As of December 18, 2014, this decision is no longer considered by WCAT to be noteworthy.

WCAT Decision Number: WCAT-2013-00473
WCAT Decision Date: February 21, 2013
Panel: Caroline Berkey, Chair
Warren Hoole, Vice Chair
Randy Lane, Vice Chair

Introduction

[1] The worker applies to the Workers' Compensation Appeal Tribunal (WCAT) for reconsideration of *WCAT-2011-01897*, dated July 27, 2011 (the "original decision"). The application proceeded before a three-person WCAT panel pursuant to subsection 238(5) of the *Workers Compensation Act* (Act). We 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 her reconsideration application. We have considered the WCAT's *Manual of Rules of Practice and Procedure* and we 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.

[4] Therefore, in our view, the worker's request for reconsideration of the original decision can be fully and fairly addressed by way of written submissions.

Issue(s)

[5] Is the original decision void because of jurisdictional defect?

Jurisdiction

[6] 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, as set out in the *Manual of Rules of Practice and Procedure*, the WCAT takes the position that it may reconsider an earlier decision in two circumstances. The first circumstance is where new evidence is provided to the WCAT in accordance with section 256 of the Act.

[7] The second circumstance is where a "jurisdictional defect" is evident in the earlier WCAT decision. Subsection 253.1(5) of the Act provides the WCAT with authority to reconsider for jurisdictional defect. The WCAT reviews for jurisdictional defect, in general, on a "one-time only" basis to ensure reasonable finality in WCAT proceedings.

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[8] The WCAT's practice is to interpret "jurisdictional defect" broadly. Such errors include an incorrect assertion of initial jurisdiction, as well as the subsequent loss of an otherwise valid initial jurisdiction because of a breach of fairness, or a finding of fact, law, or discretion that offends the applicable standard of review.

[9] We are aware that the WCAT's practice of reconsidering earlier decisions for this broad range of errors under the rubric of "jurisdictional defect" may now be in question following the recent decision of our Court of Appeal in *Lysohirka v. British Columbia (Workers' Compensation Board)*, 2012 BCCA 457. We therefore consider it helpful to address our reconsideration authority in detail.

[10] In *Lysohirka*, Garson J.A. circumscribed the common law authority of the Review Division to reconsider its own decisions. The Court limited the Review Division's common law reconsideration authority to "true" questions of jurisdiction or breaches of fairness. The Court concluded that the Review Division therefore lacked the common law authority to reconsider an earlier decision on the grounds of an error of fact, law, or discretion that offended the applicable standard of review, but did not otherwise amount to a "true" question of jurisdiction.

[11] Read broadly, *Lysohirka* might suggest that the WCAT too may only hear reconsideration applications where "true" questions of jurisdiction or unfairness are alleged. If this were so, the WCAT could no longer reconsider earlier decisions for errors of fact, law, or discretion that offend the applicable standard of review but are not "true" questions of jurisdiction.

[12] As already noted, such an outcome would be at odds with the WCAT's practice in relation to reconsiderations. The WCAT, and its predecessor the Appeal Division of the Board, conducted reconsiderations for: 1) errors in relation to what the Court in *Lysohirka* described as "true" questions of jurisdiction; 2) procedural unfairness; and 3) findings of fact, law, or discretion that offend the applicable standard of review. It is therefore this third ground of WCAT's reconsideration authority that *Lysohirka* may now call into question.

[13] In our view, *Lysohirka* is not specifically applicable to the WCAT and, without clearer direction from the Courts to the contrary, we would, with respect, decline to apply it here. For the reasons that follow, we conclude that, notwithstanding *Lysohirka*, the WCAT may continue to hear reconsideration applications about whether a finding of fact, law, or discretion offends the applicable standard of review.

[14] We reach this conclusion on the basis of the general common law authority that, where an earlier decision reflects either an original absence of jurisdiction or a subsequent excess of jurisdiction, the original decision is void. This in turn forces a rehearing to properly discharge the statutory obligation to render a valid decision. For convenience, we describe this process as the common law reconsideration authority.

[15] In the alternative, we would conclude that subsection 253.1(5) of the Act specifically permits the WCAT to exercise a broad reconsideration authority in any event. We will address each point in more detail below.

