Noteworthy Decision Summary

Decision: WCAT-2014-01006 **Panel**: Herb Morton **Decision Date:** April 18, 2012

Sections 16 and 239(2)(b) of the Workers Compensation Act – Vocational rehabilitation benefits – WCAT jurisdiction

This decision is noteworthy for its analysis of the law and policy on WCAT's jurisdiction to hear appeals from Workers' Compensation Board decisions regarding vocational rehabilitation benefits.

The worker sought reconsideration of a decision made by WCAT. A vice chair had dismissed the worker's appeal after determining it was outside of WCAT's jurisdiction pursuant to section 239(2)(b) of the *Workers Compensation Act* (Act). The vice chair found that the appeal concerned the provision of vocational rehabilitation benefits.

The WCAT reconsideration panel canvassed other decisions on the topic of WCAT's lack of jurisdiction over vocational rehabilitation appeals and determined that the original WCAT decision was not patently unreasonable in this respect. Section 239(2)(b) of the Act did apply to limit WCAT's jurisdiction to consider appeals regarding vocational rehabilitation benefits.

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WCAT Decision Number: WCAT-2012-01006
WCAT Decision Date: April 18, 2012
Panel: Herb Morton, Vice Chair

Introduction

[1] The worker seeks reconsideration of the April 17, 2007 Workers' Compensation Appeal Tribunal (WCAT) decision, on the basis of a jurisdictional defect. The WCAT senior vice chair and registrar (registrar) dismissed the worker's appeal of the February 13, 2007 decision of the Review Division of the Workers' Compensation Board (Board), operating as WorkSafeBC (*Review Decision #R0070849*). She found the worker's appeal was outside WCAT's jurisdiction pursuant to section 239(2)(b) of the *Workers Compensation Act* (Act), as concerning the provision of vocational rehabilitation benefits under section 16 of the Act.

[2] Following the April 17, 2007 decision by the registrar, a further letter dated June 18, 2007 was sent by a deputy registrar. That letter noted:

> As set out in the Registrar's April 17, 2007 letter, the February 13, 2007 Review Division decision was in respect to vocational rehabilitation entitlement, and not appealable to WCAT. The appeal was summarily dismissed.
>
> [all quotations are reproduced as written, except as marked]

[3] By letter of August 12, 2008, the worker requested reconsideration of the June 18, 2007 decision. On September 4, 2008, legal counsel in WCAT's Tribunal Counsel Office advised the worker that the June 18, 2007 letter was simply a reiteration of WCAT's April 17, 2007 decision, and that the worker's August 12, 2008 letter would be processed as an application for reconsideration of the April 17, 2007 decision. As the June 18, 2007 correspondence was essentially an information letter which described the decision issued on April 17, 2007, I have treated the worker's objections to the June 18, 2007 letter as concerning the April 17, 2007 decision.

[4] By letter dated November 3, 2008, a WCAT appeal coordinator provided information to the worker regarding the grounds for requesting reconsideration. She described the one time only limitation on such applications. The worker requested and was granted extensions of time to provide submissions until July 14, 2011. He provided a submission dated July 11, 2011.

[5] The employer is not participating in this application, although invited to do so. By letter dated July 12, 2011, the appeal coordinator confirmed that submissions were considered complete.

[6] I find that the issue as to whether grounds for reconsideration are established involves questions of a legal nature which can be properly considered on the basis of written submissions without an oral hearing.

Issue(s)

[7] Have grounds been established for setting aside the April 17, 2007 WCAT decision, on the basis of a jurisdictional defect?

Jurisdiction

[8] 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, WCAT may reconsider one of its decisions in certain circumstances.

[9] Section 256 of the Act permits reconsideration of a WCAT decision on the basis of new evidence. As well, WCAT has an implied common law authority to set aside a WCAT decision if that decision reveals a jurisdictional defect, including a sufficiently serious error of law or fact, a breach of the rules of natural justice, or an improper exercise of discretion. The British Columbia Court of Appeal (BCCA) has endorsed this implied common law reconsideration authority in *Powell Estate v. Workers' Compensation Board*, 2003 BCCA 470, [2003] B.C.J. No. 1985. Further authority for the WCAT to reconsider its decisions for jurisdictional defects is set out in subsection 253.1(5) of the Act.

[10] This reconsideration application was assigned to me by the WCAT chair on the basis of a written delegation (paragraph 25 of *Decision of the Chair No. 12*, "Delegation by the Chair," January 2, 2009).

Standard of Review – Jurisdictional Defect

[11] Practice and procedure at item #20.2.2 of the WCAT *Manual of Rules of Practice and Procedure* provides that WCAT will apply the same standards of review to reconsiderations to cure jurisdictional defects as will be applied by the court on judicial review. Section 245.1 of the Act provides that section 58 of the *Administrative Tribunals Act* (ATA) applies to WCAT. Section 58 of the ATA concerns the standard of review to be applied in a petition for judicial review of a WCAT decision. Pursuant to section 58(2)(a) of the ATA, a finding of fact or law or an exercise of discretion by the WCAT panel must not be interfered with unless it is patently unreasonable. Section 58(2)(b) of the ATA provides that 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. On all other issues, the standard of review is correctness.

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Background and Evidence

[12] In this decision, I will focus on the background and evidence which is most relevant to the worker's attempt to appeal the February 13, 2007 Review Division decision to WCAT.

[13] In 1996, the worker submitted a claim for compensation for allergies and sinus congestion he had developed while employed as a labourer in a cedar sawmill. By decision dated June 30, 2000 (*Appeal Division Decision #00-1009*), a panel of the former Appeal Division found that the worker suffered from cedar dust induced chronic allergic rhinitis, but that it was not a disabling condition.

