

Noteworthy Decision Summary

Decision: WCAT-2006-04203 **Panel:** Herb Morton **Decision Date:** November 14, 2006

Reconsideration – Jurisdiction to review a Workers' Compensation Board, operating as WorkSafeBC, officer's letter refusing to render a decision – Refusal to review

This decision is noteworthy as it reconciles two lines of WCAT decisions relating to the jurisdiction to review a Workers' Compensation Board, operating as WorkSafeBC, (Board) officer's refusal to render a further decision.

The worker suffered a left shoulder injury at work in 2002 and received four days' wage loss benefits. On September 22, 2003, the worker's lawyer wrote to the Board requesting decision letters on every aspect of the worker's 2002 claim. By letter dated February 24, 2004, the case manager responded that a soft tissue injury to the left shoulder was accepted, that short term disability wage loss benefits were paid, and that no further decision letters would be issued. In response to further correspondence from the worker's lawyer the case manager, by letter dated November 2, 2004, advised that no further letters would be issued. The worker requested a review of the November 2, 2004 letter. In *Review Division Decision #24739* a review officer advised that the Request for Review of the November letter could not be accepted as the letter was not a decision. The worker appealed the Review Division decision to WCAT.

In *WCAT Decision #2005-04397* (Original WCAT Decision) the WCAT panel found that the case manager's statement in her November 2, 2004 letter that no further letters would be issued did not constitute a reviewable decision on the basis that the Act does not provide a right of review from a refusal by the Board to make a decision. The worker sought reconsideration of the Original WCAT Decision alleging that the decision involved an error of law going to jurisdiction.

The reconsideration panel noted that while there were two different approaches to whether initial Board decisions involving a refusal to provide a further decision were reviewable, both lines could be reconciled.

In the first line of cases, WCAT panels have found that a Board officer's letter refusing to provide a further decision was not reviewable by the Review Division because there is no authority to hear an appeal of a refusal to provide a decision regarding a compensation or assessment matter. In the second line of cases, WCAT panels have allowed appeals from a Board officer's letter refusing to render a decision on the basis that, despite the form of the officer's decision, the position being expressed to the parties involved a decision rather than being a mere refusal to address a matter. For example, where a Board officer mistakenly found that that an internal determination which had not been communicated to the party amounted to a decisions which triggered the running of the 75-day time limit on the Board's reconsideration authority, WCAT has allowed appeals on the basis that the refusal to issue a decision in fact involved the making of a decision which can be subject to review.

In this case, the Original WCAT Decision had concluded that no right of review existed because the case involved a mere refusal by the Board to issue a further decision. The reconsideration panel denied the application for reconsideration finding that there was no error of law going to jurisdiction in the WCAT panel's conclusion.

WCAT Decision Number : WCAT-2006-04203
WCAT Decision Date: November 14, 2006
Panel: Herb Morton, Vice Chair

Introduction

The worker seeks reconsideration of the August 22, 2005 Workers' Compensation Appeal Tribunal (WCAT) decision (*WCAT Decision #2005-04397*). The WCAT decision confirmed a Review Division decision of December 14, 2004 (*Review Reference #24739*). The review officer rejected the worker's request for review of the November 2, 2004 letter provided to the worker's lawyer by a case manager of the Workers' Compensation Board, now operating as WorkSafeBC (Board). The case manager advised the worker's lawyer that no further letters would be issued to him or the worker (under the worker's 2002 claim). She cited her previous advisory letter of February 25, 2004.

On October 19, 2005, the worker's lawyer filed a petition for judicial review of the WCAT decision (with an accompanying affidavit by the worker). By letter of October 20, 2005, the worker's lawyer forwarded filed copies of these documents to WCAT, requesting that they be treated as an application for reconsideration. He advised that the worker would not proceed further with the petition, until WCAT had completed the reconsideration process.

Pursuant to WCAT's usual practice, by letter dated February 22, 2006 the WCAT appeal 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 submissions explain how your application meets the requirements for reconsideration (see heading [*sic*] #9 and #10, **New Evidence**; #11, **Common Law Grounds**; and #14, **Law, policy and decisions on reconsiderations**, in the information sheet).

[emphasis in original]

By letter of November 8, 2005, the worker's lawyer requested a copy of a decision made by the WCAT vice chair who issued *WCAT Decision #2005-04397*. He described the decision as having been made by her some years ago, as a summary decision of the Workers' Compensation Review Board (Review Board) relating to a particular court case involving a different worker.

In a memo dated March 28, 2006, I advised that I did not consider that a Review Board decision in or around 1997 by the vice chair on another worker's claim to be relevant to

this reconsideration application. WCAT vice chairs are required to be impartial, are not bound by legal precedent, and must approach the hearing of each appeal with a mind that is open to persuasion. As well, *WCAT Decision #2005-04397* dated August 22, 2005 was issued in the context of a new legislative framework. As part of this memo, I disclosed the following WCAT decisions as being of potential relevance to this application:

- #2004-03907, July 23, 2004
- #2004-04019, July 28, 2004
- #2004-06708, December 20, 2004
- #2005-01027, February 25, 2005
- #2005-01772, April 11, 2005
- #2005-05996, November 9, 2005

Also disclosed was a copy of the March 31, 2005 version of the Board's *Best Practices Information Sheet #5*. I also invited the employer under the worker's 1997 claim to participate as an interested person, pursuant to section 246(2)(i) of the *Workers Compensation Act* (Act). The 1997 employer did not reply to this invitation and is not participating in this application. Accordingly, I do not consider it necessary to address the objections provided by the worker's lawyer to that invitation.

By letter of July 7, 2006, the worker's lawyer advised that he would not be pursuing the matter of the previous Review Board decision. He provided a written submission dated August 10, 2006, in support of the worker's application. The employer under the worker's 2002 claim is represented by a consultant, and is participating in this application. The employer's representative provided a submission dated October 10, 2006. The worker's representative provided a rebuttal submission dated October 25, 2006.

Rule #8.90 of WCAT's *Manual of Rules of Practice and Procedure* 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)

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

Jurisdiction

Section 255(1) of the Act provides that a WCAT decision is final and conclusive and is not open to question or review in any court. In keeping with the legislative intent that WCAT decisions be final, they may not be reconsidered except on the basis of new evidence as set out in section 256 of the 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 left shoulder injuries at work in 1997 and 2002. Although *WCAT Decision #2005-04397* only concerned the worker's 2002 claim, it included reference to the worker's 1997 claim. Accordingly, I have included the worker's 1997 claim in my review of the background information.

November 5, 1997 claim

While employed as a labourer, the worker developed left shoulder and left wrist problems after spending two days loading 20 foot PVC pipes. The worker was pushing and rolling pipes and swinging a sledge hammer. The employer reported that the worker had been pulling pipe apart, and that this involved repetitive motions with his hands and shoulders. The worker underwent surgery on June 25, 1999 for a left anterior acromioplasty, for a diagnosed left anterior impingement syndrome. His claim was accepted by the Board, and wage loss benefits were paid from June 16, 1998 until March 22, 2000, and from April 17, 2000 until July 30, 2000 (total of 537 days). A series of decision letters was issued under this claim.

- By letter dated September 24, 1998, the case manager advised the employer that relief of claim costs under section 39(1)(e) of the Act was denied.

- By letter of February 16, 2000, the case manager advised Dr. Patel that Board authorization was also provided for the proposed surgical release of the worker's first extensor compartment on the left.
- By letter of March 22, 2000, the case manager noted that the worker's employer had agreed to provide suitable modified light duty work while he awaited surgery. She further noted that the worker had previously requested vacation from March 23, 2000 to April 1, 2000. She advised that wage loss benefits would be paid up to March 22, 2000, and then temporarily suspended. She further advised that it was expected that his claim would be reopened for wage loss benefits when surgery was performed. She approved an extension of physiotherapy treatments through May 1, 2000.
- By letter of July 17, 2000, the case manager noted that the worker had missed attending the occupational rehabilitation program on July 4, 2000 due to a non-compensable reason. She advised that he would not be paid wage loss for any future absences.
- By letter of August 1, 2000, the case manager advised the worker that a wrist brace had been approved for reimbursement. She further noted:

To briefly review, your claim was accepted for temporary injuries to your left shoulder and left wrist as a result of your activities at work on November 6, 1997. Your claim has also been accepted for the June 25, 1999 left anterior acromioplasty and the April 17, 2000 surgical release of your left first extensor. No other conditions have been accepted and no permanent disability has been accepted under your claim.

...

