Noteworthy Decision Summary

Decision: WCAT-2008-02706 **Decision Date:** September 15, 2008
Panel: Guy Riecken, Heather McDonald, Sherryl Yeager

Section 239 of the Workers Compensation Act - Jurisdiction to consider a review officer's decision regarding the Workers' Compensation Board's refusal to impose an administrative penalty – Section 3.3(c) of the Occupational Health and Safety Regulation - Statutory Interpretation

This decision is noteworthy as it considers whether WCAT has jurisdiction to consider an appeal of a decision by a review officer regarding a refusal by the Workers' Compensation Board, operating as WorkSafeBC (Board), to impose an administrative penalty under Part 3 of the *Workers Compensation Act* (Act).

On August 28, 2002 a worker died as a result of an accident in the course of a house moving operation. The Board conducted an investigation into the circumstances of the worker's death and issued an order that the employer had violated section 3.3(c) of the *Occupational Health and Safety Regulation* (Regulation). Section 3.3(c) deals with the requirement that employers must establish an occupational health and safety program to prevent injuries and occupational diseases and provides that the program must include appropriate written instructions available for reference by all workers. The Board did not impose an administrative penalty in relation to that violation.

In a letter to the deceased worker's brother (the appellant), a regional prevention manager at the Board explained, in part, that the occupational safety officer (OSO) who had conducted the accident investigation and issued the order had concluded that the accident was caused by the independent actions of a trained and experienced worker (a co-worker of the deceased worker), and that a penalty against the employer was not appropriate. The review officer found that the regional manager's letter was simply a reiteration of a decision that had previously been made, and that therefore the review officer did not have jurisdiction to conduct a review of it. In the alternative, the review officer concluded that if the letter contained a new decision, it was properly made.

The preliminary issue that arose was whether WCAT had jurisdiction to consider an appeal of a decision by a review officer with respect to the Board's refusal to impose an administrative penalty under Part 3 of the Act. The panel dismissed the appeal as it determined that it did not have jurisdiction.

The panel acknowledge that section 241(3) of the Act refers to appeals by members of the family of a deceased worker of decisions by review officers under section 96.2(1)(c), which includes decisions respecting a Board refusal to impose an administrative penalty. However, the panel concluded that section 241(3) describes who may bring appeals allowed under section 239, but does not describe what matters may be appealed to WCAT.

After considering the words in section 239 and 241(3) in their entire context, in their grammatical and ordinary sense harmoniously with the scheme and object of the Act, the panel found that the intention of the legislature was that section 239 contains a comprehensive set of rules governing the scope of WCAT's jurisdiction to consider decisions by review officers.

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Section 239(2)(e) provides that a decision by a review officer respecting an order under Part 3 of the Act may not be appealed to WCAT. This is the case unless the review decision dealt with an order:

(i) relied on to impose an administrative penalty under section 196(1);
(ii) imposing an administrative penalty under section 196(1), or
(iii) made under section 195 to cancel or suspend a certificate.

Section 239 of the Act does not expressly state that a decision by a review officer under section 96.2(1)(c) respecting a refusal by the Board to impose an administrative penalty cannot be appealed to WCAT. The ordinary meaning of section 239(2)(e), however, appears to be that WCAT does not have jurisdiction to hear an appeal of a decision of a review officer in respect of a refusal by the Board to impose an administrative penalty unless it comes within one of the exceptions in section 239(2)(e)(i) to (iii).

A refusal to make an order cannot logically be an order relied on to impose an administrative penalty under section 196(1) as described in 239(2)(e)(i). With respect to the exception in 239(2)(e)(ii), an order under Part 3 imposing an administrative penalty under section 196(1) is the opposite of a refusal to make a Board order respecting an occupational health and safety matter under Part 3. Finally, a refusal to make an order cannot be equated with an order made under section 195 to cancel or suspend a certificate as contemplated by 239(2)(e)(iii). Accordingly, the panel found that on the ordinary meaning analysis, "a refusal to make an order" under Part 3 does not come within any of the three exceptions in 239(2)(e)(i) to (iii) of the Act.

The panel further noted that the following points favoured an interpretation that the legislature did not intend to confer jurisdiction on WCAT to hear appeals from this type of decision:

- Historically the Appeal Division, the predecessor to WCAT, had express jurisdiction to hear appeals from Board decisions not to impose administrative penalties. Section 239 of the current Act does not expressly provide WCAT with this same jurisdiction.
- The legislature could have listed this jurisdiction with the other exceptions to section 239(2)(e) that are found in section 239(2)(e)(i) to (iii). The fact that it did not do so implies that such decisions fall under the general provision of section 239(2)(e), with the result that WCAT was not intended to have jurisdiction to hear appeals from such decisions.
- The legislature expressly gave jurisdiction over refusals to make orders in sections 240 and 96.2(1)(c) where it intended such jurisdiction to exist. No such express jurisdiction was given to WCAT.

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Heather McDonald, Vice Chair
Sherryl Yeager, Vice Chair

Introduction

[1] This appeal concerns a decision by the Workers' Compensation Board, which operates as WorkSafeBC (Board), not to impose an administrative penalty on the employer with respect to a violation of the *Occupational Health and Safety Regulation* (Regulation).

[2] The employer operates a house moving business. On August 28, 2002 a worker died as a result of an accident in the course of a house moving operation. The Board conducted an investigation into the circumstances of the worker's death and, in an inspection report dated January 17, 2003, issued an order that the employer had violated section 3.3(c) of the Regulation. Section 3.3(c) deals with the requirement that employers must establish an occupational health and safety program to prevent injuries and occupational diseases and provides that the program must include appropriate written instructions available for reference by all workers. The Board did not impose an administrative penalty in relation to that violation.

[3] In a letter dated February 15, 2007 to the deceased worker's brother (the appellant), a regional prevention manager at the Board explained that the occupational safety officer (OSO) who had conducted the accident investigation and issued the January 17, 2003 order had concluded that the accident was caused by the independent actions of a trained and experienced worker (a co-worker of the deceased worker), and that a penalty against the employer was not appropriate. In addition, because of the amount of time that had passed and the fact that the OSO was no longer a Board employee, the prevention manager was not prepared to consider an administrative penalty. The appellant requested a review of that decision by a review officer in the Board's Review Division.

[4] The appellant appeals the July 24, 2007 decision of a review officer (*Review Decision #R0076554*). The review officer found that the Board's decision not to impose a penalty was implicitly communicated to the employer through the January 17, 2003 inspection report and through the fact that the Board took no further action on the matter. Accordingly, the review officer found that the regional manager's February 15, 2007 letter was simply a reiteration of a decision that had previously been made, and that therefore the review officer did not have jurisdiction to conduct a review of it. In the alternative, however, the review officer reviewed the history of the matter and the evidence in the Board file, and concluded that if the February 15, 2007 letter contained a new decision, it was properly made.