[14] The worker's claim was also accepted for Reactive Airways Dysfunction Syndrome ("RADS"). The worker was terminated from his employment on June 24, 1999.

[15] By decision dated November 15, 2001 (*Appeal Division Decision #2001-2266*), a panel of the former Appeal Division concluded, with reference to the policy at item #86.30 of the *Rehabilitation Services and Claims Manual* (as it then was), that the worker was "at undue risk of permanent disability due to vulnerability (susceptibility to bronchospasm due to workplace exposure to airborne irritants) and that he is eligible for preventative rehabilitation." The Appeal Division panel found at paragraph 71 as follows (in relation to the worker's reactive airways disease):

> I conclude that the worker is eligible for preventative rehabilitation. The file will be referred to the Vocational Rehabilitation Consultant for follow-up.

[16] By decision dated June 26, 2003, a panel of the former Workers' Compensation Review Board (Review Board) concluded as follows in paragraphs 21 and 22:

> I find that [the worker] is entitled to rehabilitation beyond the ten-week Job Search Allowance provided under the February 26, 2002 decision letter. I direct the Board to carry out aptitude testing, an employability assessment, and a functional capacity evaluation to build a comprehensive profile for the purpose of providing further meaningful rehabilitation assistance to him.
>
> The overall philosophy of the compensation system is to replace income lost by reason of a compensable injury. **The evidence indicates that [the worker] has suffered a loss of income by reason of the compensable rhinitis and RADS. I find, with regard to s. 16 and s. 23 of the Act, that he is entitled to replacement of that lost income.** I am well aware of the findings of the Appeal Commissioner in the November 15, 2001 decision that [the worker] is not entitled to wage loss benefits for the compensable allergic rhinitis and not eligible for wage loss

> benefits respecting the reactive airways disease, and not disabled as a result of his left knee strain, and not entitled to wage loss benefits as a result of his bilateral wrist tendonitis after May 12, 1999. I construe those findings as relating to entitlement under s. 29 of the Act and as unrelated to entitlements under s. 23 of the Act or to entitlement under s. 16 for wage loss equivalent rehab allowances. **I direct the Board to investigate and determine the extent of [the worker's] income loss, net of his earnings, since June 24, 1999, and to pay those lost earnings to [the worker].**
>
> [emphasis added]

[17] A Medical Review Panel (MRP) certificate was also received on the worker's claim dated August 23, 2004. In clause 10, the MRP stated:

> The worker's compensable allergic rhinitis condition caused him difficulties while working in certain environments in the form of nasal irritation and congestion, which interfered with his nasal airway. There is no evidence at this time of any ongoing disability, which has been dealt with by his removal from a work environment laden with cedar and other dust and fumes and his continued use of anti-allergic nasal sprays as required.

[18] In a decision dated July 17, 2006, a vocational rehabilitation consultant (VRC) wrote to the worker concerning the implementation of the June 26, 2003 Review Board finding. She stated that she was providing him with "a decision regarding implementation of the last outstanding issue" (in relation to the last sentence in the above quotation from the June 26, 2003 Review Board finding). The VRC reasoned:

> **To determine the time period for loss of earnings consideration, I used the start date as June 24, 1999, as this is the date the Review Board decision identified in its decision. Regarding the end date, I have identified June 26, 2003. This is the duration date of the Review Board decision and addresses retroactive rehabilitation.** According to January 6, 2006 decision letter from [name], Vocational Rehabilitation Consultant, a baseline vocational rehabilitation return to work has been developed and any loss of earnings consideration after June 26, 2003 will be based upon this plan.
>
> For the specified time period the Board would have paid you $154,176, however for the same period you earned $212,815. As a result I have determined that for the period June 24, 1999 to June 26, 2003 you did not incur a loss of earnings. This is based upon the earnings information you provided, copies of Income Tax returns for the years 1999 – 2003, and information on file from employer. For details of the calculations refer to attached.
>
> [emphasis added]

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[19] The worker requested a review by the Review Division of the VRC's July 17, 2006 decision.

[20] By decision dated February 13, 2007, a review officer reasoned:

> Section 16 of the *Act* states that the Board may make the expenditures it considers necessary or expedient to aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap. Policy item #86.00 states that rehabilitation assistance may be provided in cases where it appears to the VRC that such assistance may be of value. The distinct use of the word "may" in both the *Act* and throughout policy clearly indicates that the provision of vocational rehabilitation is a discretionary issue for the Board to consider, and that there is no legal right or entitlement to vocational rehabilitation.
>
> The only instance in which the provision of VR [vocational rehabilitation] services and benefits is not a discretionary matter for the Board to consider is when it is directed by a review or appeal body, the findings of which are legally binding on the Board. In this case, the Review Board concluded in part that the evidence indicated that the worker had suffered a loss of income by reason of his compensable rhinitis and RADS. The decision directed the Board in part to "investigate and determine the extent of [the worker]'s income loss, net of his earnings, since June 24, 1999, and to pay those lost earnings to [the worker]". That was the portion of the findings that was being implemented in the decision letter under this review.
>
> In implementing the Review Board decision, the VRC advised the worker in the decision of July 17, 2006 under this review that the period of time she was using for consideration for retroactive benefits was June 24, 1999 to June 26, 2003. In his submissions, the worker took issue with the dates chosen. In reviewing this issue, I note that the Review Board specifically used the commencement date of June 24, 1999 in its findings; likely because that was the first day the worker was terminated from his job. I agree with the VRC's use of the commencement date since that date was specifically chosen by the Review Board in its directive. The VRC utilized the date of the Review Board findings June 26, 2003 as the end date for consideration of retroactive benefits. Since the portion of the findings being implemented referred to entitlement to retroactive (as opposed to proactive) VR benefits, I also agree with the end date used.

