Noteworthy Decision Summary

Decision: WCAT-2012-02521 **Panel**: Warren Hoole **Decision Date**: September 27, 2012

Factors to consider when deciding whether cross-examination of an expert is required – WCAT Reconsiderations[1] – WCAT Procedural Issues -- Paragraph 58(2)(b) of the *Administrative Tribunals Act* – Item #8.61 of the WCAT *Manual of Rules of Practice and Procedure*

This decision is noteworthy for its analysis of cross-examination as one of several means of obtaining evidence and the use of cross-examination in relation to the duty to act fairly under section 58(2)(b) of the *Administrative Tribunals Act* (ATA).

The decision concerns the worker's application for reconsideration of *WCAT-2007-01982*. The worker appealed several aspects of a decision regarding his pension entitlement to WCAT. The original WCAT panel held an oral hearing of the worker's appeal but denied the request to require the attendance of two Board medical advisors so the worker could cross-examine them. The worker applied for reconsideration of the original decision on several grounds, including the refusal to permit cross-examination of the two Board medical advisors.

The reconsideration panel undertook an analysis of whether the denial of cross-examination breached the tribunal's duty to act fairly under section 58(2)(b) of the ATA. In doing so, the reconsideration panel reviewed several recent court decisions that have considered WCAT procedures in light of the factors described in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 653.

The panel noted there are two lines of judicial decisions that address the issue of cross-examination. In some decisions, the courts have acknowledged the need to restrict the use of cross-examination in WCAT proceedings. In other, more recent decisions, the courts have found that workers' rights to procedural fairness were breached when workers were denied the opportunity to cross-examine expert witnesses at WCAT hearings. Specifically, in *Djakovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2010 BCSC 1279, the court decided the worker's right to procedural fairness was breached when the WCAT panel refused to order the attendance of two Board medical advisors for cross-examination by the worker. Similarly, In *Young v. British Columbia (Workers Compensation Appeal Tribunal)*, 2011 BCSC 1209, the court found

[1] As a result of the BC Court of Appeal's decision in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499, decisions in the Noteworthy Decisions Index that discuss WCAT's jurisdiction to reconsider a prior decision for jurisdictional error are no longer noteworthy for this point. However these decisions remain noteworthy for the other points set out in the noteworthy summary. For a summary of the *Fraser Health* decision, click here: summary

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the worker's right to procedural fairness was breached when she was not permitted to cross-examine a vocational rehabilitation consultant. In another decision addressing this issue, *Johnson v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2011 ABCA 345, the court found the Alberta appeals tribunal breached its duty of fairness when it denied access to Board medical advisors for the purpose of cross-examination at one of its hearings.

The reconsideration panel analysed the reasoning in the two British Columbia decisions in relation to the overall objectives of the *Workers Compensation Act* (Act) and questioned whether adequate consideration had been given by the courts to the objectives of the Act and the statutory tools provided to aid in achieving those objectives. The requirement that appeals be completed within180 days suggests that timeliness and efficiency are significant objectives of the Act. In addition, the legislation provides WCAT with various tools for obtaining evidence that could only be obtained through the cross-examination of witnesses in a court proceeding. The inclusion of these powers, such as the power to direct the Board to carry out investigations on behalf of WCAT and to obtain the opinion of an Independent Health Professional, suggests the Legislature intended to limit the use of cross-examination.

The reconsideration panel also noted that, as a practical matter, the nature of WCAT's operations militates against the regular use of cross-examination. WCAT hearings are generally brief and frequently involve unrepresented parties; and, there are several mechanisms for challenging expert evidence suitable to WCAT appeals that do not require the use of cross-examination. The panel concluded the intent of the legislation is to provide an accessible and fair appeal system with tools for obtaining evidence that support the timeliness and efficiency of decision-making. Although fairness will sometimes require the cross-examination of witnesses, it would be contrary to the objectives of the legislation and the overall scheme of the Act to rely extensively on this practice.

The panel concluded the court decisions should be interpreted narrowly and that fairness "generally" did not require the attendance of the Board medical advisors. In this case, the ease with which the opinions of the Board medical advisors could have been challenged was such that the lack of cross-examination did not jeopardize the fairness of the procedure.

The reconsideration panel found the reasons provided by the original panel for denying cross-examination were problematic but there were compelling alternative reasons for doing so. As a result, the decision to deny cross-examination did not breach section 58(2)(b) of the ATA which requires that the tribunal act "fairly". The reconsideration was allowed, however, on other grounds.

An amendment was issued for WCAT-2012-02521 and is attached to this document.

WCAT Decision Number: WCAT-2012-02521
WCAT Decision Date: September 27, 2012
Panel: Warren Hoole, Vice Chair

Introduction

[1] The worker applies to the Workers' Compensation Appeal Tribunal (WCAT) for reconsideration of *WCAT-2007-01982*, dated June 28, 2007 (the "original decision"). I will refer to the vice chair that issued the original decision as the "original panel."

[2] The worker did not request a particular method of hearing his reconsideration application. I have considered the WCAT's *Manual of Rules of Practice and Procedure* (MRPP) and I have reviewed the issues, evidence, and submissions in this application.

[3] The worker's current reconsideration application does not raise significant factual complexities, questions of credibility, or any other circumstances that indicate an oral hearing is required. Therefore the worker's request for reconsideration of the original decision can be fully and fairly addressed by way of written submissions.

Issue(s)

[4] Does the original decision demonstrate a jurisdictional defect?

Jurisdiction

[5] Subsection 255(1) of the *Workers Compensation Act* (Act) provides that WCAT decisions are final and conclusive, and are not open to question or review in any court.

[6] However, the WCAT has a common law authority to set aside a WCAT decision if that decision reveals a jurisdictional defect, including a sufficiently serious error of fact or law, a breach of the rules of natural justice, or an improper exercise of discretion.

[7] The British Columbia Court of Appeal has endorsed this implied common law reconsideration authority in *Powell Estate v. Workers' Compensation Board* 2003 BCCA 470. Further authority for the WCAT to reconsider its decisions for jurisdictional defect is set out in subsection 253.1(5) of the Act.

[8] This reconsideration application was assigned to me by the WCAT Registrar pursuant to the Chair's delegation of this authority under paragraph 25 of Decision of the Chair No. 16, "Delegation by the Chair," dated July 10, 2012.

Background

[9] I will set out a brief overview of the worker's circumstances. I will discuss relevant evidence in more detail during my reasons where necessary to address the worker's arguments in support of his reconsideration application.

[10] The worker was operating a ride-on lawnmower at a golf course on October 10, 2003, when he encountered uneven terrain and jarred his neck. As a result of this injury, the worker felt he was unable to continue with his groundskeeper job at the golf course. He also felt he was unable to perform the duties of his second job as an airport security guard.

[11] The Workers' Compensation Board (Board) initially denied the worker's claim for compensation on the basis that the worker's symptoms of October 10, 2003, were related to a pre-existing neck condition rather than to the work incident.

[12] The worker succeeded on review and his claim was accepted for an aggravation of his pre-existing cervical degenerative facet and disc disease, with C6 nerve root irritation. The worker's symptoms did not improve. He also developed a secondary chronic pain condition. The Board concluded that these injuries became permanent by May 26, 2004, and assessed the worker's pension entitlement.

