Noteworthy Decision Summary

Decision: WCAT-2007-02083 Panel: Randy Lane **Decision Date:** July 11, 2007

Reconsideration – Authority to reconsider a prior Appeal Division Decision on the Basis of Jurisdictional Error (Common Law Grounds) – Section 253.1 of the Workers Compensation Act – Section 39 of the Workers Compensation Amendment Act (No. 2), 2002 – Item #15.24 of the Manual of Rules of Practice and Procedure

Reconsideration Application. WCAT does not have the authority to set aside and reconsider a previous Appeal Division decision that was issued prior to March 3, 2003, when the Appeal Division ceased to exist (transition date), on the basis of jurisdictional error (common law grounds).

The worker applied to WCAT to reconsider and set aside a May 2002 Appeal Division decision. The reconsideration panel denied the reconsideration application by finding WCAT did not have the authority to reconsider an Appeal Division decision on the basis of jurisdictional error (common law grounds). The panel reviewed and analyzed prior WCAT decisions on this issue, including noteworthy *WCAT Decision #2004-04928* which found that WCAT had this authority.

In summary, the panel reasoned:

- WCAT is not the same appeal body as the Appeal Division. A key distinction is that WCAT is an external appeal body. The Appeal Division was a division of the Workers Compensation Board, operating as WorkSafeBC (Board) – a corporate entity. A decision of the Appeal Division was a decision of the Board. Although WCAT decisions are final and conclusive and the Board must comply with them, they are not Board decisions. Although the transitional provisions of the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63) charge WCAT with completing proceedings that were pending before the Appeal Division as of March 3, 2003 at no point did the Legislature expressly state that WCAT was the Appeal Division under a different name.

- The panel was unable to find legal authority which established that a tribunal may have a common law power to set aside the decision of another tribunal, even in the case of a successor tribunal. Such a power at common law would be extraordinary. As WCAT is not a court, the panel questioned the tribunal's ability to declare the existence of a previously undeclared common law authority. The panel found it would not be appropriate for the common law rule to be extended in circumstances where the legislation completely fails to provide for this possible transitional matter or is otherwise silent in respect of the question.

- The panel found that the *Workers Compensation Act* (Act) did not explicitly or implicitly provide this power. The authority provided in Section 256 of the Act for WCAT to reconsider and set aside an Appeal Division decision on the basis of "new" evidence did not confer on WCAT the same authority for jurisdictional (common law) errors. The panel stated that, after considering the relevant statutory language as a whole and applying the modern principle of statutory interpretation, unless it could be said that a WCAT power to set aside decisions of the Appeal Division was implied, no such power existed. Any power to set aside decisions of another tribunal, if at all defensible, would need to be supported by the

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

legislation (unlike a tribunal's power to set aside its own decisions which appears not to require any legislative support).

- Section 253.1(5) of the Act refers to WCAT's ability to reopen an appeal in order to cure a jurisdictional defect. This provision was a consequential amendment of the *Administrative Tribunals Act* (ATA) which came into force with respect to WCAT in December 2004, before the worker's application for reconsideration was filed. While the failure of section 253.1 to refer to Appeal Division decisions was likely not determinative, it was a factor suggesting WCAT did not have the power to set aside Appeal Division decisions on the basis of jurisdictional error. Further, even if at one time WCAT had the jurisdiction to set aside Appeal Division decisions, it could be argued that the ATA restricted the jurisdiction of WCAT over the decisions of other appeal bodies.

- Even if one were to conclude that the term "reconsideration" in section 39 of Bill 63 included applications to set aside Appeal Division decisions, such an interpretation did not mean one should, or could infer from this, support for a broader authority on the part of WCAT to set aside Appeal Division decisions that were not pending on the transition date (March 3, 2003).

- In *WCAT-2004-04928*, another reconsideration panel considered that an Appeal Division decision involving a jurisdictional error was incomplete and, as WCAT was charged with completing appeals, it could examine whether Appeal Division decisions were complete. This reconsideration panel did not accept that a proceeding might be viewed as incomplete if it resulted in a decision which contained a jurisdictional error. This panel was not persuaded that section 39 of Bill 63 somehow gave WCAT the authority to ascertain whether Appeal Division decisions issued before March 3, 2003 were complete. Section 39 dealt with the handling of proceedings that were outstanding as of March 3, 2003; that section did not create a substantive reconsideration authority for WCAT to exercise. It did not address Appeal Division proceedings that were not pending as of that date so as to give WCAT authority to address Appeal Division decisions issued before March 3, 2003.

- The government has the statutory power to create regulations involving transitional matters that have been incompletely provided for in the statute. If there was a "void" regarding the setting aside of Appeal Division decisions on common law grounds, it could be filled by the government passing a regulation. If a regulation is needed to fill the void, it cannot fall to WCAT to give itself authority to set aside Appeal Division decisions on common law grounds. WCAT can declare the extent of its jurisdiction, but it cannot add to it.

- Any gap in WCAT's authority on this issue was not an absurdity that was too severe to tolerate. A legislative gap may be taken to embody the actual intention of the Legislature.

- Item #15.24 of the *Manual of Rules of Practice and Procedure*, which states that WCAT has the authority to set aside and reconsider an Appeal Division decision on the basis of jurisdictional error, is not a binding rule. Its declaration of WCAT's jurisdiction does not resolve the matter.

- This authority is not critical to the effective functioning of the workers' compensation system. Parties affected by Appeal Division decisions have the alternate remedy of judicial review.

Although there may be costs incurred in exercising this option other parties contesting Medical Review Panel certificates or commissioners' decisions may also face these costs. These possible financial hurdles do not give WCAT authority over the decisions of these appellate bodies. That WCAT might be called upon to complete an appeal following a successful judicial review of an Appeal Division decision does not in any way give it authority to set aside an Appeal Division decision.

- Although the reconsideration panel left open the possibility that WCAT has the authority to set aside and reconsider Appeal Division decisions that were issued after March 3, 2003 as seized Appeal Division matters, see *WCAT-#2008-00031*. In that noteworthy decision, the reconsideration panel found that WCAT does not have that authority based upon the same analysis.

WCAT Decision Number: WCAT-2007-02083
WCAT Decision Date: July 11, 2007
Panel: Randy Lane, Vice Chair

Introduction

The worker has asked the Workers' Compensation Appeal Tribunal (WCAT) to set aside a May 27, 2002 decision of a panel of the former Appeal Division of the Workers' Compensation Board, operating as WorkSafeBC (Board). In *Appeal Division Decision #2002-1284* the panel denied the worker's appeal from a December 7, 2001 decision of a panel of the former Workers' Compensation Review Board (Review Board). The Appeal Division panel found that the worker's 100% loss of earnings pension payable under subsection 23(3) of the *Workers Compensation Act* (Act) was properly calculated at 75% of the difference between her average earnings before the injury and the average amount she was able to earn after the injury even though her pre-injury wage rate was below the statutory minimum.

The workers' request was initiated by a July 4, 2005 submission from a workers' adviser. He contended the Appeal Division panel's decision was patently unreasonable and that the worker was entitled to 100% of the difference between her pre-and post-injury earnings. The worker's employer is no longer registered with the Board. The worker was offered a further opportunity to provide a submission, but one was not received by the August 10, 2006 due date. By letter of March 30, 2007 the worker was advised that the panel would consider whether WCAT has the authority to set aside an Appeal Division decision on common law grounds. The workers' adviser provided a May 4, 2007 submission.

The rule in item #8.90 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) provides that WCAT will normally conduct an appeal on a read and review basis where the issues are largely medical, legal, or policy based, and credibility is not an issue. Similar considerations apply to a reconsideration application. I have reviewed the issues, evidence and submissions on the worker's file and have concluded that this reconsideration application may be determined without an oral hearing. The issue before me is primarily legal in nature.

Issue(s)

At issue is whether WCAT has authority to set aside the May 27, 2002 Appeal Division decision on common law grounds and, if so, whether the Appeal Division decision is patently unreasonable and should be set aside.

Jurisdiction

At the time the Appeal Division decision was issued, subsection 96.1(1) of the *Workers Compensation Act, R.S.B.C. 1996* (Act)[1] provided that a decision of the Appeal Division was final and conclusive. The Appeal Division'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. *Workers' Compensation Board,* 2003 BCCA 470, [2003] B.C.J. No. 1985, (2003) 186 B.C.A.C. 83, 19 W.C.R. 211.

Section 255(1) of the Act provides that a WCAT decision is final and conclusive, and is not open to question or review in any court. In keeping with the legislative intent that WCAT decisions be final, they may not be reconsidered except on the basis of new evidence as set out in section 256 of the current Act, or on the basis of an error of law going to jurisdiction (*Powell Estate*). This latter authority is further confirmed by section 253.1(5) of the Act.

Section 245.1 of the Act provides that section 58 of the *Administrative Tribunals Act* (ATA) applies to WCAT. Section 58 of the ATA concerns the standard of review to be applied in a petition for judicial review of a WCAT decision. Section 58 of the ATA does not apply to the Board and would not apply to a decision of the former Appeal Division.

This application was assigned to me by the Chair of WCAT on the basis of a written delegation (*Decision of the Chair, Workers' Compensation Appeal Tribunal, No. 8*, "Delegation by the Chair", March 3, 2006).

Practice and procedure at item #15.24 of the MRPP provides that on applications to set aside decisions 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.

By letter of July 20, 2006 the worker was notified of MRPP provisions regarding reconsiderations. Item #15.24 provides that reconsideration requests on common law grounds may be made only once.

Background

An evaluation of whether WCAT has the authority to set aside Appeal Division decisions requires examining (i) whether WCAT has that authority at common law and (ii) whether legislative provisions impliedly give WCAT that authority.

[1] In this decision I will use "Act" to refer to the *Workers Compensation Act, R.S.B.C. 1979* onward. The term current Act and former Act will refer to versions of the Act that were in force before March 3, 2003 and after March 3, 2003, respectively.

Before addressing these two issues, it is necessary to set out some history of the appellate processes of the workers' compensation system. The history is included to illustrate the complexity of the appellate process and identify which bodies were active at certain times.

Pre-June 3, 1991

Immediately prior to June 3, 1991 decisions at first instance regarding compensation matters were rendered by officers of the Board. Those decisions were appealable to the Review Board (section 90 of the former Act prior to June 3, 1991) whose decisions were appealable to the former commissioners of the Board (section 91 of the same Act). Medical decisions of Board officers, the Review Board, and the commissioners could be appealed to the Medical Review Panel (section 58 and 61 of the same Act).

The former commissioners were the final appeal body with respect to non-medical matters. (The commissioners were members of the commission known as the Board which came into existence in 1917). The Review Board, the subordinate appeal body, came into existence in 1986 (*Workers Compensation Amendment Act, 1985*). The Review Board was preceded by the boards of review which came into existence as a formal appeal body external to the Board in 1973 (*An Act to Amend the Workmen's Compensation Act, 1968* and *B.C. Regulation 291/1973*). [2] Decisions of the boards of review were appealable to the commissioners (see section 76 of the *Workers' Compensation Act* as of 1974 onward*)*.

Prior to 1974 there was a board of review which from 1968 onward was chaired by a Lieutenant Governor in Council appointee and members who came from the Board (see section 76 of the *Workmen's Compensation Act, 1968*). The findings of the pre-1974 board of review were reviewable by the commissioners. That review was not pursuant to a formal statutory appeal mechanism but was pursuant to the Board's power to reopen, rehear and redetermine any matter dealt with by it (see section 79 of the *Workmen's Compensation Act, 1968)*.