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> In the Review Board decision, it is important to note that the Review Board had already concluded that the evidence indicated the worker had suffered a loss of income due to his compensable conditions. The Board was directed to investigate the extent of that loss (less his earnings) and to pay the difference to the worker. Given the wording in the Review Board findings of the existence of a loss, the conclusion in the VRC's letter of July 17, 2006 that there was no loss appeared contradictory to the Review Board's findings.
>
> In the process of this review, I have perused the calculations which resulted in the VRC's conclusion that there was no loss of earnings. In doing so, I am not satisfied that all the calculations have been completed correctly….

[21] The review officer referred the July 17, 2006 decision of the VRC back to the Board with directions. She found:

> In summary, I find that:
>
> - the dates utilized in calculating the worker's retroactive entitlement to VR benefits was correct;
> - the Board must exclude the severance pay of $59,500 from its calculations of the worker's earnings;
> - the VRC and worker must attempt to obtain more detailed information on the source of the worker's earnings. If more details are obtained, the VRC must exclude all sources of income that do not represent actual earnings;
> - the worker must attempt to provide a more detailed breakdown of time periods of earnings. If more detail than what has already been provided is not available, then minimally the VRC must re-calculate the worker's top-up benefits on a year-to-year basis, as opposed to the current addition of four years into one lump amount; and
> - the VRC must provide details on how the "net monies owing" from the Board were calculated.
>
> After all the information is provided and new calculations completed, the VRC must provide the worker with a new decision letter that incorporates all of the directions above. I therefore now refer the decision of July 17, 2006 back to the Board to carry out the above-noted directions.

[22] The worker (and his lawyer) submitted notices of appeal dated February 16, 2007 and February 27, 2007, both in relation to the February 13, 2007 Review Division decision.

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[23] By letter dated March 22, 2007, a WCAT assessment officer provided the worker with a provisional decision indicating that the Review Division decision concerned entitlement to vocational rehabilitation benefits under section 16 of the Act and was thus outside WCAT's jurisdiction. The assessment officer explained:

> Section 239(2) of the Act provides that a decision of a review officer respecting a matter referred to in section 16 of the Act may not be appealed to WCAT. This means that the Review Division is the final level of appeal for decisions concerning entitlement under section 16 of the Act. For these reasons, we have concluded that WCAT does not have the authority to consider this appeal and must be dismissed.
>
> As stated, section 239(2) of the Act does not permit WCAT to consider an appeal from a decision of a review officer respecting matters under section 16. However, Section 31(2) of the *Administrative Tribunals Act* requires WCAT, before dismissing the appeal, give you an opportunity to make submissions on this matter. If you wish to make a written submission on the question whether WCAT has the authority to consider this appeal, please do so within 21 days of the date of this letter.

[24] The worker's lawyer provided a submission dated April 12, 2007. He submitted that section 239(2)(b) of the Act was in breach of section 7 or section 15(1) of the *Charter of Rights and Freedoms* (Charter). He further submitted that the February 13, 2007 decision dealt with the Board's implementation of the June 26, 2003 Review Board finding regarding the worker's eligibility for benefits prior to the time that section 239(2)(b) was enacted, and that the appeal had to be decided on the basis of the "old law." He also requested that WCAT engage in alternate dispute resolution.

[25] By decision dated April 17, 2007, the registrar dismissed the worker's appeal of the February 13, 2007 Review Division decision for the reasons set out in the March 22, 2007 provisional decision. The registrar further noted that WCAT does not have jurisdiction over constitutional questions as a result of section 44 of the ATA and section 245.1 of the Act. Accordingly, WCAT could not address whether section 239(2)(b) was in breach of the Charter. The registrar further noted:

> As the Act prohibits WCAT from considering appeals from Review Division decisions respecting vocational rehabilitation m[a]tters and WCAT cannot address the constitutional issue, it [is] not necessary to address your request that the appeal be assigned to a special panel under section 238(6) of the Act, or that the Board be directed to engage in alternate dispute resolution with [the worker].

[26] In a subsequent letter dated June 18, 2007, a WCAT deputy registrar cited the April 17, 2007 decision by the registrar. As noted above, in this decision I have interpreted the worker's objections to the June 18, 2007 letter as concerning the April 17, 2007 decision by the registrar.

Law and Policy

[27] Section 16 of the Act provides:

> **16** (1) To aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap, the Board may take the measures and make the expenditures from the accident fund that it considers necessary or expedient, regardless of the date on which the worker first became entitled to compensation.
>
> (2) Where compensation is payable under this Part as the result of the death of a worker, the Board may make provisions and expenditures for the training or retraining of a surviving dependent spouse, regardless of the date of death.
>
> (3) The Board may, where it considers it advisable, provide counselling and placement services to dependants.

[28] Policy in Chapter 11 of the *Rehabilitation Services and Claims Manual, Volumes I and II*, stated at item #85.00:

> Section 16 of the *Workers Compensation Act* is the guiding legislation of Vocational Rehabilitation Services.

[29] Section 239 of the Act provides, in part:

> 239 (1) Subject to subsection (2), a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section, may be appealed to the appeal tribunal.
>
> (2) The following decisions made by a review officer may not be appealed to the appeal tribunal:
>
> (a) a decision in a prescribed class of decisions respecting the conduct of a review;
>
> (b) a decision respecting matters referred to in section 16;

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[30] Section 245.1 of the Act includes sections 31 and 44 in the list of provisions of the ATA which apply to WCAT. Section 44 of the ATA provides:

> **44** (1) The tribunal does not have jurisdiction over constitutional questions.
>
> (2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

[31] Section 31 of the ATA also provides:

> **31** (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:
>
> (a) the application is not within the jurisdiction of the tribunal;…
>
> (2) Before dismissing all or part of an application under subsection (1), the tribunal must give the applicant an opportunity to make written submissions or otherwise be heard.
>
> (3) If the tribunal dismisses all or part of an application under subsection (1), the tribunal must inform the parties and any intervenors of its decision in writing and give reasons for that decision.