[13] In doing so, the Board considered that the worker's injuries left him with permanent limitations, including: limited tolerance for vibration; no right-sided lifting over 50 pounds; and no right-sided forceful gripping. The Board also carried out a "job demands analysis" in relation to the worker's pre-injury groundskeeper and security guard jobs. Dr. Newman, a Board medical advisor, concluded in an October 14, 2005 opinion that the worker did not demonstrate a neurological deficit and that he was capable of returning to his security guard position:

> I reviewed the job demands analysis of the security and grounds keeping job. It would appear that the worker would not be able to tolerate returning to the grounds keeping job due to the compensable injury, however, I see no obvious medical contraindication to returning to the security guard position. The worker has C6 radicular symptoms without neurological deficit. He may have additional limitations for heavy lifting and forceful gripping with the right upper limb.
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> [excerpts reproduced as written, except as noted]

[14] The Board explored returning the worker to his pre-injury security guard job; however, the employer declined to accommodate the worker's limitations. As a result, the Board offered the worker vocational rehabilitation benefits; however, he decided not to pursue this option due to his constant pain and the negative side effects of his medications.

[15] The worker moved away from British Columbia. He underwent a range of motion assessment in another province on February 10, 2006. Dr. Loyer, a Board disability awards medical advisor, considered the results of the out-of-province assessment for the purposes of the worker's functional pension entitlement.

[16] In a March 1, 2006 memo, Dr. Loyer indicated the worker did not demonstrate any measurable neurological deficit. He also concluded that the range of motion deficits recorded in the out-of-province assessment were due in part to the worker's chronic pain condition. Dr. Loyer's opinion included the following reasoning:

> I have some concerns regarding the permanency of the degree of restricted neck movement found on the PFI [permanent functional impairment] exam. I say this because, on reading the neurosurgical consultation report from Dr. J.R. Padilla, dated Jan. 19, 2004, he stated that: "He has about an 80% range of mobility for lateral rotation, tilting, flexion and extension." His current range, as demonstrated, was considerably less for extension, in particular, but also for rotation, and to a lesser degree, flexion. In the setting of chronic pain (which this man has), his degree of restricted neck movement may be largely dependent on the degree of pain present at any given time.

[17] On the basis of the out-of-province assessment and Dr. Loyer's opinion, the Board set the worker's PFI rating at 8.28% of a totally disabled person. The Board calculated the worker's entitlement to a functional pension on the basis of his PFI rating. The Board also concluded that the worker was capable of returning to the security guard occupation such that he was not entitled to a pension calculated on a loss of earnings basis.

[18] The worker disagreed with several aspects of the Board's management of his claim and pursued reviews, without success.[2] The worker appealed to the WCAT. At the WCAT, he challenged in particular the Board's decisions that his C6 nerve root irritation did not result in neurological deficit so as to merit an increase in his functional pension. He also argued that his pension should be increased in recognition of his chronic pain. Finally, he disagreed with the Board's decision that he was capable of returning to the security guard occupation such that he was not entitled to a pension calculated on the loss of earnings basis.

[19] In the course of the proceedings before the original panel, the worker filed two notices of appeal. In one notice of appeal, the worker requested an oral hearing in order to cross-examine Dr. Loyer. In the other notice of appeal, the worker requested an oral hearing to testify before the original panel regarding his inability to work as a security guard, or at all.

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[2] *Review Decision #R0062128*, dated August 31, 2006; and *Review Decision #R0064660*, dated October 18, 2006.

[20] The original panel convened an oral hearing. Prior to the oral hearing neither the worker nor the original panel corresponded further as to whether or not it would be necessary for Dr. Loyer to attend the hearing in order to be cross-examined.

[21] At the oral hearing, the worker requested that the original panel convene a second hearing so as to permit the cross-examination of Dr. Loyer and Dr. Newman. The worker explained the need to cross-examine Dr. Newman because of the brevity of his opinion on two key points: that the worker was capable of working as a security guard and that he had not sustained any neurological deficit.

[22] With respect to the need to cross-examine Dr. Loyer, the worker suggested his opinion was "somewhat equivocal" and "reinterpreted" the out-of-province functional assessment report. In addition, the worker disagreed with Dr. Loyer's opinion that the Board only considered neurological deficits for the purpose of pension assessment, with the result that the worker's hyperesthesia did not merit an increase in the quantum of his functional pension.

[23] The worker indicated that a second hearing would only be necessary if the original panel intended to rely on the opinions of Dr. Newman and Dr. Loyer. If the original panel either rejected those opinions or sought the opinion of an independent health professional (IHP), the worker advised that he would withdraw his request to cross-examine Dr. Newman and Dr. Loyer.

[24] The original panel indicated at the hearing that he would consider the worker's request and likely address it in the original decision. In the result, the original panel reasoned at pages 2 and 3 of the original decision as follows:

> At the oral hearing, the worker's representative asked that I arrange for cross-examination of the Board medical advisor and the Board disability awards medical advisor. Otherwise, he submitted, I should disregard or place less weight on their opinions. He did not indicate an intention to pay the cost of their attendance.
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> Section 10(2) of the *Evidence Act* provides for tribunals to make their own rules for the introduction of expert evidence and the testimony of experts. WCAT has done that, at section #8.61 of its *Manual of Rules of Practice and Procedure.* That section provides that written reports by an expert are admissible without the need for the expert to attend at the oral hearing. It also provides that WCAT will not require an expert to attend an oral hearing unless the panel believes that the expert's attendance is necessary for a fair hearing of the issues, or that a failure to attend would prejudice a party to the proceeding.
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> A tribunal's procedures do not necessarily include all the procedural protections enjoyed in a court of law. I do not consider that the

> attendance of the Board doctors for cross-examination is necessary for a fair hearing, and I do not consider their failure to attend would prejudice the worker in any way. The worker's representative has had the opportunity to obtain his own medical opinions and, in fact, the file contains two letters written to the worker's representative by the worker's family doctor and one letter by his orthopaedic surgeon. The opinions of the two Board doctors, although useful, were not crucial in arriving at my decisions. These appeals therefore proceeded without attendance of the two Board doctors for cross-examination.

[25] The original panel therefore denied the worker's request to reconvene his hearing in order to permit him to cross-examine Dr. Newman and Dr. Loyer. The original panel also denied the worker's appeal generally. The worker disagrees with the original decision and considers that it reveals a number of reviewable errors on the part of the original panel, leading to the current reconsideration application.

Submissions

[26] The worker's submissions are found in his petition for judicial review, his amended petition, and in separate submissions to the WCAT dated June 12 and July 19, 2012. I summarize the relevant aspects of the worker's submissions below.

[27] First, the worker says that the original panel breached the requirements of procedural fairness by failing to convene a second hearing so as to permit the worker to cross-examine Dr. Newman and Dr. Loyer.

[28] Second, the original panel similarly failed to comply with procedural fairness by not conducting his own investigation into the medical questions at issue through the use of an IHP pursuant to section 249 of the Act.

[29] Third, the worker argues that the policy that the original panel applied in deciding the worker's entitlement to a loss of earnings assessment for pension purposes (policy item #40.00 of the Board's *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) is patently unreasonable, as established in *Jozipovic v. British Columbia (Workers' Compensation Board)*, 2012 BCCA 174.

[30] The worker says he raised this issue before the original panel; however, the original panel failed to discuss this issue in his reasons. The original decision is therefore unfair because it failed to respond to a key issue and reflects inadequate reasoning. In the alternative, the original panel is said to have erred in law by applying an invalid policy.

[31] Fourth, the original panel declined to reimburse the worker for his appeal expenses without considering the factors relevant to such reimbursement. The original panel is therefore said to have exercised his discretion to reimburse appeal expenses in a patently unreasonable manner.

[32] Fifth, the worker argues the original panel reached a patently unreasonable finding of fact when he concluded that the worker was capable of returning to his pre-injury security guard occupation, such that he was not entitled to an assessment for a potential loss of earnings pension. The original panel's finding is also said to be internally inconsistent with his earlier statement that he lacked the jurisdiction to consider whether the worker was capable of returning to his pre-injury job.

