Noteworthy Decision Summary

Decision: WCAT-2007-00524 **Panel**: Janice Leroy **Decision Date:** February 14, 2007

Reassessment of Permanent Functional Impairment (PFI) - Process for and type of evidence necessary for accepting actual or potential significant permanent change in a PFI - Inquiry system - Policy items #96.20, #96.30 and 97.00 of the Rehabilitation Services and Claims Manual, Volume I

This decision is noteworthy because it describes the process and type of evidence needed for accepting an actual or potential significant permanent change in a permanent functional impairment (PFI) which would warrant a referral to the Disability Awards Department of the Workers' Compensation Board, operating as WorkSafeBC (Board), for a reassessment.

The worker sustained a right hand injury. This claim was accepted by the Board. He was granted a 7.6% permanent partial disability award. The Board declined the worker's request for a referral to the Disability Awards Department to reassess his PFI on the basis that there was no medical information on file that supported a significant change in his permanent disability.

The panel explained that policy item #96.20 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) specifies that Board officers must first accept an actual or potential permanent condition under the claim before it can be referred to the Disability Awards Department for assessment. Item #96.30 of the RSCM I provides that the Disability Awards Department then decides the extent of the disability and calculates the worker's pension entitlement. There is no corresponding policy specifically addressing the process by which actual or potential significant permanent changes might be accepted and thus referred to the Disability Awards Department for reassessment. The WCAT panel concluded that the same process outlined in items #96.20 and 96.30 of the RSCM I must apply in determining the existence and compensability of an actual or potential significant permanent change in a PFI which would warrant a referral to the Disability Awards Department for a reassessment.

The panel denied the worker's appeal. She discussed the type of evidence a Board officer needs to determine whether there has been an actual or potential significant permanent change in a worker's PFI. The Board officer would need basic information about the alleged change, such as how and when the worsening came about, and have either a diagnosis or evidence of the objective signs of worsening, which would best be provided by a doctor. A medical report would carry more weight than a worker's description because it is objective and provided by an expert. In this case the worker's apparent unwillingness to see a doctor or have a report sent to the Board weakened his own evidence, such that the Board officer not only had insufficient evidence of a significant change in the worker's condition to conclude such a change had occurred, but also insufficient foundational evidence to warrant attempting to gather further evidence about any such change.

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An amended decision has been issued for WCAT-2007-00524 and is attached to this document.

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WCAT Decision Date: February 14, 2007
Panel: Janice A. Leroy, Vice Chair

Introduction

The worker is now 38 years old. In 1993 he caught his right hand in a conveyor belt. He sustained burn injuries to his index finger and the dorsum of his middle finger, and ultimately required complete amputation of his index finger. Skin from the index finger was used for grafting onto the dorsum of the proximal phalanx of the middle finger. Healing went well but the worker remained extremely cold sensitive.

In January 1995 the Workers' Compensation Board, now operating as WorkSafeBC (Board), awarded the worker a permanent disability pension on a functional impairment basis, based on an impairment rating of 7.6% of total disability.

In a decision letter dated July 6, 2005 a Board case manager declined the worker's request for a referral to the Disability Awards Department for reassessment of his functional impairment, on the basis that there was no medical information on file that would support the contention that there had been a significant change in his pensionable condition.

The worker requested a review of the Board's decision. In a Review Division decision dated February 21, 2006 a review officer with the Review Division of the Board confirmed the Board's decision, again on the basis that there was "no evidence that the worker's condition has worsened".

The worker appealed the review officer's decision to the Workers' Compensation Appeal Tribunal (WCAT). Although notified of the worker's appeal, the employer did not file a notice of appearance, or otherwise participate in the appeal.

The worker requested an oral hearing, saying oral evidence was needed regarding his ongoing permanent impairment. The WCAT registrar determined that an oral hearing was not warranted, and arranged for written submissions. The worker's counsel filed a submission dated September 25, 2006.

The *Workers Compensation Act* (Act) provides that WCAT may conduct an appeal in the manner it considers necessary. Rule #8.90 of the WCAT *Manual of Rules of Practice and Procedure* (MRPP) provides that WCAT will normally grant a request for an oral hearing where the appeal involves a significant issue of credibility. An oral hearing may also be granted where there are significant factual issues to be determined, multiple appeals of a complex nature, complex issues with important

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implications for the compensation system, or where there are other compelling reasons for convening an oral hearing, such as where the appellant might have difficulty communicating in writing.

