IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chapman v. Workers' Compensation Appeal Tribunal,* 2023 BCSC 499

Date: 20230330
Docket: S240131
Registry: New Westminster

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

Scott David Chapman

Petitioner

And

Workers' Compensation Appeal Tribunal

Respondent

Before: The Honourable Madam Justice Girn

On judicial review from: A decision of the Workers' Compensation Appeal Tribunal, dated June 23, 2021 (WCAT Decision No. A2002856)

Reasons for Judgment

The Petitioner, appearing on his own behalf:	S.D. Chapman
Counsel for the Respondent:	I.D. Morrison D.C.A. Oleksiuk
Place and Date of Hearing:	Port Coquitlam, B.C. August 18, 2022
Place and Date of Judgment:	New Westminster, B.C. March 30, 2023

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Introduction

[1] The petitioner, Mr. Chapman, brings an application for judicial review of a decision of the Workers' Compensation Appeal Tribunal ("WCAT") dated June 23, 2021, decision number A2002856 (the "Reconsideration Decision"). The Reconsideration Decision concerned the long-term rate payable on Mr. Chapman's claim for compensation from the Workers' Compensation Board (the "Board"). He asks the Court to set aside the Reconsideration Decision and remit the matter back to the WCAT on the basis that the decision was patently unreasonable.

[2] Mr. Chapman was injured on the job on January 23, 2018 when he tripped and fell on his shoulder, which caused injury to his right shoulder.

[3] Mr. Chapman made a claim for workers' compensation benefits under the *Workers Compensation Act,* R.S.B.C. 2019, c. 1 [*WCA*], which was allowed by the Board (the "Initial Decision"). However, a review officer varied the Initial Decision reducing the long-term wage rate (the "Review Decision"). Mr. Chapman appealed the Review Decision. On August 29, 2019, the WCAT denied Mr. Chapman's appeal (the "Original WCAT Decision").

[4] Mr. Chapman applied for reconsideration by the WCAT of the Original WCAT Decision on the basis of new evidence on the sole issue of whether he was a permanent employee.

[5] The reconsideration application was assigned to the same Vice Chair who rendered the Original WCAT Decision. On November 6, 2020, having reviewed written submissions at stage one, the Vice Chair allowed the hearing to proceed to stage two to determine the sole issue of whether Mr. Chapman was a permanent employee. At stage two, Mr. Chapman was permitted to proceed by way of an oral hearing where Mr. Chapman and his union representative testified. As well, oral submissions were made by a worker's representative. On June 23, 2021, the Vice Chair rendered the written Reconsideration Decision dismissing Mr. Chapman's application.

[6] The evidence on this judicial review consisted of a Certified Record which contains the various decisions made by the Board and WCAT, the supporting materials that were before the Board and the WCAT, and correspondence between the Board or the WCAT and Mr. Chapman.

[7] Mr. Chapman filed one affidavit dated August 19, 2021. It is difficult to comprehend and much of the affidavit is crafted in the nature of argument and contains evidence that was not before the Board or the WCAT. The Respondent submits that the Court should not receive this affidavit as evidence and should only be accepted as argument to the extent that it is not inconsistent with the Amended Petition. I agree.

[8] A judicial review takes place on the basis of the record that was before the tribunal: *Goulding v. Workers' Compensation Appeal Tribunal*, 2015 BCCA 223 at paras. 6–7; *Actton Transport Ltd. v. British Columbia (Employment Standards)*, 2010 BCCA 272 at paras. 21–23. In reviewing the WCAT decision, the Court must limit its review of what was before the WCAT and not conduct its own hearing on evidence which was not before the WCAT: *Corcoran v. Workers' Compensation Appeal Tribunal*, 2014 BCSC 1087at para. 9

[9] Accordingly, in this judicial review, I have only relied on the Certified Record and have not given any weight to Mr. Chapman's affidavit.

[10] For the reasons that follow, the petition is dismissed. Mr. Chapman has failed to establish that the Reconsideration Decision is patently unreasonable.

