# Fraser Health Authority v. Workers' Compensation Appeal Tribunal

Decision Summary

| Court | B.C. Court of Appeal |
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| Citation | 2014 BCCA 499 |
| Result | Appeal Dismissed |
| Justices | **Madam Justice Newbury**<br>**Mr. Justice Chiasson**<br>Mr. Justice Frankel<br>Madam Justice Bennett<br>**Mr. Justice Goepel** |
| Date of Judgment | December 18, 2014 |
| WCAT Decisions Reviewed | WCAT-2010-03503<br>WCAT-2011-03079<br>And<br>WCAT-2010-03507<br>WCAT-2011-03080<br>And<br>WCAT-2010-03509<br>WCAT-2011-03081 |

**Keywords:**

*Judicial review – Power to reopen for jurisdictional defect – Power to reconsider for patent unreasonableness – Section 253.1(5) of the Workers Compensation Act – Composition of reconsideration panel – Occupational disease – Breast cancer – Cancer cluster – No evidence – Causation – Common sense inferences – Openly, clearly, evidently unreasonable*

**Summary:**

In three separate decisions, the majority of a panel of the Workers' Compensation Appeal Tribunal (WCAT) found that three hospital laboratory workers were entitled to compensation for their breast cancers on the basis that it was at least as likely as not that their cancers were occupational diseases due to the nature of their employment. More precisely, the majority found that the contribution of the employment to their cancers was more than *de minimis* (or trivial). The majority applied section 250(4) of the *Workers Compensation Act*, which provides that if the evidence supporting different findings on a compensation issue is evenly weighted WCAT must resolve that issue in a manner that favours the worker.

The employer, Fraser Health Authority, applied to WCAT for reconsideration of WCAT's decision on the basis that it was patently unreasonable. The application was assigned to a vice chair who was not a member of the panel that decided the appeal. The reconsideration panel

denied the application, finding that the decision was not patently unreasonable as the majority's conclusion was supported by some evidence. On judicial review, the B.C. Supreme Court found that the WCAT original decision was patently unreasonable and the WCAT reconsideration decision was incorrect for finding that the WCAT original decision was not patently unreasonable. A five justice division of the B.C. Court of Appeal dismissed the workers' appeals.

**Issue 1: Who at WCAT has Authority to Reopen to Cure a Jurisdictional Defect?**

The question of the composition of the WCAT reconsideration panel was raised by the B.C. Court of Appeal during the hearing of the appeal. The issue was not addressed by the B.C. Supreme Court.

The majority of the Court of Appeal determined that WCAT's reconsideration decision was a nullity as only the panel that made the original decision is authorized to reopen the appeal to cure a jurisdictional defect. The Act does not authorize the WCAT chair to appoint a different panel to address that question. In the absence of new evidence, finality rests with the original decision maker. The dissenting justices did not address this issue.

**Issue 2: Does WCAT Have the Power to Reconsider for Patent Unreasonableness?**

The issue of the scope of WCAT's power to reconsider was raised by the B.C. Court of Appeal in advance of the hearing of the appeal. It granted WCAT's request that the issue be heard by a five justice division. The issue was not addressed by the B.C. Supreme Court.

The majority of the Court of Appeal found that it was patently unreasonable for WCAT to conclude that it had the power, at common law or pursuant to section 253.1(5) of the Act, to consider whether a WCAT decision should be set aside on the basis that it is patently unreasonable. WCAT's power to reopen an appeal to cure a jurisdictional defect is limited to curing errors of true jurisdiction and breaches of procedural fairness. It is only in those circumstances that the tribunal has failed to fulfill its statutory task.

Section 253.1(5) preserves only the existing limited common law exceptions to the operation of the principle of *functus officio*. The exceptions do not extend to curing errors made within jurisdiction. Review for reasonableness is a review for errors made within jurisdiction. The Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick* did not change the basic dichotomy between lack of jurisdiction and excess or loss of jurisdiction. While mindful of the adage that a tribunal does not have the jurisdiction to make patently unreasonable decisions, the majority determined that the *functus officio* decisions refer only to failures by tribunals to complete their mandatory tasks. To find that a tribunal has the power to cure errors that result in a loss of jurisdiction would undermine finality and the general application of the principle of *functus officio*.

At common law, whether a tribunal is substantively wrong is for the courts to determine on judicial review, not for the tribunal itself. The Legislature did not give WCAT the authority to undertake a judicial review of its own decisions. The majority questioned whether the Legislature constitutionally could vest the WCAT with the authority of a superior court on judicial review. A common sense reading of the words "to cure a jurisdictional defect" does not connote a reconsideration of the reasonableness of a decision or give jurisdiction to set aside a decision as these powers are in the nature of an appeal.

