Noteworthy Decision Summary

Decision: WCAT-2007-01893 Panel: Herb Morton **Decision Date:** June 21, 2007

Reconsideration – New Evidence must be Substantial and Material – New Medical Evidence not "Substantial" if based on Different Facts – Section 256(3) of the Workers Compensation Act

This reconsideration decision is noteworthy because of its determination that, for purposes of meeting the requirements of section 256(3) of the *Workers Compensation Act* (Act), new medical evidence is not "substantial" if it is based upon different facts than those which formed the basis of the original panel's decision and if it is ambiguous in terms of the degree to which it supports a finding that the worker's problems were due to his employment.

The worker sought to have a previous WCAT decision reconsidered on the basis of new medical evidence pursuant to section 256(3) of the Act. The panel denied the worker's reconsideration application.

The reconsideration panel stated that any factual assumptions on which the new medical opinion was based had to be carefully evaluated. The panel found two factors which, in combination, detracted from the usefulness of the new medical opinion, so that it did not meet the test in section 256(3) of providing "substantial" new evidence. Firstly, the new medical opinion appeared to be based, at least in part, on background facts which differed from those which formed the basis for the original panel's decision. Secondly, the phrase in the medical opinion "could definitely" was ambiguous in terms of the degree to which it expressed support for a finding that the worker's problems were due to his employment.

WCAT Decision Number : WCAT-2007-01893
WCAT Decision Date: June 21, 2007
Panel: Herb Morton, Vice Chair

Introduction

The worker seeks reconsideration of the May 12, 2005 Workers' Compensation Appeal Tribunal (WCAT) decision (*WCAT Decision #2005-02474*). His application is based on new medical evidence, pursuant to section 256 of the *Workers Compensation Act* (Act). He has provided a report dated February 18, 2006, signed by Dr. M. Segal, resident, and Dr. A. Yassi, a specialist in both community medicine and occupational medicine. For convenience, I will refer to this as Dr. Yassi's letter.

By letter dated December 4, 2006, the WCAT appeals coordinator provided information to the worker regarding the grounds for requesting reconsideration, including the "one time only" limitation on reconsideration applications. The worker provided submissions dated May 24, 2006, June 5, 2006 and May 10, 2007 in support of his application. The employer is not participating in this application, although invited to do so.

The worker states that if possible, he would like an oral hearing review of his claim. I find that the issue as to whether the requirements for obtaining reconsideration are met involves questions of a legal nature which can be properly considered on the basis of written submissions without an oral hearing.

Reference in this decision to the Board or the WCB means the Workers' Compensation Board, also known as WorkSafeBC.

Issue(s)

Is there new evidence which:
(a) is substantial;
(b) is material; and,
(c) did not exist at the time of the 2005 WCAT hearing; or,
(d) did exist but was not discovered and could not through the exercise of reasonable diligence have been discovered?

Jurisdiction

Section 255(1) of the Act provides that a WCAT decision is final and conclusive. A WCAT decision 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. This

reconsideration application was assigned to me by the WCAT chair on the basis of a written delegation.

Findings and Reasons

By letter of May 24, 2006, the worker provides an explanation as to the factors which delayed his application for reconsideration. As there is no time limit for making an application for reconsideration, I need not address this history. In any event, the worker acted promptly in pursuing his application, once he obtained the February 18, 2006 letter.

In order for a WCAT decision to be reconsidered on the basis of new evidence, the new evidence must be substantial and material to the decision. “Substantial” evidence is evidence which has weight and supports a conclusion opposite to the panel’s conclusion. “Material” evidence is evidence with obvious relevance to the previous WCAT decision. In addition to being substantial and material, the new evidence must either be evidence that:

- did not exist at the time of the WCAT appeal hearing, or,
- did exist at the time of the WCAT appeal hearing, but was not discovered and could not through the exercise of reasonable diligence have been discovered.

These requirements are contained in section 256(3) of the Act.

