Noteworthy Decision Summary

Decision: WCAT-2007-03064 **Panel**: Larry Campbell **Decision Date:** October 9, 2007

Findings of Fact – Binding Effect – Permanent Disability Award – Projected Loss of Earnings – Section 255(1) of the Workers Compensation Act

This decision is noteworthy for its discussion of whether a prior WCAT panel made findings of fact and, if so, whether they were binding on subsequent decision makers, including this WCAT panel.

The worker was initially awarded a permanent disability award on a functional impairment basis. He was not granted a projected loss of earnings award. In a 2004 decision (*WCAT-2004-06853-RB)* another WCAT panel found that the positions relied upon by the Workers' Compensation Board, operating as WorkSafeBC (Board), in denying the worker's projected loss of earnings were unskilled and entry level and would not replace the worker's pre-injury earnings in the long term. In this decision the panel also found the worker was physically capable of sedentary to light-strength work and that, with modifications of his work duties, he would be able to work eight hours a day. The prior panel stated that, barring further vocational rehabilitation assistance, the worker would likely be left with a loss of earnings. She found there was insufficient evidence available to make an informed decision on the amount of that loss of earnings. She directed the Board to determine the worker's possible future earnings taking in account the worker's limited vocational skills, physical ability, and relevant labour market information.

The Board implemented this decision and granted the worker a projected loss of earnings award. The Review Division of the Board varied this decision by finding that the worker was not entitled to a projected loss of earnings award because he was capable of working in suitable occupations which would restore his pre-injury earnings in the long term. The review officer found that, by referring the issue of a projected loss of earnings back to the Board, the prior WCAT panel had cancelled the original Board decision not to grant such an award and left it open to the Board to issue an entirely new decision which was not limited by the specific reasons given by the WCAT panel.

The worker's representative argued that the 2004 WCAT panel had made a final and binding entitlement decision that the worker had a projected loss of earnings. In the alternative, the worker's representative argued that the prior panel's conclusion that there would be a projected loss of earnings was a finding of fact that deserved a high degree of deference. The representative also argued that the panel's findings of fact with respect to the worker's physical abilities were reviewable and subject to a new finding of fact in the future based on new information.

The worker's appeal was allowed, in part. This panel found that the prior panel had not made a final and binding entitlement decision that the worker was suffering a loss of earnings. The prior panel had only stated there was a likelihood the worker would suffer a loss of earnings. However, the 2004 WCAT decision contained a number of findings of fact which underpinned that decision which were final and binding. The panel found that the conclusion of the review

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officer that the Board, and subsequently the Review Division, had full authority to make decisions and was not limited to the specific reasons of the prior WCAT panel was incorrect. The specific findings of fact related to the prior WCAT decision were binding and not subject to reconsideration by the Board or the Review Division. The panel found them binding on him as well, since no reconsideration had been requested or granted in relation to the 2004 WCAT decision.

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Introduction

The worker, a then 32-year-old fiberglass gelcoater, was injured on October 13, 1998. The worker's claim was accepted for a right shoulder injury. The worker was ultimately awarded a permanent partial disability award of 7.45% of total disability for functional impairment.

In a decision of the Workers' Compensation Appeal Tribunal (WCAT) dated December 30, 2004 (*WCAT #2004-06853-RB*) the worker was granted an additional award of 2.5% for chronic pain. The WCAT vice chair found that with respect to the worker's entitlement to an award under section 23(3) of the *Workers Compensation Act* (Act) the positions relied upon by the Workers' Compensation Board, operating as WorkSafeBC (Board), were unskilled and entry level and would not replace the worker's pre-injury earnings in the long term. However, the vice chair concluded there was not sufficient information on which to reach a conclusion about the worker's final entitlement. The vice chair returned the claim to the Board for determination of the worker's possible future earnings taking into account the worker's limited vocational skills, physical ability, and relevant labour market information. This would then result in a new decision about the worker's loss-of-earnings entitlement. I will refer to this decision as the 2004 WCAT decision.