Issue(s)

[5] There is a preliminary issue with respect to whether the Workers' Compensation Appeal Tribunal (WCAT) has jurisdiction to consider an appeal of a decision by a review officer with respect to the Board's refusal to impose an administrative penalty under Part 3 of the *Workers Compensation Act* (Act). This decision deals only with that issue.

Appeal Process

[6] Pursuant to section 238(5) of the Act, the WCAT chair assigned this appeal to a three-member panel.

[7] The employer is participating in the appeal, and is represented by an adviser from the Employers' Advisers office. The appellant is not represented. In the notice of appeal the appellant asked that the appeal be considered on a read and review basis. The appellant provided a brief written submission in his notice of appeal. The appellant was invited to provide further submissions but did not do so. The employer's representative provided a written submission in which she argued, among other things, that the appeal is not properly before WCAT because the Act does not enable a family member of a deceased worker to appeal a review officer's decision with respect to the Board's refusal to impose an administrative penalty.

[8] In addition to WCAT's earlier invitation to the appellant to provide a further written submission, we also invited the appellant to provided a written submission specifically on the issue raised by the employer's representative, namely, whether WCAT has jurisdiction to consider the appeal. The appellant did not provide a submission.

[9] We are able to consider the appeal on a basis other than a read and review, including an oral hearing, if we consider it necessary. Item #8.90 of the WCAT *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. This appeal does not involve issues of credibility, nor does it involve other issues for which item #8.90 contemplates an oral hearing. This decision addresses a narrow issue of jurisdiction. We are satisfied that an oral hearing is not necessary. We have considered the preliminary issue of jurisdiction on the basis of the material in the Board's file and the written submissions, including the statements of the appellant in the notice of appeal.

Background and Evidence

[10] Evidence on which the Board's decision was based is found in a number of documents from the Board's Compliance Section and Review Division files pertaining to the August 28, 2002 accident and the request for review, including: the employer's accident investigation report; the employer's occupational health and safety manual; an RCMP

accident investigation report; transcripts of the OSO's witness interviews; the coroner's certificate of death; a report from an engineer at the Board; the OSO's accident investigation report; the OSO's January 17, 2003 inspection report; the OSO's January 17, 2003 order to a worker; and the parties' correspondence with the Compliance Section and the Review Division. The appellant and the employer received disclosure of those documents. In light of the narrow issue addressed in this decision, it is not necessary to summarize the evidence in detail.

[11] The Board's investigation into the August 28, 2002 accident included an engineer's review of the house support system, as well as interviews by the OSO and another Board officer of the foreman and two other workers from the house moving crew who were present at the site at the time of the accident. They also interviewed the principals of the employer company.

[12] In his investigation report the OSO concluded that a number of possible causes of the accident had been ruled out, including: equipment malfunction, worker fatigue, lack of understanding of the work activities, inadequate training, inadequate supervision and job scheduling pressures.

[13] The OSO found that a co-worker (CW) had been negligent in removing a critical support component without first ensuring it was safe to do so and/or without consulting the foreman. He found that CW was in violation of section 116(1)(a) of the Act. The OSO also found that the written safe instruction regarding lowering loads onto cribbing and disconnecting the truck bunk assembly found in the employer's Occupational Health and Safety Program Manual was inadequate. In that respect the employer had not completely met the requirements of section 3.3(c) of the Regulation.

[14] The OSO concluded that the fatal accident was caused by the independent actions of CW, who was a trained and experienced worker.

[15] On January 17, 2003 the OSO issued an order that the employer was in violation of section 3.3(c) of the Regulation and an order that CW had violated section 116(1)(a) of the Act. The disclosure material from the Board's Compliance Section file indicates that no further action was taken by the Board with respect to the August 28, 2002 accident or the January 17, 2003 orders until the appellant contacted the Board in 2006.

[16] In response to the appellant's initial request for a review of the Board's decision not to impose a penalty on the employer, the Review Division advised the appellant that it did not appear that a reviewable decision had been made by the Board. This led to further communication between the appellant and the Board, and ultimately to the Board's February 17, 2007 letter declining to impose an administrative penalty on the employer. That letter was the subject of the review officer's July 24, 2007 decision, which the appellant seeks to appeal to WCAT.

Law and Policy

[17] Section 1 of the Act defines "member of family" as meaning:

> wife, husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half brother and half sister and a person who stood in loco parentis to the worker or to whom the worker stood in loco parentis, whether related to the worker by consanguinity or not;

[18] Part 3 of the Act addresses occupational health and safety matters and, concerning the Board's power to impose administrative penalties, includes section 196(1) which provides that:

> The Board may, by order, impose an administrative penalty on an employer under this section if it considers that
>
> (a) the employer has failed to take sufficient precautions for the prevention of work related injuries or illnesses,
>
> (b) the employer has not complied with this Part, the regulations or an applicable order, or
>
> (c) the employer's workplace or working conditions are not safe.

[19] Decisions by the Board, including decisions under Part 3, may be reviewed by a review officer under section 96.2 of Act. Section 96.2(1)(c), which relates to matters under Part 3, provides that:

> (1) Subject to subsection (2), a person referred to in section 96.3 may request a review officer to review the following in a specific case:
> …
> (c) a Board order, a refusal to make a Board order, a variation of a Board order or a cancellation of a Board order respecting an occupational health or safety matter under Part 3.

[20] Section 96.3 (3) provides that:

> 96.3 (3) Any of the following persons who is directly affected by a decision or order referred to in section 96.2 (1) (c) may request a review of that decision or order:
>
> (a) a worker;
> (b) an employer within the meaning of Part 3;

(c) an owner as defined in section 106;
(d) a supplier as defined in section 106;
(e) a union as defined in section 106;
(f) a member of a deceased worker's family.

[21] Section 239 of the Act allows for appeals of final decisions by review officers to WCAT. Section 239 provides that:

> 239 (1) Subject to subsection (2), a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section, may be appealed to the appeal tribunal.
>
> 239 (2) The following decisions made by a review officer may not be appealed to the appeal tribunal:
> …
> (e) a decision respecting an order under Part 3, other than an order
> (i) relied upon to impose an administrative penalty under section 196 (1),
> (ii) imposing an administrative penalty under section 196 (1), or
> (iii) made under section 195 to cancel or suspend a certificate.

[22] Section 241(3) provides that:

> 241 (3) For the purposes of section 239, any of the following persons who is directly affected by a decision of the review officer in respect of a matter referred to in section 96.2 (1) (c) may appeal that decision:
> (a) a worker;
> (b) an employer within the meaning of Part 3;
> (c) an owner as defined in section 106;
> (d) a supplier as defined in section 106;
> (e) a union as defined in section 106;
> (f) a member of a deceased worker's family.

Reasons and Findings

[23] We have determined that we do not have jurisdiction to consider the appeal of the review officer's July 24, 2007 decision.

[24] We acknowledge that section 241(3) refers to appeals by members of the family of a deceased worker (among others) of decisions by review officers under

section 96.2(1)(c), which includes decisions respecting a Board refusal to impose an administrative penalty.

