Noteworthy Decision Summary

Decision: WCAT-2010-01035 **Panel:** J. Callan **Decision Date:** April 13, 2010

Section 5.1(1)(c) of the Workers Compensation Act – Mental stress – Decision relating to worker's employment – Effect of Plesner decision

This decision considers the effect of *Plesner* v. *British Columbia Hydro and Power Authority* (*Plesner*), 2009 BCCA 188, on a reconsideration of a decision by WCAT with respect to a mental stress claim by a sorter at a warehouse for a courier company.

In 2007, the worker applied to the Workers' Compensation Board, operating as WorkSafeBC (Board), for compensation for mental stress under section 5.1 of the *Workers Compensation Act (*Act). The claim for compensation arose out of the fact that the worker's supervisor asked him to work inside a container truck (which the worker found unsuitable because he can develop motion sickness when working in an enclosed space) and then asked him to work on a raised platform (which was a problem for the worker because he is afraid of heights). The Board disallowed his claim. Its decision was upheld by the Review Division, and by WCAT in *WCAT-2008-01785* ("original WCAT decision"). The worker then applied to have the original WCAT decision reconsidered on the statutory new evidence ground established under section 256 of the Act or set aside and reconsidered on the basis of a jurisdictional error.

The reconsideration panel found that neither ground was established and that *WCAT-2008-01785* stood as final and conclusive. The reconsideration panel concluded that a 2006 email which the worker sought to adduce as new evidence did not constitute new evidence for the purposes of section 256 of the Act because it existed at the time of the original appeal hearing and the worker and the vice chair were aware of it at that time.

With respect to jurisdictional error the reconsideration panel noted that in *Plesner* the B.C. Court of Appeal found that certain provisions in item #13.30 of *Rehabilitation Services and Claims Manual,* Volume II (RSCM II)) violated the *Canadian Charter of Rights and Freedoms*. Specifically, elements of the former item #13.30, which established an objective test for mental stress, and a requirement that an event be horrific in nature in order to be considered "traumatic", to be of no force and effect. As a result of *Plesner* and the related amendments to item #13.30, the reconsideration panel noted that some workers will now be able to establish claims for mental stress in circumstances that would not have supported acceptance of a claim for mental stress under the former item #13.30 of the RSCM II. However, this was not such a case as the requirements of section 5.1(1)(c) of the Act, which provides that there is no entitlement to compensation for mental stress caused by a labour relations issue, had not been met because the worker's mental stress had resulted from the employer's decision to change the work to be performed by the worker. The Court's decision in *Plesner* and the amendments to item #13.30 of the RSCM II do not change the requirements of section 5.1(1)(c) of the Act.

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Panel: Jill Callan, Chair

Introduction

[1] In 2007, the worker applied to the Workers' Compensation Board, operating as WorkSafeBC (Board) for compensation for mental stress under section 5.1 of the *Workers Compensation Act* (Act). The Board disallowed his claim. Its decision was upheld by the Review Division (see *Review Decision #R0078154* dated October 12, 2007). The worker appealed the Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT) and in *WCAT-2008-01785*, dated June 17, 2008, a WCAT vice chair confirmed the Review Division decision. I will refer to that decision as the original WCAT decision.

[2] The worker now applies to have the original WCAT decision reconsidered on the statutory new evidence ground established under section 256 of the Act or set aside and reconsidered on the basis of a jurisdictional error (common law ground). WCAT has a two-stage reconsideration process. This is the decision in the first stage of that process. In this decision, I will be determining only whether there are grounds for the original WCAT decision to be reconsidered. If I find that there are grounds, the matter that was under appeal to WCAT will be decided again by a WCAT panel.

[3] The worker is self-represented. The employer is participating in this application and submits that the worker has not established any ground for reconsideration.

[4] This application has proceeded by written submission. Given that it turns on questions of law, I find it can be fully and fairly considered without an oral hearing.

[5] By letter dated November 18, 2008, the WCAT appeals coordinator informed the worker that he could only bring a reconsideration application on the basis of new evidence on one occasion (see section 256(4) of the Act). In addition, she informed him that he could only bring a reconsideration application alleging common law grounds for reconsideration (or reconsideration on the ground of jurisdictional error) on one occasion.

Issue(s)

[6] The issue is whether the original WCAT decision regarding the worker's claim for mental stress should be reconsidered on the statutory new evidence ground established under section 256 of the Act or set aside and reconsidered in order to cure a jurisdictional defect.

