Decision of the Workers' Compensation Appeal Tribunal

Number: 2004-04928
Date: September 22, 2004
Panel: Herb Morton, Vice Chair
Subject: Reconsideration Application — Whether WCAT Has Jurisdiction to Set Aside an Appeal Division Decision on the Basis of the Common Law Ground of an Error of Law Going to Jurisdiction

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Introduction

The employer requests reconsideration of Appeal Division Decision #2003-0551 dated April 17, 2003. The Appeal Division panel concluded that:

- the worker's right shoulder impingement syndrome prior to October 16, 2000 was not caused by a workplace injury in 1984, or 1987, and was not an occupational disease due to the nature of her employment;
- the worker's pre-existing and non-compensable right shoulder impingement syndrome was aggravated by her work duties to the point of causing a rotator cuff tear; and,
- the worker's disability resulting from her rotator cuff tear is compensable under section 6(1) of the *Workers Compensation Act* (Act), as an aggravation of a pre-existing disease.

The employer's application is presented by the employers' adviser. A written submission was provided by the employers' adviser on September 22, 2003. On April 29, 2004, an appeal coordinator provided the employers' adviser with additional information concerning the grounds for reconsideration. By letter of May 13, 2004, the employers' adviser confirmed that their submissions were complete. The employers' adviser requests reconsideration of the Appeal Division decision on the common law ground of an error of law going to jurisdiction. Although invited to do so, the worker is not participating in this application.

Issue(s)

A preliminary question arises as to whether WCAT has jurisdiction to set aside an Appeal Division decision on the basis of the common law ground of an error of law going to jurisdiction. If so, the issue is whether such grounds are established in this case.

Jurisdiction

Section 96.1 of the former Act defined the authority of the Appeal Division to reconsider a decision on the basis of new evidence. The authority of the Appeal Division to set aside one of its own decisions on the basis of the common law ground of an error of law going to jurisdiction

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was confirmed by the British Columbia Court of Appeal in the August 27, 2003 decision in *Powell Estate* v. *BC (WCB)*, (2003) BCCA 470, [2003] BCJ No. 1985, (2003) 186 BCAC 83.

On March 3, 2003, the workers' compensation appeal structures were altered by changes to the Act contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). The Appeal Division and the Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT).

In paragraph 28 of WCAT Decision #1, "Delegation by the Chair," March 3, 2003, the chair delegated the authority to WCAT members (upon assignment of the application to the member by the chair):

> (a) under section 256, to refer a WCAT or Appeal Division decision to WCAT for reconsideration, and,
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> (b) where such authority exists at common law, the authority to set aside a decision as void or to find that a decision is incomplete, and to return the matter to WCAT for completion of the decision.

This delegation was confirmed in WCAT Decision #6, "Delegation by the Chair," June 1, 2004, at paragraphs 26 and 31. This application has been assigned to me by the chair.

Legislation

Appeal Division Decision #2003-0551 was issued on April 17, 2003, pursuant to section 39(4) and (5) of Bill 63's transitional provisions which provide:

> (4) If, in a proceeding pending before the appeal division on the transition date, the appeal division has
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> (a) completed an oral hearing, or
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> (b) received final written submissions and begun its deliberations,
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> the appeal division must continue and complete those proceedings, acting with the same power and authority that the appeal division had under the Act before the provisions of the Act granting that power and authority were repealed by the amending Act.
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> (5) The appointments of the appeal commissioners who are sitting on proceedings described in subsection (4) are continued until those proceedings are completed.

Section 256 of the Act, as amended by Bill 63, currently provides:

> **256** (1) This section applies to a decision in
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> (a) a completed appeal by the appeal tribunal under this Part or under Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002*, and

(b) a completed appeal by the appeal division under a former enactment or under Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002.*

(2) A party to a completed appeal may apply to the chair for reconsideration of the decision in that appeal if new evidence has become available or been discovered.

(3) On receipt of an application under subsection (2), the chair may refer the decision to the appeal tribunal for reconsideration if the chair is satisfied that the evidence referred to in the application

(a) is substantial and material to the decision, and

(b) did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

(4) Each party to a completed appeal may apply for reconsideration of a decision under this section on one occasion only.

Grounds for Reconsideration — Appeal Division Practice

Appeal Division Decision #33, Appeal Division Practice and Procedure Decision, is published in Volume 17 of the *Workers' Compensation Reporter*. Decision #33 consolidated and replaced prior Appeal Division practice and procedure decisions, effective September 1, 2001. Item #12.2, *Reconsideration on Common Law Grounds*, provided as follows:

(a) Scope of Reconsideration on Common Law Grounds

The chief appeal commissioner has authority to reconsider Appeal Division decisions on the basis of clerical mistakes or omissions, fraud, or an error of law "going to jurisdiction" including a breach of the rules of natural justice. This authority is based upon general common law principles (please see Decision #93-0740, *Right to Reconsider Appeal Division Decisions,* 10 *Workers' Compensation Reporter* 127).

Several published Appeal Division decisions consider how this ground is applicable to the reconsideration of Appeal Division decisions. Comments include:

- the weighing of evidence is generally not a reviewable matter in the reconsideration process. (Decision #96-1627, 14 *Workers' Compensation Reporter* 5 at p. 7)

- a patently unreasonable finding of fact can amount to an error of law going to jurisdiction, and that patently unreasonable finding of fact includes a finding of fact that is not supported by *any* evidence. (Decision #96-1627, 14 *Workers' Compensation Reporter* 5 at p. 6)

- the grounds for reconsideration are strict and the reconsideration process cannot be used simply to continue arguments or strengthen an unsuccessful case. (Decision #96-1628, 14 *Workers' Compensation Reporter* 9 at p. 9)

All Appeal Division decisions may be reconsidered on the common law grounds of mistake, fraud or error of law "going to jurisdiction," including a breach of natural justice.

Appeal Division Decision #96-1627 (14 *Workers' Compensation Reporter* 5 at 6) further explained:

> Appeal division decisions are "final and conclusive" and can only be reconsidered on very limited grounds. These grounds are new evidence as set out in s. 96.1 of the Act, an "error of law going to jurisdiction" (including breaches of the rules of natural justice), clerical mistakes or omissions, and fraud. A patently unreasonable interpretation (or application) of the Act amounts to an "error of law going to jurisdiction". The phrase "patently unreasonable" indicates the degree of magnitude of the error that would justify setting aside a decision. A decision may not be set aside simply because there is another preferable interpretation of the relevant statutory provision nor even because its interpretation of the Act is flawed. For it to be set aside, the decision must involve an interpretation that is not viable, in light of the legislative text. I note that the phrase "patently unreasonable" may also be used with reference to a finding of fact. A "patently unreasonable" finding of fact (such as a finding that is not supported by any evidence) would also amount to "an error of law going to jurisdiction".

