Under MRPP item #19.2.10, this decision underwent a second level of editing before posting to the WCAT internet site.

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.

WCAT Decision Number: WCAT-2011-03079
WCAT Decision Date: December 06, 2011
Panel: Daphne Dukelow, Vice Chair

Introduction

[1] The applicant (employer) applies for reconsideration of a decision of a panel of the Workers' Compensation Appeal Tribunal (WCAT). The original panel's decision concerns the worker's 2004 compensation claim. The decision is *WCAT-2010-03503*. The original panel consisted of three members of WCAT. It is the majority decision, the decision of two of those members, which is subject of this reconsideration application. For ease of reference, I will refer to them as the original panel and will refer to the dissenting member's reasons, specifically, should the need arise.

[2] The original panel found that the worker's compensation claim should be accepted for breast cancer which they found was due to the nature of her employment in a hospital laboratory.

[3] The application for reconsideration was initiated by the March 4, 2011 application from the employer's representative. The employer's representative later provided a submission in support of the employer's application.

[4] The worker is participating in this application. The worker's representative provided a submission in response to the employer's. The employer's representative provided a reply submission.

[5] I consider that this application can be determined on the basis of the claim file and the submissions made on behalf of the parties to WCAT. The issue in this application is a legal one and can be dealt with fairly by written submissions.

Issue(s)

[6] The issue is whether the applicant has established grounds on the basis of jurisdictional error for reconsideration of the decision made by the original panel.

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Jurisdiction and Standard of Review

[7] WCAT also has authority to reconsider one of its decisions and possibly set it aside on the common law ground of an error of law going to jurisdiction, including a breach of natural justice. These grounds are described at item #20.2.2 (former items #15.23 to #15.25) of WCAT's *Manual of Rules of Practice and Procedure* (MRPP). A tribunal's common law authority to set aside one of its decisions on the basis of jurisdictional error was confirmed by the British Columbia Court of Appeal in *Powell Estate v. Workers' Compensation Board,* 2003 BCCA 470. This is reinforced by section 253.1(5) of the *Workers Compensation Act* (Act).

[8] In order to succeed on this application for reconsideration on grounds of jurisdictional error ("common law" grounds), the applicant must show that the relevant standard of review set out in section 58 of the *Administrative Tribunals Act* (ATA) is met.

[9] The standard of review concerning alleged breaches of the rules of natural justice or procedural fairness is whether in all the circumstances the tribunal acted fairly. Errors of law or fact or in the exercise of discretion are governed by the patently unreasonable standard which is defined in the ATA in relation to the exercise of discretion only. Item #20.2.2 of the MRPP indicates that WCAT will apply the standards of review used by the courts in judicial review proceedings. Those standards are the ones set out in section 58 of the ATA in the case of decisions of WCAT.

[10] The employer's application was initiated by a letter from counsel dated March 4, 2011. The WCAT appeal co-ordinator, in a letter dated April 27, 2011, drew the attention of the applicant's representative to information concerning the grounds for reconsideration contained in an information sheet and available on WCAT's website. She also invited the applicant's representative to provide further submissions. The applicant's representative provided additional submissions dated July 8, 2011. The worker's representative responded with submissions dated September 8, 2011. The applicant's representative replied with submissions dated September 26, 2011.

Background

[11] The worker was employed in a hospital laboratory at the times relevant to her compensation claim. The worker's claim for compensation for breast cancer was denied by the Workers' Compensation Board (Board), known as WorkSafeBC. The worker requested a review of the decision denying her claim. The review officer confirmed the case manager's decision. The review officer found that there was an absence of positive evidence linking the worker's breast cancer to the nature of her employment.

[12] The worker appealed to WCAT. A majority of the original panel allowed the worker's claim. The original panel found that there was sufficient positive evidence to link the

worker's breast cancer to her employment. The majority reviewed the available epidemiologic and medical evidence in coming to their conclusion.

[13] The employer now has applied to have the decision of the original panel reconsidered on jurisdictional error grounds.

Reasons

[14] Generally, the law and policy relevant to the worker's claim is the current law and policy since the worker's injury occurred in 2004. The date of disability from an occupational disease is taken as the date of injury for purposes of the Act.

[15] The employer asserts that the original panel's decision is patently unreasonable because there is no evidence to support the original panel's conclusion.