[32] Section 4 of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/2002, provides:

> For the purposes of section 239 (2) (a) of the Act, the following are classes of decisions that may not be appealed to the appeal tribunal:
>
> …
>
> (e) decisions respecting the conduct of a review if the review is in respect of any matter that is not appealable to the appeal tribunal under section 239 (2) (b) to (e) of the Act.

Submissions

[33] The worker submits that wage rates are determined under section 5 and 6 of the Act. He states that section 5 and 6 benefits are not section 16 benefits, and WCAT is not restricted from hearing an appeal concerning such benefits. He states that for WCAT to

summarily dismiss his appeal on the assumption the Review Division decision is restricted to section 16 benefits is a patently unreasonable error of fact and law. The worker submits:

> The Review Division decision under consideration primarily regards rates of pay, dates of entitlement, the calculation of net earnings, and the calculation of loss of earnings. The decision was overwhelmingly determined in the worker's favour. The worker is now only asking WCAT to review those errors that remain to be corrected regarding those benefits under section 5 and 6.
>
> WCAT's summary dismissal of the worker's appeal was well short of a perfunctory effort constituting a denial of natural justice, established by the failure of the summary dismissal to review the facts before making its decision.

[34] The worker also argues that WCAT is not restricted by the amendments to the Act which prohibit appeals concerning section 16 benefit appeals. He submits:

> All claims concerned herein pre-exist those amendments. Clearly restricting this appeal is contrary to natural justice. The amendments did not apply at the time of the claims.

Other WCAT decisions (noteworthy)

[35] WCAT is not bound by legal precedent. However, other decisions may provide useful guidance. Selected WCAT decisions are flagged (and summarized) as "noteworthy" on WCAT's internet website. Item #19.3 of the *Manual of Rules of Practice and Procedure* explains:

> Noteworthy decisions fall into two distinct categories:
>
> (a) they may provide significant commentary or interpretive guidance regarding workers' compensation law or policy, or comment on important issues related to WCAT procedure; or
>
> (b) they may serve as general examples of the application of provisions of the WCA and its regulations, the policies of the board of directors, or various adjudicative principles.

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[36] Three relevant noteworthy WCAT decisions are *WCAT-2008-00480*, *WCAT-2009-00113*, and *WCAT-2004*-00999. *WCAT-2008-00480* set out the following background on pages 19 and 20:

> I now turn to *Hansard* (the *Hansard* index is accessible at http://www/leg.bc.ca/37th3rd/hansard). The British Columbia legislature debated section 239(2)(b) of the Act in the Committee of the Whole House on October 29, 2002. The relevant excerpts from *Hansard* start at page 4126 (J. MacPhail for the opposition and Hon. G. Bruce for the government):
>
> > **J. MacPhail:** This is the second division of the whole appeal process. It's entitled "Appeal Rights." I have two areas of concern. The first is under sections 239(2)(b) and (c). When you read this, on the face of it, it is of concern, and I will tell you that it is the one area that we have had a substantial amount of feedback on. Sections 239(2)(b) and (c) say that a decision made under section 16, which is vocational rehabilitation, will not be appealable. These decisions were appealable before. A vocational rehabilitation is the work that the Workers Compensation Board does with an injured worker to return that person to work. Why was the change made to make this not appealable now?
> >
> > **Hon. G. Bruce:** In respect to 239(2)(b), which I believe is where we're at, **this speaks to the vocational rehabilitation, and because this is discretionary, we've taken that from being an appealable issue.**
> >
> > …
> >
> > **Hon. G. Bruce**: We're not limiting vocational rehab here. **What we are limiting is the appeal process to voc rehab.** One of the service delivery aspects of things with the new board of directors will be how to make sure you can move someone quickly to voc rehab, physio or whatever is required, even if decisions haven't been rendered as to who's to blame here, so we can get that person back to work. Let's worry more afterwards about the decision as to who pays, as long as we're focusing on making sure that the injured worker is given whatever training or rehab is beneficial to them.
> >
> > …

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> Also, keep in mind when we're talking about the appeal process here, as I think I've stated before, there are somewhere in the neighbourhood of 180,000 cases a year. I think it's somewhere between 178,000 and 182,000 cases in a year. This past year we saw about 14,000 to 15,000 appeals in those 180,000 cases. There is the potential of some two million appealable decisions.
>
> In this instance here, we are clearly stating that we're not…. I want to be clear. We're talking at this point about the appeal section. Sometimes I get confused. Were we talking about the appeal process, or were we talking about what's the initial direction here? The initial direction is to give that injured worker the service they need to be able to heal, to get whole again and get back to work.
>
> **What we're doing is saying, in respect to the vocational rehab, that vocational rehab is discretionary. You may need different things for whatever your injury may be, but that is not going to then be an appealable decision** on what has been rendered as the level of vocational rehab that's brought down by the board.
>
> [emphasis added]

[37] *WCAT-2008*-00480 found that the Winter Report[1] recommendations and the legislative debates provided compelling evidence that the legislature intended to restrict the right to appeal vocational rehabilitation decisions to WCAT by adding section 239(2)(b) to the Act. *WCAT-2008*-00480 concluded:

> The purpose of Bill 63 is clear in terms of appealing vocational rehabilitation matters; the legislature intended to eliminate any appeal to WCAT. Furthermore, there is no indication that the legislature intended to preserve workers', but not employers', rights to appeal vocational rehabilitation matters…. I am satisfied that sections 239(2)(b) and 241(1), when read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature, do not provide WCAT with jurisdiction over review officer's decisions respecting vocational rehabilitation matters.