Preliminary Issue

[11] I will begin by addressing a preliminary issue raised by the Respondent namely that Mr. Chapman has named both the WCAT and the Vice Chair as the Respondents but only seeks relief against the WCAT.

[12] Section 15(2) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 provides that a tribunal and its members are deemed to be one person under the

name of the tribunal. Mr. Chapman does not take issue with this. Accordingly, pursuant to Rule 6-2(7) of the *Supreme Court Civil Rules*, I discharge the Vice Chair from this petition as being neither a proper or necessary party.

Background

[13] Mr. Chapman is a journeyman carpenter. On December 3, 2017, he began working for Peter Kiewit Sons ULC (the "Employer") on a construction site in North Vancouver. On January 23, 2018, he injured his right shoulder while on the job. At the time of the injury, Mr. Chapman had been employed with the employer for less than 12 months.

Board Decision

[14] The Initial Decision of the Board was included in the Certified Record. The Board accepted Mr. Chapman's claim for compensation for a permanent right shoulder massive rotator cuff tear involving both the supraspinatus and infraspinatus tendons and for chronic right shoulder pain.

[15] Mr. Chapman was initially only paid health care benefits as he continued to work for several months on modified duties.

[16] In a decision dated October 29, 2018, the Board established that Mr. Chapman's net long-term wage rate was $791.80 per week based on the class average regional earnings of a journeyman carpenter.

[17] The *WCA* sets out the manner in which average earnings are determined. The Board based its decision pursuant to s. 211 of the *WCA* which sets out the general rule that a long-term wage rate shall be based on the worker's gross earnings for the 12 month period immediately preceding the injury. The general rule is subject to exceptions including those set out in s. 217.

[18] The Board ruled that Mr. Chapman was a permanent employee of less than 12 months and used a class average applying an exception under s. 217 of the *WCA*. This section states:

> (1) This section applies to a worker who was employed, on other than a casual or temporary basis, by the worker's employer for less than 12 months immediately preceding the date of the injury.
>
> (2) The Board's determination of the amount of the worker's average earnings under section 211 *[long-term compensation]* must be based on the gross earnings, as determined by the Board, for the 12-month period immediately preceding the date of injury, of a person of similar status employed in the same type and classification of employment
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> (a) by the same employer, or
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> (b) if no person is so employed, by an employer in the same region.

The Review Decision

[19] Mr. Chapman appealed the Board's decision arguing that the class average was unfair because the class was not restricted to unionized and fully qualified carpenters.

[20] The Employer participated in the review and supported the Board's decision arguing that the "due to the ebbs and flows in the construction industry, it is rare that a worker would be employed, without interruptions or periods of lay offs, for an entire year."

[21] On April 30, 2019, in the Review Decision, the review officer held that Mr. Chapman was a temporary employee and as such the exception under s. 217 did not apply. The review officer varied the Board's decision on the basis that the long-term wage rate should have been based on Mr. Chapman's earnings in the one-year period prior to the compensable workplace accident rather than the class average earnings. This reduced Mr. Chapman's net long term wage rate to $197.99 per week because Mr. Chapman had not been fully employed during this time period.

The Original WCAT Decision

[22] Mr. Chapman appealed the Review Decision to the WCAT. The appeal was made on the basis of written submissions only and no oral hearing was held. The Employer did not participate, although invited to do so.

[23] The Vice Chair heard the review. The two issues addressed in her decision were:

- Did the Board correctly establish the worker's initial wage rate?
- Pursuant to what statutory and policy provisions and on what earnings should the worker's long-term wage rate be established?

[24] In her reasons, the Vice Chair outlined the general rule for wage loss benefits on basis of a worker's "average net earning". I note that this initial ruling was partially based on a finding that Mr. Chapman was hired through his union hall on a temporary basis rather than being hired by the employer: Original WCAT Decision at para. 41.

[25] By letter dated August 29, 2019, the Vice Chair denied the appeal and confirmed the decision of the Review Decision with respect to the long-term wage rate based on Mr. Chapman's gross earnings in the 12 months period immediately preceding his injury.