In a letter dated October 20, 2005, an officer of the Board informed the worker that pursuant to the WCAT decision an additional award of 2.5% of total disability was granted for chronic pain. The worker was also granted an award under section 23(3) of the Act. The Board officer concluded that the WCAT vice chair had decided the worker had a loss of earnings and the Board was bound by that decision regardless of subsequent evidence.

The worker requested a review of this decision. In Review Division Decision #R0061199, dated June 22, 2006, a review officer varied the Board officer's decision and found that the worker was not entitled to an award under section 23(3) of the Act. The review officer concluded that the Board officer had incorrectly determined that the Board was bound by the WCAT decision to grant the worker a loss-of-earnings award. The review officer concluded that by returning the matter to the Board for further decision, the WCAT vice chair had cancelled the prior Board decision. This meant that the Board was free to consider all evidence with full authority to make decisions and was not limited to considering the specific reason for which the vice chair made the referral back. The worker has appealed that decision to the WCAT.

An oral hearing was held on February 12, 2007. The worker was represented by a lawyer, who submitted documentary evidence and made submissions on the worker's behalf. The employer did not attend the oral hearing. The employer was represented by a consultant who provided a written submission dated January 19, 2007.

One of the aspects of this appeal relates to the question of whether determinations made in the prior WCAT decision were "decisions" or "findings of fact". If the prior panel made findings of fact, then were such findings binding on subsequent decision makers. A three-person non-precedent WCAT panel had made a decision (*WCAT Decision #2007-00430*) related to findings of fact which were unrelated to an entitlement decision. That decision is not binding on me in my determination of this appeal but contained relevant reasoning and analysis. As the decision had not been publicly available prior to the oral hearing, I disclosed this to the parties and requested submission. The worker's representative provided a submission dated April 16, 2007. This was disclosed to the employer's representative who made a brief response. This in turn was disclosed to the worker's representative.

Jurisdiction

WCAT has jurisdiction to consider this appeal under section 239(1) of the Act as an appeal from a final decision made by a review officer under section 96.2 of the Act.

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (see section 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board that is applicable in the case. WCAT 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 in an appeal before it (section 254 of the Act).

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Issue(s)

The issue on this appeal is the worker's entitlement to a loss-of-earnings award under section 23(3) of the Act.

Background and Evidence

The information on the worker's claim has been set out in prior Review Division and WCAT decisions and will not be repeated in detail.

Suffice it to say that the worker was ultimately awarded a permanent partial disability award of 9.95% of total disability under section 23(1) of the Act. This related to permanent impairment in his right shoulder and chronic pain.

In the 2004 WCAT decision, the vice chair varied the Review Division decision with respect to the worker's entitlement to an award under section 23(3) of the Act.

The Board requested an employability assessment from an external vocational rehabilitation provider. The employability assessment dated July 8, 2005 concluded that the occupation of self-serve gas station attendant/cashier would be suitable for the worker based on the limitations accepted by the 2004 WCAT decision. This position was encompassed in the more general National Occupational Classification (NOC) code 6611. The occupation would enable the worker to vary body position and was within the light strength category. The provider noted the worker would be limited to positions where the light lifting was occasional. The provider concluded that the worker would be limited to entry-level type positions given his past education and experience. The provider indicated that the occupation was regularly available in urban centres. The wages for self-serve gas station attendants ranged from minimum wage ($8.00 per hour in 2005) to $10.50 per hour. The provider also noted the Statistics Canada information from 2000 indicated full-time workers in NOC code 6611 was $23,802.00 a year.

The Board claims adjudicator in disability awards provided a recommendation to the Board's Disability Awards Committee in a memo dated September 13, 2005. The claims adjudicator in disability awards determined that based on the Statistics Canada information for NOC code 6611, the average earnings of a full-time worker were $1,923.50 a month in 1998 dollars.

