

## Noteworthy Decision Summary

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**Decision:** WCAT-2011-01422      **Panel:** Randy Lane      **Decision Date:** June 8, 2011

***Sections 6(3) and 6(1) of the Workers Compensation Act – Policy item #27.40 of the Rehabilitation Services and Claims Manual, Volume II – Practice Directive #C3-2 – Awkward Posture – Adjudication Without Presumption***

This decision is noteworthy because it provides guidance on the approach to adjudication of an activity related soft tissue disorder that is listed in Schedule B, where the requirements in the second column of Schedule B are not met.

This was a reconsideration decision. The worker's appeal concerned causation of left shoulder calcific tendinitis. The original panel denied the worker's appeal under section 5, subsection 6(3) and subsection 6(1) of the *Workers Compensation Act* (Act). In adjudicating the worker's appeal under subsection 6(1), the original panel stated that in order to be considered awkward, shoulder abduction or extension must be 60 degrees or more.

The reconsideration panel noted that policy item #27.40 in the *Rehabilitation Services and Claims Manual, Volume II* refers to joints being held at or near the end range of motion for that joint, and refers to shoulder abduction or flexion. It does not mention 60 degrees abduction or flexion. Practice Directive #C3-2<sup>1</sup> also contains a definition of awkward posture, and in connection with the risk factor of "posture," Appendix I references greater than 60 degrees of abduction or flexion.

The original panel had misapprehended published policy when it imported the requirements in Schedule B to the Act into adjudication under subsection 6(1). It would have been open to the original panel to state that in considering subsection 6(1), the criteria in subsection 6(3) could be a starting point. However, it would have then been appropriate for the original panel to comment that the adjudication was not confined to the criteria in subsection 6(1).

The aspect of the original panel's decision dealing with subsection 6(1) was patently unreasonable. While the original panel was aware of policy item #27.20, the panel misinterpreted or failed to apply it. The original panel's decision was set aside, in part. The determinations regarding section 5 and subsection 6(3) remained final and conclusive.

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<sup>1</sup> Practice Directive #C3-2 was replaced by Practice Directive #c4-2 on May 11, 2012.

**WCAT Decision Number :** WCAT-2011-01422  
**WCAT Decision Date:** June 08, 2011  
**Panel:** Randy Lane, Vice Chair

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## Introduction

- [1] The worker has applied to the Workers' Compensation Appeal Tribunal (WCAT) for reconsideration of a December 15, 2010 decision of a WCAT panel. In *WCAT-2010-03375* the panel denied the worker's appeal from a March 30, 2010 decision of a review officer with the Review Division of the Workers' Compensation Board, operating as WorkSafeBC (Board). The panel determined that the worker's left shoulder calcific tendinitis was not an injury arising out of and in the course of her employment and was not an occupational disease due to the nature of her employment as a computer systems architect/business analyst.
- [2] The reconsideration application was initiated by a December 31, 2010 application for reconsideration form. The worker was provided with an opportunity to provide a further submission in support of her application, but no further submission was received from the worker. The worker's employer was notified of the application, but it did not indicate it wished to participate.
- [3] No oral hearing is required. The issues raised by this application are legal in nature.

## Issue(s)

- [4] Does the panel's decision contain jurisdictional defects and did WCAT breach the common law rules of natural justice and procedural fairness in connection with the issuance of the December 15, 2010 decision?

## Jurisdiction

- [5] Subsection 255(1) of the *Workers Compensation Act* (Act) provides that a WCAT decision is final and conclusive and is not open to question or review in any court. In keeping with the legislative intent that WCAT decisions be final, they may not be reconsidered except on the basis of new evidence as set out in section 256 of the Act, or on the basis of a jurisdictional defect. A tribunal's authority to set aside one of its decisions on the basis of jurisdictional defect was confirmed by the British Columbia Court of Appeal in the August 27, 2003 decision in *Powell Estate v. Workers' Compensation Board (BC)*, 2003 BCCA 470, [2003] B.C.J. No. 1985, 186 B.C.A.C. 83, 19 W.C.R. 211. This authority is further confirmed by subsection 253.1(5) of the Act.

[6] Effective December 3, 2004, the provisions of the *Administrative Tribunals Act (ATA)* affecting WCAT were brought into force. Section 58 of the ATA concerns the standard of review to be applied in a petition for judicial review of a WCAT decision. Item #20.2.2 of WCAT's *Manual of Rules of Practice and Procedure (MRPP)* provides that WCAT will apply the same standards of review to reconsiderations as would be applied by the court on judicial review.

[7] Subsection 58(2) of the ATA provides as follows:

In a judicial review proceeding relating to expert tribunals under subsection (1)

- (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
- (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.

[all quotations in this decision are reproduced  
as written, save for changes noted]

[8] This application has been assigned to me by the WCAT chair, for consideration under a written delegation of authority (paragraph 25 of the *Decision of the Chair, Workers' Compensation Appeal Tribunal, No. 12*, "Delegation by the Chair," January 2, 2009).

## **Background and Evidence**

[9] In her August 27, 2009 application for compensation, the worker linked symptoms in various parts of her body to her activities following her January 2009 commencement of employment for the employer. She indicated that the "incident" occurred over time, while working at her regular work location at a tabletop in a project area. The worker described how her initial work activities caused lower back pain and how the installation of a keyboard tray and the lack of permission to remove the arms of the chair in which she was sitting resulted in left shoulder symptoms:

Daily work at my laptop on the table top with the provided chair initially causes lower back pain. I attempted to alleviate this with the purchase of a bigger monitor screen, then I purchased reading glasses. These made the work easier to see, but didn't correct the underlying ergonomic problems. I finally reported the problem May 8 and requested a keyboard tray to try to help. This resulted in an ergonomic review and I was able to have a

keyboard tray installed under the desk surface, but was not permitted to remove the arms on the chair. This was slightly too high, and over time cause pain/muscle tightening in my left shoulder. It did alleviate some of the back pain, but not all - that is still a problem.