In his letter of May 24, 2006, the worker provides submissions in support of his claim. It is important to note that an application for reconsideration does not provide a further level of appeal. My role is limited to determining, as a preliminary issue, whether the requirements are met for obtaining reconsideration of the WCAT decision (either on the basis of new evidence, or on the basis of a common law error of jurisdiction). I have no authority, in this application, to hear the worker’s submissions for the purpose of reweighing the factual and medical evidence on his claim so as to reach my own conclusion regarding the merits of his claim. A party may make applications on one or both bases, but each type of application is subject to a “one time only” limitation. This decision concerns the worker’s “new evidence” application.

Dr. Yassi’s report documents that the worker was seen for an occupational medicine consultation on two occasions, October 19, 2005 and February 8, 2006, at the Family Practice Unit at the University of British Columbia. Dr. Yassi is a specialist who was not involved in the assessment or treatment of the worker prior to the WCAT decision. For the purposes of my decision, I accept that Dr. Yassi’s report constitutes new evidence which did not exist at the time of the WCAT hearing. Accordingly, I need not address the reasonable diligence requirement.

Key questions in this application are whether Dr. Yassi's report provides new evidence which is both substantial and material to the decision. Dr. Yassi's report is material, in the sense that it is concerned with, and relevant to, the issues addressed in the WCAT decision. However, the significance of this new report in relation to the WCAT decision must be evaluated in the context of the statutory requirement that the new evidence be substantial.

The effect of this latter requirement was addressed in a decision by a chief appeal commissioner of the former Appeal Division as follows (*Appeal Division Decision #00-0796*):

> (6) With regards to the term "substantial" I note the following definitions from *Black's Law Dictionary*; "**Substantial**. Of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable … **Substantial evidence**. Such evidence that a reasonable mind might accept as adequate to support a conclusion. It is that quality of evidence necessary for a court to affirm a decision of an administrative board. . . . Substantial evidence is evidence possessing something of substance and relevant consequence and which furnishes substantial basis of fact from which issues tendered can be reasonably resolved. . . . Evidence which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance."
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> (7) From the inclusion of "material" and "substantial" I take it that the legislature contemplated that something more than new and relevant evidence is required to give the Appeal Division authority to reconsider one of its previous decisions. What is required is new evidence that is important, having to do with the substance of the matter and which has sufficient substance or weight to support a particular conclusion. The standard is not as high as to provide proof on a balance of probabilities but it must be more than evidence that is only relevant. It need not be of such weight as to decide an issue one way or the other on its own but it must be more than simply evidence that is admissible. As a general matter it is not desirable or possible to be more specific than this and the circumstances of each application for reconsideration have to be considered in light of the requirements of section 96.1 of the *Act*.

In certain respects, Dr. Yassi's report involves the provision of an opinion on the basis of the facts reported by the worker. As Dr. Yassi's report has been submitted in support of an application for reconsideration under section 256 of the Act, any of the factual assumptions on which her medical opinion is based must be carefully evaluated. In the event that any of the factual findings by the WCAT panel are in dispute, a question to be considered is whether there is new evidence which meets the requirements of section 256 in connection with those factual findings.

A new medical opinion which is based on different facts is of questionable value, unless the facts on which it is based are established. Although provided in a different context, I consider instructive the reasoning provided in the British Columbia Supreme Court decision of *Bujar* v. *Workmen's Compensation Board* (1960), 33 W.W.R. 417, [1960] B.C.J. No. 29, also quoted at length in *Appeal Division Decisions #95-1185* and *#95-1186*, "Section 58(5)", 11 W.C.R. 543, at pages 552-553. The court reasoned in part:

> 6. …The "certificate" is in the form of a letter dated November 4, 1959, addressed to Mr. Buckley, solicitor for the prosecutor, and sets out that:
>
> > "The history he gave me was of an injury, falling about 5' at work, twisting his back, following which he did not recover."
>
> 7. He then went on to state that if the history he was given was true he thought the patient had "just reason to seek appeal" and that he believed "he does have a bona fide medical complaint which is related to the accident he claims." This is not a certificate contemplated by the Act. It is conditional upon the history given him by the patient being true, and of course he goes beyond the Act in referring to the patient's "just reason to seek appeal."

