IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Scanlan v. WCAT,*
2016 BCSC 314

Date: 20160224
Docket: S12314
Registry: Campbell River

Between:

John Scanlan 6608 Mystery Beach Rd. Fanny Bay BC V0R 1W0

Petitioner

And:

WCAT 150-4600 Jacombs Rd, Richmond BC V6V 3B1 Co-Gen Mechanical Services Ltd. Suite 351-2401 Cliff Ave. Courtenay, BC V9N 2L5

Respondents

Before: The Honourable Madam Justice Young

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241; and the *Workers Compensation Act*, R.S.B.C. 1996, c. 492; and a Decision of the Workers' Compensation Appeal Tribunal rendered on January 14, 2015, WCAT Decision No. WCAT-2015-00123

Reasons for Judgment

Petitioner Acting on Own Behalf:	J. Scanlan
Counsel for the Respondents:	K.Z. Koles
Place and Date of Hearing:	Campbell River, B.C. November 5 and 6, 2015
Place and Date of Judgment:	Campbell River, B.C. February 24, 2016

[1] The petitioner seeks the following orders:

1. That WCAT Decision Number WCAT 2015–00123, dated June 5, 2014 be set aside; and

2. That the petitioner's arguments linking his infection and work which were denied, need to be heard and a new decision needs to be made based upon all of the relevant evidence.

BACKGROUND FACTS

[2] The petitioner, who is a steam fitter, claims compensation for an infection in his right hand. He sets out his claim in his written submissions as follows:

[3] The claim the petitioner is making is that his work at Cogen Mechanical Services led to a series of abrasion injuries (trauma) to the skin on his right thumb on the distal side of the interphalangeal ("IP") joint, on the ulnar side of his thumb centred slightly above (away from the palm site) the centre line running to tip to palm of thumb that predisposed him to an infection. The evidence of repeated injury to that spot was a layer of dead skin cells, a callus that was forming on this location. An infection did occur which started exactly at the location where the series of abrasion injuries were occurring. The infection progressed and eventually spread and led to a condition called flexor tenosynovitis which required immediate surgery.

[4] I will use the petitioner's own words to describe the injury:

[5] On Friday, September 20, 2013 the petitioner was grinding a pipe in the course of employment wearing gloves and using a handheld grinder. At the end of the work shift he noticed that he had a slight patch of rough skin on the volar aspect of his right thumb just distal to the IP joint which looked like a callus in its very early stages of formation.

[6] On Saturday, September 21, 2013 the petitioner noted that the above-mentioned area where the skin was rough, was sore to touch.

[7] On Sunday, September 22, 2013 the petitioner noted the area was red and was slightly inflamed.

[8] On Monday, September 23, 2013 the petitioner noted that his right thumb was approximately 1 1/2 times its normal width. He believed his thumb was infected. He went to work and informed his foreman that he believed that his thumb was infected and that he would have to go to get some antibiotics. One hour before his shift was over he left work and went to the Comox Valley Medical Clinic.

[9] After waiting over two hours at the Comox Valley Medical Clinic he saw Dr. Megan Spring. He told Dr. Spring that he thought he had an infected thumb and repeated his history. Dr. Spring inspected his thumb, asked him a few questions and told him that there were a number possibilities which could present themselves the way his thumb did. She went through a process of elimination and diagnosed his thumb as a bacterial infection. She gave him a prescription for antibiotics.

[10] The petitioner purchased the antibiotic after his appointment and began taking it on the evening of September 23, 2013.

[11] On September 26, 2013 while at work he noticed that his hand was getting sore. He initially attributed it to muscle soreness from his using his hand differently.

[12] On September 27, 2013 when the petitioner awoke in the morning he discovered that his right hand was beginning to swell. He did not go to work but rather went to the Comox Valley Medical Clinic which he found to be closed to he went to the Emergency Department at St. Joseph's Hospital in Comox.

[13] He was put on a drip antibiotic, the same antibiotic he been taking orally but at the maximum dose and the attending physician talked to him about septic flexor tendinitis and the possible need for an operation on his thumb.

[14] On Saturday, September 28, 2013 the petitioner's hand was further swollen, his wrist was swollen halfway up to his elbow and there was a red line which ran from the palm of his hand up his arm to his elbow.

[15] He went to the day clinic and got the drip antibiotic treatment and then to emergency where the attending physician expressed alarm at the state he was in and gave him more antibiotics in the drip form. He was taken to Campbell River Hospital where he was met by Dr. Robin Evans who called in the on-call surgical team and performed emergency surgery to salvage as much of the motion as possible in his hand and his wrist.

[16] The petitioner's Worker's Compensation claim was denied. He sought a review from the review division. On the basis of an opinion from a review division medical advisor ("RDMA") the claim was still denied. The RDMA was of the opinion that the petitioner's callus on his thumb did not likely cause the infection.

[17] The review officer accepted that the petitioner's callus may have developed in the course of his pipe grinding activities however, she determined that the petitioner's callus and the petitioner's hand infection are two different conditions and that the issue to be decided was whether the petitioner's hand infection, not the callus, arose out of and in the course of his employment activities.

[18] The review officer gave the RDMA's opinion significant weight given that it was the only medical opinion that discussed the possibility of a causal relationship between the petitioner's employment activities and his right hand infection. The review officer found that the petitioner's right hand infection did not arise out of the course of his employment and therefore was not compensable.

[19] The petitioner appealed to the Worker's Compensation Appeal Tribunal ("WCAT")

[20] In denying the appeal WCAT said this:

> With regard to the evidence of the worker, I accept the worker's evidence about the development of the callus. However, the question of whether the callus had causative significance with respect to the infection is a matter requiring medical expertise and is therefore not a matter within the worker's knowledge.
>
> I note policy item number 97.32 which states that a statement of a worker about his or her own condition is evidence insofar as it relates to matters that

> would be within the worker's knowledge and requires no corroboration. However, a conclusion against a statement by a worker may be reached if it is based on a substantial foundation, such as clinical findings or other medical or non-medical evidence. On this point I find that there is substantial foundation in the form of the RDMA's opinion, which I have found to be relevant, persuasive and marked by the lack of medical evidence to the contrary. I accept that the worker believes his callus was caused by his work activities and his right hand infection arose from the callus; however, the worker is not a medical professional and the medical evidence from the medical professionals does not support a finding that there is a causative significance between his work activities and his right hand infection. I must therefore deny the worker's appeal.