[33] Sixth, the worker submits the original panel's refusal to increase the worker's functional pension to recognize his chronic pain and neurological hyperesthesia amounted to a patently unreasonable finding of fact because there was no evidence beyond the original panel's speculation to support the findings in question. The worker refers me to *WCAT-2012-00718*, dated March 15, 2012, in support of the proposition that it is improper to discount a chronic pain condition in the presence of another permanent condition that results in reduced range of motion.

[34] Finally, the worker briefly disagrees with the original panel's conclusion that the worker's condition stabilized and became permanent as of May 26, 2004. The argument on this point is not clear; however, it appears that the worker considers the original panel conflated ongoing deterioration with stabilization and therefore fell into reviewable error.

[35] For these reasons, the worker submits the original decision suffers from jurisdictional defect such that it must be voided and the worker's appeal be reheard.

Reasons and Findings

[36] Section 255 of the Act directs that the original decision be considered to be final and conclusive. It follows that an application for reconsideration is not merely a further appeal and it is not an opportunity to reweigh the evidence before the original panel.

[37] Rather, the reconsideration process is intended to ensure that decisions of the WCAT meet the requirements of procedural fairness and that a WCAT panel's findings of fact and law, as well as his exercise of discretion, fall within a range of permissible outcomes.

[38] For the reasons set out in *WCAT-2009-02136*, dated August 13, 2009, section 58 of the *Administrative Tribunals Act* (ATA) describes the circumstances that will amount to jurisdictional defect as follows:

> 58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
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> (2) 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,
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> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
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> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
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> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
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> (b) is exercised for an improper purpose,
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> (c) is based entirely or predominantly on irrelevant factors, or
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> (d) fails to take statutory requirements into account.

[39] With this context in mind, I will consider each of the worker's arguments in turn.

1. Procedural Fairness Error – Cross-Examination of Dr. Newman and Dr. Loyer

[40] Cross-examination is permitted under both the Act and the ATA. As the original panel pointed out, the WCAT's MRPP in force at the time provided guidance to WCAT panels in deciding when to permit cross-examination. I interpret the MRPP as reflecting a preference for expert opinions to be provided in writing without cross-examination; however, the MRPP tempers this general preference with the advice to WCAT panels that cross-examination must be permitted where such a process is necessary to ensure a fair hearing.

[41] The worker's request to cross-examine Dr. Newman and Dr. Loyer therefore ultimately turns on whether this procedural option was necessary to ensure that the worker received a fair hearing. Accordingly, the original panel's decision to decline the worker's request must be measured against the requirement in paragraph 58(2)(b) of the ATA that, "…in all of the circumstances, the tribunal acted fairly."

[42] The question of what is fair in any particular circumstance is "…eminently variable."[3] A convenient summary of the analysis relevant to calibrating the content of procedural fairness is set out in *B.C. (Securities Commission) v. Pacific International Securities Inc.*, 2002 BCCA 421:

> [6] However, administrative tribunals are the masters of their own procedures and, unlike courts, need not be shackled by all of the requirements of natural justice; rather, they are entitled to devise flexible procedures adapted to their needs in order to "achieve a certain balance between the need for fairness, efficiency and predictability of outcome": *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at 685.
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> [7] Thus, the duty of fairness is flexible and variable and will depend upon an appreciation of the context of the statute involved and the rights affected: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 at paras. 21-22. At paras. 23-27 of that decision, L'Heureux-Dubé J. set out a non-exhaustive list of factors that are relevant to the determination of the level of procedural fairness required in particular cases. They include: (1) the nature of the decision and its underlying procedures, that is, the degree of similarity of the administrative process to the judicial process; (2) the role of the particular decision in relation to the nature of the statutory scheme; (3) the importance of the decision to the individuals affected by it; (4) the legitimate expectations of the person challenging the decision where expectations were created as to the procedure to be followed; and (5) the choice of procedure made by the tribunal, as well as its expertise and its institutional constraints.

[43] In the specific context of WCAT proceedings, the BC Courts have recently considered the *Baker* factors with reference to the right of a party to cross-examine witnesses in two recent cases. A third recent case from the Alberta Court of Appeal also addresses the issue of cross-examination in the context of the Alberta Workers' Compensation Appeals Commission.

[44] First, in *Djakovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2010 BCSC 1279, Voith J. concluded that Mr. Djakovic's right to procedural fairness included the right to cross-examine certain witnesses in the course of the oral hearing of his appeal.

[45] Mr. Djakovic alleged that he sustained a secondary injury at a rehabilitation program he attended following an initial work injury. The Board did not accept that Mr. Djakovic sustained another injury at the program and denied his claim for further benefits in that regard.

[3] *Julien v. Canada (Attorney General)*, 2008 FCA 270, at paragraph 7.

[46] The matter proceeded to the WCAT, where Mr. Djakovic requested that two staff members from the rehabilitation program be ordered to attend the appeal for cross-examination regarding their knowledge of his second injury.

[47] The WCAT panel denied the worker's request but took the step of inquiring into the matter through written interrogatories. The two staff members responded in what can best be described as a vague or even evasive manner. The WCAT panel issued a second interrogatory requesting clarification but again received a vague response. At that point, the WCAT panel concluded there was no point in pursuing the matter further and went on to decide the appeal against Mr. Djakovic.

[48] On judicial review, Mr. Djakovic argued that the WCAT panel breached his right to procedural fairness by not ordering the two staff members to attend the appeal hearing for cross-examination. In assessing the content of procedural fairness required in such circumstances, Voith J. discussed the *Baker* factors at paragraph 44 of his reasons.

[49] He concluded, first, that WCAT proceedings "…bear relatively strong similarities to the process of the courts." Second, he noted that the WCAT is the final and binding level of decision-making within the workers' compensation system such that the role of the WCAT within its statutory scheme militates in favour of a significant degree of procedural fairness. Third, Voith J. considered that the issue of causation in the context of a worker's claim was of considerable importance, again requiring "…relatively stringent" procedural rights. The court did not consider that an issue of legitimate expectations arose and therefore discounted the fourth *Baker* factor.

[50] With regard to the fifth *Baker* factor, Voith J. recognized that the WCAT's MRPP permitted it to select the method of hearing it considered appropriate in any particular appeal. Voith J. recognized that weight must be given to such choices, a factor which supported the WCAT's refusal to order the attendance of the two witnesses for cross-examination.

[51] Finally, the Court noted that the five *Baker* factors were not exhaustive and that other relevant factors could be considered. Voith J. considered that the crucial role of cross-examination in the legal system was an additional factor relevant to the calibration of procedural fairness towards the higher end of the fairness spectrum.

[52] Weighing all of these factors, Voith J. concluded at paragraph 48 that Mr. Djakovic was entitled to "…a significant degree of procedural fairness" and that this entitlement included the right to cross-examination. The Court referenced several further considerations in support of its conclusion that the WCAT panel failed to provide Mr. Djakovic with the required degree of procedural fairness:

> [49] Second, and importantly, the issue that counsel for Mr. Djakovic sought to raise in cross-examination was not only relevant but was also central to the case. Its relevance is manifest because the Appeal Tribunal,

of its own accord, pursued the question of what happened to Mr. Djakovic on December 19, 2005 during his rehabilitation. Its centrality is equally clear. The very issue posed by the Appeal Tribunal was "whether the worker suffered a low back injury, or an aggravation of a pre-existing low back condition, during the OR2 program". The importance of the issue raised is further confirmed by the fact that the Appeal Tribunal, in its November 26, 2007 letter, indicated that absent receipt of a responsive answer to its inquiry it would issue a subpoena.

[50] Third, each of the various responses provided to the Appeal Tribunal's written inquiries were unsatisfactory. The first such answer was simply not responsive. The second indicated that Mr. Dorsey did not recall any event not recorded in his notes. The third asserted that "nothing of clinical significance" occurred. This says nothing about whether Mr. Djakovic fell, whether he was thereafter assisted to his feet or whether calls were made to his family doctor as he deposed. Instead, the response is evasive and conclusory.