Analysis

A. Preliminary Issue: Scope of WCAT's Authority

A preliminary issue arises as to whether WCAT has authority to reconsider an Appeal Division decision on the basis of the common law ground of an error of law going to jurisdiction. As noted above, the British Columbia Court of Appeal found in the case of *Powell Estate* v. *BC (WCB)* that the Appeal Division had such authority. WCAT has found that it similarly has such authority to remedy jurisdictional error in respect of WCAT decisions (see *MRPP* item #15.24 and WCAT Decision #2004-03571). The question arises, however, whether WCAT has such authority in respect of decisions of the former Appeal Division.

The phrase "where such authority exists at common law" in the delegation decision, leaves open the issue as to whether WCAT has authority to consider an application (filed on or after March 3, 2003) for reconsideration of an Appeal Division decision on the basis of the common law ground of an error of law going to jurisdiction. This issue has not been previously determined by WCAT. This question is not addressed in *MRPP* items #15.20 to #15.24.

The leading decision concerning an administrative tribunal's authority at common law to correct its own jurisdictional error is the Supreme Court of Canada decision in *Chandler* v. *Alberta Association of Architects*, [1989] 2 SCR 848, (1989) 62 DLR (4th) 577, [1989] 6 WWR 521, (1989) 40 Admin. LR 128. The majority considered the application of the principle of *functus officio* to decisions of administrative tribunals as follows:

The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. where there had been a slip in drawing it up, and,

2. where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd.* v. *J. O. Ross Engineering Corp.*, [1934] SCR 186.

In *Grillas* v. *Minister of Manpower and Immigration*, [1972] SCR 577, Martland J., speaking for himself and Laskin J., opined that the same reasoning did not apply to the Immigration Appeal Board from which there was no appeal except on a question of law. Although this was a dissenting judgment, only Pigeon J. of the five judges who heard the case disagreed with this view. At p. 589 Martland J. stated:

> The same reasoning does not apply to the decisions of the Board, from which there is no appeal, save on a question of law. There is no appeal by way of a rehearing.
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> In *R.* v. *Development Appeal Board, Ex p. Canadian Industries Ltd.*, the Appellate Division of the Supreme Court of Alberta was of the view that the Alberta Legislature had recognized the application of the restriction stated in the *St. Nazaire Company* case to administrative boards, in that express provision for rehearing was made in the statutes creating some provincial boards, whereas, in the case of the Development Appeal Board in question, no such provision had been made. The Court goes on to note that one of the purposes in setting up these boards is to provide speedy determination of administrative problems.

He went on to find in the language of the statute an intention to enable the Board to hear further evidence in certain circumstances although a final decision had been made.

I do not understand Martland J. to go so far as to hold that functus officio has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd.* v. *J. O. Ross Engineering Corp.*, supra.

To this extent, the principle of functus officio applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas*, supra.

Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. . . .

In this appeal we are concerned with the failure of the Board to dispose of the matter before it in a manner permitted by the *Architects Act*. The Board intended to make a final disposition but that disposition is a nullity. It amounts to no disposition at all in law. Traditionally, a tribunal, which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision. In *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 DLR (3d) 637 (BCSC), McLachlin J. (as she then was) summarized the law in this respect in the following passage, at p. 643:

> I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision: *Lange* v. *Board of School Trustees of School District No. 42* (Maple Ridge) (1978), 9 BCLR 232 (BCSC); *Posluns v. Toronto Stock Exchange et al*. (1968), 67 DLR (2d) 165, [1968] SCR 330. In the latter case, the Supreme Court of Canada quoted from Lord Reid's reasons for judgment in *Ridge* v. *Baldwin*, [1964] AC 40 at p. 79, where he said:
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> > I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present its case, then its later decision will be valid.
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> There is no complaint made by Trizec Equities Ltd. with respect to the hearing held on March 19th. Accordingly, while the court exceeded its jurisdiction by purporting to increase the assessments on the morning of March 17, 1982, its subsequent decision of March 19, 1982, stands as valid.

> If the error which renders the decision a nullity is one that taints the whole proceeding, then the tribunal must start afresh. Cases such as *Ridge* v. *Baldwin*, [1964] AC 40 (HL); *Lange* v. *Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 BCLR 232 (SCBC) and *Posluns* v. *Toronto Stock Exchange*, [1968] SCR 330, referred to above, are in this category. They involve a denial of natural justice which vitiated the whole proceeding. The tribunal was bound to start afresh in order to cure the defect.
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> [emphasis added]

Where a tribunal's decision is found to have involved an error of law going to jurisdiction, the decision (or impugned portion) must be viewed as a nullity. The appellant is entitled to receive a disposition on a proper basis. Accordingly, the original proceeding may be viewed as incomplete.

While WCAT may be regarded as having replaced the former Appeal Division and the Review Board based on the statutory changes contained in Bill 63, it does not automatically follow that WCAT has authority to reconsider Appeal Division decisions at common law. In the *Powell Estate* decision, supra, the British Columbia Court of Appeal dealt with the Appeal Division's jurisdiction at common law to reconsider its own decision, rather than a decision of another body or tribunal. The Court of Appeal reasoned:

> Jurisdiction of the Appeal Division to Reconsider its Own Decision
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> 17 The first question is whether a panel of the Appeal Division has jurisdiction to determine that a decision of another panel of the Appeal Division was a nullity as being made beyond its jurisdiction: *Chandler* v. *Alta. Assoc. of Architects*, [1989] 2 SCR 848, citing with approval *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 22 MPLR 318, 147 DLR (3d) 637 at 639 (BCSC).
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> 18 On those authorities, the answer must be, in my view, as found by Mr. Justice Vickers. The Appeal Division was able to reconsider the matter and correct its own jurisdictional error.

It may be noted that the jurisdictional error addressed in that case concerned the reconsideration by a previous panel of the Appeal Division of a decision rendered by the former commissioners of the Workers' Compensation Board (Board) in the 1950s. The Appeal Division ultimately concluded that the Appeal Division's authority to reconsider on the basis of new evidence was limited by the terms of section 96.1 of the Act, and the wording of the transitional provisions contained in the *Workers Compensation Amendment Act*, RSBC 1989, c. 42 (Bill 27). Section 17(1) and (5) limited the Appeal Division's authority to reconsider decisions of the former commissioners based on new evidence to those decisions made under sections 91 and 96 of the former *Workers Compensation Act* (i.e. limited to matters recently decided by the Board, and not extending to matters decided by the Board under different sections of the Act due to the renumbering of various provisions based on amendments to the Act). The *Powell Estate* case makes it clear that when the Act has been amended, and the appeal structures have been reorganized, it cannot be assumed that the new body inherits similar powers to those possessed by the former body. In general, a new tribunal only has the authority granted to it under the Act and any transitional provisions.

