

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20120528
Docket: S106342
Registry: Vancouver

Between:

Michael Alton

Petitioner

And

Workers' Compensation Appeal Tribunal

Respondent

Before: The Honourable Madam Justice Dickson

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner

V.A. Ishkanian

Counsel for the Respondent

J. T. Lovell

Place and Date of Hearing:

Vancouver, B.C.
March 19, 2012

Place and Date of Judgment:

Vancouver, B.C.
May 28, 2012

COPY

INTRODUCTION

[1] The petitioner, Michael Alton, seeks judicial review of a decision of a panel of the respondent Workers' Compensation Appeal Tribunal ("WCAT") made on August 13, 2010 (the "WCAT Decision"). The WCAT Decision concerns a work-related injury to Mr. Alton's left foot sustained on July 29, 1977. Although his foot was fractured when Mr. Alton was injured in the accident, the fracture was not properly diagnosed as a fracture until 2001.

[2] Mr. Alton stopped working for a time after he was injured. He submitted a claim to the Workers' Compensation Board (the "Board") which paid him wage loss and health care benefits until November 1977. Based on erroneous medical opinions that he had suffered only soft tissue injuries to his left foot in the work-place accident, Mr. Alton returned to work in January 1978 although he experienced ongoing pain in that area of his body. When the fracture was finally properly diagnosed in 2001, the Board reopened his 1977 claim. A series of decisions were made thereafter on the reopening, the last of which is the WCAT Decision at issue on this judicial review.

[3] In the WCAT Decision, the WCAT panel dismissed Mr. Alton's appeal from a decision of the Review Division of the Board denying his reopened claim for injury-related temporary wage loss benefits for the period between November 7, 1977 and January 1, 2001. It also allowed his appeal of a separate Board decision which it varied by setting the commencement date of his injury-related permanent partial disability pension benefits at October 11, 1989 rather than January 21, 2002.

[4] In summary, Mr. Alton submits the WCAT Decision is patently unreasonable because it reaches findings of fact that are unsupported by the evidence. He also submits that it fails to apply a previous WCAT decision and binding WCB policy and fails to account for material expert evidence. In consequence, Mr. Alton asks the court to set aside those portions of the WCAT Decision that deny temporary wage loss benefits from November 7, 1977 to January 1, 2001 and deny a permanent

partial disability pension assessment as of November 7, 1977, to be followed by reassessment when his condition deteriorated.

[5] WCAT responds that there was evidence upon which the panel could reach the conclusion it did and, therefore, the WCAT Decision is not patently unreasonable. In particular, according to WCAT Mr. Alton confuses the date his left foot injury was suffered with the date of compensable disability when the two are not necessarily the same.

[6] In WCAT's submission, it was open to the panel to find that Mr. Alton was permanently impaired by the deformity and degenerative osteoarthritis that resulted from the left foot injury as of October 11, 1989. This is because October 11, 1989 was the date on which those conditions were reliably documented by objective radiographic evidence. In these circumstances, WCAT submits it is not open to this Court to reweigh the evidence and reach a different conclusion on the date of disability. Alternatively, if the WCAT Decision is found to be patently unreasonable WCAT says it should be set aside and the matter remitted for reconsideration in accordance with the court's reasons.

ISSUE

[7] The issue for determination is whether the WCAT Decision is patently unreasonable, and, if so, what relief should be granted.

LEGAL FRAMEWORK

[8] The *Workers' Compensation Act*, R.S.B.C. 1996, c. 492 (the "Act") establishes a comprehensive no-fault insurance scheme in British Columbia. Pursuant to its terms, the Board pays compensation for injury or death arising out of and in the course of employment caused to a worker. In return, the worker gives up the right to sue an employer or another worker in respect of the injury or death.

[9] Part 1 of the *Act* contains the compensation scheme; the assessment scheme; and empowers the Board, including its policy making function. Part 1 also

provides an internal review process by which Board decisions are reviewed by the Review Division.

[10] Section 5 of the *Act* sets out the criteria for entitlement to compensation for personal injury. Sections 5(1) and (2) provide:

5(1) Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part must be paid by the board out of the accident fund.

5(2) Where an injury disables a worker from earning full wages at the work at which the worker was employed, compensation is payable under this Part from the first working day following the day of the injury; but a health care benefit only is payable under this Part in respect of the day of the injury.