Prior to 1991 the final appeal body with respect to medical matters was the Medical Review Panel (that body came into existence in 1954; see the *Workmen's Compensation Amendment Act, 1954*). The certificates of the Medical Review Panel were protected by section 65 of the Act which declared they were conclusive and binding.

[2] The boards of review were not empowered to receive appeals until January 1, 1974 (see section 4 of *An Act to Amend the Workmen's Compensation Act, 1968* and a December 20, 1973 regulation.) This set of circumstances may explain why 1974 is perceived to be the year in which the boards of review came into existence.

June 3, 1991 to March 2, 2003

Effective June 3, 1991 the Appeal Division of the Board became the final appeal body with respect to non-medical matters (section 3 of the *Workers Compensation Amendment Act, 1989)*. Findings of the Review Board were appealable to the Appeal Division (some Board decisions were directly appealable to the Appeal Division). The Medical Review Panel continued to be the final appeal body with respect to medical matters.

Section 96.1 of the former Act gave the Appeal Division the ability to reconsider decisions rendered by it on the basis of new evidence. Section 17 of the *Workers Compensation Amendment Act, 1989* gave the Appeal Division the ability to reconsider decisions made by the former commissioners under section 91 or 96 of the Act on the same grounds and in the same manner as that set out in section 96.1 of the Act.

A January 6, 1992 decision of the former governors of the Board entitled *Reopening and Reconsideration of Past Commissioners' Decisions (An Amendment to Decision of the Governors No. 1)* gave the Appeal Division the authority under subsection 96(2) of the Act to reopen, rehear, and redetermine any decision of the former commissioners where that decision was based on an error of law or involved an issued under the *Canadian Charter of Rights and Freedoms* (7 WCR 171).

In 1993 the Appeal Division determined it had the authority to set aside a decision of an Appeal Division panel on the basis the earlier decision contained clerical mistakes or omissions, fraud, or an error of law going to jurisdiction, including breaches of the rules of natural justice (*Appeal Division Decision #93-0740* at 10 WCR 127).

In 1997 the former panel of administrators (the successors to the governors of the Board) assigned the Appeal Division authority to consider requests to reconsider a pre-1974 board of review decision (*Resolution 04/15/97-04*). Prior to 1991 the commissioners had used their discretion under subsection 96(2) of the Act to review those decisions. This resolution was a response to a 1994 decision of a panel of the Appeal Division which considered that the Appeal Division lacked jurisdiction over pre-1974 board of review decisions.

In 1998 the panel of administrators assigned the Appeal Division authority to consider extensions of time to appeal pre-1974 decisions by Board officers where an appeal had been filed with the Review Board or an extension of time request had been made to the Board, including the Appeal Division, on or before February 10, 1998 (*Resolution 98/02/10-08*).

In *Appeal Division Decision #2001-0779* a panel of the Appeal Division set aside an Appeal Division decision rendered in 2000 which, in turn, had allowed a reconsideration on the basis of new evidence of two decisions of the former commissioners rendered in

the 1950s. The 2001 reconsideration panel determined that section 17 of the *Workers Compensation Amendment Act, 1989* did not give the Appeal Division authority to reconsider commissioners' decisions from the 1950s on the basis of new evidence as they had not been made under section 91 of the Act. Judicial review proceedings followed which resulted in the following two court decisions.

In 2001 the British Columbia Supreme Court determined in *Atchison v. Workers' Compensation Board*, 2001 BCSC 1661, that the Appeal Division had the jurisdiction to set aside its 2000 decision:

> [18] There is no doubt the courts have the power of review. However, this does not mean that administrative tribunals lack the power to reconsider a decision, particularly where the decision is made without jurisdiction. The doctrine of *functus officio* applies to administrative tribunals based, however, "on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal." ***Chandler v. Alberta Association of Architects***, [1989] 2 S.C.R. 848 at 849. The application of the principle is more flexible and tribunals are able to reopen decisions in order to discharge the function committed to them by the enabling legislation. In particular, where a tribunal has made an error of jurisdiction, it is entitled to correct such an error: ***Chandler***, *supra;* ***Right to Rediscover Appeal Division Decisions*** (1993), 10 W.C.B. 127 (A.D.); ***Re Trizak Equities Ltd. v. Area Assessor Burnaby New Westminster*** (1983) 147 D.L.R. (3d) 637 (B.C.S.C.).
>
> [all quotations in this decision are reproduced as written, save for changes noted]

The British Columbia Court of Appeal in *Powell Estate* confirmed the lower court's decision in *Atchison v. Workers' Compensation Board* as to the Appeal Division's authority to set aside its own decisions:

> [17] The first question is whether a panel of the Appeal Division has jurisdiction to determine that a decision of another panel of the Appeal Division was a nullity as being made beyond its jurisdiction: ***Chandler v. Alta. Assoc. of Architects***, [1989] 2 S.C.R. 848, citing with approval ***Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster*** (1983), 147 D.L.R. (3d) 637 (B.C.S.C.).
> [18] On those authorities, the answer must be, in my view, as found by Mr. Justice Vickers. The Appeal Division was able to reconsider the matter and correct its own jurisdictional error.

Effective November 30, 2002 subsection 58(3) to 58(5) and subsection 63(1) of the Act were repealed (see section 7 of the *Workers Compensation Act (No. 2), 2002* (WCAA) and *B.C. Regulation 320/2002*). This resulted in workers, dependants, and employers no longer being able to appeal decisions to the Medical Review Panel, save for appeals where the time period within which an appeal right must be exercised would not have expired but for the repeal of that right as of November 30, 2002. Those proceedings and those pending as of March 3, 2003 were to be continued and completed (section 36 of the WCAA).

March 3, 2003 Onward

As a result of the WCAA, effective March 3, 2003 those sections of the former Act regarding the establishment of the Review Board, the Medical Review Panel, and the Appeal Division were repealed. While section 65 of the Act governing Medical Review Panel certificates was repealed, it continues to apply to certificates issued after March 3, 2003 (WCAA, section 36) and applies to certificates issued before March 3, 2003 (*WCAT Decision #2005-01963*). Pursuant to the WCAA, the WCAT and the Board's Review Division came into existence.

Save for certain matters on which a Review Division decision is not appealable, WCAT is the final appeal body for medical and non-medical matters. (A list of non-appealable Review Division decisions is set out in subsection 239(2) of the Act and in section 4 of *B.C. Regulation 321/2002*.)

WCAT's exclusive jurisdiction is set out in section 254 of the Act which provides as follows:

> The appeal tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined under this Part and to make any order permitted to be made, including the following:
>
> (a) all appeals from review officers' decisions as permitted under section 239;
> (b) all appeals from Board decisions or orders as permitted under section 240;
> (c) all matters that the appeal tribunal is requested to determine under section 257;
> (d) all other matters for which the Lieutenant Governor in Council by regulation permits an appeal to the appeal tribunal under this Part.

While not part of the Act in March 2003, the Act now contains section 253.1 which provides as follows regarding WCAT's ability to amend and reopen its decisions:

> (1) If a party applies or on the appeal tribunal's own initiative, the appeal tribunal may amend a final decision to correct any of the following:
>
> (a) a clerical or typographical error;
> (b) an accidental or inadvertent error, omission or other similar mistake;
> (c) an arithmetical error made in a computation.
>
> (2) Unless the appeal tribunal determines otherwise, an amendment under subsection (1) must not be made more than 90 days after all parties have been served with the final decision.
>
> (3) Within 90 days after being served with the final decision, a party may apply to the appeal tribunal for clarification of the final decision and the appeal tribunal may amend the final decision only if the appeal tribunal considers that the amendment will clarify the final decision.
>
> (4) The appeal tribunal may not amend a final decision other than in those circumstances described in subsections (1) to (3).
>
> (5) This section must not be construed as limiting the appeal tribunal's ability, on request of a party, to reopen an appeal in order to cure a jurisdictional defect.

Section 256 of the current Act empowers WCAT to reconsider WCAT and Appeal Division decisions on the basis of new evidence. The Act does not contain an explicit declaration that WCAT has the authority to set aside Appeal Division decisions on common law grounds.

Item #15.24 of WCAT's *Manual of Rules, Practice and Procedures* (in effect from March 23, 2003 to December 2, 2004) provided that WCAT could set aside its own decisions on common law grounds:

> WCAT may set aside or "void" one of its decisions on the basis of certain common law grounds or principles. These consist of clerical mistakes or omissions, fraud, or an error of law "going to jurisdiction" (including a breach of the rules of natural justice). Where an applicant is successful in impugning a WCAT decision, and the purported decision is found to be incomplete or void, WCAT has a responsibility to complete its task of providing a valid decision.

As noted above, section 36 of the WCAA provided for the continuation and completion of appeals to the Medical Review Panel. Sections 38 and 39 of the WCAA provided for the continuation and completion of Review Board proceedings and Appeal Division proceedings, respectively. Section 39 is relevant to the matter before me:

> **39**(1) In this section, "proceedings" means
>
> (a) appeal proceedings,
> **(b) proceedings for reconsideration of decisions,**
> (c) proceedings in requests under section 11 of the Act that were assigned to the appeal division, and
> (d) proceedings under section 28 (5) and (6) of the *Crime Victim Assistance Act*.
>
> (**2) Subject to subsection (4) of this section, all proceedings pending before the appeal division on the transition date are continued and must be completed as proceedings pending before the appeal tribunal, except that section 253 (4) of the Act, as enacted by the amending Act, does not apply to those proceedings.**
>
> (3) In proceedings before the appeal tribunal described in subsection (2) of this section, instead of making a decision under section 253 (1) of the Act, as enacted by the amending Act, the appeal tribunal may refer a matter to the Board, with or without directions, and the Board's decision made under that referral may be reviewed under section 96.2 of the Act, as enacted by the amending Act.
>
> (4) If, in a proceeding pending before the appeal division on the transition date, the appeal division has
>
> (a) completed an oral hearing, or
> (b) received final written submissions and begun its deliberations,
>
> the appeal division must continue and complete those proceedings, acting with the same power and authority that the appeal division had under the Act before the provisions of the Act granting that power and authority were repealed by the amending Act.
>
> (5) The appointments of the appeal commissioners who are sitting on proceedings described in subsection (4) are continued until those proceedings are completed.
>
> [emphasis added]

Section 44 of the WCAA gave the Lieutenant Governor in Council the ability to make regulations for the orderly transition of appeal proceedings:

> The Lieutenant Governor in Council may make regulations respecting any matters that, in the opinion of the Lieutenant Governor in Council, are insufficiently provided for, or not provided for, in Part 2 of the amending Act and that are necessary
>
> (a) for the orderly transition to the appeal tribunal of proceedings before the review board and the appeal division, and
>
> (b) for the orderly completion of proceedings before the medical review panel on the repeal date, including the delegation to the appeal tribunal of all or any of the functions or responsibilities of the Board under sections 58 to 64 of the Act.

