

## ***Erskine v. British Columbia (Workers' Compensation Appeal Tribunal)***

### Decision Summary

Court	B.C. Supreme Court
Citation	2021 BCSC 2322
Result	Petition dismissed
Judge	Mr. Justice A. Ross
Date of Judgment	November 29, 2021
WCAT Decision Reviewed	WCAT Decision No. A1700641 (June 27, 2018)

### **Keywords**

*Judicial review – Section 256 [now 310] of the Workers Compensation Act – “Stage Two” Reconsideration Decision – Discretionary decision to seek clarification of medical opinion – Procedural Fairness – Lack of Notice*

### **Background**

The WCAT decision reviewed by the court was a stage two new evidence reconsideration decision (decision A1700641, dated June 27, 2018, defined as the “2018 WCAT Decision” by the court). The background to that decision is the following.

In an original decision (*WCAT-2012-02032* (July 31, 2012)), the “Original Decision”, the panel accepted that on January 2, 2008, a forklift ran over the petitioner’s (worker’s) left foot in a workplace accident. The issue was whether the worker actually sustained personal injuries in this accident. The panel was unable to accept that the worker sustained a personal injury to his left foot, ankle, knee, hip or lumbar back in this accident. The British Columbia Supreme Court and the Court of Appeal upheld the Original Decision on judicial review: *Erskine v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2013 BCSC 1583; affirmed *Erskine v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2014 BCCA 96.

Subsequent to the Court of Appeal’s decision, the petitioner applied to WCAT for reconsideration of the Original Decision on new evidence grounds. He relied upon three reports from Dr. Younger, orthopaedic surgeon, and related medical imaging. In a “stage one” new evidence decision, WCAT found that the requirement that the proffered evidence be “substantial” to the original decision was not met: see *WCAT-2015-01971* (June 23, 2015). The court set this decision aside on judicial review, and remitted the petitioner’s application for reconsideration to WCAT: *Erskine v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2016 BCSC 936.

WCAT considered the petitioner's new evidence application again. In its "stage one" new evidence decision, WCAT found that Dr. Younger's reports and the medical imaging met the threshold requirements under section 256(3) of the *Act* (now section 310(3)) for obtaining reconsideration of the Original Decision.

WCAT moved to the second stage of the reconsideration process. It issued the 2018 WCAT Decision. The issue before the 2018 panel was whether the new medical evidence warranted a change in the Original Decision. The panel found that Dr. Younger's evidence supported a change to the Original Decision regarding causation of the worker's left foot and ankle condition. The panel accepted that the January 2, 2008 accident was of causative significance to the petitioner's left foot and ankle injuries. The panel found that the new evidence did not support a change to the Original Decision with respect to the worker's claim for any left knee, left hip or lumbar back injuries. Thus, those injuries remained not compensable under the *Act*.

### **Reasons of the BC Supreme Court**

The petitioner argued that Dr. Younger's evidence addressed his foot condition only. The WCAT panel was patently unreasonable because it essentially imposed an evidentiary burden on the worker to address every aspect of his injury. The court rejected this argument. The panel did not place an evidentiary burden on the petitioner. This burden was created by section 256 (now section 310) of the *Act*. Section 256 permits only one application for reconsideration on new evidence grounds. This means that all issues must be addressed in one application.

Further, the chronology of correspondence before WCAT established the following: the petitioner's counsel anticipated that causation of the left knee, hip and low back pain would be in issue in the reconsideration, the petitioner's counsel sought an opinion from Dr. Younger on the left knee, hip and low back pain, and Dr. Younger addressed those issues, although briefly, in one of his opinions.

The stage two panel sought clarification from Dr. Younger regarding causation of the petitioner's foot injury. Dr. Younger provided a supplemental report in this regard. The court accepted that the decision to seek clarification is a discretionary decision, subject to section 58(3) of the *Administrative Tribunals Act*. It rejected the petitioner's argument that the panel was patently unreasonable for not seeking clarification, or further opinion evidence, on the knee, hip and low back injuries. Dr. Younger had provided his opinion on those injuries. There was no obligation on the panel to use its discretion to seek further evidence. It was open to WCAT to make its decision on the basis of the evidence that had been submitted.

Finally, the court rejected the petitioner's argument that he did not have notice that the 2018 panel would be considering the issue of causation of the knee, hip and lower back injuries. The chronology of events before WCAT, including counsel's instruction letters and Dr. Younger's reports, indicate that causation of the knee, hip and low back

conditions were contemplated as issues that were “in play” by Mr. Erskine’s counsel and Dr. Younger. Counsel sought evidence from Dr. Younger regarding causation of the knee, hip and low back injury during the reconsideration process. Thus, he could not argue that he did not have notice that the issue would be considered by the panel.

In any event, even if the 2018 WCAT panel had not addressed causation of the petitioner’s knee, hip and low back injuries, then the Original Decision would remain in force. The Original Decision had dismissed the claim for knee, hip and low back injuries. That decision was final. This was an additional basis for rejecting the petitioner’s argument on the notice issue. His argument in this regard did not lead to anything.

The 2018 WCAT Decision was neither patently unreasonable nor procedurally unfair. The court dismissed the petition.