In the October 25, 2005 decision letter the Board granted the worker an award under section 23(3) of the Act on the basis that he could earn $1,923.50 per month.

The worker's representative provided argument and new evidence in support of the worker's request for review to the Review Division. This included a decision of the Canada Pension Plan; Pension Appeals Board dated December 2, 2005. That decision found that the worker did not, in December 2000, have the capacity to regularly engage in substantial gainful employment within the meaning of the Canada Pension Plan.

In the June 26, 2006 decision that is the subject of this appeal, the Review Division determined that the worker did not have a loss of earnings and was not entitled to a section 23(3) award.

The worker provided testimony at the oral hearing. He provided details about his functional capacity evaluation in 2001 and the problems this caused him and his medication use at that time. He believes that the 2001 functional capacity

evaluation overstated his capabilities. He has limitation in his activities of daily living, ability to do household chores, and activities with his children.

The worker has a grade 12 education and limited exposure to computers. His work experience was primarily in manual occupations. Overall, the information provided by the worker was congruent with information attributed to him on the Board file.

The worker's representative provided a submission and evidence binder. Much of this consisted of copies of documents from the Board file. The worker attended a functional capacity evaluation at a local provider and in a report dated October 16, 2006 the provider set out the detailed results of their assessment. The provider concluded that the worker was disabled from greater than 10% of his activities of daily living and employment opportunities. The worker would not likely tolerate competitive employment on a full-time basis.

The worker's representative submitted that 2006 functional capacity evaluation should be preferred to the earlier one relied upon by the 2004 WCAT panel. The representative argued that the 2004 panel overlooked the fact that the worker was on significant medications at the time of the original functional capacity evaluation. The representative noted that at page 13 of the 2006 functional capacity evaluation the provider noted the worker's condition had deteriorated significantly since 2000. The representative argued that based on the 2006 functional capacity evaluation results the worker could not work as a self-serve gas station attendant/cashier. The representative submitted that I was not bound by the conclusions of the 2004 WCAT decision. The 2004 vice chair did not have the benefit of the 2006 functional capacity evaluation. The representative considered that the review officer's decision allowed for consideration of all new evidence.

The worker's representative provided a submission dated April 18, 2007 in response to my disclosure of *WCAT Decision #2007-00430*. The representative argued in essence that:

- The 2004 decision had made a final entitlement decision that the worker had a loss of earnings.

- That the referral to the Board for an employability assessment was a procedural or administrative decision and did not reopen the question of whether there was a loss of earnings.

- Alternatively, if it was not a decision, it was a finding of fact that deserved a high degree of deference.

- The panel's findings of fact about the worker's medical condition and restrictions based on the 2001 functional capacity evaluation were reviewable subject to new information.

Law and Policy

The Act was amended effective June 30, 2002, by the *Workers Compensation Amendment Act, 2002*. Because the worker's injury and permanent disability both occurred before the amendment date, the provisions of the Act as it read immediately prior to June 30, 2002 (former Act) apply to the loss-of-earnings consideration in this appeal.

Section 23(3) of the Act, as it read prior to June 30, 2003, provided that where the Board considered it more equitable, it might award compensation based on the difference between the worker's average earnings before the injury and what the worker earned or was able to earn at some suitable occupation after the injury.

The provisions of the current Act apply with regard to WCAT's jurisdiction and decision making. Section 96(2) of the Act provides that the Board may reopen a matter that had been previously decided if there has been a significant change in the worker's medical condition that the Board had previously decided was compensable or there had been a recurrence of the worker's injury.

Section 253(3) of the Act provides that WCAT's final decision on an appeal must be made in writing with reasons.

Section 254(a) of the Act provides that WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined on an appeal.

Section 255(1) provides that any decision or action of WCAT is final and conclusive. Section 255(3) provides that the Board must comply with a final decision of WCAT.

