the worker's representative wrote to the VRC to request rehabilitation benefits be reinstated retroactive to July 31, 2002.

In a letter of understanding dated October 8, 2004, the Board agreed to sponsor the worker on four courses to provide him with additional skills to enhance his opportunities to secure employment as a NACE Coating Inspector. The worker attended three of these courses, but was unable to attend the fourth as it was not being offered at that time. The October 8, 2004 letter also advised the worker that the Board had authorized the expenditure of \$26,670.00 to enable the worker to purchase specialized equipment and instrumentation to carry out the functions of a NACE Inspector.

By decision dated July 4, 2005, the vocational rehabilitation consultant confirmed to the worker that the Board was still prepared to sponsor the worker in the "Coating for Concrete Structures" course, when and if the course was offered. In a further letter dated April 6, 2005 addressed to the worker's representative, the VRC responded to the July 19, 2004 and April 2, 2005 requests that the worker be provided with retroactive rehabilitation benefits. The VRC found that the WCAT decision did not direct the Board to provide retroactive vocational rehabilitation benefits. He advised:

As a result, [the worker] was provided with vocational rehabilitation benefits effective the date of the WCAT decision, May 7, 2004, which is in keeping with current practice at the Board. Additional entitlement provided to [the worker], which included formal training sponsorship, is outlined in the letter of understanding forwarded to [the worker] on October 8, 2004.

By decision dated January 5, 2006, the vocational rehabilitation consultant approved the worker's request for Board sponsorship of his re-attendance in an "Internal Corrosion for Pipelines" course in lieu of the "Coating for Concrete Structures" course. The vocational rehabilitation consultant advised that this represented the full and final extent of the worker's vocational rehabilitation entitlement under this claim.

The worker requested review of the April 6, 2005 decision. In *Review Decision #R0052754* dated December 5, 2005, the review officer concluded:

While the nature and extent of VR assistance was left to the Board, the Vice Chair did identify the specific issues that needed to be addressed. The Board provided the worker with further assistance the nature and extent to which was provided in a decision dated October 8, 2004.

Therefore, I do not interpret the WCAT findings to mean that the worker has entitlement to retroactive VR benefits, as there was no directive to provide any, only that the worker be provided with some VR assistance to help him overcome the effects of the compensable injury. In absence of a specific directive to pay retroactive VR benefits, I find the VRC's decision correct. As a result, I deny the worker's request.

The worker sought to appeal the Review Division decision to WCAT. By letter of January 27, 2006, a WCAT assessment officer provided the worker with a provisional decision to advise that WCAT did not have jurisdiction to hear an appeal respecting a matter referred to in section 16 of the Act. By decision dated March 30, 2006, the WCAT registrar confirmed the January 27, 2006 decision and dismissed the worker's appeal.

### **Submissions**

By submission of February 22, 2005, the worker's representative submits that the WCAT decision is patently unreasonable because it did not address all issues on appeal and does not provide a remedy for those issues under appeal. He noted that during the oral hearing, the worker told the WCAT vice chair that he had been "cut off" his job search allowance, and that the worker repeated that phrase several times. The representative further submits that the WCAT panel should have considered the loss of earnings issue. He complained:

Although the panel accepted the worker's oral evidence, the panel's conclusions did not address the specific issue of termination of job search benefits which had been referred to many times as being "cut off". This issue was ignored by the panel. The issue of loss of earnings also was not addressed by the panel.

By submission of May 19, 2006, the worker's representative argued:

It is patently unreasonable for a WCAT Panel to make a finding that the Board had made a significant error affecting a worker's job training/rehabilitation program which resulted in the program becoming a failure, and then not providing a remedy that corrects the situation without any loss of any benefits to the injured worker.

In his submission of August 18, 2006, the worker's representative further argued:

Where a Panel finds that errors or omissions have been made by a Board Officer or benefits have been terminated prematurely or incorrectly, it is the adjudicative function of the Panel to provide a remedy for the **INJUSTICE** that had occurred. If a WCAT Panel fails to complete its adjudicative function, then the Appellant has been denied **NATURAL JUSTICE**.