[16] As noted above, the applicable standard of review which I will apply in this decision is patent unreasonableness. The standard of patent unreasonableness is defined in section 58 of the ATA in relation to the exercise of discretion.

[17] The standard of patent unreasonableness in relation to errors of fact or law is defined in case law. I consider that the following definitions are useful.

[18] In *Speckling v. British Columbia (Workers' Compensation Board)* 2005 BCCA 80, (2005) 46 B.C.L.R. (4th) 77, the British Columbia Court of Appeal confirmed (at paragraph 33) the chambers judge's summary of the approach to be taken in applying the standard of "patent unreasonableness." I consider three of the six points contained in that summary to be relevant:

> 2. "Patently unreasonable" means openly, clearly, evidently unreasonable: *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 748.
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> 3. The review test must be applied to the result not to the reasons leading to the result: *Kovach v. British Columbia (Workers' Compensation Board)* (2000), 184 D.L.R. (4th) 415 (S.C.C.).
>
> ...
>
> 6. A decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not: *Douglas Aircraft Co. of Canada Ltd.* v. *McConnell*, [1980] 1 S.C.R. 245, and *Board of Education for the City of Toronto* v. *Ontario Secondary School Teachers' Federation et al* (1997), 144 D.L.R. (4th) 385 (S.C.C.).

[19] The Supreme Court of Canada, in *Kovach*, adopted the reasons of Donald, J.A. in the decision from which the appeal was taken. In *Kovach v. Singh*, 1998 CanLII 6423 (B.C.C.A.); 52 B.C.L.R. (3d) 98, Mr. Justice Donald made the following statement:

> ... I think that the review test must be applied to the result not to the reasons leading to the result. In other words, if a rational basis can be found for the decision it should not be disturbed simply because of defects in the tribunal's reasoning.

[20] He then posed the question, "Was the result illogical?"

[21] Iacobucci, J. said in *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385; [1997] 1 S.C.R. 748:

> 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.

[22] Another statement of the patently unreasonable test appears in *Canada Safeway Ltd. v. British Columbia (Workers' Compensation Board)* 1998 CanLII 6037 (B.C.C.A.); 59 B.C.L.R. (3d) 317 at paragraph 23, application for leave to appeal dismissed, [1999] S.C.C.A. No. 20:

> The Appeal Division may have arrived at its decision by questionable reasoning but it is the result which must be tested for patent unreasonableness.

[23] Although there has been a significant amount of discussion about the meaning of patent unreasonableness in this context, the case law above, along with other cases, continues to define that standard. See *Manz v. Sundher*, 2009 BCCA 92 where the court noted that the description of patently unreasonable in relation to factual matters was as described in this quotation from *Speckling*, cited above:

> As the chambers judge noted, a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable. That is not the case here.

[24] The applicant asserts that the original panel's decision is patently unreasonable because it is supported by no evidence. As the worker's counsel points out in his submission, the weighing of the evidence by the original panel is not in issue before me. The object of a reconsideration application is not the reweighing of evidence which was before the original panel.

[25] After considering both the majority and the minority decisions, the submissions of counsel for both parties, and the evidence on the claim file, I have come to the conclusion that the majority decision is supported by some evidence. Their decision is not openly, clearly, evidently unreasonable. Therefore, it is not patently unreasonable. My reasons follow.

[26] The evidence which supports the decision is not to be found in the conclusions of the experts whose opinions formed the main evidence before the panel. Rather, the evidence is found within the opinions and reports of those experts.

[27] Counsel for the employer submits, as his third point, that the only positive evidence which the original panel relied upon was the existence of an observed cancer cluster. Thus, there is an acknowledgment that there was some positive evidence upon which the original panel relied. As the worker's counsel points out there is other evidence upon which the original panel relied. I will refer to that other evidence below.

[28] I acknowledge the concern of the employer's counsel that the original panel did not identify any specific exposure as the causative agent of the worker's cancer. However, the original panel explained the evidence before them about the numerous carcinogenic agents present in the workplace over time. They also pointed out the fact that a specific agent need not be identified to support a finding of work causation in an occupational disease such as breast cancer. The employer's counsel's submission about the lack of finding of an etiologic cancer cluster goes to the weight of the evidence before the original panel and not to the lack of evidence supporting their conclusion. The same is true of the submission concerning the original panel's use of the synergistic, additive or antagonistic effects of exposure to numerous carcinogens. The same also is true of the submission concerning the use, by the original panel, of reference to the regulation concerning occupational disease of firefighters. These points go to the weighing of the evidence by the original panel. They do not show that there was no positive evidence before the original panel. They point out the evidence upon which the original panel relied. The reference to the minority panel's decision is of little persuasive value since it was the minority decision. The standard to be applied in a reconsideration application is patent unreasonableness and not correctness or even reasonableness.