I have reviewed a range of points raised in the February 18, 2006 letter as follows.

(a) Prior left elbow condition

Dr. Yassi comments:

> …he had a previous repetitive strain injury (RSI) to his left elbow – which had been deemed work-related then later re-adjudicated and attributed to a viral illness – as unusual as that sounds. We do not have all the details of that case but given what we know and what has occurred since, a diagnosis of RSI seems more plausible.

The WCAT panel noted, at page 4:

> A physician's report dated February 9, 2003 states that the worker had left elbow tendinitis in 1991. The worker's evidence at the oral hearing was that the tendinitis was due to repetitive heavy work mixing concrete. It should be noted that the worker's 1991 claim was initially accepted, but was readjudicated on the basis that his radial tunnel syndrome was unlikely to have been caused by work and was more likely the result of a viral infection. The worker does not agree with that decision. However, there is no appeal of the readjudication decision before WCAT.

The worker did not appeal the earlier decision by the Board to deny his 1990 claim, and it was not open to the WCAT panel to revisit that decision.

(b) Offer of alternative work

Dr. Yassi comments:

> The documentation on file from the WCB stated that one factor considered when adjudicating [the worker's] claim was that he had refused alternate work; he flatly denies that he was ever provided with reasonable offers for alternative work, stating the only job offered him contained similar hand and wrist movements. We found no information on file to document a reasonable alternate assignment offered.

Under the heading "Background and Evidence," the WCAT panel noted at page 2:

> The worker was apparently offered alternative work by the employer, but refused it as he enjoyed the electrical work. The case manager's history states that the employer was quite capable of providing alternative work because the plant was a "production plant" and there were a great many different tasks available.

Under the same heading, the panel further noted at pages 6 to 7:

> Throughout the claim, the employer, through its representative, wrote to the Board suggesting that the worker had refused alternative work and had not kept in contact with the employer regarding his condition. The employer specifically suggested that work as a laminator would be appropriate, and further that the worker persisted in injurious practices that worsened his condition.

The question as to whether the worker was offered alterative work by his prior employer was not further addressed by the WCAT panel under the heading "Findings and Reasons."

I do not consider that Dr. Yassi was in a position to provide new evidence on the question as to whether or not the worker was offered alternative work by his prior employer. This was not a situation in which Dr. Yassi was providing a medical opinion regarding the suitability of a particular job offered to the worker. The report by Dr. Yassi appears, on this particular point, to concern a question of fact. Her reporting of the worker's own evidence, and statement regarding the lack of evidence on file regarding an offer of alternative employment, do not involve the provision of a new medical opinion.

(c) Overtime work

Dr. Yassi advises that the worker's most recent repetitive strain injury developed with the onset of pain in his right wrist in November of 2001. She advises that this pain was brought on "especially when crimping, a task that requires considerable force and is done repetitively." Dr. Yassi notes that the worker states at this time he was working a lot of overtime, making his five day, eight-hour workday increase to ten hours a day.

There is no mention of "overtime" work in the WCAT decision. The WCAT panel had the benefit of hearing the worker's evidence in an oral hearing.

I do not consider that Dr. Yassi's recording (i.e. hearsay reporting) of the worker's own evidence regarding his overtime work amounts to substantial new evidence. This is little different than the worker now writing a letter to advise that he was working overtime. This evidence would have been within the worker's knowledge at the time of the WCAT hearing. Accordingly, there is no basis for considering that this is new evidence which was "not discovered" by the worker at the time of the WCAT hearing.

(d) Repetitive nature of work

The WCAT panel concluded, at page 12, in connection with its consideration as to whether the section 6(3) "Schedule B" presumption applied to the worker's case (at page 12):

> That leaves "frequently repeated" motions or muscle contractions that place strain on the affected tendons. The evidence clearly supports a conclusion that the electrical work, which the worker asserts caused his right sided tenosynovitis, did not require him to repeat motions at least once every 30 seconds, or to repeat the motions such that 50% of the work cycle was spent performing the same motions or muscle contractions, and the affected muscle/tendon groups had less than 50%

> of the work cycle to rest. The evidence supports a conclusion that the work was varied. I accept that the work was on a production line, but it is not the type of "robotic" or highly repetitive work contemplated by the published policy.
>
> On that basis, the worker is not entitled to the presumption in section 6(3) of the Act because the work does not fit the "description of process or industry" set out in item 13(a) of Schedule B.