...

There is no Decision pertaining to the termination or cessation of job search and/or training benefits. As a result, it is submitted that [the worker] has been denied **NATURAL JUSTICE**, and the Decision itself is **PATENTLY UNREASONABLE**.

...

Had the WCAT Panel considered all aspects of the decision letter under Appeal, and provided a remedy for each of the issues contained in that decision letter, [the worker] would have been paid retroactive job search benefits and would not have been denied natural justice because of the Panel's failure to complete its adjudicative function. [The worker] is entitled by right to have a decision rendered based on all issues expressly raised in the Appeal proceedings.

[emphasis in original]

On September 11, 2006, the employer's representative submitted that at the outset of the oral hearing the WCAT vice chair identified the issue before the panel as concerning whether the worker was entitled to additional vocational rehabilitation assistance. He advises that both he and the worker's representative agreed that was the issue to be considered. The employer's representative submitted:

It was left to the Board to determine the nature and extent thus the question of rehabilitation benefits being reinstated from the date of termination was a decision for the Board to make. There was however clear indication in the decision of the Vice Chair that she took note of the termination of benefits and found it to be improper.

The only patently unreasonable decision here is that of the Board when they implemented the decision of the Vice Chair.

In rebuttal of October 6, 2006, the worker's representative submitted:

...I stand by my contention that the Vice Chairman's [*sic*] findings are patently unreasonable. Not only did the Panel not address all issues raised at the hearing, the Panel did not provide a remedy addressing all issues arising from the failed Vocational Rehabilitation Program. It is incumbent on a Panel to make clear, decisive decisions, not only to be consistent with its adjudicative function and common law, but also because any further decisions made by the Board concerning rehabilitation benefits arising from a WCAT decision cannot be appealed to WCAT.

### **Reasons and Findings**

At the time of the May 7, 2004 WCAT decision, MRPP II item #26.20 provided:

- (e) in considering an appeal which was initially brought to the Review Board, WCAT has jurisdiction to address issues which would not be appealable to WCAT (such as vocational rehabilitation, or commutation requests). In other words, the limitations as to what will be appealable to WCAT do not restrict WCAT's jurisdiction to deal with appeals which were previously filed to the Review Board;

Accordingly, the WCAT panel had jurisdiction to address the worker's appeal of the September 19, 2002 decision by the VRC (in addressing the worker's appeal under section 38 of the transitional provisions contained in part 2 of Bill 63). However, WCAT does not have jurisdiction to hear the worker's concerns regarding implementation of the WCAT decision, in relation to the April 6, 2005 decision by the VRC and the December 5, 2005 Review Division decision. My jurisdiction in hearing this application is limited to considering whether the WCAT decision involved an error of law going to jurisdiction (including a breach of natural justice).

MRPP II item #26.69 "Scope of Decision", provided:

In considering an appeal which was transferred to WCAT from the WCRB on March 3, 2003, WCAT will apply the same approach to the "scope of decision" as is set out at item 14.30 (with any necessary changes relating to the fact that the subject of the appeal is a decision by a Board officer with no intervening decision by the Review Division).

MRPP II item #14.30 further provided:

**Where a decision of the Review Division is appealed to WCAT, WCAT has jurisdiction to address any issue determined in either the Review Division decision or the prior decision by the WCB officer which was the subject of the request for review by the Review Division. This is, of course, subject to the general limits on WCAT's jurisdiction described in item 2.00.**

However, WCAT will generally restrict its decision to the issues raised by the appellant in the appellant's notice of appeal and submissions to WCAT. **The appellant is entitled by right to a decision on the issues expressly raised in the appeal.**

...

The WCAT panel has a discretion to go beyond the issues expressly raised by the parties to the appeal which were contained in the lower decisions giving rise to the appeal. A WCAT panel will normally not proceed to address such other issues, but has a discretion to do so.