- [10] The worker was documented as reporting that she sought health care attention on July 22, 2009.
- [11] In a September 10, 2009 first report Dr. J diagnosed "muscle injuries." He indicated the worker had pain in her left shoulder, back, and both forearms due to a poor ergonomic workplace.
- [12] The employer filed a report of injury. It noted the worker verbally reported problems in April 2009. It confirmed that in early May 2009 the worker asked to be supplied with a keyboard tray. She was suffering neck, left shoulder, and back pain which she believed would be alleviated by the installation of such a tray.
- [13] The employer also confirmed that the worker requested a reduction in hours. It provided the Board with copies of the worker's invoices from April 2009 to August 2009 when the employer's contract with its client was cancelled.
- [14] In September 2009 the worker completed an activity-related soft tissue disorder (ASTD) pre-site questionnaire. On October 20, 2009 a Board ASTD case manager attended the worker's worksite to identify any occupational risk factors with respect to the worker's job tasks. He prepared a memorandum and took photographs, as well as prepared a videotape.
- [15] A December 9, 2009 report of an ultrasound of the worker's left shoulder noted the worker had reported left shoulder pain of two months' duration. A torn rotator cuff was queried. The ultrasound was interpreted as establishing the existence of a large calcification in the supraspinatus tendon in keeping with calcific tendinitis.
- [16] A January 7, 2010 memorandum documented that an ASTD meeting had been held. The memorandum noted information provided by the ASTD case manager with respect to the epidemiological evidence regarding shoulder musculoskeletal disorders, ergonomic guidelines, the absence of support in the medical literature for a relationship between calcific tendinitis of the left shoulder and trauma or repetitive activities over time, risk factors identified during a worksite visit, and the existence of any non-occupational risk factors. The memorandum also documented the opinion of Dr. V, an ASTD medical advisor, who considered the worker's symptoms could not be explained on the basis of a work-related activity-based soft tissue disorder.
- [17] By decision of January 8, 2010 the ASTD case manager summarized the history of the claim. He did not consider that the worker's claim satisfied the requirements for acceptance under subsection 5(1) of the Act given that the evidence failed to establish a

workplace incident or accident or a direct blow or trauma to the worker's left shoulder while at work. He advised that the worker's claim did not satisfy the terms of subsection 6(3) and Schedule B of the Act regarding shoulder tendinitis. Regarding subsection 6(1), he cited the opinion of the Board medical advisor and found that the ergonomic risk factors in the worker's work were not of sufficient magnitude and intensity to account for her left shoulder condition.

[18] In his March 30, 2010 decision the review officer confirmed the January 8, 2010 decision. He indicated he reviewed the worker's claim for tendinitis, a broader term than the more specific term of calcific tendinitis. He determined that the worker's tendinitis was not an injury arising out of and in the course of her employment. He found that the worker's claim did not satisfy the terms of subsection 6(3) and Schedule B of the Act regarding shoulder tendinitis.

[19] The review officer then turned to whether the worker's condition was an occupational disease under subsection 6(1) of the Act. He cited relevant policy and a practice directive:

Section 6(1) of the Act and policy item #26.22 *Non-Schedule Recognition and Onus of Proof* of the *RSCM [Rehabilitation Services and Claims Manual]* provide guidance in dealing with claims where the industry or process does not meet the criteria in Schedule B. Policy item #27.20, *Tendinitis /Tenosynovitis and Bursitis Claims Where No Presumption Applies*, specifically considers tendinitis claims where the presumption in favour of work-related causation does not apply. The employment circumstances must then be assessed to determine the impact of the risk factors outlined in the policy. Matters such as relative frequency, intensity and duration of exposure to risk factors, and whether the worker takes prescription medications, is pregnant or undergoing any therapy or treatment for another condition, are considered within the policy. Other non-occupational risk factors are also considered. The risk factors outlined in policy item #27.40 are also to be considered. Some of these factors include the magnitude/intensity of the risk factor, its duration, and the repetition, force, static load, task variability and awkward postures of the work, among other factors. Both occupational and non-occupational factors are to be considered, and again, the goal is to determine if the work played a significant causative role in producing the worker's tendinitis.

I have also found it helpful to consider Practice Directive #C3-2, *Adjudication of Activity-Related Soft Tissue Disorder ("ASTD") Claims*. Although not binding on me, this practice directive provides useful guidance to me on the adjudication of ASTD claims. Appendix 1 of the Practice Directive #C3-2 provides that the risk factor of awkward postures for shoulders occurs when shoulder abduction or extension reach

60 degrees. The risk factor of repetition is present for shoulders with movements that occur at 2 movements per minute for more than 2 hours. I agree with this interpretation of policy.

- [20] The review officer agreed that the worker's work environment involved no repetition, awkward movements or force:

Both the JSV [job site visit] Report and Dr. V concluded that there were no risk factors present in the worker's job. There was no repetition, awkward movements, or force present in the worker's environment. Again, after viewing the video images of the worker, I agree with this conclusion.

- [21] The review officer noted the worker's submissions that her work involved awkward postures and repetition but stated those were defined terms and they were not present in the worker's work environment:

The worker submits that her posture was "awkward" and her work did involve repetition. She has provided me with letters from co-workers that attest to the difficulties that the worker had with her workstation. However, the *RSCM* uses the terms "awkward postures" and "repetition" to mean very specific things. Having viewed images of the worker at her workstation, I have already noted that her left shoulder was raised in an awkward manner. But "awkward postures" in the *RSCM* means shoulder abduction or extension at 60 degrees or more. The worker's left shoulder did not approach movements close to that. Similarly, I appreciate that the worker repeats similar motions throughout the day as she keyboards. But the *RSCM* defines "repetition" as movements that occur at least twice per minute where the movement involves significant abduction or extension of the shoulder. I could see no such repetition in the video images taken of the worker.

- [22] The review officer did not consider that work causation could be established on the basis of the absence of non-occupational risk factors:

The worker also submits that there are no other reasons besides her work that would explain her shoulder condition. I would agree after reviewing the Questionnaire that the worker has few non-occupational risk factors. However, policy item #27.00 notes that some cases of an ASTD may be idiopathic (occurring without known cause) where a causal agent cannot be identified. As a result, work causation cannot be established from the lack of non-occupational risk factors. An ASTD, such as shoulder tendinitis, can be accepted only if there are sufficient risk factors at work to establish causation.

[23] The review officer summed up his analysis as follows:

The preponderance of evidence does not establish risk factors that had a significant causative role in the worker's shoulder tendinitis. I accept the opinion expressed in the JSV Report and in the opinion of Dr. V that the worker's employment did not expose her to risk factors for this ASTD. Based on this evidence, I find the worker's left shoulder tendinitis is not due to the nature of her employment.

[24] As part of her appeal to WCAT the worker filed an April 6, 2010 notice of appeal, an April 19, 2010 submission, an April 22, 2010 submission, and an August 5, 2010 submission. The file also contains the worker's typed notes for the August 31, 2010 oral hearing at which she testified.

[25] In its decision the panel outlined the history of the claim prior to the Board's initial adjudication:

The worker was employed as a computer systems architect/business analyst. In 2009, the worker was 53 years old; she began working for the employer on January 5, 2009. The worker submitted an application for compensation to the Board on August 27, 2009; she reported no specific incident or injury, but was of the opinion that the ergonomically incorrect workplace had caused her back, left shoulder and forearm symptoms, which had been diagnosed as calcific tendinitis. **Specifically, she indicated that her left shoulder symptoms began on or around late May, early June 2009, after a keyboard tray was installed at her workstation.**

The Board received a physician's first report from Dr. Jones, the worker's attending physician, dated September 10, 2009. Dr. Jones noted that the worker had reported pain in her left shoulder, back and both forearms due to a workplace with poor ergonomics. His diagnosis was "muscle injuries". An activity-related soft tissue disorder (ASTD) questionnaire completed by the worker on September 28, 2009 indicated that she spent most of her time at the computer. She had begun to notice significant back pain in April 2009, and had begun to have left shoulder pain when she began using a keyboard tray that **required her to raise her shoulders.**

The Board case manager undertook a jobsite visit on October 20, 2009. The report of that visit indicated that a keyboard tray had been installed (at the worker's request) at the location where she was working. As a result, her shoulder was pushed upward by the arm of her chair. However, the worker's job did not expose her to repetition, awkward postures, or force, or any other risk factor for shoulder tendinitis.