[26] The decision was amended on September 6, 2019 to correct Mr. Chapman's start date for the 12-month period for calculating the wage rate.

The WCAT Reconsideration

Stage One

[27] Although s. 309(1) of the *WCA* states that a decision of the WCAT is final and conclusive, s. 310 provides for an exception:

> **Reconsideration of appeal tribunal decision**
>
> **310** (1) This section applies to the following:
>
> (a) a decision in a completed appeal by the appeal tribunal under this Part or under Part 2 *[Transitional Provisions]* of the *Workers Compensation Amendment Act (No. 2), 2002*;
>
> (b) a decision in 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 receiving 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.
>
> [Emphasis added.]

[28] There are two stages to a reconsideration application. At the first stage the Chair or their delegate determines whether the new evidence meets the threshold set out in s. 310 of the *WCA*. If so, the reconsideration moves to second stage where the merits of the appeal are reconsidered in light of the new evidence.

[29] On November 18, 2019, Mr. Chapman filed an application for reconsideration. Mr. Chapman's application included documents from his union representative stating Mr. Chapman had been hired directly by the Employer and not through the union hall; that he was a permanent employee and that the collective agreement between the union and the Employer did not allow for temporary or part-time workers; and a one-page pre-job conference between the Employer and union held on October 16, 2016.

[30] The Vice Chair, who had initially decided the Original WCAT Decision, allowed the first stage reconsideration application. She found that Mr. Chapman had been misled by the employer's false statement at the Review Division concerning his hiring by the union and by the union's failure to challenge this statement as his representative.

[31] The Vice Chair allowed the reconsideration application to proceed to the second stage but limited it to only to the issue of whether, at the time Mr. Chapman

was injured, he was employed on a regular basis as a permanent employee or, in the alternative, had been hired on a temporary rather than permanent basis.

Stage Two

[32] The second stage of the reconsideration application proceeded by way of an oral hearing on March 15, 2021. Mr. Chapman and his representative participated. The Employer was invited but did not participate in the hearing. Mr. Chapman along with a union representative provided oral testimony along with written materials that were submitted in support of his position that Mr. Chapman should be deemed a permanent employee.

[33] On June 23, 2021, the Vice Chair provided a written decision dismissing Mr. Chapman's application for reconsideration. She held that although Mr. Chapman was hired directly by the employer rather than the union hall and was a regular employee rather than a casual employee, she nonetheless found that Mr. Chapman had been hired for a project that was 30 months into its expected duration of four years. She further found that although Mr. Chapman may have inferred that he had secured employment for four years rather than 18 months, it was understood by both Mr. Chapman and the employer that the employment would be limited in duration: Reconsideration Decision at para. 57

[34] The Vice Chair noted that while considering the reliability of the new evidence submitted by Mr. Chapman she had to determine whether there was a basis for changing her original decision.

[35] As I have indicated above, the sole issue for the Vice Chair at this stage two reconsideration application was whether or not Mr. Chapman was a permanent employee for the purposes of s. 217 of the *WCA* and Policy Item 67.50. This is outlined in paras. 25 and 26 of the Vice Chair's reasons:

> [25] The phrase "casual or temporary basis" is not defined in the *Act*. However, policy item #67.10 provides guidance in determining whether a worker is a casual worker. The policy states that a casual worker is a worker who has a short-term/sporadic attachment to employment. It goes on to note that, generally, the employment lasts less than three

> consecutive months and, further, that a worker who works "on call" for one or more employers may also be a casual worker.
>
> [26] The worker has argued in his reconsideration application that he is not a "casual worker." Neither the Board officer nor the review officer considered that worker was a casual worker and I agree that he is not such a worker. Rather, the sole issue to be determined in this reconsideration application is whether or not his employment with the employer was "temporary" or "permanent."