[emphasis added]

A central objection raised by the worker is that the WCAT panel failed to expressly determine whether the worker was entitled to vocational rehabilitation benefits retroactive to July 2002, thus leaving this issue to be determined by the Board.

In the oral submissions of the worker's former representative at the May 7, 2004 oral hearing, he argued that the worker was entitled to further rehabilitation assistance. He did not expressly request a determination as to whether the worker was entitled to retroactive rehabilitation benefits commencing from July 2002, as well as future rehabilitation assistance. However, in the context of the worker's appeal from the September 19, 2002 decision, I accept that this issue was implicitly raised by the worker's appeal.

The VRC's September 19, 2002 decision involved a reconsideration by the Board of its earlier decision dated August 22, 2001, pursuant to the January 8, 2002 letter by the manager, Internal Review. The January 8, 2002 letter identified four issues to be addressed in the Board's reconsideration. The September 19, 2002 decision may reasonably be viewed as providing the Board's decision on those four issues (except insofar as they were addressed in separate decision letters, such as the January 23, 2002 decision to commence retroactive rehabilitation assistance). Accordingly, it was within the WCAT panel's jurisdiction to make express findings as to whether:

- the position of Coating Inspector was a suitable position, in light of the cumulative effects and restrictions associated with the worker's compensable and non-compensable disabilities;
- whether such employment was suitable, but subject to limitations (i.e. restricted to ground inspections);
- whether such employment was reasonably available (either without restrictions or with any restrictions found to apply); and,
- if so, would this provide earnings at or near the worker's pre-injury earnings; and,
- should further vocational rehabilitation assistance be provided on a retroactive basis, and/or a prospective basis).

Under the current legislative framework, there is strong support for WCAT panels providing a final decision which will resolve all the matters in issue in the appeal. 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 to 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.

On page 33, the core reviewer addressed the standard of review to be applied by the proposed internal Review Division and external appeal tribunal:

Under the “substitutional” standard of review (which is also referred to as an appeal by way of a rehearing), the initial function of the appellate tribunal is to determine whether the previous decision was wrong. In reaching this determination, the appellate tribunal will consider both the evidence and findings originating from the previous decisionmaker, as well as any new evidence and submissions which may be provided to the tribunal. Once a determination is reached that the previous decision was wrong, the appellate tribunal has the authority to substitute its own decision on the merits of the case.

On page 50, the core reviewer recommended:

As was the case with respect to the internal review process, it is my recommendation that the appeal should be conducted on a substitutional basis, whereby the Appeal Tribunal would have the discretion to confirm, vary or cancel the decision which is the subject matter of the appeal. Since this stage of the appeal process will be the first (and only) opportunity for the appellant to express his/her dissatisfaction with a WCB decision to a body which is external from the WCB, it is imperative that the appellant has (and, as importantly, perceives he/she has) a full opportunity to have an independent tribunal conduct a broad review of the disputed issue, and render its final decision on the matter.

As was the case with the internal review process, since the external appeal would be conducted on a substitutional basis, the parties of interest would be entitled to present new evidence that had not been brought to the attention of the previous decisionmakers. This new evidence would be considered by the Appeal Tribunal itself, and would not be referred back to either the initial decision-maker or the Review Manager for their consideration prior to the Appeal Tribunal rendering its decision in the matter.

Under the March 3, 2003 amendments to the Act, section 246(2) provided WCAT with authority to:

- (a) receive evidence or information on oath, by affidavit or otherwise, as it considers appropriate, whether or not the evidence is admissible in a court;
- (b) receive new evidence;



- (c) inquire into the matter under appeal and consider all information obtained;
- (d) request the Board to investigate further into a matter relating to a specific appeal and report in writing to the appeal tribunal;

Section 246(3) and (4) of the Act 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.

On medical issues, WCAT panels also have a discretion to obtain assistance or advice from an independent health professional under section 249 of the Act.

Section 253(1) provided:

On an appeal, the appeal tribunal may confirm, vary or cancel the appealed decision or order.