Common Law Reconsideration Authority

[16] The general starting point in relation to any administrative tribunal's common law reconsideration authority is the doctrine of *functus officio* ("a task performed"), which promotes finality and certainty in court proceedings, even where hindsight might reveal an error. In the courts, the proper remedy for an aggrieved party is to appeal rather than to attempt to relitigate the matter before the original judge. If the aggrieved party does not take advantage of its appeal rights, it is bound to accept the earlier decision as final.

[17] Finality is also an important concept for administrative tribunals. Finality permits parties to "move on" and arrange their affairs with certainty once they have received a final decision. Legislators often codify in a tribunal's enabling statute the *functus officio* doctrine. For example, the Act states in subsection 255(1): "[a]ny decision or action of the chair or the appeal tribunal under this Part is final and conclusive...." Finality is therefore an important feature of WCAT proceedings.

[18] However, in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, the Court specifically recognized that finality for administrative tribunals should be applied more flexibly than for courts. The very efficiencies that underlie the ability of administrative tribunals to resolve matters more quickly and with less procedural complexity than courts, serve also to increase the potential for erroneous decisions. It is because of this difference between the judicial and administrative systems of justice that the Court in *Chandler* considered that finality should apply more flexibly to the latter than the former.

[19] Evans J.A. provides a convenient summary of the key principles from *Chandler* in *Nazifpour v. Canada*, 2007 FCA 35:

> (a) *Functus officio* and administrative tribunals
>
> [33] The legal principles governing the jurisdiction of administrative tribunals at large to reopen or rehear a matter already decided were restated in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. Writing for the majority, Sopinka J. made the following three points which are relevant to the broader legal context of the present appeal.
>
> [34] First, an important reason for the application of the *functus officio* rule to administrative tribunals is the public interest in the finality of their proceedings (at page 861).
>
> [35] Second, the rule should not be applied as rigidly to administrative tribunals from which there is a right of appeal only on questions of law as it

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> is to courts from which there is an unrestricted right of appeal. Sopinka J. regarded *Grillas* as a case where the *functus* principle was not strictly applied because of indications in the legislation that a power to reopen was consistent with the Board's mandate to determine appeals on an "equitable" basis (at page 862).
>
> [36] Third, a tribunal may always rehear a matter anew if its original decision was vitiated by an error rendering it a nullity, including a breach of the principles of natural justice which taints the whole proceeding (at pages 862-864). **In other words, a tribunal does not have to wait for a court order setting aside a fatally flawed decision before it rehears the matter afresh and decides it again**.
>
> [our emphasis]

[20] *Chandler* therefore relaxed the *functus officio* doctrine so as to permit a tribunal to revisit an earlier decision in certain circumstances. The particular facts of that case turned on whether the tribunal had the initial jurisdiction to rehear a matter in respect of which it had already issued a flawed decision. The Court concluded the tribunal enjoyed such a rehearing authority because the flawed decision was, in effect, no decision at all, such that the tribunal remained seized of the matter and was obliged to issue a valid decision in respect of it.

[21] The Court also noted in passing that a breach of procedural fairness was another circumstance that would merit relaxation of the *functus officio* doctrine so as to permit a reconsideration. *Chandler* therefore clearly stands for the proposition that administrative tribunals enjoy a common law reconsideration authority. The real question is the extent of that reconsideration authority.

[22] In this regard, we understand that *Chandler* did not expressly address whether the *functus officio* doctrine should also be relaxed where a tribunal falls into an error of fact, law, or discretion that offends the applicable standard of review. However, *Chandler's* silence in this regard is not surprising as it dealt with the consequences of a failure in the initial assumption of jurisdiction rather than an excess of an otherwise valid initial jurisdiction. We therefore take little from the fact that the Court in *Chandler* did not specifically identify errors of fact, law, or discretion contrary to the applicable standard of review as also providing grounds for relaxing the *functus officio* doctrine in order to permit a reconsideration.

[23] Indeed, if the guiding principle behind *Chandler* is that the *functus officio* doctrine should be relaxed so as to permit tribunal correction of serious errors, then surely that principle should apply to all types of jurisdictional error, and not just to the narrower category of error identified in *Lysohirka*. It is illogical to permit reconsideration for an error of fairness, which is simply an excess of jurisdiction rather than a failure of initial jurisdiction, but at the same time to deny reconsideration for other examples of

jurisdictional excess, such as a finding of fact, law, or discretion that offends the applicable standard of review.

