Noteworthy Decision Summary

Decision: WCAT-2007-01040 **Panel**: Herb Morton **Decision Date:** March 29, 2007

Binding Effect of prior WCAT Decision on subsequent WCAT panel – Section 255 of the Workers Compensation Act

Reconsideration of a previous WCAT decision. The reconsideration panel provides a discussion of the binding effect of a previous WCAT decision on a subsequent WCAT panel. The subsequent panel had relied upon new medical evidence in refusing to be bound by a prior WCAT decision. This was patently unreasonable and the decision was set aside as void.

A prior WCAT panel found that, because the worker had chronic regional pain syndrome (CRPS) as well as a bilateral wrist and thumb tendonitis condition, there was persuasive medical evidence that the worker likely had a permanent functional impairment. Therefore, the worker was entitled to a permanent partial disability pension award, pursuant to section 23 of the *Workers Compensation Act*.

The Workers' Compensation Board, operating as WorkSafeBC (Board), issued an implementation decision which found no permanent functional impairment other than the worker's chronic pain complaint. A Board medical advisor had examined the worker and found no physical findings suggestive of CRPS. The medical advisor described the worker's condition as chronic pain complaints. There was no evidence of a permanent functional impairment. The worker was provided a 2.5% pension award for chronic pain.

The original panel accepted that the prior WCAT decision was binding at the time it was made but did not consider that this prior WCAT decision was binding with respect to a diagnosis in perpetuity. It did not preclude a decision, based on subsequent evidence, that the CRPS had resolved. The original panel thus accepted the medical advisor's findings that the worker no longer exhibited symptoms of CRPS. The Board had correctly determined that the worker did not meet the diagnostic criteria for CRPS, and his pain complaints should be recognized by the 2.5% award for chronic pain.

The reconsideration panel allowed the worker's reconsideration application. The reconsideration panel agreed that, where medical evidence establishes a change in a worker's condition, there is the basis for a new decision that does not impugn or call into question the prior decision. However, that is not what happened in this case. The original panel considered new evidence which called into question the previous WCAT panel's decision and reached a conclusion inconsistent with it. This was not open to the original panel. Failing to recognize the previous WCAT decision as binding in relation to matters as they stood at and prior to the date of that decision is patently unreasonable.

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WCAT Decision Number: WCAT-2007-01040
WCAT Decision Date: March 29, 2007
Panel: Herb Morton, Vice Chair

Introduction

The worker seeks reconsideration of the September 20, 2006 Workers' Compensation Appeal Tribunal (WCAT) decision (*WCAT Decision #2006-03807*). The worker submits that the WCAT decision was patently unreasonable.

The worker is represented by a lawyer (counsel), who filed a petition for judicial review on December 1, 2006. Counsel submitted that the 2006 WCAT decision contravened the *Workers Compensation Act* (Act), in refusing to follow a prior binding WCAT decision (*WCAT Decision #2004-004407-RB*, August 24, 2004).

By letter dated January 8, 2007, WCAT's legal counsel provided counsel with information regarding the grounds for requesting reconsideration, including the "one time only" limitation on reconsideration applications. On January 24, 2007, counsel submitted an application for reconsideration which incorporated by reference the statement of facts set out in the Petition. On January 29, 2007, WCAT's legal counsel referred the worker's application to the WCAT Registry for handling on an expedited basis. On February 5, 2007, the WCAT appeal coordinator invited submissions from the applicant. Counsel provided a further submission dated March 12, 2007. The employer is not participating in this application, although invited to do so.

I find that the issue as to whether common law grounds for reconsideration are established 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 2006 WCAT panel have jurisdiction to reach a different conclusion than was reached in the 2004 WCAT decision, based on new medical evidence? Was the 2006 WCAT decision patently unreasonable, in finding that the worker was not entitled to a pension award for chronic regional pain syndrome (notwithstanding the 2004 WCAT decision that the worker was entitled to such an award)?