[38] *WCAT-2009-00113* concerned a worker's application for reconsideration of a decision by the WCAT registrar, which found that WCAT did not have jurisdiction to consider his appeal of a February 27, 2008 Review Division decision (which confirmed a decision by

[1] *Core Services Review of the Workers' Compensation Board* (Victoria: 2002), accessible at: www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf

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a VRC to deny any further income continuity benefits). The WCAT chair reasoned at paragraphs 25 to 27:

> In my view, it is clear that the policies of the board of directors establish that continuity of income benefits are vocational rehabilitation benefits under section 16 of the Act. They cannot be characterized as short-term disability or wage loss benefits, which are paid under sections 29 and 30 of the Act, because a worker is only eligible to receive continuity of income benefits if his or her condition has stabilized (thus rendering him or her ineligible to receive benefits under section 29 or 30 because those benefits are only payable when the condition is temporary). Since continuity of income benefits are paid before a worker is assessed for entitlement to a permanent partial disability pension payable under section 22 or 23 of the Act, they do not constitute permanent disability benefits.
>
> Many provisions of the Act resulted from the recommendations made in the *Core Services Review of the Workers' Compensation Board* by A. Winter (British Columbia: Ministry of Skills Development and Labour, 2002). Mr. Winter made recommendations regarding vocational rehabilitation benefits in chapter 12 of his report. At pages 271 and 272, he noted that Board officers who issue vocational rehabilitation decisions are exercising a very broad discretion in doing so. In light of this broad discretion, he recommended that there not be a right to appeal Review Division decisions regarding vocational rehabilitation benefits to WCAT.
>
> The legislature implemented Mr. Winter's recommendation by enacting section 239(2)(b) of the Act, which clearly provides that decisions of review officers regarding vocational rehabilitation benefits are not appealable to WCAT. I find the registrar's April 4, 2008 decision that the February 27, 2008 decision is not appealable to WCAT is entirely reasonable. In fact, I find her decision is correct.

[39] In *WCAT-2004-00999*, the WCAT chair considered an appeal from a review officer's refusal to review involving a vocational rehabilitation matter. The WCAT chair found that such an appeal was within WCAT's jurisdiction:

> I do not find that the review officer's July 30, 2003 decision can be categorized as a decision regarding the conduct of a review. *The Concise Oxford Dictionary*, 9th ed. defines "conduct" as including "the action or manner of directing or managing". Accordingly, I view the conduct of a review to refer to the manner in which the review has been processed. In this case, the central issue is whether the request for review raised a reviewable issue. The manner in which the review was processed does not arise as an issue.

However, it appears that there are two possible interpretations of the Act applicable to the decision that is before me because it concerns a request for a review of a letter regarding vocational rehabilitation benefits. If the review officer's decision is characterized as a decision concerning vocational rehabilitation benefits, pursuant to section 239(2)(b) it would not be appealable to WCAT. However, if, pursuant to section 239(1), it is characterized as limited to the narrow question of whether the review officer correctly declined to conduct a review, WCAT would have jurisdiction over the appeal.

The exclusion of appeals concerning vocational rehabilitation benefits from the jurisdiction of WCAT arises out of recommendations at pages 217 and 218 of the *Core Services Review of the Workers' Compensation Board* by A. Winter (British Columbia: Ministry of Skills Development and Labour, 2002). The core reviewer noted a decision concerning vocational rehabilitation benefits is discretionary but it can be overturned on appeal on the basis of differing judgement, even when the decision was made in good faith and involved the application of the relevant policies. He recommended that decisions concerning vocational rehabilitation benefits not be appealable to WCAT. Based on the core reviewer's discussion of this issue, **I view the purpose of section 239(2)(b) as restricting WCAT from substituting its judgement on the merits of a vocational rehabilitation matter. Accordingly, I do not interpret section 239(2)(b) as preventing WCAT from considering an appeal of a decision declining to conduct a review on the basis that the debate concerning whether there is a reviewable issue arises out of a letter concerning vocational rehabilitation.**

I find there is a significant distinction between an appeal from a Review Division decision dealing with the merits of a vocational rehabilitation issue and a decision regarding the narrower question of whether a letter issued by a Board officer raises a reviewable issue concerning vocational rehabilitation benefits. In the former case, section 239(2)(b) provides the decision is not appealable to WCAT. However, in the latter case, which is the situation arising out of the appeal before me, **the Review Division decision is limited to the question of whether the review officer correctly declined to conduct the review. The merits of the matter, which concern vocational rehabilitation benefits, do not come into play. In fact, the review officer declined to consider the merits on the basis that the worker's request for review did not raise a reviewable issue. I find WCAT's jurisdiction to consider the worker's appeal under section 239(1) is not negated by section 239(2)(b).**

[emphasis added]

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Reasons and Findings

[40] I have addressed the issues raised by the worker's application under separate headings below.

(a) Applicable law

[41] The worker raises an argument concerning whether the March 3, 2003 amendments to the Act, which involved a restructuring of the appeal bodies under the Act, apply to his claim. His claim was initiated prior to 2003, and the July 17, 2006 decision by the VRC was concerned with implementing a finding of the former Review Board.

[42] In considering this argument, I have reviewed the transitional provisions contained in the *Workers Compensation Amendment Act (No. 2), 2002*, which was previously referred to as Bill 63 – 2002. For convenience, I will refer to this legislation as Bill 63. The transitional provisions were contained in sections 34 to 44 of Bill 63.

