

## ***Encinger v. Workers' Compensation Appeal Tribunal***

### Decision Summary

Court	B.C. Supreme Court
Citation	2017 BCSC 1483
Result	Petition Allowed
Judge	Mr. Justice Macintosh
Date of Judgment	August 8, 2017
WCAT Decision Reviewed	WCAT-2011-03305

#### **Keywords:**

*Judicial Review – Extensions of Time (Court) – Health Care Benefits (section 21) – Procedural Fairness*

#### **Background to WCAT Decision:**

The worker suffered a compensable injury to her right hip and leg while working as a nurse in 2004. She had Workers' Compensation Board (the Board)-sponsored hip surgery (arthroscopy) by Dr. Gilbert in 2008. Her condition continued to deteriorate after this surgery. She researched other orthopaedic surgeons and discovered Dr. Villar in London, England. Ms. Encinger travelled to London to have a consult with Dr. Villar in September 2009 and a diagnostic procedure in December 2009. Dr. Villar recommended that she have a second hip arthroscopy. Ms. Encinger travelled to London in March 2010 for that procedure.

In May 2010, the Board reimbursed Ms. Encinger for the British Columbia scheduled cost of these three procedures. The Board denied Ms. Encinger's request for reimbursement of travel expenses to London and for medical expenses above the British Columbia scheduled rates. The Review Division confirmed the Board's decision. Ms. Encinger appealed to WCAT.

Ms. Encinger relied upon two written statements before WCAT. Her representative asked that her statements be accepted as true, or an oral hearing be held, as there were significant factual issues in dispute. In her written statements, Ms. Encinger essentially alleged that commencing in 2009 [that is, prior to her travel to London to consult with Dr. Villar], she and her attending physician asked the Board and Dr. Gilbert whether any other local surgeon could provide her with a second opinion or treatment. Ms. Encinger alleged that both the Board and Dr. Gilbert told her that no one else was available.

The WCAT panel denied the request for an oral hearing. It said that the issue before it required consideration of the largely undisputed facts and medical evidence, and the application of the relevant law and policy to that evidence. It proceeded by way of written submissions. In denying Ms. Encinger's request for an oral hearing, the panel did not expressly address Ms. Encinger's statements regarding her alleged discussions with the Board and Dr. Gilbert.

The panel essentially characterized the issue before it as whether the worker was forced to seek treatment in England that was not available to her in British Columbia. The panel essentially found that Ms. Encinger could have received adequate treatment within British Columbia. It denied Ms. Encinger's appeal. Thus, it confirmed reimbursement only of the British Columbia scheduled cost of the three procedures, and it confirmed that Ms. Encinger would not have her travel costs reimbursed.

### **Summary of Court Decision:**

The court addressed two issues.

The first issue was whether the court should extend the time for filing the petition. Pursuant to section 57(1) of the *Administrative Tribunals Act (ATA)*, there is a 60 day timeline to file a petition for judicial review of a WCAT decision. The WCAT decision was issued on December 28, 2011. The petition was filed on January 29, 2015 (and thus beyond the 60 day timeline prescribed in the *ATA*).

WCAT took no position as to whether the court should extend the time for filing the petition or not. The court exercised its discretion to permit the late filing of the petition. The court essentially found that the petitioner had provided a reasonable explanation for the late filing. The petitioner had applied for reconsideration of the WCAT decision on patent unreasonableness and procedural fairness grounds in 2012, and there was no time limit to apply for reconsideration with WCAT. Her application was pending before the tribunal when *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499 was released in 2014. Once *Fraser Health Authority* was released (with the effect that WCAT could no longer reconsider one of its previous decisions for patent unreasonableness), Ms. Encinger applied for judicial review of the WCAT decision, in early 2015 (on patent unreasonableness and procedural fairness grounds).

The court then considered the merits of the petition. It found that the tribunal denied Ms. Encinger procedural fairness when it denied her an oral hearing and proceeded by way of written submissions. The court said that it was apparent from Ms. Encinger's written statement to the tribunal, and from her representative's submission on her behalf, that the facts giving rise to her obtaining treatment in London were squarely in dispute. Credibility would probably also need to be tested. There should have been an oral hearing and the lack of such a hearing was procedurally unfair.

The court allowed the petition. It set WCAT's decision (*WCAT-2011-03305*) aside, and remitted the matter to the tribunal to proceed by way of an oral hearing.

Having found the decision to be procedurally unfair, the court did not find it necessary to address whether the decision was patently unreasonable or not.