[11] When a worker experiences a work related injury and loses time from work, the worker is initially entitled to “temporary total disability benefits” or “temporary partial disability benefits” under ss. 29 or 30 of the *Act*. These benefits are referred to as “wage loss benefits” in Board policy. The term “disability” refers to a reduction in earning capacity.

[12] Temporary wage loss benefits are paid until the worker’s condition resolves or stabilizes. Once a condition has stabilized, or “plateaued”, wage loss benefits are terminated. If the condition resolves the worker returns to work, subject to subsequent worsening in his or her condition necessitating further time off and renewed payment of wage loss benefits. If the worker’s condition does not resolve, but becomes stable, the Board considers whether the worker has a “permanent disability”.

[13] Section 23(1) of the *Act* requires the Board to pay pensions for permanent partial disabilities that arise from physical and psychological impairments resulting from injuries. In most circumstances, the transition from wage loss benefits to a pension is seamless.

[14] The transition from wage loss benefits to pensions is addressed in Board policy. Pursuant to Board policy, wage loss benefits are to be terminated when a

worker's condition becomes permanent and prior to assessment of any pension. Wage loss benefits may become payable again thereafter, however, because a further work injury or natural relapse in the condition for which the pension is being paid causes a further period of temporary disability.

[15] If disabling fluctuations occur but they are within the normal range to be expected from the condition for which a pension has been awarded, no wage loss will be payable. Wage loss is only paid in cases where there is medical evidence of a significant deterioration in the worker's condition beyond what is normally to be expected and the change is temporary in nature. If, on the other hand, a change is permanent an existing pension will be reassessed: see Item #34.12, *Rehabilitation Services and Claims Manual* (the "*Manual*").

[16] Board policy also addresses the types of findings that may be considered in connection with claims for permanent partial disability pensions. For example, both objective physical findings noted by examining doctors and subjective complaints of pain will be considered. The fact that complaints are largely subjective in nature does not preclude a finding that a worker has a disability within the meaning of s. 23(1) of the *Act*: see Item #39.01, the *Manual*.

[17] Part 4 of the *Act* enables WCAT and contains a process for appeals to WCAT, which is an external, independent appellate body. WCAT is the final level of appeal in the workers' compensation system. In certain circumstances, WCAT may choose to suspend an appeal and refer a matter back to the Board for determination.

[18] Sections 254 and 255 of the *Act* form a privative clause with respect to WCAT. In summary, s. 254 provides that WCAT has exclusive jurisdiction to inquire into, hear and determine all matters and questions of law, fact and discretion. In addition, s. 255(1) provides that WCAT's decisions are final, conclusive and not open to question or review in any court and s. 255(3) provides that the Board must comply with WCAT's decisions.

[19] Significant changes were made to the workers' compensation system by way of amendments to the *Act* in 2002 and 2003. Pursuant to the transitional provisions, a worker in Mr. Alton's circumstances is subject to the compensation provisions of the *Act* as it read immediately prior to June 30, 2002.

BACKGROUND

[20] Mr. Alton worked in the construction industry in the 1970s. On July 29, 1977, he was injured when a forklift ran over his left foot. The injury caused an un-united Lisfranc fracture.

[21] Although Mr. Alton attended hospital when he was injured and his left foot was X-rayed, the Lisfranc fracture was not then detected.

[22] Mr. Alton went off work immediately after he was injured. He made a claim to the Board for wage loss and health care benefits, which claim was accepted.

[23] In a consultation report dated August 16, 1977, the Board's Dr. Randall stated:

I form the impression that he has had a soft tissue injury.

[24] In a consultation report dated November 17, 1977, Dr. Fenton, an orthopedic surgeon, stated that Mr. Alton had suffered:

... quite an extensive soft tissue injury which has left him with a little residual symptoms.

Dr. Fenton went on to opine that Mr. Alton could return to work.

[25] Based on these medical opinions, Mr. Alton returned to work in January 1978. Despite so doing, however, he continued to experience pain in his left foot, he required medication and he was left with a limp.

[26] Mr. Alton received wage loss and health care benefits from the Board until November 6, 1977.

[27] On July 4, 1979, Mr. Alton injured his left foot again when a heavy load of steel pipes he was loading rolled onto it. He went off work for a week and made another claim to the Board. Based on a July 16, 1979 medical opinion that he could return to work again he did so, although his ongoing left foot pain continued.

[28] In October 1989, Mr. Alton was employed as a carpenter when he suffered increased pain in his left foot that caused him again to stop working. An X-ray report dated October 11, 1989 revealed osteoarthritic changes but did not detect the Lisfranc fracture. Dr. Yurkovich, a physician who examined him on October 30, 1989, also reported deformity over the mid-tarsal area with tenderness and pain. Mr. Alton was not referred by the Board for further investigation.