During your recovery, you have participated in the Board's Work Conditioning Program, the Hand Program, and the Occupational Rehabilitation Program. You have successfully completed the recommended graduated return to work program and have returned to your pre-injury job, working full hours, effective July 31, 2000. Therefore, your wage loss benefits have been paid up to an including July 30, 2000.

[reproduced as written]

The August 1, 2000 decision letter enclosed an appeals pamphlet. The case manager further advised: "Please note that an appeal to the Workers' Compensation Review Board should be made within 90 days from the date a decision is communicated." The worker filed a notice of appeal – part 1 with the

Review Board dated September 12, 2000, in relation to the August 1, 2000 decision.

- By decision dated August 24, 2000, the case manager noted she had received a further report from Dr. Patel, and had referred the worker's claim to a Board medical advisor for an opinion. She advised:

He has noted that there was reported to be an active full range of motion of your left wrist, elbow and shoulder on August 3rd and at that time the strength of your left upper extremity was noted to be within your normal limitations. He has clarified that in his opinion there is no permanent functional impairment and this decision was previously outlined to you by way of letter dated August 1st, 2000.

Therefore, your claim will not be reopened for temporary partial disability nor will your claim file be referred to the Disability Awards Department for any consideration of permanent functional impairment based on the current medical information on your file. The objective medical evidence on your file does not meet the need for referral to the Vocational Rehab Department of the W.C.B. for vocational assistance.

Appeal information was provided. The worker filed a further notice of appeal – part 1 dated September 28, 2000, in connection with the decisions dated August 1, 2000 and August 24, 2000.

- By decision of November 1, 2000, the case manager noted that an account had been received for a left wrist x-ray of October 2, 2000. She advised:

I note that the October 2nd, 2000 x-ray report found there was no fracture or dislocation identified in your left wrist and that the bones demonstrated apparent anatomic position and alignment. There is no indication that there was necessity for this further left wrist x-ray. Therefore, health care benefits will not be provided by the WCB.

The case manager advised that future investigation and/or treatment for the worker's left wrist and shoulder would be his own responsibility, and that it was no longer necessary for his attending physician to submit reports to the Board unless there were new medical findings. Appeal information was provided.

By letter dated December 11, 2000, the worker's union representative wrote to the Review Board to request that the November 1, 2000 decision be included in the worker's notice of appeal – part 1 dated September 28, 2000. He requested an extension of time for filing a notice of appeal – part 2 (pending the results of an MRI).

On January 9, 2001, the Review Board advised the worker's representative that he must file a notice of appeal – part 2 in relation to the decisions of August 1, 2000, August 24, 2000 and November 1, 2000 by July 10, 2001, or the worker's appeals may not proceed. On June 8, 2001, the Review Board deputy registrar provided the worker's union representative with a reminder of the July 10, 2001 deadline, noting: "If we have not received either the Part 2 or a request for more time by the due date, the appeals will be treated as abandoned." By letter dated August 16, 2001, the Review Board senior deputy registrar advised the worker that due to the absence of a reply to the June 8, 2001 letter, his appeals had been treated as abandoned.

On May 14, 2001, the case manager advised that the Board would not cover the costs of a pending bone scan. Appeal information was provided.

By letter of June 19, 2003, a lawyer representing the worker requested that the worker's 1997 claim be reopened under section 96(2) of the Act. On July 2, 2003, the case manager denied the worker's request for reopening under the new section 96(2) of the Act (as amended effective March 3, 2003 pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63)). The case manager provided appeal information. The worker requested review by the Review Division of the July 2, 2003 decision.

By decision dated February 23, 2004 (*Review Decision #8537*), the review officer confirmed the Board officer's decision of July 2, 2003.

The worker appealed *Review Decision #8537* to WCAT. The WCAT panel held an oral hearing on July 28, 2004. In *WCAT Decision #2004-05072* dated September 29, 2004, the WCAT panel varied the review officer's decision. The WCAT panel reasoned:

In this case, the worker was reporting that he had developed a new condition, bicipital tendonitis, secondary to his original 1997 compensable injury, that had left him with permanent restrictions. As this condition was not in existence at the time the claim was closed in 1997, the reopening provisions under section 96(2) of the Act do not apply. The worker's 2002 diagnosis is not new medical evidence about his accepted compensable condition (left shoulder tendonitis and impingement), nor is it a recurrence of that condition.

I find there is sufficient medical evidence of a possible relationship between the worker's 1997 shoulder tendonitis and impingement and his 2002 bicipital tendonitis that the matter should be adjudicated by the Board. I refer to Dr. Loomer's opinion and that of the Board medical advisor.

I also note the worker's evidence, confirmed by the information in the 2002 claim file, that he is on permanent light duties which indicates an ongoing limitation in his physical abilities.

In short, this is a new diagnosis that had not previously been considered by the Board, and requires an initial adjudication under policy #22.00 of the RSCM II. This policy directs that if it can be established that an injury would not have happened but for the first compensable injury, the second injury is also compensable.

The normal practice therefore would be to suspend the appeal and refer this file back to the Board for the adjudication and then proceed with the appeal if necessary following the Board's new decision as set out at section 246(3) and 246(4) of the Act. In this particular situation, this process may result in an injustice to the employer for the 2002 claim file, who was never notified of or involved in these proceedings, because the appeal was based on the 1997 injury. Therefore, I consider it more appropriate to vary the review officer's decision and return the file to the Board for the initial adjudication identified above, in order to preserve the appeal rights for all parties.

By decision dated October 18, 2004, the case manager advised the worker concerning the implementation of *WCAT Decision #2004-05072*. The case manager quoted from a lengthy opinion by the Board medical adviser. On page 4, the case manager concluded:

I accept the opinion of the Medical Advisor and find that it is in keeping with Dr. Loomer's evidence. I find that there is no causative relationship between your 1997 and 2002 injuries. I find that the 2002 injury was not a consequence of your 1997 injury. I find that you have not sustained a permanent functional impairment of your left shoulder as a result of your 1997 injury. On the contrary, I find that the evidence supports a conclusion that you had a full and complete recovery from your 1997 injury. I find that you are not entitled to any further compensation under your 1997 claim beyond that which has already been provided.

The worker requested review by the Review Division of the October 18, 2004 decision. In *Review Decision #23522* dated March 15, 2005, the review officer confirmed the October 18, 2004 decision.

On August 15, 2005, the worker's notice of appeal from the March 15, 2005 Review Division decision was received by WCAT. As this was beyond the 30-day time limit for appealing to WCAT, the worker requested an extension of time to appeal under section 243(3) of the Act. By decision dated March 9, 2006 (*WCAT Decision #2006-01136*), the worker's request for an extension of time to appeal was denied.

September 3, 2002 injury

The worker commenced employment with a different employer on June 4, 2001. The employer filed a report of injury with the Board, advising that the worker injured his left shoulder at work on September 3, 2002, and had returned to work on September 5, 2002. He pulled a heavy recycling tote or bin when he felt a pull in his left shoulder. The tote was on wheels but the worker had to turn the tote around in order to push it. The worker did not file an application for compensation. Wage loss benefits were paid for a total of four days, on September 4, 2002 and from September 19 to 23, 2002.

By letter dated October 31, 2002, the Board advised the worker:

During your recent disability, rather than paying benefits directly to you, we paid them to your employer. In return, your employer continued to pay your full salary. The amount we paid to your employer was \$470.39.

While not necessary to my decision, I note that the information in the Board's computerized automated wage loss payments system indicates that the amounts of \$112.36 and \$5.24 were paid for one day on September 4, 2002, and that a further amount of \$352.79 was paid for three days from September 19 to 23, 2002. These amounts total \$470.39. Other information in the automated wage loss payments system indicates that a daily wage rate was set of \$117.59.

On April 4, 2003, the worker requested disclosure of his 2002 claim file. This was provided to him on April 19, 2003.

On July 17, 2003, the worker requested disclosure of his 1997 and 2002 claim files. This was provided to him on September 1, 2003.

On September 22, 2003, the worker's lawyer wrote to the Board concerning the worker's 2002 claim file, stating:

I have not found any decision letters in the disclosure generated on August 22, 2003. There has been considerable activity in this file, but apparently no decision letters. As you are no doubt aware, Board policy requires Board officers to issue decision letters, and the Review Division considers only actual decision letters as the basis for a request for review.

[The worker] has therefore been unable to determine his status, and I am unable to advise him until I review specific decision letters. Please provide me with decision letters on every aspect of this claim file, beginning with what exactly is being accepted and not accepted, what the initial and long term wage rates are, whether his entitlements to benefits of any kind are

limited or concluded, and if so on what basis, and whether the Board has closed his file, and if so why.