[25] However, after considering the words in section 239 and 241(3) in their entire context, in their grammatical and ordinary sense harmoniously with the scheme and object of the Act, we find that the intention of the legislature was that section 239 contains a comprehensive set of rules governing the scope of WCAT's jurisdiction to consider decisions by review officers. Section 241 describes who may bring appeals allowed under section 239, but does not describe what matters may be appealed to WCAT.

[26] We recognize that section 239 of the Act does not expressly state that a decision by a review officer under section 96.2(1)(c) respecting a refusal by the Board to impose an administrative penalty cannot be appealed to WCAT. Section 239(2)(e) does, however, provide generally that a "decision respecting an order under Part 3" cannot be appealed to WCAT, unless it is found in one of the exceptions listed in sections 239(2)(e)(i) to (iii). These include the exception in section 239(2)(e)(ii) for decisions respecting "an order … imposing an administrative penalty." We have concluded that the exceptions in section 239(2)(e) do not include decisions by review officers with respect to a Board refusal to impose an administrative penalty. Such a decision is a "decision respecting an order under Part 3" referred to in section 239(2), and cannot be appealed to WCAT.

[27] Although the legislation allows for an appeal of a review officer's decision regarding an administrative penalty imposed by the Board under Part 3 of the Act, WCAT does not have authority to consider an appeal when the subject matter of the review officer's decision was the Board's refusal to impose an administrative penalty.

[28] A more detailed explanation of the reasoning which led us to this conclusion follows.

[29] In our analysis of the relevant provisions of the Act, we have referred to some prior WCAT decisions as well as texts on statutory interpretation. Although these prior decisions and texts are not binding on WCAT, we have referred to them because they include helpful analysis of issues of statutory interpretation.

1. The Relationship between Sections 239 and 241

[30] In *WCAT Decision #2006-00480*[1], the vice chair addressed the relationship between sections 239(2) and 241 of the Act. In her reasons the vice chair described the principles of statutory interpretation that guided her analysis of those sections. Her decision dealt with whether a decision by a review officer concerning vocational rehabilitation entitlement could be appealed to WCAT. Although made with respect to vocational rehabilitation entitlement, a different issue than the refusal to impose a penalty issue in this appeal, nevertheless we find the vice chair's discussion of the principles of statutory interpretation, particularly with respect to the relationship between

[1] WCAT decisions are accessible on the WCAT internet site (www.wcat.bc.ca).

sections 239 and 241, to be helpful and applicable in this case. Therefore we have followed the same approach here.

[31] In her reasons in *WCAT Decision #2006-00480* the vice chair referred to the modern principle of statutory interpretation, which has been described by Ruth Sullivan in *Sullivan and Dreidger on the Construction of Statutes,* 4th ed. (Ontario: Butterworths, 2002) at 1, as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[32] Sullivan notes that this approach has been adopted as the preferred approach to statutory interpretation by the Supreme Court of Canada in *Re Rizzo and Rizzo Shoes Ltd.,* [1998] 1 S.C.R. 27 at 41; and in *Bell ExpressVu Limited Partnership* v. *Rex,* [2002] SCC 42.

[33] The modern principle of statutory interpretation includes elements which we will discuss in turn with respect to sections 239 and 241 of the Act, including the ordinary meaning rule and textual analysis.

(a) Ordinary Meaning Rule

[34] The modern principle of statutory interpretation, as discussed in the authorities cited above, includes the ordinary meaning rule under which interpretation begins with a review of the ordinary meaning, or first impression, of the impugned text. Interpreters must then consider the total context of the words to be interpreted in every case, no matter how unambiguous the words may seem. This rule was concisely summarized by the vice chair in *WCAT Decision #2006-00480* as follows:

> The ordinary meaning rule is a strong but rebuttable presumption in favour of an interpretation consistent with the ordinary meaning of the text.

[35] The vice chair went on to consider the ordinary meaning of section 239, and stated:

> The ordinary meaning of section 239(1) of the Act is clear. It is a broad appeal-granting provision, which provides that "subject to" section 239(2) a final decision by a review officer in a review under section 96.2 is appealable to WCAT. … Section 239(1) only speaks of what may be appealed not who may appeal. (Section 241(1), in contrast, refers to who may appeal.)

> The ordinary meaning of section 239(2) also appears to be clear. By setting out what "may not be appealed to the appeal tribunal," section 239(2) narrows the scope of section 239(1) by enumerating specific decisions made by review officers that may not be appealed to WCAT….

[36] The vice chair in *WCAT Decision #2006-00480* then considered the ordinary meaning of the phrase "for the purposes of section 239" which is found in both section 241(1) and 241(3), stating:

> What is the meaning of "for the purposes of"? The *Concise Oxford English Dictionary*, 10th ed. revised (New York: Oxford University Press, 2002) defines "purpose" as "the reason for which something is done or for which something exists." *Black's Law Dictionary*, 8th ed., (St. Pauls: West, a Thompson Business, 2004) defines "purpose" as "an objective, goal, or end" and "for purpose of" as "with the intention of." In my mind, the ordinary meaning of the phrase "for the purposes of section X" simply requires that one consider the section that is being referred to, specifically its purpose, before determining the scope of the application of the section being interpreted.
>
> Section 239 could be said to either have one general purpose, namely, to set out the scope of the right to appeal to WCAT, or two more specific purposes, namely, to set out a general right to appeal and also to set out specific limits to that right to appeal. Thus, one ought to read the phrase "for the purposes of section 239" as requiring one to consider *both* purposes of the section, i.e. not just the general appeal-granting authority, but also the limitation purpose.
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> In addition, the phrase "for the purposes of section 239," as found in section 241, amongst other things, may also have been intended to distinguish between those decisions that can be appealed by virtue of section 239 and those that can by appealed by virtue of section 240 (see sections 241(4) and (5)).
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> In sum, I am not persuaded by … [the] argument that the ordinary meaning of sections 239(2)(b) and 241(1) results in a conflict. In the absence of a conflict, it is not necessary for section 241(1) to modify or amend section 239(2)(b).

[37] We agree with and adopt the vice chair's interpretation of the ordinary meaning of sections 239 and 241, including her analysis of the meaning of "for the purposes of," which is found in both 241(1) and 241(3). We conclude that, on the basis of the ordinary meaning of the words in section 239(1), this section grants broad appeal rights,

subject to the limitations in section 239(2). Section 241(3) describes only who may exercise appeal rights with respect to various kinds of review decisions. The use of the phrase "for the purposes of section 239" in section 241(3) does not modify or add to the appeal rights granted by section 239. Rather, that phrase is intended to require the decision maker to consider the purpose of section 239, which sets out the scope of what may be appealed to WCAT, before applying section 241(3), which is limited to determining who may appeal.