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

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evidence as set out in section 256 of the Act, or on the basis of an error of law going to jurisdiction, including a breach of natural justice (which would affect the validity of the decision). 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 WCR 211. This authority is further confirmed by section 253.1(5) of the Act.

Effective December 3, 2004, the provisions of the *Administrative Tribunals Act* (ATA) affecting WCAT were brought into force. Section 58 of the ATA concerns the standard of review to be applied in a petition for judicial review of a WCAT decision. Item #15.24 (Reconsideration on Common Law Grounds) of WCAT's *Manual of Rules of Practice and Procedure*, as amended December 3, 2004, 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. Section 58(2) of the ATA provides:

> (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
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> (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.

This application has been assigned to me by the WCAT chair for consideration under a written delegation of authority (paragraph 24 of *Decision of the Chair No. 9*, "Delegation by the Chair", February 1, 2007).

Background

The worker's 1997 claim was accepted on a permanent basis for a left wrist and thumb tendonitis and right wrist tendonitis. The worker appealed five decisions by officers of the Workers' Compensation Board, operating as WorkSafeBC (Board), to the former Workers' Compensation Review Board (Review Board). Those five decisions were dated August 8, 2000, May 3, 2001, June 5, 2001, May 1, 2002 and September 10, 2002. As a result of the March 3, 2003 changes to the appeal structures contained in

the *Workers Compensation Amendment Act (No. 2), 2002*, these appeals were transferred to WCAT for completion. All five appeals were considered together in *WCAT Decision #2004-04407-RB*. The issues addressed in the 2004 WCAT decision were as follows (at pages 1-2):

1. Is either the diagnosis of Dupuytren's contractures or complex regional pain syndrome a compensable consequence?
2. Is the diagnosis of fibromyalgia a compensable consequence?
3. Is the worker entitled to a permanent partial disability award?
4. Is the worker entitled to vocational rehabilitation benefits beyond October 29, 2000?
5. Is the worker entitled to medical aid for palm protective gloves and prescription medicine?

In its decision, the WCAT panel considered the opinion provided by Dr. Laidlow, a physical medical and rehabilitation specialist. Under the heading "Reasons and Findings", the WCAT panel found at pages 10-11 as follows:

> I find that the preponderance of evidence indicates that the worker's complex regional pain syndrome is a compensable consequence. I do not find that the differential diagnosis of fibromyalgia and/or Dupuytren's contractures are plausible clinical diagnoses.
>
> . . .
>
> **Because of my finding that the worker also had regional complex pain syndrome, Type 1 as well as a bilateral wrist and thumb tendonitis condition, I find there is persuasive medical evidence that the worker likely has a permanent functional impairment. Therefore, the worker is entitled to a permanent partial disability pension award, pursuant to section 23 of the Act.** In this regard I considered the worker's and other evidence regarding the worker's reduced employability and limitations and restrictions for employment. I accept that the worker has some significant limitations for employment, particularly arising from his complex regional pain syndrome symptomatology. Therefore I recommend that the Board complete a permanent functional impairment examination, another functional capacity evaluation and then complete another employability assessment, as part of the permanent partial disability assessment process.
>
> [emphasis added]

Under the heading "Conclusion", the WCAT panel further stated at page 11 (in part):

> For the above noted reasons I allow the worker's appeal in part. I find that complex regional pain syndrome is acceptable under the claim. I vary the Board's determination in this regard. **I also find that the worker likely has a permanent functional impairment and should be assessed for a permanent partial disability.** I vary the Board's determination in this regard.
>
> [emphasis added]

The worker was examined at the Board on May 13, 2005 by a disability awards medical advisor (DAMA). By memo dated May 13, 2005, the DAMA advised the disability awards officer as follows:

> This worker's presentation is very inconsistent. As far as I can see he has no physical findings suggestive of either Type 1 or 2 Chronic Regional Pain Syndrome. In fact in reviewing his file one notes that none of the consultants actually found any physical signs of real pathology. All he has are chronic complaints of pain. His presentation is so varied inconsistent [*sic*] that I would not accept any abnormal findings particularly regarding strength to be of significance. Overall I would describe this as chronic complaints of pain with no clinical or pathological findings. I see no evidence of permanent functional impairment.
>
> The worker has refused to consider attending a chronic pain facility. He states that he is happy to continue with his Oxycodeine dose. With the inconsistency of his presentation I would suggest that Oxycodeine is not appropriate here.