The WCAT panel further concluded, on weighing the evidence under section 6(1) of the Act (at page 14):

> The site visit provided a full opportunity for the Board and the worker to explore the job functions and the risk factors. Although there is certainly upper extremity use involved, **I am satisfied that the work was varied, and that there was no requirement to perform forceful, repetitive and awkward movements of the right arm**. In the electrical area, the worker was involved in installing wiring, light and related items. **He did not perform robotic-like tasks such as constantly stripping or crimping wires**. Each task was interspersed with other talks related to the job at hand.
>
> The same is also true of the worker in the pre-delivery inspection area. That work was varied and although there were instances where some heavier lifting, such as when installing a fridge or stove, was required, the work was varied and the evidence supports a conclusion that there was ample time for biological rest of the tissues involved. **The worker was not consistently repetitive and forceful.**
>
> I am also cognizant of the fact that despite change his work habits, and using his left upper extremity more extensively, his right wrist/hand condition has not improved significantly and in particular by the date of the oral hearing the worker felt it had still not improved sufficiently to return to work. It seems unlikely that a condition that was caused by the work in question would not improve after a lengthy absence from the work. It suggests that there are some other, unknown factors that are causative of the condition, be they intrinsic to the worker or the result of some non-occupational activity. I also do not doubt that working as an electrician for the employer brought the worker's condition to his attention. However, the fact that a condition is painful while working does not mean it is due to the nature of the work and that work was of causative significance.
>
> [reproduced as written, emphasis added]

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Dr. Yassi's refers to the worker's right wrist pain as being brought on especially when crimping, a task that requires considerable force and is done repetitively. It is unclear as to the extent to which her finding that this job function was performed "repetitively" differs from the conclusion by the WCAT panel that the worker's "work was varied, and that there was no requirement to perform forceful, repetitive and awkward movements of the right arm."

(e) Worksite visit

Dr. Yassi notes at page 2:

> According to [the worker] the visit did not accurately depict the awkward positions he frequently had to assume, and thus did not give a true indication of his work activities. He states the RV [recreational vehicle] units he was working on when his symptoms developed were not present during the visit and in fact the ones observed during the inspection were smaller and less complicated. The larger RV units, as explained by [the worker], require more crimping per unit and involve much more wiring and more awkward postures due to the location of the wiring harness connections. Additionally, the pictures used to depict his work positions do not give the full spectrum of hand positions he was frequently required to adopt in order to fulfill his job requirements. He does agree that the pictures show some of the positions, but feels that they are not comprehensive and leave out other, more difficult postures he would frequently assume.

The WCAT panel found at page 14:

> The worker views the site visit by the case manager and the Board medical advisor as an attempt to find ways to deny his claim. I do not agree that the Board approached the worker's claim in that way. The site visit provided a full opportunity for the Board and the worker to explore the job functions and the risk factors. Although there is certainly upper extremity use involved, I am satisfied that the work was varied, and that there was no requirement to perform forceful, repetitive and awkward movements of the right arm. In the electrical area, the worker was involved in installing wiring, light and related items. He did not perform robotic-like tasks such as constantly stripping or crimping wires. Each task was interspersed with other talks [*sic*] related to the job at hand.

A reporting by Dr. Yassi of the worker's evidence regarding his job requirements, and concerning the validity of the evidence obtained from the site visit, does not constitute a new medical opinion. The WCAT panel heard the evidence of the worker, in that regard, in an oral hearing.