The worker contends that the Board was and remains obliged to refer his claim to Disability Awards for reassessment of his functional impairment on the basis of his evidence that his permanent condition has significantly deteriorated. He wishes to present this evidence orally.

Reopenings for reassessment of permanent impairment are about changes in medical conditions. Apart from any emotional impression the worker might seek to make by presenting his evidence orally, I am not persuaded that his evidence would be better understood, or his argument more clearly communicated in person than in writing. In fact when, as here, the issues are medical, the written format provides the opportunity for a more a more thorough and cogent presentation than does the oral format.

No issue of credibility is apparent, and the factual issues and procedural matters are not so complex that they must be presented orally to be fully appreciated or sorted out. Nor do I see the issue in this appeal as having important implications for the compensation system as a whole. Finally, the worker is represented by competent counsel.

I am thus satisfied that the worker's appeal can be fairly decided on the basis of a read and review of the claim file and written submissions.

Issue(s)

The issue is whether the worker's claim ought to be reopened for reassessment of his permanent functional impairment.

Jurisdiction

Bill 49, the *Workers Compensation Amendment Act, 2002,* significantly amended the Act in a number of areas. The changes became effective as of June 30, 2002. As the worker's injury and first indication that it was permanently disabling occurred before that date, this appeal is decided under the legislative provisions in effect prior to Bill 49.

Section 239(1) of the Act states that, with limited exceptions (which do not apply to this appeal), final decisions made by review officers in reviews under section 96.2 may be appealed to WCAT. Section 253(1) provides that WCAT may confirm, vary or cancel the appealed decision or order.

Background and Evidence

The worker's injury occurred in June 1993. He initially underwent a partial amputation of his right index finger and returned to his mill job. However, he found that the stump of his index finger was non-functional, so went on to have a complete amputation in March 1994. By early May 1994 he had completed physiotherapy and was beginning to lift weights to prepare for a return to his mill job on May 16, 1994. However, when he learned that he was scheduled to return to work operating a rip saw, he concluded he would be in danger doing this work, and in late May 1994 obtained work as a meat cutter in a local grocery store. He had done this work earlier in his career.

The worker attended a permanent functional impairment evaluation (PFIE) with a disability awards medical advisor (DAMA) on December 5, 1994. He advised he felt the surgery had been successful. The hand did not feel as cold as it had, but it was still cooler than his left hand in cold temperatures. There was no amputation pain. He had good feeling over the hand, though there was numbness over the surgical areas, including the grafting on the middle finger. He had a good grip, but after holding a knife all day he could feel very stiff in the three remaining fingers the next morning, especially the middle finger, and there was still some cramping in that finger. He could not completely straighten the middle finger. He was not on any medication.

On examination there was no purplish discolouration of the stump. The alignment of the space between the thumb and middle finger was good. Sensation in the fingertips was good. There was numbness over the surgical areas as the worker had stated. Grip strength on the right was reduced: 110 pounds on the right versus 135 pounds on the left. There was restricted range, especially in the PIP joint of the middle finger: 15 to 95 degrees on the right versus 0 to 110 degrees on the left. MP joint range on the right was 90 degrees versus 95 degrees on the left. DIP joint range was 80 degrees bilaterally.

The DAMA summarized his findings, saying the worker had a loss of his right dominant index finger and part of the metacarpal area. Surgical repair had been good. There was some remaining sensitivity over the dorsum of the hand and slight loss of range in the middle finger.

In a memo dated December 5, 1994 the DAMA said the worker had a complete loss of index finger and remaining stiffness in his right middle finger, which he rated at 7.6% of total disability using "Chart II". He said he felt that the functional loss in the middle finger would eventually settle so "it might be worthwhile to have another look at this finger in a year to two years from now".

The disability awards officer calculated a scheduled rating of 6.84% of total disability, but agreed with the DAMA's overall rating of 7.6%, commenting that this would include the impairment associated with altered sensation, cold sensitivity, and subjective complaints, which she considered to be consistent with the objective findings.