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Jurisdiction

[7] Section 255(1) of the Act provides that WCAT decisions are final and conclusive and are not open to question or review in any court. However, section 256 of the Act authorizes WCAT to reconsider one of its decisions on the basis of evidence that meets the requirements of section 256(3). In addition, in limited circumstances, WCAT may reconsider one of its decisions on the basis of a jurisdictional defect, such as a serious error of law or fact, a breach of the rules of procedural fairness, or an improper exercise of discretion. The British Columbia Court of Appeal confirmed this authority in *Powell Estate v. Workers' Compensation Board* 2003 BCCA 470. This authority is further confirmed by section 253.1(5) of the Act.

Section 5.1 of the Act and Item #13.30

[8] Section 5.1 of the Act sets out the circumstances in which a worker will be entitled to compensation for mental stress. It provides, in part:

> (1) Subject to subsection (2), a worker is entitled to compensation for mental stress that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental stress
>
> (a) is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment,
>
> (b) is diagnosed by a physician or a psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and
>
> (c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

[9] The policy in item #13.30 (Mental Stress) of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) establishes guidance and criteria for the application of section 5.1. Under section 82(1) of the Act, the board of directors of the Board has the authority to set and revise policies and section 250(2) requires WCAT members to apply the applicable policies of the board of directors in making their decisions. The version of item #13.30 that was applicable when the original WCAT decision was issued (the former item #13.30) is reproduced, in part, below. Subsequently, in *Plesner v. British Columbia Hydro and Power Authority* (*Plesner*), 2009 BCCA 188, the B.C. Court of Appeal found that certain provisions in item #13.30 of RSCM II violated the *Canadian Charter of Rights and Freedoms* (Charter). Specifically, *Plesner* declared

elements of the former item #13.30, which established an objective test for mental stress and a requirement that an event be horrific in nature in order to be considered "traumatic", to be of no force and effect. I will provide further details of *Plesner* later in this decision.

[10] As a result of *Plesner*, the board of the directors of the Board amended item #13.30 effective April 30, 2009. I will call the version of item #13.30 that came into effect on April 30, 2009 the amended item #13.30. In the applicable resolution, the board of directors among other things deleted those provisions of the former item #13.30 policy that are reproduced in bold type below. The former item #13.30 provided:

> … A worker may be entitled to compensation for mental stress that does not result from a physical injury or occupational disease if the impairment is due to an acute reaction to a sudden and unexpected traumatic event.
>
> "Mental stress" is intended to describe conditions such as post-traumatic stress disorder or other associated disorders. Mental stress does not include "chronic stress", which refers to a psychological impairment or condition caused by mental stressors acting over time. Workers, who develop mental stress over the course of time due to general workplace conditions, including workload, are not entitled to compensation. …
>
> Under subsection 5.1(1)(a), the *Act* establishes a two-part test:
>
> 1. There must be an acute reaction to a sudden and unexpected traumatic event.
>
> 2. The acute reaction to the traumatic event must arise out of and in the course of employment.
>
> An "acute" reaction means – "coming to crisis quickly", it is a circumstance of great tension, an extreme degree of stress. It is the opposite of chronic. The reaction is typically immediate and identifiable. **The response by the worker is usually one of severe emotional shock, helplessness and/or fear. It may be the result of:**
>
> - **a direct personal observation of an actual or threatened death or serious injury;**
>
> - **a threat to one's physical integrity;**
>
> - **witnessing an event that involves death or injury; or,**
>
> - **witnessing a personal assault or other violent criminal act.**

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For the purposes of this policy, a "traumatic" event is a severely emotionally disturbing event. It may include the following:

- **a horrific accident;**
- **an armed robbery;**
- **a hostage-taking;**
- **an actual or threatened physical violence;**
- **an actual or threatened sexual assault; and,**
- **a death threat.**

In most cases, the worker must have suffered or witnessed the traumatic event first hand.

In all cases, the traumatic event must be

- clearly and objectively identifiable; and
- sudden and unexpected in the course of the worker's employment.

This means that the event can be established by the Board through information or knowledge of the event provided by co-workers, supervisory staff, or others, **and is generally accepted as being traumatic.** The "arising out of" determination is discussed in policy item #14.00.

In considering the matter of work-relatedness, the Board must determine if there is a connection between the employment and the resulting acute reaction. This requires consideration of personal factors in the worker's life, which may have contributed to the acute reaction. For compensation to be provided, the workplace circumstances or events must be of causative significance to the worker's mental stress. If there is no causal link to work-related factors, the worker's mental stress will not be compensable. …

There is no entitlement to compensation if the mental stress is caused by a labour relations issue such as a decision by the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

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Examples where there is likely entitlement to compensation for mental stress:

- **A person commits suicide by jumping in front of a bus. The bus driver is not physically injured by the incident, but is unable to work due to mental stress arising from the event. The bus driver's physician or psychologist confirms the driver is suffering from a condition described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, and requires time off and professional counseling.**