In further letters dated November 21, 2003 and January 20, 2004, the worker's lawyer requested a reply to his September 22, 2003 letter.

By letter dated February 24, 2004, the case manager responded to this inquiry. She stipulated: "This letter is not intended to be a decision letter. This letter is being sent for clarification purposes only." The case manager explained:

Where a claim is allowed and there has been no protest from the employer, such as in [the worker's] case, no reasons are given. The Board simply sends a cheque. Notification of the allowance is sent to any Advocate designated by the worker's designated union or association who is acting on behalf of the worker. This is in accordance with Board policy, specifically *Rehabilitation [sic] Services and Claims Manual* Volume I, Policy Item 99.20 entitled Notification of Decisions. The Officer that made the decision to accept this claim was on September 17, 2002 and the claim was accepted for a soft tissue injury to the left shoulder with the date of injury of September 3, 2002. This claim remains accepted for that condition only. Short term disability wage loss benefits were paid a total of 4 shifts lost commencing on September 19, 2002 to September 23, 2002 inclusive. This is an initial rate only. There are no long term wage rates to report.

This letter will further provide you with the information that you will not be given decision letters on every aspect of this claim file. Under the terms of Section 96(4) of the *Workers Compensation Act (the "Act")*, I may not reconsider a decision if more than 75 days have elapsed since the decision was made.

I am enclosing a pamphlet entitled Claims Review and Appeal Guide for Workers and Dependents for your convenience. You will note in exceptional circumstances, you may request a review of a decision after the expiry date has past to the Review Division. The instructions are contained in the pamphlet provided.

By letter of response dated March 8, 2004, the worker's lawyer noted that the February 24, 2004 letter had answered several of his questions. He further enquired:

However, the complete statement in policy Item #99.20 requires a letter of explanation, with a list of details, if a decision is "adverse" to the worker. The list has 12 items in it. Your letter suggests that [the worker's] claim was limited to a soft tissue injury, hence it was adverse to any other condition. You further advise that wage loss was closed, apparently along

with the file as a whole, on September 23, 2002. This suggests that the Board decided that this worker was not entitled to either rehab or a pension, both of which decisions, if made (there is no direct evidence one way or the other), were adverse to the worker. [The worker] is therefore entitled of [*sic*] a decision letter as outlined by Board policy, including all 12 items listed.

This is not a request for a reconsideration. This is a request for compliance with Board policy that requires a decision letter, with explanations, be sent to the worker (and his employer) whenever the Board reaches a conclusion that is adverse to the worker. Since no such decision letter ever issued from the Board, there is nothing to re-consider.

Kindly provide [the worker] with a complete decision letter, as required by Board policy.

By letter dated November 2, 2004, the case manager advised the worker's lawyer as follows:

Your letter regarding [the worker], please be advise no further letters to you or [the worker] will be issued. I refer you back to my previous advisory letter of February 25, 2004.

[reproduced as written]

The worker did not request review of the February 24, 2004 letter. However, he filed a request for review by the Review Division of the November 2, 2004 letter. By letter dated December 14, 2004 (*Review Decision #24739*), the review officer, Registrar's Office, advised:

The Review Division is not able to accept your Request for Review of the November 2, 2004 letter. This letter is not a decision as defined under *Item C1 of the Review Division – Practices and Procedures*. Under this item the term "Decision" is defined as follows:

A letter or other communication to the person affected that records the determination of a Board Officer as to a person's entitlement to a benefit or benefits or a person's liability to perform an obligation or obligations under any section of the Act other than one that authorizes the Board to issue orders.

The November 2, 2004 letter does not contain a decision. The letter refers to a clarification letter of February 25 [*sic*], 2004. It would appear from the correspondence dated February 25 [*sic*], 2004 that the Board Officer indicates that the claim acceptance decision was made on

September 17, 2002. Review of the claim file indicates that a form letter dated September 17, 2002 was issued to the employer which indicated that the claim had been accepted.

The review officer advised the worker that if he wished to request review of the decision provided to the employer concerning the acceptance of his claim, he would need to ask for an extension of time. She further advised that the rejection of the worker's request for review of the November 2, 2004 letter was appealable to WCAT.

On December 15, 2004, the worker's lawyer protested the Review Division's action of providing the December 14, 2004 decision without first seeking submissions from the worker. He complained that this involved a breach of natural justice. By reply of January 7, 2005, a review officer, Registrar's Office, advised that the Review Division would not be conducting a review of the November 2, 2004 letter, and confirmed that the worker could appeal to WCAT.

The worker appealed the December 14, 2004 Review Division decision to WCAT. By decision dated August 22, 2005 (*WCAT Decision #2005-04397*), the WCAT panel found:

The first issue to determine on this appeal is whether a refusal by the Board to issue a decision on a compensation matter is reviewable. Section 96.2(1)(c) of the Act specifies that a refusal to make a Board order respecting an occupational health and safety matter is reviewable. However, sections 96.2(1)(a) and (b), which set out review rights regarding compensation, rehabilitation, assessment and other matters, do not specify that the refusal to make a decision is reviewable. Therefore, applying the statutory interpretation presumption that the Legislature has expressed itself consistently within a particular piece of legislation, I conclude that the Act does not provide a right of review from a refusal by the Board to make a decision. In reaching this conclusion, I am aware that there may be situations in which a letter which on its face is a refusal to make a decision is in fact adjudication as to entitlement. However, in this case, I find that the November 2, 2004 letter was exactly what it purported to be: a refusal to issue further letters. Although it is not critical to my disposition of this appeal, I note that no further decisions were required, as the worker already had reviewable decisions addressing the key issues on his claim.

I find that the case manager's statement in her November 2, 2004 letter that no further letters would be issued does not constitute a reviewable decision. I therefore confirm the review officer's decision refusing to conduct a review. In this context, I find no authority to order the Board to issue specific decisions on this claim, as requested by the worker's counsel.

The WCAT decision further reasoned:

As noted above, the key decisions which the worker appears to dispute were addressed in the case manager's February 24, 2004 letter, which appears to fall within the Review Division's definition of "decision."

Submissions

Under this heading, I have summarized the arguments which I view as central to this application. I have not attempted to recite all of the submissions provided.

In his petition for judicial review, the worker submits that the WCAT decision was patently unreasonable. He complains that WCAT failed to decide the issue of whether Board officers must by law render and communicate decisions to claimants. By submission of August 10, 2006, the worker's lawyer argues in part:

It is respectfully submitted that the decision under re-consideration has mis-stated the issue under appeal, and has not answered the fundamental issue raised by the worker in his appeal to WCAT. At page 1, the panel states the issue as: "*Does the case manager's November 2, 2004 letter contain a reviewable decision?*"

The submissions dated March 15, 2005 argued that the Board through its Board Officers was required to issue decision letters both under Board policy and under administrative law principles. The panel in the decision under re-consideration ignored that argument, and considered another issue (wrongly decided) rather than responding to the argument based on case law on the question of whether Board Officers are obliged to issue decision letters.

All other issues are subsumed under this one. If the Board is not required as a matter of law to communicate decisions to workers, then the Board's position may be justified. However, if the Board is required by law to communicate decisions to workers, then their refusal to do so is a failure of jurisdiction, and no "letter" from the Board can correct that error merely by refusing to do the very thing that the law requires them to do.

The worker's lawyer submits:

The February 24, 2004 letter did not contain any decision, and clearly said so, and as the WCAT panel acknowledged. It re-iterated what the Case Manager considered to be "decisions" on file (not communicated to the worker), and then simply stated "...that you will not be given decision letters on every aspect of this claim file."

The worker's lawyer further submits:

It cannot have been the intention of the Legislature to prevent interested parties from access to the Board or to the appeal system. If the Board can refuse to issue decisions, and the appeal tribunals can refuse to take jurisdiction, then no claimant has any access to justice.

...

There are further anomalies in the WCAT decision under re-consideration. It purports to reach conclusions that were not communicated to the worker. The chronology of events recited at pages 1-2 amounts to hearsay, since without formal decisions from the Board, it was not open to WCAT to reach any of those conclusions, which amount to original decisions beyond the jurisdiction of the panel. The panel has transformed evidence into findings, a matter within the exclusive jurisdiction of the Board. Until the Board issues a decision based on the evidence, that is all that the file contains, evidence, not decisions.