In late January 1995 the disability awards officer awarded the pension at 7.6%, effective from May 16, 1994. He commented that the DAMA anticipated eventual good recovery in the middle finger, and recommended reassessment in one to two years.

It appears that the worker returned to work at the mill at some point in January 2005. In a letter dated February 16, 1995 the worker's surgeon advised he had seen the worker in follow up. He had returned to work at the mill, and for the past month had been stacking lumber. This had put a significant strain on his right hand and wrist. The pain in his wrist seemed to be improving as he became hardened to the job, but there was still some continuing discomfort around the base of the amputated second metacarpal and this was not improving. The pain was worse at the start of the day, and improved as the hand gradually loosened up. He had had to take February 15, 1995 off due to the severity of the discomfort. The hand remained moderately cold sensitive. On examination there was no evident problem in the hand. It was not swollen and there was no significant limitation of movement or tenderness to palpation. The worker planned to continue in his present job and try to work through the morning stiffness and discomfort. The surgeon advised that the worker was welcome to return as necessary.

In a letter dated February 20, 1995 the disability awards officer confirmed a recent telephone conversation with the worker in which the worker had expressed that although he was back with the pre-injury employer at the same rate of pay as he had been earning at the time of injury, his hand was painful and he did not know how much longer he could continue. The officer commented that in his experience, hands could take several months to fully recover when used actively, and noted the worker was prepared to work with a rehabilitation consultant over the next few months to see if they could resolve the problem. Although it is not clear how he intended to do so, he undertook to leave the matter open for appeal for some time, in case the worker was not satisfied with the result after working with the consultant.

The worker did not appeal the pension decision. The Board did not revisit the pension in two years or at all.

The next communication from the worker was a telephone call in March 2005. He asked about having his pension reassessed. He followed this up with a letter dated March 31, 2005 in which he requested reassessment "for an injury occurring in 1993". He said he wanted a permanent settlement. He wrote, "I believe my disability level has changed since my one and only assessment several years ago".

In a claim log memo dated April 20, 2005 the Board case manager acknowledged the worker's letter of March 31, 2005 seeking a reassessment of his pension. He noted there was no recent medical information on file. He reported he had telephoned the worker and left a message asking him to see his family physician so that a medical report could be submitted detailing the changes in his medical condition. He said he told the worker he would refer the claim to Disability Awards if his doctor provided evidence of significant change.

In a memo dated May 25, 2005 the Board case manager reported that the worker had left a message, "again stating that he wants to settle his claim", but he had not seen his family doctor as requested. The case manager recorded that he had once again telephoned the worker and left a message explaining that claims were never "settled" in the same sense that ICBC settles claims. He told him that entitlement was determined based on evidence, and the most recent medical information on file was from 1998. He again suggested the worker see his family doctor and ask him to provide a report detailing changes in his medical condition.

In a letter dated June 30, 2005 the worker's counsel requested reassessment of the worker's compensable disability. He said the worker's current job required him to place his hands under cold water, and this caused increased pain in his right hand. Some days he could not even lift a cup of coffee, and repetitive tasks increased his pain. He was currently taking Acetaminophen. He had recently seen his family doctor, Dr. Penny, who had recommended he soak his hand in warm water each day to promote proper blood circulation and increase his range of motion. He said the worker also reported a decrease in his range of motion and an overall increase in the level of his pain.

The case manager then issued the decision letter of July 6, 2005 under appeal, which was addressed to the worker's counsel and copied to the worker.

In his submission to the Review Division the worker's counsel said a referral to Disability Awards was warranted based on the worker's evidence that his pain had increased and his range of motion had decreased, and he was having increased problems with cold intolerance and overall decreased strength and function in his right hand.

The review officer then issued her decision of February 21, 2006 under appeal, saying that by failing to file any medical evidence to support his contention that his pensionable condition had significantly deteriorated, the worker had failed to establish that there was a proper claim.

In his submission to WCAT the worker's counsel said the current disability award does not truly reflect the extent of the worker's current impairment. He said the worker had advised that:

- his grip strength had further decreased;
- his pain symptoms were now more acute;
- his cold sensitivity was far more disabling than in 1994 and impacted on his ability to work outdoors or in cold environments; and,
- the range of motion in his remaining fingers had decreased.