[29] The original panel's decision can be distinguished from that in *Page v. British Columbia (WCAT)*, 2009 BCSC 493. In that case the court found the WCAT panel substituted its opinion on the diagnosis of a psychological condition for that of an expert. The court stated that the WCAT panel could not reject a diagnosis provided by an expert in the absence of a conflicting opinion. *Srochenski v. WCAT*, 2009 BCSC 1488 contains a

similar reference to diagnosis and the need for an expert opinion. In *Lalli v. British Columbia (WCAT)* 2010 BCSC 1501, the court again was concerned with specific medical evidence concerning specific conditions. In this case, the issue which was before the original panel was causation and not diagnosis. There was no issue about diagnosis. The only issue before the original panel was causation. The question of causation of an occupational disease is often determined by consideration of medical and scientific literature combined with evidence (usually somewhat or significantly limited) of exposure to causative agents. The evidence on the claim file shows that breast cancer's causation is determined mainly, if not entirely, by consideration of risk factors and not by consideration of known agents, other than radiation.

[30] As counsel for the worker points out the case law, which he cites, supports the original panel's reasoning about causation on a common sense basis. The case law supports the original panel's use of information on the claim file and contained within the expert reports to arrive at their conclusion, drawing inferences as they did, on a common sense basis. In *Nova Scotia (WCB) v. Nova Scotia (WCAT) and Johnstone*, 1999 NSCA 164 (referenced by both counsel), the tribunal made a decision which was based on expert medical evidence. The appeal concerned a worker's compensation claim for bladder cancer. As in this case there was no expert opinion linking the specific worker's cancer to exposure in the workplace. There was no contrary opinion. The tribunal had evidence from an occupational and environmental medicine specialist which the court noted was generic evidence not related, specifically, to the worker. In that case the environment in the general area and in the workplace were considered equally likely to be causes of the worker's cancer. The panel applied the equivalent of section 250(4) of the Act and found in the worker's favour. I consider this case quite similar to the one subject of this application. The panel's reasoning did not follow exactly the same lines as the panel's in this case but the evidence before the panel in the *Johnstone* case was similarly limited.

[31] As the employer's counsel points out, in *Cape Breton Development Corp. v. Nova Scotia (WCAT)* 2008 NSCA 72, there was no expert medical evidence concerning the cause of the worker's alcoholism. The WCAT panel relied upon lay evidence to come to the conclusion that the worker's back injury and resulting pain contributed to his alcoholism. That decision was upheld by the court on judicial review. (The case was decided by the court applying the reasonableness standard set out in *Dunsmuir v. New Brunswick,* 2008 SCC 9.) Again, I consider this case supports the original panel's reasoning in this case.

[32] The worker's counsel cited other cases which support the original panel's consideration of causation on a common sense basis. In any event, the reconsideration application has been argued on the basis of a lack of evidence to support the original panel's conclusion on causation and not on the legal tests of causation.

[33] The original panel pointed out that it was finding, only, that the worker's occupational exposure was a significant cause of her breast cancer. Significant was defined as greater than *de minimis.*

[34] The evidence upon which the original panel relied is, in the case of the statistical evidence, extracted from the expert epidemiologic evidence. That evidence was a literature review and study of the worker's workplace and the cluster of breast cancer found in workers in that workplace. The original panel clearly points out that it is approaching the statistical frequency of the occurrence of breast cancer in the workplace on a common sense basis. The original panel explains in some detail why they found the statistical evidence supportive of the worker's claim despite the expert opinion which was formed, in part, on the basis of that evidence.

[35] The original panel points out that the [2006 investigation report], on file, indicated that the factors associated with the increased incidence of cancer found at the workplace could not be determined but may have been due to three factors. Included in these three is past exposures to chemical carcinogens and less likely to ionizing radiation. Several sources of carcinogens were identified in the laboratory. Fumes from the hospital incinerator, chemicals used in or generated in the laboratory itself (particularly in the past), and radiation from the radiology department.