[emphasis added]

- [26] The panel noted that in a pre-hearing submission the worker submitted new evidence regarding her work space:

...In a subsequent submission, the worker argued that there were sufficient ergonomic risk factors in her employment to cause her diagnosed left shoulder condition. **She also submitted photographs of her work space, and provided measurements of the relevant desk, chair and work space height.**

[emphasis added]

- [27] The panel's summary of the worker's oral hearing evidence and submissions included the events of May 2009 onward:

In May 2009, she did ask for a keyboard tray installed. This triggered an ergonomic assessment. However, the ergonomist, because of the physical limitations, could not do much. The keyboard tray was installed, and this enabled the worker to lower her chair. **However, the arms of the chairs were high for her torso, causing her to raise her arms. Her request for a new chair was refused. She could not do anything but rest at least one arm on the arm of her chair, which was too high, or both. The worker considered that this was an incident or injury, pursuant to section 5 of the Act.**

In the alternative, the worker argued that her elevated shoulder caused her tendinitis, and should be accepted as an occupational disease. The worker developed tightness of her shoulder, and **chiropractic treatment for her shoulder began in June 2009.** Her keyboard and chair were the only things in her life which had changed, and she was of the opinion that these were clearly causative of her shoulder symptoms. On July 15, 2009, it was announced that the project would be completed by August 15, 2009. She therefore began to work ten hours a day. She had trouble driving and sleeping and carrying her groceries. In August 2009, when she returned to yoga, she found out that she could barely lift her arm. She filed her claim on August 27, 2009. She saw her doctor in September 2009.

The worksite evaluation occurred in October 2009. Pictures and measurements were taken. **The worker thought that the measurements were sloppy, but she thought the case manager was only confirming that the situation was clearly unacceptable, and so she did not object to the case manager at the time. She has since taken measurements to confirm that those done by the case manager were wrong. She is of the opinion that the photographs do not adequately show the discrepancy between the height of the table and a regular desk, nor did**



**they reflect the raising of her shoulder while using the computer.** She is of the opinion that her work was unaccustomed, because of the change in the physical plant. The case manager did not take into account the stress of working in that environment, which could cause strain to the muscles.

In May 2010, the worker saw a rehabilitation specialist, who indicated that the worker might have had pre-existing calcific tendinitis, which might have been aggravated by her work circumstances.

The worker advised the panel that, as of the time of the oral hearing, her shoulder is now very much better than it has been, and she feels that she is now able to return to work.

In her final submission, the worker argued that the Board medical advisor relied on the worksite evaluation, which she considered to be inaccurate. The case manager relied on that opinion to make her decision. **The worker reiterated that the specific incident which caused her symptoms was the installation of the keyboard tray and the chair, which the employer refused to modify.** In the alternative, she argues that she has an occupational disease under section 6(3) or section 6(1) of the Act, and indicated that different risk factors should have been used to assess her circumstances. She asked the panel to accept her claim, and direct the Board to pay wage loss and health care benefits as indicated.

[emphasis added]

[28] At the outset of its reasons and findings, the panel noted that the compensability of the worker's back symptoms was not before it for adjudication.

[29] The panel found that subsection 5(4) of the Act was not applicable because there was no accident:

The worker reported no specific accident or trauma, and, having reviewed the evidence in the claim file, and that presented at the oral hearing, I agree that there was none. As there was no accident, as that concept is defined in the Act, the presumption of work relatedness in section 5(4) of the Act does not apply.

[30] The panel found the worker had not suffered an injury:

Even though I have found that there was no specific accident, item #15.20 of the RSCM II [*Rehabilitation Services and Claims Manual, Volume II*] provides that if a job requires a particular motion and that motion results in

injury, that is an indication that the injury arises out of the employment and is compensable. Item #14.20 of the RSCM II provides that it is not a bar to compensation that an injury occurs over a period of time rather than from a specific incident. However, the worker's job duties must have caused the disabling symptoms; it must be more than mere speculation that the worker's symptoms were caused by his work activities.

**At the oral hearing, the worker submitted that the installation of the keyboard tray in May 2009, and the subsequent refusal by the employer to remove the arms of her chair, constitute specific incidents, and her work on the subsequent days could be considered a series of further incidents.** She took issue to the Board's characterization of her condition as arising over time, and noted that **her shoulder symptoms arose immediately after the noted installation of the keyboard tray and subsequent failure to remove the arms of her chair.** She argued that these facts would enable that her claim might be considered under section 5 of the Act.

With respect, the panel disagrees. It was the worker's submission that her shoulder condition was caused by her work activity as a result of using a workstation with poor ergonomics. **It was her evidence that her symptoms came on almost immediately after the installation of the keyboard tray.** However, the panel notes that this occurred in **May 2009; the worker did not file an application for compensation until August 2009, and the first medical report was submitted in September 2009.** Diagnosis for the worker's left shoulder symptoms is calcific tendinitis. That condition is not considered an injury, as that concept is defined in the worker's compensation system. Rather, it is considered an occupational disease, and is generally considered under section 6 of the Act, which provides for compensation for occupational disease if certain requirements are met.

[emphasis added]

- [31] The panel noted the requirements in subsection 6(3) and Schedule B of the Act regarding shoulder tendinitis and how various relevant terms had been defined in policy item #27.11 of the RSCM II.
- [32] The panel noted the worksite evaluation revealed insufficient risk factors and noted the review officer's summary of relevant Board policy:

The worksite evaluation report noted that there were no repeated, awkward postures of the worker's left shoulder.

After reviewing the video and still photographs of the work site, the Board medical advisor noted that there was very little movement at the shoulder with keyboarding. There was no abduction or forward flexion approaching 60 degrees, and the keyboard tasks generated no more than 10 degrees of internal or external rotation. Specifically, the video and report of the worksite visit showed no evidence of work involving more than 2 to 2.5 awkward shoulder movements per minute continuously for 60 minutes, nor was there evidence that such motions constituted a significant portion of the work cycle. That being the case, he was unable to find sufficient risk factors to have caused the worker's diagnosed condition.

The review officer noted that Board policy defined sustained abduction or flexion of the shoulder joint meant that the shoulder joint is held in a static position of abduction or flexion greater than 60 degrees, and that "a significant component of the employment" means that the worker performs motions involving such use of the shoulder joint for sufficiently long that it is biologically plausible that the inflammation affecting the shoulder has resulted from the work activities.