[36] In paras. 28 to 37 of her reasons, the Vice Chair summarized the evidence from Mr. Chapman:

- He was known to the employer because he had previously worked for the employer on two previous projects. The first was a highway project on which he worked for about eight months before moving on to working on his own doing renovations. The second was a bridge on which he worked for about 2.5 years, after which he began working with another employer.
- He was contacted by someone from the employer's head office inquiring if he wanted a job. This employee told him that the expected duration of the job and/or the project was four years. The Petitioner told the employee that he needed a couple of months to finish a renovation job. A couple of months later he received another call from the head office. He then went to the head office, signed some forms, went through orientation, and on 3 December 2017 began working for the employer.
- During orientation, he was informed that it was a union job and covered by a collective agreement. According to this agreement, he would become entitled to pension and group benefits after about three months.
- When he began working, he was paid the journeyman carpenter established in the collective agreement. There was no mention of him being a temporary employee, and he was treated just the same as all the other union members.
- He was laid off in June 2018. The employer did not say that they would call him back to work in the future.

[37] The Vice Chair also considered the evidence from the union representative at paras. 33 to 37 of her reasons:

- The union does not operate a hiring hall. Rather, an employer will ask the union to refer workers with particular qualifications and experience. The union provides a list of qualified members, and then the employer decides who to hire.

- In his 16 years as a union representative, the employer in the present case had never used the union's referral service, apparently preferring to use its hiring team. However, all persons hired are members of the union, apart from certain exempt classes of employees.
- Employees hired by the employer do not sign an employment contract, as that would constitute a violation of the *B.C. Labour Relations Code*.
- There is no typical duration for the projects that union members are hired on. Projects may last for weeks, months, or several years. The project for which the Petitioner was hired was a four-year project. (The Vice Chair noted that in a pre-hearing submission, the representative stated that the project had an expected remaining duration of 18 months at the time the Petitioner was hired.)
- All employees are hired on a full-time basis. New employees are subject to a three- month probationary period. They become eligible for group benefits after completing 350 hours. These are paid for by the employer but administered by the union.
- Once a job is finished, union members simply seek another job from the union or independently. Employers are looking to hire people all the time.
- The employer must promptly notify the union when an employee is laid off. While employers in the construction industry typically recall the last employees to be laid off, they are not required to do so under the collective agreements with the union, as these do not provide for seniority or recall rights. The representative stated that this is the case because of the nature of the industry in which workers can be laid off due to inclement weather.
- Group, RRSP, and Pension benefits are available to union members. These are contributed to by the employer and administered by the union.
- The union representative did not consider the Petitioner's employment "temporary," and noted that the collective agreement had no provisions for temporary workers. The Petitioner's employment was only temporary in the sense that any construction job is temporary because any project will come to an end. "You build the project, the project is finished, and then you go on to something else."
- The Petitioner was unable to continue working for the employer after the completion of the two previous projects, the highway and the bridge, because the employer had no other projects in British Columbia at those times.

[38] Mr. Chapman's representative also made oral submissions at the end of the hearing. They are summarized at paras. 38-40 of the Reconsideration Decision:

> - Mr. Chapman was hired on the same basis as any other construction worker who is represented by the union.
> - Half of the union's membership is involved in various projects in the construction industry that are of two, three, four- or five-years duration and have a beginning and an end and, in that sense, one could argue they are temporary. However, the union does not consider any of them to be temporary but rather they are permanent employees
> - They are permanent members of the union and the issues of whether they are permanent or temporary has never been called into question before.

[39] The Vice Chair then summarized her Original WCAT Decision in which she confirmed the Review Divison's decision.

[40] At para. 42 of her reasons, the Vice Chair acknowledged that the new evidence in the appeal confirms that her initial assumption that Mr. Chapman was hired by the employer through the union hall was incorrect. Nevertheless, she held that did not change her ultimate conclusion that Mr. Chapman was a temporary employee.

[41] The Vice Chair the summarized helpful WCAT decisions with similar circumstances but acknowledged that they were not binding on her: WCAT 2004-06831 and WCAT-2004-06831.

[42] In WCAT-2004-06831, the panel relied on Board Practice Directive 33B, which categorized on-call workers as "casual" if their work was sporadic, occasional and unpredictable. As well, the Practice Directive categorized employment for a fixed duration of three months or more as being "temporary" rather than permanent for the purpose of the "permanent less than 12 months exception in s. 217 of the *WCA*". The panel ruled that the worker's employment was temporary and as such subject to the general rules for the setting of wage rates.

