Fraser Health Authority v. Workers' Compensation Appeal Tribunal

Decision Summary

Court	Supreme Court of Canada
Citation	2016 SCC 25
Result	Workers' Appeal Allowed WCAT Appeal Dismissed
Justices	Chief Justice McLachlin Madam Justice Abella Mr. Justice Moldaver Madam Justice Karakatsanis Mr. Justice Wagner **Madam Justice Côté** **Mr. Justice Brown**
Date of Judgment	June 24, 2016
WCAT Decisions Reviewed	WCAT-2010-03503 WCAT-2011-03079 And WCAT-2010-03507 WCAT-2011-03080 And WCAT-2010-03509 WCAT-2011-03081

Keywords:

Judicial review – Occupational disease – Breast cancer – Cancer cluster – Causation – Sufficiency of evidence – Common sense inferences – Patent unreasonableness – Power of tribunal to reopen for jurisdictional defect – Power to reconsider for patent unreasonableness – Section 253.1(5) of the Workers Compensation Act

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 and also determined that the WCAT reconsideration decision was a nullity because WCAT has no power to reopen an appeal to cure a patently unreasonable error and because the power to reopen that WCAT does have must be exercised by the same panel who decided the original appeal.

The majority of the Supreme Court of Canada allowed the workers' appeal and determined that WCAT's original decision was not patently unreasonable.

Issue 1: Was WCAT's Original Decision Patently Unreasonable?

(a) WCAT Original Panel

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.

(b) B.C. Supreme Court

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.

(c) B.C. Court of Appeal

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.

(d) Supreme Court of Canada

The majority of the Supreme Court of Canada stated that a finding of fact, such as whether the workers' breast cancers were occupational diseases caused by the nature of their employment, is not patently unreasonable where a court finds the evidence merely to be insufficient. A finding is patently unreasonable where the evidence, viewed reasonably, is incapable of supporting the finding.

On the issue of causation, the court emphasized that it was important to recognize, as WCAT had, that a less stringent standard of proof applies in the workers' compensation context than applies in civil tort claims. The applicable standard also contrasts sharply with the "scientific" standards employed by the authors of the expert reports, which the court described as a standard of scientific certainty and wholly inapplicable to determining causation in the workers' claims. The lower courts therefore erred in law in relying upon the inconclusive quality of the expert reports as determinative of the causation question.

The majority of the court found that the central problem in the handling of causation by the lower courts however was their fundamental misapprehension of how causation may be inferred from evidence. It noted that WCAT has exclusive jurisdiction to decide precisely these sorts of issues and found that while WCAT may choose to draw from the expert evidence put before it the decision remains WCAT's to make. The presence or absence of opinion evidence from an expert positing (or refuting) a causal link is not, therefore, determinative of causation. It is open to a trier of fact to consider, as WCAT did, other evidence, including circumstantial evidence, in determining whether it supported an inference that the workers' breast cancers were caused by their employment. Here, though the record did not include confirmatory expert evidence, WCAT nonetheless relied upon other evidence which, viewed reasonably, was capable of supporting its finding of a causal link.

The dissenting justice found that WCAT's finding was patently unreasonable as there was no evidence supporting a causal link. WCAT openly disregarded the medical experts' consensus view and relied on "common sense" to speculate. She found that experts are responsible for providing decision-makers with precisely those inferences that decision-makers -- due to the technical nature of the issues -- are unable to formulate themselves. While WCAT is not bound by the medical experts' findings, it cannot simply disregard their uncontradicted conclusions. The dissenting justice also finds that this was not a case where the expert opinions applied too high a standard of proof, which would otherwise justify their rejection, as they questioned whether the workplace exposures "could" or "may" have been of causative significance. The justice also disagreed with the WCAT majority that there was anything in the expert opinions that constituted sufficient evidence of a causal link. And a statement in one report that it could not exclude a causal link should not be mistake for evidence, and certainly not positive evidence. In the end, WCAT's conclusion was speculative and ignored a policy requirement that there must be positive evidence to support a causal link. The relaxation of the standard of proof in section 250(4) does not assist the workers' when there is no evidence capable of supporting causation.

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

A unanimous court determined that there was no need to interfere with the Court of Appeal's decision on this issue on the basis that the respondent Fraser Health agreed that the reconsideration decision was a nullity.