[29] On December 11, 1989, Mr. Alton applied for compensation with respect to his left foot injury. The claim was treated by the Board as a reopening of the 1977 claim. Based on a memo produced by the Board's medical advisor, Mr. Alton was paid wage loss benefits for the period October 19 to 30, 1989. As before, he promptly returned to work thereafter.

[30] Throughout the 1990s, Mr. Alton continued to experience increased pain and difficulties with his left foot that impacted upon his work-life. In 2001, he applied again for a reopening of the 1977 claim. Further medical investigations were conducted, and, in June 2001, a CT scan revealed for the first time radiographic evidence of Mr. Alton's Lisfranc fracture.

[31] The Board issued several decisions in connection with Mr. Alton's reopened claim. Prior to the WCAT Decision, amongst other things, it determined that he was entitled to temporary wage loss benefits between January 1, 2001 and January 20, 2001 and a permanent partial disability pension from January 21, 2002 as a result of his left foot injury. In addition, in a decision dated July 27, 2007 with respect to the wage rate to be used at the reopening, it determined that Mr. Alton's benefits should be based on his wages at the time of the 1977 claim rather than his earnings in the months prior to the 2001 reopening (the "2007 WCAT Decision").

[32] In the 2007 WCAT Decision, WCAT found that:

... the evidence as a whole reliably establishes that the worker entered self-employment in order to better cope with the effects of the injury. The evidence also reliably establishes that the worker has had reduced earnings by reason of the effects of the injury.

[33] Following the 2007 WCAT Decision, Mr. Alton asked the Board to decide whether he was entitled to wage loss benefits or a pension, retroactive to 1977. It decided that he was not. Mr. Alton again appealed.

[34] An oral hearing of Mr. Alton's appeal was conducted in November 2009 by the WCAT panel. Mr. Alton testified and, amongst other things, relied upon a consultation report of Dr. Alan Baggoo, his treating orthopedic surgeon. Additional evidence, including medical reports from Dr. Baggoo and a Board medical advisor, as well as selected AMA Guides listing disability ratings for injuries to the foot and ankle area and additional submissions were presented thereafter.

[35] As noted, the WCAT Decision was issued on August 13, 2010.

THE WCAT DECISION

[36] The issues for determination are summarised at paragraph 8 of the WCAT Decision as follows:

1. Was the worker entitled to wage loss benefits between 1977 and 2011 due to the effects of his undiagnosed Lisfranc fracture?
2. Did the worker have a permanent functional impairment resulting from the 1977 Lisfranc fracture prior to the reopening of his claim in 2001?

[37] The WCAT panel began her analysis by considering the first of the foregoing questions. In particular, she asked whether Mr. Alton's

...condition was temporary as defined by the policy, meaning that further medical treatment to improve his condition was planned or considered, or that there was a significant improvement or worsening of his condition within a one-year period.

She went on to answer this question by referring to Board policy items 34-50 and 34-54 and concluded:

[25] The worker has not provided any medical evidence in support of his argument that his condition was temporary as defined by policy, meaning that further medical treatment to improve his condition was planned or considered, or that there was a significant improvement or worsening of his condition within a one year period. By his own evidence, during the time from 1977 to 2001, the physicians were not contemplating any further investigation to determine the cause of the pain in his foot, nor was any additional treatment recommended. The worker was essentially told to keep functioning with the pain in his foot. There is very limited medical evidence between 1977 and 1989, and even after that point, until the Board reopened the worker's claim in 2011. He did not report a period of improvement in his symptoms in those years.

[26] I accept the worker's evidence that he had to modify his work, become self-employed, and had periods of unemployment because of the pain condition in his foot. It is also evident from the evidence relating to the reopening of his claim in 2001 that the condition of his foot deteriorated through the 1990s to the point he could no longer work. However, the evidence does not support a finding his condition was temporary as defined by Board policy. The worker is not entitled to wage loss benefits for the period from 1977 through to 2001.