[43] The Vice Chair noted at para. 51 of her reasons that even though the Practice Directive 33B has been replaced with Practice Directive 9-9 which does not refer to

s. 217 or the permanent less than 12 month exception, the conclusion in WCAT-2004-06831 that workers on long-term temporary assignment should not be considered permanent is consistent with the grammatical and ordinary meaning of the language in s. 217 and policy item "1167.50 within the context of the *Act* and Board policy, and is in harmony with the scheme and object of the *Act*".

[44] Based on the facts before her, the Vice Chair held that the petitioner was best characterized as a regular employee employed on a long-term temporary assignment.

[45] The Vice Chair also addressed the worker's representative's submission that Mr. Chapman was a permanent member of the union and that once the project was concluded other work would likely have been available for Mr. Chapman.

[46] In responding to this argument, the Vice Chair relied on WCAT-2007-03405, which dealt with the meaning of the term "temporary" in s. 217 of the *WCA*:

> While the worker's representative has suggested there is nothing in the legislation or policy that defines a "temporary contract worker" as the worker was described by the Board, the legislation does clearly contemplate two classes of worker who do not fall into the exception created by section (217) of the *Act*. The term "casual" has been clarified by Board policy…. There is no such policy in regards to the question of what a temporary worker may be.
>
> The *Oxford Dictionary,* tenth edition, defines "temporary" as "lasting for only a limited period". In this case the evidence supports a conclusion the worker was hired for a specific project, which would have ended in the fall of 2006. He was not a permanent employee of the accident employer, and while there was a statement to the effect that he may have received further work if there was work available, the preponderance of evidence supports a conclusion that the worker was hired only for the specific road building contact on which he was employed and his employment would have ended when that project was completed.

[47] The Vice Chair then proceeded to summarize the specific terms of Mr. Chapman's employment at para. 56 of her reasons:

> a) He was hired for a specific project with a 4-year duration that was expected to end 18 months after the date he started working on the project.

b) The employer was entitled to lay the worker off for a variety of reasons, including inclement weather.

c) Once the project ended or the worker was laid off, the worker had no entitlement to be called back to work, and he did not enjoy any seniority rights.

d) The employer funded, but did not administer the worker's benefits, and these benefits accrued to the worker only because he was a member of the union.

[Emphasis added.]

[48] Finally, at para. 57 of her reasons, the Vice Chair addressed the issue that Mr. Chapman was told the project was for a four-year duration:

> Nevertheless, it was clear to the worker that his employment would be of temporary duration. Moreover, the worker acknowledged that, during his orientation with the employer, he was advised that his relationship with the employer was governed by the collective agreement between the employer and the union. Based on the content of that agreement and having considered all of the other evidence, I find that, while the worker was a regular rather than casual employee of the employer, he was employed on a temporary basis at the time of his injury. Therefore, I am unable to conclude that the exception in section 217 applies.

[49] Having found that the new evidence did not support a change from her original decision, the Vice Chair denied Mr. Chapman's application for reconsideration.

Legal Principles

[50] The *WCA* establishes a no-fault workers' compensation scheme. Effective April 6, 2020, the *WCA* was the subject of a statutory revision pursuant to the *Statute Revision Act*, R.S.B.C. 1996, c. 440. The revisions were purely for clarity and editorial in nature. They resulted in a re-numbering of the parts, divisions, and section numbers of the *WCA*. In this decision I will refer to the new numbering system.

[51] WCAT has exclusive jurisdiction to determine all questions of law, fact, and discretion on an appeal: *WCA*, s. 308. The decisions of the WCAT are final and conclusive: *WCA*, s. 309. Put together, sections 308 and 309 of the *WCA* constitute

a privative clause: *Aghili v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2022 BCSC 717 at para. 26.

[52] Accordingly, s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*], provides that on judicial review, the standard that applies to findings of fact or law or an exercise of discretion is patent unreasonableness.