[21] The petitioner filed a Reconsideration Application dated February 6, 2015 requesting a reconsideration of the WCAT decision because it was unfair. On February 25, 2015 the petitioner withdrew his February 6, 2015 application and replaced it with an application for reconsideration dated February 24, 2015 along with a further 12 page letter.

[22] WCAT denied the petitioner's application for reopening/reconsideration of WCAT– 015–00123 on the basis that no grounds had been established for setting aside the WCAT decision in whole or in part.

[23] The petition was filed March 11, 2015 seeking to set aside the first WCAT decision which is #2015 – 00123.

PRELIMINARY MATTERS

1. Standing of WCAT
2. Statutory and policy framework
3. The record
4. Standard of review
5. Application of standard of review to the WCAT decision
6. Remedy

1. Standing of WCAT

[24] Pursuant to s. 15 of the *Judicial Review Procedure Act*, RSBC 1996 c. 241, for an application for judicial review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power must be served with a notice of the application and may be a party to the application at the person's option.

[25] WCAT is entitled to be a party to an application for judicial review. WCAT is an administrative tribunal and there are some limits on scope of its standing on judicial review.

[26] WCAT submits that it is the only respondent and thus the need for a fully informed adjudication weighs in favour of it having standing in this judicial review hearing.

[27] The standing of WCAT to attend at the hearing was not opposed. I find it of assistance to the court to have WCAT in attendance. The WCAT also argues that any benefits paid to the petitioner will come out of monies in the accident fund which is funded by employers in the province through premiums assessed on their payroll. As such, there is a public interest aspect to the Worker's Compensation proceedings generally. These public interest factors militate in favour of granting WCAT standing before the court.

[28] The argument against WCAT having standing is based on the traditional thought that a tribunal should not appear to defend the correctness of its own decision as it might be unseemly and inappropriate to do so. The Supreme Court of Canada in *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 (referred to in *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at paras. 43 and 44) endorsed a "powerful" policy reason in favour of permitting a tribunal to demonstrate that its decision was not patently unreasonable.

[29] I have granted the WCAT standing.

2. Statutory and Policy Framework

[30] The *Workers Compensation Act,* R.S.B.C. 1996, c. 492 (the "*Act*") creates a no-fault insurance scheme in British Columbia under which the Workers' Compensation Board ("Board") pays compensation for personal injury or death arising out of and in the course of a worker's employment. The scheme is fully funded by British Columbia employers and administered by the Board.

[31] Part 1 of the *Act* contains a compensation scheme and empowers the Board. Part 1, s. 5(1) says:

> **5** (1) Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment **is caused** to a worker, compensation as provided by this Part must be paid by the Board on out of the accident fund.
>
> [Emphasis added]

[32] Counsel for WCAT submits that, in the case of personal injury, s. 5(1) of the *Act* is the gateway that must be satisfied in order for benefits under the *Act* to be paid to the petitioner. If the gateway is not satisfied, that is a personal injury is not found to have arisen out of and in the course of the worker's employment, then the personal injury is not compensable under the *Act* and benefits are not payable.

[33] The Board is empowered to make policies. Section 82(1) of the *Act* establishes the authority for the Board of Directors of the Board to set policies including policies respecting compensation matters.

[34] Applicable Board policies are binding on the Board and WCAT decisions. See ss. 99(2) and 250(2) of the *Act:*

> **Board decision-making**
>
> **99** (1) The Board may consider all questions of fact and law arising in a case, but the Board is not bound by legal precedent.
>
> (2) The Board must make its decision based upon the merits and justice of the case, but in so doing the Board must apply a policy of the board of directors that is applicable in that case.
>
> (3) If the Board is making a decision respecting the compensation or rehabilitation of a worker and the evidence supporting different findings on an

> issue is evenly weighted in that case, the Board must resolve that issue in a manner that favours the worker.
>
> **250** (1) The appeal tribunal may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent.
>
> (2) The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.
>
> (3) Despite subsection (1), the appeal tribunal is bound by a prior decision of a panel appointed under section 238 (6) unless
>
> > (a) the specific circumstances of the matter under appeal are clearly distinguishable from the circumstances addressed in the prior decision,
> >
> > (b) subsequent to the prior decision, a policy of the board of directors that the panel relied upon in the prior decision was repealed, replaced or revised, or
> >
> > (c) the prior decision has been overruled under subsection (3.1) of this section.
>
> (3.1) Despite subsection (3), a panel appointed under section 238 (6) may overrule a prior decision of another panel appointed under that section.
>
> (4) If the appeal tribunal is hearing an appeal respecting the compensation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the appeal tribunal must resolve that issue in a manner that favours the worker.

[35] The relevant Board policies are contained in the Rehabilitation Services and Claims Manual, Volume II and the most relevant policies for this review are in policy item numbers 97.00 and 297.34. I have attached the relevant policies from the Rehabilitation Services and Claims Manual Volume II as Appendix A to this decision.

[36] The nature of a WCAT appeal is a hybrid decision. It is not a *trial de novo* nor is of trial on the record. It is a rehearing. Section 253(1)(2) and (3) of the *Act* sets out some of the appeal powers of WCAT

> **253** (1) On an appeal, the appeal tribunal may confirm, vary or cancel the appealed decision or order.
>
> (2) Despite subsection (1), on an appeal under section 240 (2), the appeal tribunal may make one of the following decisions:
>
> > (a) the matter that is the subject of the application under section 96 (2) must be reopened;
> >
> > (b) the matter that is the subject of the application under section 96 (2) may not be reopened.

> (3) The appeal tribunal's final decision on an appeal must be made in writing with reasons.

[37] Some sections of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 ("ATA") apply to WCAT. The relevant sections are ss. 11 and 58.

