

## DJAKOVIC V. BRITISH COLUMBIA (WORKERS' COMPENSATION APPEAL TRIBUNAL)

### Decision Summary

Court	B.C. Supreme Court
Citation	2010 BCSC 1279
Result	Judicial Review Allowed
Judge	Mr. Justice Voith
Date of Judgment	September 10, 2010
WCAT Decision(s) Reviewed	WCAT-2008-01126, WCAT-2008-01448, WCAT-2008-03611

### **Keywords**

*Cross examination – Procedural fairness - Finding of no contrary evidence - Loss of earnings assessment*

In this judicial review, the Court considered three decisions by the Workers' Compensation Appeal Tribunal (WCAT) which dealt with a number of issues including whether the Petitioner was entitled to an award for upper extremity nerve impairment or symptoms, and whether the Petitioner was entitled to a loss of earnings assessment under section 23(3) of the *Workers Compensation Act* (Act).

On judicial review, all three WCAT decisions were set aside. With respect to the first decision the issue was whether the Petitioner suffered a low back injury, or an aggravation of a pre-existing low back condition, during the rehabilitation program he was attending due to an earlier compensable injury. The Petitioner wanted to cross examine two staff members at the rehabilitation program with regard to his allegation that they witnessed his injury during the program when he fell off of an exercise bike. The WCAT panel elicited the witnesses' evidence in writing. The Petitioner was of the view that the written responses were unsatisfactory. The Court found that in denying the Petitioner the right to cross examine the witnesses to the alleged event, which was relevant and central to the appeal, there was a denial of procedural fairness.

The issue before the second WCAT panel was whether the Petitioner was entitled to an additional award for upper extremity nerve impairment or upper extremity symptoms. The panel relied on the Board medical advisor's opinion that an award be given for reduced range of motion, but that there were no additional factors warranting an award. The panel found that there was no expert opinion contrary to the Board medical advisor's opinion. The Court concluded that there were medical opinions to the contrary on file, and while it was open to WCAT to reject those opinions, WCAT committed a jurisdictional error by finding that there was no such evidence.

In the third decision the Court found that WCAT erred in law due to its central reliance on a report by the Board's Disability Awards Department with respect to whether the Petitioner was entitled to a loss of earnings assessment under section 23(3) of the Act. In particular, the Board's report relied on an interpretation of "impossible" under Board Policy Item #40.00 which was appropriate when its report was prepared (based on the non-binding Best Practice Information sheet #17 in effect at that time) but which had been significantly modified to consider physical limitations by the time the WCAT decision was made by Practice Directive C6-2. Despite this modification the WCAT panel relied on the report which applied the outdated policy, and the Court found the decision patently unreasonable.