[53] The patent unreasonableness standard is highly deferential to the original tribunal. The decision must be "clearly irrational or evidently not in accordance with reason" or "almost border on the absurd" before it will be disturbed: *Shamji v. Workers' Compensation Appeal Tribunal*, 2018 BCCA 73 at para. 37; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal*), 2018 SCC 22 at para. 28 [*West Fraser*]. This standard extends to the interpretation of WCAT's enabling statute, the *WCA*: *West Fraser* at para. 28.

[54] WCAT's findings of fact are entitled to "utmost deference": *Sherstobitoff v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2019 BCSC 1659 at para. 51. Further, "[p]atent unreasonableness will not be established where the reviewing court considers the evidence to be insufficient": *Sherstobitoff* at para. 51. Instead the evidence, viewed reasonably, must be incapable of supporting the factual finding: *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 at para. 30.

[55] In *Sherstobitoff*, Justice Fleming described the application of the patent unreasonable standard:

> [52] Significantly, in applying the patent unreasonableness standard the court must examine both the reasons and the result: *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at paras. 69–70 and 74. The reasons however, are to be read as an organic whole, not parsed or dissected in a search for error: *Vukovic v. Workers' Compensation Appeal Tribunal*, 2017 BCSC 904 at para. 86; *Erskine v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2013 BCSC 1583 at para. 18, aff'd 2014 BCCA 96.
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> [emphasis added]

[56] Not every element of the WCAT's reasoning must independently pass a reasonableness test – if there is a rational basis for the decision on the record, it should not be disturbed simply because of defects in reasoning: *Bhullar v. Workers' Compensation Appeal Tribunal*, 2019 BCSC 1673 at para. 63.

Positions of the Parties

[57] Both parties agree that the standard of review that applies in these circumstances is patent unreasonableness.

[58] Mr. Chapman's written submissions were difficult to follow. I appreciate Mr. Chapman did not have legal representation and did his best to articulate his position. I have tried my best to summarize his submissions in the Amended Petition. Mr. Chapman asserts that the decision is patently unreasonable for the following reasons:

a) Misinterpreted "temporary" employment in s. 33.3 (now s. 217) of the *WCA* by:

   i. ignoring the common law presumption of permanent employment;

   ii. not interpreting the words of the contract, but impermissibly turning to the surrounding circumstances of the contract;

   iii. considering irrelevant factors as part of the surrounding circumstances, such an employment history and the seasonal nature of a journeyman carpenter;

   iv. applying a policy meant for determining casual not temporary workers;

b) Concluded the worker's employment with Kiewit was temporary without any supporting evidence;

c) Gave no weight to clearly relevant evidence regarding the nature of the worker's employment; and

d) Failed to apply s. 250(4) (now s. 303(5)) of the *WCA* which would resolve a "tie" in the worker's favour.

[59] The Respondent opposes the petition, responding to Mr. Chapman's arguments as follows:

a) In *Sherstobitoff* at para. 63, the Court held that the presumption of permanent employment does not necessarily apply in a workers' compensation context;

b) Regarding consideration of the surrounding circumstances, the Vice Chair:

   i. Did not attempt to consider certain aspects of the surrounding circumstances as alleged by Mr. Chapman, such as words exchanged when forming the employment contract; and

   ii. The Vice Chair's consideration of surrounding circumstances, when done, was not patently unreasonable.

c) Mr. Chapman's oral testimony contradicts his assertion that the Vice Chair should not have considered the length of the project and Mr. Chapman's knowledge of the length of the project;

d) The Vice Chair did have supporting evidence to find that Mr. Chapman's employment was temporary, and her determinations were not patently unreasonable;

e) The Petitioner's assertion that the Panel failed to consider the "employment objective set out in the employment contract and the collective agreement" is not supported by the terms of the collective agreement that Mr. Chapman cites;

f) The Vice Chair was correct in not applying s. 303(5) of the *WCA* because she did not find that the evidence was equally weighted, so it did not apply; and

g) There is no principle of law that the Panel ought to have shown deference to the original Board decision-maker and to his union representatives.