- **A worker directly witnesses a very serious accident to a co-worker. The worker suffers no apparent symptoms for the first two weeks after the accident, but then calls in one morning to say he/she is unable to work because he/she is haunted by the images of the event. A diagnosis by a physician or psychologist confirms that the worker suffers from post-traumatic stress disorder as described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*.**

- **During a prison riot, inmates hold a guard hostage. The guard is subsequently diagnosed by a physician or psychologist as suffering from a mental condition described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, and requires time off from work to recover.**

- **A female worker attends at work and is confronted by her male supervisor who sexually assaults her. As an immediate and direct result of the assault, the worker suffers an acute reaction and is subsequently diagnosed with a mental condition described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*. In addition to a potential claim for physical injury, the worker may be entitled to compensation for mental stress.**

Examples where there is likely no entitlement to compensation for mental stress:

- **A worker is subjected to frequent sexual innuendo, humour in poor taste, practical jokes, and other forms of inappropriate**

attention from co-workers. One day the worker calls in to say the stress is too much, and he/she cannot work.

- **A worker in a machine shop characterized by high levels of sudden noise calls in one morning to say he/she is unable to work due to mental stress. The worker also cites impossibly high production quotas, machine-pacing of work and constant threats of termination by the foreperson as reasons for the mental stress.**

The History of the Worker's Claim

[11] The worker's claim for compensation for mental stress arose out of events that occurred at his workplace on January 25, 2007. He was employed as a sorter at a warehouse for a courier company. As he was driving home from work that day, he suffered a panic attack. He drove to hospital emergency, where he was diagnosed with a panic attack and anxiety disorder. In her decision, the WCAT vice chair accepted that the worker suffered a severe reaction to the events that took place when he was at work.

[12] During the time period when the events surrounding the worker's claim for compensation occurred, he was seeing Dr. Young, who is a clinical psychologist. Dr. Young saw the worker on January 26, 2007 and submitted a report to the Board. Dr. Young noted that the worker had suffered from post-traumatic stress disorder since he was a child. However, he had been functioning well until January 25, 2007, when his supervisor asked him to work inside a container truck (which the worker found unsuitable because he can develop motion sickness when working in an enclosed space) and then asked him to work on a raised platform (which was a problem for the worker because he is afraid of heights). The assignment of these work duties to the worker led to his claim for mental stress.

[13] By decision dated May 2, 2007, the Board case manager informed the worker that his claim was disallowed because the requirements of section 5.1 of the Act had not been satisfied. The case manager noted there may have been labour relations issues in the workplace and also found that there was no sudden and traumatic event. In her October 12, 2007 decision, the review officer characterized the January 25, 2007 events as labour relations matters and, alternatively, concluded that there was no traumatic event as required by section 5.1. The worker's appeal of the review officer's decision to WCAT was the subject of the original WCAT decision.

[14] The WCAT vice chair conducted an oral hearing of the worker's appeal on June 10, 2008. I have listened to the audio recording for the hearing. In the original WCAT decision, the vice chair set out the following summary of the evidence regarding the cause of the worker's anxiety:

> The worker's anxiety for which he sought treatment was due, at least in part, to his reaction to his task assignments and to the supervisor's response to his refusal to take on the tasks. The worker refused one task which involved working in a trailer putting packages onto a conveyor belt. He said he did not mind taking a pallet full of goods in or out of the trailer but he was fearful of actually working in a trailer for any length of time. The worker also refused to work at a task where he was required to stand on a platform and sort packages. The platform is about four feet above the level of the floor beneath. The worker indicated that he is afraid of heights. After the worker refused to do these two tasks, the supervisor told the worker that there was no other work for him that day and he should go home. The worker left the employer's premises. He drove to the hospital instead of to his home because he began experiencing very significant symptoms while driving.

[15] The vice chair's conclusion and reasons were as follows:

> I agree with the conclusion of the other adjudicators. In my view, the worker's claim does not meet two of the three criteria, set out in the Act, about mental stress claims. …
>
> There is no doubt that the worker suffered an acute reaction for which he sought immediate treatment. The events which occurred at the employer's premises arose out of and in the course of the worker's employment. However, I do not consider that his reaction was to "a sudden and unexpected traumatic event." The worker submitted, at the hearing, that he should not be subject to the same standard as others because of his pre-existing depression. He submits that what he finds traumatic may not be the same as what another person finds traumatic. This may be so. However, the policy (item #13.20 RSCM II), which I must apply, states that the traumatic event must be clearly and objectively identifiable. The policy goes on to say that this means that the event can be established through evidence from other persons and it must be "generally accepted as being traumatic." I am unable to find that the directions to work in a trailer or to work on a platform are generally accepted as being traumatic. The activities of working in a dark trailer or on a platform raised a few feet above the surrounding area are not generally accepted as being traumatic. It is not generally accepted as being traumatic to be told to carry out tasks and to be told if you choose

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not to do them there is no work for you for the day. This set of events may be upsetting and stressful but it is not traumatic in the generally accepted sense of that term.