> **11** (1) Subject to an enactment applicable to the tribunal, the tribunal has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.
>
> **58** (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> >
> > (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
> >
> > (c) for all matters on the than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
>
> (3) For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion
>
> > (a) is exercised arbitrarily or in bad faith,
> >
> > (b) is exercised for an improper purpose,
> >
> > (c) is based entirely or predominantly on irrelevant factors, or
> >
> > (d) fails to take statutory requirements into account.

3. The Record

[38] The Certified Record of the Appeal Tribunal filed in this Judicial Review is missing the submissions and exhibits filed in advance of the WCAT hearing by the petitioner. How can I properly review a decision of WCAT if I am not certain what material was before them?

[39] The petitioner has provided me a copy of what he filed at tab 5 of his petition record. It includes a 13 page written argument, some correspondence from his representative and a diagram of the cross-section of the right thumb showing the location of his callus.

[40] I have listened to the audiotape of the oral hearing. The diagram is specifically referred to in the oral hearing. The written submissions are alluded to during and at the end of the hearing. The vice-chair makes a passing reference to them in the decision. The petitioner did cover all the topics from the written submission in the oral hearing so the vice-chair was well aware of the content of his argument and did ask on two occasions if what he was reading from was in his filed written material.

[41] I have reviewed the documents at tab 5 and find that they should be part of the record for the purpose of this judicial review.

[42] Interestingly the statement filed by the employer do form part of the record created by WCAT.

4. Standard of Review

[43] The standard of review is defined by the *ATA* at s. 58 which I set on the above.

[44] Since the *Act* does contain privative clauses at ss. 254 and 255, the standard of review is that of patent unreasonableness. I have set on the ss. 254 and 255 of the *Act* below:

> **Exclusive jurisdiction**
>
> **254** The appeal tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined under this Part and to make any order permitted to be made, including the following:
>
> (a) all appeals from review officers' decisions as permitted under section 239;
>
> (b) all appeals from Board decisions or orders as permitted under section 240;

> (c) all matters that the appeal tribunal is requested to determine under section 257;
>
> (d) all on the matters for which the Lieutenant Governor in Council by regulation permits an appeal to the appeal tribunal under this Part.
>
> **Appeal tribunal decision or action final**
>
> **255** (1) Any decision or action of the chair or the appeal tribunal under this Part is final and conclusive and is not open to question or review in any court.
>
> (2) Proceedings by or before the chair or appeal tribunal under this Part must not
>
> (a) be restrained by injunction, prohibition or on the process or proceeding in any court, or
>
> (b) be removed by certiorari or otherwise into any court.
>
> (3) The Board must comply with a final decision of the appeal tribunal made in an appeal under this Part.
>
> (4) A party in whose favour the appeal tribunal makes a final decision, or a person designated in the final decision, may file a certified copy of the final decision with the Supreme Court.
>
> (5) A final decision filed under subsection (4) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court.

[45] The *ATA* codified the standard of patent unreasonableness in 2004. In 2008 the Supreme Court of Canada rendered its decision in *Dunsmuir v. New Brunswick* 2008 SCC 9. *Dunsmuir* considered the common-law standard of reasonableness and patent unreasonableness and abolished those standards in favour of a single standard of reasonableness.

[46] Because of the enacting of the *ATA,* patent unreasonableness standard of review still exist in British Columbia.

[47] The Supreme Court of British Columbia and the British Columbia Court of Appeal have confirmed patent unreasonableness is the appropriate standard of review for WCAT decisions respecting work causation: *Jensen v. Workers' Compensation Appeal Tribunal*, 2010 BCSC 266 at para. 77, aff'd 2011 BCCA 310.

[48] Issues of the standard of review have also been dealt with by the British Columbia Court of Appeal in *British Columbia Ferry and Marine Workers' Union v.*

British Columbia Ferry Services Inc. (B.C. Ferry), 2013 BCCA 497, where at page 53 Saunders J.A. said:

> Although the term "patently unreasonable" is not a standard applied in most jurisdictions as a result of *Dunsmuir*, the phrase continues to have effect in British Columbia because s. 58 of the *Administrative Tribunals Act* invokes it in respect to an expert tribunal in an area of its expertise (see *Khosa*). It is clear that whereas the term "reasonableness" describes a range of decision, "patently unreasonable" is at the high end of the deference spectrum and it retains its pre-*Dunsmuir* character. In *Auyeung*, Mr. Justice Chiasson for this court said in respect to *Dunsmuir* and the standard of patent unreasonableness:

[49] The British Columbia Court of Appeal endorsed *Kovach v. The British Columbia (Workers' Compensation Board)*,[1998] 52 B.C.L.R. (3d) 98 (B.C.C.A.) in *British Columbia Ferry* at para. 52. In *Kovach*, Donald J. said in his dissenting decision that:

> The review test must be applied to the **result** of the WCAT decision not to the **reasons** leading to the result. In other words if a rational basis can be found for the decision it should not be disturbed simply because of the defects in the tribunal's reasoning.

[50] Donald J.'s dissenting decision was upheld by the Supreme Court of Canada in *Kovach v. The British Columbia (Workers' Compensation Board)*, [2000] 1 S.C.R. 55 (S.C.C.).

[51] The court must ask; was the result is illogical?

[52] The BC Court of Appeal has defined patently unreasonable as "clearly irrational": *Phillips v. British Columbia Worker's Compensation Appeal Tribunal,* 2012 BCCA 304 at paras. 20 and 48

[53] Another test is whether the result almost borders on the absurd or is it so flawed that no amount of deference can justify letting it stand: *Vandale v. Workers' Compensation Appeal Tribunal,* 2013 BCCA 391 at paras. 41 and 42.

Object of the review

[54] It is agreed that the object of the review is the WCAT decision and not the reconsideration decision.

[55] Counsel for WCAT explained that after the decision of *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499 (leave to appeal to Supreme Court of Canada granted), WCAT does not have the authority to reconsider one of its previous decisions for patent unreasonableness.

[56] The petitioner takes no issue with the standing of WCAT to make submissions, the standard of review or the object of the review.