By decision dated July 20, 2005, the claims adjudicator, Disability Awards Department (CADA), advised the worker concerning the implementation of the 2004 WCAT decision. He advised the worker that he had been granted an award of 2.5% for his compensable condition, effective March 22, 1999. His award was based on his permanent partial disability wage rate of $2,694 per month. The accompanying memo dated July 14, 2005, entitled "Form 24 FP – PFI Review (Former provisions)", explained:

> …I agree with the opinions of the Disability Awards Medical Advisor that there is no permanent functional impairment other than the worker's chronic complaint of pain. I have reviewed Board policy concerning chronic pain. In this situation, I conclude that the worker has non-specific chronic pain which is disproportionate to the injury. I have now granted the worker 2.5% for chronic pain.

The July 20, 2005 decision further advised the worker that an employability assessment would be completed at a later date by the vocational rehabilitation consultant.

The worker requested review of the July 20, 2005 decision. By decision dated February 13, 2006 (*Review Decision #R0057415*), the review officer found in part:

> My review of the WCAT decision indicates that WCAT only determined that the worker's claim should have been accepted for CRPS. WCAT did not make any determination with respect to any permanent partial disability as a result of the CRPS.
>
> Policy item #96.30 provides that the Board Office [*sic*] in Disability Awards, in this case the CADA, is responsible for determining whether a worker's injury or occupational disease has caused a permanent disability. The CADA also decides the extent of the disability and calculates the worker's permanent disability award. As noted, the DAMA's report is the primary input that the CADA must consider in reaching his or her decision.
>
> In this case, after examining the worker, the DAMA concluded that the worker no longer had any physical findings suggestive of type I or II CRPS. The worker has not presented any expert evidence to the contrary. As a result, I agree with the CADA's decision to rely on the DAMA's expert evidence in concluding that the worker does not have a permanent disability as a result of CRPS.

However, the review officer further found that the CADA had erred in adjudicating the worker's pain complaints under policy item #39.01, "Chronic Pain", rather than the former policy item #39.01, "Subjective Complaints", of the *Rehabilitation Services and Claims Manual*, Volume I (RSCM I). The review officer concluded as follows:

> Therefore, as a result of my review, I refer the decision of July 20, 2005, with respect to issue #2, back to the Board with the following directions:
>
> The Board will provide the worker with a new decision with respect to the assessment of his functional award following the completion and review of the EA [employability assessment] of the worker. Following the completion and review of the EA, the Board will determine whether the worker is entitled to a functional award for his subjective complaints of pain under the provisions of policy item #39.01, *Subjective Complaints.* I confirm the Board's decision that the worker does not have any other permanent functional impairment.

Section 239(2) of the Act provides that:

> (2) The following decisions made by a review officer may not be appealed to the appeal tribunal:
>
> (a) a decision in a prescribed class of decisions respecting the conduct of a review;

Section 224(2)(j) of the Act provides that the Lieutenant Governor in Council may make regulations:

> (j) prescribing any decisions or orders under this Act or the regulations that may be appealed to the appeal tribunal under Part 4, prescribing who may appeal those decisions or orders and prescribing classes of decisions for purposes of section 239 (2)(a);

Section 4 of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/2002, provides:

> For the purposes of section 239 (2)(a) of the Act, the following are classes of decisions that may not be appealed to the appeal tribunal:
>
> . . .
>
> (d) decisions about whether or not to refer a decision back to the board under section 96.4 (8)(b) of the Act;

While the February 13, 2006 Review Division decision about whether or not to refer the July 20, 2005 decision back to the board under section 96.4(8)(b) of the Act was not appealable, the directions contained in the Review Division were appealable to WCAT (see *WCAT Decision #2004-03138*, June 16, 2004, summarized as noteworthy on the WCAT website).

