

Under MRPP item #19.2.11, this decision has been summarized to enable public access in a manner that protects the privacy of the parties to the proceedings.

This decision was the subject a Supreme Court of Canada decision. See 2016 SCC 25.

This decision was the subject of a BC Court of Appeal decision. See 2014 BCCA 499.

This decision was the subject of a BC Supreme Court decision. See 2013 BCSC 524.

This decision was the subject of a reconsideration. See *WCAT-2011-03079*, dated December 6, 2011.

WCAT Decision Number :	WCAT-2010-03503
WCAT Decision Date:	December 29, 2010
Panel:	Randy Lane, Vice Chair Lisa Hirose-Cameron, Vice Chair Melissa R. Clarke, Vice Chair

- [1] A three-person panel of the Workers' Compensation Appeal Tribunal (WCAT), appointed under subsection 238(5) of the *Workers Compensation Act* (Act), allowed the worker's appeal from a decision of a review officer with the Review Division of the Workers' Compensation Board, operating as WorkSafeBC (Board). The review officer found that the worker's breast cancer was not due to the nature of her employment.
- [2] The worker was one of six female workers whose claims for cancer were considered at the same time by the same WCAT panel. The workers linked their cancers (three breast, one ovarian, one thyroid, and one carcinoid tumour) to their employment at the same workplace. The three workers with breast cancer worked in the same area of the workplace, as did the worker with ovarian cancer. The workers with thyroid cancer and carcinoid tumour worked in a second area of the workplace.
- [3] The evidence before the panel included a report regarding the occurrence of cancers in that one area in the workplace in which the three workers with breast cancer worked, a critique of that report, an assessment of the presence of radiation in that area, an assessment of the presence of carcinogens in that area, and an examination of exposures in the second area of the workplace. In each of the breast cancer cases, a medical opinion was supplied by Dr. Y, a Board medical advisor and a specialist in occupational medicine, who did not consider the cancers were due to various forms of exposure.

Panel majority

- [4] The panel commented that the issue was whether there was sufficient positive evidence in favour of a causal link between employment and a disease. The issue was not whether the evidence established that a worker's disease did not arise out of her employment. An occupational cause is not established if the evidence fails to establish a non-occupational cause. There must be positive evidence linking the disease to employment. That point is clearly made in item #26.22 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

- [5] The panel observed that the passage in item #26.22 of the RSCM II referred to the Board but it contained guidance relevant to WCAT's adjudication of appeals. It was true that Board policy is binding upon WCAT panels pursuant to subsection 250(2) of the Act; however, the policy does not specifically refer to WCAT but rather refers to the Board. The panel noted there might be some question as to whether that policy binds WCAT.
- [6] The panel found that passage in item #26.22 is consistent with WCAT's duty under subsection 250(4) of the Act to resolve an issue in a manner that favours the worker where evidence supporting different findings is evenly weighted. That subsection makes it clear there must be some positive evidence, and the panel considered its decision should be guided by item #26.22.
- [7] The panel observed that the issue of whether employment is of causative significance is assessed by determining if the employment's contribution is greater than *de minimis* (of trifling consequence or importance; too insignificant to be worthy of concern). There is no requirement in law or policy that work be the only causative factor or the most significant causative factor. The panel reviewed several tort cases and commented that any exercise of "ordinary common sense" or inference must, of course, be firmly based in the evidence.
- [8] The panel reviewed in detail the report regarding the cancers in one area of the workplace. That report includes discussions of the incidence of breast cancer, breast cancer risk factors, occupational and environmental factors in breast cancer, studies of breast cancer in the occupational group in which four of the workers worked, cancer clusters, and occupational cancer clusters.
- [9] The report documented a very elevated, statistically significant standard incidence ratio of breast cancer which was referred to as a true cluster of breast cancer cases. The report noted investigations undertaken to identify exposures to potentially carcinogenic substances or physical agents before concluding there was no occupational cause based on consideration of current occupational chemical exposures, or records of past occupational exposures. The factors associated with the increased incidence could not be determined but might have been due to the following: (i) a cluster of reproductive and other known, non-occupational, risk factors, (ii) past exposures to chemical carcinogens and less likely to ionizing radiation, and (iii) a statistical anomaly.
- [10] The panel's review of the issue of causation included consideration of criteria noted by A. Bradford Hill and set out in the *Protocol for the Assessment of Medical/Scientific Information - Industrial Diseases Standing Committee, Workers' Compensation Board of British Columbia*, (9 W.C.R. 429), (the Protocol).
- [11] The panel noted, among other matters, the statistically significant elevated relative risk of breast cancer among workers in a specific area of the workplace, the possibility that during an earlier period that area contained some unique mixtures of chemicals and the

possibility that they interacted in such a manner as to promote breast cancer, and the workers' exposure to carcinogens.