Examples of such statements are: that the worker injured his left shoulder, that he missed only one shift initially and later more shifts in September, that he returned to light duties, that the claim was accepted for an undiagnosed left shoulder injury including the scapula and clavicle, and that referred to the 1997 claim file.

The employer's representative submits that grounds have not been established for reconsideration of the WCAT decision. He argues:

We note that the impugned WCAT decision upholds the decision of a Review Officer, which decision held that a December 14, 2004 [*sic*] decision of a Board Officer did not constitute a reviewable decision. A rather straightforward issue. Counsel does not really set out where and how the Vice Chair erred in dealing with that issue, never mind an error that would give rise to grounds for reconsideration. Rather, the submission appears to be that WCAT should constitute itself some kind of Royal Commission into the manner in which Board Officers carry out their

duties. Indeed, the prayer for relief in the final paragraph of the August 10, 2006 submission is expressed thus:

...WCAT should vary or cancel the WCAT and Board decisions below, and direct the Board to communicate written decisions with reasons to [the worker] that answer the questions he raised with respect to his claim.

By rebuttal of October 25, 2006, the worker's lawyer explains that the worker is asking WCAT to direct the Board to issue decisions, as required by law and policy. He submits that the WCAT panel fettered its discretion, and the worker is entitled to know what the Board decided and the reasons for their decisions so that he may know the case against him and exercise his right of appeal.

Policy

At the time of the February 24, 2004 letter, policy at *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) item #99.20 provided:

#99.20 Notification of Decisions

Where a claim is allowed and there has been no protest from the employer, no reasons are given. The Board simply sends the cheque. Notification of the allowance is sent to any advocate designated by the claimant's designated union or association who is acting on behalf of the worker. Information may also be disclosed to any other advocate, representative or other person where authorized in writing by the worker.

When a decision is made to allow a claim that has been protested by an employer, the employer will be notified of the decision and reasons, where possible by telephone. Only personal information which is relevant to the claim and the issues involved will be provided to the employer. A letter explaining the decision and reasons will be sent in any case where the employer cannot be contacted by telephone, or where in the course of the telephone conversation the employer indicates that in spite of the explanation there is a dissatisfaction with the decision. The letter is sent to the employer, with a copy to the worker. The guidelines outlined in the following paragraph, with regard to letters sent to workers, should be followed to the extent that they apply. Employer advocates are notified in the same manner as workers' representatives.

Where a decision is made adverse to a worker, the reasons are stated in a letter to the worker. The guidelines set out below apply in writing these letters. The Board officer will, where appropriate:

1. Specify clearly the matter being adjudicated.
2. Describe investigations carried out, including interviews conducted.
3. Outline the evidence considered.
4. Explain how the evidence was evaluated (specify its reliability; analyze conflicting evidence; give reasons for the weight apportioned to the evidence).
5. Review contact with the worker where the relevant issues were discussed and detail the worker's response.
6. List the various conclusions possible from the evidence.
7. In support of the conclusion reached, explain:
 - a) what evidence was considered favourable, with reasons, and
 - b) what evidence was considered unfavourable, or discounted, with reasons.
8. Point out statutory, policy or discretionary factors involved.
9. Discuss the question of evenly weighted evidence.
10. Summarize the formal decision.
11. Explain what the decision entails regarding non-payment of wage loss compensation, medical accounts, other benefits, etc.
12. Include an explanation of the relevant rights of review and/or appeal.

A copy of the decision letter will be sent to the employer, and to any advocate designated by the worker's union or association who is acting on behalf of the worker. Information may also be disclosed to any other advocate, representative or other person where authorized in writing by

the worker. A copy may also be sent to the physician where the decision involves medical factors. In all other cases, such as, a notification to a pharmacy, a simple letter or notification will be sent.

The term “reject” in decision letters is different than a “disallow” and refers to a claim where:

1. a self-employed worker has no personal optional protection;
2. the claimant was employed by an employer not covered under the *Act*;
3. a report was submitted in error. Normally, this occurs when a physician, on the basis of a misunderstanding, submits a report in error.

Where a claim has been reopened, the employer is notified of the decision either directly or by receiving a copy of the notification sent to the worker.

Law, Practice and other WCAT Decisions

The changes to the Act contained in Bill 63 included a statutory constraint on the Board’s authority to reconsider its decisions. Section 96(2) previously provided the Board with discretion to reconsider its prior decisions. It provided:

Notwithstanding subsection (1), the Board may at any time at its discretion reopen, rehear and redetermine any matter, except a decision of the appeal division, which has been dealt with by it or by an officer of the Board.

Effective March 3, 2003, this provision was repealed. The Board’s authority under section 96 to reconsider its decisions was amended as follows:

(2) Despite subsection (1), at any time, on its own initiative, or on application, the Board may reopen a matter that has been previously decided by the Board or an officer or employee of the Board under this Part if, since the decision was made in that matter,

- (a) there has been a significant change in a worker’s medical condition that the Board has previously decided was compensable, or
- (b) there has been a recurrence of a worker’s injury.

(3) If the Board determines that the circumstances in subsection (2) justify a change in a previous decision respecting compensation or rehabilitation,

the Board may make a new decision that varies the previous decision or order.

(4) Despite subsection (1), the Board may, on its own initiative, reconsider a decision or order that the Board or an officer or employee of the Board has made under this Part.

(5) Despite subsection (4), the Board may not reconsider a decision or order if

- (a) more than 75 days have elapsed since that decision or order was made,**
- (b) a review has been requested in respect of that decision or order under section 96.2, or**
- (c) an appeal has been filed in respect of that decision or order under section 240.**

(6) Despite subsection (1), the Board may review a decision or order made by the Board or by an officer or employee of the Board under this Part but only as specifically provided in sections 96.2 to 96.5.

(7) Despite subsection (1), the Board may at any time set aside any decision or order made by it or by an officer or employee of the Board under this Part if that decision or order resulted from fraud or misrepresentation of the facts or circumstances upon which the decision or order was based.

[emphasis added]

Effective March 3, 2003, section 221 of the Act further provided:

221 (1) A document that must be served on or sent to a person under this Act may be

- (a) personally served on the person,
- (b) sent by mail to the person's last known address, or
- (c) transmitted electronically, by facsimile transmission or otherwise, to the address or number requested by the person.

(2) If a document is sent by mail, the document is deemed to have been received on the 8th day after it was mailed.

(3) If a document is transmitted electronically, the document is deemed to have been received when the person transmitting the document receives an electronic acknowledgement of the transmission.

Section 221 was further amended effective December 3, 2004.

The 75-day time limit on the Board's reconsideration authority contained in section 96(5)(a) was a new provision. This gave rise to questions as to when the 75-day time period commenced (and ended).

Prior to March 3, 2003, section 101 of the Act had provided:

Every notice which the Board is empowered or required to give to an employer or worker under this Part, or under rules or regulations made under it, must be in writing, and may be served either personally or by mailing it to the address of the person to whom it is given. Where a notice is mailed, service of the notice is deemed to be effected at the time at which the letter containing the notice, and properly addressed, postage prepaid and mailed, would be delivered in the ordinary course of post.

Past practice of the Board had been to allow 10 days for the mailing of decisions to a worker or employer, in calculating the time limitation periods which applied for the filing of an appeal to the Appeal Division under sections 91(1), 96(6) or 96(6.1), or for the filing of a request for examination by a Medical Review Panel under section 58(3) or (4) of the Act.

The statutory framework provided by the March 3, 2003 amendments to the Act permitted time periods for reconsideration which were shorter than the time periods for filing a request for review or appeal. The Board had discretion to reconsider within 75 days, which left 15 days remaining in the 90-day time period permitted for requesting review by the Review Division. The Review Division similarly had discretion to reconsider within 23 days under section 96.5(3), which left 7 days remaining in the 30-day time period for appealing to WCAT. In both cases, the filing of a request for review, or the filing of an appeal, had the effect of terminating the Board's authority to reconsider. Thus, if a party asked a Board officer or the Review Division to reconsider a decision, the party would know, even in the absence of any response, whether any change had been made to the decision, within the time period set for filing a request for review or appeal. If the party elected to file their request for review or appeal at an earlier date, this automatically foreclosed any reconsideration by the Board.