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(f) Hobbies

The WCAT panel noted the following background evidence at page 3:

> The worker's hobby was collecting science books and building motors or generators. The worker was noted to "classify himself as an inventor." The worker said he was very interested in electricity **and occasionally had parts such as shafts or casings milled by a local machine shop in order to build and work on his hobby.**
>
> [emphasis added]

The WCAT panel further noted at page 7, in connection with the oral hearing evidence:

> The worker tendered his resume [*sic*], which was exhibit #1 in the oral hearing. The worker has extensive experience operating equipment, and his resume states that he is mechanically inclined and inventive. He has fabricated many inventions using rare earth magnetic alloys, phenolics, lexan, aluminium, and cobalt. He has constructed highly efficient motors and generators. The worker states on his resume that he has extensive electronic soldering and circuit board construction experience, and has assembled many electronic kits such as light generators, laser devices, high gain amplifiers, and transmitters.
>
> [reproduced as written]

The WCAT panel found, at pages 13 to 14:

> There has been little or no consideration given in this case to the worker's non-occupational activities. In that respect, the worker told the case manager that he was very interested in electricity and considered himself an inventor. **The extent of the worker's participation in his hobby is illustrated by the fact that he had shafts or casings milled by a local machine shop in order to build and work on his hobby**. Furthermore, the worker indicates on his resume that he has extensive soldering and circuit board construction and had been involved in building lighting generators, laser devices, high gain amplifiers, and transmitters. The worker's employment history suggests that the majority of these activities have been in pursuit of the worker's hobby. The worker also states that he has "fabricated many inventions using rare earth magnetic alloys, phenolics, lexan, aluminium, and cobalt. He constructs highly efficient motors and generators.
>
> With all due respect to the worker, who denies that he participated in any outside activities that could have caused his problems, the activities he participates in respecting his hobbies, by necessity, require extensive upper extremity use.
>
> [emphasis added]

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

Dr. Yassi comments:

> We note in the WCAT report that it is suggested that perhaps [the worker's] hobbies have caused his disability. [The worker] has explained to us that as an "inventor" he mostly designs/drafts his creations on paper and then all the machine/heavy work that has been done was contracted out to various shops. He has not had the opportunity to explain this in the past and has all the documents/receipts to show this. He states that he has only done light/minor tasks to complete the projects and this has been very intermittent over the course of 20-plus years.

This is not new medical evidence. This is a reporting by Dr. Yassi of the worker's evidence. Inasmuch as the information concerning the worker's hobbies came from his résumé which he tendered at the oral hearing and from claim log entries on his file which were disclosed to him, it would have been open to the worker to provide additional information to the WCAT panel at the oral hearing concerning the nature of his activities in pursuing his hobbies.

By submission dated May 24, 2006, the worker states:

> I also have all the work orders and receipts to demonstrate that my inventions were built by machine shops that were contracted to me. I will be happy to forward this information to you for your review upon your request. I design my ideas and inventions on paper and over a period of years I contracted the hard work to machine shops to build specialty parts for my inventions. I do not own milling machines or lathes and so all the machine work to make the parts for my inventions was contracted out to machine shops.

I note, first of all, that the WCAT panel took note of the evidence that the worker had shafts or casings milled by a local machine shop in order to build and work on his hobby. Secondly, if the worker had additional evidence to provide concerning these activities, he could have furnished this to the WCAT panel at the April 13, 2005 oral hearing.

In *WCAT Decision #2003-01116-AD*, summarized as noteworthy on the WCAT website, the WCAT chair reasoned:

> In *Appeal Division Decision #91-0724* (*Workers' Compensation Reporter* Vol. 7, p. 145), the chief appeal commissioner stated the following in respect of the due diligence requirement (at pages 148 and 149):

I find, first of all, that the test of "due diligence" applies to the person requesting reconsideration rather than to the decision-maker. The most reasonable interpretation of Section 96.1 is that it constitutes a bar to reconsideration to an applicant, where the basis for their request is that ... the Appeal Division did not consider evidence which the applicant could through the exercise of due diligence have obtained and submitted prior to the making of the impugned decision.

The effect of this provision is to place some onus on an appellant for ensuring that the Appeal Division is in possession of the information necessary to the proper consideration of their appeal in the first instance.