[60] I should note that, unfortunately, Mr. Chapman's assertions are almost identical to those advanced by the petitioner in *Sherstobitoff.* Passages that are largely a cut and paste of this decision appear throughout the Amended Petition, although they are not cited.

[61] In *Sherstobitoff*, at issue was whether the WCAT's finding of temporary employment was patently unreasonable. In that case, the Petitioner entered into an oral employment contract to work as a heavy equipment operator for a large project. During the job interview, the interviewer wrote notes on a form, which indicated that the worker was applying for full-time work, and that the specific project was the "potential site" of her work. The employer's contract for the large project had an end date. The contract was subject to a collective agreement, which did not distinguish or define temporary workers. On her first day of work, she was involved in an accident that left her with injuries. In her first application for compensation to WCB, she indicated her employment as temporary, but her second application indicated it as permanent. The employer's report of the injury stated she was a temporary worker. The WCB found that her employment was temporary and WCAT denied the subsequent appeal of the decision. As a result, the worker's long-term wage rate was set using her earnings during the 12 months that preceded her injury.

[62] The decision maker had relied upon common law interpretations of the oral contract of employment. The worker stated that the decision maker erred in that analysis. Justice Fleming provided the following summary of the common law of contractual interpretation:

> [69] The reality is, at common law, the same analytical framework applies to the interpretation of written and oral contracts. The goal always is to determine objectively the parties' intention at the time the contract was formed. The key interpretive tool is the language of the contract, read, or in the case of an oral contract, considered as a whole and based on its ordinary, grammatical meaning. While the language remains paramount, the surrounding circumstances must also be considered when interpreting the terms of any contract: *Sattva* at para. 57. The reason for doing so is to

> deepen the understanding of the parties' intention, as expressed by their words, not to find a contractual term based on the surrounding circumstances. Essentially, contractual interpretation involves considering the words in their context: Hall at 33.
>
> [70] It is often much more difficult to establish what the parties to an oral contract agreed to, precisely because the contract is unwritten, and the evidence regarding the words may be lacking or disputed. Given the importance of the words at common law, there is greater flexibility regarding the nature of the evidence that is admissible to prove the terms of an oral contract: *Shaw Production Way Holdings Inc. v. Sunvault Energy, Inc.*, 2018 BCSC 926 at para. 151, aff'd 2019 BCCA 72.
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> …
>
> [75] It is well-established that only evidence of facts both parties knew or ought to have known at the time of contracting can be considered. Whether something was or ought to have been in the common knowledge of the parties is a question of fact: *Sattva* at para. 58.

[63] Relying on those principles of contractual interpretation, Justice Fleming found that the reasons were clearly and openly unreasonable because the decision-maker did not analyze the words of the contract, instead improperly using the surrounding circumstances:

> [80] Apart from discussing what he viewed as the surrounding circumstances and rejecting those he viewed as irrelevant, the VC's reasons do not include any express interpretation of the Contract. In addition to ignoring the question of the words used, he made no findings about the effect of the surrounding circumstances on the meaning of those words. Absent an attempt to ascertain the words exchanged by the contracting parties, and consider the surrounding circumstances based on what they knew or ought to have known for the purpose of clarifying the terms of the Contract, I am left to conclude the VC interpreted the Contract without assessing the objective intention of Ms. Sherstobitoff and Morgan at the time of formation. Given the approach required by the general principles of contractual interpretation, the VC's reasons as they relate to the Contract in my view are clearly and openly unreasonable.

[64] Although the Court found that the result may not have been clearly wrong, the approach of the decision maker was unreasonable, and therefore the matter was remitted back to WCAT: *Sherstobitoff* at para. 87.

Analysis

[65] I will address each of Mr. Chapman's submissions on why the Vice Chair decision was patently unreasonable.

[66] Mr. Chapman says the Vice Chair misinterpreted "temporary" employment in s. 33.3 (now s. 217) of the *WCA* by ignoring the common law presumption of permanent employment.