Position of the Petitioner

[57] The Petitioner submits that callus on the his thumb formed at the same time as the infection became apparent and in exactly the same location. There is no other reasonable explanation for the event, therefore on a balance of probabilities, if the callus was created by a work activity then so was the infection.

[58] The petitioner was using a Hitachi grinder at work for the two week period (September 9-13 and September 16-20, 2013) prior to the callus forming. He used this grinder two to three hours a day. He noted that the same location on his thumb was pressed against the grinder for extensive periods of time. That point on his right thumb was touching the body of the grinder. He was wearing used leather gloves at the time.

[59] The petitioner submits that a callus doesn't just happen, it is created by rubbing or pressure abrading the skin disrupting the surface and repeatedly injuring the same spot on the skin. Bacteria always exist on our skin but when skin is disturbed it creates an area for the bacteria to colonize.

[60] The petitioner makes reference to the text book *Mechanisms of Microbial Disease*, written by Schaechter, Medoff and Schlessinger, published by Williams & Wilkins of Baltimore, Hong Kong, London and Sydney. He cites the following

passage from page four of that text. This is an excerpt from the petitioner's written submission which may be a verbatim quote or may be paraphrasing the quote:

> Members of the microbial flora that are normally present on our skin or mucous membranes may cause disease, usually when they penetrate into deeper tissues. A cut may lead to pus caused by the staphylococci that inhabit healthy skin. Here the encounter with the agent took place long before the disease namely at the time of colonization of the skin by the staphylococci.

[61] The petitioner submits that it is possible that the bacteria that caused the infection came from the petitioner's skin or from the gloves that he was wearing. The gloves were discarded by another worker. They became soaked at work when it rained and this created an environment that increased the likelihood of the bacteria migrating from the gloves to the petitioner's hand and entering his body through the breaks present in his skin due to the abrasion from the grinder which was causing a callus to form at the same time.

[62] The skin creates a barrier against bacteria but when the skin is broken the defence is breached. A callus was in the process of forming through continual abrasion of the skin in a small area. It was not a thick multi-layered callus but rather a thin rough patch.

[63] The petitioner submits that Dr. Schaechter says at page eight of the same text that most infecting agents must be carried across the skin by insect bites or await breaks in the surface. He does not say that the break must be observable.

[64] The petitioner submits that the damage to his skin caused by his work-related activity left him predisposed to the subsequent infection. The break in the surface of the skin on the volar aspect of his right thumb just distal to the IP joint caused the callus to begin to form and those same breaks also provided an entry point for the bacteria which would be on his skin and in his glove.

[65] In support of his claim the petitioner has the medical evidence of Dr. Spring and Dr. Evans who were his treating physicians. Dr. Spring notes the redness at the site where the callus was being formed. Dr. Evans performed the surgery on the

hand and said in his consultation report, dated September 28 2013: ”He had a callus on the volar aspect of his right thumb IP joint, which subsequently became infected.”

[66] Neither doctor was asked to prepare a medical report for the appeal. This is unfortunate because they may well have opined that it was more likely than not that the infection arose from the same event that the callus arose from. That evidence is not on the record or available to the vice-chair of WCAT.

[67] Instead, the petitioner relied on the circumstantial evidence of the spatial coincidence and the temporal coincidence which suggests a connection but in the face of a medical opinion to the contrary, does not prove causation.

[68] Dr. Schaechter, who wrote the textbook on microbiology, is likely a renowned expert but he is not an expert in these proceedings and he has not provided opinion evidence on these facts. The petitioner did not consult with him but merely read his textbook and drew a connection between the infection in his finger and what Dr. Schaechter said in his book.

[69] The Petitioner submits that as an intelligent person with a master’s degree in some undisclosed subject and first aid certificates, he has the ability to make those connections. WCAT does not agree. To make that connection and to contradict a contrary medical opinion, WCAT found that worker required an opinion from a doctor. I do not find that to be patently unreasonable.

WCAT Position

[70] The review division officer sought an opinion from the RDMA with respect to the medical issues. That opinion is dated April 28, 2014. It is written by Dr. M. Bulger. Dr. Bulger is asked four questions:

1. What is the diagnosis with respect to the worker’s right hand?
2. What are the accepted causes of this condition?
3. Is it medically likely that the worker’s work activities caused this condition?

4. Is it medically likely that the worker's callus caused this condition or was otherwise related to this condition?

[71] These answers are given by Dr. Bulgur, RDMA in the report dated April 28, 2014.

1. What is the diagnosis with respect to the worker's right hand?

> The worker has a septic flexor tenosynovitis with deep Parona space infection requiring debridement of the right thumb and thenar eminence along with carpal tunnel release and median nerve exploration. Operative findings indicated that there was purulence and inflamed synovium in the carpal tunnel and the surgeon indicated that the nidus *(point of origin or focus or nucleus)* of the infection was in the carpal tunnel; there was no evidence of obvious infection or purulence in the flexor tendon sheath of the thumb.

2. What are the accepted causes of this condition?

> This condition was likely caused by a bacterial infection, often staphylococcus or streptococcus, enterococcus and gram negative organisms, N. gonorrhea, tuberculosis and some fungi and more opportunistic infections in immune-compromised host. There is often a history of trauma/skin puncture, or animal/human bite. Infection can also be spread through the bloodstream without any evidence of local trauma and can seed in the tendon sheath's/carpal tunnel space. Inflammatory bursitis in individuals with gout, Rheumatoid arthritis, seronegative spondyloarthropathies and other inflammatory conditions can become secondarily infected and can spread locally to infect the tendon sheath or carpal tunnel space.

3. Is it medically likely that the worker's work activities caused this condition?

> There is no indication that the described work activities on September 20, 2013 were associated with a traumatic break in the skin. The medical chart notes (undated but printed on October 23, 2013; presumed to be related to the September 23, 2013 visit to the doctor) include a two day history of sensitivity right thumb, no incident, has callus where redness first started, has history of gout; examination was documented to show swelling, erythmia of thumb, more redness at callus, no evidence of bite or sting site. It is my opinion that the attending physician looked for evidence of break in the skin and did not find any evidence of acute traumatic skin lesion. It is my opinion that the described work activities did not likely significantly contribute to the development of the pyogenic tenosynovitis and infection of deep Parona space.