The case manager issued a decision dated February 21, 2006, in implementation of the February 13, 2006 Review Division decision. The case manager advised the worker:

> Noting the above decision your file has been assigned to Claims Adjudicator Disability Awards and referral made to Vocational Rehabilitation for completion of an Employability Assessment. You will hear directly from those departments with regard to the referrals.
>
> No further claims intervention is indicated at this time.

The worker appealed the February 13, 2006 Review Division decision to WCAT. In the October 5, 2006 WCAT decision, the panel found as follows regarding the effect of the 2004 WCAT decision (at pages 4-5):

> **In an August 24, 2004 finding, a prior WCAT panel found that the preponderance of evidence indicated that the worker's CRPS was a compensable consequence of his work injury**. The panel did so on the basis of Dr. Laidlow's diagnosis, given his expertise, and because he had examined the worker on at least two occasions. The panel was also satisfied that Dr. Laidlow had a complete understanding regarding the worker's symptomatology from the time of onset.
>
> However, the panel agreed with the Board that the differential diagnosis of fibromyalgia and/or Dupuytren's contractures were not plausible clinical diagnoses. The WCAT panel accepted the medical evidence which indicated no convincing symptoms of any rheumatologic or other non-compensable systemic disorders; as the Board's decisions were all predicated on the Board medical advisor's view that a non-compensable systemic disorder was at play, and responsible for the worker's ongoing symptomatology (beyond the worker's accepted tendonitis condition), the panel found that those decisions were fatally flawed.
>
> **The WCAT panel found that there was persuasive medical evidence that the worker had a PFI, and he was entitled to a pension award pursuant to section 23 of the Act**. The panel accepted that the worker had "some significant limitations for employment", and recommended that the Board complete a PFI examination, another functional capacity evaluation and another EA as part of the permanent partial disability assessment process. While the panel found that the worker, because of his failure to participate in any self-directed vocational rehabilitation plan after October 29, 2000, was not entitled to retroactive vocational rehabilitation, the panel thought that the Board might consider vocational rehabilitation efforts, particularly on-the-job training, to mitigate any potential loss of earnings, and the worker would be entitled to such services.
>
> [emphasis added]

My decision is concerned with the subsequent analysis by the 2006 WCAT panel, as set out below, regarding the effect of the 2004 WCAT decision. My analysis will proceed on the assumption that the above interpretation by the 2006 WCAT panel of the 2004 WCAT decision was correct. The WCAT panel considered the legal effect of the 2004 WCAT decision as follows (at pages 13-14):

> I acknowledge the August 2004 WCAT decision that the worker was suffering from CRPS, and that it was affecting his ability to return to work.

> **Although that decision was made on the basis of a diagnosis by Dr. Laidlaw only, it is binding on this panel insofar as this: I must accept that, at the time of the WCAT decision, the worker was suffering from CRPS, and it was affecting the worker's ability to return to work. However, a prior WCAT decision does not bind one to a diagnosis in perpetuity**. For example, if a WCAT decision finds that a worker is, at the time of the decision, temporarily disabled as a result of a condition, it cannot later be argued that because WCAT found that the worker's condition was temporary, it can never become permanent. **Likewise, although a WCAT decision can find that a worker is suffering from a certain condition at the time of the decision, it does not preclude a decision, based on subsequent evidence, that the condition has resolved**.
>
> [emphasis added]

With respect to the worker's case, the 2006 WCAT decision found that "the evidence that the worker is suffering from CRPS is slight." The 2006 WCAT decision concluded:

> I accept, as I must, the August 2004 WCAT finding that the worker was suffering from CRPS and that it was affecting his ability to work. However, from the time of that decision, the only medical evidence submitted to the claim file were physician's progress reports from the worker's attending physician, noting his upper extremity pain and repeating the diagnosis (which is referred to as reflex sympathetic dystrophy).
>
> As indicated in item #97.40 of the RSCM I, the report of the DAMA or external service provider engaged by the Board, is expert evidence, which in the absence of expert evidence to the contrary should not be disregarded. The worker has submitted no new medical evidence in support of his appeal. **I therefore accept the finding of the DAMA that, at the time of the PFI evaluation, the worker was no longer exhibiting symptoms of CRPS Type 1 or Type 2. That being the case, I find that the Board correctly determined that the worker did not meet the diagnostic criteria for CRPS, and his pain complaints should be recognized by a 2.5% award for chronic pain**.
>
> Finally, I must address two prior WCAT decisions regarding CRPS, brought to the panel's attention by the worker's representative. In the first, *WCAT 2005-02202*, the panel considered it clear that "pain symptoms are only adjudicated under the chronic pain policy where a CRPS diagnosis has not been accepted". In that case CRPS *had* been accepted, and therefore the panel found that the worker's pain had been incorrectly adjudicated under the worker's chronic pain policy. However, in the case at hand, I have found that the worker no longer meets the diagnostic

> criteria of CRPS; this case confirms that the Board therefore correctly adjudicated the worker's pain complaints under the Board's chronic pain policy.
>
> [emphasis added]

It is apparent from the WCAT panel's reasoning in this last passage that its conclusion that the worker no longer met the diagnostic criteria for CRPS was central to its decision to deny the worker's appeal.

In a subsequent decision dated October 17, 2006, the CADA found that the Review Division decision of February 13, 2006 had confirmed the July 20, 2005 decision. The CADA noted that the 2006 WCAT decision had confirmed the February 13, 2006 Review Division decision, and determined that there was no permanent functional impairment with regard to the previously diagnosed chronic regional pain syndrome condition. The CADA found that the worker would be capable of securing employment as a Sheet Metal and Plasma Table Operator without sustaining any long-term loss of earnings. A loss of earnings pension award was denied. The worker has requested review by the Review Division of the October 17, 2006 decision (*Request for Review Reference #R0074434*).

Reasons and Findings

An application for reconsideration on the common law grounds concerns whether a valid decision has been rendered. In general, this requires consideration as to whether the WCAT decision was patently unreasonable. 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 explained the effect of the "patent unreasonableness" standard of review (at paragraph 37):

> . . .a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable.

Counsel for the worker submits that the 2006 WCAT decision failed to take statutory requirements into account, and is patently unreasonable. He argues, in part:

> We take issue with the examples set out in the Second Decision as justifying the position taken by the panel. The first example is that "if a WCAT Decision finds that a worker is at the time of the decision, temporarily disabled as a result of a condition, it cannot later be argued

> that because WCAT found that the worker's condition was temporary it can never become permanent". With the greatest of respect, how could anyone ever argue that a temporary disability can never become permanent? In fact all temporary disabilities are eventually adjudged as being permanent or resolved. That is simply not analogous to a panel overruling another panel after a period of two years as to whether a permanent partial disability exists.

Section 255 of the Act concerns the "final and conclusive" legal effect of a WCAT decision. It provides that the Board must comply with a final WCAT decision:

> (1) Any decision or action of the chair or the appeal tribunal under this Part is final and conclusive and is not open to question or review in any court.
>
> . . .
>
> (3) The Board must comply with a final decision of the appeal tribunal made in an appeal under this Part.

Section 256(2) provides that:

> A party to a completed appeal may apply to the chair for reconsideration of the decision in that appeal if new evidence has become available or been discovered.

A "new evidence" application must meet the tests set out in section 256(3), and may be made on one occasion only (section 256(4)). An application for reconsideration of a WCAT (or former Appeal Division) decision on the basis of new evidence may only be brought by a party to the completed appeal, and the application can only be made to the WCAT chair.

Under section 236(4) of the Act, the WCAT chair may delegate the authority of the chair as follows:

> Subject to section 251(9), the chair may delegate in writing to another member of the appeal tribunal or to an officer of the appeal tribunal a power or duty of the chair and may impose limitations or conditions on the exercise of that power or performance of that duty.