Section 256(2) of the Act provides that a party to a completed appeal may apply to the chair of WCAT for reconsideration of the decision if new evidence has become available or been discovered.

The policies which apply to this appeal are found in the Board's *Rehabilitation Services and Claims Manual, Volume I* (RSCM I).

RSCM I item #40.00 set out that worker's with permanent disabilities were entitled to assessment under both sections 23(1) and 23(3) of the Act.

RSCM I item #40.10 set out the assessment formula for awards under section 23(3) of the Act. Consideration must be given to the medical evidence as well as evidence about suitable and reasonably available occupations which maximize the worker's long-term earning potential.

RSCM I item #40.12 set out the factors for consideration in determining suitable and reasonably available occupations.

RSCM I item #40.13 related to measurement of earnings loss. This provides, in part, that the practice of the Board was to use the earnings in the occupations available after the injury as they stood as of the date of injury. When such earnings are not available, the Board will use the earnings in the occupations as of another date and bring the pre-injury earnings into line by applying Consumers Price Index (CPI) increases.

RSCM I item #67.21 relates in part to use of class averages in the determination of long-term wage rates. This item notes that a number of averages are available, one for all workers in a class, the others involving restricted categories of workers in a class. The one generally used is the average for all workers in the class.

Findings and Reasons

The first question is how to categorize the various aspects of the 2004 WCAT decision. The worker's representative submits that the 2004 vice chair made a final and binding entitlement decision that the worker had a loss of earnings. I do not agree. The vice chair, at page 13, specifically stated:

> I find that barring further vocational rehabilitation assistance, the worker will likely be left with a loss of earnings.
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> [reproduced as written]

I consider it apparent from the wording of the decision that the vice chair made no determination that the worker would have a loss of earnings. This was a comment on a perceived likelihood, not a final entitlement decision.

The representative alternatively argued that if the panel had not made an entitlement decision, then the vice chair's conclusion there would be a loss of earnings was a finding of fact. As set out above, the problem with that argument is that the vice chair did not find the worker would be left with a loss of earnings; only that there was a likelihood.

The vice chair did, however, make a number of findings of fact. I find the vice chair determined at page 13 that:

> I do not accept the Board's conclusion that work as a dispatcher, or in sales or telephone solicitation, would replace the worker's pre-injury earnings in the long term. This worker has a grade 12 education, no computer skills and has been employed in manual labour for most of his working life. The identified positions were unskilled, entry level jobs, which would pay minimum wage and not replace his pre-injury earnings of approximately $15 an hour.
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> [reproduced as written]

I find that the vice chair made additional findings of fact, also on page 13, where the vice chair determined that:

> I accept the findings of the functional capacity evaluation that the worker was physically capable of sedentary to light-strength work. I prefer this evaluation to the opinion of the worker's physician that the worker is completely disabled, as the evaluation was based on an unbiased, extensive two-week period of observation of the worker's physical abilities. I do not accept the worker's position that he is not capable of regular hours of employment. He participated in a two-week assessment of his physical abilities. While he had some difficulty with the heavier components involved, the evidence supports a conclusion that with modification of his work duties (i.e. opportunity to take stretch breaks or alternate between sitting and standing) the worker would be able to work eight hours a day.
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> [reproduced as written]

The worker's representative submitted, in relation to his argument that a finding of fact had been made about the existence of a loss of earnings, that a finding of fact at WCAT is one that deserves a high level of deference, as discussed in the reasoning in *WCAT Decision #2006-02738*. The representative also argued that the vice chair's findings of fact, with respect to the worker's physical abilities, are reviewable and subject to a new finding of fact in the future based on new information.

The representative based that argument on a partial quotation from *WCAT Decision #2006-04596*. I find that quotation was taken out of context. That decision referred to a conclusion by a Board review officer that findings of fact unrelated to entitlement decisions should not be reviewable as they could preclude the Board from changing the finding of fact based on new information or discovery of an error. The WCAT

vice chair determined that because the issue before them represented the only opportunity of the party to address the findings of fact which the Board relied upon, the Board had made a reviewable decision.