The issue raised in the present case involves an additional complexity. As the Appeal Division's authority to reconsider on the basis of an error of law going to jurisdiction was inferred from the common law, it was not articulated in the statute. The Act was silent in respect of any such authority. Accordingly, it is not surprising that this authority was not expressly addressed by Bill 63 and its transitional provisions. In this context, the legislative silence on this subject is not determinative. The fact that the legislature had given the Appeal Division authority under section 96.1 to reconsider its decisions on the basis of new evidence did not have the effect of limiting its authority at common law to reconsider a decision on the basis of an error of law going to jurisdiction.

The Appeal Division's authority to reconsider its decisions at common law was the subject of commentary in the March 11, 2002 Core Services Review of the Workers' Compensation Board (the Winter Report), accessible on the internet at: http:// www.labour.gov.bc.ca/wcbreform/ WinterReport-Complete.pdf. The recommendations in the Winter Report provided the basis for many of the statutory amendments contained in Bill 63. At the Second Reading of Bill 63 in the Legislature on October 22, 2002, the Minister of Skills Development and Labour commented concerning the purposes of the statutory amendments as follows (*Hansard*, 3rd Session, 37th Parliament (2002), at page 3935):

> **Hon. G. Bruce**: With this bill we aim to make the appeal process more responsive to injured workers and employers alike. In developing the new system, the ministry took into consideration the recommendations of the 1999 royal commission report on workers compensation and the 2001–02 WCB core services review conducted by Mr. Allan Winter. The changes that we are introducing will accomplish three main goals: first, limit the amount of time that it takes to reach a decision; second, improve the quality and consistency of decision-making; and third, end the cyclical nature of the current process.

At pages 61–63, the core reviewer reasoned as follows:

> 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 — ie: it's action is ultra vires. Errors of law going to jurisdiction would include:
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> (i) exercising an authority which the tribunal has no power to do under its enabling legislation;
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> (ii) making a "patently unreasonable" interpretation of the provisions in the statute;
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> (iii) making a "patently unreasonable" finding of fact (such as when the finding is not supported by any evidence);
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> (iv) basing a decision on irrelevant considerations; and
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> (v) breaching the rules of natural justice.

The Supreme Court of British Columbia also has the inherent power to judicially review a decision made by an administrative tribunal which is outside or in excess of its jurisdiction. Such a challenge to the administrative tribunal's jurisdiction would be brought to the Supreme Court pursuant to the *Judicial Review Procedure Act*, RSBC 1996, c. 241.

The rationale for the former Chief Appeal Commissioner's decision (that the Appeal Division did have the authority to reconsider one of its previous decisions on the basis of "error of law going to jurisdiction") was set out on pages 128 and 129 of Decision #93-0740, supra:

> The traditional starting point for judicial treatment of administrative reconsiderations is that a tribunal has no inherent power to reconsider its own decisions. The basic rule is that jurisdiction to hear a case previously heard and decided by the same tribunal must be expressly granted by statute to that tribunal: . . .
>
> There is a very significant policy reason behind the principle that, in the absence of an explicit statutory provision, a tribunal does not have the power to reconsider its own decision. It is in the public interest for parties to be able to rely generally on the finality of a tribunal decision. . . .
>
> On the other hand, it is also in the public interest to avoid unnecessary court proceedings. This would justify giving tribunals flexibility in the matter of reconsiderations.

I agree with the concept that court proceedings in the workers' compensation system should be avoided where possible. The question which arises is whether a statutory tribunal, such as the proposed Appeal Tribunal, has any inherent authority to reconsider one of its own decisions on the basis of an error of law going to jurisdiction.

This issue was recently considered by the BC Supreme Court in its decision dated November 29, 2001 in *Atchison* v. *Workers' Compensation Board* (Victoria Registry, Docket #01 2685). In that case, Mr. Justice Vickers stated the following on page 9:

> There is no doubt the courts have the power of review. However, this does not mean that administrative tribunals lack the power to reconsider a decision, particularly where the decision is made without jurisdiction. The doctrine of *functus officio* applies to administrative tribunals based, however, "on the policy ground which favours finality of proceedings, rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal." *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848 at 849. The application of the principle is more flexible and tribunals are able to reopen decisions in order to discharge the function committed to them

by the enabling legislation. In particular, where a tribunal has made an error of jurisdiction, it is entitled to correct such an error: *Chandler, supra: Right to Rediscover Appeal Division Decisions* (1993), 10 WCB 127 (AD); *Re Trizak Equities Ltd. V. Area Assessor Burnaby New Westminster* (1983) 147 DLR (3d) 637 (BCSC).

(emphasis added)

Based upon the above jurisprudence, I see no reason to recommend any change to the inherent authority of the Appeal Tribunal to determine whether it will reconsider one of its previous decisions, on the basis of an error of law going to jurisdiction.

Accordingly, it is my recommendation that, subject to the Appeal Tribunal's authority to reconsider one of its previous decisions on the basis of error of law going to jurisdiction, a decision rendered by the Appeal Tribunal:

(i) is final and conclusive, and

(ii) would be protected from a Court challenge by a privative clause similar to what is currently found in Section 96(1) of the *Act*.

The reference by the core reviewer to the British Columbia Supreme Court decision in *Atchison*, reported at [2001] BCJ No. 2509, 2001 BCSC 1661, concerned the same case which was cited above as *Powell Estate*.

The core reviewer also recommended, however, that the reconsideration authority of the new external appeal tribunal (WCAT) be limited to its own decisions, and to the common law ground of an error of law going to jurisdiction (i.e. not including new evidence). Winter stated, at page 61:

> With the exception of the ability to reconsider one of its own decisions on the basis of an error of law "going to jurisdiction", I am recommending that the new Appeal Tribunal should not have the authority to reconsider any of its previous decisions (or of any decision of a predecessor appellate tribunal, be it the former Commissioners of the WCB, the Review Board or the Appeal Division). I will be elaborating on the topic of "reconsideration" in a later section of this Report.

At page 103, the core reviewer recommended that the Board be given a power of "reinquiry" to reconsider (on a prospective basis only) prior decisions on the basis of substantial and material new evidence, which would encompass decisions of the former commissioners, former Appeal Division, and WCAT. It is evident from sections 96(4), 96(5)(a) and 256 of the Act that this recommendation was not followed by the legislature. The Board's current reconsideration authority only concerns its own decisions, and is limited to the 75-day period following the decision. WCAT is given authority under section 256 to reconsider both its own decisions, and decisions of the former Appeal Division, on the basis of new evidence which meets the requirements of the section. Consequently, the reasoning and recommendation of the core

reviewer on this point does not assist in interpreting the current statutory framework, with respect to whether WCAT's common law reconsideration authority extends to decisions by the former Appeal Division.