[38] Another way of stating this conclusion is that section 241(3) only applies to the kinds of decisions that may be appealed under section 239, and in particular matters that may be appealed under section 239(2)(e)(i) to (iii) of the Act. Persons listed in section 241(3) may appeal decisions by review officers concerning matters which fall under section 96.2(1)(c) and over which WCAT has jurisdiction under section 239, but cannot appeal other matters that fall under section 96.2(1)(c) over which WCAT has not been given jurisdiction under sections 239(2)(e)(i) to (iii). This leads to the same conclusion, namely that in its ordinary meaning section 239 sets out the kinds of decisions that can be appealed to WCAT, and section 241 describes the people who can bring those appeals.

(b) Textual analysis

[39] While the ordinary meaning of sections 239 and 241 appear to indicate that WCAT's authority with regard to decisions by review officers is set out in section 239 and not in section 241 of the Act, this may not be conclusive in determining the intent of the legislature. It is the starting point for analysis. The next step is to consider inferences that can be drawn regarding the intended meaning of the legislative text considering the grammatical, conventional and logical relations between the impugned provisions and the rest of the legislative text.[2] In analyzing the language used and the circumstances in which it is used, there are assumptions and presumptions that can assist in determining the intention of the legislature.

(i) Presumption of Coherence

[40] The presumption of coherence is an element of textual analysis which presumes that the provisions of legislation are meant to work together, both logically and by design, as parts of a functioning whole.[3]

[41] If section 241(3) does, in fact, set out appeal rights from all decisions by a review officer in respect of matters referred to in section 96.2(1)(c), then the general prohibition in section 239(2)(e) against appeals of decisions "respecting orders under Part 3" would run counter to this. If section 241(3) grants appeal rights and section 239(2)(e) prohibits those same appeal rights, these two provisions would be directly in conflict

[2] *Sullivan and Driedger on the Construction of Statutes* at page 169.
[3] Supra, at page 168.

with each other. This would be contrary to the presumption that the provisions of a statute are meant to work together, each playing a particular role, to form a rational, internally consistent framework.

[42] Applying the presumption of coherence to the provisions under consideration here, the interpretation that reconciles the two provisions is that section 239 sets out rights of appeal from review decisions, and section 241(3) is limited to describing who may appeal and applies only after it has been determined that WCAT has jurisdiction under section 239. Section 241(3) does not set out the kinds of appeals that WCAT has jurisdiction to hear.

(ii) Presumption Against Tautology

[43] The presumption against tautology provides that meaning should be given to every word in a statute. It presumes that every feature of a legislative text has been deliberately chosen and does not include unnecessary or meaningless language, and does not repeat the same thing twice.[4]

[44] The exceptions under section 239(2)(e)(i) to (iii), which set out the Part 3 decisions over which WCAT does have jurisdiction, would be redundant if there were already a right in section 242(3) to appeal all matters referred to in section 96.2(1)(c). This would be contrary to the presumption against tautology. This lends further support to the conclusion that the legislature intended section 239 to be the comprehensive set of rules governing the scope of WCAT's jurisdiction to consider appeals of review decisions, and section 241(3) to be a description of who may appeal that applies where it has been first determined that WCAT has jurisdiction to consider an appeal under section 239.

2. The Authority Granted Under Section 239

[45] Having found that section 239 is a comprehensive set of rules that establishes which kinds of decisions can be appealed to WCAT, we now turn to a discussion of the authority granted under section 239. In particular, it is necessary to consider whether this section provides WCAT with jurisdiction to consider an appeal of a review officer's decision respecting a refusal by the Board to impose an administrative penalty.

[46] Section 239(2)(e) provides that a decision by a review officer respecting an order under Part 3 of the Act may not be appealed to WCAT. This is the case unless the review decision dealt with an order:

(iv) relied on to impose an administrative penalty under section 196(1);
(v) imposing an administrative penalty under section 196(1), or
(vi) made under section 195 to cancel or suspend a certificate.

[4] R. Sullivan, *Statutory Interpretation* (Ontario: Irwin Law, 1997), at 56.

[47] The ordinary meaning of section 239(2)(e) appears to be that WCAT does not have jurisdiction to hear an appeal of a decision of a review officer in respect of a refusal by the Board to impose an administrative penalty. On its face, a decision respecting "a refusal to make a Board order … respecting an occupational health and safety matter under Part 3" (the language used in section 96.2(1)(c)), is a "decision respecting an order under Part 3" (the words used in section 239(2)(e)). Accordingly, there is no right to appeal such a decision to WCAT unless it comes within one of the exceptions in section 239(2)(e)(i) to (iii).

[48] Does a "refusal to make a Board order … under Part 3" come within any of the three exceptions? A refusal to make an order cannot logically be an order relied on to impose an administrative penalty under section 196(1) as described in 239(2)(e)(i). With respect to the exception in 239(2)(e)(ii), an order under Part 3 imposing an administrative penalty under section 196(1) is the opposite of a refusal to make a Board order respecting an occupational health and safety matter under Part 3. Finally, a refusal to make an order cannot be equated with an order made under section 195 to cancel or suspend a certificate as contemplated by 239(2)(e)(iii). Accordingly, we find that on the ordinary meaning of the words employed in the relevant sections, "a refusal to make an order" under Part 3 does not come within any of the three exceptions in 239(2)(e)(i) to (iii) of the Act.

[49] Although the ordinary meaning of section 239(2)(e) does not support a right to appeal a decision by review officer respecting a refusal by the Board to issue an order under Part 3, it also appropriate to consider whether there is reason to reject the ordinary meaning of this section, taking into account the purpose and meaning of the legislation.

(a) Purposive Analysis

[50] In considering the purpose of the legislative text we have taken into account the following propositions set out in *Sullivan and Driedger on the Construction of Statutes,* page 195:

> (1) All legislation is presumed to have a purpose. It is possible for courts to discover or adequately reconstruct this purpose through interpretation.
>
> (2) Legislative purpose should be taken into account in every case and at every stage of interpretation, including the determination of a text's meaning.
>
> (3) In so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided.

[51] *Sullivan and Driedger* at page 218 state that the purpose of legislation can be inferred by tracing the legislative evolution of a provision.

[52] The following summary of the evolution of statutory appeal rights with respect to health and safety orders assists in clarifying the legislature's intent with respect to the scope of WCAT's appellate jurisdiction over decisions by review officers under section 239 of the Act.

(i) Appeal Rights Historically

[53] Prior to 1968, other than a right to appeal disputed medical issues to a Medical Review Panel, the Act did not include formal appeal rights. Rather, decisions could be reviewed and reconsidered by the Board's commissioners under their general authority to "reopen, rehear, and re-determine any matter."[5] The reason for this was explained in a 1974 decision by the then commissioners of the Board as follows:

> The compensation system was originally perceived as involving decision-making by a three-man commission with no rights of appeal. The theory was that speed and efficiency would be achieved in this way, and that decisions by the three Commissioners would provide the safeguards against arbitrariness and error.
>
> But the delegation of decision-making was inevitable virtually from the start; and as the volume of claims expanded, claims decisions were made by single adjudicators with informal appeals to the Commissioners. It was in fewer and fewer cases that the Commissioners decided a claims matter in the first instance, and now that is done very rarely.
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> As the volume of claims further expanded, even the volume of appeals became too much for the Commissioners to consider personally, and an intermediate level of appeal, the Boards of Review, was established.
>
> (See: Decision No. 70, *Re Boards of Review*, 1 WCR 287, at page 288.