Counsel cited item #97.32 of *the Rehabilitation Services and Claims Manual, Volume I* (RSCM I), which states that a worker's statement about his or her own condition is evidence to the degree it relates to matters that would be within the worker's knowledge, and should not be rejected on the basis that it must be inherently biased. Further, there is no requirement that the statement of a worker about his or her own condition must be corroborated. The absence of corroboration might be grounds for interviewing the worker or having him or her examined by a medical advisor. A conclusion against the statement of a worker about his or her own condition may be reached if the worker's statement relates to a matter that could not possibly be within his or her knowledge, or if it rests on a substantial foundation, such as clinical findings; other medical or non-medical evidence; or serious weakness demonstrated by questioning the worker.

Counsel said the worker's statement about his own condition, at least concerning the subjective symptoms, is within his knowledge, so a reassessment of the worker's pension entitlement is warranted.

Reasons and Findings

WCAT panels must apply applicable policies of the board of directors of the Board. The policies relevant to this appeal are set out in the RSCM I.

Section 23(1) of the Act provides that where permanent partial disability results from a compensable injury, the impairment of earning capacity for pension purposes must be estimated from the nature and degree of the injury, or in other words, from the degree of physical impairment.

Section 23(2) of the Act authorizes the Board to compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations to use as a guide in determining the compensation payable in permanent disability cases. The Board has adopted the Permanent Disability Evaluation Schedule (PDES) found in Appendix 4 to the RSCM I as the rating schedule. The PDES attributes a percentage of total disability (where quadriplegia is rated at 100%) to each of the specified impairments.

In the present case the Board awarded the worker's disability pension based on the amputation value for the entire index finger plus partial amputation of the metacarpal, totaling 6.2%; for loss of range of motion in the middle PIP joint of .64%; and for subjective cold intolerance, loss of sensation and sensitivity on the dorsal portion of the hand totaling .76% of total disability, for an overall rating of 7.60% of total disability.

Item #42.20 of the RSCM I provides that if the disability on which an award is based worsens or resolves, the extent of the disability is reassessed, and a new award is made based on the reassessment.

Section 96(2) of the Act provides that the Board may reopen a matter if there has been a significant change in a medical condition that the Board has previously ruled as compensable, or if there has been a recurrence of the worker's injury.

Item #C14-102.01 of the RSCM I states that claims may be reopened for repeats of temporary disability, and also for any permanent changes in the nature or degree of a worker's permanent disability. It clarifies that "significant change", as that term is used in section 96(2), refers to a change in the worker's physical condition that would, on its face, warrant consideration of a change in compensation benefits or services, or in the case of a permanent condition, a change that is outside the range of fluctuation in the condition that would normally be associated with the nature and degree of the permanent disability.

So to warrant a reassessment of disability a worker's condition must have worsened or resolved, and any worsening must have been significant. As explained in item #34.12, no condition is ever absolutely stable or permanent; there will commonly be some degree of fluctuation. Pensions are intended to cover the range of fluctuations normally to be expected from the conditions for which they are granted. Thus only a change outside of that range – in other words, a significant change, will warrant a reassessment.

Until July 2, 2004 item #96.20 provided that it was the responsibility of Board officers in the Claims Department "to determine whether a worker's claim should be referred to the Disability Awards Department for review and possible pension evaluation". This decision was generally to be made "on the basis of information supplied by a treating physician, qualified practitioner, consulting specialist or the injured worker". The policy went on to provide that to ensure consistent referrals of all cases where there was a potential permanent disability, the Board officer was required to refer the claim to the Disability Awards Department for further evaluation where a medical report indicated that a permanent disability existed or potentially existed, or where a worker indicated there was a permanent disability.

Effective July 2, 2004 item #96.20 was amended to provide that it is the responsibility of Board officers to determine "whether an actual or potential permanent disability is accepted on the claim", rather than simply to determine whether a claim should be referred to the Disability Awards Department, as it previously provided. The language that these decisions should generally be made on the basis of information supplied by a treating physician, qualified practitioner, consulting specialist or the injured worker has been retained, but the directive that Board officers must refer the claim where a worker indicates that there is a permanent disability has been eliminated.