BC Regulation 392/2002 which was issued pursuant to section 44 of the WCAA includes the following provisions regarding unexercised appeal rights:

> Unexercised rights
>
> **2**(1) If, before the transition date,
>
> (a) a person has not exercised a right under the Act to appeal a decision of the Board to the review board, and
>
> (b) the time period within which the person must exercise that right has expired,
>
> the person may apply to the chief review officer under section 96.2 (4) of the Act, as enacted by the amendment Act, to extend the time to request a review under that section and the chief review officer may extend the time to file the request for review under that section.
>
> (2) If, before the transition date,
>
> (a) a person has not exercised a right under the Act to appeal
>
> (i) a decision of the Board to the appeal division, or
> (ii) a finding of the review board to the appeal division, and
>
> (b) the time period within which the person must exercise that right has expired,

> the person may apply to the chair under section 243 (3) of the Act, as enacted by the amendment Act, to extend the time to file a notice of appeal under that section and the chair may extend the time to file the notice of appeal under that section.
>
> (3) A person who is granted an extension of time to file a request for review or a notice of appeal under subsection (1) or (2) may request a review or appeal the decision or finding, as the case may be, within the extended period.

Pursuant to section 96 of the current Act the Board has a limited ability to reconsider its own decisions. Of interest is item #C14-03.01 of the *Rehabilitation Services and Claims Manual, Volume II* which provides as follows regarding the Board's ability to reconsider decisions of various appeal bodies:

> There are, in addition, a number of implicit restrictions on reconsidering previous decisions and orders. The Board is not authorized to reconsider decisions or findings of the following bodies:
>
> - the former Appeal Division, which existed prior to March 3, 2003;
> - the former Commissioners, who existed prior to June 3, 1991;
> - the boards of review and the Workers' Compensation Review Board, which existed prior to March 3, 2003; and
> - the Board of Review, which existed prior to January 1, 1974.
>
> Section 256 of the Act provides for the Workers' Compensation Appeal Tribunal to reconsider its own decisions and decisions of the former Appeal Division under certain limited conditions. The Legislature therefore "turned its mind" to the extent that former appellate decisions should be reconsidered and legislated its intent.

WCAT Decisions and Setting Aside Appeal Division Decision on Common Law Grounds

In *WCAT Decision #2004-04928*, dated September 22, 2004, a WCAT panel determined WCAT has authority to set aside a decision of the Appeal Division on the basis of the common law ground of an error of law going to jurisdiction. That case concerned an Appeal Division decision which was issued on April 17, 2003, several weeks after the March 3, 2003 transition date.

The conclusions of the panel are set out as follows as part of a summary of the decision found on WCAT's website:

- As the legislation is silent on this issue, it is implied that WCAT has the ability to determine the extent of its own authority at common law to correct an error of law going to jurisdiction.

- Section 256 of the Workers Compensation Act (Act), which sets out statutory rules relating to WCAT's reconsideration of decisions, should not be read as defining the limits to WCAT's reconsideration authority.

- In determining its jurisdiction to reconsider at common law, a tribunal may look to "indications" in its enabling statute rather than an express statutory grant of authority. Key indicators from Bill 63 [WCAA] include: section 39 of the transition provisions, which demonstrates a legislative intent that all Appeal Division proceedings be properly concluded; and section 256 of the Act, which gives WCAT the same jurisdiction to reconsider both WCAT and Appeal Division decisions.

- It is in the public interest for parties to be able to rely generally on the finality of a tribunal decision and to avoid unnecessary court proceedings.

- An appellant retains the right to bring a judicial review application in respect of any WCAT reconsideration decision and a court would apply similar criteria as WCAT had on the reconsideration application.

- The legislature has provided a mandate under section 39 of Bill 63's transitional provisions for the continuation and completion of all proceedings pending before the Appeal Division on March 3, 2003. A decision may be viewed as incomplete if it contains an error of law going to jurisdiction.

- The Appeal Division or WCAT would continue to be responsible for completing appeals filed to the former Appeal Division (in the event a court was to find that the decision involved an error of law going to jurisdiction). This constitutes a powerful argument for inferring jurisdiction to hear such arguments without the necessity for intervention by the courts.

- In the case of remedial statutes such as workers' compensation legislation, it is important that the statute be given such fair, large and liberal interpretation as will best ensure the attainment of its objects

Following that decision, WCAT's MRPP (the successor to WCAT's *Manual of Rules, Practice and Procedure*) came into force and declared as follows as to WCAT's authority to set aside decisions:

> WCAT may set aside one of its decisions on the basis of certain common law grounds or principles. These consist of fraud or an error of law "going to jurisdiction" (including a breach of the rules of natural justice). WCAT also has jurisdiction to consider an application to set aside an Appeal Division decision on common law grounds (see WCAT-2004-04928). Where an applicant is successful in impugning a WCAT decision, WCAT has a responsibility to complete its task of providing a valid decision.

Effective December 3, 2004 section 253.1 was added to the Act pursuant to the ATA.

In *WCAT Decision #2006-03098*, dated August 3, 2006, a WCAT panel examined a new evidence reconsideration application filed in 2005 with respect to a 1998 decision of the Appeal Division. The 1998 Appeal Division decision concerned an application to reconsider a 1961 commissioners' decision. (The WCAT panel also examined a reconsideration application regarding a December 7, 2005 WCAT decision.) The panel raised a number of concerns with respect to WCAT's ability to entertain a reconsideration application of an Appeal Division decision. I have summarized them as follows:

- The transition provisions of WCAA add support to the conclusion that the panel in *WCAT Decision #2004-04928* had jurisdiction to set aside the Appeal Division decision, especially when, as in that case, the Appeal Division decision was decided after the transition date of March 3, 2003.

- WCAT is charged under section 39 of the WCAA with completing "proceedings" which were pending before the Appeal Division on March 3, 2003, the transition date. "Proceedings" is defined to include proceedings for reconsideration of decisions. Although the reconsideration application itself was not commenced before the transition date, the appeal was. In order to fully complete "proceedings" in relation to that appeal, a reconsideration application might be considered.

- In the case before the panel in *WCAT Decision #2006-03098*, the application for reconsideration was made well after March 3, 2003 and was not pending before the Appeal Division as of March 3, 2003.

- Section 39 of the WCAA did not apply to this application.

- The jurisdiction to reconsider an Appeal Division decision must be found in the provisions governing WCAT in the Act. Section 256 of the Act is the only provision which deals with reconsiderations of Appeal Division decisions. It provides for the reconsideration of Appeal Division decisions on the ground of new evidence only.

- The Act does not contain a general authority for WCAT to reconsider former Appeal Division decisions.

- A tribunal's jurisdiction is defined by its governing legislation. WCAT relies upon common law as supporting its jurisdiction to reconsider its own decisions on common law grounds.

- Aside from those situations supported by the transitional provisions in the WCAA, common law grounds do not extend WCAT's jurisdiction to the reconsideration of another tribunal's decision, even though the other tribunal is one of the two predecessor organizations.

- The application concerning the Appeal Division decision in this case raised further issues as to whether WCAT can reconsider an Appeal Division decision which is a reconsideration of a decision of the former commissioners of the Board. It also raised potential issues as to WCAT's authority to reconsider a decision of the former commissioners of the Board. The decision which the applicant applied to reconsider was itself a decision on a reconsideration application.

- The panel had some concern that the decision on a reconsideration application is not a "decision in a completed appeal" within the meaning of section 256(1) of the Act. It had no doubt that it was a decision, but it asked, "Is it a decision 'in a completed appeal'?"

- There was no appeal to the Appeal Division. The decision which the Appeal Division reconsidered was one of the former commissioners, made in 1961, about 30 years before the Appeal Division came into existence. The former commissioners' decision was made under the predecessor to section 96 of the Act, the provision allowing the Board to reconsider its own decisions. Thus the 1961 decision itself was never an "appeal." It was a reconsideration of an earlier decision by officers of the Board to deny the claim.

In *WCAT Decision #2007-00817*, dated March 8, 2007, the panel that issued *WCAT Decision #2004-04928* again determined WCAT has the ability to reconsider Appeal Division decisions. The panel noted *WCAT Decision #2006-03098*. I have summarized the key points of *WCAT Decision #2007-00817* as follows:

- The question as to whether WCAT has authority to reconsider Appeal Division decisions on common law grounds is a difficult one. The law is not clear.

- By definition, questions regarding common law authority are not defined by the statute alone.

- *WCAT Decision #2004-04928* found sufficient indicia of legislative intent from section 256 of the Act and section 39 of the transitional provisions contained in the WCAA to infer that WCAT has the same jurisdiction to reconsider or set aside either a WCAT decision or an Appeal Division decision. To conclude otherwise would

mean that the party would have to pursue a petition for judicial review in order to request that an Appeal Division decision be set aside. If successful, the matter would then involve an incomplete Appeal Division proceeding, which would be within WCAT's jurisdiction to complete under section 39 of the WCAA's transitional provisions.

- The rationale identified in *Appeal Division Decision #93-0740*, concerning the public interest in avoiding unnecessary court proceedings, similarly supports WCAT taking a broad view regarding its jurisdiction to consider an application to set aside an Appeal Division decision on the common law grounds. In *Pasiechnyk v. Saskatchewan (Workers' Compensation Board),* [1997] 2 S.C.R. 890, the Supreme Court of Canada recognized, at paragraph 27, four interconnected fundamental principles on which the provincial schemes of workers' compensation are based as including "compensation to injured workers provided quickly without court proceedings".

- A strong argument may be mounted that, based on the literal meaning of subsection 39(2) of the WCAA, WCAT's authority is strictly limited to considering such applications for reconsideration as had actually been filed to the Appeal Division by the transition date of March 3, 2003.

- However, the Lieutenant Governor in Council has not applied such a literal or restrictive interpretation in dealing with similar wording in section 44 of the WCAA.

- A literal reading of section 44 might suggest that the power to make regulations only concerned proceedings which were actually before the Review Board or the Appeal Division prior to March 3, 2003. However, this authority to make regulations was used in *BC Regulation 322/2002* for the purpose of making it clear that parties have a right, subsequent to March 3, 2003, to initiate requests for an extension of time to obtain review by the Review Division, or to appeal to WCAT, even where the time period for appealing had expired prior to March 3, 2003.

- It is evident, therefore, that the statutory reference to proceedings before the Review Board and the Appeal Division is capable of being broadly interpreted to refer to transitional issues arising from such proceedings, even where these concern future applications (such as applications for an extension of time to appeal).

- The WCAA contains many provisions aimed at providing increased finality for the workers' compensation system. These changes include a 75-day time limit on the Board's reconsideration authority and the addition of statutory tests which must be met before an extension of time can be granted to obtain a review or appeal. However, the intent of providing increased finality is not absolute or unconditional. It is tempered to some degree by other provisions. The Legislature need not have granted WCAT authority to reconsider Appeal Division decisions under section 256.

Similarly, the Lieutenant Governor in Council need not have exercised the authority to provide regulations to make it clear that a party may apply to the WCAT chair for an extension of time to appeal a Review Board finding (even though the time limit for appealing expired prior to March 3, 2003 with no appeal having been filed).

- Subsection 253.1(5) of the Act involves a recognition of WCAT's common law jurisdiction to reopen an appeal in order to cure a jurisdictional defect. That provision neither limits nor expands such authority.

- Having regard to the public interest in avoiding unnecessary court proceedings, it might reasonably be inferred from the various statutory indicia that WCAT has authority to consider whether an Appeal Division proceeding had, in fact, been properly completed by the transition date.

- There are sufficient indications in the Act to infer that WCAT was intended to complete appeals to the Appeal Division, where the earlier decision involved an error of law going to jurisdiction.