[54] The Boards of Review, as initially created under 1968 amendments to the Act, were not independent of the Board. Rights to appeal to an independent Board of Review were introduced by amendments that came into effect in 1974. However, those appeal rights did not include the right to appeal decisions or orders with respect to assessments or penalties. Appeals to the Boards of Review were limited to decisions made "with respect to a worker." (See: Decision No. 70, *supra).* However, it was possible to have an assessment or penalty decision reconsidered by the commissioners under the

[5] Originally set out in section 68 of the *Workmen's Compensation Act,* 1916, c.77, and continued in subsequent versions to the Act.

Board's general power to reopen, rehear, and re-determine any matter decided by the Board.

[55] The statutory right to appeal assessment and penalty decisions was introduced along with the creation of the Appeal Division of the Board in legislation that amended the Act effective June 3, 1991.[6] Under the new section 96(6.1), an employer who had received a notice relating to an assessment, a classification, a monetary penalty, or an apportionment or shifting between classes could appeal to the Appeal Division on grounds of error of law or fact or contravention of a published policy of the Board. This section did not provide for an appeal of a Board decision not to impose a monetary penalty.

(ii) Royal Commission and Bill 14

[56] The *Workers Compensation (Occupational Health and Safety) Amendment Act, 1998*, S.B.C. 1998, chapter 50 (Bill 14) replaced the occupational health and safety provisions in the Act (which had been found in Part 1 of the Act) with the new Part 3 and repealed the *Workplace Act*, R.S.B.C. 1996, chapter 493. Part 3 of the Act came into effect on October 1, 1999.[7] Hansard shows that the Hon. D. Lovick, in the debates at the time of the second reading of Bill 14, made only the following general reference with regard to appellate jurisdiction over Part 3 decisions:

> Formalized review and appeal mechanisms, including what is reviewable and appealable -- who may request a review or an appeal -- and review and appeal processes are also set out in the legislation. Until such time, though, as the royal commission submits its final report, which will include recommendations on appeal structures, the appeal division of the Workers Compensation Board has been designated as the appeal tribunal for purposes of this legislation.
>
> [Hansard Debates May 5, 1998, morning, Vol. 9, No. 10]

[57] Bill 14 was introduced based on the recommendations of the Royal Commission on Workers Compensation in British Columbia (Royal Commission): *Throne Speech (Thursday, March 26, 1998, Afternoon, Vol. 8, No. 1)*. The first report of the Royal Commission, *Report on Sections 2 and 3(a) of the Commission's Terms of Reference,* dated October 31, 1997, proposed that the scope of appeal in occupational health and safety matters "should be prescribed in the statute" (Recommendation 43, page 92). The Report does not elaborate further on the scope of appeal regarding penalties, nor does it expressly speak to the issue of appealing decisions not to impose an administrative penalty.

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6 Section 9(c), *Workers Compensation Amendment Act,* 1989 S.B.C. chapter 42 (in force June 3, 1991 – B.C. Regs 56/90 and 457/90).

7 B.C. Reg. 162/99.

[58] The Final Report of the Royal Commission, *For the Common Good,* was issued in 1999. The report stated that when Bill 14 is proclaimed in force, the following provision would come into effect:

> **Section 207 of Division 14 authorizes the Appeal Division to hear appeals to** administrative penalties, the cancellation of a penalty order or **the decision not to impose an administrative penalty**. Section 208 states who may bring specific types of appeals to the Appeal Division; clause 208(a) authorizes various parties to appeal decisions in relation to administrative penalties. Amendments to Sections 96(6) and (6.1) will allow an employer to appeal levies that have been assessed under the new narrower Section 73.
>
> [emphasis added*;* Vol. 1, Ch. 9, page 78]

[59] When Bill 14 was proclaimed in force in October 1999 it set out the scope of appeals to the Appeal Division in sections 207 and 208. Section 207 expressly gave the Appeal Division the jurisdiction to hear appeals from Board decisions not to impose administrative penalties. Section 208 set out who could exercise the rights of appeal. Those sections stated:

> 207 The following are decisions that may be appealed to the appeal tribunal in accordance with this Division:
>
> (a) in relation to administrative penalties under section 196,
> (i) an order imposing an administrative penalty,
> (ii) the cancellation of an order imposing an administrative penalty, or
> (iii) **a decision not to impose an administrative penalty made after issuing a penalty notice under section 196 (2);**
>
> 208 The following may bring an appeal of an appealable decision:
>
> (a) for an appeal in relation to an administrative penalty,
> (i) the employer subject to the penalty, unless the employer accepted the penalty under section 196(4)(a),
> (ii) a worker of the employer or a union representing workers of the employer, or
> (iii) **any other person aggrieved by the decision**;
>
> [emphasis added]

(iii) Winter Report and Bills 56 and 63

[60] Sections 207 and 208 remained in force until amendments to the review and appeal provisions came into force in 2003. The legislature first removed the language giving the appellate tribunal jurisdiction over a decision not to impose an administrative penalty in Bill 56, *Workers Compensation Amendment Act (No. 2), 2002,* which was never proclaimed in force. Bill 56 was revised and became the *Workers Compensation Amendment Act (No. 2), 2002*, S.B.C. 2002, chapter 66 (Bill 63), which took effect on March 3, 2003.[8] Bill 63, sections 30 and 33, repealed sections 207 and 208 and replaced them with sections 239 and 241 respectively, which remain in effect today.

[61] Section 239 does not follow the language of section 207 with regard to the right to appeal a decision not to impose an administrative penalty made. Rather, it is silent about the right to appeal that type of decision. One inference is that the legislature turned its mind to this issue and it was the intent of the legislature to remove the appellate tribunal's jurisdiction over matters that arise out of Board decisions to not impose administrative penalties. Unfortunately there were no comments in the Hansard debates surrounding Bill 56 or Bill 63 that would clarify the reason behind the removal of the language.

[62] The recommendations by Allan Winter in his March 11, 2002 *Core Services Review of the Workers' Compensation Board* (the Winter Report) were taken into consideration when drafting Bill 63. The Winter Report was also silent with respect to the issue of WCAT's jurisdiction over Board decisions not to impose administrative penalties. Thus, the Winter Report is of limited assistance in this respect.

[63] Overall, a review of the legislative history indicates that prior to 1999 the Act did not include an express right to appeal decisions by the Board not to impose administrative penalties. That right was set out in section 207, which gave the Appeal Division jurisdiction to consider such appeals, from October 1, 1999 to March 3, 2003. The current Act does not include similar language with respect to WCAT. The legislature's decision not to include wording in section 239 that is similar to the former section 207 favours an interpretation that the legislature did not intend to confer jurisdiction on WCAT to hear appeals from such decisions.