Item #96.30 now provides that where the Board officer has accepted an actual or potential permanent disability, Board officers in Disability Awards then decide the extent of the disability and calculate the worker's permanent disability award entitlement. Board officers in Disability Awards must accept the final decision of the Board officer as to what conditions are accepted under the claim.

Item #96.20 specifies that Board officers must first accept an actual or potential permanent conditions under the claim, before it can be referred to Disability Awards for assessment, and officers in Disability Awards may only make awards in relation to that or those conditions that have been so accepted. There is no corresponding policy specifically addressing the process by which actual or potential significant permanent changes may be accepted, and thus referred to Disability Awards for reassessment. However, I accept that through policy at #96.20 the Board intended to ensure a division of responsibility for decision making on claims between the Claim Department and the Disability Awards Department that reflected the respective expertise of Board officers in the two departments. That is, decisions about the existence and compensability of a likely permanent condition, in other words, medical and causation decisions, are to be made by claims officers; decisions about the existence and extent of a permanent disability in relation to such conditions, in other words, functional impairment and rating decisions, are to be made by disability awards officers.

Thus, even though item #96.20 does not specifically speak of changes in permanent conditions, it follows that the same process must apply to determine first the existence and compensability of an actual or potential significant change in a pensionable condition by the Claim Department, and second the impairment in relation to it by the Disability Awards Department.

I accept, therefore, that a Board officer in the Claims Department must first determine whether there is an actual or potential significant change in a pensionable condition before the claim can be referred to the Disability Awards Department for reassessment.

The worker's counsel contends that due to the fact that a worker's own evidence about his or her condition is evidence so long as it concerns a matter that is likely to be within the worker's knowledge, and so long as that evidence is not undermined by other probative evidence such as clinical findings, other medical o r non-medical evidence,

or serious weakness demonstrated by questioning, the Board officer in this case had sufficient evidence of a significant change in the worker's pensionable conditions to warrant acceptance referral to Disability Awards for reassessment.

However, item #97.00 explains that although there is no burden of proof on the worker, neither is there any presumption in the worker's favour. The Act contains pre-requisites for benefits. Some basic evidence must be submitted by the worker to show that there is a proper claim. The correct approach is to examine the evidence to see whether it is sufficiently complete and reliable to arrive at a sound conclusion with confidence and, if not, the adjudicator should consider what other evidence might be obtained, and must take the initiative in seeking further evidence.

As is the case with item #96.20, this policy specifically applies to initial entitlement issues, but the underlying reasoning applies generally to the nature of evidence required to establish entitlement to benefits at any point in the life of a claim. Thus, just as workers must provide some basic evidence at the outset of a claim to show that there is a proper claim, workers must likewise provide certain basic information when they seek a reopening of a claim, to show that there is a proper basis for a reopening, and the extent of that basic evidence necessary, and the weight to be attached to it, is entirely in the hands of the adjudicator.

So, although the workers' compensation system is an inquiry based one, such that Board officers do not merely weigh competing positions put forth by parties who are adverse in interest, but rather must inquire into the facts of a case, the duty to seek further evidence does not arise until a party seeking a benefit first submits some basic evidence that on its face would attract benefits. For this reason section 55(1) of the Act and item #93.20 of the RSCM I oblige workers to file applications for compensation setting out how and where and when they were injured, and the nature of the injuries. Similarly, item #94.10 obliges employers to file notices of injury, setting out the employer's understanding of how and when and where the worker was injured, and the nature of the injuries. Finally, item #95.00 of the RSCM I obliges medical practitioners to file reports of injury, and if treatment continues, ongoing progress reports.

Once the Board officer has the worker's application, the employer's report, and the doctor's report, he or she has the basic facts upon which to go about determining whether the worker is a worker under the Act who has an injury or occupational disease, and whether the injury or occupational disease arose in compensable circumstances. This foundational evidence allows the Board officer to either make a decision on the merits, or if the information in insufficient from which to make a sound decision with confidence, to go about obtaining the necessary evidence on which to reach a sound and fair decision.