[38] The WCAT panel turned next to the question of Mr. Alton's entitlement to permanent disability benefits by virtue of a permanent functional impairment resulting from the 1977 Lisfranc fracture. She reviewed the evidence, accepted Dr. Baggoo's opinion in preference to that of the Board medical advisor and concluded that Mr. Alton had a permanent disability in his left foot as of October 11, 1989. In so doing, she stated:

[40] The medical advisor provided a response on April 8, 2010. The medical advisor noted when an orthopaedic surgeon examined the worker in November 1977, no residual disability was anticipated. There were no further medical reports until October 1989, when the worker had obvious deformity over the metatarsal area. There was no mention of loss of range of motion of the left ankle or forefoot. The deformity itself would not be considered a permanent functional impairment, and without loss of range of motion there was no objective evidence of measurable permanent functional impairment. Although the minor osteoarthritis seen on x-ray was evidence of a permanent condition, this was minor and would not usually be associated with a loss of range of motion or function, and therefore was not an indication of permanent functional impairment. The medical advisor believed there was no medical evidence of an objectively measurable permanent functional impairment prior to Dr. Kendall's examination in May 2001.

[41] By letter dated June 1, 2010, the worker's representative requested Dr. Baggoo address the medical advisor's opinion that because there was no loss of range of motion, there was no permanent functional impairment. Dr. Baggoo was asked to comment on whether the worker had a permanent functional impairment after 1977, and if possible the dates of the deterioration of his Lisfranc fracture.

[42] Dr. Baggoo assessed the worker at the Visiting Specialists Clinic on June 16, 2010. In his consultation report of that date, he addressed the Board medical advisor's comments. He noted that the Lisfranc area of the foot does not have much motion, and in a normal foot, this area moves only a few degrees. As a result, patients with this injury are not going to suffer a loss of range of motion, as there is not much motion in the joints to begin with. Patients with Lisfranc injury develop deformity, osteoarthritis and pain. The only objective measure of Lisfranc injury is direct physical examination of the area for tenderness and deformity, in combination with radiographic examination, which shows eventual osteoarthritis in the chronic situation. The 1989 x-ray and examination in which a deformity was noted would have been due to the 1977 Lisfranc injury.

[43] I do not place significant weight on the Board medical advisor's opinion. The opinion of the orthopaedic specialist in 1977 that no permanent impairment would result was offered without the knowledge the worker had a Lisfranc fracture in the injured foot. It can therefore not be relied upon in this matter. I am also aware that objective evidence of disability in the form of limitation in range of motion is not the only criteria or standard used by the Board when determining a worker has a permanent impairment. For example, workers with permanent chronic pain may have full range of motion in the affected area, and yet are entitled to a pension award under policy #39.02.

[44] Finally, I accept the opinion and comments of Dr. Baggoo, an orthopedic specialist, that the Lisfranc area of the foot has limited range of motion and this is therefore an unreliable measure of permanent disability for this type of injury. I also rely on his description of how the injury evolves and how a permanent injury would be assessed through direct observation and examination, and documentation of osteoarthritis and deformity. It is evident from Dr. Baggoo's comments that the lack of timely diagnosis has resulted in a serious degenerative condition in the worker's left foot and that this degeneration was well established long prior to the assessments in 2001.

[45] I find that the worker had a permanent disability in his left foot as of October 11, 1989, when a physician and radiographic evidence first documented visible deformity, altered gait, and osteoarthritis. The worker reported ongoing, significant pain which was worsened with activity beginning in this time frame. He had to modify his employment at that time as a result of his symptoms. I consider this reliable evidence the worker had a permanent condition in his left foot as of that date. I note chronic pain has been accepted on the worker's claim previously as a permanent condition and the worker received an award of 2.5% of total disability for this condition, effective January 21, 2002. The file is returned to the Board to determine the worker's entitlement to benefits under sections 23(1) and 23(3) of the Act as a result of my decision.

[46] I allow the worker's appeal on this issue.

[47] I confirm the decision set out in *Review Decision #R0101105*, dated June 17, 2009. I find the worker was not entitled to temporary disability benefits during the period from 1977 until his claim was reopened in 2001.

[48] I vary the decision set out in the determination letter of April 30, 2010. I find the worker had a permanent disability in his left foot as a consequence of the undiagnosed Lisfranc fracture as of October 11, 1989. The file is returned to the Board for further adjudication regarding the worker's entitlement to sections 23(1) and 23(3) benefits as a result of this decision.

LAW

[39] The applicable legal principles on this judicial review are not controversial. The standard of review with respect to findings of fact is patent unreasonableness. A high degree of deference is to be shown by the reviewing court and if the decision is rationally defensible in respect of the facts and law it must not be interfered with: see *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 58, *Manz v. Sundher*, 2009 BCCA 92.