[64] In the situation addressed in *WCAT Decision #2006-00480,* both the legislative debates and the Winter Report recommendations clearly stated that there should be no right of appeal to the appellate tribunal with regard to vocational rehabilitation. No similar clear, express statement was made in any of those secondary sources with regard to WCAT's jurisdiction to consider an appeal from a Review Division decision regarding the Board's decision not to impose an administrative penalty. While the removal of express language giving the appellate tribunal jurisdiction over such matters is informative, it is

[8] B.C. Reg. 320/2002.

not conclusive. It is also useful to look to other statutory interpretative tools to assist in determining the scope of section 239.

(b) Implied Exclusion

[65] *Sullivan and Driedger on the Construction of Statutes*, at page 186, explain implied exclusion as follows:

> An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.

[66] The two most common forms of implied exclusion are: failure to mention comparable items; and, failure to follow an established pattern.

(i) Failure to Mention Comparable Items

[67] In *Sullivan and Driedger on the Construction of Statutes*, at 187 the failure to mention comparable items is elaborated on as follows:

> When a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned. The reasoning goes as follows: if the legislature had intended to include comparable items, it would have mentioned them or described them using general terms; it would not have mentioned some while saying nothing of the others because to do so would violate a convention of communication.

[68] An argument could be made that it would have been a simple matter to draft the Act so that it expressly excluded the right to appeal a decision not to impose an administrative penalty to WCAT, if that was the intent of the legislature. In *WCAT Decision #2006-00480* this type of argument had been advanced. The panel rejected this argument stating:

> In my view, this wording, aside from being redundant (since the reference to section 239 includes a reference to section 239(2)(b)), would be insufficient. The section would have to include additional clauses, each

corresponding to the exceptions created by section 239(2)(a) to (d). It would need to read as follows:

> 241 (1) For the purposes of section 239, any of the following persons who is directly affected by a decision of the review officer in respect of a matter referred to in section 96.2(1)(a), **except for a decision in a prescribed class of decisions respecting the conduct of a review, a decision respecting matters referred to in section 16 of the Act, a decision respecting the application under section 23(1) of rating schedules compiled under section 23(2) where the specified percentage of impairment has no range or has a range that does not exceed 5%, or a decision respecting commutations under section 35**, may appeal that decision.
>
> Furthermore, in my view, it would be an error to conclude that simply because section 241(1) refers to section 96.2(1)(a) that section 241(1) was intended to create a right to appeal all decisions referenced in 96.2(1)(a). A more reasonable explanation for the reference to section 96.2(1)(a) in section 241(1) is that it distinguishes between the different types of "final decisions" mentioned in section 239(1), so that it could describe who could potentially appeal them. Since section 96.2(1) had already defined the different types of final decisions, it was unnecessary to repeat the language of each within section 241(1).
>
> [emphasis added]

[69] Similar reasoning can be applied to the statutory provisions under consideration in this case. Moreover, if the legislature had wanted WCAT to have jurisdiction over refusals to impose an administrative penalty, the most straightforward way to accomplish that would have been to simply list this jurisdiction together with the other exceptions to section 239(2)(e) that are found in section 239(2)(e)(i) to (iii). The fact that "decisions not to impose a penalty" are not referred to in the exceptions under section 239(2)(e)(i) to (iii) implies that they fall under the general provision of section 239(2)(e), with the result that WCAT was not intended to have jurisdiction to hear appeals from such decisions.

(ii) Failure to Follow a Pattern of Express Reference

[70] *Sullivan and Driedger on the Construction of Statutes*, at page 189, explain the "failure to follow a pattern of express reference" category of implied exclusion as follows:

> As described above, consistent expression is a basic convention of legislative drafting. As much as possible, drafters strive for uniform and

> consistent expression, so that once a pattern of words has been devised to express a particular purpose or meaning, it is presumed that the pattern is used for this purpose or meaning each time the occasion arises. This convention naturally creates expectations that may form the basis for an implied exclusion argument.

[71] Section 240 expressly provides that, with regard to a discriminatory action claim, there is a right of appeal directly from the Board decision to WCAT where there has been **a refusal to make an order** under section 153. Section 96.2(1)(c) expressly provides, in part, that a review may be requested at the Review Division in respect of a **refusal to make a Board order** under Part 3**.**

[72] Applying the implied exclusion principle it can be inferred that where the legislature intended to give a review or appellate body the jurisdiction over refusals to make orders it did so expressly, as in sections 240 and 96.2(1)(c). If the legislature had intended there to be a right of appeal from a Review Division decision to WCAT with respect to a refusal to make a penalty (or other health and safety) order, we would expect the legislature to have used the same expression in section 239. By not following a similar pattern and referring in section 239 to "a refusal to make an order under Part 3" (or using similar language), we infer that the legislature did not intend to give WCAT jurisdiction over this type of decision.

[73] In *Banks* v. *B.C. (W.C.B.)* (1988), 25 B.C.L.R. (2d) 282 (B.C.S.C.) Gibbs J. found that the logical inference to be drawn where the Act was silent about a power in one section but not another was that the legislature intended that such a power ought not to be granted in the first section:

> As for the silence of the Act on suspension of payments it is appropriate to observe that the Act is not entirely silent. The draftsman turned his mind to that question and made specific provisions for suspension in certain instances. Under s. 57 a worker's right to compensation is suspended if he fails to attend, or obstructs, on a medical examination ordered by the board, or if he persists in unsanitary or injurious practices, or if he refuses to submit to medical or surgical treatment. And under s. 98 the board is given the discretion to suspend payment of compensation if the worker is confined to jail or prison. The logical, and proper, inference to be drawn is that the Act is silent on the subject of suspension during the appeal process because the legislature intended that there should not be any suspension of payment in those circumstances.

[74] It could be argued that this line of reasoning is diluted to some extent by the fact that section 96.2(2)(b) expressly states that no review to the Review Division may be requested for a refusal to make an order under section 153. This indicates that where the legislature intended to take away a right of review of a refusal to make an order it

has done so in express terms. However, in this case, because there is the general limitation on appeal rights in section 239(2)(e) it would be redundant and unnecessary for there to also be a provision stating that there is no right to appeal matters respecting a Board decision not to impose a penalty. In light of this, comparison of the language in section 239 with that in sections 240 and 96.2(1)(c) supports the conclusion that the legislature did not intend to give WCAT the jurisdiction to hear appeals from Board decisions not to impose an administrative penalty.

[75] The employer has argued that this position is consistent with item #2.42 of the MRPP which states:

> Decisions by review officers concerning the following types of orders are appealable to WCAT [s. 239(2)(e)]:
>
> (a) an order relied upon to impose an administrative penalty under section 196(1);
> (b) an order imposing an administrative penalty under section 196(1); or
>
> (c) an order made under section 195 to cancel or suspend a certificate.
>
> **Any other decision respecting an order under Part 3 of the WCA is not appealable to WCAT.** (A decision to levy claim costs on an employer under s. 73(1) of the WCA is a decision under Part 1 which is appealable to WCAT).
>
> [emphasis added]

[76] While this is true, item #2.42 of the MRPP is not a rule under Appendix A of the MRPP, and thus is not binding on us.