Although workers and employers are not obliged to file specific forms when a worker believes his or her pensionable condition has significantly changed, the Board officer will need the same basic information about the alleged change as he or she would have needed in the case of an initial injury, before he or she can proceed to adjudicate entitlement. That is, the officer will need to know how and when the worsening came about, and have either a diagnosis or evidence of the objective signs of worsening, such as would be provided in a physician's first report filed at the outset of a claim. This latter evidence, the diagnosis and objective signs, is best provided by a doctor. First, a medical report carries more weight than a worker's description simply by virtue of the fact that it is objective and provided by an expert. Second, and perhaps even more important, one would generally expect a worker who has suffered such a significant change in his or her pensionable condition as to warrant a reopening to have consulted a doctor about the symptoms, or at the very least be willing to consult a doctor about the symptoms.

I accept that the worker feels his pensionable condition has deteriorated. He says his grip strength has further decreased; he has more pain; the range of motion in his middle finger is reduced; his cold sensitivity is more disabling. However, in spite of the Board officer having left him two messages asking him to see his doctor and have his doctor file a report, and having provided him with a decision letter essentially saying he required a report from his doctor, and the review officer again having said the same thing, the worker has either not seen his doctor, or has been unwilling to ask his doctor to send a report to the Board. Nor has he indicated that his doctor is unwilling to file such a report. This undermines or weakens his own evidence about the changes in his condition.

I find it was not unreasonable for the case manager to ask the worker to have his doctor send a report. Without such a report the case manager had only the worker's statement that he had more pain and thought his range of motion and grip strength had also deteriorated. Although all of those matters were within the worker's knowledge, the extent of them was and is a matter requiring medical opinion and/or measurement. The worker's apparent unwillingness to see a doctor or have a report sent to the Board weakened his own evidence, such that the case manager not only had insufficient evidence of a significant change in the worker's condition to conclude such a change had occurred, but also insufficient foundational evidence to warrant attempting to gather further evidence about any such change.

Conclusion

The appeal is denied. The review officer's decision is confirmed. I find there is insufficient evidence on which to conclude that the worker has suffered a significant deterioration in his pensionable condition, so the worker is not entitled to have his claim reopened for reassessment of his pensionable condition.

It remains open to the worker to file medical evidence indicating a significant change in his pensionable condition, and to again request a reopening for reassessment of his pensionable condition.

Expenses

No hearing expenses were requested. None are ordered.

Janice A. Leroy
Vice Chair

JAL/jkw

WCAT Amended Decision Number: WCAT-2007-00524a
WCAT Amended Decision Date: March 13, 2007
Panel: Janice A. Leroy, Vice Chair

Amended Decision

In *WCAT Decision #2007-00524*, issued on February 14, 2007, I denied the worker's appeal regarding his request for a referral to the Disability Awards Department for re-assessment of his functional impairment. It has come to my attention that my decision contains a date error in line one, paragraph three on page four and a typographical error appearing in line six, paragraph four on page nine. After reviewing the original decision, and based on the statutory authority set out in section 253.1(1) of the *Workers Compensation Act* (Act) regarding correction of decisions, I am amending the relevant paragraphs as follows (changes in bold):

Line one, paragraph three on page four:

> It appears that the worker returned to work at the mill at some point in January **1995**. In a letter dated February 16, 1995 the worker's surgeon advised he had seen the worker in follow up. He had returned to work at the mill, and for the past month had been stacking lumber. This had put a significant strain on his right hand and wrist. The pain in his wrist seemed to be improving as he became hardened to the job, but there was still some continuing discomfort around the base of the amputated second metacarpal and this was not improving. The pain was worse at the start of the day, and improved as the hand gradually loosened up. He had had to take February 15, 1995 off due to the severity of the discomfort. The hand remained moderately cold sensitive. On examination there was no evident problem in the hand. It was not swollen and there was no significant limitation of movement or tenderness to palpation. The worker planned to continue in his present job and try to work through the morning stiffness and discomfort. The surgeon advised that the worker was welcome to return as necessary.

Line six, paragraph four on page nine:

> Once the Board officer has the worker's application, the employer's report, and the doctor's report, he or she has the basic facts upon which to go about determining whether the worker is a worker under the Act who has an injury or occupational disease, and whether the injury or occupational disease arose in compensable circumstances. This foundational evidence allows the Board officer to either make a decision on the merits, or if the information **is** insufficient from which to make a sound decision with confidence, to go about obtaining the necessary evidence on which to reach a sound and fair decision.

Janice A. Leroy
Vice Chair

JAL/jk