In connection with the WCAT panel's hearing of the worker's appeal under section 38 of Bill 63's transitional provisions, section 38(2) further provided:

In proceedings before the appeal tribunal under subsection (1), instead of making a decision under section 253 (1) of the Act, as enacted by the amending Act, the appeal tribunal may refer a matter back to the Board, with or without directions, and the Board's decision made under that referral may be reviewed under section 96.2 of the Act, as enacted by the amending Act.

The description by the WCAT panel of its jurisdiction stated on page 2 of the WCAT decision:

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

This statement accorded with the legislative history and statutory framework described above.

It is evident, therefore, that the WCAT panel had broad jurisdiction to address the issue as to whether the worker should be provided with retroactive rehabilitation assistance. The worker's request for further rehabilitation assistance may reasonably be interpreted as having incorporated such a request, even if this was not expressly stated. Accordingly, the question to be considered is whether, having regard to the guidance provided at MRPP II item #14.30 and the statutory framework, the WCAT decision was incomplete, or otherwise involved an error of law going to jurisdiction, by failing to provide an express finding on the worker's request for retroactive rehabilitation assistance?

Upon careful consideration, I find that a valid distinction may be drawn between an obligation to address an issue, and the obligation to provide an express finding which provides a final determination of an issue. In general terms, it is desirable that a WCAT decision do the latter. WCAT has been granted a variety of powers to assist it in providing a decision which will both be final, and will also constitute a final resolution of the matters in issue in the appeal.

The finding by the WCAT panel (i.e. that the evidence before the VRC was insufficient to support his decision and that the worker was therefore entitled to additional vocational rehabilitation assistance), was very narrow. However, it is clear that the WCAT panel was aware that it was not simply conducting an appeal "on the record". The WCAT panel expressly acknowledged "the worker's further explanation" as one of the factors supporting its conclusion regarding the insufficiency of the evidence to support a conclusion that physically suitable work as a coating inspector was reasonably available to the worker.

In this case, the WCAT panel had a discretion under subsection 38(2) of Bill 63's transitional provisions to refer the matter back to the Board, with or without directions. The WCAT panel did not utilize that provision. Rather, it varied the Board officer's decision to the extent of finding that the worker was entitled to additional vocational rehabilitation assistance, with the extent and nature of such further assistance to be determined by the Board.

In my view, this constituted a finding or decision in respect of all the issues raised in the worker's appeal, including the implied request for retroactive rehabilitation assistance.

Accordingly, the WCAT panel did not overlook or fail to address the request. I consider that in the circumstances of the worker's appeal, this was a viable response or outcome to the worker's appeal on that issue. While the WCAT panel had an obligation to address the issues raised in the worker's appeal, I consider that those issues were in fact addressed by this finding. I am not persuaded that the obligation to address an issue requires, in all circumstances, that the WCAT decision provide a final resolution of all such issues so as to avoid the need for further adjudication by the Board in implementing the WCAT decision. While it is generally desirable to avoid referring a matter back to the Board in such a fashion, I am not persuaded that this involved a breach of natural justice or other error of law going to jurisdiction. I find that the WCAT decision involved a viable exercise of the panel's authority under section 253(3) of the Act to "confirm, vary or cancel the appealed decision."

Accordingly, I am not persuaded that the WCAT decision overlooked an issue raised by the worker's appeal, or otherwise involved an error of law going to jurisdiction, based on its failure to make an express finding on the merits with respect to whether the worker was entitled to retroactive rehabilitation assistance. It was open to the WCAT panel to leave that issue to be further addressed by the Board, in implementing the WCAT decision.

The worker's representative further complains that the WCAT panel did not address the worker's "loss of earnings". This complaint is ambiguous. It may be read as simply expressing, in different terms, the worker's complaint regarding the failure by the WCAT panel to expressly determine whether the worker was entitled to retroactive vocational rehabilitation assistance. In that case, this argument has already been addressed above. The concern relating to any "loss of earnings" suffered by the worker based on the decision by the Board to deny retroactive rehabilitation assistance relates to the Board's decision regarding the implementation of the WCAT decision. As noted above, WCAT does not have jurisdiction to address a decision by the Board issued subsequent to March 3, 2003, concerning vocational rehabilitation assistance under section 16 of the Act. Accordingly, there is no basis for further addressing this argument. I find no error of law going to jurisdiction in the WCAT decision on this basis.