It is evident from the references above to a tribunal's authority at common law to correct its decisions, where the tribunal has made an error of jurisdiction, that this authority only extends to decisions of the particular tribunal. I consider, therefore, that at least as a starting point for my consideration of this issue, I should assume that WCAT would not have any authority at common law to reconsider decisions of the former commissioners, Appeal Division, or Review Board or Boards of Review.

Policy of the Board of Directors at item C14-103.01 of the *Rehabilitation Services and Claims Manual*, *Volumes I and II*, provides:

> The Board is not authorized to reconsider decisions or findings of the following bodies:
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> - the former Appeal Division, which existed prior to March 3, 2003;
> - the former Commissioners, who existed prior to June 3, 1991;
> - the boards of review and the Workers' Compensation Review Board, which existed prior to March 3, 2003; and
> - the Board of Review, which existed prior to January 1, 1974.
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> Section 256 of the *Act* provides for the Workers' Compensation Appeal Tribunal to reconsider its own decisions and decisions of the former Appeal Division under certain limited conditions. The Legislature therefore "turned its mind" to the extent that former appellate decisions should be reconsidered and legislated its intent.

The final paragraph quoted above is ambiguous. On one interpretation, it might be read as constituting policy direction that WCAT's reconsideration authority is limited to the terms of section 256. In the context of item C14-103.01 as a whole, however, I would read this last paragraph as referring to the absence of authority of the Board to reconsider decisions of the various bodies listed above (rather than speaking to the scope of any authority WCAT may have at common law). I consider, therefore, that this remains an issue for WCAT to determine subject to express policy direction being provided by the Board of Directors under section 82 of the Act, or a transitional regulation being provided under section 44 of Bill 63's transitional provisions.

The argument had been raised in the past that the Appeal Division's authority to reconsider its own decisions had been defined by the legislature in the former section 96.1 of the Act. It was suggested that the Appeal Division had erred in inferring jurisdiction from the common law to correct errors of law going to jurisdiction. That argument was, however, not accepted by the British Columbia courts in the *Powell Estate* case. Accordingly, I do not consider that section 256 should be read as defining the limits to WCAT's reconsideration authority.

As the legislation is silent on the issue of the extent of WCAT's authority at common law, I consider it appropriate to proceed with a decision on this issue. Bill 63 implicitly leaves it to WCAT to determine the extent of its authority at common law to correct an error of law going to jurisdiction. This interpretation could be confirmed or overruled by a regulation under section 44 of the transitional provisions, to clarify the application of the transitional provisions.

If WCAT has no common law authority to reconsider Appeal Division decisions to correct jurisdictional error, what does this mean? Currently, there is no time limit for filing a petition for judicial review in the British Columbia Supreme Court. Parties may file a petition for judicial review. An allegation of an error of law going to jurisdiction would, if established, provide a basis for the court to set aside the Appeal Division decision, thus requiring a new decision. Section 39 of Bill 63's transitional provisions states:

> **Appeal division proceedings**
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> **39** (1) In this section, **"proceedings"** means
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> (a) appeal proceedings,
> (b) proceedings for reconsideration of decisions,
> (c) proceedings in requests under section 11 of the Act that were assigned to the appeal division, and
> (d) proceedings under section 28 (5) and (6) of the *Crime Victim Assistance Act.*
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> (2) Subject to subsection (4) of this section, all proceedings pending before the appeal division on the transition date are continued and must be completed as proceedings pending before the appeal tribunal, except that section 253 (4) of the Act, as enacted by the amending Act, does not apply to those proceedings.
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> (3) In proceedings before the appeal tribunal described in subsection (2) of this section, instead of making a decision under section 253 (1) of the Act, as enacted by the amending Act, the appeal tribunal may refer a matter to the Board, with or without directions, and the Board's decision made under that referral may be reviewed under section 96.2 of the Act, as enacted by the amending Act.
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> (4) If, in a proceeding pending before the appeal division on the transition date, the appeal division has
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> (a) completed an oral hearing, or
> (b) received final written submissions and begun its deliberations,
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> the appeal division must continue and complete those proceedings, acting with the same power and authority that the appeal division had under the Act before the provisions of the Act granting that power and authority were repealed by the amending Act.
>
> (5) The appointments of the appeal commissioners who are sitting on proceedings described in subsection (4) are continued until those proceedings are completed.

It is evident from section 39(2) and 39(4) that the legislature intended that all Appeal Division proceedings be continued and completed. To the extent an Appeal Division decision involved an error of law going to jurisdiction, the proceeding may be viewed as incomplete, in the sense that a valid decision has not been provided. While the term "reconsideration" may be used in a colloquial fashion to encompass such proceedings, this in fact involves the further consideration required in order to provide a valid decision in the first instance (rather than a true reconsideration as envisaged by section 256).

As noted above, it is in the public interest for parties to be able to rely generally on the finality of a tribunal decision. It is also in the public interest to avoid unnecessary court proceedings. The legislature has provided a mandate under section 39 of Bill 63's transitional provisions for the continuation and completion of all proceedings pending before the Appeal Division on March 3, 2003.

The fact that the Appeal Division or WCAT would continue to be responsible for completing appeals filed to the former Appeal Division (in the event a court were to find that the decision involved an error of law going to jurisdiction) constitutes a powerful argument for inferring jurisdiction to hear such arguments without the necessity for intervention by the courts. The rationale remains the same as in the case of the Appeal Division or WCAT exercising such authority over its own decisions.

Coupled with this is the fact that the legislature has provided WCAT with the authority under section 256(1)(a) and (b) to reconsider completed Appeal Division or WCAT appeals on the basis of new evidence. It is noteworthy that for the purpose of addressing new evidence applications, the legislature has not limited WCAT's reconsideration authority to WCAT decisions. In terms of statutory reconsideration authority, similar authority has been conferred on WCAT as was previously held by the Appeal Division under the section 96.1 of the former Act. Differences in wording between the former section 96.1 and the current section 256 include:

- section 96.1 concerned a decision of the Appeal Division, while section 256 concerns "a completed appeal" by WCAT or by the Appeal Division;
- the phrase "exercise of due diligence" has been replaced by "exercise of reasonable diligence";
- section 256(4) limits the exercise of this authority to "one occasion only" while section 96.1 contained no such limitation.

There are four references in section 256 to "a completed appeal" by WCAT or by the Appeal Division. An argument that a decision involved an error of law going to jurisdiction is, in effect, an argument that the decision is incomplete, and the appeal body should complete its task of providing a valid decision.