4. Is it medically likely that the workers callus caused this condition or was otherwise related to this condition?

> Callus is an area of thick and skin related to repeated rubbing or pressure, often on feet or hands and usually asymptomatic. Because calluses build up in an area exposed to pressure/friction they are generally protective against further similar trauma (i.e. calluses develop on the fingers of guitar players). In the absence of a traumatic event involving the right hand/thumb at work on September 20, 2013, it is my opinion that the petitioner's callus on his thumb did not likely cause the infection in the flexor tendon sheath or in the deep Parona space/carpal tunnel space.

[72] The review officer accepted the RDMA's opinion that the pipefitting activities did not likely significantly contribute to the development of the petitioner's right hand infection.

[73] In the WCAT decision the vice-chair notes that the review officer gave the RDMA's opinion significant weight given it was the only medical opinion that discussed the possibility of a causal relationship between the petitioner's employment activities and his right hand infection.

[74] She reviews the petitioner's oral submissions and understands that he is saying that the callus and the infection had the same cause. The repeated injury to the skin disrupted the surface of the skin and provided an opportunity for bacteria to colonize in the skin.

[75] The vice-chair relies on s. 5(1) of the *Act* (set out above) and policy items #C3-12 (Personal Injury) which says that there must be something in the employment which has causative significance in producing the injury.

[76] To be considered as having causative significant the incident leading to the injury must make more than a trivial or insignificant contribution to the injury.

[77] She says at paragraph 34 of her decision:

> Like the review officer, I place considerable weight on the opinion of the RDMA. The RDMA reviewed the medical reports provided by the worker's medical practitioner and her opinion clearly addresses the relationship between the worker's right hand infection and his employment activities. The RDMA opined that the worker's pipe grinding activities were not of causative significant in producing the worker's right hand infection. I acknowledge that the worker believes that the work activities caused his callus and the callus

> resulted in the infection; however, I agree with the review officer that it would be speculative to conclude this to be so without supporting medical evidence.

[78] I have set out her conclusion at paragraph 35 at the beginning of this decision.

5. The Petitioner's Response to the WCAT decision

[79] I have reviewed the extensive submissions written by the petitioner in response to the WCAT decision both filed in advance and then a larger volume of written material from which he was reading at the judicial review hearing and which he presented me with on the second day of the hearing.

[80] The petitioner disagrees with the finding that he does not have the medical expertise to answer the question of whether the callus had causative significance with respect to the infection.

[81] I agree with the vice chair's conclusion despite the fact that Mr. Scanlon does have two university degrees one of which being a master's degree and a first aid certificate.

[82] He argues that the medical advisor's opinion expressed in answers to questions three and four from the review officer do not apply to his case. He criticizes the Brandi Stocks' memo to the medical advisor because it does not describe his callus which was slight and not fully developed.

[83] He therefore submits that the opinion of Dr. Bulgur should not be relied on because it assumed that the callus was fully formed and would have provided a protective shield against similar trauma.

[84] He submits that question four of the review officer's memo is misleading as it presupposes that the callus existed prior to the injury which led to the infection occurring. In his case, the callus was not fully formed. It was not substantial enough to rule out mere breaks in the skin capable of permitting bacteria to pass through his skin.

[85] He submits that the infection and the callus appeared virtually simultaneously in exactly the same location he concludes because infections take time to incubate, the injury which led to the infection had to have occurred prior to the callus discovery.

[86] As for the petitioner's history of gout, he explained that he was never diagnosed with gout by a doctor. A welder he had worked with told him that the pain he was experiencing was likely gout. The infection in the thumb did not feel anything like what he had experienced before.

[87] The petitioner makes the argument that Dr. Spring was in a better position than the RDMA to make a finding because Dr. Spring actually examined his hand. Again it is unfortunate that the petitioner did not obtain a medical opinion from Dr. Spring.

[88] At the petition hearing in his opening statement, the petitioner questioned whether the WCAT vice-chair had his written submissions (from tab 5 of his petition record) in her possession. I see indication that she did. I also listened to the tape of the hearing and find that the submissions were made orally as well as in writing.

[89] In determining whether the decision of WCAT is patently unreasonable I considered whether the written submissions added anything to the oral submissions. It is likely that the vice-chair had not read the written submissions prior to the hearing but that does not mean she did not review them after the hearing.

[90] At page 54 of his written submission submitted in support of the petition the petitioner said:

> During the oral hearing I was making a point and quoted Dr. Schaechter from the book Mechanisms of Microbial Disease and I was stopped by the vice chair and she demanded to know if I had a letter from Dr. Schaechter regarding the information I was giving. As she was asking "did I have a letter" I responded that I did not. She then refused my quote.

[91] I have listened to the tape and at 40 minutes into CD #1 the petitioner is clearly reading some text and the vice-chair in a polite manner asks “where are you getting this information from?”

[92] The petitioner gave her the name of two different textbooks that he has researched dealing with microbiology. In describing the second textbook he describes Dr. Schaechter as a renowned specialist in the field and again politely, the vice-chair asks if the petitioner consulted with Dr. Schaechter. The petitioner says that he did not and that he has just read his textbook and then he continued with his submission.

[93] It is a complete mischaracterization to say that the vice-chair “demanded to know” or stopped the petitioner or refused the petitioner’s quote in anyway.

[94] During this exchange, the vice-chair asked twice whether the material that the petitioner was reading from was in his written material and he indicated that it was. For this reason I believe that the vice-chair did have the written material but had not read it prior to the hearing.

[95] I will not address all 60 pages of the petitioner’s written submissions handed to me at the end of the petition hearing. Although he raises many helpful arguments he has repeated himself a number of times and I will only address those arguments which have not yet been addressed in this decision. I reiterate that I have considered all of the arguments and read the submission entirely.

[96] The petitioner’s understanding of policy number 97.00 evidence is, in my view, accurate.