I have a second reason for denying the worker's appeal. In my view, the worker's mental stress was precipitated by the employer's directions to him about his tasks for that day. The worker maintained, at the oral hearing, that he had provided the employer with evidence of his pre-existing depression. He maintained that the employer was aware that he was afraid of heights and working in dark, enclosed spaces. The supervisor gave evidence that he was not aware of any of these matters. The supervisor's evidence was that the tasks he was trying to assign to the worker were ones with which he was familiar. The worker said they were not his usual tasks. He gave evidence that he was filling in for a co-worker who was not available to work that morning.

I accept the employer's evidence that the tasks the worker was assigned that day were ones which fell within the worker's job. I accept that the worker may not have done them before. He was being asked to carry out tasks which took place in the sorting area and which on a common sense basis would fall within the tasks one would expect a sorter in such a facility to do. The worker's reaction was to being told to do the tasks or that there was no work for him that day. It was not to actually doing the tasks assigned. In the policy, examples are given of events that are generally accepted as being traumatic. These involve death, serious injury, significant threats to life or person, or physical assaults. No such traumatic event occurred in the worker's case.

I find that the worker's claim does not meet the criteria set out in section 5.1 of the Act and policy item #13.30 of the RSCM II. I deny the worker's appeal. I confirm the review officer's October 12, 2007 decision.

The Jurisdictional Errors (Common Law grounds) raised by the Worker

[16] The worker contends that there are common law grounds for setting aside the original WCAT decision because it involved patently unreasonable errors of fact and law and the vice chair's exercise of discretion was patently unreasonable.

(a) The standard of review

[17] Item #20.2.2 (Reconsideration to Cure a Jurisdictional Defect) of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) provides that WCAT will apply the same standards of review to reconsiderations to cure jurisdictional defects as are applied by

the court on judicial review. Although the MRPP was amended after the worker applied for reconsideration, this provision was also contained in the previous version of the MRPP.

[18] Section 58 of the *Administrative Tribunals Act* (ATA) sets out the standards of review applicable when the courts deal with petitions for judicial review of WCAT decisions. It provides, in part:

> (2) In a judicial review proceeding relating to [tribunals such as WCAT]
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
>
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
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> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
>
> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

[19] Although section 58(3) essentially codifies the common law principles for determining whether a discretionary decision is patently unreasonable, the criteria applicable in determining whether a finding of fact or interpretation of law is patently unreasonable are not set out in section 58. Accordingly, reference to decisions of the courts is required.

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[20] In *Speckling v. British Columbia (Workers' Compensation Board),* [2005] B.C.J. No. 270, 2005 BCCA 80, 46 B.C.L.R. (4th) 77, the BCCA described the application of the patent unreasonableness standard of review as it applies to findings of fact as follows (in paragraph 37):

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

[21] In the text *Administrative Law in Canada*, Fourth Edition (Ontario: LexisNexis, 2006), Sara Blake states at page 213:

> Findings of fact are reviewable only if patently unreasonable. An unreasonable finding of fact is one that is not supported by any evidence. A court will not review the evidence considered by the tribunal to determine whether there was sufficient evidence to support a finding of fact. A court will go no further than to determine whether there was any evidence, and only essential findings of fact upon which the decision of the tribunal turns will be reviewed in this manner. Non-essential findings of fact are not reviewable.

[22] Regarding interpretations of law, in reviewing WCAT's interpretation of the Act or a policy of the board of directors the courts have established that the WCAT decision is not patently unreasonable if the interpretation is rational (see, for instance, *Hill v. WCB* 2007 BCSC 1187).

(b) The impact of the duties assigned to the worker

[23] The worker interprets the original WCAT decision as indicating that the vice chair was not concerned about the worker working inside a trailer or on a high platform even though the worker experienced severe symptoms and had to go to emergency. He argues that, in this regard, the vice chair exercised her discretion in a manner that was arbitrary and inconsistent with the facts.

[24] In my view, the worker has misinterpreted the original WCAT decision. As I read the decision, the vice chair accepted that the worker suffered an acute reaction following the events at work. However, she found that the worker's mental stress was not compensable under the framework established by section 5.1 for two reasons. Firstly, the circumstances did not meet the requirements of section 5.1(1)(c) because the worker's psychological reaction was caused by a decision of his employer to "change

the work to be performed or the working conditions". Secondly, the requirements of section 5.1(1)(a) were not met because the worker's psychological reaction was not "an acute reaction to a sudden and unexpected traumatic event". The vice chair's determination in this regard resulted from the application of the former item #13.30, which required the traumatic event identified by the worker to be clearly and objectively identifiable and that the events be capable of characterization as "generally accepted as being traumatic".