- [33] The panel found the terms of subsection 6(3) and Schedule B of the Act were not satisfied:

The worker provided no new medical information in support of her appeal. Her argument was that as her shoulders were somewhat elevated, as a result of her height and the placement of the arms of her chair, the requirements of section 6(3) of the Act had been met. However, she did not indicate that her shoulder was in a static position of abduction or flexion greater than 60 degrees, **nor could she explain why, if both shoulders were maintained in that position, only her left shoulder was affected.** In order for the presumption of work causation to apply, all of the condition listed in Schedule B must be present in the worker's employment. I find that the preponderance of the evidence supports that awkward shoulder movements, as defined in Board policy, were not a significant component of the worker's employment. That being the case, the presumption in Schedule B does not apply. I find the worker is not entitled to compensation pursuant to section 6(3) of the Act.

[emphasis added]

- [34] The panel summarized the law, policy, and practice relevant to the adjudication of shoulder tendinitis claims which are not subject to subsection 6(3) of the Act but are subject to subsection 6(1):

Section 6(1) of the Act and item #27.20 of the RSCM II deal with claims in which a worker has tendinitis and does not satisfy the requirements of

Schedule B. In such cases, it is necessary to consider the evidence of both occupational and non-occupational exposure to risk factors relevant to the causation of the worker's disorder. Item #27.40 of the RSCM II sets out relevant risk factors considered contributory to shoulder tendinitis. These include force, awkward postures and repetition. Sustained awkward postures where the shoulder has greater than 60 degrees of flexion or abduction, combined with significant repetition or significant, sustained static loading, would be considered a risk factor. "Sustained" is defined as more than 25% to 33% of a worker's shift spent in the awkward posture.

The Board has issued a Practice Directive, #C3-2, which, although not binding, provides guidance to this panel in the adjudication of ASTD claims. It reiterates that the risk factor of awkward postures for shoulders is present when the worker's employment requires awkward postures, that is, shoulder abduction or extension of 60 degrees. Repetition is considered to be present if movements occur two times per minute for more than two hours.

[35] The panel determined there were no risk factors for shoulder tendinitis in the worker's job:

Both the worksite visit and the opinion of the Board medical advisor are in agreement that there were no risk factors for shoulder tendinitis in the worker's job. **There was no repetition, awkward movements, or force. Like the review officer, I agree with their conclusions.** At the oral hearing, the worker cited no force with relation to her job. She did submit that her posture was awkward, in that her shoulders were somewhat elevated, and that there was repetition. However, like the review officer, I note that Board policy means quite specific things when it refers to "awkward postures" and repetition. In order to be considered awkward, shoulder abduction or extension must be 60 degrees or more. I note that the photographs and video showed nothing approaching that, nor did the worker's description and demonstration of her activities at the oral hearing. Likewise, repetition requires movements which occur at least twice per minute *where the movement involves significant abduction or extension of the shoulder*. The evidence does not support that the worker's employment required repetition as that risk factor is defined by Board policy.

[emphasis added]

- [36] The panel found that the absence of non-occupational risk factors did not establish work causation:

The worker submitted that she was not subject to any non-occupational risk factors, and I agree that the evidence does not suggest any non-occupational risk factors. However, the lack of non-occupational risk factors does not establish work causation, as tendinitis often appears in cases where a causal element cannot be identified. Like the review officer, this panel is bound by Board policy, which requires that an ASTD is compensable only if there are sufficient risk factors to establish work causation. In this case, the preponderance of the evidence does not support that the worker's left shoulder tendinitis is due to the nature of her employment. I find the worker is not entitled to compensation pursuant to section 6(1) of the Act.

## Findings and Reasons

### *Standards of review*

- [37] In her materials the worker raises concerns regarding jurisdictional defects and natural justice.
- [38] What are the standards of review associated with such submissions?
- [39] In 2006 the British Columbia Court of Appeal issued its judgment in *United Brotherhood of Carpenters and Joiners of America, Locals 527, 1370, 1598, 1907 and 2397 v. British Columbia (Labour Relations Board)*, [2006] B.C.J. No. 1757, 2006 BCCA 364. The court determined that, despite the ATA, the pragmatic and functional approach should be applied to determine whether a question decided by an administrative tribunal is within its jurisdiction. It noted that the application of the pragmatic and functional approach requires consideration of "the presence or absence of a privative clause; the tribunal's relative expertise; the purpose of the Act as a whole and the provision in particular; and the nature of the problem."
- [40] WCAT is an administrative tribunal with specialized expertise; its decisions are protected by a privative clause (subsection 255(1) of the Act). The case before the WCAT panel did not involve constitutional or Charter issues. The panel's decision concerned whether the worker's left shoulder calcific tendinitis was a personal injury arising out of and in the course of the employment or was an occupational disease due to the nature of her employment. I find that the privative clause, the expertise of the tribunal, the purposes of the Act, and the nature of the question before the panel support the conclusion that the applicable standard of review is one of patent unreasonableness. I do not consider those issues are matters of pure jurisdiction to which the standard of correctness would apply, especially in light of the comments of

the court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, as to the types of issues that attract the correctness standard of review.

[41] I am aware that in a very recent decision, *Kerton v. Workers' Compensation Appeal Tribunal*, 2011 BCCA 7, issued on January 10, 2011, the British Columbia Court of Appeal seemed to indicate that recourse to its decision in *United Brotherhood* may not be necessary. The court suggested a recent Supreme Court of Canada decision indicated the preferred approach was to consider the ATA:

[28] Most recently, in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, the Supreme Court of Canada was called upon to determine the standard of review applicable to the B.C. Utilities Commission, a tribunal protected by a privative clause, and to which s. 58 of the *Administrative Tribunals Act* applies. While the reasoning of the Court is not entirely explicit, it would appear that the Court simply considered the language of the applicable privative clause to determine whether the "matters" addressed by the tribunal were within its exclusive jurisdiction.

[29] The approach endorsed by the Supreme Court of Canada, then, is somewhat different than the one that this Court followed in *United Brotherhood of Carpenters*. Rather than considering all factors in the pragmatic and functional approach to determine whether a matter is within the exclusive jurisdiction of a tribunal under its privative clause, the preferred approach is simply to examine whether the privative clause covers the "matters" in issue. While the common law standard of review analysis is instructive, particular attention must be paid to the governing legislative provisions, such as s. 58 of the *Administrative Tribunals Act*.

[30] In the case before us, the matter in issue is the extension of an appeal period under s. 243(3) of the *Workers Compensation Act*. The language of s. 254 of the *Workers Compensation Act* manifestly places such a matter under the exclusive jurisdiction of WCAT:

254 The appeal tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or *required* to be determined under this Part ....

[31] In the result, s. 58(2) of the *Administrative Tribunals Act* establishes the appropriate standard of review in this case. The standard is one of patent unreasonableness.

[42] Applying the analysis in *Kerton* supports a finding that the standard of review regarding errors alleged by the worker is the standard of patent unreasonableness found in paragraph 58(2)(a) of the ATA.

