

# Mitchell v. Workers' Compensation Appeal Tribunal

## Decision Summary

Court	B.C. Supreme Court
Citation	(June 15, 2012), Vancouver S114531
Result	Judicial Review Dismissed
Judge	Madam Justice Wedge
Date of Judgment	June 15, 2012
WCAT Decision(s) Reviewed	WCAT-2009-00128 and WCAT-2011-01189

### **Keywords**

*Judicial review – Standard of review – Patently unreasonable – Causative significance – Weighing medical opinion – Petitioner's own statement of medical condition – Item #97.32 of the Rehabilitation Services & Claims Manual*

*Judicial review – Application for reconsideration based on new evidence – Section 256 of the Workers Compensation Act – Substantial evidence*

*Natural justice / procedural fairness – Bias – Apprehension of bias – Onus – Evidence of bias*

### **Summary:**

The petitioner slipped and fell at work but did not report the accident to the Workers' Compensation Board, operating as WorkSafeBC (Board) for three months, during which time she continued to work. The petitioner first sought medical attention for low back pain more than a month after her fall but did not tell the doctor that she was injured at work. The petitioner claimed that she did not report the injury right away for fear of reprisals from her employer. The Workers' Compensation Appeal Tribunal (WCAT) agreed with the Board's findings that, based on the opinions of the Board medical advisors, the fall was unlikely to have caused the petitioner's low back pains. The petitioner applied to WCAT for reconsideration of its original decision on the grounds of new evidence and an allegation that WCAT had made a patently unreasonable error. The application was dismissed. The petitioner then petitioned the Court for judicial review of both WCAT decisions, repeating the arguments she made to WCAT and alleging that both WCAT panels were biased. The Court dismissed the petition, finding that neither WCAT decision contained a patently unreasonable error and that the petitioner had failed to provide any evidence in support of her allegations of bias.

Around the time she reported her injury to the Board, the petitioner saw another doctor who diagnosed her with pre-existing osteoarthritis in her lumbar spine. In its original decision, WCAT found evidence consistent with the basis for the medical advisors' opinions. The panel preferred these opinions over those of the petitioner's doctors because the latter opinions were based on a different description of the mechanism of injury from that accepted by the Board.

The petitioner applied for reconsideration on the basis of both an alleged jurisdictional error and new evidence. The jurisdictional error said to have been committed was not applying policy item #97.32 of the *Rehabilitation Services & Claims Manual*, which requires the Board to consider a worker's own statements about her medical condition when it relates to matters that would be within her knowledge. The evidence the petitioner said was new was a) a note from the first doctor she saw purporting to clarify his diagnosis and b) a lengthy report from a rheumatologist which confirmed that the petitioner has a compression fracture to a lumbar disc and that the fracture and low back pain were attributable to the fall.

WCAT dismissed the application for reconsideration, finding that the original WCAT decision did not misapply policy item #97.32. There was other medical evidence and clinical findings on which to conclude that the fall did not cause the low back pain. WCAT refused to accept the letter from the first doctor purporting to clarify his diagnosis. This evidence was not new and could have been obtained before the WCAT hearing through the exercise of reasonable diligence. WCAT also rejected the opinion from the rheumatologist because it was not "substantial", as required by section 256 of the *Workers Compensation Act*. Specifically, the panel deciding the reconsideration application shared the original panel's conclusion that the doctor's opinion was based on the petitioner's reports of a mechanism of injury different from that accepted by the Board.

The Court found there was evidence to support the original WCAT decision and concluded that WCAT's decision to refuse to accept the petitioner's purportedly new evidence was not irrational. Accordingly, the Court found that neither WCAT panel made a patently unreasonable error. The judge said that on judicial review, she could not reweigh the evidence.

On the allegations that the WCAT panels were biased, the Court said that the petitioner had failed to offer any substantive sworn evidence to prove the allegations. Noting that the onus to prove bias is on the party making the allegation, the judge also said the allegations of bias should have first been raised with WCAT.