- Bearing in mind the "tempered" finality evidenced by section 256 of the Act, and the broad and purposive interpretation given by the Lieutenant Governor in Council to the wording of section 44 of the WCAA's transitional provisions concerning the meaning of "proceedings before the review board and the appeal division", the panel agreed with the interpretation provided in *WCAT Decision #2004-04928*.

- Just as WCAT is empowered by the statute to reconsider Appeal Division decisions on the basis of new evidence, WCAT is, for the reasons set out above, in a position to complete the task of providing a valid decision in the first instance (on an appeal brought to the Appeal Division), upon request by a party.

- The alternative interpretation, that such a remedy remains available but only by means of a petition for judicial review, would mean that the opportunity to be heard regarding whether the Appeal Division decision involved an error of law going to jurisdiction would only be available for those parties with the financial resources to pursue such an application (or the ability to pursue such an application in the courts without legal representation). In the event an Appeal Division decision were to be set aside by the courts, it would fall to WCAT to complete the task of providing a valid decision on the appeal.

- To the extent the law is ambiguous in this area, the panel favoured resolving the ambiguity in a fashion which accords with the basic principles which supported the creation of administrative tribunals, involving the desirability of providing timely decisions without incurring the expense of court proceedings. This interpretation bests accords with the requirement of section 250(2) of the Act, which requires that WCAT make its decision based on the merits and justice of the case.

- The panel recognized that a question might be posed as to why WCAT should entertain an application to set aside a decision of the Appeal Division on the common law grounds, after the passage of several years. At the time WCAT was created, there were recent Appeal Division decisions from the months preceding March 3, 2003. The oldest Appeal Division decisions dated back approximately 12 years to June 3, 1991, when the Appeal Division was created. However, the same question may be posed in relation to WCAT decisions. Should there be any time limitation in regard to the consideration of such applications? It has been four years since WCAT was created.

- Subject to any statutory change, WCAT decisions will similarly encompass a 12-year time frame in due course. It may be that a consistent approach should be taken in connection with both Appeal Division and WCAT decisions, in regard to whether any such limitation should be contemplated. Section 57 of the ATA established a 60-day time limit for bringing a petition for judicial review of a WCAT decision. However, the court may extend the time for making the application on terms the court considers proper, if it is satisfied that there are serious grounds for relief, there is a reasonable explanation for the delay and no substantial prejudice or hardship will result to a person affected by the delay. To date, no similar time limit exists for bringing a petition for judicial review of an Appeal Division decision.

My March 22, 2007 memorandum which accompanied WCAT's March 30, 2007 letter to the worker and the workers' adviser referred to the three WCAT decisions noted above.

Reasons and Decision

Matters of Terminology

It is often difficult, if not impossible, to sort out the meaning of the various terms used to describe changes to decisions. For example, one might "reconsider", "reopen", "rehear", "reconvene", "revisit", or "review" a decision. The results of such a process might be to "change", "amend", "confirm", "vary", "cancel", "revoke", "set aside", "rescind", "annul", or "void" a decision. The meanings provided to these terms vary and are often inconsistent. Some are used synonymously; some are not. Part of the problem is that often one attempts to capture with a single word all of the ways in which a tribunal can change something about a decision that was thought to be a final decision by the decision-maker. Lack of precision when speaking generally about the topic is therefore probably unavoidable.

This concern was raised by R. A. Macdonald in his 1979 case comment entitled *Reopenings, Rehearings And Reconsiderations In Administrative Law: Re Lornex Mining Corporation And Bukwa* (17 Osgoode Hall Law Journal 207):

> Much of the confusion in this area results from the fact that a variety of words, each with a differing nuance, are often used to describe the same phenomenon. Reopenings, rehearings, reconsiderations, reevaluations, reassessments and redeterminations are the most common. Some of these connote a judicial-type proceeding, i.e., rehearing or redetermination, others are more neutral, i.e., reopening or reconsideration. It is a principal premise of this comment that formalistic distinctions are irrelevant to the question of agency reconsiderations, and, therefore, the choice of any of these words in a given context is not intended to be significant.

In respect of the term "reconsider", I prefer the term "set aside" as it is more precise. To set aside a decision is to declare a final decision void, invalid, or a nullity (in my view all of these terms are synonymous). Where a final decision has been set aside as void either by a court or by the tribunal, the tribunal is empowered as a matter of law to consider the matter afresh and issue a new valid decision. Properly considered, such a process is not a reconsideration at all as there is no valid decision to reconsider[3]. As stated by R.A. Macdonald:

> Strictly speaking, the question of agency reconsiderations cannot arise when a prior act is void. If a first attempted determination is a nullity, any second consideration is legally only the original exercise of an agency's power. However, courts have often treated the problem of nullities as an exception to the rule requiring authorization to reconsider. This probably arises because of the limited ways in which judicial tribunals may render decisions that are nullities. At common law, courts were permitted to set aside any of their orders made without jurisdiction. But since these jurisdictional defects were invariably *rationes materiae*, there was never any question of courts' redetermining the matter. On the other hand, agency nullities may result from the breach of mandatory procedural requirements, failure to afford natural justice, the making of *ultra vires* orders, or the improper exercise of a discretionary power. In these cases there can be no question that agencies have jurisdiction to make a proper determination. Although this reassumption of jurisdiction has usually induced courts into viewing such determinations as reconsiderations, logically, the general principle requiring authorization to reopen a matter can only apply to valid acts.

In my view, to "reconsider" a decision is to consider changing a final, valid decision. A reconsideration in this sense requires statutory authorization. If a tribunal is considering changing a final, invalid decision it is not reconsidering a decision at all. Even if "reconsider" could be said to have a very broad meaning and include the act of

[3]See *Chandler v. Alberta Association of Architects* [1989] 2 S.C.R. 848*, Appeal Division Decision #93-0740*, and *Eastern School v. Minister of Community Affairs* 2002 PESCTD 17

setting aside a final decision, it is clearly broader in scope. Conceptually[4], it is broad enough to include a power of a tribunal to change the outcome of a final decision for reasons other than its invalidity. Such reasons might include the tribunal simply changing its mind, the appearance of new evidence, or a change in circumstances. This is the sort of power conferred on the Board under the former Act (subsection 96(2)) and under the current Act (subsection 96(4)). In this respect, the power to reconsider is considerably greater than the more limited power to set aside a decision on the basis of jurisdictional error. A tribunal with only the power to set aside a decision would be unable to change the outcome of a decision in the absence of a jurisdictional error.

Ability to Set Aside a Decision at Common Law

While in his May 4, 2007 submission the workers' adviser sets out his arguments with respect to the common law after setting out his arguments regarding WCAT's statutory authority, I consider it appropriate to examine the common law first. He notes that (i) *Appeal Division Decision #93-0740* referred to a tribunal reconsidering its earlier decisions; (ii) the court in *Powell Estate v. Workers' Compensation Board* referred to the Appeal Division being able to reconsider and correct its jurisdictional errors; and (iii) the panel in *WCAT Decision #2006-03098* referred to the common law not extending the jurisdiction of WCAT to reconsider another tribunal's decision, even if the other tribunal is one of the two predecessor organizations. He contends the common law is capable of continually evolving and the jurisdiction of tribunals to reconsider decisions based on common law is not frozen in time.

He submits that the issue of determining the common law jurisdiction of successor tribunals does not often arise. WCAT is clearly the successor tribunal to the Appeal Division. He contends with reference to a comment in *WCAT Decision #2004-04928* that "if the Appeal Division had shoes, the WCAT is properly placed to stand in those shoes." The WCAA created WCAT to stand in place of the Appeal Division, and the WCAT continues to perform duties very similar to those of the Appeal Division.

He submits WCAT has the authority to determine its own jurisdiction pursuant to subsection 250(1) of the Act. Subsection 246(1) of the Act states an appeal should be conducted subject to any rules, practices, and procedures established by the chair of WCAT. MRPP item #15.24 contains a statement of jurisdiction. For all the public interest reasons outlined in *WCAT Decisions #2004-04928* and *#2007-00817* with regard to the interpretation of the transitional provisions in subsection 39(2) of the WCAA and the deference that the courts accord to the decisions of specialist tribunals like WCAT, the courts would likely be loath to find that WCAT's review of Appeal Division decisions on common law grounds is outside the common law jurisdiction of WCAT. This is particularly so since the courts would still be able to exercise judicial review of such WCAT reconsideration decisions.

[4] Leaving aside for the moment any additional meaning or limitations given to it by statute or common law

In considering this matter, it must be kept in mind there is a distinction between (i) setting aside a decision based on common law grounds and (ii) the common law jurisdiction to set aside a decision. The former concerns the standard of review to be applied, and the latter concerns whether a tribunal has the common law authority to review an application to set aside a decision (as opposed to an express or implied statutory authority).

Among other matters, the decision of the court in *Chandler v. Alberta Association of Architects* [1989] 2 S.C.R. 848 establishes the principles that (i) the application of the doctrine of *functus officio*[5] "must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law" and (ii) where a decision is a nullity a tribunal may, in the absence of statutory authority, subsequently issue a valid decision. The latter point stems from the court's approval of the decisions in *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637 (B.C.S.C.) and *Ridge v. Baldwin*, [1964] A.C. 40 in which tribunals were found to have appropriately set aside their own decisions.

I note that the panel in *WCAT Decision #2004-04928* started with the assumption WCAT did not have common law authority to set aside Appeal Division decisions:

> It is evident from the references above to a tribunal's authority at common law to correct its decisions, where the tribunal has made an error of jurisdiction, that this authority only extends to decisions of the particular tribunal. I consider, therefore, that at least as a starting point for my consideration of this issue, I should assume that WCAT would not have any authority at common law to reconsider decisions of the former commissioners, Appeal Division, or Review Board or Boards of Review.

Later the panel noted it was not aware of any court decision concerning the exercise of a common law setting aside authority after the original tribunal had been disbanded. It commented it might be necessary to look for indications of legislative intent in considering whether such authority may reasonably be inferred from the common law.

The panel then examined *Zutter* v. *British Columbia (Council of Human Rights)*, [1995] B.C.J. No. 626, (1995) 122 D.L.R. (4th) 665, (1995) 57 B.C.A.C. 241, (1995) 3 B.C.L.R. (3d) 321, (1995) 30 Admin. L.R. (2d) 310, (1995) 10 C.C.E.L. (2d) 287 which it considered indicated that, in determining its jurisdiction to reconsider at common law, a tribunal may look to indications in its enabling statute rather than an express grant of authority. The panel then concluded as follows as to WCAT's authority to set aside Appeal Division decisions:

[5] A Latin expression commonly interpreted as meaning "having discharged one's duty."

> To my mind, key indicators from Bill 63 include section 39 of the transition proceedings, which demonstrates a legislative intent that all Appeal Division proceedings be properly concluded. This included the transfer of all Appeal Division proceedings to WCAT for completion, unless the Appeal Division was seized. As well, section 256 of the Act gives WCAT the same jurisdiction to reconsider both WCAT and Appeal Division decisions. I find, upon consideration of all of the foregoing, that WCAT is properly placed to stand in the shoes of the Appeal Division to consider whether an Appeal Division decision involved an error of law going to jurisdiction. This best ensures the attainment of the legislative objective that all Appeal Division proceedings be properly concluded. It does not undermine the legislative objective to provide finality, as decisions of the Appeal Division would remain subject to judicial review in any event. The requirements for obtaining reconsideration on the common law grounds will normally be the same as would be applied by a Court in an application for judicial review.
>
> For the reasons set out above, I find that WCAT has authority to reconsider a decision of the former Appeal Division, on the basis of the common law ground of an error of law going to jurisdiction.