The delegation decisions of the WCAT chair are accessible on the WCAT website (currently listed under "Publications"). At the time of the October 5, 2006 WCAT

decision, paragraph 25 of *Decision of the Chair No. 8*, "Delegation by the Chair", March 3, 2006, provided:

> 25. **Reconsideration of appeal decision — section 256 and common law**
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> I delegate the authority of the chair:
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> (a) under section 256, to refer a WCAT or Appeal Division decision to WCAT for reconsideration, and,
>
> (b) where such authority exists at common law, the authority to set aside a decision as void or to find that a decision is incomplete, and to return the matter to WCAT for completion of the decision,
>
> to the following position (upon assignment by the chair):
>
> member.

At the time of the 2006 WCAT decision, there had not been any application by a party for reconsideration of the 2004 WCAT decision on the basis of new evidence under section 256 of the Act (nor any assignment by the WCAT chair of such an application to a WCAT member for consideration pursuant to a written delegation).

The Board's authority to reopen or reconsider is set out in section 96 of the Act. This provides:

> (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.

The Board has no authority to reconsider a WCAT decision. Even in the case of fraud or misrepresentation, the Board may only reconsider a decision or order made by it or by an officer or employee of the Board under Part 1 of the Act. This does not include WCAT decisions under Part 4 of the Act.

At the time of the CADA's July 20, 2005 decision, policy at RSCM I item C14-102.01, "Changing Previous Decisions – Reopenings", provided:

> **(a) General**
>
> **The reopening of a previous decision does not affect the application of the decision to the period prior to the significant change in the worker's medical condition or the recurrence of the worker's injury**. Rather, it enables the Board to reopen matters previously decided and determine a worker's ongoing entitlement. A reopening involves the adjudication of new matters.

(b) A reopening is not a reconsideration

A reopening is to be distinguished from a reconsideration of a previous decision.

A reconsideration occurs when the Board considers the matters addressed in a previous decision anew to determine whether the conclusions reached about these matters reached were valid. Where the reconsideration results in the previous decision being varied or cancelled, it constitutes a redetermination of those matters.

[emphasis added]

Policy at item C14-101.01 ("Changing Previous Decisions – General") further provided:

(a) New matters not previously decided

The need to adjudicate new matters not previously decided and make decisions on these matters may occur at various points during the adjudication of a claim. **The limits in the *Act* on the Board's ability to change previous decisions through a reconsideration or a reopening are not intended to restrict the Board's ability to make new decisions in accordance with the *Act* and policy that do not question previous decisions**.

[emphasis added]

Given the "final and binding" nature of a WCAT decision, a useful analogy may be drawn to Medical Review Panel (MRP) certificates. Prior to March 3, 2003, section 65 of the Act provided that a MRP certificate is "conclusive as to the matters certified and is binding on the Board." In October, 2006, policy in the *Appendix to Item C13-103.00*, RSCM I, explained the effect of a "binding" MRP certificate as follows:

#103.86 Certificate Binding on the Board

Section 65 provides that a properly constituted certificate which certifies to a medical decision of a Medical Review Panel is conclusive as to the matters certified to and is binding on the Board. **Any subsequent decision of the Board at any point in time, must be consistent with the certificate**. For example, a Board officer in the Compensation Services Division could not decide, e.g. even 10 years after a Panel certificate was issued stating there was no disability, that the worker had a disability, if there was no change in the medical evidence upon which the Medical Review Panel certificate was based. **However, a Medical Review Panel certificate is binding on the Board only to matters as they stand at and prior to the date of the certificate. A decision by a**

> **Medical Review Panel that a worker has no disability could be followed by a decision of the Board officer made a week after the Medical Review Panel decision that the worker had a disability if there was evidence that a new disability had arisen on the same claim after the Medical Review Panel had issued its certificate. Similarly it is open to the Board to make a decision as to the nature and extent of disability of a worker after a certificate is issued without being bound by the terms of that certificate if there is evidence that the worker's condition has changed, so long as that decision is not inconsistent with the original Medical Review Panel certificate.**
>
> [emphasis added]

Although provided in a different context, I consider that this reasoning similarly provides useful guidance regarding the effect of a binding WCAT decision. This reasoning would similarly apply to a Review Division decision which has not been reconsidered or appealed. Section 96.4(9) of the Act provides:

> Subject to sections 96.5 and 239, a decision by the review officer under subsection (8) is final and the Board must comply with that decision.