[36] The original panel considered the criteria set out in the *Protocol for the Assessment of Medical/Scientific Information—Industrial Disease Standing Committee, Workers Compensation Board of British Columbia,* 9 W.C.R. 429 even though they made their decision, as required, on a common sense basis. The original panel found that strength of association, temporal relationship and statistical significance were met in this case. They also accepted that consistency (reproducibility) and coherence (biological plausibility) criteria were also met.

[37] The evidence, upon which the original panel's decision is based, consists of the elevated standard incidence ratio (SIR), the possible effects of exposure to a mix of various chemicals and possibly radiation over time and the application of common sense to the evidence.

[38] The SIR for breast cancer in the workers was significantly elevated. It was found to be 8.43. When the number of expected cancers (based on the average in the British Columbia female population) was 0.83, the number observed was 7. The range of SIR expected was to be between 3 and 17. The SIR and even the lowest figure in the range described by the 95% confidence level would indicate a rate of breast cancer at least three times that expected.

[39] Another aspect of the common sense approach concerns exposure to multiple chemicals. As the minority member pointed out, the expert evidence did not identify a specific causal link to any one of the specific chemical exposures. However, any carcinogen has the potential to initiate or promote cancer, according to the 2006

[investigation] report evidence before the panel. The synergistic effects of multiple chemicals and, possibly radiation, are not known. Common sense would lead one to believe that the synergistic effect is likely greater than that of individual components of a mix of chemicals. The workers were known to have been exposed to carcinogens in their work environment. Although the occupational medicine specialist ruled out their individual causative significance, the combined effect was not addressed specifically.

[40] The original panel considered the study showing the elevated rate of breast cancer in the laboratory workers was a substitute for consistent or reproducible results from multiple studies. This is a common sense approach to the scientific evidence. Again they pointed to the elevated incidence of breast cancer in the actual laboratory and the documented strength of association found in the study done of the workers in the laboratory.

[41] In the case of dose-response they did not find a relationship on the basis of the finding of the first report concerning the workplace which concluded that the increased risk related to employment was not statistically related to duration of exposure. The original panel did not consider this issue determinative noting that the threshold exposure level could be related to duration or magnitude of exposure or both. The worker had been employed at the laboratory for about 20 years at the time the case manager spoke to her concerning her medical and work history. This was a long time to be exposed to the carcinogens which were known to be present in the workplace. The file shows that exposure to chemicals was greater in earlier years. Changes in the work and the work methods reduced exposure to chemicals as time went on. The worker's long work history at the workplace means that she had a significant duration of exposure including during an earlier time period.

[42] The original panel does not appear to have found the specificity criterion to be met although, as they noted, the majority of cancers in the laboratory workers were breast cancers. As the original panel noted, the occurrence of non-breast cancer could be unrelated to occupational exposure and might, as a result, muddy what otherwise could be a clear link between breast cancer and occupational exposure in the laboratory.

[43] The original panel considered the limited evidence before them relating to non-occupational risk factors. They concluded that the worker and the other two workers whose cases they decided did not exhibit non-occupational risk factors which were different from the general British Columbia female population. The panel noted that workplace contribution to the worker's breast cancer was not ruled out by the [2006 investigation report]. They also noted that while individual causes were ruled out by the occupational medicine specialist, the synergistic effects of the various chemicals were not. They also noted that the worker and her co-workers were known to have been exposed to carcinogens. That factor in combination with the elevated SIR lead them to their conclusion on a common sense basis.

[44] Having reviewed their decision, I cannot say that the original panel had no evidence upon which to base their acceptance of the worker's claim. The elevated SIR and the exposure to carcinogens is some evidence. As the worker's counsel noted in his submission, the weighing of the evidence is not the subject of this application. I am satisfied that the original panel had some evidence upon which to base their decision. As a result I find that it was not patently unreasonable. I deny the employer's application. The original panel's decision (the majority decision) remains in effect.

[45] For the reasons above, I deny the employer's application for reconsideration of the original panel's decision on jurisdictional error grounds. The original panel's decision remains in effect.

Conclusion

[46] I deny the employer's application for reconsideration of the 2010 WCAT decision. The decision to accept the worker's compensation claim for breast cancer remains in effect.

Daphne Dukelow
Vice Chair

DD/gw