[25] As I understand the worker's argument, he submits that the vice chair made an error of fact or a mixed error of fact and law. In both cases, the standard of review is patent unreasonableness. I find that the vice chair's findings of fact regarding the events that took place on January 25, 2007 were supported by the evidence and she applied section 5.1 of the Act and the former item #13.30 to those facts in a rational manner. In addition, I do not find that the vice chair exercised her discretion in an arbitrary manner.

(c) The worker's history of depression

[26] The worker also contends that his long history of depression prior to January 25, 2007 was not appropriately taken into account by the vice chair. At the hearing, the worker argued that, in light of his history, he might find events traumatic in circumstances where others would not. In his submissions in support of this application, the worker states that, although the work the employer assigned to him on the night of January 25 could be viewed as a "regular order", for him it "could be a killing order … to work inside a forty-feet long trailer or up to a platform which was 4 to 5 meter[s] high above the ground".

[27] In the original WCAT decision, the vice chair acknowledged the worker's argument in this regard but pointed out that item #13.30 established an objective test rather than a subjective test for determining whether there was a traumatic event. She noted that the activities of working in a trailer or on a raised platform are not generally considered to be traumatic. She also found that those activities were among the duties of the worker's job. In the absence of an objectively established traumatic event, she found that the worker's previous psychological history was not relevant to the question before her.

[28] Questions regarding interpretation of a policy and relevance of evidence are questions of law. Therefore, the standard of review applicable to the vice chair's application of the former item #13.30 and her determination that the worker's previous history of depression was not relevant is patent unreasonableness.

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[29] The former item #13.30 provided that a traumatic event would be a severely emotionally disturbing event such as “a horrific accident”, “an armed robbery”, “a hostage-taking”, “an actual or threatened physical violence”, “an actual or threatened sexual assault” or “a death threat”. These are clearly all events that can be objectively characterized as traumatic. I find no error in the vice chair’s conclusion that the former item #13.30 established an objective test for determining whether an event was traumatic. In light of her finding that the events the worker experienced on January 25, 2007 were not objectively traumatic and her finding that the requirement of section 5.1(1)(c) had not been met, I find that the vice chair’s determination that the worker’s previous history of depression was not relevant was not patently unreasonable.

(d) Reasonable apprehension of bias

[30] The worker also submits the following:

> WCAT’s Panel ? A government’s statutory body whose mainly function are supervising and instructing WCB’s work but choose to close her eyes to the facts I presented at the hearing held on June 10, 2008 and to make things worse, the WCAT’s panel cut off and remove and forge and distort the evidence to make her decision in favor of my employer.
>
> Sometimes, I do really believe there is a under table agreement between all these government statutory body (WCB, WCAT, Workers’ adviser) on what case they should give a green light or a red light. Should the WCAT reconsideration Panel to find out what that agreement is, and how long it has been there, how it works, how many people are deeply affected by this under table agreement (Not required to be displayed on dashboard).
>
> [reproduced as written]

[31] Two arguments arise out of this part of the worker’s submission. The first is whether there was a reasonable apprehension of bias and the second is whether the discretion of the vice chair was fettered in some way. I will first consider the worker’s allegation that the vice chair distorted the evidence and decided in favour of the employer because she was biased in favour of the employer.

[32] An allegation of bias falls into the broader category of an allegation of a breach of the common law rules of natural justice and procedural fairness. The specific test for bias was set out by the Supreme Court of Canada in *Newfoundland Telephone Co. Ltd. v. Board of Commissioners of Public Utilities,* [1992] 1 S.C.R. 623, as follows:

> The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an

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> adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. **The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.**
>
> [emphasis added]

[33] In *R. v. S. (R.D.),* [1997] 3 S.C.R. 484, the Supreme Court of Canada emphasized that the threshold for finding bias is high, stating:

> Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. **It is a finding that must be carefully considered since it calls into question an element of judicial integrity.** Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.
>
> [emphasis added]

[34] In the text *Administrative Law in Canada*, Fourth Ed. (Ontario: LexisNexis Canada Inc., 2006) Sara Blake states at page 114:

> There is a presumption that a tribunal member will act fairly and impartially, in the absence of evidence to the contrary. The onus of proving bias lies on the person who alleges it. A real likelihood or probability of bias must be demonstrated. Mere suspicion is not enough.

[35] Section 30 of the ATA requires WCAT vice chairs to perform their duties impartially and section 232(8) of the Act requires them to take an oath of office prior to beginning their duties. The oath of office, which is found in section 3 of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/2002, requires vice chairs to carry out their duties impartially and conduct themselves with integrity.