While it was not explicit, it appears that the panel considered that WCAT had common law authority to set aside Appeal Division decisions. Yet it did so based on its finding of a "legislative intent."

After reviewing the matter, I find that WCAT does not have common law authority to set aside Appeal Division decisions.

I cannot stress strongly enough that WCAT is not the same appeal body as the Appeal Division. A key distinction is that WCAT is an external appeal body. The Appeal Division was a division of the Board. Pursuant to subsection 85.2(6) of the former Act, a decision of the Appeal Division was a decision of the Board. Decisions of WCAT are not decisions of the Board. It is true that subsection 255(1) of the current Act provides that a decision of WCAT is final and conclusive and subsection 255(3) provides that the Board must comply with a final decision of WCAT made in an appeal. Yet, those provisions do not make a WCAT decision a decision of the Board.

I appreciate that the Appeal Division and WCAT share some attributes. They issued/issue final decisions on non-medical matters and were/are the senior non-medical appeal tribunal in the workers' compensation system. Further, the transition provisions of the WCAA charge WCAT with completing proceedings that were pending before the Appeal Division as of March 3, 2003. However, at no point has the Legislature expressly stated that WCAT is the Appeal Division under a different name

with the result that WCAT could be found to wield the Appeal Division's powers. As well, the statutory provisions do not, by implication, establish such a status for WCAT.

I find that any "successorship" status that WCAT might have with respect to the Appeal Division does not provide a basis to consider that WCAT has common law reconsideration authority to set aside Appeal Division decisions. I consider it significant that neither the workers' adviser nor the panel that issued *WCAT Decisions #2004-04928* and *#2007-00817* cited a court case which establishes that a tribunal may have a common law authority to set aside the decision of another tribunal, even in the case of a successor tribunal. I have been unable to locate such a case. Such a power at common law would be extraordinary.

The common law authority to set aside a decision on the basis of an error of law does not require an examination of statutory indications. That the courts in *Atchison v. Workers' Compensation Board* and *Powell Estate v. Workers' Compensation Board* did not engage in any statutory interpretation with respect to the Appeal Division's ability to set aside its own decision establishes that tribunal's power to set aside its own decisions on the basis of jurisdictional error is not rooted in the discovery of statutory indications. This power instead derives from the common law which has determined that a jurisdictionally unsound decision is, in fact, no decision at all.

The *Zutter* case cited by the panel in *WCAT Decision #2004-04928* concerned whether a tribunal could reconsider one of its own decisions on the basis of new evidence and submissions. The court noted that no party took issue with the lower court's determination that no breach of procedural fairness occurred as part of the proceedings before the tribunal.

Thus, the *Zutter* decision did not involve a tribunal being asked to set aside one of its own decisions on the basis of an error of law going to jurisdiction. The search for statutory indications was necessary because the issue was not whether the tribunal could set aside one of its own decisions as a nullity. As illustrated by the *Powell Estate* decision, no such search would be necessary for a tribunal to set aside a decision on such a basis.

I find that the *Zutter* decision does not directly apply to the issue of whether a tribunal can set side one of its own decisions on the basis of an error of law going to jurisdiction, let alone whether a tribunal can set aside the decision of another tribunal on the basis of an error of law going to jurisdiction. Further, I do not consider there is a persuasive rationale for extending the *Zutter* analysis to the case before me. The panel in *WCAT Decision #2004-04928* did not explicitly state why the principle identified in the *Zutter* case should be extended.

Mr. Zutter's desire to adduce new evidence could not be addressed by a judicial review. He would have no remedy in the courts. The court in *Zutter* considered the decision in

Grillas v. Minister of Manpower and Immigration, [1972] S.C.R. 577 which addressed the ability of a tribunal to hear new evidence. The decisions of the tribunal in question in that case were subject to an appeal only on an issue of law, and Mr. Grillas would not have been able to adduce his new evidence as part of such an appeal.

Those two cases concerned parties whose recourse to the courts from the initial tribunal decision would not have been able to provide them with a remedy. That differs from the case before me because the worker could argue before the courts as part of a judicial review that the Appeal Division decision was patently unreasonable. I appreciate the worker in the case before me would incur expenses should she pursue judicial review. However, I do not consider that such a fact is a sufficient basis to extend the principle identified in the *Zutter* case.

Regarding the expense associated with judicial review proceedings, it must be kept in mind that, to some extent, WCAT now exercises a similar function to that of the Medical Review Panel in that WCAT now renders final medical decisions in the workers' compensation system. While the workers' adviser does not argue that WCAT has the common law authority to set aside decisions of the Medical Review Panel, to some extent, his argument would provide justification for that authority. Any public interest reasons (notably, the cost of judicial review proceedings) associated with subsection 39(2) of the WCAA might have equal application.

For that matter, one could argue that WCAT should have common law authority over the decisions of the former commissioners as WCAT now exercises an authority similar to that of the former commissioners. Parties who now object to decisions of the former commissioners would appear to be required to seek judicial review to obtain further review of a decision of the former commissioners.

I am aware that the panel in *WCAT Decision #2004-04928* indicated that its reasoning would not support WCAT considering decisions of any body other than the Appeal Division.

I appreciate one could argue that, regardless of whether it has been previously decided at common law it is open to WCAT to declare that a tribunal has the common law authority to set aside a decision of a predecessor tribunal. Yet, as WCAT is not a court, I question its ability to declare the existence of a previously undeclared common law authority.

However, even assuming that WCAT has such an ability, could an argument be made that, in the absence of any legislative support for the existence of the power, the common law rule should be extended to permit the successor tribunal to set aside decisions of the former tribunal where the successor tribunal possesses similar expertise and addresses similar subject matter as the defunct tribunal and where the

applicable legislation provides no other administrative avenue for jurisdictional errors to be cured?

As much practical sense as it might make for the common law to adopt such a position, it must be remembered that administrative tribunals are creatures of statute and have no more jurisdiction than is granted to them by statute[6]. I find it would not be appropriate for the common law rule to be extended in circumstances where the legislation completely fails to provide for this possible transitional matter or is otherwise silent in respect of the question. Where the legislation does provide for this power, either expressly or by reasonable implication, the power is naturally no longer grounded in a common law rule but rather is grounded in the statute itself. In my view, any power to set aside decisions of another tribunal, if at all defensible, would need to be supported by the legislation (unlike a tribunal's power to set aside its own decisions which appears not to require any legislative support). Therefore, if after considering the relevant statutory language as a whole and applying the modern principle of statutory interpretation, if it cannot be said that a WCAT power to set aside decisions of the Appeal Division is implied, then no such power exists.

Such an approach is consistent with that taken by the Yukon's own WCAT when it considered the question of its ability to rehear matters decided by the former "appeal panels." The WCAT panel in *Decision No. 11* (viewable at its website at www.yukonwcat.ca) determined, on the basis of the statutory language and the overall scheme of its enabling Act, that it had no authority to rehear an appeal panel decision. At paragraph 22 WCAT stated:

> The answer as to whether or not the tribunal has authority to rehear this matter must be found within the legislation. The tribunal can only do what the Act says it can do.

Among other matters, the panel considered (i) the fact that WCAT's jurisdiction-conferring section does not expressly give the tribunal authority to review the decision of an appeal panel; (ii) WCAT's own reconsideration provision said that the tribunal could reopen and rehear "its own decisions" and such language does not give it authority to (re)hear decisions it has not made, and (iii) although there were transition provisions, nothing in them gives the tribunal jurisdiction as the provisions only related to issues relating to entitlement to compensation. I appreciate that in the Yukon case there was an express reopen and rehear power regarding that tribunal's "own decisions."

6 *Canadian Pacific Airlines Ltd. v. Canadian Air Line Pilots Association*, [1993] 3 S.C.R. 724

Legislative Intent to Give WCAT Authority to Reconsider Appeal Division Decisions

If WCAT has authority to set aside Appeal Division decisions on common law grounds, that authority must be found in the legislative scheme, as either an express or implied power. While item #15.24 of WCAT's MRPP cites *WCAT Decision #2004-04928* as authority for WCAT's jurisdiction over Appeal Division decisions that item is not a binding rule. Its declaration of WCAT's jurisdiction does not resolve the matter.

- Principles of Statutory Interpretation

In considering this matter, I have kept in mind relevant provisions of the *British Columbia Interpretation Act* which include the following:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. [section 8]
>
> If in an enactment power is given to a person to do or enforce the doing of an act or thing, all the powers that are necessary to enable the person to do or enforce the doing of the act or thing are also deemed to be given. [subsection 27(2)]

I have also kept in mind the modern principle of statutory interpretation which has been endorsed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 and in many subsequent cases:

> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The* Interpretation *of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The court in *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54 offered the following further comments of note on statutory interpretation:

> …The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

The decision in *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] 3 S.C.R. 425, 2005 SCC 70 illustrates the considerations applicable to the various steps in the analysis which the court listed as follows:

(1) Grammatical and Ordinary Sense
(2) The Scheme of the Act
(3) The Object of the Act
(4) The Public Policy Debate
(5) Avoidance of Anomalous Results
(6) Legislative History
(7) Penal Provision

Of note is the discussion of the doctrine of necessary implication in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4. The court noted the modern principle of statutory interpretation and then referred to this doctrine which concerns implied powers of tribunals:

> But more specifically in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: (1) express grants of jurisdiction under various statutes (explicit powers); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers) (see also D. M. Brown, *Energy Regulation in Ontario* (loose-leaf ed.), at p. 2-15).

It further explored the doctrine in its discussion of the entire context of the legislative scheme:

> The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between

judicial interpretation and legislative drafting (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.*, at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see Brown, at p. 2-16.2; *Bell Canada*, at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

> When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (Ont. H.C.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd [1985] 1 S.C.R. 174).

It noted the circumstances in which the doctrine may be applied:

> The City seems to assume that the doctrine of jurisdiction by necessary implication applies to "broadly drawn powers" as it does for "narrowly drawn powers"; this cannot be. The Ontario Energy Board in its decision in *Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, March 23, 1987, at para. 4.73, enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:
>
> - [when] the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;
> - [when] the enabling act fails to explicitly grant the power to accomplish the legislative objective;
> - [when] the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
> - [when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and

- [when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.

(See also Brown, at p. 2-16.3.)

In light of the above, it is clear that the doctrine of jurisdiction by necessary implication will be of less help in the case of broadly drawn powers than for narrowly drawn ones. Broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework. This is explained by Professor Sullivan, at p. 228:

> In practice, however, purposive analysis makes the powers conferred on administrative bodies almost infinitely elastic. Narrowly drawn powers can be understood to include "by necessary implication" all that is needed to enable the official or agency to achieve the purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose.
>
> [Emphasis in original]

- Language of the Act

The initial consideration is the language of the Act. Section 256 of the Act concerns reconsiderations of WCAT decisions based on new evidence. It expressly provides that WCAT can also reconsider Appeal Division decisions based on new evidence.

Notably, the Act does not authorize WCAT to reconsider the decisions of other appeal bodies on new evidence grounds (that is, Medical Review Panels, commissioners or boards of review). Presumably, this choice was made because Appeal Division decisions were made more recently than those of the other appeal bodies (with the exception of Medical Review Panels), and it was thought there was a greater likelihood in those cases that new evidence might arise that may possibly affect the outcome of the decision.