Several WCAT decisions have addressed the operation of the 75-day time limit on the Board's reconsideration authority. An appeal to WCAT concerned the issue as to whether the recording of an entry in a claim log, which was not communicated to the worker or employer, constituted a decision which triggered the running of the 75-day

time limit on the Board's reconsideration authority. By letter of September 2, 2003, a Board case manager responded to an employer's request for relief of claim costs under section 39(1)(e) of the Act. The case manager advised that this issue had been previously addressed by the Board, pursuant to a notation on an internal Board form. The case manager acknowledged that no decision letter was ever sent to the employer. He concluded, however, that as this matter had been previously decided by the Board, and more than 75 days had elapsed, subsections 96(4) and (5) of the Act barred him from reconsidering the prior decision. The case manager acknowledged in the September 2, 2003 letter that the employer "may feel an injustice has been done, as a decision letter was never forwarded to the accident employer". He suggested the employer might submit a request for an extension of time to appeal the prior decision. The employer requested review by the Review Division.

By decision dated October 23, 2003, the review officer rejected the employer's request for review. She advised that for the purposes of sections 96.2(1)(a) and (b) of the Act, no reviewable decision is made where a Board officer simply communicates the statutory time limit on the Board's authority and the fact that the time has elapsed. The employer appealed the Review Division decision to WCAT. *WCAT Decision #2004-03907* dated July 23, 2004 reasoned as follows:

While a literal interpretation of subsections 96(4) and (5), read in isolation, would lead to a conclusion that the Board cannot reconsider any matter which had been previously addressed by the Board more than 75 days earlier, I consider that these provisions must be read in the context of the Act as a whole. A purposive interpretation of subsections 96(4) and (5) is required, which takes into effect the requirement for service of a decision and the statutory time periods for appealing a decision. I find, based on the requirements for service contained in the former section 101, and the current section 221, and the sections of the Act which provide statutory appeal rights, that an internal determination on the Board's file which was not communicated cannot be effective as a decision for the purpose of triggering the 75-day time limit on the Board's reconsideration authority. To find otherwise would violate basic principles of procedural fairness and natural justice. I do not consider that the legislature, in placing a 75-day time limit on the Board's reconsideration authority, intended this to apply to situations in which the "decision" had never been communicated so as to deprive the parties of their rights of review or appeal under the Act.

Accordingly, I do not consider that section 96(4) and (5) operate so as to limit the Board from reconsidering a matter, where the earlier file determination or "decision" had not been communicated. Where the determination has not been communicated, it may, at least in some circumstances, remain tentative or provisional in nature, and subject to revision. The situation may be different where the affected party chooses to accept a file memorandum, and elects to bring an appeal on the basis

that it constitutes a decision. It may be that the affected party could waive their right to service of a decision, for the purpose of exercising a right of appeal. I am not addressing that situation in this decision.

WCAT Decision #2004-04019 dated July 28, 2004 concerned a similar situation. That decision reasoned:

The case manager concluded by advising that she could not reconsider the February 19, 1998 decision, as more than 75 days had elapsed.

On initial reading of the July 23, 2003 letter, I assumed it referred to a decision letter dated February 19, 1998. However, I could not locate a decision letter with that date. I infer, therefore, that the case manager was treating the notation in the February 19, 1998 disability awards referral memo as constituting the Board's decision to deny relief of costs. The effect of such an action, were it to stand, would be to deprive the employer of its appeal rights under the Act as the employer had never been provided with a decision concerning the application of section 39(1)(e).

I adopt the reasoning set out in *WCAT Decision #2004-03907*, dated July 23, 2004....

WCAT Decision #2004-06708 dated December 20, 2004 concerned a situation in which a Board officer made an entry in a file memo indicating that it did not appear that the worker had any permanent disability. This was not communicated to the worker. When the worker subsequently requested a permanent partial disability assessment, the case manager advised the worker that she could not reconsider the prior decision as more than 75 days had passed. The worker's request for review was denied by the Review Division, on the basis that the Board officer was simply communicating the statutory time limit on the Board's reconsideration authority. The worker appealed to WCAT. In its decision, the WCAT panel noted:

A July 8, 2003 letter from the director of the Board's Rehabilitation and Compensation Services Divisions advised the worker's representative as follows:

The Division has taken the position that Section 96(5) applies to all decisions made by the Board, regardless of whether or not they are accompanied by a decision letter. **In the event that a worker or employer wishes to appeal an old decision that was not communicated by a decision letter, our practice is to have a Board Officer provide the details of the old decision.** This has been done by the

case manager in the April 14, 2003 letter. **The party would have to request an extension of time from the Review Division for a review of the decision.**

I have consulted with the Director of Disability Awards and we have given careful consideration to whether the memorandum of March 26, 1981, constitutes a decision. In our opinion, Bill 63 was intended to bring finality to the decision-making process. We believe that the memorandum must be read within that context and be considered a decision. Therefore, it cannot be reconsidered but could be reviewed if an extension of time is granted by the Review Division. The decision can be reopened.

[emphasis added]

In *WCAT Decision #2004-06708*, the WCAT panel adopted reasoning from *WCAT Decision #2004-03907* and found:

I find that, properly characterized, the Disability Awards officer's March 26, 1981 memo was not a "decision" within the meaning of sections 96(4) or (5), but rather in the nature of an administrative action or an interim or preliminary determination or conclusion.

I therefore find that the April 14, 2003 letter was a reviewable decision concerning whether the 75-day time limit applies to limit the Board's authority to address the worker's request to be assessed for permanent partial disability.

On March 31, 2005, the Board issued *Best Practices Information Sheet #5*, entitled "Reconsiderations". This stated as follows:

Adjudicative Guidelines

(A) Restrictions on Reconsideration – The 75-Day Rule

It is not possible to reconsider a decision if 75 days have elapsed since the decision was made or if a review has been requested or an appeal filed with respect to that decision (even if it is within 75 days of the decision). **For purposes of determining the 75-day period, a decision is made when it is documented on the claim file and the 75-day period commences the following day.** Decisions are communicated to the parties in accordance with the requirements of RSCM Policy item #99.20, *Notification of Decisions*.

[emphasis added]

WCAT Decision #2005-05996 dated November 9, 2005 concerned a situation in which the Board accepted a September 12, 2003 incident as providing the basis for establishing a new claim for the worker, rather than reopening his 2000 claim. The Board's determination was recorded in a log entry in the claim file. When the worker requested a reopening of his 2000 claim, the Board office advised him that this issue had previously been addressed and could not be reconsidered as more than 75 days had passed. The Review Division rejected the worker's request for review, on the basis that the Board's letter was informational only with respect to the statutory limits on the Board's reconsideration authority. On appeal to WCAT, the WCAT panel reasoned as follows:

I find that, since the October 23, 2003 decision to accept a new claim was not communicated to the worker, the 75-day time limit on the Board's authority to reconsider does not apply. I realize that this conclusion does not accord with *Best Practices Information Sheet #5* (BPIS #5), published by the Board's Regulatory Practices Department on March 22, 2005. These Information Sheets replace Practice Directives and do not have the status of Board policy. They therefore are not binding on WCAT.

Under the heading "Adjudicative Guidelines," BPIS #5 provides:

For the purposes of determining the 75-day period, a decision is made when it is documented on the claim file and the 75-day period commences the following day. Decisions are communicated to the parties in accordance with the requirements of RSCM Policy Item #99.20, *Notification of Decisions*.

BPIS #5 replaces *Practice Directive #59*, which did not contain such restrictive wording. Although it may be administratively more convenient, given the reasoning I have adopted from *WCAT-2004-03907*, and my conclusion that sections 96(4) and (5) cannot operate in the face of an uncommunicated decision, this guideline violates basic principles of procedural fairness and natural justice.

The worker has been placed in an untenable situation by the responses to his request he has received to date. He was entitled to a formal reviewable decision on the new claim versus the reopening question, and that is all he has been requesting since November 2003. Although it is possible to argue that he must have known that a new claim was established given the other correspondence he received, I consider that argument to be disingenuous. The workers' compensation system includes rights of review and appeal. Parties cannot request reviews of decisions not communicated to them. The worker has been deprived of that right here and he is entitled to be provided with a reviewable decision.

I find that the November 25, 2004 letter contained a reviewable decision. It was not simply an information letter communicating information about the 75-day time limit on the Board's reconsideration authority. Since it is the first formal communication to the worker of the entitlement officer's decision to accept a new claim for his September 12, 2003 injury, rather than to reopen the 2000 claim, I find that it is the decision addressing the merits of the worker's request. I therefore allow the worker's appeal, and return this matter to the Review Division for review on the merits.