[97] It is my view that the evidence was never evenly balanced between the petitioner’s submissions and the medical report from the RDMA. For that reason WCAT was not required to resolve the issue in favour of the petitioner.

[98] Medical information can come from textbooks but medical opinions are only valuable if they’re specific to the case at hand and not making general statements of

medical information. What was lacking here is an application of medical information to Mr. Scanlon's specific case.

[99] It is true WCAT's enabling legislation does permit WCAT to refer medical questions to a medical expert but that is only in the case where there is a conflict in medical evidence that needs to be resolved.

[100] The vice-chair did not deny the scientific facts presented from the quotes of opinions from the source material from Dr. Schaechter's textbook but she does not accept it as opinion evidence relevant to Mr. Scanlon's specific case. The vice-chair weighs the evidence of the RDMA opinion against the petitioner's opinion and interpretation of medical textbooks and placed more weight on the RDMA medical opinion.

[101] By finding that this information is not within the petitioner's expertise the vice-chair is not questioning the petitioner's intelligence but is making a determination that an opinion on causation required a medical opinion specifically related to Mr. Scanlon's case.

[102] I find that it is not unreasonable to deny the arguments made by Mr. Scanlon because he lacks the medical expertise to give an opinion on causation. The vice-chair is entitled to consider all evidence and weight the strength of the evidence.

[103] At item 17 on page 48 of the petitioner's written submissions, he asks this Court to consider whether a matter has been overlooked or incorrectly considered. That matter is the extent of development of the callus at the time of the injury. He says there is evidence about the latency of the state of the callus should a callus be said to have existed at the time of the injury which led to the infection. He asked me to decide whether the panel has correctly understood and used the evidence in the decision.

[104] At paragraph 34 of her decision the vice-chair says "I acknowledge that the petitioner believes that the work activities caused his callus and the callus resulted in

the infection however I agree with the review officer that it would be speculative to conclude this to be so without supporting medical evidence."

[105] I agree with the petitioner that this statement in the decision is a misinterpretation of his submissions. He submits that the infection and the callus arose around the same time and that it was quite likely that the infection had begun before the callus started to form. He speculates that the callus may have covered to the point of entry of the infection or that the roughening of the skin prior to the callus formation may have been a sufficient break in the skin to allow the bacteria to enter that area of skin. This is different than saying that the callus caused the infection.

[106] The petitioner's argument is articulated correctly in paragraph 23 of the WCAT decision where the vice-chair says:

> The worker's testimony at the oral hearing reiterated the evidence provided upon review and the written submissions. The worker maintains that the callus either caused his right hand infection, *or that the callus and the infection had the same cause.* The worker described the nature of his work, his duties, his discovery of a callus and the subsequent infection and surgery.
>
> [Emphasis added]

[107] Dr. Evans, the surgeon, said that Mr. Scanlon had a callus which later became infected and that the infection continue to progress to the point that he was transitioned to IV Ancef and the infection continue to spread up his arm. This may be where the vice-chair came to the conclusion that the petitioner was saying that the callus caused the infection.

[108] I find there is evidence in the decision that the vice-chair considered both arguments and rejected both because there was no medical opinion on causation to support the petitioner's position.

[109] The petitioner says that the review officer who posed questions for the RDMA misinterpreted the facts of his case. The questions suggest that there was a fully formed callus before any infection arose. In fact, the callus was in its initial stages of development when the petitioner noticed that that same area around the callus was becoming red and tender.

[110] Dr. Bulgur was of the opinion that if there wasn't a break in the skin found which was caused at work than the infection was not work-related. In paragraph four of her opinion she refers to the protective nature of a callus.

[111] I agree with the petitioner that Dr. Bulgur didn't appreciate the fact that he didn't have a fully formed callus which was protecting his skin. This argument was made to the vice-chair who did not think that it raises significant issue sufficient to overturn the review division's decision. I have concluded that this is not patently unreasonable because it is still just a theory proposed by the petitioner without the support of medical evidence.

[112] The petitioner alleges breaches of natural justice by WCAT.

[113] First he says WCAT denied him the ability to quote Dr. Schaechter during the oral hearing. That simply did not happen.

[114] Secondly the petitioner argues that the vice-chair should have told him at the hearing that she would not rely on his evidence because it was not within his knowledge and expertise.

[115] The petitioner was well aware of the policies governing WCAT. He was also aware that his appeal to the review division did not succeed because there was no medical opinion presented by him to contradict that of Dr. Bulgur. It's not the vice-chair's responsibility to engage in an argument with the petitioner during his presentation. I see no breach of natural justice or rule of procedural fairness.

CONCLUSION

[116] I understand that my role is limited to a supervisory role and that I am to determine, on the applicable standard of review, whether the WCAT has made a reviewable error. I am not permitted to set aside a decision merely because I might have reached a different conclusion.

[117] I am not sitting as an appellate court. I cannot re-weigh the evidence or make findings of fact or substitute my view of the merits for that of the tribunal. I find

WCAT had a rational basis for the overall result in the decision and that the decision is not patently unreasonable. WCAT preferred the opinion of Dr. Bulgur on the issue of causation to that of the petitioner who was referencing textbooks.

[118] As I have said earlier, the textbooks set out the scientific theory for the passage of microorganisms into the body, but they do not relate directly to this the petitioner and this injury and the causation of this infection.

[119] For that reason WCAT was well within reason to prefer the medical evidence of Dr. Bulgur.

[120] WCAT did not prevent the petitioner from making his submissions and reading from the textbook. The vice-chair was not required to set out the reasons for rejecting his submission at the hearing. The petitioner was well aware that his review had been denied because he did not provide medical evidence.

[121] WCAT did not set out all of the petitioner's arguments and address each of them but I'm satisfied on my reading of the decision that his arguments were considered.

[122] At paragraph three of the WCAT decision, the panel says the petitioner maintained that the callus either caused his right hand infection or that the callus and infection had the same cause. This is repeated at paragraph 23.