Whatever the reason, it is clear that, at least in respect of new evidence, the legislature wished to treat Appeal Division decisions differently than those of other former appeal bodies.

In respect of the ability of WCAT to set aside Appeal Division decisions on the basis of jurisdictional error, the Act is silent. The panel in *WCAT Decision #2004-04928* considered this silence was not determinative because the Act had never expressly authorized the Appeal Division to set aside its own decisions, even though that power had been exercised by the Appeal Division since 1993 and was confirmed by the court in *Powell Estate*. While statutory authority is not required for a tribunal to exercise a curing jurisdiction, statutory silence in respect of a power that the common law has for some time inferred is very different from statutory silence in respect of a power for which I can find no common law authority, namely the power to cure the decisions of another tribunal.

That is to say, it is one thing for a statute to be silent and let the common law apply; it is another for it to be silent and expect the common law to do something it has never done. Statutory silence of the second kind, while not determinative, does provide support for concluding the Legislature did not intend to provide WCAT curative jurisdiction over Appeal Division decisions. That the Act does not refer to any other form of reconsideration of Appeal Division decisions is significant in light of its reference to reconsideration in connection with new evidence.

After *WCAT Decision #2004-04928* was issued, the ATA came into force. Although the panel in that decision referred to the ATA, it noted that as the ATA had not yet been brought into force it did not need to consider the impact of the future provisions on its analysis. The ATA is now in force. It added to the Act section 253.1 which specifically refers to the ability of WCAT to "reopen an appeal to cure a jurisdictional defect". Thus, while at one time the Act did not expressly refer to WCAT's ability to cure jurisdictional errors, it does so now. In *WCAT Decision #2007-00817* the panel indicated it did not read section 253.1 as either limiting or expanding WCAT's common law authority.

In respect of the impact of amendments on the meaning of statutory provisions, Sullivan writes in *Sullivan and Driedger on the Construction of Statutes* (4th ed., Butterworths Canada Ltd. 2002) at page 281, after commenting that provisions are to be determined in the context of the Act as a whole:

> The Act as a whole includes any amendments that have come into force before the relevant facts arose. As explained by Houlden J.A. in *G.T. Campbell & Assoc. Ltd. v. Hugh Carson Co.* ((1979), 99 D.L.R. (3d) 529, Ont C.A.):
>
> > … amendments to a statute are to be construed together with the original Act to which they relate as constituting one law and as part of a coherent system of legislation; the provisions of the amendatory and amended Act are to be harmonized, if possible, so as to give effect to each….

> When a court interprets a provision in the context of the Act as a whole, it looks to the Act as it existed when the facts arose. Subsequently added amendments are ignored.
>
> Sometimes the meaning of a word or expression appears to change as a result of an amendment to another part of the Act. Ordinarily such changes are presumed to have been intended. However, this presumption is easily rebutted, particularly in the case of complex and frequently amended legislation like the *Unemployment Insurance Act* or the *Criminal Code*.
>
> [footnotes deleted]

Where once the Act was silent regarding WCAT's authority to amend its own decisions, section 253.1 now expressly provides WCAT with that authority. It also makes clear that the express powers to amend were not intended to detract from the ability of WCAT to reopen "an appeal" to cure a jurisdictional defect. Subsection 253.1(5) does not expressly refer to WCAT decisions or appeals specifically, but chooses to use the more general term "an appeal".

One might argue that the use of a general term is some evidence of an intent to extend the power to "reopen" beyond WCAT decisions to Appeal Division decisions. I have three reasons for not accepting the existence of such intent. First, there would be no principled reason based on the language of subsection 253.1(5) why one would limit the power to reopen to Appeal Division decisions if "an appeal" was extended beyond WCAT decisions; why not the decisions of other former appeal bodies? Second, section 253.1 was a consequential amendment of the ATA and is based very closely upon section 53 of the ATA which used the term "application". There is no indication in the ATA, read as a whole, that the term "application", which is defined to include an appeal, was intended to refer to applications of tribunals other than that of the tribunal hearing the application. Third, if section 253.1(5) was read broadly in that fashion, presumably it would mean that WCAT would also have the ability to correct and clarify Appeal Division decisions based on the authority granted in the rest of section 253.1. That would be an extraordinary power.

Arguably, it would have been a simple matter, had it been the Legislature's intention to grant WCAT the power over the Appeal Division, for the Legislature to have made it clear in the consequential amendments of the ATA that section 253.1 was also not intended to limit the ability of WCAT to cure jurisdictional defects in Appeal Division decisions. This argument is not as strong as it might otherwise be when one considers (i) that the amendment resulted from a generic provision set out in a general purpose statute, and (ii) subsection 253.1(5) modifies the rest of the section which deals only with corrections and clarification of "final decisions" (presumably limited to those of WCAT).

Nonetheless, it is worth noting that unlike other provisions of the ATA that were simply incorporated into the Act by reference (see section 245.1 of the Act), section 253.1 was a consequential amendment to the Act. While the changes made to section 253.1 when compared to section 53 of the ATA are relatively minor, changes were made. The section was tailored to some degree for application to WCAT. The Legislature thus had an opportunity to make further changes. Its failure to do so is highlighted when section 253.1 is compared to section 256 which expressly provides for Appeal Division decisions in respect of new evidence reconsiderations.

While the failure of section 253.1 to refer to Appeal Division decisions is likely not determinative, it is a factor suggesting WCAT does not have the power to set aside Appeal Division decisions. Further, even if at one time WCAT had the jurisdiction to set aside Appeal Division decisions, it could be argued that the ATA restricts the jurisdiction of WCAT over the decision of other appeal bodies. Thus, any jurisdiction that WCAT may have had prior to December 3, 2004 is restricted after that date. As the worker's reconsideration application was filed in July 2005 it would be caught by the addition of section 253.1 to the Act.

- Language of the WCAA

A further consideration is the wording of section 39 of the WCAA. That section which governs the transition of Appeal Division proceedings was reproduced earlier in this decision.

At first blush one could consider that the term "proceedings for reconsideration of decisions" found in paragraph 39(1)(b) of the WCAA refers to all requests for reconsideration of Appeal Division decisions on the grounds of new evidence and errors of law going to jurisdiction.

Yet the use of the word "reconsideration" in subsection 39(2) of the WCAA does not necessarily mean that the Legislature was using it to refer to the Appeal Division's reconsideration of its own decisions on the basis of errors of law going to jurisdiction. I consider it appropriate to have regard to the use of the words reconsider and reconsideration as they were found in the Act prior to March 3, 2003.

Prior to the WCAA coming into force, the Act used the term "reconsider" in two principal sections[7]. Section 24 was a specific section providing the Board with an obligation, on application by a worker, to reconsider benefits for a worker who received a permanent disability award based on a total disability of 12% or greater or received a loss of earnings award, where the worker was still suffering from a compensable disability ten years later.

[7] There are two other sections – (i) section 91(2) where the Appeal Division could direct the Review Board to reconsider a matter and (ii) subsection 212 which gave the Appeal Division the ability to refer a matter back to the Board for reconsideration.

The second section was section 96.1 of the former Act which allowed for applications to the Appeal Division "for reconsideration of a decision of the appeal division" on the basis of new evidence. If there was such evidence, the chief appeal commissioner could direct the Appeal Division "to reconsider the matter." Subsection 96(2) provided the Board the right to "reopen, rehear, and redetermine" any matter. While the workers' compensation system may have referred to the Board reconsidering its own decisions, it was actually reopening, rehearing, and redetermining them. Thus, prior to the amendments, to reconsider an appeal body decision pursuant to the Act could only have referred to the Appeal Division's ability to reconsider one of its own decisions on new evidence grounds.

On this basis, the reference to "proceedings for reconsideration of decisions" in paragraph 39(1)(b) of the WCAA could only sensibly refer to reconsiderations on new evidence grounds. This meaning is further supported by the fact the only use of the term "reconsider" in reference to Appeal Division decisions in the amended Act is largely consistent with this historical meaning. Section 256 of the Act, the only section of the Act expressly empowering WCAT to do anything with Appeal Division decisions, refers to "reconsideration of the decision" on new evidence grounds. That the workers' compensation system might have referred to applications to set aside decisions as void as "reconsiderations", while important to consider, is not determinative of the statutory meaning of the term. The use of that term by the workers' compensation system would likely not have been in the minds of the Legislature when it passed the WCAA. One could argue that the Legislature would have used that term in a manner similar to its earlier use of the term when it gave the Appeal Division an ability to reconsider its own decisions on the basis of new evidence.

As set out above, there is good reason to consider that an application to set aside a decision on jurisdictional grounds cannot even be said to be a "reconsideration" at all (one notes that section 253.1(5) of the Act uses the term "reopen" and not "reconsider.")

Admittedly, section 1 of the Act defines "reconsider" more broadly by saying that to reconsider is "to make a new decision in a matter previously decided where the new decision confirms, varies or cancels the previous decision or order". However, in my view, cancelling a decision is not the same as voiding a decision. Also, section 96 of the Act seems to distinguish between "reopen" (subsection 96(2), "reconsider" (subsection 96(4), and "set aside" (subsection 96(7) a previous decision of the Board (as does section 113(2.3)), further divorcing the concept of reconsideration from that of setting aside a decision. Subsection 96(7)'s reference to the Board's authority to set aside a decision which resulted from fraud or misrepresentation would be consistent with the Appeal Division's 1993 determination that it could set aside its own decisions on the basis of fraud.

Lastly, I note that when the appeal structure of the workers' compensation scheme was last changed in 1991, the transition provisions also expressly addressed the issue of "reconsiderations." In respect of decisions of the former commissioners of the Board, subsection 17(5) of the *Workers Compensation Amendment Act, 1989* authorized the Appeal Division to "reconsider" past commissioners' decisions "on the same grounds and in the same manner as set out in section 96.1", namely on new evidence grounds. In respect of applications to set aside decisions of the former commissioners on the basis of jurisdictional error, the Board expressly delegated its authority to set aside the decisions of former commissioners to the Appeal Division in *Decision No. 8* (noted earlier in this decision). To the extent that Board practice has any bearing on the interpretative exercise, it seems that the Board at least felt it was necessary, if it wished to provide the Appeal Division with voiding jurisdiction over the decisions of a former appeal body, to do so expressly.

Thus, there is arguably a question as to whether the transition provisions ever permitted WCAT to hear applications pending before the Appeal Division involving challenges on jurisdictional grounds. I am aware that WCAT has issued many decisions in which it has adjudicated transition applications on jurisdictional grounds.

The most obvious objection to this theory is there seems to be little reason for the Legislature not to have intended to have all pending proceedings before the Appeal Division appropriately completed, including jurisdictional applications. Would the sudden termination of those applications not interfere with a person's vested rights? In respect of those people who had pending jurisdictional error applications before the Appeal Division on the transition date, they are arguably in the same position as all those who had reconsideration applications pending before the Board on the transition date and whose decisions had been issued more than 75 days before the transition date. Those applications to the Board were terminated owing to the 75-day time limit on Board reconsiderations in the absence of fraud and misrepresentation (subsections 96(4) and 96(5) of the Act). Such actions were justified on the basis that the amendments to the Act were intended to bring finality to matters.