Best Practices Information Sheet #5 was amended August 11, 2006, to state as follows:

Adjudicative Guidelines

(A) Restrictions on Reconsideration – The 75-Day Rule

It is not possible to reconsider a decision if 75 days have elapsed since the decision was made or if a review has been requested or an appeal filed with respect to that decision (even if it is within 75 days of the decision). **For purposes of determining the 75-day period, a decision is made when it is communicated to the affected party, either verbally or in writing.** A letter will be provided to the parties in accordance with the requirements of RSCM Policy item #99.20, *Notification of Decisions*. Where Policy item #99.20 does not require a letter to be sent, officers should ensure that they record the verbal communication of the decision on the claim file.

[emphasis added]

This amendment was provided subsequent to my memo of March 28, 2006 which disclosed the March 31, 2005 version. However, the amendment was publicly accessible on the Board's website by the time of the employer's submission and the rebuttal by the worker's lawyer (in October 2006). In any event, this amendment was consistent with the line of WCAT decisions which was disclosed with my March 28,

2006 memo. Accordingly, I did not consider it necessary to defer my decision for the purpose of disclosing the amendment to this non-binding practice directive.

While also not necessary to my decision, I note that more recent decisions have similarly concluded that a decision is not “made” unless it is communicated (see *WCAT Decision #2006-02121* dated May 17, 2006, and *WCAT Decision #2006-02669* dated June 27, 2006, summarized as noteworthy on the WCAT website). These decisions address the related requirement that the second decision (the reconsideration decision) be communicated within the 75-day period in order to be effective.

Two WCAT decisions on related issues have been published in the *Workers' Compensation Reporter*. *WCAT Decision #2004-00638*, “Refusal to Review – Reconsideration After 75 Days Denied”, February 5, 2004, 20 W.C.R. 59, concerned a situation in which the Board officer furnished the employer with a copy of the prior decision letter (issued more than 75 days previously) which denied relief of claim costs but declined to further address the employer’s request for additional consideration of relief of costs under sections 39 and 42 of the Act. The WCAT decision cited section 96.2(1) of the Act:

96.2 (1) Subject to subsection (2), a person referred to in section 96.3 may request a review officer to review the following in a specific case:

- (a) a Board decision respecting a compensation or rehabilitation matter under Part 1;
- (b) a Board decision under Part 1 respecting an assessment or classification matter, a monetary penalty or a payment under section 47 (2), 54 (8) or 73 (1) by an employer to the Board of compensation paid to a worker;
- (c) a Board order, a refusal to make a Board order, a variation of a Board order or a cancellation of a Board order respecting an occupational health or safety matter under Part 3.

WCAT Decision #2004-00638 reasoned (at pages 66 to 68 of the published version):

Section 96.2(a) and (b) do not expressly grant a right to request review of a failure or refusal by the Board to make a decision concerning a compensation, rehabilitation, or assessment matter (or the other matters covered in (b)). This may be contrasted with section 96.2(c), which creates a right of review for:

a Board order, **a refusal to make a Board order**, a variation of a Board order or a cancellation of a Board order

respecting an occupational health or safety matter under Part 3.

[emphasis added]

Other provisions in the Act creating a right of review or appeal with respect to a refusal to make an order, or to decline to conduct a review, include the following:

Section 239(1)

Subject to subsection (2), a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section, may be appealed to the appeal tribunal.

Section 240(1)

A determination, an order, a refusal to make an order or a cancellation of an order made under section 153 may be appealed to the appeal tribunal.

However, having regard to both the express reference in section 96.2(c), which creates a right of review for a refusal to make a Board order respecting an occupational health or safety matter under Part 3 of the Act, and the other provisions (section 239(1) and section 240(1) of *Workers' Compensation Reporter — Volume 20, Number 1* 67 the Act) creating a right of appeal to WCAT from a refusal to make an order under section 153 or a decision to decline to conduct a review, we find the absence of comparable language in section 96.2(a) and (b) significant.

...

The legislature has provided a right of review concerning “a Board decision,” “in a specific case,” “respecting an assessment or classification matter.” All three elements must be present. By logical inference, as set out above, the legislature did not intend to provide a right of review by the Review Division under section 96.2(b), with respect to the Board’s failure to make a decision concerning an assessment matter. The practical impact of these provisions is to allow the Board discretion in assigning resources to various tasks and determining when and if decision letters are required. We are not satisfied that the March 18, 2003 letter constituted a new “Board decision under Part 1 respecting an assessment or classification matter.” Nor do we consider that the failure to provide a

decision constitutes a reviewable decision under section 96.2(b) of the Act.

The references to section 96.2 of the Act in that decision should have referred to section 96.2(1)(a), (b) and (c).

WCAT Decision #2005-01772, “Review Division and WCAT Jurisdiction – Refusal to Make a Decision”, April 11, 2005, 21 W.C.R. 157, concerned a situation similar to that addressed in *WCAT Decision #2004-00638* except that there was some basis for considering that there remained an outstanding issue with respect to the employer’s request for relief of claim costs (which was not present in the prior case). In *WCAT Decision #2005-01772*, the panel noted on page 162:

If the analysis in *WCAT Decision #2004-00638* were applied to the August 23, 1999 decision that was issued under the claim before us, we might consider the decision on relief of costs under section 39(1)(e) to be a conditional decision which leaves it open to the Board to make a further decision. While the employer’s representative has advanced numerous arguments about the application of sections 96(4) and (5) of the Act, the situation before us is not one in which the Board declined to make a further decision due to the operation of those sections — it is a situation in which the Board has simply declined to make a further decision.

WCAT Decision #2005-01772 reasoned in part:

Superior courts, such as the Supreme Court of British Columbia, have the inherent jurisdiction to review the legality of actions of administrative bodies. Accordingly, they generally have supervisory jurisdiction to review all administrative decisions. In contrast, the jurisdiction of administrative tribunals, such as WCAT, is limited to the jurisdiction expressly granted to them by statute. WCAT’s jurisdiction to hear appeals from the Review Division arises out of and is limited by section 239 of the Act. The jurisdiction of the Review Division arises out of and is limited by section 96.2(1) of the Act. We do not interpret sections 250(2) and 251 as granting WCAT supervisory jurisdiction over the Board. If the legislature had intended WCAT to have the general authority to compel the Board to make decisions, the limited discretionary authority in section 246(3) would have been unnecessary.

Accordingly, we find that WCAT does not have the general authority to compel the Board to make a further decision.

I note, at this juncture, that a question may be posed as to whether there is a contradiction between these latter WCAT decisions which found that:

- the legislature did not intend to provide a right of review by the Review Division under section 96.2(1)(a) and (b), with respect to the Board's failure to make a decision concerning an assessment or compensation matter, and,
- WCAT has no jurisdiction to compel the Board to make a decision,

and the other WCAT decisions cited earlier which granted a remedy to the appellant (following apparently similar refusals by the Board to issue decision letters, and appeals to WCAT concerning refusals to review by the Review Division). For reasons set out further below, I consider that these two lines of cases can be reconciled. While WCAT panels have identified certain limitations on WCAT's jurisdiction as set out in *WCAT Decision #2004-00638* and *WCAT Decision #2005-01772*, WCAT panels have also found, in effect, that they were not bound by the "form" of the letter issued by the Board and could, in some circumstances, conclude that the refusal to issue a decision in fact involved the making of a decision (which is subject to review).

Reasons and Findings

In these reasons, I focus on the central arguments which have been provided, and provide reasons to explain the basis for my decision. While these reasons do not expressly address every argument which was presented, or refer to every prior decision which was cited, I have included those arguments in my consideration.

(a) *Standard of Review*

In his petition, the worker's lawyer submits that the WCAT decision was patently unreasonable. I agree that this is the appropriate standard of review to be applied in this decision. Inasmuch as this application may be characterized as involving jurisdictional questions, I consider it necessary to explain my conclusion on this point.

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. 236 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:

[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.

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, (2006) 55 B.C.L.R. (4th) 325. The appellant cited the 1990 decision of the British Columbia Court of Appeal in *I.U.O.E., Loc. 115 v. C.A.I.M.A.W., Loc. 19*, (1990) 48 B.C.L.R. (2d) 321, and argued that the interpretation of the particular provision of the *Labour Relations Code* was a jurisdictional matter and the proper standard of review was correctness. The Court of Appeal reasoned:

42 The landscape of judicial review has changed since Gibbs J.A.’s decision in *IUOE*. The beginnings of that change were evident when Beetz J. wrote in *Bibeault*, at 1088:

The formalistic analysis of the preliminary or collateral question theory is giving way to a pragmatic and functional analysis, hitherto associated with the concept of the patently unreasonable error.