[51] Next, if one weighs the burden as opposed to the benefit of allowing the cross-examination which counsel for Mr. Djakovic sought, the scales tip squarely in favour of allowing the cross-examination. Significant rights on the part of Mr. Djakovic were at stake. Questions of credibility were at issue. The issue raised was central and important. It was not of peripheral relevance. Conversely, the apparent burden of allowing the cross-examination was that the hearing would have been modestly extended.

[52] Still further, the Appeal Tribunal appears to have misapprehended the nature of the role served by cross-examination. The decision-maker asserted that, "there would be little value" in allowing a cross-examination and that asking "the same question is not likely to elicit an opposing opinion and there is no other evidence which this panel requires to arrive at a decision". These comments reflect two related problems. First, the decision-maker pre-supposed or prejudged what success might be achieved during the cross-examination of Mr. Dorsey or his colleague. Yet based on the various earlier written answers provided to the Appeal Tribunal, a range of potential responses were realistic – some of which may well have advanced Mr. Djakovic's interests.

[53] Second, as I have noted earlier, one significant object of procedural fairness is to allow a party to further his or her case and to respond to the case he or she has to meet. Cross-examination serves a potentially vital role in fostering and advancing these objects….

> [55] In preventing counsel for Mr. Djakovic from undertaking the cross-examination he sought, the Appeal Tribunal foreclosed the prospect that Mr. Djakovic's case might be advanced. It further impaired the ability of Mr. Djakovic to meet the case he faced. The question was not whether the Tribunal had the information required to arrive at a decision. Rather the question was whether Mr. Djakovic was given the opportunity to "fully and fairly" present his case: *Baker* at para. 28.

[53] It is therefore apparent that, at least where no other reasonable means exists for a party to adduce evidence essential to its case, Voith J. considered that cross-examination was essential to a fair hearing before the WCAT.

[54] The second BC Supreme Court case of particular significance to the current reconsideration application is *Young v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2011 BCSC 1209. That case involved Ms. Young's entitlement to a pension calculated on a loss of earnings basis.

[55] In concluding that Ms. Young was not entitled to such a pension, the Board relied on the opinion of one of its vocational rehabilitation consultants to the effect that Ms. Young was employable in the occupation of bookkeeper. Ms. Young disagreed and before the WCAT she requested that the vocational rehabilitation consultant be ordered to attend her appeal hearing for cross-examination. The WCAT panel declined Ms. Young's request and denied her appeal.

[56] On judicial review, Ms. Young argued that the WCAT panel breached her right to procedural fairness by not permitting her to cross-examine the vocational rehabilitation consultant. Humphries J. agreed.

[57] Humphries J. considered that the vocational rehabilitation consultant's opinion, on its face, failed to take into account whether Ms. Young was "competitively employable" – a requirement of the policy framework applicable to her appeal. In this context, the WCAT panel was required to provide Ms. Young the opportunity to test the vocational rehabilitation consultant's opinion both as to her underlying assumptions and whether she had considered applicable policy. Humphries J. therefore held:

> [82] The central factor in this case is the VRC's determination of employability/available employment. Cross-examination…was necessary to allow the assumptions upon which the VRC based her opinion to be tested. As well, it was necessary to allow a determination of whether and how her opinion took into account the concepts contained in the relevant policy.
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> [83] Here, the report given by the VRC cannot be compared to the report of a doctor, which was the analogy used by the reconsideration panel to demonstrate the scheduling chaos that would result if hearing were

> adjourned and bifurcated to allow for the cross examination of experts. The VRC made assumptions, did selected statistical research, and came to a deemed conclusion as to the employability of the petitioner without apparent consideration of the applicable Board policy. Failure to allow cross-examination of the VRC in these circumstances undermined the fairness of the hearing, since the Vice Chairman simply relied on her untested report and conclusions.

[58] Consequently, *Young* suggests that a party to a WCAT appeal will be entitled to cross-examine a Board expert as to whether the expert took into account statutory requirements and as to the general basis of the expert's opinion. *Young* is perhaps the strongest BC authority for requiring the routine attendance of Board experts for cross-examination in WCAT proceedings.

[59] A third recent case of significance to the current reconsideration application is *Johnson v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2011 ABCA 345. In that case, Mr. Johnson sustained a compensable low back injury. He was initially provided with wage loss benefits; however, the Alberta Workers' Compensation Board concluded that his compensable injury resolved within a short time and his benefits were terminated.

[60] Mr. Johnson continued to experience low back problems and his family physician supported his view that the ongoing problems were related to the original accident at work. For its part, the Board secured several opinions from its own medical advisors indicating that Mr. Johnson's ongoing symptoms were attributable to a pre-existing degenerative back condition and not to the work accident.

[61] The matter proceeded to the Alberta Workers' Compensation Appeals Commission, where Mr. Johnson requested that he be permitted to cross-examine the Alberta Board's medical advisors. The Commission declined Mr. Johnson's request and he sought judicial review successfully before the Court of Queen's Bench. The Alberta Board appealed.

[62] On the issue of cross-examination of the Alberta Board's medical advisors, McFadyen J.A. for the Court held that the *Baker* factors need not be considered because the Alberta *Workers' Compensation Act* as well as the Commission Rules provided for cross-examination in certain circumstances. It was therefore only necessary to look to the criteria set out in the Rules to determine whether or not to grant Mr. Johnson's request to cross-examine the Alberta Board's medical advisors.

[63] McFadyen J.A. noted that Mr. Johnson had filed medical opinions contrary to those of the Alberta Board medical advisors, with the result that the issue of reconciling otherwise conflicting expert opinion evidence was squarely in play. In this context,

McFadyen J.A. considered that cross-examination was essential because it was the only proper procedural method capable of resolving otherwise valid but contradictory medical opinions. The Court reasoned, in relevant part:

> [18] Pursuant to Rule 3.10(2)(a), the Respondent was only required to show the "relevance" of the proposed examination. In our view, the Appeals Commission erred in confining itself to a consideration of whether the proposed cross-examination demonstrated that the opinions or reports the Respondent wished to challenge contained errors, incomplete facts or unsubstantiated conclusions. Overlooked in its consideration of the matter was another important purpose of cross-examination: the reconciliation of otherwise conflicting testimony.
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> [19] The proposed subject of cross-examination was quite straightforward: the family doctor diagnosed a continuing back injury that was attributable to the accident, whereas the Appellant's doctors opined that the injury from the accident had resolved itself and that any remaining symptoms were possibly psychological in nature. The issue, central to the decision to be made by the Appeals Commission, was which opinion to accept. In deciding whether to allow examination of the doctors, the question was whether the fundamental disagreement between the doctors could be resolved by some other procedural method.
>
> [20] The dispute was obvious, and the proposed line of questioning clearly relevant; no additional details were required to decide if cross-examination should be permitted. The difference of opinion did not necessarily depend on a want of credibility or expertise; it is likely that both groups of doctors were credible. Nor did it mean that one set of opinions or the other "contain errors, incomplete facts or unsubstantiated conclusions". The Appeals Commission was faced with conflicting expert opinions. The issue was whether without cross-examination the Appeals Commission could resolve that conflict in a fair, justified, transparent and intelligible manner.
>
> [21] In the result, we conclude that the approach of the Appeals Commission was not reasonable….

[64] *Johnson* therefore appears to suggest that, at least where the medical opinion evidence conflicts but is otherwise valid, procedural fairness will require that the Board medical advisors be subject to cross-examination in order to comply with the requirements of procedural fairness. Consequently, although not binding in BC, *Johnson* provides strong support for the worker's position that a fair hearing required that he be permitted to cross-examine Dr. Newman and Dr. Loyer.