In considering this matter, I would acknowledge that WCAT is not the Appeal Division. The question as to whether WCAT may consider a new application (filed after March 3, 2003) to have an Appeal Division decision set aside on the basis of an error of law going to jurisdiction, is a difficult jurisdictional issue. I am not aware of any court decisions concerning the exercise of such common law authority after the original tribunal had been disbanded.

In this case, the Appeal Division decision was issued on April 17, 2003, subsequent to the March 3, 2003 transition date. The Appeal Division decision was issued under section 39(4) of Bill 63's transitional provisions, as the written submissions were completed and the panel commenced its deliberations before March 3, 2003.

Inasmuch as the legislation was silent concerning the Appeal Division's or WCAT's authority at common law to reconsider a decision on the basis of an error of law going to jurisdiction, it cannot be expected that the basis for such authority will be expressly spelled out in the transitional provisions. Accordingly, it may be necessary to look for indications of legislative intent in considering whether such authority may reasonably be inferred from the common law.

Another court decision dealing with an administrative tribunal's common law authority to reconsider is *Zutter* v. *British Columbia (Council of Human Rights)*, [1995] BCJ No. 626, (1995) 122 DLR (4th) 665, (1995) 57 BCAC 241, (1995) 3 BCLR (3d) 321, (1995) 30 Admin. LR (2d) 310, (1995) 10 CCEL (2d) 287. The British Columbia Court of Appeal considered the jurisdiction of the British Columbia Council of Human Rights to reopen and reconsider a decision to discontinue proceedings on a complaint. Section 15 of the *Human Rights Act* provided that "where proceedings are discontinued or the complaint is dismissed, no further proceedings shall be taken in relation to the subject matter of the discontinued proceedings or the dismissed complaint." The Council interpreted section 15 to mean that a decision to discontinue is a "final" decision, and that if the decision met the requirements of procedural fairness the Council had no jurisdiction to further consider the matter.

The facts of the case involved a complaint that Zutter's lawyer had failed to present evidence (provided by Zutter) to the Council. The solicitor was subsequently disciplined by the Law Society for his failure to represent Zutter adequately. The Court of Appeal found at paragraph 22, that "nothing which the law recognizes as a breach of procedural fairness arose as a result of the unfortunate series of events which ultimately deprived Zutter of the opportunity to present evidence and make submissions." The Court of Appeal further reasoned:

> The Council having afforded an opportunity to Mr. Zutter to make written submissions, could not have known of Mr. Zutter's intentions or of his instructions to his solicitor and, in the circumstances, reasonably assumed that his intention was to make no written submission in response to the Summary of Investigation. (p. 249)
>
> 23 However, it cannot be doubted that from Zutter's point of view, and indeed from that of any reasonable person, the result to him is unfair in the ordinary sense of that word. Thus, it would be an unfortunate irony if the Council, whose very existence and remedial purpose is characterized by the fundamental values of fairness and justice, nonetheless lacked the jurisdiction to remedy that unfairness.
>
> 24 The remedial nature of human rights legislation generally is well recognized. Referring specifically to the *Canadian Human Rights Act*, RSC 1985, c. H-6, in *Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84, La Forest J. made the following comments which have equal application to all such statutes:

> The purpose of the Act is set forth in s. 2 as being to extend the laws of Canada to give effect to the principle that every individual should have an equal opportunity with other individuals to live his or her own life without being hindered by discriminatory practices based on certain prohibited grounds of discrimination, including discrimination on the ground of sex. As McIntrye J., speaking for this Court, recently explained in *Ontario Human Rights Commission and O'Malley v. Simpson Sears Ltd.*, [1985] 2 SCR 536, the Act must be so interpreted as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly fashion but in a manner befitting the special nature of the legislation, which he described as "not quite constitutional"; see also *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 SCR 145, per Lamer J., at pp. 157–58. By this expression, it is not suggested, of course, that the Act is somehow entrenched but rather that it incorporates certain basic goals of our society. More recently still, Dickson C.J. in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission) (the Action Travail des Femmes case)*, [1987] 1 SCR 1114, emphasized that the rights enunciated in the Act must be given full recognition and effect consistent with the dictates of the *Interpretation Act* that statutes must be given such fair, large and liberal interpretation as will best ensure the attainment of their objects. (pp. 89–90)

25 Turning first to s. 15 of the Act, I note that it does not say that any of the decisions or orders to which it applies shall be regarded as final. Rather, it provides that once any of the dispositions to which it applies have been made with respect to a complaint, no further proceedings shall be taken in respect of the *same subject matter* of the discontinued proceedings or the dismissed complaint. That is not the same thing as saying that no further proceedings shall be taken in the same complaint in respect of which the decision or order was made.

26 Applying the approach to statutory interpretation described by LaForest J. in the *Robichaud* case, it seems appropriate to confine the scope of the prohibition found in s. 15 of the Act to new or fresh proceedings, *i.e.* further complaints, brought in respect of the same "subject matter", rather than to construe it as additionally stifling the power to reconsider a decision or order made in the same proceedings, where it appears to the Council, a member of the Council or the minister, as the case may be, that considerations relating to the fairness of those very proceedings requires such reconsideration.

27 It is my view that, when properly construed, s. 15 does not contain any express or implied impediment to the ability of the Council to reconsider its decision to discontinue Zutter's complaints pursuant to s. 14(1)(a) of the Act.

The Court of Appeal took note of the guidance provided by the Supreme Court of Canada in the *Chandler* decision, and concluded as follows:

> 30 There is no right of appeal from any decision made by either the Council, a member of the Council or the minister, pursuant to the provisions of sub-ss. 14(1) or (3) of the Act. In my view, when s. 15 is construed as I have suggested it should be, there is a sufficient "indication" in the Act that a decision or order made under those sub-sections can be re-opened when, in the opinion of the Council, member of Council or minister who made it, as the case may be, the interests of justice and fairness in relation to the proceedings themselves require the re-opening.
>
> 31 I do not accept the argument of the appellants that the equitable jurisdiction described by Martland J. in *Grillas* must be viewed as subservient to the doctrine of *functus officio*, in the case of all administrative tribunals except those where such jurisdiction is expressly stated to exist, in order to give effect to the "sound policy" of finality in the proceedings of such tribunals. That policy will necessarily govern the manner in which the jurisdiction to reconsider is exercised by the Council, thus ensuring its restrictive application, just as the power of this Court to admit fresh evidence is carefully and restrictively exercised in deference to the same policy.
>
> 32 The equitable jurisdiction to reconsider was recognized to exist in, and found to have been properly exercised by, the administrative tribunals under consideration in *Re Lornex Mining Corporation Ltd.*, [1976] 5 WWR 554 (BCSC), in *Re Ombudsman of Ontario and the Minister of Housing* (1979), 103 DLR (3d) 117 (Ont.H.C.), aff'd, (1980), 117 DLR (3d) 613 (Ont.CA), and more recently in *Attorney General of Canada v. Grover and Canadian Human Rights Commission* (4 July, 1994), T-1945-93 (FCTD). In each case, the jurisdiction was exercised notwithstanding the absence of any express acknowledgement of its existence in the tribunal's enabling statute. The judge below applied the first two of these authorities when reaching his conclusion that the Council had jurisdiction to reconsider its decision to discontinue Zutter's complaints in the circumstances of this case, and I am of the view that he was right to do so.