[43] A statement as to the approach to be taken in applying the standard of patent unreasonableness was endorsed by the court in *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80:

1. The standard of review is that of patent unreasonableness: *Canada (Attorney General) v. P.S.A.C.* (1993), 101 D.L.R. (4th) 673 (S.C.C.).
2. "Patently unreasonable" means openly, clearly, evidently unreasonable: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
3. The review test must be applied to the result not to the reasons leading to the result: *Kovach v. British Columbia (Workers' Compensation Board)* (2000), 184 D.L.R. (4th) 415 (S.C.C.).
4. The privative clause set out in s. 96(1) of the Act requires the highest level of curial deference: *Canada Safeway v. B.C. (Workers' Compensation Board)* (1998), 59 B.C.L.R. (3d) 317 (C.A.)
5. A decision may only be set aside where the board commits jurisdiction error.
6. A decision based on no evidence is patently unreasonable, but a decision based on *insufficient* evidence is not: *Douglas Aircraft Co. of Canada Ltd. v. McConnell*, [1980] 1 S.C.R. 245, and *Board of Education for the City of Toronto v. Ontario Secondary School Teachers' Federation et al* (1997), 144 D.L.R. (4th) 385 (S.C.C.).

[44] A reconsideration application is not an opportunity for a party to re-argue his or her case with respect to how the evidence should have been weighed. The court in the *Speckling* decision offered the following comments as to arguments regarding the weighing of evidence:

...a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division 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.

[45] I have no jurisdiction to reweigh the evidence which was considered by the WCAT panel in making its decision. Regarding matters of evidence, my role is limited to considering whether the findings of the WCAT panel were based on no evidence, whether the WCAT panel overlooked or failed to consider significant evidence without explanation,

or whether the decision was clearly irrational in light of the evidence which was before the panel.

- [46] With respect to fairness, item #1.5.3 of WCAT's MRPP provides the following guidance with respect to matters of procedural fairness:

There is a general common law principle called the duty of procedural fairness which applies to every administrative body making a decision affecting the rights, privileges or interests of an individual.

The content of the duty to act fairly in a given case, that is, what is "fair", depends on the circumstances of the case and may vary depending on the nature of the decision in question. The more important the decision is to those affected and the greater its impact on that person or persons, the more stringent the procedural protections that will be required. Also, administrative bodies which adjudicate formal appeals, like WCAT, are generally required to adhere to particularly high standards of procedural fairness (sometimes referred to as the "rules of natural justice").

The common law duty of fairness applies to all administrative bodies unless a statute provides otherwise, for example, if it specified that an administrative body follow a certain procedure, or the person for whose benefit a procedural rule exists waives the rule.

The duty to act fairly consists of four basic elements, which can be expressed as rights of the person whose interests are affected by a decision. The four rights are:

- a) the right to be heard,
- b) the right to a decision from an unbiased decision maker,
- c) the right to a decision from the person who hears the case, and
- d) the right to reasons for the decision.

### *Analysis*

- [47] In reviewing the worker's submissions regarding the panel's determinations relevant to section 5 of the Act, I consider it appropriate to note Board policy at item #13.00 of the RSCM II in effect at the time<sup>2</sup> of the onset of the worker's left shoulder symptoms:

"Personal injury" is defined as any physiological change arising from some cause, for example, a limitation in movement of the back or restriction in the use of a limb. It is not confined to injuries which are readily and

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<sup>2</sup> All references to policy are to the version of policy in effect at the time of the worker's claim rather than to the recently revised Chapter 3 of the RSCM II which has no application to the worker's claim.



objectively verifiable by their outward signs, e.g. breaks in the skin, swelling, discolouration, deformity, etc. It includes, for example, strains and sprains.

[48] Policy item #13.10 observes, “A common difficulty is to distinguish between an injury and a disease.” It lists examples of disorders classified as injuries and disorders classified as diseases.

[49] Section 5 of the Act concerns injuries. Subsection 5(4) deals with injuries due to accidents:

In cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it must be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it must be presumed that it arose out of the employment.

[50] Section 1 of the Act which includes the following definition of “accident”: “...includes a wilful and intentional act, not being the act of the worker, and also includes a fortuitous event occasioned by a physical or natural cause...”

[51] Further assistance in defining the word “accident” is found in policy item #14.10 of the RSCM II (as it read as of June 2009). That item notes the definition of accident in section 1 of the Act is not “exclusive”: “... the word has been interpreted in its normal meaning of a traumatic incident.”

[52] Policy item #14.20 notes, “Where there is no ‘accident’, there is no presumption under section 5(4) and the evidence must support a conclusion that the injury arose out of the employment as well as a conclusion that it arose in the course of the employment.”

[53] Adjudication in the absence of an accident is performed under subsection 5(1) of the Act which provides as follows:

Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part must be paid by the Board out of the accident fund.

[54] Policy item #14.20 provides that evidence is needed to establish that an injury arose of and in the course of employment:

It is not a bar to compensation when an injury occurs over a period of time rather than resulting from a specific incident. To be compensable, however, the evidence must warrant a conclusion that there was something in the employment that had causative significance in producing the injury. A speculative possibility that this might be so is not enough.

[55] That policy item also discusses the continuing relevance of a specific incident:

This does not mean that the presence or absence of a specific incident is never relevant in the decision of a claim for compensation. What it does mean is that the absence of a specific incident is not of itself ground for denying a claim. The existence of a specific incident may still be relevant in that:

1. There are some disabilities that are classified as resulting from an "injury" if they arise out of a specific incident, but are classified as resulting from a "disease" if they occur over time. (2)
2. The etiology of a disabling condition is always relevant, and the presence or absence of a specific incident may have some evidentiary value in establishing whether it was caused by any feature of the employment.

[the footnote refers to item #13.12 and vibrations]

[56] Policy item #15.20 provides, "If a job requires a particular motion, and that motion results in injury, that is an indication that the injury arises out of the employment and is compensable."

[57] Further assistance in determining if a claim should be adjudicated as one for an injury or one for a disease is found in Practice Directive #C3-2: Adjudication of Activity-Related Soft Tissue Disorder ("ASTD") Claims. The practice directive expressly provides that occupational diseases recognized via Schedule B of the Act or by regulation as an occupational disease are normally adjudicated under section 6 of the Act, but may be adjudicated as injuries under section 5 in certain circumstances:

If the condition is either recognized through Regulation or listed in Schedule B, it should be considered under section 6 UNLESS the evidence indicates the condition is:

- attributable to a specific event/trauma;
- a consequence of a specific event/trauma;
- **a consequence of a series of specific events/traumas; or**
- **regulated but the onset occurred over less than a shift.**

[emphasis added]

[58] I observe that the last bulleted point seems to permit only occupational diseases recognized by regulation ("regulated") to be adjudicated under section 5 of the Act as an injury if the onset occurs over less than a shift. As shoulder tendinitis is recognized as an occupational disease via Schedule B of the Act rather than by Regulation, the effect of the last bulleted point above would appear to be that if the onset of tendinitis occurred

over less than a shift it could not be adjudicated as an injury under section 5. Somewhat later in the practice directive, a footnote observes it is difficult to contract an occupational disease over the course of one shift.