43 Since then, the Supreme Court has repeatedly stated that the ultimate question with regard to standard of review is “What was the legislature’s intent?”; that the answer to that question is to be determined by applying the pragmatic and functional approach; that the pragmatic and functional approach is always the first step in a judicial review; and that decisions of labour boards are due a high degree of deference, including with regard to questions of statutory interpretation. I am satisfied that the change in the legal landscape justifies this Court in declining to apply the **IUOE** decision.

44 With the advent of the **Administrative Tribunals Act**, the legal landscape in British Columbia changed further. The **Act** has effectively negated the decision in **IUOE**. It specifies the standard of review to be applied to the Board’s decisions according to whether the decision is within the Board’s “exclusive jurisdiction”. Because the term “jurisdiction” is not defined within the **Act**, the Court may look to the backdrop of the general law against which the legislation was drafted. The legislative drafters must be taken to be aware that the law concerning the approach to determining whether a matter is “jurisdictional” changed considerably between the Court’s decision in **IUOE** and the enactment of the **Act**.

The Court of Appeal concluded that its prior decision in IUOE was not binding and the pragmatic and functional approach must be applied to determine whether the Board’s decision was within its exclusive jurisdiction. This requires reference to the four factors of the presence or absence of a privative clause, the tribunal’s relative expertise, the purpose of the Act as a whole and the provision in particular, and the nature of the problem.

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 worker’s appeal from a Review Division’s refusal to review the Board officer’s letter of November 2, 2004. 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.

(b) *Issue Identification*

The WCAT panel identified the issue(s) raised by the worker's appeal as follows (on page 1):

Does the case manager's November 2, 2004 letter contain a reviewable decision?

The worker's lawyer complains that the WCAT panel erred by misstating the issue under appeal, and failed to answer the fundamental issue raised by the worker in his appeal to WCAT. He submits that the panel ignored the argument presented on behalf of the worker, that the Board through its officers was required to issue decision letters both under Board policy and under administrative law principles.

In this case, the December 14, 2004 decision by the Review Division rejected the worker's request for review on the basis that the November 2, 2004 letter did not contain a decision. The Review Division did not confirm, vary or cancel the November 2, 2004 letter, or refer it back to the Board with directions, under section 96.4(8) of the Act.

Section 239(1) of the Act provided:

Subject to subsection (2), a final decision made by a review officer in a review under section 96.2, **including a decision declining to conduct a review under that section**, may be appealed to the appeal tribunal.

[emphasis added]

I find that the WCAT panel had the jurisdiction to determine the nature of the issue(s) which were raised by the worker's appeal. While the WCAT panel was obliged to consider the arguments presented on behalf of the worker, the panel was not obliged to accept the appellant's characterization of the issues in the appeal. The WCAT panel had the authority to determine, having regard to the statutory framework and the background information, the true nature of the issue which was before it for determination. I do not consider that the WCAT decision was patently unreasonable, in respect of the manner in which the panel framed the central issue raised by the worker's appeal in connection with the wording emphasized above from section 239(1) of the Act.

I note, in any event, that the fact that the panel framed the issue in this fashion did not mean that the panel failed to consider the arguments presented by the worker's lawyer. Under the heading "Analysis", the WCAT panel stated as follows in its opening paragraph:

The worker's position is that the Board failed to exercise its jurisdiction by not issuing decisions to the worker on a variety of issues on his claim.

Worker's counsel asks this panel to direct the Board to provide those decisions to the worker.

The reasons of the WCAT panel which followed also addressed this argument.

(c) *Authority to review a Board officer's refusal to make a decision*

The WCAT panel found that the first issue to determine was whether a refusal by a Board officer to issue a decision on a compensation matter is reviewable. The WCAT panel noted that section 96.2(1)(c) of the Act specifies that a refusal to make a Board order respecting an occupational health and safety matter is reviewable. However, sections 96.2(1)(a) and (b), which set out review rights regarding compensation, rehabilitation, assessment and other matters, do not specify that the refusal to make a decision is reviewable. Applying the statutory interpretation presumption that the legislature has expressed itself consistently within a particular piece of legislation, the WCAT panel concluded that the Act does not provide a right of review from a refusal by the Board to make a decision. The panel's analysis on this issue was similar to that expressed in *WCAT Decision #2004-00638*, although that case concerned section 96.2(1)(b) and this case concerned section 96.2(1)(a) of the Act.

The worker's lawyer submits:

Section 96.2(1)(a) of the *Workers Compensation Act* does not limit a worker's right to appeal a decision "respecting" a compensation or rehabilitation matter in any way. There are no qualifications or conditions imposed by statute, such as whether or not a worker's entitlement to benefits is affected.

It is contrary to the purpose and intent of the appeal provisions, and also contrary to Section 8 of the *Interpretation Act*, to impose those conditions on a worker's right to appeal. It is respectfully submitted that the panel's conclusion that section 96.2(1) does not specify that that a refusal to make a decision is appealable is an error of law. A statute does not need to state the obvious or repeat the state of the law; the law is understood.

Further, occupational health and safety issues have nothing to do with a worker's rights to benefits under the statute, but only with an employer's obligations to the Board, in the same vein as assessments or decisions with respect to relief of costs. It is an error of interpretation to apply an issue that is irrelevant to a worker in such a manner as to restrict a worker's rights of appeal.

Section 8 of the *Interpretation Act*, RSBC 1996, ch. 238, provides:

Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

For the purposes of this application, I am not determining whether the alternative interpretation proposed by the worker's lawyer would also be viable, or whether it is the correct interpretation. For the reasons set out above under (a), the question for my consideration is whether the interpretation of the WCAT panel was patently unreasonable.

The interpretation given by the WCAT panel in *WCAT Decision #2005-04397* to section 96.2(1)(a) was consistent with that provided in the published *WCAT Decision #2004-00638* concerning section 96.2(1)(b). These decisions attached significance to the legislature's choice to include the phrase "a refusal to make a Board order" in section 96.2(1)(c) only. That interpretation concerned both worker's appeals concerning compensation, and employer's appeals concerning compensation or assessment matters. The WCAT panel provided a reasoned explanation for her interpretation of this provision, which took into account the wording of the section as a whole. I am not persuaded that the WCAT panel's interpretation of this provision of the Act was patently unreasonable.

As noted above, a question may be posed as to whether there is a possible contradiction between the analysis in this case and in *WCAT Decisions #2004-00638* and *#2005-01772*, and the reasoning in various other decisions such as *WCAT Decisions #2004-03907*, *#2004-04019* and *#2004-06708*. All of these WCAT decisions stemmed from decisions by Board officers refusing to issue a further decision. One line of cases granted a remedy to the appellant, while the other line of cases confirmed the Review Division decision that a refusal to provide a further decision was not reviewable by the Review Division.

In the first line of cases, the refusal to issue a further decision was based on the position that the matter had previously been addressed in an internal Board decision which triggered the running of the 75-day time frame on the Board's reconsideration authority. As summarized above, a number of WCAT decisions have allowed appeals from the Review Division's refusal to review, where the initial decision by the Board officer involved the mistaken position that an "internal" determination which had not been communicated to the party amounted to a decision which triggered the running of the 75-day time limit on the Board's reconsideration authority. The second line of cases concerned the exercise of the Board's discretion as when or how decisions should be made in the adjudication of a claim (particularly in the face of open-ended requests for decisions). WCAT has allowed appeals in dealing with decisions rendered in the first type of situation, while at the same time finding that it does not have authority to hear an appeal regarding a refusal to provide a decision regarding a compensation or assessment matter in other circumstances.

On their face, all of the initial Board decisions (which gave rise to these two different approaches) involved a refusal to provide a further decision. It is evident, however, that WCAT panels have not considered themselves bound by the “form” of the letter by the initial Board officer. In appropriate circumstances, WCAT panels have looked beneath the form of the letter, and concluded that the position being expressed to the parties in fact involved a decision rather than being a mere refusal to address a matter. Accordingly, such decisions have been found to be subject to review, notwithstanding the fact that the form of the letter was the same as that provided in other cases in which WCAT panels found they had no jurisdiction.

In this case, the WCAT panel expressly noted that in reaching her conclusion, she was aware that there may be situations in which a letter which on its face is a refusal to make a decision is in fact an adjudication as to entitlement. In my view, this reflected a recognition of the other type of situation discussed above. In this case, the WCAT panel found that the November 2, 2004 letter was exactly what it purported to be: a refusal to issue further letters. This conclusion must be viewed in light of the fact that the November 2, 2004 letter was provided more than 75 days subsequent to the initial response by the Board officer on February 24, 2004 (considered further below under (d)).

