

Bhullar v. Workers' Compensation Appeal Tribunal

Decision Summary

Court	B.C. Supreme Court
Citation	2019 BCSC 1673
Result	Judicial Review Dismissed
Judge	Mr. Justice Crerar
Date of Judgment	September 20, 2019
WCAT Decision(s) Reviewed	A1601400 A1802186

Keywords:

Judicial review – Procedural fairness – Method of hearing – Credibility – Section 7.5 of the Manual of Rules of Practice and Procedure - Patent unreasonableness – Aggravation of a pre-existing condition – Section 5(1) of the Workers Compensation Act.

Summary:

The Board Decisions

The petitioner, a 64 year old delivery worker, injured his low back at work while moving boxes. The Workers' Compensation Board, operating as WorkSafeBC, accepted his claim for a lumbar back strain and later a temporary aggravation of a pre-existing condition, namely an annular tear of his L5/S1 vertebral disc. The Board and the Review Division found that his other vertebral disc conditions were pre-existing and were not caused or aggravated by the incident. This conclusion was premised on the finding that the petitioner's low back was symptomatic prior to the work incident, which the petitioner denied.

The Board and the Review Division relied, in part, on hospital records from three days after the work incident in which medical staff noted, depending on the record, either a two week, three week, or three month history of low back pain. The petitioner had also reported that his pain medications were finished. Before the Review Division, the petitioner argued that the hospital records were unreliable as they contained typographical errors, as they should have recorded complaints "three days" earlier. The petitioner relied on a report from his family doctor suggesting that he was asymptomatic before the incident and an opinion from a physical medicine and rehabilitation specialist that the work incident caused an aggravation of his pre-existing disc conditions. That opinion was based, in part, upon the petitioner reporting that his low back was asymptomatic before the work incident.

WCAT Decisions

The petitioner appealed to the Workers' Compensation Appeal Tribunal (WCAT) and requested that the WCAT proceeding be heard by way of written submissions. WCAT did so. WCAT dismissed the petitioner's appeal for reasons similar to those of the Board and Review Division. In the course of the appeal, WCAT obtained the records of the petitioner's family doctor and his PharmaNet records. His doctor's records indicated that the petitioner had complained of back pain three months before the work incident but not after that. The PharmaNet records indicated that the petitioner had filled prescriptions for anti-inflammatory pain relief medications the day before the work incident. WCAT gave the petitioner (through his representative) an opportunity to provide additional submissions in respect of these records. The petitioner did so. He continued to argue that he was asymptomatic before the incident and that the medication was for other conditions he had, namely knee pain. The petitioner sought reconsideration of WCAT's decision on the basis that WCAT should have held an oral hearing as its decision turned on a credibility finding against the petitioner. WCAT found it was not procedurally unfair.

Court Decision

The court dismissed the petition, finding that the WCAT original decision was neither patently unreasonable nor procedurally unfair for not holding an oral hearing. The WCAT reconsideration decision was correct.

- WCAT Decision not Patently Unreasonable

The court found that it was not patently unreasonable for WCAT to rely on the evidence found in the hospital records or to draw from it the conclusions it did. The clinical evidence was more consistent than inconsistent with respect to the central question of whether the petitioner's back was symptomatic before the incident. That evidence was not limited to the hospital records. The court stated that the task on review is to ask whether there was some evidence before WCAT allowing it to reach the conclusion that it did and concluded that there was some evidence, and indeed ample evidence, to support WCAT's conclusion.

- WCAT Process not Unfair

The court found that it was not unfair for WCAT to proceed by way of written submissions in the circumstances of this case. In no way did WCAT deny the petitioner the opportunity to make his case and be heard. The petitioner had full opportunity to participate meaningfully in the administrative process, and did so. There was nothing unusual in the process such as to require WCAT to second-guess the petitioner's own decision not to proceed by way of an oral hearing.

The duty of fairness does not always require an oral hearing. There is no requirement at law that a decision-maker hold an oral hearing in every case where credibility is at issue. Procedural fairness requirements in administrative law are not technical, but rather functional in nature. A reviewing court examines whether a party had the opportunity for meaningful participation. WCAT was entitled to conclude that the existence of the multiple medical records was determinative, and find a probe of the petitioner's credibility to be unnecessary. Both WCAT and the petitioner expressly opted not to make the process one based upon credibility, or to put the petitioner's honesty and integrity on the line.

The court said that in law, the term “credibility” spans a broad conceptual range. In most cases (apart from rulings on a purely legal basis) where a worker or a plaintiff files a claim, in which facts are asserted, and the claim is rejected, it could be described as some form of an adverse credibility finding: the decision maker dismisses the implied or express assertion by the claimant that they have suffered a wrong. At the other end of the spectrum of the concept of credibility is a direct condemnation of the honesty and integrity of the claimant, with an express statement that the moving party is a liar. The present scenario falls much closer to the former, more tenuous, concept of credibility. Neither WCAT decisions denigrate the petitioner’s honesty or question his credibility. WCAT did not reject a specific assertion by the petitioner, but based its decision on multiple objective pieces of evidence. The petitioner did not provide any direct evidence, sworn or otherwise, to WCAT about his medical condition.

The court rejected the petitioner’s argument that he was taken by surprise when WCAT relied upon the medical evidence that his lower back condition was symptomatic before the incident. That issue was central at every stage of the proceeding and the petitioner made submissions on that very issue to the Review Division and WCAT. When WCAT took the additional step of obtaining the additional records, the petitioner would have been further reminded that this was the central issue of the case and was given yet an additional opportunity to participate, which he accepted.

The court also rejected the petitioner’s argument that the absence of the employer in the WCAT proceeding – and thus any employer challenge to his credibility – rendered him even less able to anticipate WCAT’s decision based on the medical records. The court first noted that the employer did participate at the Review Division and its submissions there highlighted to the petitioner that the central issue was whether or not the petitioner had a pre-existing back condition. The court also stated that to accede to the petitioner’s arguments would require WCAT (and indeed other similar tribunals) to prophylactically convene an oral hearing in almost every case. If the tribunal fails to do so, and rejects the application of the party, based on external objective evidence, the applicant would always be able to say, *ex post facto*, that the rejection of their claim impugned their credibility and that they ought to have had their credibility assessed in an oral hearing. The court found that this is antithetical to the efficient conduct of a high-volume tribunal such as the Board, and would promote moral hazards: applicants opting for written proceedings would in effect buy themselves a free ground of judicial review if the decision goes against them.

Lastly, the court stated that even if an oral hearing had been ordered and the petitioner had provided an earnest statement that he had not felt lower back pain before the incident, it is unclear how such testimony would have assisted WCAT, or displaced the other ample medical evidence of a pre-existing back condition.