- [59] The practice directive does appear to hold out the possibility that an occupational disease such as tendinitis can be adjudicated as an injury if it is a consequence of a series of specific events/traumas. Trauma is often understood as a reference to an accident. Given that term “events” is also used, one could argue that the practice directive envisions something other than the occurrence of a trauma or accident as justifying adjudication of a tendinitis claim under section 5 of the Act.
- [60] Turning to the panel’s adjudication of issues relevant to section 5 of the Act, I find that the panel’s decision regarding subsection 5(4) was not patently unreasonable. The panel’s finding was not clearly irrational. It is true that both the installation of the keyboard and the employer’s refusal to permit the worker to remove the arms of the chair were the actions of someone other than the worker (one aspect of the definition of accident found in section 1). Yet those actions did not satisfy the other requirement of the definition of an accident. The employer’s actions were not traumatic events. This is not a case in which a worker’s shoulder was struck by an object. That would be a traumatic event. Installing a keyboard tray was not a traumatic event.
- [61] The panel’s decision demonstrates it was aware the worker argued that the installation of the keyboard and the employer’s refusal to permit her to remove the arms of the chair were specific incidents. The panel’s analysis suggests it did not consider that its decision as to the absence of a specific accident or trauma meant there was no incident that needed to be considered. Had the panel thought that, it would have stated that. Instead, the panel appears to have considered the notion of specific incidents as being separate from the occurrence of an accident.
- [62] It appears that, at least initially, the panel considered whether adjudication of an injury under subsection 5(1) of the Act was warranted. Specifically, the panel discussed the provisions of policy item #15.20 of the RSCM II and the notion of a motion resulting in an injury and then noted the worker’s argument that the events referred to by her would warrant consideration of her claim under section 5.
- [63] At that juncture in the WCAT decision, one might anticipate the panel would have addressed whether the events noted by the worker were indeed specific incidents such that a claim could be adjudicated under section 5 of the Act.
- [64] With respect, the panel did not respond to the worker’s argument as to the occurrence of specific incidents. As can be seen from the above excerpts from its decision, the panel’s response to the worker’s arguments was something of a *non sequitur* (it does not follow). The panel noted the worker’s evidence as to her symptoms having come on almost immediately after the installation of the keyboard and then referred to the onset

of symptoms having occurred in May 2009 and the worker's application having been made in August 2009.

- [65] It is not apparent from the panel's analysis as to how the timing of an application for compensation has relevance to whether certain events amount to specific incidents or whether a claim should be considered under section 5 of the Act.
- [66] Certainly, the panel was not obliged to accept the worker's view that she experienced specific incidents. Further, it was open to the panel to have weighed the evidence and to have found that the delay between the events and the filing of an application undermined the worker's assertion that certain events were of causative significance. A decision-maker could approach the matter on the basis that a worker who experienced symptoms immediately after specific events would normally apply for compensation immediately. A decision-maker could consider that the fact that a particular worker did not apply immediately for compensation suggested the worker did not in fact experience symptoms immediately after specific events.
- [67] It is not at all apparent from the panel's decision that it engaged in such analysis. The panel did not expressly state that it rejected the worker's evidence that her symptoms came on almost immediately after the installation of the keyboard tray. Instead, it made reference to the timing of the worker's application and then stated that calcific tendinitis is not considered an injury as that concept is defined in the workers' compensation system.
- [68] Had the panel rejected the worker's evidence as to her symptoms having come on almost immediately, one would have expected it to have expressly dealt with the worker's evidence noted in her submissions that her left shoulder pain was noted in her chiropractor's case notes of June 1, June 5, June 22 and July 13, 2009. Shoulder treatment on such dates would indeed have been shortly after the installation of the keyboard tray.
- [69] That the panel did not expressly reject the worker's evidence as to her experiencing symptoms and as to her chiropractor having noted shoulder treatment is consistent with the panel not finding such evidence to be relevant to the issue of subsection 5 of the Act. Indeed, that evidence would be irrelevant if the issue was simply resolved by the panel (as it apparently was) on the basis that tendinitis is adjudicated as an occupational disease rather than as an injury.
- [70] On that analysis – upon which it was open to the panel to base its determination – it would not have been necessary for the panel to address the worker's argument in her April 19, 2010 submission that her condition had its onset in less than one shift. Pursuant to the practice directive, such an onset of an occupational disease recognized by Schedule B of the Act would not qualify for adjudication under section 5 of the Act. Even if the practice directive did permit such adjudication under section 5, it must be kept in mind that a practice directive is not binding on WCAT.

[71] While as set out above I have some concerns regarding the panel's handling of section 5 of the Act, I consider that, by itself, the panel's handling is not fatal to the panel's decision. The fundamental issue before the panel was whether the worker's work activities were of causative significance with respect to her left shoulder condition. That is the issue that the panel addressed when it considered section 6 of the Act. I consider that whether the panel's decision contains a jurisdictional error is to be determined with regard to its analysis under section 6.

[72] The panel initially analyzed subsection 6(3) of the Act. It noted the requirements of shoulder tendinitis found in Schedule B entry #13(b):

Shoulder tendinitis	Where there is frequently repeated or sustained abduction or flexion of the shoulder joint greater than sixty degrees and where such activity represents a significant component of the employment.
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[73] While the panel stated that the worker did not indicate her left shoulder was in a position of abduction or flexion of greater than 60 degrees, the worker had argued as part of her August 31, 2010 submission to the initial panel that her left shoulder elevation was as if it was 180 degrees. She made that argument on the basis that that arm of the chair pushed up her left shoulder.

[74] The panel's decision did not address that point made by the worker.

[75] If indeed the worker's evidence established that her left shoulder was beyond 60 degrees of abduction or flexion, the panel's failure to deal with her evidence would amount to a jurisdictional defect flowing from a failure to take into account relevant evidence.

[76] Yet, the evidence on file does not establish that the worker's left shoulder being pushed upwards is equivalent to abduction or flexion of 180 degrees. A figure of 180 is achieved if a shoulder is put through a range of motion. That point is made in diagrams in the ASTD Worksite Evaluation Report (on file) which shows that 180 degrees is achieved when a straight arm is extended straight overhead via abduction (initially moving away from the body in a lateral fashion) or flexion (moving the arm forward and initially away from the body). The worker's left shoulder being elevated owing to the presence of the arm on the chair did not involve her shoulder being in such a position of abduction or flexion.

[77] In such circumstances, I do not consider that the absence of any analysis by the panel of the worker's argument as to 180 degrees of elevation establishes a jurisdictional error in connection with that part of its adjudication under subsection 6(3) of the Act.