[36] In *Adams v. B.C.* (W.C.B.) (1989), 42 B.C.L.R. (2d) 228, the British Columbia Court of Appeal noted the presumption of regularity of the acts of public officials and that "suspicion alone" will not rebut the presumption. The court made the following statements concerning the allegation of bias (at pages 231 and 232):

> This case is an exemplification of what appears to have become general and common practice, that of accusing persons vested with the authority to decide rights of parties of bias or reasonable apprehension of it without any extrinsic evidence to support the allegation. It is a practice which, in

> my opinion, is to be discouraged. An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by a general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause. As I have said earlier, and on other occasions, suspicion is not enough.

[37] The judgment in *Adams* underscores the very serious nature of an allegation of bias and suggests that it is inappropriate to make such an allegation in the absence of a sound basis to support the apprehension that the decision-maker is not impartial.

[38] In this case, there is no extrinsic evidence to support the very serious allegation that the vice chair was biased against the worker. When I listened to the recording of the oral hearing, I found the vice chair was courteous and respectful to the worker, the employer, and the employer's representative. Her tone and the manner in which she ran the hearing and asked her questions were entirely appropriate. Her decision turned on the test for establishing a mental stress claim set out in section 5.1 of the Act and item #13.30 of RSCM II. I do not find the worker has established a reasonable apprehension of bias.

(e) Fettering of discretion

[39] Another possible interpretation of the worker's allegation that there was an "under the table agreement" that caused his claim to be disallowed is that he contends that the vice chair's discretion was unlawfully fettered so that she could not freely find that his mental stress was compensable.

[40] In this case, there is no evidence that the vice chair's discretion was unlawfully fettered by any sort of direction or secret agreement that compensation should not be provided for mental stress claims. In addition, I find that the vice chair was required to apply section 5.1 of the Act and the former item #13.30, which comprised the foundation of her decision. The courts have recognized that section 82 of the Act coupled with section 250(2), among others, authorizes the board of directors to establish policies that amount to inflexible rules (see, for example, *Western Stevedoring Co. Ltd. v. W.C.B.* (*Western Stevedoring*)*,* 2005 BCSC 1650). It was not unlawful or inappropriate for the vice chair to apply the former item #13.30 in deciding the worker's appeal because she had a statutory obligation to do so.

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The New Evidence

[41] In support of this application, the worker has provided copies of a June 7, 2006 exchange of emails, in which the employer provided him with contact information for the employee assistance program that the employer had made available to its workers. The worker stated that he had submitted the emails as new evidence at the oral hearing but the vice chair did not accept them into evidence. This statement is consistent with the original WCAT decision in which the vice chair noted:

> At the hearing, the worker sought to introduce new evidence. The employer's representative objected. I did not accept a copy of an email which the worker wished to use to show that the employer has a personal assistance program for its employees. He had already provided evidence of the existence of this program in his pre-hearing submissions.

[42] The worker argues the exchange of emails is relevant to his claim because it confirms that the employer was aware of his history of depression before January 25, 2007. He submits that the employer deliberately caused him psychological distress by assigning work to him that was unsuitable in light of his long history of depression. He goes so far as to say that he was "mentally abused and harassed by the manager on duty on the grounds … that I have mental problems".

[43] Under section 256(3) of the Act, WCAT can reconsider a decision on the basis of new evidence that meets certain criteria provided that the evidence did not exist at the time of the original appeal hearing or, if it did exist, had not been discovered at that time. In this case, I find that the June 7, 2006 email does not constitute "new evidence" for the purposes of section 256(3) because it existed at the time of the original appeal hearing and the worker and the vice chair were aware of it at that time. Accordingly, the WCAT decision cannot be reconsidered on the basis of that evidence.

[44] The worker considers the exchange of emails to be relevant to establishing his claim for compensation because it is evidence that the employer was aware of his psychological problems prior to the events of January 25, 2007. Accordingly, in addition to considering whether the emails constitute new evidence under section 256(3), I have considered whether the vice chair made a jurisdictional error in not accepting the emails as evidence. The vice chair declined to accept the emails because she determined that they were not relevant to the question raised by the worker's appeal, which was whether the worker can establish a compensation claim under section 5.1 of the Act for mental stress arising out of the events of January 25, 2007. Questions regarding the admissibility of evidence are questions of law. Accordingly, the standard of review applicable to the vice chair's ruling that the emails would not be accepted into evidence is patent unreasonableness.

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[45] In my view, the vice chair correctly characterized the question that she was required to answer in order to decide the worker's appeal. In light of the objective test applicable under the former item #13.30 for establishing a "traumatic event" and the vice chair's conclusion that the requirement of section 5.1(c) had not been met, I find the vice chair correctly determined that the worker's earlier psychological history was not relevant to that question. As the emails regarding the employer's employee assistance program were not relevant, I find that the vice chair did not make a patently unreasonable error of law when she declined to accept the emails as evidence at the oral hearing.