[24] We therefore see little qualitative difference between an error of fact, law, or discretion that offends the applicable standard of review and an error of fairness or an error of "true" jurisdiction. All three types of error reflect a tribunal acting outside the legislator's grant of authority and thereby reaching an invalid decision. If it is correct that in the latter two circumstances *Chandler* explicitly relaxes the *functus officio* doctrine, then we see no principled basis to refuse to relax the doctrine for the former type of error. Thus, we do not read *Chandler* itself as intending to limit a tribunal's reconsideration authority to only address errors of fairness or "true" questions of jurisdiction. The *functus officio* doctrine ought not to stand in the way of a tribunal completing its statutory mandate to issue a valid decision.

[25] Nevertheless, in *Lysohirka*, the reasons of the Court might be interpreted to suggest that *Chandler* was only intended to relate to "true" errors of jurisdiction or procedural unfairness. With respect, we would hesitate to adopt such an interpretation of *Lysohirka*. In our view, the Court's narrow view of *Chandler*, as expressed in *Lysohirka,* rests on what appears to us to be a misinterpretation of *Dunsmuir v. New Brunswick* 2008 SCC 9.

[26] In essence, the Court in *Lysohirka* considered that *Dunsmuir* narrowed the circumstances that would permit relaxation of the *functus officio* doctrine and therefore a tribunal's reconsideration authority. However, in our view, *Dunsmuir* did not attempt to define the contours of jurisdictional defect. *Dunsmuir* limited the circumstances in which the correctness standard of review should be applied on judicial review to "true" jurisdictional questions. *Dunsmuir* did nothing to narrow the circumstances where, once the applicable standard of review was breached, a jurisdictional defect would result, such that the original decision was void.

[27] We therefore have difficulty understanding the conclusion of the Court in *Lysohirka* that *Dunsmuir* modifies or interprets the common law reconsideration authority originally described in *Chandler*. In our view, *Dunsmuir* does not attempt to define the contours of what amounts to a jurisdictional error for the purposes of relaxing the *functus officio* doctrine. The Court's use of *Dunsmuir* to support its reasoning in *Lysohirka* therefore suggests to us, with respect, that *Lysohirka* should be approached with some caution with respect to WCAT proceedings. We therefore query whether *Lysohirka* is a compelling authority upon which to restrict the WCAT's common law reconsideration authority.

[28] In our view, the common law, as reflected in *Chandler*, likely already provides the WCAT with sufficient authority to reconsider its decisions not only for fairness and "true" questions of jurisdiction, but also for errors of fact, law, or discretion that offend the applicable standard of review.

Statutory Reconsideration Authority

[29] We need not rely exclusively on *Chandler* for our conclusion that the WCAT has the necessary authority to reconsider an earlier decision not only for a "true" error of jurisdiction or unfairness, but also for errors of fact, law, or discretion that offend the applicable standard of review. As already mentioned, the Legislature has not left the WCAT's reconsideration authority to be assessed only in relation to the common law. In this regard, subsection 253.1(5) of the Act states:

> **Amendment to final decision**
> 253.1 (1) ...
>
> (5) This section must not be construed as limiting the appeal tribunal's ability, on request of a party, to reopen an appeal in order to cure a jurisdictional defect.

[30] The enactment of subsection 253.1(5) appears to us to be consistent with the *2002 Core Services Review of the Workers' Compensation Board* in which Alan Winter recommended the following at pages 61 and 62:

> Returning to the topic of a reconsideration based upon an error of law "going to jurisdiction", such an error would occur when the tribunal acts outside of its jurisdiction – i.e: it's [*sic*] action is *ultra vires*. Errors of law going to jurisdiction would include:
>
> (i) exercising an authority which the tribunal has no power to do under its enabling legislation;
>
> (ii) **making a "patently unreasonable" interpretation of the provisions in the statute**;
>
> (iii) **making a "patently unreasonable" finding of fact (such as when the finding is not supported by any evidence)**;
>
> (iv) **basing a decision on irrelevant considerations**; and
>
> (v) breaching the rules of natural justice.
>
> [our emphasis]

[31] Although not promulgated in direct response to the Winter Report, the Legislature's subsequent enactment of subsection 253.1(5) suggests that the Legislature nevertheless agreed with Mr. Winter's view that the WCAT should correct errors of fact, law, and discretion that offend the applicable standard of review. Consequently, we interpret the phrase "jurisdictional defect" for the purposes of subsection 253.1(5) of the Act as incorporating the various features that Mr. Winter ascribed to that phrase, including errors of law or fact that offend the applicable privative clause.