- [78] The panel's decision establishes that, in conjunction with its comment that the worker did not indicate her left shoulder was in a position of abduction or flexion greater than 60 degrees, it indicated the worker could not explain why, if both shoulders were maintained in that position only her left shoulder was affected. That comment by the panel was in the nature of *obiter dicta* (not necessary to the determination of the appeal); that comment was not necessary to its determination under subsection 6(3) of the Act. The panel could have concluded adjudication under subsection 6(3) once it determined that the worker's shoulder had not achieved a position of abduction or flexion greater than 60 degrees. Such a determination would have been enough to establish that subsection 6(3) was not applicable to the worker's claim.
- [79] Given that the comment was *obiter dicta*, I find any error by the panel in that comment would not establish a jurisdictional defect. That said, I do accept that the panel erred in that comment. The error appears to have stemmed from the panel's comments earlier in its decision (reproduced earlier in my decision and emphasized) to the effect that in her questionnaire, the worker advised she began using a keyboard tray that required her to raise "her shoulders."
- [80] Notably, in my review of that questionnaire, I was unable to find any indication that the worker indicated the installation of a keyboard tray required her to raise her shoulders. In response to question 2, the worker indicated her left arm was raised up somewhat. In response to question 14, she indicated that installation of the keyboard tray caused shoulder pain resulting from her left shoulder being pushed upwards due to the height of the arm on the chair.
- [81] It appears that the panel misapprehended the contents of the worker's questionnaire, which in turn, seemingly led to its impression that both of the worker's shoulders were elevated. Significantly, in her April 19, 2010 submission to WCAT the worker indicated that the arms of the chair were too high for her arms to naturally fall by her sides and thus her left shoulder area was raised up out of its natural alignment. In her August 31, 2010 submission the worker explained why only her left shoulder was so affected. She indicated that the arm height of the chair was too narrow to permit her arms to be inside and too wide to let her arms outside. One of her arm/elbows had to rest on one arm of the chair. She chose her left arm, as she put her right arm outside the chair to facilitate her right-handed mousing.
- [82] Thus, in her submissions to the panel the worker had explained that her shoulders were not in the same position. In such circumstances, it was clearly erroneous for the panel to point to what it considered to be a failure by the worker to explain why only one of two shoulders in the same position was affected. The worker had already offered such an explanation.
- [83] It was open to the panel to have found it was not persuaded by that explanation, but it was not open to the panel to have said that the worker had not offered an explanation.

- [84] Indeed, at one stage in its decision the panel seemed to understand that the worker had explained the matter. In its recitation of the worker's oral hearing evidence (reproduced earlier in my decision), the panel noted the worker's testimony that she rested at least one of her arms on the arm of her chair. Further, in another location in its decision the panel noted that the case manager's job site visit documented that, as a result of the installation of the keyboard tray, the worker's "shoulder" was pushed upward by the arm of her chair. That comment seems to indicate that the panel understood that one shoulder was pushed up. The panel did not state in those parts of its decision that both of the worker's "shoulders" were pushed up.
- [85] As I noted above, given that the panel's error was made in its comments which were not necessary to its adjudication of subsection 6(3) of the Act, the error does not amount to a jurisdictional defect. While I appreciate the worker considers that the "nature of the injury" was not correctly understood, I am not satisfied that any misapprehension the panel may have operated under while adjudicating under subsection 6(3) affected its adjudication of the worker's claim under subsection 6(1). As well, I find that such an error by the panel did not affect its adjudication of the worker's claim under section 5. As noted above, the panel based its adjudication of section 5 on the worker's condition being considered to be an occupational disease.
- [86] The panel then adjudicated the worker's claim under subsection 6(1) of the Act. As can be seen from excerpts from its decision, the panel referred to policy item #27.40 of the RSCM II and the practice directive. It noted that the relevant risk factors in the policy item included force, awkward postures, and repetition. It did not state that those were the only risk factors identified in that policy item. It noted that sustained awkward postures where the shoulder has greater than 60 degrees of flexion or abduction, combined with significant repetition or significant, sustained static loading, would be considered a risk factor. The panel stated that the practice directive indicated the risk factor of awkward postures for shoulders is present when the worker's employment requires awkward postures, that is, shoulder abduction or extension of 60 degrees and that repetition is considered to be present if movements occur two times per minute for more than two hours.
- [87] The worker asserts it was a breach of natural justice to consider the criteria associated with subsection 6(3) and Schedule B of the Act when adjudicating the claim under subsection 6(1).
- [88] In considering that argument, I find the panel documented its awareness of the fact that policy recognizes there may be a number of risk factors. In its adjudication under subsection 6(1), the panel did not confine itself to examining only the risk factors set out in Schedule B. Thus, the panel did not confine itself to looking only at repetition and awkward postures.

[89] Yet, while it may not have inappropriately confined itself only to some risk factors, I consider that when the panel considered the risk factors of repetition and awkward posture it erred.

[90] It appears that both the review officer and the WCAT panel were operating under a misapprehension that Board policy defined the terms “awkward postures” and “repetition” in the manner they stated in their decisions. Specifically, the review officer stated that “the RSCM uses the terms ... to mean very specific things.” The WCAT panel stated, “However, like the review officer, I note that Board policy means quite specific things when it refers to ‘awkward postures’ and repetition.”

[91] In assessing the panel’s understanding of Board policy, I note that policy item #27.11 of the RSCM II regarding adjudication of tendinitis of the shoulder under subsection 6(3) of the Act provides a non-exhaustive definition of “frequently repeated”:

Generally, tasks that are considered to involve “frequently repeated... abduction or flexion of the shoulder joint” **include:**

- ones that involve abduction or flexion of the shoulder joint **greater than sixty degrees at least once every thirty seconds**; or
- ones that are repeated and where at least 50 percent of the work cycle involves abduction or flexion of the shoulder joint greater than sixty degrees and where the muscle/tendon groups of that shoulder have less than 50 percent of the work cycle to return to a relaxed or resting state.

**Whether tasks that involve lower work cycle frequencies or greater periods of rest and recovery time than referred to above involve “frequently repeated...abduction or flexion of the shoulder joint”, will require the exercise of judgment based on the circumstances of the individual claim.**

[emphasis added]

[92] The RSCM II defines “repetition” as follows in policy item #27.40:

- the cyclical use of the same body tissues either as a repeated motion or as repeated muscular effort without movement. The shorter the time variation of a repeated muscle, tendon, or joint movement required to perform a task the less time such tissues will have to return to the resting state for recovery, and the higher the potential for causing an ASTD. The time variation of repetition may be expressed as the frequency of the work cycle



[93] Neither provision provides as asserted by the panel:

Likewise, repetition **requires** movements which occur at least twice per minute *where the movement involves significant abduction or extension of the shoulder*. The evidence does not support that the worker's employment required repetition **as that risk factor is defined by Board policy**.

[italics in original, bold emphasis added]

[94] Specifically, Board policy does not declare in connection with adjudication under subsection 6(1) of the Act that repetition can only exist when movements occur twice per minute. The panel did not document any consideration of whether any repetition that did not amount to two movements a minute was of causative significance.

[95] The WCAT panel was incorrect when it made its comments as to what Board policy required in the way of repetition.