While the Appeal Division functions on an inquiry basis, and may itself seek out additional information, an appellant should be aware of the ramifications of Section 96.1 if they proceed with their appeal without taking reasonable steps to ensure that the evidence on file is complete.

It is important to note, however, that the test of "due diligence" includes a concept of reasonableness as to the nature and scope of the inquiries an appellant is expected to have pursued. The fact that information previously existed and could have been obtained upon inquiry is not conclusive as to whether it could through the exercise of "due diligence" have been discovered. The circumstances of the particular case must also be considered, with regard to the extent of the inquiries which due diligence would have required.

The question is not simply whether the appellant could have obtained the particular information if they had made diligent inquiries for the purpose of obtaining it. The requirement of "due diligence" is more properly interpreted as referring to the degree of care which a prudent and reasonable appellant would have exercised in ensuring that the Appeal Division had all relevant information necessary to the proper consideration of their appeal. If, for example, certain information existed, but it was not reasonably foreseeable that it would be germane to the Appeal Division's consideration, "due diligence" would not have required the appellant to search it out. To interpret the requirement of

> "due diligence" otherwise would be to create an artificial and unrealistic legal barrier to reconsideration which, in my view, was not intended by the statute. The requirements of section 96.1 of the Act must be interpreted in a fair and meaningful fashion, with regard to the realities of the appeal process.

I adopt the analysis in *Appeal Division Decision #91-0724*. I note that this analysis may also be of assistance in interpreting section 256(3) of the amended Act.

I find the Supervisor's Accident Investigation Report does not meet the due diligence requirement. Such evidence was obviously germane to the question before the Appeal Division panel and a reasonable appellant would have provided all evidence related to the injury prior to the issuance of the Appeal Division decision. The reconsideration process is generally intended for rather extraordinary circumstances. It is not intended to be a vehicle by which appellants can re-argue the appeal and provide evidence that ought to have been provided to the original Appeal Division panel. While the worker has not provided witness statements, she has stated that they would be available. It seems to me that the same analysis would be applicable to witness statements. That is, a reasonable appellant would have provided the Appeal Division panel with all available evidence relevant to the acceptance of the claim at the time of the appeal to the Appeal Division.

For similar reasons, I do not consider it necessary to ask the worker to submit his work orders and receipts to show the work done by machine shops. As this evidence was in the worker's possession, this was not a situation involving evidence which was not discovered by the worker, where reasonable diligence would not have required him to search it out. I find that the worker's explanations do not meet the test of providing new evidence which existed at the time of the WCAT hearing but was not discovered and could not through the exercise of reasonable diligence have been discovered.

(g) Lack of improvement when away from work

The WCAT panel reasoned, at page 14:

> I am also cognizant of the fact that despite change [*sic*] his work habits, and using his left upper extremity more extensively, his right wrist/hand condition has not improved significantly and in particular by the date of the oral hearing the worker felt it had still not improved sufficiently to return to work. It seems unlikely that a condition that was caused by the work in question would not improve after a lengthy absence from the work. It

> suggests that there are some other, unknown factors that are causative of the condition, be they intrinsic to the worker or the result of some non-occupational activity.

Dr. Yassi advises:

> The fact that his symptoms have not completely resolved in the absence of his work activity does not discount the diagnosis as there is clear evidence that there are three phases in repetitive strain injury. In the first phase, symptoms only occur at work. If the aggravating factors are not eliminated, these symptoms then generally progress to a second phase in which symptoms also occur in the evening or when not actually performing the tasks that elicited the problem, and then to a third phase in which they are chronic; we believe that this is where [the worker] lies.

Dr. Yassi's medical evidence on this point is material to the WCAT decision, and is further considered below.

(h) Impression and recommendation

Under the heading "Impression and recommendation," Dr. Yassi advises:

> We conclude that [the worker] sustained repetitive strain injuries in both his right wrist and left elbow. The symptoms he describes could definitely be attributable to his job activities, and there is good documentation in the literature in this regard.