Alternatively, this complaint might be read as concerning the failure by the WCAT panel to address the worker's eligibility for a loss of earnings pension award. By decision dated January 17, 2003, the disability awards officer granted the worker a permanent partial disability award of 40.50% of total disability (27% of total disability for left arm and shoulder impairment and thoracic outlet syndrome, plus 13.5% of total disability for bilateral enhancement), with no loss of earnings pension award. The worker was considered capable of performing suitable alternative employment over the long-term as a coating inspector, with no loss of earnings. The WCAT decision found that there was insufficient evidence to support the conclusion that physically suitable work as a coating inspector was reasonably available to the worker and that further vocational rehabilitation assistance was therefore not warranted.

The worker's appeal to WCAT was concerned with the sufficiency of the vocational rehabilitation assistance provided to him, and not with his pension award. While both decisions involved a common finding regarding the suitability and availability of work as a coating inspector, the January 13, 2003 decision by the disability awards officer to deny a loss of earnings pension award had not been appealed to the Review Board and was not before WCAT. Accordingly, I find no error of law going to jurisdiction in connection with the fact that the WCAT panel did not address the loss of earnings pension decision.

Current policy of the board of directors provides guidance regarding the situation where a WCAT decision on one issue impacts another decision by the Board on a related issue. In a resolution dated November 16, 2004 (2004/11/16-04, "Re: Reconsideration and Reopening Policy Amendments", the board of directors approved amendments to RSCM I and II to clarify the types of decisions that do not constitute a reconsideration or a reopening of a previous decision. The revised policy at item C14-101.01 in the *Rehabilitation Services and Claims Manual*, Vol. I (RSCM I), entitled, "Changing Previous Decisions – General", provides:

(b) Implementation of Review Division Decisions or WCAT Decisions

On a review or an appeal, the Review Division and the WCAT may make a decision that confirms, varies or cancels the decision under review or appeal. The Review Division and WCAT decisions are final and must be complied with by the Board.

**Varying or canceling a decision may make invalid other decisions that are dependent upon or result from the decision under review or appeal.**

**The reconsideration and reopening requirements under section 96 do not limit changes to previous decisions that are required in order to fully implement decisions of the Review Division or the WCAT.**

[emphasis added]

Accordingly, to the extent the WCAT decision had the potential to impact the decision to deny a loss of earnings pension award, that impact could be assessed by the Board in implementing the WCAT decision. This did not, however, provide the WCAT panel with jurisdiction to address the unappealed pension decision. I find no error of law going to jurisdiction in relation to the fact that the WCAT panel only addressed the VRC's decision under appeal dated September 19, 2002.

## Conclusion

The worker's application for reconsideration of *WCAT Decision #2004-02399-RB* is denied. I do not consider that the WCAT decision was incomplete, involved a breach of natural justice, or otherwise involved an error of law going to jurisdiction, in not expressly determining whether the worker was entitled to retroactive rehabilitation benefits. The decision by the WCAT panel, which found that the worker was entitled to additional vocational rehabilitation assistance (with the extent and nature of such further assistance to be determined by the Board), represented an adequate or viable outcome to all of the issues raised in the worker's appeal from the September 19, 2002 decision by the VRC. The worker's complaint regarding the panel's failure to address his "loss of earnings" appears to involve disagreement with the Board's subsequent decision to deny retroactive vocational rehabilitation assistance, and does not identify an error of law going to jurisdiction in the WCAT decision. The WCAT decision did not involve an error of law going to jurisdiction, in addressing the worker's appeal of the decision of the VRC and not addressing the unappealed decision by the disability awards officer to deny a loss of earnings pension award. Accordingly, the WCAT decision stands as "final and conclusive" under section 255(1) of the Act.

Herb Morton  
Vice Chair

HM/cda