[65] Read broadly, *Djakovic*, *Young*, and *Johnson* might all be said to reflect an increasing momentum on the part of the Courts towards expanding the availability of cross-examination in the context of the workers' compensation appeal system.

[66] However, with respect, I am reluctant to endorse such an outcome without more explicit direction from the Court. Rather, I would read *Djakovic, Young, and Johnson* more narrowly than the worker proposes, lest excessive procedural requirements interfere with the efficiency, flexibility, timeliness, and cost-effectiveness that underlie the Legislature's purpose of assigning final and exclusive jurisdiction over workers' compensation appeals to the WCAT.

[67] Indeed, the former WCAT Chair addressed the systemic concerns associated with routinely permitting cross-examination of Board medical advisors in *WCAT-2006-03224*, dated August 18, 2006. The following passage at page 21 generally illustrates the concerns that arise from permitting routine cross-examination of Board medical advisors:

> I note Ms. Blake's [*Administrative Law in Canada*, 3rd ed. at page 62] statement that cross-examination is not generally required in proceedings before administrative tribunals that do not operate on an adversarial basis. WCAT hears appeals and applications on the basis of an inquiry model rather than an adversarial process. It is a high-volume tribunal which receives approximately 6,000 new appeals per year. In the course of each appeal, parties receive disclosure of the Board file and are invited to provide new evidence and submissions. A significant number of WCAT decisions are determined on the basis of expert medical reports. If WCAT was required to routinely subpoena the authors of those reports for cross-examination, its decisions would be delayed and its workload would increase. It is possible that some experts would no longer be willing to provide reports for workers' compensation matters and WCAT appeals because of the time required for them to attend oral hearings. I acknowledge that situations may arise in which procedural fairness will require WCAT to subpoena experts for cross-examination by the opposing party to an appeal. However, I do not find that such a circumstance arose in this case.

[68] Earlier court decisions support the notion that cross-examination plays a limited role in the workers' compensation appeal system. Indeed, even in the context of statutory bar proceedings, perhaps the most court-like type of adjudication under the Act, cross-examination was recognized as impairing efficiency and as not routinely required for fairness.

[69] For example, in *Murphy v. Dowhaniuk*, [1985] B.C.J. No. 2937; 66 B.C.L.R. 319 (S.C.); aff'd [1986] B.C.J. No. 987; 7 B.C.L.R. (2d) 335 (C.A.), MacDonald J. noted that even though credibility was at issue the Board had not erred by failing to provide an oral

hearing or cross-examination prior to issuing its determination under section 11 (an earlier version of section 257) of the Act then in force. At paragraph 19, MacDonald J. held:

> I also accept the submission of the respondents that if an opportunity to cross-examine all witnesses in the presence of the Board must be afforded in connection with every s. 11 determination where credibility is in issue, that requirement would have a profound effect on the Board and its ability to perform its statutory function.

[70] In my view, there is some tension apparent between the potentially expansive approach to cross-examination flowing from recent cases of *Djakovic*, *Young*, and *Johnson*, and the older line of authority reflected in such cases as *Murphy* and *WCAT-2006-03224*.

[71] Given this tension, it may be helpful for me to discuss in more detail what I understand to be the Legislature's intentions as to the general nature of WCAT proceedings. I will also briefly discuss the reality of WCAT proceedings from a practical perspective.

[72] As already recognized in *Djakovic*, there is no doubt that the Act, the ATA, and the MRPP all permit the WCAT to order cross-examination, even of expert witnesses such as Dr. Newman and Dr. Loyer. It follows that the Legislature intended this procedure to be available in WCAT proceedings.

[73] On the other hand, a number of other provisions relevant to WCAT proceedings suggest the Legislature intended significant limits to the scope of cross-examination, particularly of experts such as Dr. Newman and Dr. Loyer.

[74] First, paragraph 253(4)(a) of the Act provides that appeals are to be completed within 180 days. The 180-day period may be extended; however, only in limited circumstances and with the WCAT Chair's permission. Every appeal that requires more complex procedures puts in peril the 180-day time frame. If the 180-day time frame is extended, this will in turn reduce the resources available to complete less complex appeals and therefore impact the WCAT's obligation to complete other appeals in accordance with the 180-day time limit.

[75] Consequently, I suggest that the 180-day limit set out in the Act reflects a significant legislative preference for the WCAT to generally foster proceedings that are simple and convenient so as to ensure timeliness within the appellate structure of the workers' compensation system.[4]

[4] Indeed, efficiency and timeliness were key themes in Alan Winter's 2002 *Core Services Review of the Workers' Compensation Board*, the catalyst for the substantial restructuring of the appeal system, including the creation of the WCAT.

[76] In my view, the Legislature's emphasis on these values, as expressed by the 180-day time limit in the Act, was not squarely considered in *Djakovic* or *Young*. The important role of timeliness as a factor to consider in calibrating fairness was also given short shrift in *Johnson*; however, the different legislation in place in Alberta may explain this point. Consequently, in my view, this aspect of the Act tends to militate against an expanded role for cross-examination. I do not say that cross-examination should never be used. I merely say that for it to become a routine feature of WCAT proceedings risks undermining the important values of timeliness and efficiency as expressed in the 180-day time limit.

[77] Second, the WCAT is provided with powers quite different from those of the courts, particularly in relation to inquiring into matters where necessary. The WCAT may direct the Board to carry out investigations on the WCAT's behalf, pursuant to paragraph 246(2)(d) of the Act. Similarly, pursuant to subsection 246(3) of the Act, the WCAT may order the Board to make adjudicative determinations that "should" have been made and report back to the WCAT. In addition, the WCAT may seek the opinion of an IHP pursuant to section 249 of the Act.

[78] The statute therefore provides the WCAT with tools that offer viable alternative methods for resolving conflicts in medical opinion evidence. The WCAT's authority in this regard tends to reduce the importance of cross-examination in cases of conflicting medical opinion evidence. I also note in passing that the running of the 180-day time period is suspended during an IHP process but it is not suspended in order to facilitate the potentially complex and time-consuming scheduling of cross-examination.

[79] Again, the recent jurisprudence does not appear to dwell on this important aspect of the statutory framework within which the WCAT operates. Given the other viable procedural options available to both the WCAT and to the parties appearing before the WCAT for resolving disputed matters of expert medical opinion, I would suggest that cross-examination, although still necessary in some cases, is perhaps not as critical to WCAT proceedings as it is to proceedings before the courts.

[80] Third, section 7 of the *Workers Compensation Appeal Act Regulation*, B.C. Reg. 321/2002, permits the WCAT to reimburse a party to an appeal for expenses generated in securing an expert opinion. This provision is of significance because, unlike in court proceedings, a party need not be successful in order to recover his or her costs of filing a medical opinion with the WCAT. In other words, the *Regulation*, and by extension the Legislature, encourages parties to establish medical facts through the filing of written medical opinion.

[81] Conversely, the *Regulation* largely prohibits the paying of legal costs. As a general point, I would suggest it is uncontroversial that cross-examination of expert opinion is more effective in the hands of well-prepared counsel, an expensive choice. The

Legislature's decision to largely preclude reimbursement of legal costs is a further indication of its general intention that the WCAT avoid undue complexity in its proceedings.

[82] Consequently, although the Act permits cross-examination to occur, I consider that this option is not intended to be used routinely. The use of cross-examination must be balanced against opposing values manifest in the Act such as timeliness, cost-effectiveness, efficiency, and access to other practical procedural options for resolving competing opinion evidence.

[83] In referencing these points, I again emphasize that I do not dismiss cross-examination as a valuable tool in WCAT proceedings, I merely point out elements of the legislative context that cases such as *Djakovic*, *Young*, and *Johnson* perhaps underemphasize when analyzing the circumstances in which procedural fairness demands access to cross-examination before WCAT panels.