As noted above under (g), Dr. Yassi notes that the lack of improvement in the worker's condition affecting leaving his employment does not discount the diagnosis of a repetitive strain injury. She further points to the lack of a reasonable competing hypothesis regarding the cause of the worker's disability, bearing in mind the worker's evidence regarding the intermittent and light nature of the tasks in which he engaged in relation to his hobby as an inventor. She concludes:

> …it seems that [the worker] was not offered an occupational medical specialist's assessment, physical rehabilitation, or even reasonable vocational rehabilitation advice. We feel it would be reasonable for the WCB to review the work tasks, with [the worker] available to actually demonstrate the posture he adopted at work, the tools used, and how he used them, and how he attempted to compensate for his left arm problem by using the right arm differently and vice-versa aggravating the problem. The other cases from his same workplace should also be reviewed. If the new workplace assessment substantiates, as we are confident it would, that this man was at risk of work-related RSI, he should be offered a short

rehabilitation program (e.g. subsidizing him through the program he was admitted into) to allow him to re-join the workforce in a manner that will not put him at further risk.

On its face, Dr. Yassi's opinion that the worker is suffering from repetitive strain injuries in both his right wrist and left elbow, which could definitely be attributable to his job activities, might constitute substantial new medical evidence. At the same time, however, Dr. Yassi's report appears to be based upon the evidence provided by the worker concerning matters such as his overtime work, his involvement in work duties which were not fairly documented by the site visit, and the repetitive nature of his work. To the extent this factual evidence differs from that on which the WCAT decision was based, it lessens the usefulness of the February 18, 2006 opinion.

It would not be open to the worker to simply state disagreement with the findings of fact in the WCAT decision, for the purpose of seeking reconsideration under section 256 of the Act. To the extent Dr. Yassi's opinion may be based upon information concerning the factual background to the worker's claim which was not accepted by the WCAT panel, the usefulness or value of the new medical opinion is thereby diminished. It then becomes necessary to weigh the significance of such matters in connection with the medical opinion which has been provided.

Dr. Yassi concludes by indicating that the worker was suffering from repetitive strain injuries which "could definitely be attributable to his work activities." This conclusion is somewhat ambiguous in its effect. An Internet dictionary, dictionary.com, defines "could" as the past participle of "can." The word "can" has several meanings, including "to have the possibility: A coin can land on either side." Thus, the word "could" may refer to a possibility. For example:

- John could be the one who took the money.
- It could rain today.

It is unclear as to the extent to which the term "definitely" makes the identified possibility more likely.

- John could definitely be the one who took the money.
- It could definitely rain today.

The phrase "could definitely" would seem to identify a real possibility, without conveying a sense of its likelihood on a balance of possibilities.

Accordingly, the February 18, 2006 report is subject to two limitations. Firstly, it appears to be based, at least in part, on background facts which differ from those which formed the basis for the WCAT decision. Secondly, the phrase "could definitely" is

ambiguous in terms of the degree to which it expresses support for a finding that the worker's problems were due to his employment. I find that these two factors, in combination, detract from the usefulness of the February 18, 2006 report, so that it does not meet the test of providing "substantial" new evidence.
Dr. Yassi further recommends a new workplace assessment be conducted. She expresses confidence that this would substantiate that the worker was "at risk of work-related RSI." However, this opinion involves an assumption as to the accuracy of the description provided by the worker regarding the specifics of his various work activities. This appears to involve the factual dispute noted above regarding the accuracy of the information obtained from the site visit.

The February 18, 2006 report does provide material evidence regarding the fact that a lack of improvement following the worker's removal from the workplace does not discount the possibility of a work relationship. However, as this was merely one factor considered in the WCAT decision, I am not persuaded that this evidence by itself amounts to substantial new evidence.

For all of the reasons set out above, I find that the February 18, 2006 report (and the worker's own evidence), do not meet the test of providing "substantial" new evidence.

Conclusion

The February 18, 2006 consultation report, and the worker's own evidence, do not constitute new evidence that meets the requirements of section 256(3) of the Act. Accordingly, *WCAT Decision #2005-02474* will not be reconsidered on the basis of new evidence. The decision stands as final and conclusive in accordance with section 255(1) of the Act.

Herb Morton
Vice Chair

HM/gw

 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898