[67] This same argument was advanced by the petitioner in *Sherstobitoff.* In that case, the decision maker specifically turned to the question of how to construe the contract and discussed general principles of contract interpretation. At para. 63, Justice Fleming held that the common law presumption of permanent employment does not necessarily apply in a workers' compensation context and found that the decision maker's finding on this point was not patently unreasonable. In fact, Justice Fleming noted that "it did not come close to being openly, clearly or evidently unreasonable".

[68] In the review before me, I note that Mr. Chapman did not raise this issue in the reconsideration hearing and nowhere in the decision did the Vice Chair make reference to the common law presumption. Given that the WCAT is not bound by legal precedent and a high level of deference is owed to its interpretation, I am of the view, that it is not necessary for this Court to address whether or not the Vice Chair was required to do so.

[69] The Vice Chair did not consider whether or not carpentry work was seasonal in nature. Nowhere in the Vice Chair's decision did she state that the carpentry work is seasonal. This argument appears to be a product of Mr. Chapman's reliance on *Sherstobitoff* and is not applicable in these circumstances.

[70] Mr. Chapman further submits that the Vice Chair's decision is patently unreasonable by failing to interpret the words of the contract, impermissibly turning to the surrounding circumstances of the contract and considering irrelevant factors as part of the surrounding circumstances, such an employment history and the seasonal nature of a journeyman carpenter. Once again, this is the same argument advanced by the petitioner in *Sherstobitoff.*

[71] The Respondent submits that the Vice Chair did not impermissibly turn to the surrounding circumstances of the contract nor did she consider irrelevant factors such as employment history and seasonal nature of journeyman carpenter. I agree.

[72] Unlike the decision maker in *Sherstobitoff,* the Vice Chair's reasons expressly included an interpretation of the contract, and addressed the words used by the parties and the effect of the surrounding circumstances on the meaning of those words. The Vice Chair specifically addressed Mr. Chapman's initial conversation with the employer: at para. 29. The Vice Chair also considered evidence from the union representative: at paras. 34–37.

[73] Mr. Chapman says there was no evidence that he knew or should have known that the project was not expected to continue beyond four years. However, the Vice Chair specifically noted that Mr. Chapman testified that he was told by employer that the expected duration of the project was four years thereby concluding that Mr. Chapman knew his employment would be of temporary duration: at para. 57. Furthermore, the Union representative testified that "there is no typical duration for the projects that union members are hired on. Depending on the nature of the project, they can last from weeks to months to multiple years." As well, the union representative confirmed that the project Mr. Chapman was hired to work on was a four-year project, end to end. It was reasonable for the Vice Chair to consider all of this evidence in arriving at her decision.

[74] Mr. Chapman also submits that the Vice Chair's decision was patently unreasonable because she applied a policy meant for determining casual not temporary workers. I disagree. The decision specifically noted that neither the Board officer nor the review officer considered Mr. Chapman to be a casual worker.

[75] In determining the sole issue before her, whether Mr. Chapman was a temporary or permanent worker, the Vice Chair considered a number of WCAT decisions, which she acknowledged were helpful but not binding on her. As well, she relied on practice directive #33B (replaced by Practice Directive #C9-9) which

expressly addresses workers with temporary assignments and contracts: see para. 49.

[76] Finally, Mr. Chapman submits that the Vice Chair failed to apply s. 250(4) (now s. 303(5)) of the *WCA* which would resolve a "tie' in the worker's favour. I am unable to agree with Mr. Chapman that the Vice Chair found the evidence to be of equal weight. The decision simply does not reflect that. Accordingly, it did not apply.

[77] Based on the evidence before the Vice Chair, I conclude that the Vice Chair's reasoning to arrive at the conclusion that Mr. Chapman was best characterized as a regular employee employed on a long-term temporary assignment was not patently unreasonable. I cannot say that the Vice Chair's conclusions were openly, clearly and evidently unreasonable.

[78] Accordingly, the petition is dismissed.

[79] The Respondent says that the usual rule in judicial review proceedings is that costs are not awarded for or against an administrative tribunal: *Laursen v. Director of Crime Victim Assistance*, 2017 BCCA 8 at para. 95.

[80] There will be no order as to costs.

"Girn J."