[84] In addition to the legislative context, I would suggest that several practical considerations arise that may further call into question whether routine access to cross-examination of medical experts is an appropriate feature of WCAT proceedings.

[85] First, WCAT hearings are generally brief. Parties are frequently self-represented, or are not represented by counsel. Many people appearing before the WCAT have no experience or understanding of any form of legal proceedings; indeed, some have difficulty with English and require interpreters. In short, proceedings before the WCAT are substantially different from those before the courts.

[86] Although I understand Voith J.'s admonition in *Djakovic* not to speculate as to the outcome of cross-examination, it nevertheless merits mention that the practical day-to-day reality of WCAT proceedings is quite different from that of the courts.

[87] Second, in addition to the statutory tools available to the WCAT, parties are free as a practical matter to dispute opposing medical opinions in several ways. The factual basis for an opposing medical opinion may be attacked by leading evidence at the hearing to demonstrate the opinion giver misunderstood the facts. Alternatively, the parties may secure their own opinions that specifically point out the flaws in the opposing expert's opinion. As already noted, the WCAT routinely reimburses parties for expenses incurred to secure their own opinions.

[88] Finally, parties may attack an opposing expert opinion through submissions, such as complaining of an absence of logic or reasoning, or the failure of the medical expert to personally examine the worker. It therefore cannot be said that, at least in routine cases, cross-examination of Board medical advisors is the only reasonable way for a party to make its case before the WCAT. Simply put, procedural fairness does not require that a party receive the best procedures possible to make his or her case; the law merely requires that the parties understand the case to meet and have a meaningful

opportunity to make that case. In most WCAT appeals, including the current case, the worker had several other viable options open to him to contest the medical issues in question. His failure to access those alternative options weakens the force of his argument that he should also have been permitted cross-examination of Dr. Newman and Dr. Loyer.

[89] A third practical point to consider is that Board medical advisors provide many opinions in the course of their duties. WCAT proceedings typically arise up to a year or longer after such opinions are provided. Medical advisors will have little recollection of any particular case and will have little ability to add to the opinion that was already provided in writing and disclosed to the parties.

[90] Consequently, I suggest that the practical reality of the context within which WCAT proceedings occur further lessens the significance of cross-examination as an effective or helpful method for testing routine medical opinions from Board medical advisors, such as those of Dr. Newman and Dr. Young in the current case.

[91] In summary, I suggest that an expansive reading of *Djakovic*, *Young*, and *Johnson* may not be appropriate because these cases perhaps underemphasize both the legislative and practical considerations I have discussed above. I therefore decline to read *Djakovic*, *Young*, and *Johnson* as supporting the worker's procedural fairness argument. I would limit those decisions to their specific context.

[92] More particularly, I would distinguish *Djakovic* from the current case because *Djakovic* dealt with lay witnesses when no other viable avenue existed for the worker to prove that he had suffered a secondary injury. It was a case where a party was seeking to develop original evidence from the only source available, rather than, as here, a case where the original evidence was already on file and open to attack through a variety of other methods.

[93] *Young* is also distinguishable from the current circumstances because that case did not deal with expert medical opinion. Indeed, the court appears to have made a point of distinguishing vocational rehabilitation consultants from medical advisors at paragraph 83, where Humphries J. reasoned:

> [83] Here, the report given by the VRC cannot be compared to the report of a doctor, which was the analogy used by the reconsideration panel to demonstrate the scheduling chaos that would result if hearing were adjourned and bifurcated to allow for the cross examination of experts. The VRC made assumptions, did selected statistical research, and came to a deemed conclusion as to the employability of the petitioner without apparent consideration of the applicable Board policy. Failure to allow cross-examination of the VRC in these circumstances undermined the fairness of the hearing, since the Vice Chairman simply relied on her untested report and conclusions.

[94] *Johnson* too is distinguishable because it arose in a different Province and in a somewhat different legislative and procedural context. Moreover, the Court in *Johnson* focused exclusively on the Commission's Manual in determining whether cross-examination was required.

[95] As a result, the court declined to assess the *Baker* factors. Unlike in Alberta, the WCAT's MRPP specifically requires consideration of fairness[5] in the context of cross-examination of experts. This means that in WCAT proceedings it is therefore necessary to calibrate fairness with regard to the *Baker* factors and not to restrict consideration of the cross-examination issue to the criteria set out in the MRPP. The Court's focus on the Commission's Manual rather than the *Baker* factors therefore renders *Johnson* less persuasive.

[96] In addition, the Court's reasoning in *Johnson* that procedural fairness requires cross-examination in order to resolve otherwise valid and equally persuasive but contrary expert medical opinion appears, with respect, to disregard subsection 250(4) of the Act and thus to be an argument with less force in BC.

[97] In summary, although I do not suggest that cross-examination of medical advisors is impermissible, I disagree that cases such as *Djakovic*, *Young*, and *Johnson* should be read so as to require that cross-examination of Board medical advisors becomes a routine matter.

[98] Here, the opinion of Dr. Newman at issue was so cursory and easy to attack on a variety of fronts as to not require cross-examination. Although open to him, the worker chose not to file a specific opinion during the WCAT proceedings to contest Dr. Newman's opinion. Instead, he first raised the question of cross-examining Dr. Newman at the hearing, despite the fact that he should have known of Dr. Newman's opinion since the time he received document disclosure several months earlier.

[99] In my view, Dr. Newman's opinion was of a routine and general nature that could easily have been contradicted by a variety of other effective methods. If cross-examination is required in such routine circumstances, the Legislature's emphasis on WCAT conducting timely and efficient appeal proceedings would be put in jeopardy. I therefore find that procedural fairness did not require the panel to order the attendance of Dr. Newman at the hearing for cross-examination.

[100] The opinion of Dr. Loyer is more detailed; however, I consider it significant that he did not physically carry out the evaluation of the worker's permanent impairment. He merely interpreted the report of the out-of-province physician who in fact physically measured the worker's permanent deficits. Dr. Loyer also considered the other medical reports already on file in providing his opinion as to the worker's permanent deficits.

[5] Rule #8.61(g) of the MRPP then in force.

Dr. Loyer therefore did not generate original underlying evidence from his own observations and his opinion could be as easily refuted through an opposing written medical opinion as through cross-examination. This was again a routine type of opinion and one that I disagree procedural fairness requires cross-examination to adequately contest.

[101] I therefore do not consider that fairness generally required the attendance of either Dr. Newman or Dr. Loyer at the hearing before the original panel for cross-examination.

[102] In the more specific context of the MRPP criteria, I also note that the worker did not satisfy item #8.70 of the MRPP then in force to guide WCAT panels in deciding whether to order cross-examination. In particular, the worker did not establish with any detail, either in his notice of appeal or during the hearing, the specific relevance of issues about which Dr. Newman and Dr. Loyer should be cross-examined. By framing his request for cross-examination in only the broadest terms, the worker did not comply with the MRPP.

[103] In addition, the worker did not advise what other means he pursued to obtain the same evidence elsewhere, another factor to consider under the MRPP. As already noted, an obvious alternative source for contradicting Dr. Newman and Dr. Loyer was to simply adduce an opposing medical opinion. Or, as the worker said in submissions, to rely on earlier medical opinions in his favour. Because such reasonable alternative options were open to the worker, the guidance in the MRPP indicates cross-examination of Dr. Newman and Dr. Loyer was unnecessary. Therefore, in the context of the specific MRPP criteria, I find that the original panel's refusal to order cross-examination of Dr. Newman and Dr. Loyer was consistent with the MRPP.