***Plesner* and Subsequent Amendments to Item #13.30**

(a) Plesner

[46] The parties' submissions regarding this application were completed in January 2009. On April 30, 2009, the B.C. Court of Appeal issued its judgment in *Plesner* (cited earlier). The Court of Appeal majority declared that some of the provisions of item #13.30 contravene section 15(1) of the Charter and cannot be saved under section 1. Section 15(1) of the Charter provides that every individual has the right to equal protection and benefit of the law without discrimination, including discrimination based on mental disability.

[47] The Court majority found that the provisions of the former item #13.30 which set out the examples of an acute reaction and a traumatic event and the requirement that the event be "generally accepted as being traumatic" contravene the Charter. The majority severed those provisions of the former item #13.30 and declared them to be of no force and effect. The majority concluded that the provisions in the former item #13.30 regarding a "traumatic event" give rise to discrimination on the basis of mental disability as the ability of workers suffering from mental stress to access workers' compensation benefits is significantly restricted in comparison with the access for workers suffering physical injuries. The majority noted that workers with mental stress have to show that they suffer a work-related injury, and that the injury was caused by a traumatic event, which the former item #13.30 requires to be akin to "horrifying". In contrast, workers who suffer physical injuries only have to show that they suffered a work-related injury to receive compensation.

[48] The Court majority declared that some of the elements of the former item #13.30 contravene section 15(1) of the Charter because they discriminate based on mental disability. The Court deleted from the former item #13.30 the words that I reproduced in bold type earlier in this decision. In light of *Plesner*, the board of directors of the Board amended the former item #13.30 in July 2009 effective April 30, 2009.

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[49] It is clear that, as a result of *Plesner* and the related amendments to item #13.30, some workers will now be able to establish claims for mental stress in circumstances that would not have supported acceptance of a claim for mental stress under the former item #13.30.

(b) Submissions regarding the application of the amended item #13.30 to the worker's application

[50] As a result of the amendments to item #13.30, in September 2009 WCAT invited the parties' submissions on the question of whether the amended item #13.30 is applicable to this reconsideration application. The worker did not provide a submission in this regard. However, the employer submitted that, regardless of the amendments to item #13.30 that followed *Plesner*, the worker's claim could not be accepted because the requirement of section 5.1(c) of the Act had not been met. In addition, the employer argued that the events of January 25, 2007 do not satisfy the requirements of the amended item #13.30.

(c) Application of section 5.1(1)(c)

[51] In the original WCAT decision, the vice chair determined that the tasks that the employer assigned to the worker on January 25, 2007 were tasks that one would expect someone with his job to do. Accordingly, the vice chair concluded that the requirements of section 5.1(1)(c) had not been met because the worker's mental stress had resulted from the employer's decision to change the work to be performed by the worker on that day.

[52] No basis has been established for setting aside the vice chair's determination in that regard. The Court's decision in *Plesner* and the amendments to item #13.30 do not change the requirements of section 5.1(1)(c) or the statement in the former item #13.30 that there is no entitlement to compensation for mental stress caused by a labour relations issue, such as an employer's decision to change the work performed by or the working conditions of a worker. Accordingly, I conclude that regardless of whether the amended item #13.30 is applicable to the worker's claim, there is no basis for setting aside the vice chair's decision that the worker is not entitled to compensation for mental stress because the vice chair did not err in determining that the worker's mental stress was caused by a decision of the employer to change the work performed by the worker or his working conditions.

[53] As a result of my conclusion in this regard, there is no need for me to determine whether the current version of item #13.30 should be applied in determining whether the worker has established grounds for reconsideration.

(d) Should WCAT set aside decisions regarding mental stress made under the former item #13.30 and reconsider them applying the amended item #13.30?

[54] Although, in this case, it was ultimately unnecessary for me to do so, I have turned my mind to the question of whether a worker who received a WCAT decision dated April 29, 2009 or earlier in which WCAT determined that a claim for mental stress could not be established because there was no traumatic event could now seek reconsideration of that WCAT decision on the basis of a jurisdictional error.

[55] In *Cowburn v. WCB of BC*, 2006 BCSC 722, the Court concluded that item #1.03(b)(4) of RSCM I and II was patently unreasonable. As a result, by resolution passed in August 2006, the board of directors of the Board amended item #1.03(b)(4). In the relevant resolution, the board of directors established that the amended policy was applicable to all decisions, including appellate decisions, made on or after October 16, 2002, which was the date that the patently unreasonable policy came into effect.