As was the case in *Chandler*, the *Zutter* decision indicates that in determining its jurisdiction to reconsider at common law, a tribunal may look to "indications" in its enabling statute rather than an express statutory grant of authority. In the case of remedial statutes such as human rights or workers' compensation legislation, it is important that the statute be given such fair, large and liberal interpretation as will best ensure the attainment of its objects. Jurisdiction to reopen and reconsider may be found at common law where the interests of justice and fairness require this.

I have referred to the *Zutter* decision for this limited purpose only. In a later decision of the British Columbia Supreme Court in *British Columbia (Human Rights Commission, Deputy Chief Commissioner)* v. *British Columbia (Human Rights Tribunal)*, [2000] BCJ No. 2665, 2000 BCSC 1798, the *Zutter* decision was explained as turning on a restrictive interpretation of the wording of section 15. The court commented that "with all due respect, it would seem that the words "or the dismissed complaint," in the old section 15 were not examined closely" in *Zutter*.

Section 8 of the *Interpretation Act* provides:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

To my mind, key indicators from Bill 63 include section 39 of the transition proceedings, which demonstrates a legislative intent that all Appeal Division proceedings be properly concluded. This included the transfer of all Appeal Division proceedings to WCAT for completion, unless the Appeal Division was seized. As well, section 256 of the Act gives WCAT the same jurisdiction to reconsider both WCAT and Appeal Division decisions. I find, upon consideration of all of the foregoing, that WCAT is properly placed to stand in the shoes of the Appeal Division to consider whether an Appeal Division decision involved an error of law going to jurisdiction. This best ensures the attainment of the legislative objective that all Appeal Division proceedings be properly concluded. It does not undermine the legislative objective to provide finality, as decisions of the Appeal Division would remain subject to judicial review in any event. The requirements for obtaining reconsideration on the common law grounds will normally be the same as would be applied by a court in an application for judicial review.

For the reasons set out above, I find that WCAT has authority to reconsider a decision of the former Appeal Division, on the basis of the common law ground of an error of law going to jurisdiction.

While not necessary to my decision, I would note that this reasoning would not support WCAT reconsidering decisions of the former commissioners, Review Board, or Boards of Review. With respect to Review Board findings, a party is able to seek an extension of time to appeal to WCAT. That would appear to be the proper avenue for pursuing any objections to a prior Review Board finding. The "indicators" provided by Bill 63's transitional provisions would not support WCAT exercising common law authority to reconsider decisions of any body other than WCAT and the Appeal Division.

The *Administrative Tribunals Act, 2004* (Bill 56) received Third Reading on May 19, 2004. The provisions affecting WCAT have not yet been brought into force. It is of interest that section 53(5) of that Act acknowledges the common law jurisdiction of administrative tribunals, by referring to a "tribunal's ability, on request of a party, to reopen an application in order to cure a jurisdictional defect." Section 53 states:

> **53** (1) If a party applies or on the tribunal's own initiative, the tribunal may amend a final decision to correct any of the following:
>
> (a) a clerical or typographical error;
>
> (b) an accidental or inadvertent error, omission or other similar mistake;
>
> (c) an arithmetical error made in a computation.
>
> (2) Unless the tribunal determines otherwise, an amendment under subsection (1) must not be made more than 30 days after all parties have been served with the final decision.

> (3) Within 30 days of being served with the final decision, a party may apply to the tribunal for clarification of the final decision and the tribunal may amend the final decision only if the tribunal considers that the amendment will clarify the final decision.
>
> (4) The tribunal may not amend a final decision other than in those circumstances described in subsections (1) to (3).
>
> (5) This section must not be construed as limiting the tribunal's ability, on request of a party, to reopen an application in order to cure a jurisdictional defect.

Section 57 of the *Administrative Tribunals Act, 2004* will also create a 60-day time for judicial review (subject to the time being extended by the court). As that provision has not yet been brought into force, I similarly need not consider its effect for the purposes of this decision.

B. Application for Reconsideration: Error of Law Going to Jurisdiction

The employers' adviser submits that Appeal Division Decision #2003-0551 dated April 17, 2003 involved an error of law going to jurisdiction. In paragraph 46, the Appeal Division panel summarized its decision as follows:

> I also find that the worker's pre-existing and non-compensable right shoulder impingement syndrome was aggravated by her work duties to the point of causing a rotator cuff tear. I find that this rotator cuff tear caused the worker to be disabled for a number of months after October 16, 2000. Therefore, the worker's disability resulting from her rotator cuff tear is compensable under section 6(1) of the Act, as an aggravation of a pre-existing disease.

The employers' adviser submits that the Appeal Division panel asked itself the wrong question, leading to a patently unreasonable decision, or an error of law going to jurisdiction. He argues:

> In this case, the commissioner held that a rotator cuff tear was a compensable occupational disease. She asked herself if the injury was "due to the nature of the worker's employment" in keeping with section 6(1) of the Act. Fundamentally, this is the wrong question to ask, and the wrong criteria to apply.
>
> A rotator cuff tear is not recognized as an occupational disease. The employer believes that, more than this, the accepted condition is not an injury that can arise over time; however, the employer recognizes that this issue is more appropriately decided by a panel adjudicating the issue under the correct statutory provisions.

The allegation that a panel asked itself the wrong question, or applied the wrong criteria, is one which may properly be addressed in relation to whether the panel made an error of law going to jurisdiction.

The Appeal Division panel referred in paragraph 26 to the new policy of the panel of administrators effective March 29, 2000. The amendments to Schedule B dealing with bursitis and tendonitis and tenosynovitis are published in the *Workers' Compensation Reporter* at Volume 17, page 31. The complete policy resolution of the panel of administrators dated December 17, 1999, is accessible at: http://www.worksafebc.com/law_and_policy/policy_decision/panel_decisions/1999/dec17/law_99_11_19_03.asp. The resolution stated, in part:

> The above amendments to Schedule B and to Sections 27.10, 27.11, 27.12, 27.20, and Appendix 2 of the *Rehabilitation Services and Claims Manual* shall be effective 30 days after publication of the above Regulation in the British Columbia Gazette. The amendments to Schedule B and to the above policies shall apply only to those claims where the initial application for compensation has been received by the Board on or after the effective date of such amendments.