[104] In reaching this conclusion, I am aware that the original panel's reasons for refusing to permit cross-examination were problematic. He appears to have considered the largely irrelevant factor that the worker had not offered to pay for pay for the attendance of Dr. Newman and Dr. Loyer at the hearing. He also suggested he had not relied on their opinions "much" although it is apparent from reading the original decision that the opinions were in fact significant to his reasoning.

[105] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Court pointed out at paragraph 12 that reasons should be read with regard to reasons that could have been offered and the court should not focus unduly on defects in those reasoning. Consequently, notwithstanding the deficiencies in the original decision, other compelling alternate reasons support the original panel's procedural decision and I find he did not err by refusing the worker's request to cross-examine Dr. Newman and Dr. Loyer.

[106] The worker has raised a number of other tangential concerns in relation to the cross-examination issue. I will deal with them briefly. First, the worker argues that the original panel's reasoning in relation to his decision to deny cross-examination was

inadequate and contradictory. The scope for arguing that inadequate reasons form a discrete ground of reviewable error is much reduced or possibly even eliminated since *Newfoundland Nurses' Union*, where Abella J. for the Court held:

> [21] It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. As Professor Philip Bryden has warned, "courts must be careful not to confuse a finding that a tribunal's reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it" ("Standards of Review and Sufficiency of Reasons: Some Practical Considerations" (2006), 19 *C.J.A.L.P.* 191, at p. 217; see also Grant Huscroft, "The Duty of Fairness: From Nicholson to Baker and Beyond", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 115, at p. 136).
>
> [22] It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.

[107] In *Phillips v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2012 BCCA 304, the Court endorsed the view that *Newfoundland Nurses' Union* stands for the proposition that inadequacy of reasons, as long as some are provided, no longer forms an independent ground of review in British Columbia.

[108] In my view, *Newfoundland Nurses' Union* disposes of the worker's argument that the original panel provided inadequate reasoning in relation to the cross-examination issue. For the reasons already described above, procedural fairness did not require cross-examination. Beyond this point, any deficiency in the original panel's reasoning in this regard does not assist the worker.

[109] Second, the worker appears to attack the MRPP then in force as unfair or unreasonable in itself. This argument cannot succeed. The MRPP does not preclude cross-examination of medical advisors and directs, in any event, that regard always be had to the overall fairness of the proceeding. By retaining an emphasis on fair proceedings, I fail to see how the MRPP can be said to be unfair or unreasonable.

[110] In summary, I see no jurisdictional defect in the original decision in relation to the issue of cross-examination.

2. *Procedural Fairness Error – IHP*

[111] The worker argues that he asked the original panel to secure an independent expert medical opinion pursuant to section 249 of the Act. The worker says that the original panel's refusal to take this step was unfair.

[112] In my view, a WCAT panel generally need only access its investigative powers when the panel is not satisfied that the evidence on file is sufficient to answer the question at issue, or where the circumstances otherwise clearly require further investigation.

[113] Indeed, at paragraph 83 of *Schulmeister v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2007 BCSC 1589, Hinkson J. indicated that the WCAT's decision not to access its investigatory powers merits considerable deference and a failure to investigate will only amount to reviewable error if the WCAT failed to investigate "obviously crucial evidence."

[114] In this case, the evidence from the worker's attending physicians and the Board medical advisors was sufficient to permit the original panel to reach a conclusion regarding the worker's entitlement to a functional pension. It may be that more was required in relation to the worker's ability to return to his pre-injury occupation for the purposes of an assessment for a loss of earnings pension; however, as the original decision must be quashed on this point for reasons I will discuss later, I need only consider the IHP issue in the context of the worker's appeal of his entitlement to a functional pension.

[115] Consequently, although it is true that additional investigations might have been helpful, I cannot conclude that an IHP was "obviously crucial" such that the original panel failed to accord the worker procedural fairness when he declined to retain the services of an IHP.

3. Patently Unreasonable Finding of Law: Policy item #40.00 and Jozipovic

[116] It is now apparent from *Jozipovic* that the version of policy item #40.00 that was in force at the time of the original decision is patently unreasonable.[6] The question that arises is whether an otherwise final WCAT decision issued prior to *Jozipovic* should now be overturned on the basis of that case.

[117] In general, it appears to me that the law favours finality over "correctness" for cases that have been finally decided but where a subsequent change in the law calls into question the validity of the earlier, final decision.

[118] An illustration of this point is found in the cases of "constructive murder" convictions under the Criminal Code prior to 1985. The constructive murder provision was ultimately declared unconstitutional. The question then arose as to whether people

[6] The panel understands that the Board has sought leave to appeal to the SCC; however, the BC Court of Appeal decision remains binding at this time.

convicted of constructive murder prior to 1985 could benefit from the later finding of unconstitutionality or whether their convictions remained final. In essence, the Supreme Court of Canada has resolved this question so as to permit people "still in the system" to benefit from a change in the law but so as to maintain the finality of a conviction for a person once he or she has exhausted all appeals and the conviction is final.[7]

[119] Similar concerns prevail in the administrative law setting, as seen, for example in *Johnson v. British Columbia (Workers' Compensation Board)*, 2011, BCCA 255, and *WCAT-2010-01035*, dated April 13, 2010. These cases emphasize the importance of finality as well as the importance of first raising issues before a WCAT panel as a prerequisite to raising that issue on judicial review. In my view, the proper approach is therefore to favour finality, except where a party is "still in the system".

[120] Here, the applicant raised his dispute with policy item #40.00 before the original panel. The applicant also filed a timely judicial review of the original decision and his petition included an argument that policy item #40.00 was patently unreasonable. This is therefore a case where the worker is still "in the system" and may properly benefit from the change in the law following *Jozipovic*.

[121] In these relatively unusual circumstances, I do not consider that the worker is precluded from benefitting from the recent holding in *Jozipovic* that policy item #40.00 is patently unreasonable. This is not a case of a party attempting many years later to overturn an otherwise final WCAT decision in which the validity of policy item #40.00 was never raised and in relation to which a judicial review or reconsideration was not filed in a timely manner.

[122] Moreover, in the current case, if the worker pursues his judicial review on the policy item #40.00 issue, the petition must succeed before the chambers judge because the Court of Appeal decision in *Jozipovic* will bind the chambers judge. It is therefore unlikely, with respect, that there would be any basis for the Court to refuse a remedy on the basis of finality concerns. Consequently, I see little purpose in forcing the worker to expend valuable resources in Court on a matter in which he will almost certainly prevail.

[123] As a result, because the version of policy item #40.00 in force at the time of the original decision was patently unreasonable, I find on the basis of *Jozipovic* that the original panel erred in law by applying that policy. Further, in the unusual circumstances of this reconsideration application, I see no grounds for refusing the worker a remedy in relation to this error.

[124] I therefore void the original decision in relation to the worker's entitlement to a pension calculated on the loss of earnings issue and I direct that this aspect of the worker's appeal be reheard.

[7] See, for example, *Wigman v. The Queen*, [1987] 1 S.C.R. 246, and *R. v. Sarson*, [1996] 2 S.C.R. 223.

4. Patently Unreasonable Exercise of Discretion: Expenses

[125] The worker argues that he should have been provided with reimbursement for his expense of traveling to attend the oral hearing. He also appears to argue that he is entitled to reimbursement for the cost of providing medical opinion evidence.

[126] The decision to award expenses is a discretionary one and is therefore to be measured against the patently unreasonable standard of review, as defined in subsection 58(3) of the ATA. It may also be helpful to note by way of context that in WCAT proceedings expenses are generally understood to be an ancillary matter and reasoning in relation to such issues is brief.[8]

[127] In relation to the travel expense issue, the original panel merely stated that because the worker's appeals failed he was not entitled to reimbursement. Section 7 of the *Workers Compensation Act Appeal Regulation* provides that the WCAT may order the Board to reimburse a party to an appeal for expenses associated with an oral hearing. The MRPP provides guidance to vice chairs in exercising this discretion.

