

McGowan v. Forster

Decision Summary

Court	B.C. Supreme Court
Citation	2019 BCSC 1647
Result	Allowed
Judges	Madam Justice Marzari
Date of Judgment	September 27, 2019
WCAT Decisions Reviewed	A1603218

Keywords:

Judicial review – Patent unreasonableness – Sections 1, 5(1), 5(4), and 257 of the Workers Compensation Act– Policy items #12.20, #C3-14.00, and #C3-18.00 of the Rehabilitation Services Claims Manual Vol. II – Arising out of and in the course of employment.

Summary:

The petitioner, Tydel McGowan, was injured in a motor vehicle accident. Ms. McGowan was meant to start a new job with Geraldine Yousif, the foster mother of N, the following day. Ms. McGowan offered to take N out for a slurpee, as she was going to the grocery store. Ms. McGowan did not expect to be compensated for the favour. However, Ms. McGowan had never done this type of favour for Ms. Yousif before, and only did the favour in expectation of her employment starting the next day. The accident occurred after Ms. McGowan had picked up N, and was on her way to the grocery store.

Ms. McGowan did not make a workers' compensation claim, and instead filed a civil claim against the driver of the other vehicle. Very late in the day, the defendants in the civil claim brought an application before the Workers' Compensation Appeal Tribunal (WCAT) pursuant to section 257 of the *Workers Compensation Act*, RSBC 1996 c. 492 for a determination as to whether Ms. McGowan was a worker at the time of the accident.

WCAT determined that Ms. McGowan was a worker at the time of the accident. Specifically, WCAT considered the nine non-medical factors set out in policy item C3-14.00 in the *Rehabilitation Services and Claims Manual, Vol. II* (RSCM II), and found that one of the factors supported a finding of employment connection, and the other eight factors did not support an employment connection. WCAT also considered other factors, as the list of factors in the RSCM II is not exhaustive. In particular, WCAT considered the nature of the relationship between Ms. McGowan and Ms. Yousif (that is, primarily a business relationship). WCAT also considered a factor that had been deleted from policy, which was whether risk to which the employee was exposed was the same as the risk to which the employee is exposed in the normal course of production. WCAT also considered policy item C3-18.00.

WCAT found the case was in a grey area, but ultimately decided that Ms. McGowan was a worker at the time of the accident, and that her injuries arose out of and in the course of employment.

The Court allowed the petition for judicial review, finding that the tribunal's decision expanded the scope of the Board's jurisdiction regarding workers who have not commenced work, and relied almost exclusively on a non-enumerated factor in coming to its decision. The Court accepted that WCAT could add non-enumerated factors to the list in policy item C3-14.00. However, in this case, WCAT relied almost exclusively on a non-enumerated factor in coming to its decision, and ignored the evidence and findings on the evidence already made regarding Ms. McGowan's motivations. The Court set the WCAT decision aside, and returned the matter to WCAT for reconsideration.