The representative asserted that based upon *WCAT Decision #2006-01590*, WCAT was not bound by the Board's determination of a worker's restrictions. I agree, where the issue before WCAT involves consideration of a worker's restrictions and limitations, in the context of the decision under appeal.

However, in the appeal before me the Board did not make the determination in question. The finding of fact was made by a prior WCAT panel, which is an entirely different proposition.

I adopt the analysis of the vice chair in *WCAT Decision #2006-02738:*

> I appreciate that a previous decision based on a prior finding of fact must stand if it has not been reviewed or appealed. However, facts are not necessarily frozen in time. New evidence and changed circumstances may modify prior factual findings. Previous benefit entitlement decisions based on prior facts may not be modified unless a review, appeal, or reconsideration has taken place. If a subsequent finding of fact casts a significant doubt on a previous decision, it is open to the parties to seek an extension of time to review or appeal that prior decision. With respect to WCAT decisions, section 256(3) provides for reconsideration of a WCAT decision where the WCAT chair determines that new substantial and material evidence is discovered subsequent to the decision.
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> [reproduced as written]

The panel in *WCAT Decision #2007-00430* analyzed the application of BPIS #14 with a caveat as to its not being applicable where it could deprive a party of a statutory right of review where there was no other mechanism for bringing to appeal a disputed finding of fact which affected entitlement. However, that panel's analysis related to a finding of fact which did not serve as the basis for an entitlement decision. I find that in the appeal before me, the findings of fact determined by the prior vice chair served as the basis for an entitlement decision.

The Act provides that a decision of WCAT is final and conclusive. This applies to not only the Board but also to subsequent WCAT panels. Where substantial and material new evidence has been discovered after a final WCAT decision has been made, a party's recourse lies in section 256(3) of the Act, and a reconsideration can be requested.

I find that a final decision of WCAT is not necessarily the same thing as a final entitlement decision. A final decision of WCAT may deal with a variety of issues under the Act, some of which will be final entitlement decisions. For example:

- whether the worker meets the threshold under section 5(1) of the Act for the acceptance of a claim, or

- the worker's entitlement to a specific percentage award for permanent disability under section 23(1) of the Act.

A final decision of WCAT may also deal with matters which, while final on a specific aspect of entitlement, require additional adjudication by the Board to be fully implemented. For example:

- where the worker is found to still be entitled to temporary disability benefits under section 29 of the Act but further adjudication as to the duration of benefits must be made by the Board, or

- where the worker's percentage of permanent disability under section 23(1) of the Act must be recalculated to include additional impairment accepted by WCAT, but further adjudication must be made by the Board as to the percentage of additional disability.

In the present appeal, I find that the 2004 vice chair made a final decision which related to the worker's entitlement to an award under section 23(3) of the Act. The implementation of that decision required additional adjudication by the Board. However, I find that the decision, and the findings of fact which underpinned the decision, were final and binding as set out in section 255(1) of the Act and the Board was required to comply as set out in section 255(3) of the Act.

I find that in this case, in order for the WCAT decision to have any effect, the findings of fact contained in the final WCAT decision must be considered binding. If the findings of fact were not binding, then the WCAT decision is essentially meaningless. That would equate to the position taken by the review officer: that by returning the matter to the Board for further decision, the WCAT vice chair had cancelled the prior Board decision. That would mean the Board was free to consider all evidence with full authority to make decisions and was not limited to considering the specific reason for which the vice chair made the referral back.

I find the review officer's interpretation cannot be supported by the provisions of the Act. Section 253(1) of the Act provides that WCAT may confirm, vary, or cancel the appealed decision. As cancel is a separate category of statutory decision, it cannot have the same meaning as vary. In the 2004 WCAT decision the vice chair varied the Board decision under appeal. It was not cancelled.