The majority referred to the Core Services Review (Winter Report), in which Mr. Alan Winter recommended that the new tribunal (ultimately WCAT) retain the power that he concluded the former Appeal Division of the Board had to reconsider for errors of law going to jurisdiction, including patently unreasonable findings. The majority concluded that section 253.1(5) was not enacted in response to the Winter Report as the section was added to the Act by the *Administrative Tribunals Act* (ATA) and not the earlier legislation that significantly revised the Act and incorporated many of Mr. Winter's recommendations. The government papers produced prior to the enactment of the ATA do not refer to the Winter Report and do not suggest that a tribunal's authority to reconsider extends to a review for patent unreasonableness.

The two dissenting justices concluded that WCAT does have the power to reconsider for patent unreasonableness. They found that *Dunsmuir* was not purporting to narrow the constitutional principle of "jurisdiction" when it referred to "true questions of jurisdiction". To the extent that earlier Court of Appeal decisions might be construed to the contrary they should not be followed. Further, the phrase "jurisdictional defect" in section 253.1(5) was drafted prior to *Dunsmuir* and in the context of the Winter Report. The broad meaning of jurisdiction survives in British Columbia. The dissent found that permitting WCAT to reconsider for patent unreasonableness would not usurp the powers of the superior court to judicially review its decisions as that avenue remained open to a party. Lastly, to eliminate WCAT's established practice of reconsidering for patent unreasonableness would be contrary to the purposes of the Act and to the principles of administrative law generally which includes the encouragement of the adjudication of disputes by specialized tribunals without the need to resort to courts.

**Issue 3: Was WCAT's Original Decision Patently Unreasonable?**

In concluding that the workers' breast cancers were due to the nature of their employment, the majority of the WCAT original panel relied, in part, on evidence that there was a higher than expected rate of breast cancer amongst laboratory workers at the hospital and that they had been exposed to carcinogens. The majority characterized this evidence as positive evidence to support its conclusion. The majority noted that although none of the three expert reports before the panel concluded that the cancers were due to the nature of the employment, there was expert evidence that identified employment as one of three possible causes. Observing that the experts were applying a standard of scientific certainty to their conclusions, and that WCAT need not achieve that level of certitude in its adjudication, the majority determined that a finding of work causation was in keeping with ordinary common sense. While agreeing with the majority that scientific certainty was not required, the dissenting vice chair found that the workers were not entitled to compensation because there was insufficient positive evidence linking their cancers to their employment given the clear consensus of the experts.

The B.C. Supreme Court determined that the WCAT original decision was patently unreasonable as there was no positive evidence to support it. The court found that the expert opinions before WCAT were unambiguous and uncontradicted in that there was no evidence that workplace factors caused the workers' cancers. The court found that a higher than expected rate of cancer in a workplace cannot alone provide evidence that the cancer was caused by occupational factors because cancer clusters are statistically certain to arise in various places and times. While some expert evidence did leave open the possibility that workplace factors played some role in the workers' cancer, it was only a possibility. There was no objective evidence supporting that possibility. In finding that this possibility did in fact occur and that the cancer was caused by workplace factors, WCAT was speculating into an area in

which it has no expertise. In the face of contrary expert opinion, the cause of the breast cancers could not be determined by the application of common sense inferences.

The majority of the B.C. Court of Appeal agreed with the B.C. Supreme Court that WCAT's majority decision was patently unreasonable for finding the workers' breast cancer was due to the nature of their employment. Two of the three justices of the majority found that the existence of the statistical anomaly constitutes some supporting evidence for the decision but is not a sustainable basis for the decision. They agreed with a third justice who found that "even if it could be said that there was some evidence before [WCAT] to support its finding, its decision is, on the basis of the evidence before it, openly, clearly, evidently unreasonable". The third justice found the decision to be patently unreasonable given the absence of any evidence and the expert opinion to the contrary - none of which found the cancer was due to the nature of the employment. The suggestion that the cancer was due to the employment did not rise above speculation.

The two dissenting justices of the B.C. Court of Appeal concluded that there was some evidence to support the majority decision. They referred to the fact that none of the experts were able to rule out work related factors and that the experts were attempting to reach scientific conclusions with a degree of medical certitude that is not required by courts of law, much less by a workers' compensation tribunal. They emphasized that the compensation system has different objectives, and operates differently, than a tort system. They found that the chambers judge analyzed the law as if he were discussing a personal injury claim in a court of law. They found that the WCAT majority acted in the spirit of the Act in resolving the uncertainty in favour of the workers.