[128] The MRPP in effect at the time provided that the WCAT "generally" reimburses travel expenses where a party is successful. Here, the worker was not successful. The lack of success of the worker was therefore a relevant factor for the original panel to consider in its analysis of this issue and the original panel did not err by referencing the worker's lack of success as the basis for denying reimbursement of travel expenses.

[129] Moreover, although the MRPP does not preclude a WCAT panel from considering other relevant factors in assessing whether to reimburse travel costs, the worker did not put persuasive additional relevant factors to the original panel that he should have considered. The original panel therefore cannot be said to have failed to consider relevant factors.

[130] Finally, I see nothing in the original panel's decision on expenses that reflects bad faith or an improper purpose. Accordingly, although brief, I see no reviewable error in the original panel's finding regarding the ancillary issue of the worker's lack of entitlement to reimbursement for travel expenses.

[131] With respect to reimbursement for medical opinion evidence, it does not appear to me that the worker in fact made any request for such reimbursement. I have listened to the oral hearing and reviewed the appeal record. The worker does not appear to me to have requested reimbursement and I am unable to locate any invoices filed with the original panel during the WCAT proceedings. The worker's submissions to me and his petition to the Court do not identify the medical opinion expense in question. I therefore conclude that it is premature for the worker to argue that the original panel erred in not

[8] See, for example, the former Chair's decision in *WCAT-2010-00928*, dated March 30, 2010, at paragraph 20

reimbursing medical expenses. Rather, the worker should have contacted the WCAT and requested an addendum in relation to the outstanding issue, if any, of reimbursement for medical expenses. As this option remains open to the worker, it follows that the worker's argument regarding the medical expenses issue is premature and therefore not persuasive.

[132] In conclusion, I see no error in relation to the original panel's disposition of the expenses issue.

5. Patently Unreasonable Finding of Fact: Return to Pre-Injury Occupation

[133] My earlier finding in relation to policy item #40.00 makes this aspect of the worker's argument moot as he has already succeeded in voiding the loss of pension assessment portion of the original decision.

6. Patently Unreasonable Finding of Fact: Functional Pension

[134] The worker argues with two aspects of the original decision in relation to his entitlement to a pension calculated on the loss of function basis. First, he says that his neurological hyperesthesia merits an increase in his pension. Second, he says that his chronic pain entitles him to an increase in his pension.

[135] In effect, the worker disputes the original panel's findings of fact in relation to his functional pension. Such findings lie within the WCAT's exclusive jurisdiction. In light of *Kerton v. Workers' Compensation Appeal Tribunal*, 2011 BCCA 7 and *Lavender Co-Operative Housing Association v. Ford*, 2011 BCCA 114, it is therefore the patently unreasonable standard of review that applies to the original panel's factual finding on this point.

[136] For the reasons set out in *WCAT-2010-02878* dated October 28, 2010, with which I agree, the meaning of "patently unreasonable" is conveniently described in *Speckling v. British Columbia (Workers' Compensation Board)* 2005 BCCA 80, as follows:

> [33] Having confirmed the correctness of the patently unreasonable standard of review, I agree with the chambers judge's summary of the approach to be taken in applying that standard. He noted the following principles (at para. 8):
>
> > […]
> >
> > 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.).
>
> […]
>
> 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.).

[137] I also note the statement from Mr. Justice Iacobucci in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paragraph 57:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

[138] With this standard of review in mind, the record need only show some evidentiary basis for the original panel's conclusions in dispute.

[139] In relation to the original panel's finding that the worker had not sustained any measurable neurological injury, I need look no further than Dr. Loyer's opinion. The out-of-province medical examiner also provided sufficient evidence to support the original panel's conclusion that the worker did not demonstrate neurological deficit. I do not say that the original panel's decision was necessarily "correct" or even "reasonable"; however, there was at least some evidence in the record before the original panel supporting his conclusion that, although the worker had neurological symptoms, he had no functional deficit in this regard. Given the deference due to the original panel's factual finding on this point, I see no basis for interfering with this aspect of the original decision.

[140] With respect to the issue of chronic pain, the original panel was similarly entitled to rely on Dr. Loyer's opinion that the worker's reduced range of motion was in part mediated by his pain. The original panel was also entitled to draw the same conclusion from the earlier neurosurgeon report which suggested the worker's range of motion was better than that measured by the out-of-province medical examiner. In my view, it was open to the original panel to conclude that, by recognizing the full extent of the worker's range of motion deficit he was effectively recognizing and incorporating the worker's chronic pain condition. There was evidence before the original panel capable of supporting this conclusion and I therefore see no basis to disturb this aspect of the original decision.

[141] The worker also suggests that the original panel reached a conclusion contrary to *WCAT-2012-00718* and by extension *Jozipovic*. The simple answer to that is that the circumstances in *WCAT-2012-00718* were quite different from those before the original panel. This was not a case where the original panel discounted the worker's demonstrated range of motion deficits in favour of a chronic pain PFI rating. Here, the original panel did not discount the worker's chronic pain; he merely considered that it was proportionate to the level of disability evidenced by his overall reduction in range of motion. The original panel reached this conclusion because of the medical evidence that the worker's range of motion deficit was partly due to his chronic pain. The original panel was entitled to reach this conclusion and I see no reviewable error in this regard.

7. Patently Unreasonable Finding of Fact: Plateau/Stabilization

[142] The worker has provided only a brief submission on this point. He appears to suggest that the original panel erred in his factual finding that the worker's condition revealed little prospect of improvement such that it should be characterized as stabilized. In the alternative, he appears to argue that the original panel was wrong to equate ongoing deterioration with stabilization and therefore erred in law in interpreting this aspect of the RSCM II.

[143] I see no merit to either argument. The worker confuses the day-to-day variations in his symptoms with ongoing change in his underlying compensable injuries. In the absence of more detailed and persuasive argument from the worker on this point I need not address it further.

[144] In conclusion, I allow the worker's reconsideration application, in part, on the grounds of jurisdictional defect. I void the original decision in relation to the worker's entitlement to a pension calculated on the loss of earnings basis. In all other respects, I confirm the original decision and find that it remains final and conclusive pursuant to section 255 of the Act.

Conclusion

[145] I allow in part the worker's application for reconsideration of the original decision on the basis of jurisdictional defect in relation to his entitlement to a pension calculated on the loss of earnings basis. This aspect of the worker's appeal must be reheard.

[146] In all other respects the original decision remains final and conclusive pursuant to section 255 of the Act.

[147] No expenses were requested or apparent and I therefore make no order for the reimbursement of expenses in relation to the worker's reconsideration application.

Warren Hoole
Vice Chair

WH/gl

WCAT Amended Decision Number: **WCAT-2012-02521a**
WCAT Amended Decision Date: **October 16, 2012**
Panel: Warren Hoole, Vice Chair

Amended Decision

[1] In *WCAT-2012-02521*, dated September 27, 2012 I allowed in part the worker's request for reconsideration of *WCAT-2007-01982*.

[2] It has come to my attention that my decision contains a typographical error in relation to the name of one of the Board medical advisors. This error appears in paragraph 90 of page 19. After reviewing the original decision, and based on the statutory authority set out in section 253.1(1) of the *Workers Compensation Act* regarding correction of decisions, I amend paragraph 90 of my decision as follows (deletion struck through and addition underlined).

> [90] Consequently, I suggest that the practical reality of the context within which WCAT proceedings occur further lessens the significance of cross-examination as an effective or helpful method for testing routine medical opinions from Board medical advisors, such as those of Dr. Newman and Dr. ~~Young~~ Loyer in the current case.

Warren Hoole
Vice Chair

WH/pm

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