In this case, the July 20, 2005 decision by the CADA concerned the initial implementation of the 2004 WCAT decision. This involved the making of a pension award retroactive to March 22, 1999.

An element of ambiguity is present in the conclusion provided in the 2004 WCAT decision, where it found that the worker should be assessed for a permanent partial disability. Such language would normally only involve a referral of a worker for assessment, without anticipating the outcome of the assessment. In this case, however, the 2004 WCAT decision further stated that the worker had "regional complex pain syndrome, Type 1 as well as a bilateral wrist and thumb tendonitis condition" and that he was "entitled to a permanent partial disability pension award, pursuant to section 23 of the Act." The 2006 WCAT panel found that the 2004 WCAT panel "found that there was persuasive medical evidence that the worker had a PFI, and he was entitled to a pension award pursuant to section 23 of the Act." Accordingly, one of the issues for consideration by the 2006 WCAT panel concerned the legal effect of such a finding.

In *Cowburn v. BC (WCB)*, [2006] B.C.J. No. 1020, 2006 BCSC 722, 148 A.C.W.S. (3d) 1037, May 5, 2006, the British Columbia Supreme Court granted the petitioner's application to quash a policy of the board of directors on the basis that it involved a

patently unreasonable interpretation of the Act. The Court explained the meaning of the test of "patent unreasonableness" as follows:

> [25] The judgment of Mr. Justice Iacobucci in ***Canada (Director of Investigation & Research) v. Southam Inc.***, [1997] 1 S.C.R. 748, is frequently cited by courts attempting to define patent unreasonableness**.** He said the following at p. 777**:**
>
> > The difference between "unreasonable" and" patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in ***Canada (Attorney General) v. P.S.A.C.***, [1993] 1 S.C.R. 941, at p. 963, "[i]n the Shorter Oxford English Dictionary' patently', an adverb, is defined as 'openly, evidently, clearly"'. This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem. See ***National Corn Growers Assn. v. Canada (Canadian Import Tribunal)***, [1990] 2 S.C.R. 1324, at p. 1370, per Gonthier J.; see also ***Toronto (City) Board of Education v. O.S.S.T.F., District 15***, (1997), 144 D.L.R. (4th) 385 *per* Cory J. But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident. [emphasis added]
>
> [26] He expanded on this principle in ***Ryan v. Law Society (New Brunswick)***, [2003] 1 S.C.R. 247, where he said at ¶ 52:
>
> > [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. P.S.A.C.*, [1993] 1 S.C.R. 941 (S.C.C.), at pp. 963-964, *per* Cory J., *Sherbrooke (Ville) c. Centre communautaire juridique de l'Estrie*, [1996] 3 S.C.R. 84 (S.C.C.), at paras. 9-12, *per* Gonthier J.). A decision that

> is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

[27] More recently, in ***Voice Construction Ltd. v. Construction & General Workers' Union,*** [2004] 1 S.C.R. 609, Mr. Justice LeBel offered the following comment at ¶ 41:

> It is illuminating in this respect to consider the definition of patent unreasonableness by Dickson J. (as he then was) in ***C.U.P.E., Local 963 v. New Brunswick Liquor Corp.***, [1979] 2 S.C.R. 227 (S.C.C.), at p. 237, which is the seminal judgment of our Court in the development of a modern law of judicial review. Rather than contemplating the metaphysical obviousness of the defect, he explained that a decision will only be patently unreasonable if it "cannot be rationally supported by the relevant legislation."