[96] A definition of "repetition" is found in Appendix II to the practice directive:

*Repetition* A pattern of movements performed over and over during a given time period. Consideration should be given to:

Cycle time  
Work period  
Duration  
Rest period within each cycle

[97] Appendix I of the practice directive contains "Assessment Guidelines" for "consideration of force, magnitude, duration" that are declared to be "not absolute." Under the heading repetition, Appendix I of the practice directive refers to movements of "2 per minute" and a duration of "Greater than 2 hours" in connection the shoulder.

[98] Thus, even Board practice is not absolute as to the specifics of repetition.

[99] Turning now to "awkward postures", I note the following definition found in policy item #27.40 of the RSCM II:

- postures such as where joints are held at or near the end range of motion for that joint, or where loads are supported by passive tissues, or where muscle tension is required to hold the posture (such as holding the arm straight out at shoulder height). Awkward postures place significant stresses on tendons, muscles and other soft tissues and reduce the tolerances of such tissues. Some postures may adversely affect the physiologic function of the arm as a result of

impingements, occlusion of blood flow and the like. Postures to watch for include:

- overhead reaching and lifting
- postures involving static shoulder loads
- sustained shoulder abduction or flexion
- sustained flexion or extension of the wrist
- sustained ulnar deviation of the wrist

[100] While policy item #27.40 refers to joints being held at or near the end range of motion for that joint and it does refer to shoulder abduction or flexion, it does not refer to 60 degrees of abduction or extension. It does not provide support for the panel's assertion that in the context of adjudication under subsection 6(1) of the Act "[i]n order to be considered awkward, shoulder abduction or extension **must** be 60 degrees or more [emphasis added]."

[101] That the panel focused only on 60 degrees or more finds support in the subsequent comment by the panel:

I note that the photographs and video showed nothing approaching that, nor did the worker's description and demonstration of her activities at the oral hearing.

[102] The panel did not document any consideration of whether any abduction or flexion that did not equal 60 degrees or more was of causative significance.

[103] Appendix II of the practice directive also contains a definition of "awkward posture":

*Awkward Posture*

Postures where joints are held at or near the end range of motion for that joint, or where loads are supported by passive tissues, or where muscle tension is required to hold the posture. Consideration should be given to:

- As a joint moves farther away from its neutral range, it requires more effort to achieve the same force.
- The weight of the body may contribute significantly to the total load. For example, in long arm reaches, the shoulder muscles must bear the weight of the entire arm.
- Awkward whole body position when several joints of the body are in awkward postures at the same time. For example, kneeling, crouching involves several joints.

- [104] In connection with the risk factor of “Posture”, Appendix I of the practice directive entitled “Assessment Guidelines” lists “Degrees of Movement” of “Greater than 60” for shoulder flexion and abduction.
- [105] Board practice appears to be the basis for the panel’s assertion as to the provisions of Board policy regarding awkward postures, but even the practice directive documents in Appendix I that the Assessment Guidelines are “not absolute.”
- [106] Save for cases in which a policy is patently unreasonable, a WCAT panel must apply applicable policy.
- [107] On the other hand, practice is not binding on a panel. Practice directives document expectations that the Board has of its officers in adjudicating claims. Practice directives are of interest to WCAT because they create certain expectations as to how claims will be adjudicated, but they do not bind WCAT panels.
- [108] The panel misapprehended the contents of Board policy. It then determined that the worker’s claim did not satisfy what it thought were the requirements found in Board policy.
- [109] The panel in effect applied Schedule B requirements regarding repetition and abduction/flexion to adjudication under subsection 6(1) of the Act. Such an approach by the panel was contrary to policy item #27.20 of the RSCM II. That policy item deals with claims for tendinitis/tenosynovitis and bursitis where no presumption applies. Notably, that policy item explicitly states that the requirements of the second column of Schedule B are not preconditions to the acceptance of a claim under subsection 6(1):

The requirements of the second column of Schedule B are not preconditions or limitations to the acceptance of a claim. There may be other evidence supporting the conclusion that the disease is due to the nature of the worker’s employment. It also follows that the requirements of the second column of Schedule B are not the only matters to be considered for that disease in the adjudication of the claim.

- [110] Thus, a decision-maker would be in error if it bases its adjudication of a tendinitis claim under subsection 6(1) of the Act on consideration of the terms found in the second column of Schedule B. In the case before me, the panel so misinterpreted policy that it found that repetition and awkward postures applicable to adjudication under subsection 6(3) were Board policy applicable to the worker’s claim under subsection 6(1).
- [111] I accept it would have been open to the panel to have stated that, in considering subsection 6(1), the criteria in subsection 6(3) could be a starting point for determining if the worker’s work activities were of causative significance; however, it would then have been appropriate for the panel to have commented that its adjudication of the potential

causative significance of abduction/flexion and repetition was not confined to considering whether any abduction/flexion and repetition experienced by the worker satisfied the terms of Schedule B. It would have been appropriate for the panel to have assessed whether repetition less frequent than twice a minute and abduction/flexion less than 60 degrees were of causative significance.

[112] After having reviewed the matter, I find that that aspect of the panel's decision dealing with subsection 6(1) of the Act was patently unreasonable. While the panel's decisions regarding section 5 and subsection 6(3) were not patently unreasonable, its decision regarding subsection 6(1) was openly, clearly, evidently unreasonable.

[113] The panel failed to apply policy item #27.20 of the RSCM II. I find that the following passage from *WCAT-2005-01290*, as to a panel ignoring or overlooking a policy, is relevant:

Under section 250(2), a WCAT panel must apply a policy that is applicable in that case. In so doing, the panel may determine which policy or policies are applicable in that case. The panel need not cite every policy which might be relevant, no matter how tangential or peripheral it may be in terms of its relevance to the issue being determined by the panel. However, if the issue being addressed by the panel is one to which a policy has obvious application, or is central to the issue framed by the panel, the panel cannot ignore (or overlook) the policy, or fail to apply it without explanation....

[114] While there is no doubt the panel was aware of the applicable policy at policy item #27.20 – it cited that policy item – the panel misinterpreted the policy or failed to apply it.

[115] In light of this conclusion, I do not need to consider the worker's other arguments which include her assertion that the panel did not address her evidence/arguments that the Board's measurements at the site visit were inaccurate, did not address information on the website of the International Brotherhood of Electrical Workers as to the role elevated shoulder postures may play in shoulder tendinitis, and did not address whether her work aggravated a pre-existing condition.

## **Conclusion**

[116] The worker's reconsideration application is allowed in part. While the panel's determinations regarding section 5 of the Act and subsection 6(3) of the Act were not patently unreasonable, the panel's determination regarding subsection 6(1) was patently unreasonable. That aspect of the panel's decision is set aside. The remainder of *WCAT-2010-03375* is final and conclusive pursuant to subsection 255(1) of the Act.

- [117] The WCAT Registry will contact the worker about WCAT's further consideration of her appeal from the Review Division's decision regarding her shoulder tendinitis and subsection 6(1) of the Act.
- [118] There has been no request for reimbursement of appeal expenses. Therefore, I make no order in that regard.

Randy Lane  
Vice Chair

RL/hb