The panel in *WCAT Decision #2005-02379*, a noteworthy decision, determined that a worker whose reconsideration application was pending before the Board on the transition date was not entitled to a decision from the Board. It is not clear on what basis the worker applied for reconsideration. The panel concluded that, as the Board had an unfettered discretion to reconsider, the worker did not have a vested right to a reconsideration. Similarly, the ability of a tribunal to set aside one of its own decisions is a discretionary power. No tribunal is obligated to entertain such an application. For this reason and on the basis of this WCAT decision, it is arguable that no one who had a pending application before the Appeal Division on the transition date had a vested right to have an earlier Appeal Division decision set aside if a jurisdictional error was found.

Those parties whose applications to set aside the decisions of Board officers had been filed with the Board (as opposed to the Appeal Division) would have been able to request an extension of time in which to appeal the Board's decision. Thus, they would have had potential access to a further remedy within the workers' compensation system.

If, on March 3, 2003, applicants who had filed applications with the Appeal Division to set aside Appeal Division decisions had been advised that WCAT had no jurisdiction to hear their applications, they would have been without a further remedy within the workers' compensation system. Those applicants would have been in no different position than applicants who applied on or after March 3, 2003.

Even if the language found in paragraph 39(1)(b) of the WCAA was intended to include applications to set aside Appeal Division decisions on common law grounds that were pending with the Appeal Division as of March 3, 2003, such an interpretation would not assist the worker in the case before me. Her application was filed over two years later in July 2005. If it had been intended that WCAT have the authority to set aside Appeal Division decisions on common law grounds regardless of the date of application, it would have been a simple matter to have made such an intention clear by providing statutory language to that effect, either in the transitional provisions or in the Act. I consider the Legislature's silence on this question is indicative of its intention. In any event, there would be nothing inconsistent with or absurd about WCAT's ability to set aside Appeal Division decisions being limited to only transitional proceedings.

Thus, even if one was to conclude that the term "reconsideration" in section 39 of the WCAA includes applications to set aside Appeal Division decisions such an interpretation does not mean one should, or can infer from this, support for a broader authority on the part of WCAT to set aside Appeal Division decisions that were not pending on the transition date.

The panel in *WCAT Decision #2007-00817* found a broader authority. It considered that *BC Regulation 322/2002* issued pursuant to section 44 of the WCAA provided a basis for interpreting the word proceedings broadly such that the language in section 39 should not be interpreted to be limited to applications that had been actually filed with the Appeal Division as of March 3, 2003:

> Section 44(1) provides a power to make regulations concerning matters that, *inter alia*, are necessary for the orderly transition to WCAT of proceedings before the Workers' Compensation Review Board (Review Board) and the Appeal Division. A literal reading of this wording might suggest that the power to make regulations only concerned proceedings which were actually before the Review Board or the Appeal Division prior to March 3, 2003. However, this authority to make regulations was used for the purpose of making it clear that parties have a right, subsequent to

> March 3, 2003, to initiate requests for an extension of time to obtain review by the Review Division, or to appeal to WCAT, even where the time period for appealing had expired prior to March 3, 2003.
>
> Section 2(2) of the *Transitional Review and Appeal Regulation*, B.C. Reg. 322/2002, provides….
>
> **It is evident, therefore, that the statutory reference to proceedings before the Review Board and the Appeal Division is capable of being broadly interpreted to refer to transitional issues arising from such proceedings, even where these concern future applications (such as applications for an extension of time to appeal).**
>
> [emphasis added]

I note the power in section 44 of the WCAA to make regulations is generally described. In respect of "proceedings before" the Review Board and the Appeal Division, the Lieutenant Governor in Council must believe that a "matter" relating to their "orderly transition" to WCAT is not provided for, or insufficiently provided for, by the WCAA. One could interpret the phrase "proceedings before" as meaning only those proceedings initiated or pending before those respective appeal bodies before the transition date.

"Proceedings" is not defined in section 44 of the WCAA. The term is defined in section 39 of the WCAA, for the purposes of section 39 only, by enumerating types of proceedings (without reference to when the proceedings might have begun, if at all), and in that section the terms "proceedings" and "proceedings pending" are both used. Other provisions of Part 2 of the WCAA use the expression "proceedings pending before the appeal tribunal on the transition date." A similar expression is used in subsection 44(b) which refers to the "completion" of "proceedings before the medical review panel on the repeal date". *Black's Law Dictionary*[8] defines "proceeding" alternatively as "1. The regular and orderly progression of a lawsuit, including all acts and events between the time of the commencement and the entry of judgment. 2. Any procedural means for seeking redress from a tribunal or agency…. 4. The business conducted by a court or other official body; a hearing." Relying on the statutory interpretation presumption of consistent expression, one could conclude that the expression "proceeding before" means something different from "proceedings pending before" or "proceedings before … (on X date)" and as such would permit the government to make a regulation providing for transition rules for requests to set aside Appeal Division decisions.

One might presume that these are the same sorts of reasons that the Lieutenant Governor in Council would rely on to justify its decision to make the sole regulation

[8] *Black's Law Dictionary*, 8th ed., (St. Pauls: West, a Thomson Business, 2004)

issued pursuant to section 44 of the WCAA, *BC Regulation 322/2002.* That regulation provides rules to address situations where a person never commenced an appeal to the Review Board or the Appeal Division within the time required to do so. If section 44(a) was interpreted to apply only to pending proceedings, the Lieutenant Governor in Council could not have made the regulation.

The regulation appears to attend to a gap not addressed by sections 40 and 41 of the WCAA which concern appeal rights to the Review Board and the Appeal Division that were unexercised, but had not expired, as of March 3, 2003. Those provisions in the WCAA did not address the fate of parties whose appeal rights had expired prior to March 3, 2003. The regulation gives those parties an ability to seek an extension of time in which to dispute a decision; that ability existed prior to March 3, 2003 and the regulation fills a gap not explicitly addressed by the WCAA.

I consider that the difference in language between section 39 and 44 of the WCAA provides sufficient basis for the Lieutenant Governor in Council to have issued the regulation. I do not consider that the regulation somehow supports a finding that the language in section 39 provides a basis for WCAT to have the authority to set aside Appeal Division decisions.

I have considered whether the language of section 44(a) is broad enough to authorize the Lieutenant Governor in Council to issue a regulation involving applications to set aside Appeal Division decisions brought to WCAT after the transition date. One could argue that the language of that section, as interpreted by the Lieutenant Governor in Council in the regulation, could be broad enough to accomplish that task. If proceedings in section 44 does not mean proceedings pending on March 3, 2003, and can mean proceedings that could have been before the Appeal Division had a reconsideration request been made before March 3, 2003, the Lieutenant Governor in Council arguably could have, or could still, authorize WCAT to hear applications to set aside Appeal Division decisions.

Regulations, being subordinate legislation not enacted by the Legislature, are of limited, if any, use when interpreting a statute. One cannot generally determine the intent of the Legislature by appealing to the actions of the Lieutenant Governor in Council. For this reason I do not contend that by choosing not to pass a regulation authorizing such applications the Legislature clearly intended to prohibit WCAT from hearing such applications. However, the fact that the WCAA included such a regulatory power can be used as an interpretative aid when considering whether it was the Legislature's intent to permit WCAT to "fill the void" in transitional matters.

Thus, if there is a "void" regarding the setting aside of Appeal Division decisions on common law grounds it can be filled by the Lieutenant Governor in Council passing a regulation. If a regulation is needed to fill the void, it cannot fall to WCAT to give itself

authority to set aside Appeal Division decisions on common law grounds. WCAT can declare the extent of its jurisdiction, but it cannot add to it.

The panel in *WCAT Decision #2004-04928* had a further significant justification for finding WCAT had the authority to set aside Appeal Division decisions. It considered the use of the words "complete" and "completed" in section 39 of the WCAA was significant regarding WCAT's jurisdiction over Appeal Division decisions. (Its analysis on this point is separate from any consideration of whether section 39 should be read literally as only giving WCAT the ability to complete common law reconsideration applications that had been filed with the Appeal Division prior to March 3, 2003.) The panel's analysis is as follows:

> **It is evident from section 39(2) and 39(4) that the legislature intended that all Appeal Division proceedings be continued and completed. To the extent an Appeal Division decision involved an error of law going to jurisdiction, the proceeding may be viewed as incomplete, in the sense that a valid decision has not been provided.** While the term "reconsideration" may be used in a colloquial fashion to encompass such proceedings, this in fact involves the further consideration required in order to provide a valid decision in the first instance (rather than a true reconsideration as envisaged by section 256).
>
> As noted above, it is in the public interest for parties to be able to rely generally on the finality of a tribunal decision. It is also in the public interest to avoid unnecessary court proceedings. The legislature has provided a mandate under section 39 of Bill 63's transitional provisions for the continuation and completion of all proceedings pending before the Appeal Division on March 3, 2003.
>
> The fact that the Appeal Division or WCAT would continue to be responsible for completing appeals filed to the former Appeal Division (in the event a court were to find that the decision involved an error of law going to jurisdiction) constitutes a powerful argument for inferring jurisdiction to hear such arguments without the necessity for intervention by the courts. The rationale remains the same as in the case of the Appeal Division or WCAT exercising such authority over its own decisions.
>
> [emphasis added]

The panel drew support from section 256 of the Act as well:

> Coupled with this is the fact that the legislature has provided WCAT with the authority under section 256(1)(a) and (b) to reconsider completed Appeal Division or WCAT appeals on the basis of new evidence. It is

> noteworthy that for the purpose of addressing new evidence applications, the legislature has not limited WCAT's reconsideration authority to WCAT decisions. In terms of statutory reconsideration authority, similar authority has been conferred on WCAT as was previously held by the Appeal Division under the section 96.1 of the former Act. Differences in wording between the former section 96.1 and the current section 256 include:
>
> - section 96.1 concerned a decision of the Appeal Division, while section 256 concerns "a completed appeal" by WCAT or by the Appeal Division;
> - the phrase "exercise of due diligence" has been replaced by "exercise of reasonable diligence";
> - section 256(4) limits the exercise of this authority to "one occasion only" while section 96.1 contained no such limitation.
>
> There are four references in section 256 to "a completed appeal" by WCAT or by the Appeal Division. An argument that a decision involved an error of law going to jurisdiction is, in effect, an argument that the decision is incomplete, and the appeal body should complete its task of providing a valid decision.
>
> [emphasis added]

The panel in *WCAT Decision #2004-04928* considered that an Appeal Division decision involving an error of law going to jurisdiction was incomplete and as WCAT was charged with completing appeals it could examine whether Appeal Division decisions were complete. Does this declaration survive close scrutiny?

Even assuming that the purpose of the transitional provisions of WCAA was to ensure that all Appeal Division proceedings were completed, I do not accept that a proceeding may be viewed as incomplete if it results in a decision that contains an error of law going to jurisdiction. I am not inclined to characterize a void decision as an incomplete decision. A void decision is no decision at all. Until such time as a final decision is set aside as void I would say it is a complete decision. Normally a decision would only be considered incomplete if the tribunal failed to address an issue before it or failed to discharge a statutory obligation imposed upon it. I think that it is important to draw a clear distinction between the finality of a decision and the validity of a decision.

I am not persuaded that section 39 of the WCAA somehow gives the WCAT the authority to ascertain whether Appeal Division decisions issued before March 3, 2003 were complete. I find that section 39 deals with the handling of proceedings outstanding as of March 3, 2003; that section does not create a substantive reconsideration authority for WCAT to exercise. The section does not address Appeal

Division proceedings that were not pending as of that date so as to give WCAT authority to address Appeal Division decisions issued before March 3, 2003.