The 2006 WCAT panel found that "a prior WCAT decision does not bind one to a diagnosis in perpetuity." The examples provided by the panel both concerned situations involving a later change in a worker's condition which would provide a new basis for a decision without impugning or calling into question the prior decision. The examples listed were:

- if a WCAT decision finds that a worker is, at the time of the decision, temporarily disabled as a result of a condition, it cannot later be argued that because WCAT found that the worker's condition was temporary, it can never become permanent; and,
- although a WCAT decision can find that a worker is suffering from a certain condition at the time of the decision, it does not preclude a decision, based on subsequent evidence, that the condition has resolved.

However, the WCAT panel then proceeded to consider new evidence which called into question the 2004 WCAT decision, and reached a conclusion inconsistent with the 2004 WCAT panel (while addressing the worker's appeal concerning the initial implementation of the 2004 WCAT decision).

The 2006 WCAT decision concerning the legal effect of the prior WCAT decision involved a "finding of law" for the purposes of section 58(2)(a) of the ATA, which must not be interfered with unless it is patently unreasonable. A patently unreasonable decision has been described as one which is "clearly irrational" or "evidently not in accordance with reason", or which "cannot be rationally supported by the relevant legislation." I consider that this is a situation in which the WCAT decision contained a patently unreasonable defect which, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. The 2006 WCAT

decision erred in failing to recognize the 2004 WCAT decision as binding in relation to matters as they stood at and prior to the date of the 2004 WCAT decision.

Under section 255 of the Act, the Board was legally obliged to implement the 2004 WCAT decision. Following implementation of the WCAT decision, it would be open to the Board to consider whether there was a significant change in the worker's medical condition that the Board had previously decided was compensable, or a recurrence of the worker's injury, so as to warrant a new decision under section 96(2) of the Act. It was not open to the Board to decide, in light of new evidence, that the 2004 WCAT decision no longer applied or that it could be modified, without it ever being implemented. Hence, it was not open to the WCAT panel to reach such a conclusion on appeal.

The worker's appeal concerned the Board's initial implementation of the 2004 WCAT decision, rather than concerning a subsequent reassessment under section 96(2) of the Act. The 2006 WCAT decision erred in finding that it had authority to make a new decision, on the basis of new evidence, which was inconsistent with the prior WCAT decision. I agree with counsel that this was a patently unreasonable decision, which was outside the WCAT panel's authority under the Act. The 2006 WCAT decision cannot be rationally supported by the relevant legislation. Accordingly, the 2006 WCAT decision is set aside as void (in whole).

The 2006 WCAT decision also purported to confirm the February 13, 2006 Review Division decision. However, the conclusion by the 2006 WCAT panel, that the Board had correctly adjudicated the worker's subjective complaints under its policy dealing with chronic pain, appears to have been inconsistent with the referral made by the review officer back to the Board with the direction that the worker's claim should be adjudicated under the Board's former policy concerning subjective complaints rather than the January 1, 2003 policy concerning chronic pain. In view of my conclusion set out above, I need not address this issue.

Counsel suggests that if it is agreed that the second WCAT panel cannot overrule the first panel, the proper remedy would be to provide a direction that the "Original Decision" be implemented. I find that the wording of section 255 of the Act itself provides the necessary direction requiring implementation of the 2004 WCAT decision.

My decision is limited to considering whether grounds have been established, at common law, for setting aside the 2006 WCAT decision. The question as to whether the February 13, 2006 decision by the review officer properly implemented the 2004 WCAT decision is not before me. That issue concerns the merits of the worker's appeal from the Review Division decision. The worker's appeal of the "directions" contained in the February 13, 2006 Review Division decision will be considered afresh by WCAT.

Conclusion

The worker's application for reconsideration of *WCAT Decision #2006-03807* is allowed on the common law ground of an error of law going to jurisdiction. In addressing the worker's appeal concerning implementation of the 2004 WCAT decision, the 2006 WCAT panel had no jurisdiction to render a decision inconsistent with the prior WCAT decision on the basis of new evidence. Accordingly, the 2006 WCAT decision is set aside as void. The worker's appeal of the "directions" in the February 13, 2006 Review Division decision will be considered afresh by WCAT. The WCAT Registry will contact the parties concerning the further handling of the worker's appeal.

Herb Morton
Vice Chair

HM/cda