[32] We consider that the Legislature's intent is best understood in light of the settled law at the time of the amendments to the Act that brought subsection 253.1(5) into force. At that time, there was little dispute that an error of fact or law outside the privative clause reflected an excess of authority and thus a jurisdictional defect. For example, in *Greater Victoria Hospital Society v. Parton*, [1993] B.C.J. No. 305 (S.C.), Shaw J. provides a convenient summary of what constitutes jurisdictional error, or defect, as follows:

> [31] **Jurisdictional error is committed if the tribunal's findings, either in fact or in law, are patently unreasonable.** In *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)* (1990), 74 D.L.R. (4th) 449 (S.C.C.) Gonthier J. for the majority said at p.481:
>
> > "...it is to be remembered that courts, in the presence of a privative clause, will only interfere with the findings of a specialized tribunal where it is found that the decision of that tribunal cannot be sustained on any reasonable interpretation of the facts or of the law."
>
> And further at p.482:
>
> > "In this particular case, s.76 of SIMA [*Special Import Measures Act*] provides that the tribunal's decision, with certain limited exceptions, is final and conclusive. Given this provision, this court, therefore, will only interfere with the tribunal's ruling if it acted outside the scope of its mandate by reason of its conclusions being patently unreasonable."
>
> [32] **Jurisdictional error may also occur if the tribunal's finding of an essential fact is made without any supporting evidence**: *Re Keeprite Workers' Independent Union and Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.); *Cadillac Fairview Corp. Ltd. v. Retail, Wholesale & Department Store Union* (1989), 71 O.R. (2d) (Ont. C.A.).; *United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry, Local 740 v. W.O. Lester (1978) Ltd.*, [1990] 3 S.C.R. 644 at 669 and 687-8.
>
> [our emphasis]

[33] In the specific context of workers' compensation the Court stated in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890:

> 16 […]. If the conclusion is that a full privative clause applies, then the decision of the tribunal is only reviewable if it is patently unreasonable or the tribunal has made an error in the interpretation of a legislative

> provision limiting the tribunal's powers. **In either circumstance the tribunal will have exceeded its jurisdiction**.
>
> [our emphasis]

[34] These references suggest that, at the time of enacting subsection 253.1(5) of the Act, the notion of jurisdictional error was not limited to "true" questions of jurisdiction and unfairness. Indeed, it was not until well after the enactment of subsection 253.1(5) of the Act that the concept of a "true" question of jurisdiction developed. Even then, that principle relates to selecting a standard of review and not to defining the contours of jurisdictional error.

[35] In our view, therefore, at the time of enacting subsection 253.1(5) of the Act, the Legislature understood that jurisdictional error included both initial failures of jurisdiction as well as subsequent excesses of jurisdiction by a tribunal.[1] We see no reason to interpret this accepted formulation of jurisdictional error as being different from "jurisdictional defect" for the purposes of subsection 253.1(5) at the time of its enactment. We would therefore conclude that subsection 253.1(5) of the Act was intended to authorize the WCAT to conduct reconsiderations for errors of fact, law, or discretion that offend the applicable standard of review.

[36] Indeed, such an interpretation appears to be consistent with the several instances where our Court of Appeal has addressed WCAT reconsideration decisions without raising concerns about the WCAT's reconsideration authority. For example, in *Manz v. Sundher*, 2009 BCCA 92, Saunders J.A. stated at paragraph 48:

> [48] Last, I should add this postscript. The standard of review as between the two Tribunal decisions came into question before us. The *Administrative Tribunals Act* does not apply to internal reviews, and application of common law would suggest the *Dunsmuir* "reasonableness" analysis is required. The Tribunal here applied the patently unreasonable standard of review, the same standard required on review of both decisions in court. **There is a solid practicality in the Tribunal reviewing the first decision on the same standard as used in court**. However, here the question makes no difference because the result on review of the first decision will necessarily determine the fate of the second decision, they having been to the same result. It is for that reason I will say no more on this issue, and leave it for determination on another case in which the question has practical consequences.
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> [our emphasis]

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[1] Another case supporting this conclusion in the particular context of reconsideration in the workers' compensation system is: *Clarke v. Newfoundland (Workers' Compensation Commission)*, [1998] N.J. No. 254 (T.D.).