[43] Section 38(1) of Bill 63 provided:

> **38** (1) Subject to subsection (3), all proceedings pending before the review board on the transition date are continued and must be completed as proceedings pending before the appeal tribunal except that section 253 (4) of the Act, as enacted by the amending Act, does not apply to those proceedings.

[44] Section 39(2) provided:

> (2) Subject to subsection (4) of this section, all proceedings pending before the appeal division on the transition date are continued and must be completed as proceedings pending before the appeal tribunal, except that section 253 (4) of the Act, as enacted by the amending Act, does not apply to those proceedings.

[45] In general, all appeals before the former Review Board and Appeal Division were transferred to WCAT for completion, apart from appeals on which the Review Board or Appeal Division had already completed an oral hearing, or received final written submissions and begun its deliberations. Section 44 further provided:

> **44** The Lieutenant Governor in Council may make regulations respecting any matters that, in the opinion of the Lieutenant Governor in Council, are insufficiently provided for, or not provided for, in Part 2 of the amending Act **and that are necessary**

(a) **for the orderly transition to the appeal tribunal of proceedings before the review board and the appeal division**, and

(b) for the orderly completion of proceedings before the medical review panel on the repeal date, including the delegation to the appeal tribunal of all or any of the functions or responsibilities of the Board under sections 58 to 64 of the Act.

[emphasis added]

[46] It is evident that the legislature's intent was to provide for an orderly transition of proceedings before the former Review Board and Appeal Division to WCAT.

[47] Upon reading the current provisions of the Act, in conjunction with the transitional provisions contained in Bill 63, I find no basis for concluding that the legislature intended to limit the application of the new provisions regarding the avenues of review and appeal available under the amended Act, except as specifically provided.

[48] In the worker's case, the June 26, 2003 Review Board finding was issued after the March 3, 2003 changes to the Act. The Review Board panel explained in paragraph 15:

> These appeals were filed with the Review Board. On March 3, 2003, the Appeal Division and the Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As the Review Board panel started its consideration of these appeals before March 3, 2003, they are being completed as Review Board appeals. (See the *Workers Compensation Amendment Act (No. 2), 2002*, Section 38.)

[49] Accordingly, the Review Board finding was issued under section 38 of the transitional provisions contained in Bill 63. Section 38(3) of Bill 63 provided:

> (3) If, in a proceeding pending before the review board on the transition date, the review board has
>
> (a) completed an oral hearing, or
>
> (b) received final written submissions and begun its deliberations,
>
> the review board must continue and complete those proceedings, acting with the same power and authority that the review board had under the Act before the provisions of the Act granting that power and authority were repealed by the amending Act.

[50] Section 41(3) of Bill 63 provided:

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> If, on or after the transition date and at the conclusion of a proceeding referred to in section 38 (3) of the amending Act, a person would have had a right to appeal the finding of the review board in that proceeding to the appeal division under section 91 (1) of the Act but for the repeal of that right on the date the section of the amending Act repealing that right came into force, that person may appeal the review board's finding to the appeal tribunal within 30 days after the finding is sent out.

[51] Accordingly, the Review Board finding was one which would have been appealable to WCAT.

[52] It is evident from the foregoing that the legislature made detailed provision for the orderly transition of matters to the new appeal tribunal (WCAT). I find no basis for concluding that the current legislation (based on the March 3, 2003 amendments to the Act contained in Bill 63) regarding the avenues of review and appeal under the Act was not intended to apply in the worker's case. Accordingly, I find that the statutory limitation on WCAT's authority contained in section 239(2)(b) is applicable. I consider that the April 17, 2007 decision was correct (and not patently unreasonable), in applying section 239(2)(b) to the worker's appeal.

(b) Nature of February 13, 2007 Review Division decision

[53] An issue to be considered is whether the Review Division decision was "a decision respecting matters referred to in section 16" of the Act as contemplated by section 239(2)(b) of the Act.

[54] The Review Division decision concerned the July 17, 2006 decision by the VRC. That decision was stated to concern the "loss of earnings" consideration. It addressed the worker's eligibility or entitlement to retroactive rehabilitation benefits, pursuant to a Review Board finding dated June 26, 2003. In turn, the Review Board finding dated June 26, 2003 had specified that consideration was required under section 16 (concerning vocational rehabilitation) and section 23 (permanent partial disability).

[55] I consider it clear that the July 17, 2006 decision by the VRC, and the February 13, 2007 decision by the review officer, were directed to determining the worker's eligibility or entitlement to benefits under section 16 of the Act. They were not concerned with the worker's pension entitlement under section 23 of the Act.

[56] The worker refers to sections 5 and 6 of the Act. Those sections of the Act set out the criteria for accepting a claim for personal injury or occupational disease under the Act. The decision(s) regarding the acceptability of the worker's claim(s) for compensation had previously been made on the worker's claim, and were not the subject of the February 13, 2007 Review Division decision.

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[57] The worker also refers to matters such as the calculation of his wage rate. This would involve the calculation of his average earnings under section 33 of the former Act (as it read prior to June 30, 2002). The review officer referred on page 4 to policy item #35.22, Calculation of Earnings, of the *Rehabilitation Services and Claims Manual, Volume I*. The review officer further reasoned on page 7:

> If the worker can provide the Board with more detailed income and earnings information for any or all of those periods, the top-ups must be calculated using the smallest amount of time (to a minimum of weekly) as possible. If a more detailed break-down is not available, the VRC must re-calculate the worker's entitlement by subtracting the worker's income for each year from the worker's annual wage rate on the claim and providing the worker with the sum total of the differences of each year. If the worker's income is higher than the wage rate for any given year, the net effect is that he receives no top-up for that year only.

