

# McKnight v. Workers' Compensation Appeal Tribunal

## Decision Summary

Court	B.C. Supreme Court
Citation	2012 BCSC 1820
Result	Judicial Review Allowed
Judge	Mr. Justice A. Saunders
Date of Judgment	December 4, 2012
WCAT Decision Reviewed	WCAT-2010-02229

### **Keywords:**

*Judicial review – Insufficient Evidence – Weighing of Evidence – Standard of Proof – Section 250(4) of the Workers Compensation Act – Item #97.00 Rehabilitation Services and Claims Manual, Volume II – Medical Diagnosis – Occupational Disease - Mercury Poisoning*

### **Summary:**

#### Workers' Compensation Appeal Tribunal Decision

Six teachers applied to the Workers' Compensation Board, operating as WorkSafeBC, (Board) for compensation on the basis that they had mercury poisoning as a result of spills of elemental mercury at a school. The Board, the Review Division of the Board, and the Workers' Compensation Appeal Tribunal (WCAT) determined that the teachers did not suffer from mercury poisoning and therefore were not entitled to compensation pursuant to section 6 of the *Workers Compensation Act*. WCAT heard the six appeals at the same time.

The evidence before WCAT included that of three physicians, each of whom had given an opinion as to whether the teachers had mercury poisoning. Each had used a different level of certainty when determining whether it was appropriate to diagnose a teacher with the disease. One physician who had diagnosed the teachers with mercury poisoning had applied an "at least as likely as not" standard (i.e. 50%). Of the two other physicians, both of whom rejected the diagnosis of mercury poisoning, one had stated that the level of certainty must be "as close to 100% as possible", and the other had stated he had to be 75% certain for a diagnosis.

In the course of its reasoning, WCAT rejected the teachers' argument that section 250(4) of the Act – a provision which requires WCAT to resolve an issue in a manner that favours a worker where the evidence supporting different findings on an issue is evenly weighted – requires that the level of "diagnostic certitude" must only be established at the level of 50%. WCAT found that it would be wrong to inject subsection 250(4) into matters of diagnosis in such a fashion that little significance would be attached to whether, as a matter of medicine, a physician would find that a worker had a particular condition or disease. The panel found that that the issue before them was whether the evidence was evenly weighted that the teachers have mercury poisoning as that diagnosis is made by physicians.

## B.C. Supreme Court Decision

The court allowed the teachers' application for judicial review and remitted the matter to WCAT for rehearing and reconsideration. The court found WCAT's decision to be patently unreasonable for two reasons:

- (1) WCAT failed to weigh all of the relevant evidence in reaching its conclusion that the teachers did not have mercury poisoning; and
- (2) WCAT imposed a requirement that there be proof of mercury poisoning as that diagnosis is made by physicians.

### (1) Failure to weigh relevant evidence

In respect of the first issue, the court found that the panel had impermissibly considered whether the evidence in favour of the teachers' claims was sufficient to support a finding of mercury poisoning without weighing that evidence against the evidence supporting the opposite conclusion. The court found that the panel's decision was "largely abstract and inconclusive" as it made few specific findings as to which body of evidence on any particular issue was to be preferred. For example, WCAT rejected the conclusions of the expert who found the teachers had mercury poisoning but did not state that it found the opinions of the other experts that expressed a contrary view to be superior. The panel appeared to have decided that the positive evidence, considered alone, was insufficient to support the claim and therefore appears to have concluded that the weight of evidence to the contrary did not have to be considered.

However, the panel did not state what criterion it was using to determine that the evidence was insufficient. The court found that one possible inference was that the panel thought the evidence required proof beyond a balance of probabilities (which the court found was patently unreasonable) and another was that the panel considered the claimants as being under an onus to prove their case (which the court found was a breach of item #97.00 of the *Rehabilitation Services and Claims Manual, Volume II*). The court found that the panel's statement at the end of the decision that it did not consider the evidence "evenly weighted" was a bald assertion that the case did not require application of s. 250(4) rather than an actual engagement with the proper process of weighing the evidence.

In addition, the court found it difficult to understand the panel's rejection of the opinions of the psychiatric and neuropsychological experts that also had found the teacher's symptoms to be consistent with mercury poisoning. WCAT had questioned the expertise of some of these experts, the summary nature of one report, the confidence one expressed in their diagnosis, and the incompleteness of the information that the experts had before them. The court said that it was not clear what information was missing, and why the summary opinion was not sufficient, and therefore why these opinions were not given "all due weight". Further, in respect of the concern raised by the panel over the confidence of one expert's diagnosis, the court found that it was an error for the panel to ask itself whether a diagnosis had been made as the appropriate question was whether the whole weight of the evidence in favour of a finding of poisoning outweighed the evidence to the contrary.

WCAT had also found that the absence of evidence of non-occupational causes (such as a psychiatric illness) does not mean it must be assumed that the symptoms are occupationally induced and that this is especially so in cases in which there may be sources of information that have not been explored (such as one doctor's reference to psycho-social sources). The court found that rejecting evidence because of a concern as to the theoretical possibility of other factors which were not in evidence before WCAT appears to be a violation of item #97.00 that states that decisions are not to be made in accordance with speculations unsupported by evidence. The court found that doing so effectively put the teachers to a considerable, if not impossible burden.

(2) Erring in imposing requirement of proof of poisoning as diagnosed by a physician

In respect of the second issue, the court found that WCAT must be free to make findings of fact on a balance of probabilities (with an evenly balanced case to be decided in the claimant's favour), regardless of whether the higher degree of certainty some physicians might insist upon in arriving at a diagnosis can be satisfied. It would be proper, as a matter of law, for an adjudicator to do so, if the conclusion was one supported by the evidence. This is especially so where there is a known risk of under-diagnosis.

A finding that a worker suffers from an occupational disease is a finding of fact, to be proven on a preponderance of the evidence, just as is any other fact. Evidence that a disease has been diagnosed or that it would, or would not, be diagnosed by an expert witness in given circumstances will be of significant weight when making such a finding.

The court found that WCAT's approach of applying a diagnostic criterion higher than the balance of probabilities standard to the evaluation of the evidence, could effectively deny compensation at least to some deserving workers who, on a balance of probabilities, have suffered or contracted an occupational disease, within the meaning of s. 6(1). The court found that no such result is contemplated by the Act and is patently unreasonable.