[37] We understand that Saunders J.A.'s comments are *obiter dicta* and were directed at the standard of review the WCAT reconsideration panel applied when assessing an earlier panel's finding of fact. However, if the WCAT reconsideration process was not permitted to address erroneous findings of fact at all, surely Saunders J.A. would not have agreed with the WCAT's selection of a standard of review for assessing such questions.

[38] Put another way, if the WCAT reconsideration panel in *Manz* lacked the authority to reconsider the earlier panel's decision for patently unreasonable fact finding in the first place, the standard of review used to evaluate such an error would be irrelevant. We therefore suggest that *Manz* implicitly endorses our view that the WCAT's reconsideration authority includes review for errors of fact, law, or discretion that offend the applicable standard of review and not merely for breaches of fairness or "true" questions of jurisdiction.

[39] Finally, in looking to the purposes of the Act generally and to the specific context of subsection 253.1(5), we agree that there is "solid practicality" in permitting the WCAT to exercise a reconsideration authority that is generally intended to cover the same types of error as may be raised on judicial review.

[40] First, WCAT reconsiderations are usually less expensive and speedier than judicial review. It would be inconsistent with the general purposes of efficiency and timeliness that inform much of the Act to force a party to pursue a judicial review to correct an error that, at least in many cases, the WCAT reconsideration process would likely cure at far less cost. This is particularly so given that many applicants for reconsideration are unrepresented and would find the complexities and cost of judicial review such as to effectively bar them from correcting the type of errors that inevitably arise from time to time in decisions of a high-volume tribunal such as the WCAT.

[41] Further, there is no "downside" to the "upside" of permitting parties to access the speedy and inexpensive option of a WCAT reconsideration. There is nothing in the Act requiring a party to file a reconsideration application in order to exhaust his or her internal remedies before proceeding to judicial review for jurisdictional error. If a party prefers to go straight to court, he or she is free to do so. Parties requesting a WCAT reconsideration are there by choice, not obligation under the Act.

[42] Moreover, a WCAT reconsideration decision is not entitled to any deference. The notion of identifying jurisdictional defect is not a subject matter within the "exclusive" jurisdiction of the WCAT so as to attract deference under the *Administrative Tribunals Act*. Even if that were not so, constitutional imperatives would demand a correctness review.[2] A party is therefore not disadvantaged if it decides to proceed with a judicial review even if it has been unsuccessful before a WCAT reconsideration panel. The

[2] See, for example, *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714; and *Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220

WCAT reconsideration authority therefore permits the tribunal to correct its own errors while still leaving constitutionally appropriate supervisory authority with the Courts.

[43] Second, even if *Lysohirka* is applicable to the WCAT, the WCAT would still retain a reconsideration authority to correct "true" errors of jurisdiction or instances of procedural unfairness. By exercising only the stunted reconsideration authority suggested in *Lysohirka*, the WCAT will be required to ignore obvious errors of fact, law, or discretion that offend the applicable standard of review.

[44] Surely the latter type of error, at base, is as objectionable as denying procedural fairness. Both would reflect a WCAT action that the Legislature did not intend the privative clause to protect and both should therefore be as amenable to correction on an application for reconsideration as the other.

[45] Indeed, we note that, if it is true that a patently unreasonable finding of fact or law, or exercise of discretion, did not amount to a jurisdictional error, then the reasoning in *Lysohirka* might be interpreted to have the unintended consequence of depriving the Courts of the ability to hear judicial reviews of such alleged errors. That outcome is clearly inconsistent with *Crevier*, *supra*, and would be constitutionally faulty, such that we do not interpret *Lysohirka* as intending to limit the scope of what amounts to jurisdictional error or defect.

[46] Third, and on a related point, parties will likely be forced into framing what are really substantive standard of review issues as procedural fairness issues, or "true" questions of jurisdiction in order to pursue the quicker and cheaper option of a reconsideration application, even in the face of a clearly erroneous finding of fact, law, or discretion. The resulting confusion will merely complicate the reconsideration process to no purpose. Such an outcome is, in our view, best avoided by simply permitting the WCAT reconsideration process to continue in the same manner as prior to *Lysohirka*.