[58] To the extent the Review Division decision concerned such calculations, it was for the purpose of determining the worker's entitlement to retroactive vocational rehabilitation benefits under section 16 of the Act. I find, therefore, that the Review Division decision was, in general, one respecting matters referred to in section 16 of the Act. Accordingly, section 239(2)(b) of the Act provides that it is one which is not appealable to WCAT (subject to the analysis under (f) below).

(c) Charter

[59] I find that the April 17, 2007 decision by the registrar was correct, and was not patently unreasonable, in finding that WCAT cannot consider the application of the Charter pursuant to section 44 of the ATA. The legislation is clear and the worker has not provided further argument on this issue.

(d) Referral back to the Board

[60] While not raised as an issue by the worker, and not necessary to my decision, I note that the February 13, 2007 Review Division decision referred the VRC's decision of July 17, 2006 back to the Board with certain directions.

[61] Section 4 of the *Workers Compensation Act Appeal Regulation* provides:

> For the purposes of section 239 (2) (a) of the Act, the following are classes of decisions that may not be appealed to the appeal tribunal:
>
> …
>
> (d) decisions about whether or not to refer a decision back to the board under section 96.4 (8) (b) of the Act;

[62] Accordingly, there was a possible question as to whether the Review Division decision was one which would not be appealable to WCAT in any event (as involving a decision about whether or not to refer a decision back to the Board). However, *WCAT-2004-03138*, summarized as noteworthy on the WCAT website, and published 20 W.C.R. 287[2], concluded:

> The intent of the appeal and review scheme of the Act is to provide parties with a mechanism for disputing Board decisions regarding entitlement or liability under the Act. A referral back to the Board results in further reviewable decisions and is therefore not a final decision. There is therefore no need to provide an appeal mechanism from a decision to refer a matter back to the Board. However, the directions which may be provided by the review officer constitute decisions which are binding on the Board regarding a party's entitlement or liability. Section 4(d) of the Regulation prohibits appeals from "decisions about whether or not to refer a decision back to the board". There is no reference in section 4(d) to appeals from the directions which may or may not accompany the referral. In my view, both on the plain reading of the Regulation and based on the underlying intent of the legislative scheme, the prohibition against appeals from referrals does not apply to those directions. Otherwise, parties would be deprived of their right to appeal decisions regarding their entitlement or liability simply because those decisions are coupled with a referral back to the Board for further adjudication.

[63] Accordingly, the worker had the right to appeal the directions contained in the February 13, 2007 Review Division decision to WCAT, but this was subject to section 239(2)(b) which precludes any appeal to WCAT from a Review Division decision respecting matters referred to in section 16 of the Act.

(e) Natural justice and procedural fairness

[64] The worker submits that there was a denial of natural justice, established by the failure of the summary dismissal to review the facts before making its decision.

[65] In this case, the worker was provided with a provisional decision on March 22, 2007 by a WCAT assessment officer indicating that the Review Division decision concerned entitlement to vocational rehabilitation benefits under section 16 of the Act and was thus outside WCAT's jurisdiction. The worker was given an opportunity to provide submissions. A submission dated April 12, 2007 was provided by the worker's lawyer. The April 12, 2007 submission was addressed in the April 17, 2007 decision by the registrar.

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[2] "Review Officer Referred a Decision Back to the Board Pursuant to Section 96(4)(8) with Directions - Under Section 4(d) of the Appeal Regulation, Such Decisions are Not Appealable to WCAT; Any Accompanying Directions are Appealable."

[66] The April 17, 2007 summary decision by the registrar was brief. It did not provide detailed reasons, so as to set out the background to the worker's claim or the particular details of the Review Division decision. Nevertheless, I consider that the reasons were adequate to address the question in issue, namely, whether the worker's appeal was within WCAT's jurisdiction. I find that the April 17, 2007 decision was correct, and not patently unreasonable, in its conclusion that the worker's appeal was not within WCAT's jurisdiction (subject to the analysis under (f) below).

[67] I have noted that the April 12, 2007 submission by the worker's lawyer was labelled "**PARTIAL WRITTEN SUBMISSION**." Implicitly, this might have suggested that the worker wished to provide a further submission before a decision was made. However, the March 22, 2007 provisional decision by the WCAT assessment officer invited the worker's submission within 21 days (by April 12, 2007). No request was made by the worker or his lawyer for an extension of time to provide a further submission. In the circumstances, I find no breach of natural justice or procedural fairness in respect of the April 17, 2007 decision by the registrar.

(f) Jurisdiction of review officer

[68] In *WCAT-2004-00999*, the WCAT chair found that a review officer's refusal to review involving a vocational rehabilitation matter is appealable to WCAT. I have considered whether the February 13, 2007 Review Division decision is appealable to WCAT on the basis of the reasoning set out in that decision.

[69] On pages 3 to 4, the review officer noted, as part of a summary of the submissions provided by the worker and employer:

> The worker has provided an extensive submission on many issues that are not contained in the decision before me. Due to its length and non-relevance to the issue under this review, I will not repeat the contents of the submission. I will summarize the pertinent portion of the submissions only, as follows.
>
> …
>
> The employer submitted that the decision under this review related solely to the worker's possible entitlement to VR benefits. The employer also stated that in this case, the previous reviews and appeals had been superseded by the Medical Review Panel certificate. The employer asserted that the VRC's decision should be confirmed.
>
> The worker, through his representative, responded to the employer's submission. He stated that it is unlawful to restrict reviews and appeals to the sole issues which the Board sets out in a decision letter, particularly where there are alternative or overlapping benefit entitlements. The

worker also stated that the Medical Review Panel certificate did not apply to the worker's entitlement to VR benefits, since the Medical Review Panel does not have jurisdiction over VR issues.