[123] I believe the statement that the petitioner says the callus caused the right hand infection came from the surgeon and not the petitioner. It is the petitioner's arguments that the infection and the callus occurred around the same time.

[124] I do not find that this misstatement of the petitioner's argument creates a reviewable error because the petitioner's argument is properly stated elsewhere in the decision and the real issue leading to a loss of the appeal is the lack of a relevant medical opinion.

[125] The petitioner's proposal that the callus and the infection had the same cause constitutes speculation which the Board found was not enough to establish work causation.

[126] I see no breach in natural justice.

[127] I see no grounds to interfere with WCAT's decision. The petition is therefore dismissed.

"Young, J."

SCHEDULE A

REHABILITATION SERVICES & CLAIMS MANUAL

VOLUME II

Published by the Workers' Compensation Board Province of British Columbia

[redacted]

WORKERS' COMPENSATION BOARD OF BC

Workers and Workplaces Safe and Secure from Injury and Disease

Subscription information is available at WCB Customer Service at 604-232-9704 or toll free 1-866-319-9704; fax 604-232-9703 or toll free 1-888-232-9714.

#97.00 Evidence

Under the old English system, which was an adversary system of workers' compensation, there was a burden of proof imposed on the worker, but that is not the correct practice here. The Board must not start with any presumption against the worker, but neither must there be any presumption in the worker's favour.
The correct approach is to examine the evidence to see whether it is sufficiently complete and reliable to arrive at a sound conclusion with confidence. If not, the Board should consider what other evidence might be obtained, and must take the initiative in seeking further evidence. After that has been done, if, on weighing the available evidence, there is then a preponderance in favour of one view over the other, that is the conclusion that must be reached. But if it appears upon the weighing of the evidence that the disputed possibilities are evenly balanced then the rule comes into play which requires that the issue be resolved in accordance with that possibility which is favourable to the worker.

Although there is no burden of proof on the worker, the *Act* contains prerequisites for benefits. Compensation will not be paid simply because, for example, a telephone call is received from someone claiming to be a worker, who has been hurt, and was disabled for a certain number of days. Some basic evidence must be submitted by the worker to show that there is a proper claim. The extent of that basic evidence necessary, and the weight to be attached to it, is entirely in the hands of the Board.

It is therefore not uncommon to see that a claim will be denied when a worker, away from employment, begins to feel some pain and discomfort in the lower back, and seeking to find a reason for this condition, thinks back to the work being done over a period of time and concludes that the problem must have resulted from something which occurred on a certain day when certain heavy work was being performed. The question then arises whether there was anything other than the worker's hindsight which would allow the Board to conclude that the work done some weeks or months previously had causative significance. It is at this point that investigation takes place and the evidence is weighed. If there is nothing objective to indicate any activity at work was potentially causative of the condition complained of, at or near the time alleged by the worker, it can fairly be said that the claim has not been established. The worker has simply failed to present those fundamental facts which bring the provisions of the *Act* into play.

EFFECTIVE DATE: June 1, 2009 - Delete references to officer and Adjudicator.
APPLICATION: Applies on or after June 1, 2009

#97.10 Evidence Evenly Weighted

Complaints are sometimes received at the Board that a worker has not been given the benefit of the doubt. Usually, these complaints relate to a situation in which the worker has a disability, but the issue is whether it is one arising out of or in the course of employment. The essence of the complaint is often that if there is some possibility that the injury arose out of the employment, the worker should be given the benefit of the doubt. For the Board to take that view, however, would be inconsistent with the terms of the *Act.* Where it appears from the evidence that two conclusions are possible, but that

one is more likely than the other, the Board must decide the matter in accordance with that possibility that is more likely.

Under the terms of section 99(3), the Board is required to decide an issue in accordance with the possibility which is favourable to the worker where it appears that "the evidence supporting different findings on an issue is evenly weighted in that case". This applies only where there is evidence of roughly equal weight for and against the claim. It does not come into play where the evidence indicates that one possibility is more likely than the other. (23)

While an absence of positive data does not necessarily mean that a condition is not related to a person's employment, it may mean that there is a lack of evidence that any such relationship exists. The Board, as a quasi-judicial body, must make its decisions according to the evidence or lack of evidence received, not in accordance with speculations unsupported by evidence. Section 99(3) of the *Act* applies when "the evidence supporting different findings on an issue is evenly weighted in that case." However, if the Board has no evidence before it that a particular condition can result from a worker's employment, there is no doubt on the issue; the Board's only possible decision is to deny the claim. If one speculates as to the cause of a condition of unknown origin, one might attribute it to the person's work or to any other cause, and one speculated cause is no doubt just as tenable as any other. However, the Board can only be concerned with possibilities for which there is evidential support and only when the evidence is evenly weighted does section 99(3) apply.

EFFECTIVE DATE: March 3, 2003 (as to new wording of section 99)
APPLICATION: Not applicable.

#97.20 Presumptions

There are three statutory presumptions in favour of workers or dependants which have already been discussed in earlier chapters. These are as follows:

> In cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it shall be presumed that it arose out of the employment. (24)

(1) If the worker at or immediately before the date of disablement was employed in a process or industry mentioned in the second column of Schedule B, and the disease contracted is the disease in the first column of the schedule set opposite to the description of the process, the disease shall be deemed to have been due to the nature of that employment unless the contrary is proved. (25)

(2) Where a deceased worker was, at the date of death, under the age of 70 years and suffering from an occupational disease of a type that impairs the capacity or function of the lungs, and where the death was caused by some ailment or impairment of the lungs or heart of non-traumatic origin, it shall be conclusively presumed that the death resulted from the occupational disease. (26)

The *Act* contains no general presumption either in favour of the worker or against the claim.

#97.30 Medical Evidence

It is the responsibility of the Board to make all the decisions relating to the validity of a claim and to make all the decisions relating to compensation payments. This includes decisions relating to medical as well as other aspects of the claim.

This does not mean, of course, that a lay judgment is preferred to a medical opinion on a question of medical expertise. What it means is that the Board is responsible for the decision-making process, and for reaching the conclusions on the claim. But this will, of course, require an input of medical evidence, or sometimes other expert advice, on any issue requiring professional expertise.