[47] Finally, we note that the WCAT reconsideration process is of benefit to the Courts. In light of the scarce judicial resources and the added time requirements frequently associated with unrepresented litigants, often the case in WCAT judicial reviews, the WCAT reconsideration process substantially reduces the burden on the Courts. We note from the WCAT's 2011 annual report that 90 reconsideration applications were issued that year, 23 of which were allowed on the basis of jurisdictional error. Therefore, the WCAT reconsideration process not only assists a party to remedy an error more quickly and easily, the process also saves the Courts the extra workload of dealing with these matters.

[48] These additional points support our view that subsection 253.1(5) of the Act authorizes the WCAT to conduct reconsiderations for findings of fact, law, or discretion that offend the applicable standard of review. In short, we would suggest that the WCAT's historical approach to its reconsideration authority is a sensible practice that should not be discontinued without clear direction from the Courts.

[49] We doubt that *Lysohirka* provides such clear direction and, with respect, we therefore would not extend its application to the WCAT. We find that the WCAT retains the necessary authority to correct earlier WCAT decisions that involve errors of "true" jurisdiction and unfairness, as well as errors of fact, law, or discretion that offend the applicable standard of review. To the extent that *Lysohirka* might be said to have eliminated this third ground of reconsideration, we would limit its application to the Review Division.

[50] Having concluded that we have the necessary jurisdiction to hear the current reconsideration application, we turn now to consider the substance of the worker's application.

Background

[51] The worker is a Court clerk. Her employer filed a report of injury on March 3, 2010 with the Workers' Compensation Board (Board)[3], indicating that the worker developed right neck and shoulder pain on February 25, 2010. The employer objected to the worker's claim for compensation on the grounds that her injury was not work related.

[52] The worker attended Dr. Naaykens, her family physician, on May 12, 2010. Dr. Naaykens diagnosed the worker with a chronic right trapezius strain and stated:

> This young woman works as a court reporter. She is developed problems in her neck for some time. Some attempts have been made to mitigate this by adjustment of her workstation. The pain has gotten to the point where she cannot cope with it on examination, she moves his shoulder well, but is quite tender over the right trapezius muscle. Neck range of motion is reasonable. Impression, soft tissue pain….
>
> [excerpts reproduced as written]

[53] A Board officer spoke with the worker by telephone on May 13, 2010. The Board officer summarized this conversation, in relevant part, as follows:

> She started with the [employer] in June 2008 and on June 26, 2008 she said this was her initial onset of injury – neck/shoulder/back pain that she relates immediately to sitting at a poorly designed work station.
>
> She said she emailed her boss at that time […] and verbally complained on/off after the initial onset. She said the 1st email clearly outlined what her issue was and that she needed a better work desk/set up. Nothing was done. No medical attention received at that time.

[3] The Board operates as WorkSafeBC.

> Her condition persisted so she sent a further email February 10, 2009 […] again explaining her condition and work related issue.
>
> Her first medical examination by a qualified doctor was not until March 2009 (Dr. L'Esperance) and said she delayed because she didn't think there was much they would suggest. She said they did exactly what she expected which was a recommendation for massage therapy. She went for a couple of treatments but didn't get much relief and it was costly so she stopped going.
>
> No other medical attention between March 2009 and May 2010. I asked her why not and she said she was giving up and not feeling like there was any point as nothing was helping.
>
> […]
>
> I asked her why she feels the ergonomics of her work stations (courtrooms) are the cause for her ongoing condition? She said the desks are 1960's too low which makes for poor posturing while having to sit for full days in court – she only gets about a 15 min break between court sessions at best she said.
>
> She said her condition is on/off since June 26, 2008 with breaks in-between flare-ups. Sometimes the flare-ups can last up to 5 days. No prior time loss as result.
>
> She said the employer has made some improvements – new chairs but it hasn't helped and there is a courtroom with a new desk set up which she has tried but it didn't make any difference to her symptoms.

[54] In a May 18, 2010 progress report, Dr. Naaykens again diagnosed the worker with a right trapezius strain and indicated that after attending physiotherapy the worker was feeling improvement. Dr. Naaykens recommended a graduated return to work.

[55] The Board secured Dr. L'Esperance's chart notes for the worker. In an entry dated March 26, 2009, Dr. L'Esperance noted that the worker had been experiencing right shoulder pain for about seven months at that time. The worker attributed this pain to poor ergonomic conditions at work.