[56] In *WCAT-2006-03922*, I determined that a WCAT decision that had applied the patently unreasonable version of item #1.03(b)(4) could be set aside and reconsidered by WCAT on the basis of a jurisdictional error. I considered a variety of legal principles and factors in making my decision (see the discussion under the title "Submissions and Analysis", which starts at page 8), including the doctrine of *res judicata.* It provides that, in the absence of appeal rights, a matter that has been finally determined by a competent court cannot be pursued further by the same parties. I determined that *res judicata* is not a conclusive bar to reconsidering WCAT decisions that had applied the patently unreasonable version of the policy because section 253.1(5) of the Act recognizes WCAT's common law authority "on request of a party, to reopen an appeal in order to cure a jurisdictional defect". However, the most significant factor was the application statement in the August 2006 resolution, which was discussed in *WCAT-2006-03922* as follows (at pages 13 and 14):

> The August 2006 Resolution provides that the Amended item #1.03(b)(4) is to be applied to "decisions, including appellate decisions, made on or after October 16, 2002". It reflects the conclusion of the board of directors that good public administration requires that the amended policy have retroactive application and that claims to which item #1.03(b)(4) was applied be readjudicated. When the language in the application statement for the August 2006 Resolution is contrasted with the application statements for other policy changes, it is evident that the board of directors viewed the circumstances under consideration to be extraordinary.
>
> For instance, in *Resolution #2005/10/06-03* (Re: Changes to the Casual Workers Policy In the *Rehabilitation Services & Claims Manual*), the

directors set a future effective date of January 1, 2006 and determined that the new policy "applies to all decisions made on or after" that date. *Resolution #2005/07/19-03* (Re: Changes to Average Earnings Policies In the *Rehabilitation Services & Claims Manual,* Volume II) provided that it "applies to injuries that occur on or after October 1, 2005".

In contrast, in *Resolution #2005-12/13-03* (Re: Benefits for Dependent Children), the application statement provides:

> Amendments to policy item #55.40 of the *RS&CM* Volume I, attached as Appendix A, are approved and apply to claims adjudicated on or after January 1, 1984.

In that case, the policy amendment flowed from my determination under section 251(3) that item #55.40 was patently unreasonable under the Act (see *WCAT Decision #2005-04492-rb*). As a result of the resolution, the Board readjudicated the entitlement to benefits that had been granted under the impugned policy retroactively to the date the policy came into effect.

In the August 2006 Resolution, the Board clearly stated that the Amended item #1.03(b)(4) applies to appellate decisions made on or after October 16, 2002. As a result of the Resolution, the Board is readjudicating all of the decisions in which item #1.03(b)(4) has been applied. This approach is consistent with that of the governors in *Decision #28*. It appears that the board of directors intended that the policy change would apply to WCAT decisions in which item #1.03(b)(4) had been determinative.

While the board of directors does not have the authority to determine that a WCAT decision is not final and conclusive, WCAT has the authority to set aside as void and reconsider a patently unreasonable WCAT decision. In light of *Cowburn* and the intended retroactive application of the August 2006 Resolution, I am persuaded by counsel's argument that the Previous WCAT Decision must be set aside as void because these subsequent events have rendered the decision patently unreasonable.

[57] In my view, the circumstances that arise from the policy amendments that followed *Plesner* are significantly different from those I considered in *WCAT-2006-03922* because the board of directors' resolution stated that the amendments to item #13.30 were applicable "to all decisions, including appellate decisions, on or after April 30, 2009", which was the date of the decision in *Plesner*. The board of directors could have amended the former item #13.30 effective the date it came into existence as they had when they amended item #1.03(b)(4) following *Cowburn*. However they did

not do so. As noted earlier, section 250(2) of the Act requires WCAT to apply the applicable policies of the board of directors in making its decisions. It is fundamental that WCAT be guided by the relevant application statements in determining the applicable policies. The application statement for the amendments to item #13.30 clearly indicates that the board of directors did not intend that the amended item #13.30 would apply to decisions that were made within the workers' compensation system prior to April 30, 2009.

[58] In *Plesner*, the Court severed provisions in the former item #13.30 and declared them to be of no force and effect on the basis that they offended the Charter. Accordingly, a question that could arise is whether WCAT could set aside and reconsider decisions that applied the former item #13.30 on the basis that the policy that was applied in those cases contravened the Charter. Section 45(1) of the *Administrative Tribunals Act* establishes that WCAT does not have jurisdiction over constitutional questions relating to the Charter. In light of this lack of jurisdiction, it does not appear that WCAT could reconsider its decisions on this basis.

Conclusion

[59] The worker has not established grounds for reconsideration of *WCAT-2008-01785.* I find the evidence he has provided does not meet the requirements of section 256 of the Act and no jurisdictional error has been established. In accordance with section 255(1) of the Act, *WCAT-2008-01785* stands as final and conclusive.

Jill Callan
Chair

JC/it