I find there is a significant difference between (i) completing a pending proceeding and (ii) declaring that an Appeal Division decision which completed an appeal should be set aside. Any assertion that WCAT's ability to exercise the former power gives it the authority to exercise the latter power is a form of boot strapping. The latter power is not by any means an inherent aspect of the former power such that any decision-maker that exercises the former power must have the latter power.

I do not consider that section 256 of the Act assists in finding that WCAT has authority to reconsider Appeal Division decisions. Section 256 concerns new evidence applications. That new evidence applications may be made with respect to Appeal Division decisions does not somehow confer on WCAT the ability to set aside Appeal Division decisions on common law grounds.

I am not persuaded that the word "completed" should be interpreted in the manner suggested by the panel in *WCAT Decision #2004-04928*. If the word "completed" somehow confers authority to reconsider on common law grounds, it would be incumbent upon WCAT in every new evidence application to examine whether it was, indeed, being asked to consider a completed appeal. This is so because section 256 uses the expression "completed appeal by the Appeal Division" and "completed appeal by the appeal tribunal." Thus, it would be incumbent upon each reconsideration panel examining a new evidence application initially to determine whether the Appeal Division or WCAT decision subject to the reconsideration application contained an error of law going to jurisdiction.

To relieve WCAT of any obligation, as part of a section 256 application, to examine whether the decision sought to be reconsidered contains an error of law going to jurisdiction, one could argue that "completed" in section 256 of the Act should not necessarily be interpreted in the same manner as the word "completed" in section 39 of the WCAA. Thus, while "completed" in section 39 of the WCAA could involve an examination as to whether there was an error of law going to jurisdiction, the word "completed" in section 256 of the Act could simply refer to an Appeal Division or WCAT decision which has addressed all the issues raised in an appeal to the Appeal Division or WCAT and is thus not incomplete. The imposition of a requirement that an appeal be "completed" would simply mean that it was not open to a party to request reconsideration on the basis of new evidence part way through the decision-making process and would have to wait until the appeal was complete.

Yet, it is striking that the addition of section 256 of the Act was the result of the Legislature passing the WCAA (section 256 is found in section 33 of the WCAA). It seems quite likely that the Legislature intended "completed" in section 256 of the Act to mean the same as "completed" in section 39 WCAA. "Completed" would most simply

be interpreted as meaning a tribunal having addressing all the issues raised on appeal and producing a final WCAT decision as envisioned by section 255 of the Act. Such a decision would be complete. Such an interpretation means that in subsection 39(2) of the WCAA and in section 256 of the Act completed does not involve an assessment of whether a decision contains an error of law going to jurisdiction.

WCAT's Statutory Authority to Set Aside Appeal Division Decisions on Common Law Grounds

For the reasons set out above, I find that taken individually the statutory provisions do not provide a basis to find that WCAT has the authority to reconsider the May 22, 2002 Appeal Division decisions on common law grounds.

What of the statutory provisions as a whole in the context of the modern principle of statutory interpretation?

The workers' adviser comments that given WCAT's ability under subsection 256(2) of the Act to reconsider Appeal Division decisions on the basis of new evidence and WCAT's obligation under subsection 39(2) of the WCAA to complete appeal proceedings (including reconsideration requests) pending before the Appeal Division on the transition date, the omission of a provision specifically referring to requests for reconsideration of Appeal Division decisions on common law grounds (made after the transition date) appears to be "inadvertent." He accepts that while a literal interpretation of subsection 39(2) does not lead to an absurd result, it does lead strictly to a strikingly inconsistent and anomalous result. He concludes as follows:

> It is difficult to think of a reason why the legislature would intend to empower the WCAT to reconsider appeal division decisions based on new evidence, but not reconsider decisions that were patently unreasonable. While consistency is sometimes said to be the 'hobgoblin of little mind', in carrying out the arcane art of statutory interpretation, consistency (with legislative intention) is considered a virtue.

My conclusion regarding the individual statutory provisions and WCAT's jurisdiction over Appeal Division decisions does not change when I consider all of the statutory provisions together and the other considerations set out by the Supreme Court of Canada as part of statutory interpretation. I appreciate that the scheme of the Act, the object of the Act, and the intention of the Legislature is to provide for timely access to compensation and to the appellate process without court proceedings, but those considerations do not provide a basis to read into the statutory provisions a power that WCAT does not have.

I question whether the doctrine of necessary implication has relevance to the issue before me. To the extent it may be relevant, I do not consider that an authority to set

aside Appeal Division decisions is essential to WCAT fulfilling its mandate or critical to its function as an appellate body. One of the objects of the WCAA was to provide transition rules for pending proceedings. WCAT's mandate includes completing the proceedings that were pending as of March 3, 2003 and completing the appeals to WCAT that are initiated after March 3, 2003. I do not consider that WCAT's mandate includes authority on common law grounds to set aside in excess of more than 20,000 Appeal Division decisions that had been issued prior to March 3, 2003. The WCAA addressed reconsideration authority over Appeal Division decisions on the basis of new evidence and arguably addressed reconsideration applications that were pending as of March 3, 2003.

That the Legislature did not confer on WCAT the authority on common law grounds to set aside Appeal Division decisions is not an oversight that must somehow be cured by WCAT finding jurisdiction in this area. I consider it significant that, as established by the *Official Report of the Debates of the Legislative Assembly* (*Hansard*), during the October 29, 2002 review of the WCAA by the Committee of the Whole House the Minister of Labour commented that it would take WCAT two to three years address the backlog of appeals. As noted in WCAT's 2003 annual report (viewable on WCAT's website), over 22,400 outstanding appeals were transferred from the Review Board and Appeal Division to WCAT.

Against the backdrop of such a sizeable backlog, it would be quite understandable for WCAT not to have authority to set aside Appeal Division decisions on common law grounds. I accept that WCAT was given reconsideration authority on the basis of new evidence, and thus it would be exposed to the possibility of receiving new reconsideration requests in connection with the Appeal Division decisions.

That the WCAA did not address all appellate circumstances is illustrated by *BC Regulation 322/2002* which ensured that parties could seek extensions of time in which to appeal. It is significant that that apparent gap in the legislation was filled by regulation. That was not a gap filled by WCAT. Any gap associated with WCAT and the authority to set aside Appeal Division decisions is another gap that is not to be filled by WCAT.

I have considered the discussion of gaps and oversights found at pages 134 to 141 of *Sullivan and Driedger on the Construction of Statutes.* I do not consider any gap in WCAT's authority is an absurdity that is too severe to tolerate. I note that a legislative gap may be taken to embody the actual intention of the Legislature.

The panel who issued *WCAT Decisions #2004-04928* and *#2007-00817* attached significance to the fact that, if WCAT did not have setting aside authority, parties would need to resort to judicial review to pursue disagreement with an Appeal Division decision. It is true that only those with sufficient financial resources can pursue such a remedy. WCAT's exercise of such authority over Appeal Division decisions would

mean that parties would not have to incur the expenses associated with judicial review assuming that the applicants were satisfied with the WCAT decisions. I am aware that the court in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, recognized four interconnected fundamental principles on which the provincial schemes of workers' compensation are based as including "compensation to injured workers provided quickly without court proceedings."

Yet, how much significance should be attached to the saving of judicial review expenses that would accompany WCAT's exercise of setting aside authority? Parties who wish to contest a Medical Review Panel's certificate or a decision of the commissioners are also faced with the costs of judicial review. Surely that financial hurdle does not give WCAT authority over the decisions of those appellate bodies. This is so even though one could argue that WCAT has now taken over from the Medical Review Panel as the final decision-maker on medical matters in the workers' compensation system.

It should be kept in mind that many self-represented parties file judicial review applications. Those parties do not incur the expense of legal representation.

The panel that issued *WCAT Decision #2004-04928* attached significance to the fact WCAT would be called upon to complete a decision if a judicial review of an Appeal Division decision was successful. Yet not in all judicial review proceedings does a court remit the matter to an administrative tribunal for a further decision after finding an error of law going to jurisdiction. It would be open to a court to determine that the matter should not be further addressed by the tribunal. However, I accept that a successful judicial review of an Appeal Division decision might result in WCAT completing what would then be an appeal from a Review Board finding regarding a compensation matter or an appeal from a Board decision regarding a non-compensation matter.

With respect, that WCAT would be called upon to complete an appeal is not "a powerful argument for inferring [WCAT's] jurisdiction to hear such arguments without the necessity for intervention by the courts." That WCAT might be called upon to complete an appeal does not in any way give it authority to determine that it should be called upon (that is, give it the authority to set aside an Appeal Division decision). There is a significant difference between doing the work (completing an appeal) and deciding that the work needs to be done (setting aside the earlier decision). I do not agree that the rationale is somehow similar to the case of the Appeal Division or WCAT exercising such authority over its own decisions. Those bodies exercise jurisdiction over their own decisions, not the decisions of other bodies.

The panel that issued *WCAT Decision #2007-00817* referred to the tempered finality evidenced by section 256 of the Act and *BC Regulation 322/2002.* It is true that the finality promoted by the WCAA was not absolute. Yet the fact that finality may be tempered does not persuasively advance a claim that WCAT can set aside Appeal

Division decisions on common law grounds. The tempering of finality flowed from express statutory provisions. Why would such tempering provide any basis for WCAT being able to set aside Appeal Division decisions? That would be an extraordinary tempering of finality not supported by any express language.

The workers' adviser's submission appears to contend that a conclusion that WCAT has the authority to set aside Appeal Division decisions on common law grounds would be consistent with WCAT's ability to set aside Appeal Division decisions on the basis of new evidence. I do not consider that there is a legislative intention that WCAT have full authority to reconsider and set aside Appeal Division decisions. The legislative intention that WCAT have the ability to reconsider Appeal Division decisions on the basis of new evidence does not speak in any significant manner to support a finding that WCAT has the jurisdiction to set aside Appeal Division decisions on common law grounds.

The panel in *WCAT Decision #2007-00817* considered that its interpretation best accorded with the requirements of subsection 250(2) of the Act which requires WCAT to makes its decision based on the merits and justice of the case. Assuming that that subsection has application to issues of whether WCAT has jurisdiction, I consider there must be sufficient legislative intent that can be gleaned from the statutory provisions. One cannot use that subsection to create an authority for which there is no persuasive basis. As noted above, I do not consider there is a persuasive basis to find that WCAT has authority.

After having reviewed the matter, and for the reasons set out above, I find WCAT does not have the authority to set aside the May 22, 2002 Appeal Division decisions on common law grounds. I question whether WCAT has the authority to set aside any Appeal Division decision on common law grounds. It may be that WCAT had the authority to complete applications to set aside Appeal Division decisions that were pending on March 3, 2003. Further, it may be that WCAT has the authority to set aside Appeal Division decisions that were issued after March 3, 2003 as seized Appeal Division matters. However, even those considerations do not assist the worker as her application to set aside the Appeal Division decision was made in July 2005 with respect to an Appeal Division decision issued in May 2002.

Conclusion

The worker's application to set aside *Appeal Division Decision #2002-1284* is denied. I find WCAT does not have the authority to set aside that Appeal Division decision on common law grounds. *Appeal Division Decision #2002-1284* stands as "final and conclusive" pursuant to subsection 96.1(1) of the former Act.

Randy Lane
Vice Chair

RL/jd