[56] The worker provided a further description of her circumstances in a letter to the Board dated May 18, 2010. The worker also provided copies of several e-mail communications with her employer describing her pain symptoms and informing the employer that the symptoms were related to poor ergonomics in the courtroom.

[57] In a May 27, 2010 progress report, Dr. Naaykens indicated that the worker was slowly improving with physiotherapy. Dr. Naaykens recommended that the worker spend only about half of her working day in court due to the ergonomic issues with her workstation there.

[58] The Board completed its adjudication of the worker's claim on June 3, 2010. The Board concluded that it would be speculative to relate the worker's symptoms of right shoulder pain to her employment. The Board therefore denied the worker's claim for compensation.

[59] The worker disagreed with the Board's decision and requested a review. In *Review Decision #R0118649*, dated November 25, 2010, a review officer confirmed the Board's decision.

[60] The worker appealed to the WCAT. In the course of the WCAT proceedings, the worker provided additional written descriptions of her job duties and the development of her symptoms. In addition, the worker filed a February 13, 2011 opinion from Ms. Edwards, an occupational therapist, as to the worker's exposure to occupational risk factors and as to whether these risk factors were likely of causative significance to the worker's right shoulder condition. Of particular relevance, Ms. Edwards opined:

> [The worker] was placed in a situation at work where, when seated to carry out hand writing notes in [a courtroom]:
>
> 1. Her lumbar and thoracic spine were continually unsupported;
> 2. Undue pressure was placed on her posterior thighs;
> 3. Her right arm/shoulder was overstretched in a forward flexion position for prolonged periods of time in an attempt to write at a tall desk while sitting on a chair which was not tall enough; and
> 4. No rest breaks were provided in order to return to neutral posture or carry out stretching exercises.
>
> ***Opinion***
>
> It is this therapist's opinion, based upon the documentation reviewed, a verbal account from [the worker], and my own analysis of the work environment that [the worker's] injury was caused by awkward static posturing in her duties as a court clerk in [a courtroom]. This is also supported by the fact that when she discontinued this specific work her symptoms have mostly resolved with just a residual pain in her right scapula area.

[61] Following an oral hearing, the original panel issued the decision that is the subject of the current reconsideration application.

Submissions

[62] The worker has filed lengthy submissions; in light of our disposition of this reconsideration application, we do not consider it necessary to set out those arguments in detail.

Reasons and Findings

[63] As already noted, 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.

[64] 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 its exercise of discretion, fall within a range of permissible outcomes.

[65] In our view, the original decision reflects a patently unreasonable error of fact that amounts to a jurisdictional defect. The error of fact in question relates to the original panel's conclusion that the worker was not exposed to activities at work that would be capable of causing her right trapezius strain. On this point, the original panel stated at paragraph 56:

> **The** worker's **description of her work duties, and the analysis by the ergonomist, do not reveal any activity which would cause a strain injury to the shoulder.** The main aggravating activity seems to have been reaching forward to write on a desk that might have been too far away, and passing files up to the judge. Passing files to the judge occurred quite often, but the motion was not particularly awkward, being at about shoulder level, and was not particularly repetitive, being about 230 movements in her work day. The files were not heavy. **There is an absence of activity which would stress the trapezius more than normal activities of daily living**.
>
> [our emphasis]

[66] By referring to "activities" capable of causing injury, particularly in light of the long-term development of the worker's symptoms, we interpret the original panel as finding that she was not exposed to any occupational risk factors capable of causing her shoulder condition. In our view, because this finding has no rational support in the record before the original panel, it is patently unreasonable and thus demonstrates a jurisdictional defect in the original decision. The test for jurisdictional defect is set out in *WCAT-2009-02136*, dated August 13, 2009, with which we agree. In that decision, the panel reasoned that subsection 58(2) of the *Administrative Tribunals Act* describes the

circumstances in which an error of fact will amount to jurisdictional defect for the purposes of a WCAT reconsideration 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.
>
> (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,

[67] It is therefore apparent that where, as here, a finding of fact falls within the WCAT's exclusive jurisdiction, that finding of fact will only amount to jurisdictional defect where it is "patently unreasonable".[4]

[68] For the reasons set out in *WCAT-2010-02878*, dated October 28, 2010, with which we also 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*

[4] We find further support for selecting the patently unreasonable standard of review in *Kerton v. Workers' Compensation Appeal Tribunal*, 2011 BCCA 7 and *Lavender Co-Operative Housing Association v. Ford*, 2011 BCCA 114.