[40] In *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80, the Court of Appeal emphasized that a reviewing court must not reweigh evidence, regardless of its sufficiency to support factual findings. In particular, the Court stated:

As the chambers judge ruled, a decision is not patently unreasonable because the evidence is insufficient ... A court on review 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.

DISCUSSION

[41] Mr. Alton submits the WCAT finding that he had a permanent disability of his left foot as of October 11, 1989 was patently unreasonable because it focused inappropriately on an X-ray showing deterioration of an existing impairment rather than on the impairment's commencement. The uncontroverted medical evidence, as well as Mr. Alton's own testimony, was that the left foot fracture occurred in 1977, not in 1989. The evidence was also unequivocally to the effect that the fracture,

although undiagnosed as such until much later, caused ongoing pain and associated impairment on a permanent basis from 1977 onward.

[42] According to Mr. Alton, the findings in the 2007 WCAT Decision are entirely consistent with the foregoing conclusion. They are also irreconcilable with the subsequent WCAT Decision finding that permanent disability did not commence until left foot deformity and osteoarthritis were radiographically evidenced. In the circumstances, he says the only rational conclusion available on the accepted evidence was that he was permanently partially disabled within the meaning of s. 23 (1) of the *Act* from the point of plateau in November of 1977 forward and accordingly entitled to permanent partial disability pension benefits. Thereafter, he submits he was entitled to adjustment to his pension by way of temporary wage loss benefits for any subsequent significant deterioration(s) in his existing compensable condition.

[43] WCAT responds that it was open to the panel to conclude the permanent functional impairment entitling Mr. Alton to a partial disability pension was not established until left foot deformity and osteoarthritis were objectively revealed on October 11, 1989. In other words, according to WCAT the panel was entitled to find, as it did, that the compensable disability at issue was the degenerative condition eventually caused by the left foot fracture, and not the fracture itself. In the circumstances, having made this permissible finding, WCAT submits it was not patently unreasonable for the panel to fix the start of Mr. Alton's permanent partial disability pension as of October 11, 1989.

[44] I cannot agree with WCAT's submission. Although it is true that the weight the WCAT panel chooses to give to the evidence is a matter within its exclusive jurisdiction, a decision based on no evidence at all is patently unreasonable:
Speckling.

[45] There was no evidence upon which to rest a rational conclusion that Mr. Alton was not functionally impaired by the undiagnosed Lisfranc fracture on a permanent partial basis until the point at which degenerative osteoarthritis and deformity were radiographically evidenced. On the contrary, Mr. Alton's uncontroverted evidence,

corroborated by the accepted medical evidence of Dr. Baggoo, was that he suffered ongoing pain as a result of the undiagnosed Lisfranc fracture. The fracture occurred in July, 1977 and the point of plateau was November, 1977, after which Mr. Alton returned to work despite the pain he continued to experience. His condition was permanent, within the meaning of the legislative scheme, from the point of plateau in 1977 onward.

[46] The fact that Mr. Alton's condition was not properly diagnosed for many years does not detract from its ongoing existence. Nor does the fact that some of its consequences, including osteoarthritis, developed slowly over time. The pain associated with the Lisfranc fracture increased periodically after 1977 and his condition deteriorated correspondingly thereafter. In these circumstances, I agree with Mr. Alton's submission as summarised above.

[47] It is perhaps unfortunate that the WCAT panel analysis began with consideration of whether Mr. Alton was entitled to wage loss benefits between 1977 and 2011 due to the effects of his undiagnosed Lisfranc fracture. Given the evidence and legal framework set out above, the answer to this question logically followed, rather than preceded, the answer to the second question posed: did Mr. Alton have a permanent functional impairment resulting from the 1977 Lisfranc fracture prior to the reopening in 2001? If, having received wage loss benefits between July and November 1977, Mr. Alton was permanently partially impaired thereafter he was entitled to a partial disability pension. That pension would be subject to adjustment for additional wage loss benefits for any subsequent deterioration(s) in his condition.

[48] Although I accept Mr. Alton's submission that the WCAT Decision is patently unreasonable and, therefore, WCAT lost jurisdiction I agree with WCAT that, in the result, the WCAT Decision should be set aside and the matter remitted for reconsideration in accordance with these reasons.

[49] As to costs, the usual rule is that costs are not awarded for or against a tribunal in a judicial review proceeding: see *Lang v. British Columbia*

(Superintendent of Motor Vehicles), 2005 BCCA 224. I see no reason in this case to depart from the usual rule.

Dickson, J.

DICKSON J.