Therefore, I find the conclusion of the review officer that the Board, and subsequently the Review Division, had full authority to make decisions and was not limited to the specific reasons of the vice chair was incorrect. I find that the specific findings of fact related to the final WCAT decision were binding and not subject to reconsideration by the Board or the Review Division. I find that they are also binding on me, as no reconsideration had been requested or granted in relation to the 2004 WCAT decision.

As I have determined that the 2004 WCAT decision and its attendant findings of fact are binding, the question then turns to the extent of the worker's entitlement under section 23(3) of the Act.

The 2004 WCAT decision found that the occupations of dispatcher, sales and telephone solicitation were unskilled, entry-level jobs, which would pay minimum wage and would not replace the worker's pre-injury earnings. That being the case, it was not open to the Board or the Review Division to determine differently. As noted previously, I find I am also bound by that final decision.

Similarly, the 2004 WCAT decision found that the worker was physically capable of sedentary to light-strength work and that with modification of his work duties (that is, the opportunity to take stretch breaks or alternate between sitting and standing) the worker would be able to work eight hours a day. The Board and Review Division and WCAT are bound by this determination.

The 2004 WCAT decision left it open to the Board to provide further vocational rehabilitation assistance prior to making an adjudication of 23(3) entitlement. Alternatively, the Board could make an entitlement decision without further vocational rehabilitation assistance, but within the binding parameters set by the vice chair's findings of fact.

I find that based upon the findings of fact in the 2004 WCAT decision, the occupation of self-serve gas station attendant/cashier was suitable for the worker. It would allow for alternation of standing and sitting as required and was within the light-strength category. I also find that the occupation would be reasonably available in the long term as the worker resides in an urban area.

The Board claims adjudicator in disability awards concluded that the worker could earn $1,923.50 per month in 1998 dollars. I do not agree.

A rate of $1,923.50 a month would provide a weekly rate of about $442.67, which on a 40-hour week would equate to about $11.07 an hour. The Statistics Canada information relied upon by the claims adjudicator in disability awards to set that rate was based on the general NOC code 6611. This code relates to all cashier occupations, none of which, other than self-serve gas station, were identified by the vocational rehabilitation provider as being suitable for the worker. I find that

the worker was limited to a subset of NOC code 6611 and the more specific recommendations of the provider should be preferred. The employability assessment indicated the self-serve gas station attendant/cashier occupation paid between minimum wage and $10.50 per hour. I note that in 1998 the BC minimum wage was $7.15 per hour.

The vocational rehabilitation provider also indicated the worker would be limited to positions within the occupation which would only require occasional light lifting. I agree. I find that based on the hourly range within the worker's subset of NOC code 6611 and given his limitations, it is unlikely that the worker would have earned more than the approximate mid-range of the earnings set out by the provider. I find the facts support that the worker's long-term earning capacity would have been $9.00 per hour in 1998 dollars. This provides a monthly rate of $1,564.29.

Therefore, I allow the worker's appeal in part. I find that the worker was entitled to an award under section 23(3) of the Act based on the difference between his pension wage rate and $1,564.29 a month.

Conclusion

I vary the decision of the Review Division dated June 22, 2006. The worker is entitled to an award under section 23(3) of the Act based on the difference between his pension wage rate and $1,564.29 a month.

The worker is entitled to transportation expenses from his home to the oral hearing location. The worker's representative requested reimbursement of the costs of the 2006 functional capacity evaluation report. I find, in the circumstance of this appeal, that it was reasonable for the worker to have obtained this report.

Therefore, under section 7 of the *Workers Compensation Act Appeal Regulation, B.C. Reg. 321/02*, I direct the Board to reimburse the worker for expenses related to the October 16, 2006 functional capacity evaluation report, according to the Board's schedule of fees.

Larry J. Campbell
Vice Chair

LJC/jkw