In reaching conclusions on a medical question, the guide-rules are set out below.

EFFECTIVE DATE: June 1, 2009 - Delete references to Claims Adjudicator, Claims Officer, the Disability Awards Officer and the Adjudicator in Disability Awards.

APPLICATION: Applies on or after June 1, 2009

#97.31 Matter Requiring Medical Expertise

Where the matter is one requiring medical expertise, the decision must be preceded by a consideration of medical evidence (this term includes medical opinion or advice). Medical evidence might consist of a statement in the Form 8 Physician's First Report, (27) or some information or opinion from the attending physician, or it might consist of advice provided from a Board Medical Advisor or another doctor. It is for the Board to decide when medical evidence is needed, what kind of medical evidence is needed, and on what questions.

EFFECTIVE DATE: June 1, 2009 - Delete references to Claims Adjudicator and Claims Officer.
APPLICATION: Applies on or after June 1, 2009

#97.32 Statement of Worker about His or Her Own Condition

A statement of a worker about his or her own condition is evidence insofar as it relates to matters that would be within the worker's knowledge, and it should not be rejected simply by reference to an assumption that it must be biased. Also, there is no requirement that the statement of a worker about his or her own condition must be corroborated. The absence of corroboration is, however, a ground for considering whether the worker should be interviewed by the Board, *a** or telephone enquiries made, or whether anything relevant could be discovered by having the worker medically examined. A conclusion against the statement of the worker about his or her own condition may be reached if the conclusion rests on a substantial foundation, such as clinical findings, other medical or nonmedical evidence, or serious weakness demonstrated by questioning the worker, or if the statement of the worker relates to a matter that could not possibly be within his or her knowledge.

EFFECTIVE DATE: June 1, 2009 - Delete references to Claims Adjudicator, Claims Officer and Board Medical Advisor,

APPLICATION: Applies on or after June 1, 2009

#97.33 *Statement by Lay Witness on Medical Question*

A statement by a lay witness on a medical question may be considered as evidence if it relates to matters recognizable by a layperson; but not if it relates to matters that can only be determined by expertise in medical science. For example, a statement by a fellow worker that he or she saw the worker suffering from silicosis would be worthless; but a statement by a fellow worker reporting to have seen the worker bleeding from the forehead would be evidence of a head wound. Statements made by a first aid attendant or other categories of paramedical personnel can be considered insofar as they relate to matters within the normal experience or training of that category of paramedical personnel. But they must obviously be treated very cautiously if they go beyond that into areas requiring greater medical expertise, or if they conflict with the opinion of a doctor.

#97.*34 Conflict of Medical Opinion*

Where there are differences of opinion among doctors, or other conflicts of medical evidence, the Board must select from among them. The Board must not do it by automatically preferring the opinions of one category of doctors to another category, nor should it be done by counting heads, so many opinions one way and so many another. The Board must analyze the opinions and conflicts as best as possible on each issue and arrive at her or his own conclusions about where the preponderance of the evidence lies. If it is concluded that there is doubt on any issue, and that the evidence supporting different findings on an issue is evenly weighted in that case, the Board must follow the mandate of section 99 and resolve that issue in a manner that favours the worker. (28)

It should never be assumed that there is a conflict of medical opinion simply because the opinions of different doctors indicate different conclusions. A difference in conclusion between doctors may or may not result from a difference in medical opinion. For example, the difference could result from different assumptions of non-medical fact. Where there are two or more medical reports or memos on file from physicians, indicating different conclusions, the Board will not simply select among them as a first step. The Board should first think about why they are different and consider whether the relevant non-medical facts have been clearly established; The Board may seek advice to determine whether the best medical evidence has been obtained and, for example, find out if any appropriate medical procedures can be instituted that would assist in arriving at a more definite conclusion.

Where two or more medical reports or memos indicate a probable difference of medical opinion and the issue is serious, the matter will normally be discussed with the physicians involved.

The Board has no rule that states that the evidence of a physician is always to be preferred to that of a chiropractor or other qualified practitioner. Reports from both types of practitioner are acceptable evidence and are weighed on their merits. This principle applies even if the referral to the practitioner is contrary to Board policy. Should there, for example, be concurrent treatment by a physician and a chiropractor, the Board might not pay for the chiropractor, but any chiropractor reports received must be weighed as evidence. They are not ignored just because the referral was unauthorized, (29)

EFFECTIVE DATE: June 1, 2009 - Delete references to officers.
HISTORY: March 3, 2003 - Insert new wording of section 99.
APPLICATION: Applies on or after June 1, 2009.

If appearing against the worker, the employer is not allowed to be present at the interview with the worker and must be interviewed separately. If there is any doubt as to the employer's intentions, the employer will be interviewed separately.

If a worker is represented, an employer may be permitted to be present even if the employer is appearing against the worker.

#98.25 Oaths

The oath is not administered as a normal routine in every inquiry, but is used when considered appropriate.

If:

1. a person called to give evidence objects to taking an oath, or is objected to as incompetent to take an oath, and the Board is satisfied of the sincerity of the objection of the witness from conscientious motives to be sworn or that the taking of an oath would have no binding effect on his or her conscience;

2. or the Board is satisfied that the form of oath which a person called to give evidence declares to have a binding effect on his or her conscience is not such that it can be taken in the place where the inquiry is being held, or that it is not fitting so to do, and the Board so directs,

the person shall, instead of taking an oath, make an affirmation. (33) An employer or representative or a worker's representative need not be placed under oath unless they have something specific or pertinent to contribute to the inquiry.

#98.26 Witnesses and Other Evidence

A worker may bring to an inquiry such witnesses, and may submit such verbal and documentary evidence, as she or he thinks will be of assistance.

Wherever possible, witnesses will be interviewed separately without the worker being present. They will not be present while the worker is being interviewed.

#98.27 Cross-examination

Under the inquiry system (contrary to the adversary system), there is no right of cross-examination of the parties or witnesses. If, in the process of an inquiry, one of the parties wishes to ask a question of the person whose evidence is