(c) Plausible Meaning

[77] Under the plausible meaning rule, the ordinary meaning may be rejected in favour of an interpretation that better fits the context, promotes the purpose of the legislation, or avoids an absurd result. R. Sullivan in *Statutory Interpretation,* at page 45 explains this rule as follows:

> Although it is permissible to reject the ordinary meaning of a provision in favour of an interpretation that promotes the purpose or avoids unacceptable consequences, under the plausible meaning rule the interpretation adopted must normally be one that the words are capable of bearing.

[78] Section 239(2)(e) states:

> The following decisions made by a review officer may not be appealed to the appeal tribunal:
>
> (e) a decision **respecting an order** under Part 3, other than an order…
>
> [emphasis added]

[79] We have considered whether, since a refusal by the Board to make an order under Part 3 is not the same as an actual order, a Review Division decision respecting a refusal to make an order under Part 3 is not a decision "respecting an order under Part 3." Under this narrow interpretation, a review officer's decision respecting a refusal to make a penalty order would not be captured by the exclusion of appeal rights under section 239(2)(e).

[80] In considering this interpretation, what constitutes an "order" is of importance. Section 106 of the Act defines "order" to mean an "order under … [Part 3] of the regulations." No further explanation or definition is found in the Act. The following case law and definitions assist in determining what constitutes an order:

- In *Cotter* v. *Cotter* (1986), R.F.L. (3d) 124 (Ont.C.A.) the Court concluded that a decision refusing to make a maintenance order under the *Divorce Act* was not in itself an order.

- *The Dictionary of Canadian Law*, 3rd ed, page 883 states that an order is a "ruling which a tribunal is specifically authorized to make by statute and which takes immediate effect to force the doing or not doing of something by somebody: *Canadian Padvid Air Lines Ltd.* v. *C.A.L.P.A.* (1988), 30 Admin. L.R. 277 (Fed.C.A.)

- *Black's Law Dictionary*, 7th ed, page 1123 provides that an order is a "command, direction, or instruction."

- The Review Division *Practices and Procedures*[9] defines "order" as follows: "A decision made under any section of the *Act* that authorizes the Board to issue orders. Orders are usually issued under the prevention provisions of Part 3 of the *Act* but can be issued under other sections, for example, the recognition of an occupational disease by order under the definition of "occupational disease" in section 1."

[9] Available on the Board's internet site (www.worksafebc.com.

[81] From the foregoing we conclude that where the Board refuses to impose an administrative penalty, an adjudication has been made; but an order has not been made, as nothing is being commanded or directed to be done or not done. This is consistent with the fact that the Act itself differentiates between decisions and orders.

[82] Section 96.4(8)(a), for example, states that a Review Officer may make a decision confirming, varying or cancelling the **decision** or **order** under review. Under a narrow interpretation of section 239(2)(e) which reflects the distinction between a decision and an order, if the Board does not issue an order under Part 3, section 239(2)(e) does not apply and the matter would fall under the general appeal granting provision in section 239(1). This narrow interpretation would mean that WCAT has jurisdiction to hear an appeal of a review officer's decision respecting a Board decision not to issue a Part 3 order, since it would be an appeal respecting a review officer's decision, but not a decision "respecting an order under Part 3."

[83] Alternatively, section 239(2) could be read more broadly to mean that there must be a decision respecting an order (including a decision about whether or not to issue an order) which is the subject of a Review Division decision in order to fall within the scope of section 239(2)(e). It is significant that section 239(2)(e) does not refer to a decision "making" an order under Part 3, but rather to a decision "respecting" an order, which is a broader context. As noted in *Words and Phrases*, *Cumulative Supplement* Vol. 7 (Thomson Carswell, June 2007) at pages 7 to 85 when discussing *Dynamex Canada Inc.* v. *C.U.P.W.*, [1999] 3 F.C. 349:

> Like the words "in respect of" [In *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39, Dickson J. (as he then was) described these words as "of the widest possible scope"] the word "respecting" is of broad import [The *Canadian Oxford Dictionary* (Don Mills, Ont.: Oxford University Press, 1998) at p. 1228, defines the word "respecting" as: "with reference or regard to; concerning"]….

[84] In *Morche* v. *British Columbia* (1982), 40 B.C.L.R. 249 at paragraphs 21 and 22 "respecting" was defined as follows:

> The Shorter Oxford Dictionary says "respecting" is derived from the third sense of the verb "respect" which it defines as "to be directed to," "to refer or relate to," "to deal with," or "be connected with." The word "respecting" is defined as "with reference to or regard to." Webster's New World Dictionary equates "respecting" with "concerning" and "about."
>
> The foregoing, and numerous authorities, establish that "respecting" is a word of broad general signification. Almost any provision which relates to the subject matter in question is a provision respecting that subject.

[85] Under a number of sections in the Act, when the legislature intends to specifically refer to situations where an order must be made, it does so expressly: See sections: 96(6), 96(7), 113(2.2), 113(2.3), 169(2), 192(1), 240(1). Under section 96(6), for example, it states:

> (6) Despite subsection (1), the Board may review a decision or **order made** by the Board or by an officer or employee of the Board under this Part but only as specifically provided in sections 96.2 to 96.5.
>
> [emphasis added]

[86] Based on consistent expression, we would have expected similar language in section 239(2)(e) if the intent of the legislature had been to limit the application of that section to cases where an order has been made. The legislature, however, has not so narrowly limited section 239(2)(e). By referring to decisions by review officers "respecting" an order under Part 3, the inference that the words are capable of bearing is that the legislature intended the restriction on WCAT's jurisdiction to be broader. Under this broader interpretation, so long as there is a decision related to or dealing with an order under Part 3 – including a decision refusing to impose an order -- and the exceptions under section 239(2)(e)(i)-(iii) do not apply, then section 239(2)(e) denies WCAT jurisdiction to consider the appeal. We consider this broader interpretation of the limitation on WCAT's jurisdiction in section 239(2)(e) to be consistent with the language employed by legislature.

(d) Consequential Analysis Rule

[87] The consequential analysis rule takes into account the consequences of adopting a particular interpretation in attempting to determine legislative intent. *Sullivan and Driedger on the Construction of Statutes* at page 132 set out the consequential analysis rule as follows:

> Sometimes it is possible to give meaning to a provision, but that meaning is so absurd that, in the view of the court, it cannot have been intended. If there is no way to interpret the provision so as to avoid the absurdity, the court has no choice but to redraft it.

[88] This raises the question of whether it is so absurd to find that WCAT does not have the jurisdiction to hear appeals from Board decisions not to impose an administrative penalty, that it cannot have been the result intended by the legislature.