[70] The review officer reasoned on page 5, under the heading "Preliminary Matter":

> Contrary to the suggestions made by the worker's representative, **the only issue before me in this review is the decision made by the VRC in the letter of July 17, 2006. I have no legal jurisdiction over any other matter not made in the decision letter before me**. The decision letter of July 17, 2006 implemented a portion of the Review Board findings of June 26, 2003. Therefore my review is restricted to that issue and the relevant portion of the evidence, submission and facts pertaining to that issue.
>
> [emphasis added]

[71] In his notice of appeal to WCAT dated February 27, 2007, the worker stated he was seeking the following outcome:

> Correct the errors, implement the MRP decision as of date of injury – Oct. 1996 and provide benefits from June 26 '03 to the present.

[72] *WCAT-2009-02136*, a WCAT noteworthy decision, provided the following helpful summary regarding the requirement for adequate reasons (at paragraphs 100 to 103):

> The requirements for procedural fairness are described in paragraph 58(2)(b) of the ATA. This subsection states that, in all the circumstances, a tribunal must act fairly.
>
> It is a well-established principle of the rules of procedural fairness that an administrative tribunal must provide sufficient reasons for its decision. This principle finds explicit expression in subsection 253(3) of the Act, which requires that a WCAT final decision on an appeal be made in writing with reasons.
>
> In her text *Administrative Law in Canada*, 3rd ed., Blake provides a convenient summary of the purpose behind the obligation to provide sufficient reasons, at page 86:
>
>> To be of any value to the parties, reasons should explain how the tribunal reached its conclusions, both on fact and on law or policy. The essential findings of fact on which the decision is based should be stated and explanations should be given for rejecting important items of evidence pertaining to the central facts in issue….However, reasons need not be

> given on every minor point raised during the proceeding nor must reference be made to every item of evidence.

Although not binding upon me, a helpful summary of recent jurisprudence relating to the obligation to give sufficient reasons, including the content of this obligation, is set out in *WCAT-2009-00048*, dated January 8, 2009. I note in particular the following extract from *Baldwin v. Workers' Compensation Appeal Tribunal* 2007 BCSC 942:

> [43]…WCAT is required to provide reasons for its decisions, pursuant to s. 253(3) of the [Act]. However, I am unaware of any requirement stating that a tribunal must mention every factor that could possibly influence a decision. In my view, to require endlessly detailed reasons in all situations would ask too much. Reasons must be sufficient to allow the parties involved to understand the decision-maker's reasoning and to provide enough information for an appeal, if one is desired, but should not be held to a standard of perfection.

[73] I consider that the worker's notice of appeal to WCAT took issue with the review officer's decision regarding her lack of jurisdiction to address matters not decided in the VRC's decision. For the reasons provided by the WCAT chair in *WCAT-2004-00999*, this does not appear to have concerned matters referred to in section 16 of the Act.

[74] I consider that this aspect of the review officer's decision was overlooked in the April 17, 2007 decision by the WCAT registrar. No reasons were provided to address this issue. I find that this involved a breach of fairness. I would, therefore, set aside the registrar's decision and reinstate the worker's appeal on this limited basis.

(g) Interest

[75] The worker submits that WCAT has authority to review the Review Division decision that did not direct the payment of interest on the $105,000 paid to the worker in 2007. He submits this is within WCAT's authority to review.

[76] There was no reference to interest in the February 13, 2007 decision by the Review Division, or the April 17, 2007 decision by the registrar. In the circumstances, I consider that the question as to whether this issue may be raised in the worker's appeal to WCAT is one which could also be addressed by the WCAT panel considering the worker's appeal, including whether this is a matter which should have been addressed by the review officer and/or whether this is a matter which is not appealable to WCAT as a decision respecting matters referred to in section 16 of the Act.

[77] In summary, I find no jurisdictional defect in relation to the April 17, 2007 decision by the registrar, which found that WCAT had no jurisdiction to hear the worker's appeal from the February 13, 2007 Review Division decision in relation to the worker's entitlement to vocational rehabilitation benefits under section 16. However, I reinstate the worker's appeal of the Review Division decision in relation to the review officer's finding that the only issue before her was the decision made by the VRC in the letter of July 17, 2006 and that she had no jurisdiction over any other matter not decided in the July 17, 2006 decision letter.

Conclusion

[78] The worker's application for reconsideration of the April 17, 2007 decision by the WCAT registrar is granted, in part. I find that the WCAT decision did not involve any jurisdictional defect in respect of its finding that WCAT had no jurisdiction to hear the worker's appeal from the February 13, 2007 Review Division decision respecting matters referred to in section 16 of the Act. I find, however, that the April 17, 2007 decision involved a jurisdictional defect, in overlooking or failing to provide adequate reasons in connection with the worker's attempt to appeal the review officer's decision that she lacked jurisdiction to address other issues.

[79] Accordingly, I reinstate the worker's appeal of the Review Division decision in relation to the review officer's finding that the only issue before her was the decision made by the VRC in the letter of July 17, 2006 and that she had no jurisdiction over any other decision not made in the July 17, 2006 decision letter. For clarity, I note that the worker's appeal to WCAT does not concern whether the worker has any additional entitlement to benefits. Rather, it is limited to addressing whether the review officer erred in determining the scope of her jurisdiction in her review of the July 17, 2006 decision. It is also open to the worker to present submissions regarding the fact the Review Division decision did not address interest.

[80] In the event that the worker's appeal is allowed, and it is determined that there was a further issue(s) which should have been addressed by the review officer, that matter(s) could be returned to the Review Division so that the review officer could complete its review. The WCAT Registry will contact the parties regarding the further handling of the worker's appeal of the February 13, 2007 Review Division decision (*Review Decision #R00770849*).

Herb Morton
Vice Chair
HM/gw