> *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.).

[69] We also note the following 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.

[70] It is therefore apparent that the original panel's finding of fact, because it was within the WCAT's exclusive jurisdiction, is not to be lightly disturbed. The record need only show some rational basis for the original panel's conclusion that there was an absence of an occupational activity capable of causing a right trapezius strain.

[71] However, here, the only expert evidence as to the worker's exposure to occupational risk factors involving her shoulder was provided by Ms. Edwards, the occupational therapist. Although it is true that Ms. Edwards cannot opine with expertise directly on the medical question of causation, her expertise permits her to identify work activities that increase the risk of injury. In this regard, Ms. Edwards specifically noted that the worker sat for prolonged periods with her right shoulder and arm "overstretched in a forward flexion position" while writing at her desk. The reason for this overstretching was a tall desk and a low chair.

[72] It is therefore apparent that the record reveals at least one work activity capable of stressing the worker's trapezius. The original panel's contrary assertion at paragraph 56 that there is "an absence" of such occupational risk factors therefore not only lacks any foundation in the expert opinion evidence, it is directly contrary to the only expert opinion directly on this point. There is no basis in the evidence or policy to support the conclusion that holding a shoulder in an extended posture for prolonged periods is not a significant risk factor.

[73] The original panel provided a reasonable explanation for why passing files up to the judge did not amount to a significant risk factor, his finding in this regard is supported by the policy, which suggests that such activities must be repetitive and form a substantial portion of a work day. It was therefore open for the original panel to discount Ms. Edwards' opinion in relation to passing material to the judge as a risk factor. However, the same cannot be said for the prolonged extension, which the original panel did not discuss and which the policy framework in fact identifies as a significant potential risk factor for the development of a shoulder injury.

[74] Consequently, in our view, the original panel's finding that the worker was not exposed to any occupational risk factors finds no rational support in the record because it disregards the evidence that she was exposed to prolonged postures involving shoulder extension.

[75] The original panel may have been distracted by his view that Ms. Edwards could not opine specifically on the medical question of causation, with the result that the original panel also discounted the aspect of her opinion identifying shoulder extension as an occupational risk factor. However, it was within Ms. Edward's expertise to identify occupational risk factors and she did so. The original panel did not otherwise disagree with the shoulder extension risk factor and provided no other explanation for why this evidence should be ignored.

[76] Moreover, we see nothing in the record before the original panel or in the applicable policy that was capable of contradicting Ms. Edwards' opinion regarding prolonged overstretching of the worker's right shoulder. Indeed, an earlier report from another ergonomist recommended that the worker try to sit closer to her desk to avoid stretching with her right arm, further supporting the presence of this occupational risk factor.

[77] Against this evidentiary record, we conclude that the original panel reached a patently unreasonable finding of fact by concluding that there was "an absence" of occupational risk factors in the worker's circumstances. We further find that the original panel's patently unreasonable finding of fact related to such a central issue as to taint the entirety of the original decision and thereby fall into jurisdictional error. We must therefore void the original decision.

[78] We note that our conclusion is not intended to suggest that the worker's appeal should or should not be accepted. We merely say that the question of causation must be determined in light of valid factual findings on key issues such as the worker's occupational exposure to factors capable of causing her injury. It remains for the rehearing panel to weigh the evidence afresh and reach its own conclusion as to the causation issue.

[79] In light of our conclusion, we need not address the worker's argument regarding her entitlement to reimbursement for the expense of providing Ms. Edwards' opinion in support of her appeal. As the worker's appeal must be reheard, we consider that reimbursement for Ms. Edwards' opinion is better left to the rehearing panel.

[80] As a result, we allow the worker's application for reconsideration of the original decision on the basis of jurisdictional defect.

Conclusion

[81] We allow the worker's application for reconsideration of the original decision on the basis of jurisdictional defect and we void the original decision. The WCAT Registry will contact the parties regarding further processing of the appeal rehearing.

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

Caroline Berkey
Chair

Warren Hoole
Vice Chair

Randy Lane
Vice Chair

WH/gw