The worker's application for compensation was made in January 2001, after the March 29, 2000 effective date. Accordingly, the new policy was applicable in her case.

The Appeal Division panel referred to item #26.55 of the *Rehabilitation Services and Claims Manual* (as it existed prior to March 3, 2003). That policy provided:

> **#26.55 Aggravation of a Disease**
>
> Where a worker has a pre-existing disease which is aggravated by work activities to the point where the worker is thereby disabled, and where such pre-existing disease would not have been disabling in the absence of that work activity, the Board will accept that it was the work activity that rendered the disease disabling and pay compensation. Evidence that the pre-existing disease has been significantly accelerated, activated, or advanced more quickly than would have occurred in the absence of the work activity, is confirmation that a compensable aggravation has resulted from the work.
>
> This must be distinguished from the situation where work activities have the effect of drawing to the attention of the worker the existence of the pre-existing disease without significantly affecting the course of such disease. For example, a worker who experiences hand or arm pain due to an arthritis condition affecting that limb will not be entitled to compensation simply because they experience pain in that limb from performing employment activities. Similarly, a worker with a history of intermittent pain and numbness in a hand/wrist due to a pre-existing median nerve entrapment (carpal tunnel syndrome) will not be entitled to compensation just because their work activities also produce the same symptoms. To be compensable as a work-related aggravation of a disease, the evidence must establish that the employment activated or accelerated the pre-existing disease to the point of disability in circumstances where such disability would not have occurred but for the employment.
>
> Where the pre-existing disease was compensable, the Adjudicator must decide if the aggravation should be treated as a new claim or as a reopening of an earlier claim.

An aggravation of a pre-existing disease which is attributed to a specific event or trauma, or to a series of specific events or traumas, will be treated as a personal injury and will be adjudicated in accordance with the policies set out in Chapter 3. For example, a worker who injures his or her back while performing a series of awkward lifts at work may suffer an aggravation to an underlying degenerative disc disease, or a worker with subacromial bursitis may strain the shoulder while completing a particular lift.

An aggravation of a pre-existing disease which is not attributed to a specific event or trauma, or to a series of specific events or traumas, will be treated as a disease. For example, a worker with a prior history of carpal tunnel syndrome may aggravate such condition to the point of requiring surgery as a result of several weeks of exposure to vibrating equipment.

Where a compensable aggravation of a pre-existing disease occurs, consideration will be given to relief of costs under Section 39(1)(e) of the Act and to Section 5(5) of the Act. (See #114.40.)

[emphasis added]

The Appeal Division panel referred to item #27.12 concerning tendonitis and tenosynovitis. The policy stated:

Schedule B lists "Hand-wrist tendinitis, tenosynovitis (including deQuervain's tenosynovitis)" and "Shoulder tendinitis" as occupational diseases.

The performance of work often involves positioning and exerting the upper extremities in order to carry out tasks. Tendons carry much of the strain in the performance of certain types of work. If the strain on the tendon is large enough or lasts long enough (resulting in insufficient recovery time), the tendinous tissue may be damaged, leading to an inflammatory response in the tendon or extending to the tendon sheath.

Inflammation of a tendon (tendinitis) and of its synovial sheath (tenosynovitis) may occur at the same time.

Common sites for these inflammations include:

- **the shoulder — for example rotator cuff tendinitis, supraspinatus tendinitis (either of which may cause an impingement syndrome), and bicipital tendinitis**. Any of these may occasionally lead to frozen shoulder (adhesive capsulitis);

- the hand and wrist — for example deQuervain's tenosynovitis (inflammation affecting the abductor pollicis longus and the extensor pollicis brevis tendons).

Hand-wrist tendinitis/tenosynovitis and shoulder tendinitis may result from sudden strain placed on the tendons (such as where the tendon is suddenly contracted or stretched with sufficient force to cause immediate damage). Such a claim will be treated as an injury and will be adjudicated in accordance with

> the policies set out in Chapter 3. **A claim made by a worker diagnosed with handwrist tendinitis/tenosynovitis or with shoulder tendinitis where no specific event or trauma, or series of events or traumas, has occurred, will be treated as a disease and will be adjudicated in accordance with the policies set out in Chapter 4**.
>
> [emphasis added]

The Appeal Division panel also cited policy at #27.20 which provides in part:

> In the investigation of a claim for tendinitis/tenosynovitis or bursitis (in circumstances where no presumption applies) it is incumbent on the Adjudicator to seek out evidence of both occupational and non-occupational exposure to risk factors relevant to the causation of the disorder (see #26.21 regarding the approach when a presumption applies). Non-occupational exposures may be present as a result of participating in sports, hobbies, or certain ordinary activities of daily living. The compensability of such a claim depends on whether or not the employment activities (the occupational exposure to risk factors) played a significant role in producing the inflammatory disorder. **The occupational exposure need not be the sole or even the predominant cause; it simply needs to have been a significant cause**.
>
> [emphasis added]

It is evident that there was a typographical error in paragraph 26 of the Appeal Division decision. The Appeal Division panel summarized the policy quoted above by stating:

> Policy item #27.20 on tendinitis claims where no presumption of causation under Schedule B is applicable changed effective March 29, 2000. Under the new policy, the role of employment activities in causing a tendinitis condition need not be the sole or even the predominant cause; it simply needs to be the predominant cause.

The last sentence should have ended by stating that it simply needs to have been a significant cause. In the context of the decision as a whole, I consider this was a mere typographical error.

Policy at #27.20 provides a list of factors to consider in assessing whether or not a tendinitis/tenosynovitis or bursitis condition is due to the nature of a worker's employment, in circumstances where there is evidence of both occupational and non-occupational exposure to risk factors. One of the factors in this list is as follows:

> - whether the worker has suffered from any degenerative or systemic disorders (including but not limited to degenerative arthritis, rheumatoid arthritis, gout, systemic lupus erythematosus, connective tissue disease, or inflammatory rheumatological disorder), **and if so whether such underlying disorder is the likely cause of the subject inflammatory disorder, or alternatively has had the effect of rendering the worker more susceptible such that shorter, or less frequent, or less intense exposure to risk factors may initiate the subject disorder**;
>
> [emphasis added]

A key paragraph in the Appeal Division decision is paragraph 33, in which the panel addressed the employer's submission in the appeal as follows:

> The Board also considered the worker's condition as a possible occupational disease under section 6 of the Act. The employer submits that the worker's condition is not a recognized occupational disease and so should not be considered under section 6. I note that the Manual provides that tendinitis is a recognized occupational disease (policy items #27.11 and #27.20). In these policy items, shoulder tendinitis includes rotator cuff syndrome, which is also referred to as impingement syndrome. These policies provide that when this form of tendinitis occurs where there is no specific event or trauma, the condition will be adjudicated as an occupational disease in accordance with these policies. Given Dr. A.'s diagnosis of the worker as having an impingement syndrome, and then a rotator cuff tear, and the absence of a specific trauma causing this condition, I find that the worker's condition is properly assessed as an occupational disease under section 6 of the Act.