- [12] The panel found it did not have sufficient evidence to conclude that the incidence of non-occupational risk factors in the three breast cancer cases was any different than the incidence in the general British Columbia female population who had been diagnosed with breast cancer.
- [13] The panel found that the breast cancers of the three workers were occupational diseases due to the nature of their employment. It found that an inference in favour of causation for the three breast cancer cases was in keeping with "ordinary common sense." The panel majority stated its decision did not mean it considered that the workers' employment exposure was the only cause or even the predominant cause of their breast cancers. It was satisfied their employment exposure satisfied the *de minimis* test. It stated that, even though it acknowledged the amount of exposure was not known and the specific carcinogens which contributed to their development of breast cancer are not known. As part of the exercise of "ordinary common sense", the panel majority reiterated it was weighing the evidence using a standard of proof as set out by subsection 250(4) of the Act. It considered that the report regarding the cancers in workers who worked in one area of the workplace referred to a level of certitude with respect to causation that was more exacting than that found in subsection 250(4) of the Act. That report did not exclude the possibility of occupational causation. The panel attached weight to the fact the report observed that past exposures were likely much higher.
- [14] The panel stated its analysis did not involve rejection of the report's analysis with respect to whether the workers' breast cancers were due to exposure to various agents, as stand-alone exposures. The panel noted the workers' exposure was not limited to those substances. It also observed that, as noted by the report, workers in the relevant occupation had the potential for exposure to a variety of potentially harmful chemical, biological, as well as physical agents.
- [15] Perhaps the most compelling evidence for the panel majority was the fact workers with breast cancer were exposed to carcinogens and there is a very elevated, statistically significant standard incidence ratio for breast cancer. Their decision did not simply rest on the occurrence of a very elevated, statistically significant standard incidence ratio for breast cancer.
- [16] That standard incidence ratio occurred against the backdrop of (i) a particular standard of proof employed by the panel and (ii) the workers' exposure to carcinogens. As well, there were comments in the report to the effect that all cancer-causing agents have the potential to initiate and promote cancer, little is known about the possible synergistic, additive or antagonistic effects of multiple chemical exposures, and past exposures were likely much higher.

- [17] The panel found it had “sufficient positive evidence” as used in item #26.22 of the RSCM II. It accepted there was a difference of opinion between it and the dissenting member of the panel as to whether the evidence amounted to sufficient positive evidence.
- [18] The panel found that application of the factors and criteria in the Protocol justified a conclusion that earlier employment in the workplace had the capacity to cause breast cancer and that these workers’ breast cancers were due to that employment.
- [19] The panel accepted it was possible that the breast cancer cluster was a statistical anomaly. However, it was not persuaded that the likelihood it was a statistical anomaly exceeded the likelihood that the breast cancers in the three workers were occupational diseases due to the nature of their employment.

Dissenting reasons

- [20] The dissenting member of the panel agreed with and adopted the panel majority’s framing of the issue and the notable background and evidence relevant to the panel’s decision. However, the dissenting member did not agree with the panel majority’s disposition of the appeal.
- [21] The dissenting member agreed there were elevated levels of breast cancer in one area of the workplace. That fact alone was not dispositive of the question of whether workplace exposures were of causative significance in the cancers found.
- [22] The dissenting member found that cancer cluster research has shown that elevated levels occur by chance at some places and times. Clusters are a common statistical phenomenon – even when there is no causal factor that is responsible for the increased incidence. She was not prepared to draw an inference that this work environment was of causative significance based solely on the existence of this particular cluster. Board policy cautioned that there must be some positive evidence to support a causal link between the workplace environment and the elevated incidence of, in this case, breast cancer.
- [23] The dissenting member found there was insufficient evidence to find that the workers’ breast cancers were due to the various exposures listed in the evidence on file. She did not find it necessary to consider non-occupational risk factors because there was insufficient positive evidence before her to establish that the employment was causally significant.
- [24] The dissenting member referred to the report regarding the incidence of breast cancer in one area of the workplace, a letter written by the lead author of that report, the critique of that report, and the opinion of the Board medical advisor. She found the evidence insufficient to establish that employment was of causative significance with respect to the workers’ breast cancers.