[89] One category of absurdity is where the ordinary meaning, or one interpretation, of the impugned provision clearly defeats the purpose of the Act. *Sullivan and Driedger on the Construction of Statutes* at page 243 state in this respect:

> Statutory interpretation is founded on the assumption that legislatures are rational agents. They enact legislation to achieve a particular mix of purposes, and each provision in the Act or regulation contributes to realizing those purposes in a specific way. An interpretation that would tend to frustrate the purpose of legislation or the realization of the legislative scheme is likely to be labeled absurd.

[90] Another category of absurdity is where an interpretation would lead to irrational distinctions. *Sullivan and Driedger on the Construction of Statutes* at pages 244 to 245 refers to the type of irrational distinctions that fall under this category:

> A proposed interpretation is likely to be labeled absurd if it would result in persons or things receiving different treatment for inadequate reasons or for no reason at all. This is one of the most frequently recognized forms of absurdity.

[91] A third category is that of contradictions and anomalies. At pages 247 to 248 the authors note:

> From the earliest recognition of the golden rule, contradiction and internal inconsistency have been treated as forms of absurdity.
> …
> Interpretations are labelled absurd if they create an inconsistency or anomaly when considered in the light of some other provision in the statute.

[92] It could be argued that a finding that WCAT does not have jurisdiction over decisions respecting a Board refusal to impose a penalty is absurd because it makes no sense that the legislature would give a right to appeal an administrative penalty but not to appeal a decision not to impose an administrative penalty. We recognize that this does give rise to an apparent anomaly, in that it does not make much sense that under sections 239 and 241, a family member of a deceased worker could appeal a decision with respect to a Board order respecting the (possibly low) quantum of an administrative penalty, yet could not appeal a decision refusing to impose any penalty at all.

[93] As secondary sources do not provide an explanation with regard to WCAT's jurisdiction over decisions not to impose penalties, the best we can do is to determine whether there could be a rational connection between the consequence and the key determining factor.

[94] Historically there have been very few cases where a decision not to impose a penalty has been appealed to the Appeal Division. See for example: *Appeal Division Decisions #2002-3205* and *#2001-1990* (failure to impose penalty appealed), *#2002-0271* and *#2002-0272* (reduction of penalty appealed). We have found no

previous cases in which a decision not to impose a penalty has been appealed to WCAT.

[95] This can be contrasted with those cases where a penalty is imposed. With regard to those cases, the Winter Report noted at page 313 that given the progressive nature of the penalty structure two levels of review were necessary:

> As I indicated above, there are two exceptions to this narrower scope of review of Prevention Orders.
>
> The second exception applies to any Prevention Order relied upon by the WCB to impose an administrative penalty or to initiate a prosecution. These Orders would also be subject to the broader substitutional scope of review at both the internal review process and at a subsequent appeal to the external Appeal Tribunal.
>
> The rationale for this broader scope of review of these Orders is once again based upon the significant impact an administrative penalty or prosecution can have, particularly when one recognizes the progressive nature of the administrative penalty scheme adopted by the WCB. I have been advised that in 2000 there were 350 administrative penalties recommended by the Prevention Division, and 238 were imposed.
>
> This recommendation will result in the level of appeals for administrative penalties increasing to two from the one avenue of appeal that exists in the current legislation.
>
> (Pursuant to the combined effect of Sections 199 and 207 of the *Act*, any Order imposing an administrative penalty is appealable directly to the Appeal Division, which considers the appeal on a substitutional basis.) However, as elaborated upon in the "Appellate Structure" section of this Report, the internal review process is intended to become an essential component of the WCB's overall strategy to develop and maintain quality adjudication by initial decision-makers within the WCB, and to enhance consistency and predictability within the WCB decision-making process. I do not believe it would be appropriate to forego these objectives in those cases where the initial decision-maker within the Prevention Division has determined to impose an administrative penalty.

[96] There is arguably a rational connection between the legislature determining that two levels of review and appeal are necessary for decisions to impose an administrative penalty (the potentially significant impact of a penalty given the progressive nature of the penalty scheme), but one level of review is sufficient where no penalty is imposed.

[97] While one may or may not agree that this is the best or the fairest approach, the connection does not appear to be "foolish or trivial," in that there is some link between the limitation on appeal rights and at least one rationale for when an appeal to WCAT is granted in administrative penalty cases. In light of this it is difficult to say that the ordinary meaning of the legislative text, by which WCAT does not have jurisdiction over decisions to not impose an administrative penalty, results in an interpretation that would tend to frustrate the purpose of legislation or the realization of the legislative scheme and would be labelled absurd.

[98] The alternative interpretation, by which WCAT has jurisdiction, would seem more likely to defeat the purpose of section 239(2)(e) and thus to create "contradiction and internal inconsistency" which have been treated as forms of absurdity.

(e) Gaps in the Legislative Scheme & Drafting Errors

[99] R. Sullivan in *Statutory Interpretation* at pages 162 to 163 considers gaps in the legislative scheme versus drafting errors:

> A gap is normally defined as an error in the conception or design of legislation that is attributable to the legislature. It is a failure by the legislature to come up with a direction or plan that is appropriate for its purpose, rather than a failure by the drafter to communicate accurately the intended direction or plan. Since gaps are mistakes attributed to the legislature, most courts are unwilling to do anything about them. The general rule is that courts lack jurisdiction to fill gaps in a legislative scheme.
> …
> The courts have a well-established jurisdiction to cure legislative drafting errors. These errors occur when the language chosen by the drafter fails to express the rule that the legislature intended to enact. Errors may be corrected provided the court is confident that it knows what the legislature intended and would have said had the mistake not occurred.

[100] In the present case, it is possible that the legislature simply failed to turn its mind to WCAT's jurisdiction over Board decisions not to impose administrative penalties. Even if this is the case, this is not a mere drafting error that a decision maker could be confident in curing, particularly in light of the history of the section and the change in wording that was adopted in Bill 63. If this is a gap in the legislative scheme, we do not consider it appropriate to attempt to fill it, since that is the role of the legislature.

[101] We conclude that there is insufficient reason to interpret section 239 in a manner other than in accordance with the ordinary meaning, namely that WCAT does not have jurisdiction to hear an appeal of a decision of a review officer in respect of a refusal by

the Board to impose an administrative penalty. Accordingly, we have decided to dismiss the appeal on this preliminary jurisdictional issue.

Conclusion

[102] We dismiss the appeal of *Review Decision #R0076554* because it is not within WCAT's jurisdiction to consider an appeal of a review officer's decision with respect to a refusal by the Board to impose an administrative penalty under Part 3 of the Act.

[103] The appellant and the employer's representative did not identify any expenses related to this appeal for which there should be reimbursement. Further, our review of the file does not reveal any expenses were incurred and accordingly we make no order in that regard.

Guy Riecken
Vice Chair

Heather McDonald
Vice Chair

Sherryl Yeager
Vice Chair

GR/jd