I find no error of law going to jurisdiction in the reasoning and conclusion of the WCAT panel on this issue.

(d) 75-day limit on the Board’s reconsideration authority

The Board initially responded to the requests of the worker’s lawyer by letter dated February 24, 2004. The worker did not request review of the February 24, 2004 letter. The worker’s lawyer wrote to the Board officer to object to the February 24, 2004 response to his earlier enquiry. The Board’s further response was not provided until November 2, 2004, more than 75 days subsequent to the February 24, 2004 letter.

To the extent the February 24, 2004 letter involved any erroneous decision (or the communication of a decision concerning the worker’s entitlement), the Board did not have authority to reconsider its decision after 75 days had elapsed following the February 24, 2004 letter. (This reasoning is dependent on the February 24, 2004 letter being characterized as a decision, which it asserted it was not).

An analogy may be drawn to a somewhat similar situation under the prior legislation, in which Board officers issued letters which they described as not being appealable decisions. Prior to the March 3, 2003 changes to the Act, the Board had authority to reconsider its decisions on the basis of significant new evidence. It sometimes occurred that a Board officer would examine new evidence and review it in relation to a prior decision, and then deny reconsideration on the basis that the new evidence was not significant. Such letters often indicated that they did not involve an appealable decision, pursuant to item #108.50 of the former *Rehabilitation Services and Claims Manual* which stated: “. . . no appeal lies from a decision on a preliminary question whether any

grounds for a reconsideration have been submitted in support of the application". However, it was not the practice of the Review Board or Appeal Division to accept the characterization by the Board officer as binding, and as immune to appeal. Rather, the appeal bodies considered that they had jurisdiction (in the context of an appeal from such a decision) to examine the evidence and make their own determinations, as to whether or not the new evidence was significant and as to whether grounds for reconsideration were established. *Appeal Division Decision #94-0194*, "Reconsiderations and Re-openings", 10 W.C.R. 313, reasoned at page 320 to 321 (in the pre-March 3, 2003 context in which Board policies provided non-binding guidelines):

The 1991 changes to the legislation intended, in part, to prevent claims from becoming protracted. The reconsideration grounds found in Section #108.10 of the *Rehabilitation Services and Claims Manual* are, therefore, consistent with this intent. A reconsideration may not proceed unless grounds such as new evidence or a mistake of evidence or law exist. But, that does not make the decisions by the claims adjudicators as to whether these grounds exist unappealable. It is entirely consistent with the legislation that the claims adjudicators' application of the policy guidelines should be appealable to the Review Board. For instance, the judgment as to whether evidence submitted constitutes significant new evidence should be appealable. What is not appealable is the requirement that there be new evidence (or a mistake of evidence or law) before a reconsideration may proceed. Simply put, if an applicant requests a reconsideration without, by presentation of evidence or argument, invoking any of the grounds specified in the governors' policies and is met with a refusal to consider the application, there is no appealable issue. But, if the applicant relies explicitly or implicitly on one of the specified grounds and the evidence or argument presented is rejected as insufficient, there is an appealable issue; this issue is whether there are sufficient grounds for a reconsideration within the meaning of the governors' policies. Section #108.50 of the *Rehabilitation Services and Claims Manual*, which forms part of the governors' published policy, states ". . . no appeal lies from a decision on a preliminary question whether any grounds for a reconsideration have been submitted in support of the application" must be interpreted in a manner that is consistent with the foregoing. Although its wording suggests an absolute bar against appeals of decisions pertaining to the sufficiency of grounds for reconsideration, it would be incorrect to adopt this narrow interpretation.

Accordingly, the fact that a Board officer had asserted that the letter did not constitute a decision would not necessarily be conclusive under the former statutory framework.

Under the current statutory framework, to the extent Board officers had previously rendered determinations on the worker's 2002 claim file which had not previously been communicated, it may be considered (on the basis of the reasoning in the several

WCAT decisions cited above) that the Board had failed to provide the worker with decisions. However, the February 24, 2004 communication of those determinations to the worker may be characterized as completing the requirements for the issuance of a decision (i.e. involving both the making of a determination, and its communication).

One possible interpretation is that the Board failed to provide the worker with prior decisions on his 2002 claim as none were communicated to the worker. When the Board subsequently communicated with the worker in the February 24, 2004 letter, it did so in terms which expressly qualified that letter as not constituting a decision. Accordingly, one possibility was that it remained open to the worker to ask the Board for a decision or decisions, on particular questions of concern to him in relation to the 2002 claim. On this interpretation, the November 2, 2004 letter could be viewed as a reviewable decision, in respect of its position that the 75-day time limit on the Board's reconsideration authority had been exhausted by the Board's prior actions (involving the "secret" determinations on file, and the subsequent advisory letter of February 24, 2004 which was expressly described as not being intended to be a decision letter).

An alternative possibility, as described by the WCAT panel, is that it was open to the worker to challenge the Board officer's characterization of the February 24, 2004 letter as not amounting to a decision. It would be open to the worker to request an extension of time to request review of the February 24, 2004 letter under section 96.2(4) of the Act. (While the issue is not before me, the fact that the letter stated it was not a decision might be relevant to the question as to whether there were special circumstances which precluded the timely filing of a request for review. Such an issue is outside the scope of WCAT's jurisdiction, as decisions by the chief review officer on extension of time applications are not appealable to WCAT).

The WCAT panel stated:

Although it is not critical to my disposition of this appeal, I note that no further decisions were required, as the worker already had reviewable decisions addressing the key issues on his claim.

The WCAT decision concluded by noting that the key decisions which the worker appeared to dispute were addressed in the case manager's February 24, 2004 letter, which appeared to fall within the Review Division's definition of "decision."

I am not, in this decision, considering an appeal regarding the correctness of the decision by the WCAT panel, or contemplating whether an alternative analysis would also have been viable. Rather, my consideration concerns whether the decision by the WCAT panel was viable under the Act. I do not consider that the decision of the WCAT panel was patently unreasonable, in having regard to the February 24, 2004 letter as a possible decision based on its communications to the worker of the Board's determinations on certain issues. On that interpretation, the February 24, 2004 letter

would have triggered the running of the 75-day time limit on the Board's reconsideration authority.

A possible concern arises in connection with the panel's reference to its reasoning on this point as not being critical to its disposition of the appeal. It is arguable that such reasoning was necessary to its conclusion, and that the panel's interpretation of section 96.2(1)(b) was not necessarily determinative. In fact, the panel acknowledged that its interpretation of section 96.2(1)(b) was not necessarily determinative, and that there may be situations in which a letter which on its face is a refusal to make a decision is in fact adjudication as to entitlement.

In *Speckling v. British Columbia (Workers' Compensation Board)*, [2005] B.C.J. No. 270, (2005) BCCA 80, (2005) 46 B.C.L.R. (4th) 77, the British Columbia Court of Appeal confirmed (at paragraph 33) the chambers judge's summary of the approach to be taken in applying the standard of "patent unreasonableness". One of the six points contained in that summary was as follows:

3. The review test must be applied to the result not to the reasons leading to the result: *Kovach v. British Columbia (Workers' Compensation Board)* (2000), 184 D.L.R. (4th) 415 (S.C.C.).

The panel's reasoning regarding the effect of the February 24, 2004 letter supported its conclusion that this was a case in which the limitation contained in section 96.2(1)(a) was applicable. The panel's analysis also provided a viable alternative, or additional, rationale for its decision. Even if it was considered that this further reasoning was necessary to the panel's decision, rather than being merely in the nature of *obiter*, both the result (and this additional reasoning) were not patently unreasonable. Accordingly, I do not consider that any basis has been provided for setting aside the decision of the WCAT panel on this point.

(e) *Other*

The worker's lawyer seeks certain remedies in this application for reconsideration. The question of remedies only arises if grounds for the reconsideration are established.

The course of events which occurred on the worker's 2002 claim is unfortunate. However, in the context of this application for reconsideration, my jurisdiction is limited to considering whether the WCAT decision involved an error of law going to jurisdiction. Upon examining the decision of the WCAT panel, in the context of the particular decisions and background in which it was provided, I do not consider that it was patently unreasonable. The worker's application for reconsideration of the WCAT decision must, therefore, be denied.

Conclusion

The worker's application for reconsideration of *WCAT Decision #2005-04397* is denied on the common law grounds. No error of law going to jurisdiction has been established in relation to the WCAT decision. The WCAT decision stands as "final and conclusive" under section 255(1) of the Act.

Herb Morton
Vice Chair

HM/cda