It is evident from this reasoning that the panel accepted the worker's claim as involving a work aggravation to an underlying non-compensable occupational disease. The panel expressly noted that shoulder tendonitis is a recognized occupational disease, which pursuant to the listed policy items encompasses rotator cuff syndrome or impingement syndrome.

Evidence cited in the Appeal Division decision included the opinion of Dr. L, Board medical advisor, as set out in paragraph 17. This stated in part:

> Rotator cuff disease and it's accompanying symptom complex sometimes referred to as rotator cuff syndrome is a continuum of pathology starting with inflammatory changes in the subacromial bursa and rotator cuff tendons, which may continue on to become a rotator cuff tendon rupture, or tear.

The Appeal Division panel accepted the medical opinion provided by Dr. A, that the worker's employment activities contributed to aggravation and exacerbation of a pre-existing tendinopathy. Dr. A considered it likely that the worker's occupation was a contributory factor in the worker developing a full-thickness rotator cuff tear of her right shoulder.

I appreciate the point being made by the employers' adviser, that the worker's rotator cuff tear could perhaps have been adjudicated as a claim for personal injury under section 5 of the Act. Policy at #13.10 of the *Rehabilitation Services and Claims Manual*, *Volume I*, acknowledges that a common difficulty is to distinguish between an injury and a disease. The policy notes that this distinction is one that can be illustrated more easily than defined. One of the examples provided, in a subsequent paragraph, concerns the situation of a logger who claimed damage to his knee that had been diagnosed as a fraying of the cartilage. It was concluded that if this was externally caused through physical activity, and was not caused through degenerative disease, infection, or a disorder of internal origin, there was an injury rather than a disease. #13.12, dealing with disablement from vibrations, states:

> There are some situations in which a disablement from vibrations would be classified as an "injury". For example:

1. If the vibrations are of a traumatic nature, causing an instant disablement to a worker, such as an explosion.

2. If, though the vibrations may have occurred over a long period of time, the result was an instant or sudden disablement, possibly because of some sudden breakdown in the worker's system.

Apart from those cases, a gradual deterioration in a worker's condition resulting from exposure over time would not be an "injury", but would be classified as an occupational disease. For example, vibrating hand tools may cause the decalcification of small areas of the bones of the carpus, or damage to the soft tissues of the hand, or osteoarthritis in the elbows, wrists or shoulders, or vascular disturbances.

The production of a rotator cuff tear due to work activities over time (in the absence of a specific event or trauma) might be viewed as comparable to the situation described in point #2 in the policy at #13.12. However, the policies at #13.10 and #13.12 are more general in nature, and were thus not as directly relevant to the appeal before the Appeal Division panel as the policies cited by the panel in its decision. Indeed, one of the examples provided in the policy at #26.55 dealing with aggravation of a disease, provides the example of a worker with a prior history of carpal tunnel syndrome who might aggravate such a condition to the point of requiring surgery as a result of several weeks of exposure to vibrating equipment. The policy provides that such an aggravation of a pre-existing disease which is not attributed to a specific event or trauma, or to a series of specific events or traumas, will be treated as a disease. The fact that this example seems inconsistent with point #2 in the policy at #13.12 illustrates the difficulties in determining whether a worker's disability is better adjudicated under section 5 or section 6 of the Act.

The employer has not challenged the lawfulness of the policies relied upon by the Appeal Division panel. I find that the Appeal Division decision was not patently unreasonable in its application of policy items #26.55, #27.11 and #27.20, in relation to the circumstances of this case.

The employers' adviser further objects that the Appeal Division panel failed to recognize the worker's occupational disease (which the employers' adviser asserts was the final event involving the rotator cuff tear), as an occupational disease by order dealing with a specific case on the basis of the policy at #26.04 and section 1 of the Act. In light of the reasoning provided by the panel, concerning its adjudication of the worker's claim as involving a work aggravation to a pre-existing shoulder tendonitis condition, such recognition would appear unnecessary. In any case, I note that WCAT decisions have taken different approaches in dealing with the policy at #26.04, as to whether such recognition should be included in the WCAT decision or addressed by the Board after WCAT has determined whether the worker's problems were caused by the worker's employment. WCAT Decisions #2004-02651 and #2004-04590 expressly included recognition as an occupational disease by order dealing with a specific case in the decision. WCAT Decision #2003-02802 dealt only with the acceptance of the worker's condition as being due to the nature of her employment, and returned the matter to the Board for consideration under #26.04. Both approaches appear viable under the Act, although the approach of returning the matter to the Board would seem to contribute to a "treadmill" effect (identified as one of the factors which created a need for reform of the prior

appeal structures, as set out on page 26 of the March 11, 2002 Core Services Review of the Workers' Compensation Board (the Winter Report), accessible on the internet at: http://www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf).

In consideration of the foregoing, I do not consider that there was any error of law going to jurisdiction in the Appeal Division decision. The Appeal Division decision provided a reasoned analysis of the applicable law and policy, with reference to the evidence in this case. The decision did not state that the rotator cuff tear was accepted as an occupational disease. Rather, it is evident from the evidence cited in the panel's decision, and the reasoning provided by the panel in its decision, that the rotator cuff tear represented the culmination of the effects of the aggravation of the worker's underlying disease condition (as found by the Appeal Division panel). The policy expressly contemplates that a worker with a non-compensable disease condition may be more susceptible to a work aggravation, as this possibility is listed as a relevant factor for consideration. The policy further specifies that a claim made by a worker diagnosed with shoulder tendinitis where no specific event or trauma, or series of events or traumas, has occurred, will be treated as a disease and will be adjudicated in accordance with the policies set out in Chapter 4. I do not consider that the Appeal Division decision was patently unreasonable in focusing on the underlying factors or disease condition which gave rise to the rotator cuff tear (as the final culminating event), rather than adjudicating the tear as a claim for a personal injury, having regard to the absence of any specific work event or trauma.

Conclusion

The employer's application for reconsideration of Appeal Division Decision #2003-0551 dated April 17, 2003 is denied. As a preliminary issue, I find that WCAT has jurisdiction to consider an application to set aside an Appeal Division decision on the common law ground of an error of law going to jurisdiction. I find, however, that such an error has not been established in this case. The Appeal Division decision stands as final and conclusive.