

Pistell v. Worker's Compensation Appeal Tribunal

Decision Summary

Court	B.C. Supreme Court
Citation	2012 BCSC 463
Result	Judicial Review Dismissed
Judge	Mr. Justice Bracken
Date of Judgment	March 29, 2012
WCAT Decision(s) Reviewed	WCAT-2007-03078 WCAT-2011-00348

Keywords:

Whether Injury Arose out of and in the Course of Employment (section 5(1)) – Reconsideration – Jurisdictional Defect – New Evidence – Whether court to review reconsideration decision or original decision, in circumstances where a reconsideration has occurred – Administrative Tribunals Act (standard of review) – Patent unreasonableness

Background:

The Petitioner was employed as an apprentice plumber for a 13 week period. His job included installing pipe hangers in a ceiling. His work required him to use a heavy drill over his head. After his employment ended, he was diagnosed with a torn tendon in the rotator cuff of his left shoulder. The issue before the Workers' Compensation Appeal Tribunal (WCAT) was whether the Petitioner's tendon tear arose out of and in the course of his employment, and was therefore compensable pursuant to section 5 of the *Workers' Compensation Act* (Act).

After holding an oral hearing, the WCAT original panel concluded that, while it accepted that the Petitioner had a full thickness tear of the supraspinatus tendon, his evidence that his condition had been caused by his employment was unreliable. Given the absence of corroborating evidence, the panel could not conclude that the injury arose out of and in the course of the Petitioner's employment as an apprentice plumber.

A reconsideration panel dismissed the Petitioner's application for reconsideration on grounds of jurisdictional defect, and on new evidence grounds. With regards to jurisdictional defect, the Petitioner had essentially challenged the original panel's findings of fact.

Reasons of the Court:

The Court, applying *United Steelworkers, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung*, 2011 BCCA 527, held that in circumstances where there has been a reconsideration of a WCAT original

decision, the court's review will generally be of the reconsideration decision only, although it will be informed by the original decision.

The standard of patent unreasonableness applied to the reconsideration panel's review of the original decision. In applying this standard, the Court reviewed the original decision.

In that regard, the Court found that there was clearly some evidence to support the conclusion reached by the original panel on the question of causation. In part, that conclusion was based on the medical evidence before the panel, and the evidence of the employer's foreman, who testified that he did not see any sign of pain or injury throughout the time of the Petitioner's employment. The original panel canvassed all the facts at an oral hearing and concluded that the Petitioner had exaggerated the amount of overhead work that he had done, and that his evidence with respect to the development of his injury and the work he performed was simply not credible. The original panel concluded that the Petitioner had responsibilities that would not have strained his left shoulder, that he had placed fewer hangers or inserts overhead than he had indicated, and that even when working overhead, he had the opportunity to work at other tasks that would have rested his shoulder. The original panel rejected the medical evidence as largely reliant on information that the Petitioner provided to the doctors and which the panel rejected as not credible.

The reconsideration panel was not patently unreasonable in concluding that there was at least some evidence to support the original panel's conclusion, and that the original panel had not made a jurisdictional error.

The standard of review of the reconsideration panel's consideration of the new evidence application was also patent unreasonableness. The new evidence the Petitioner had sought to adduce was a medical report from a physician who had provided two earlier reports that had been considered by the original panel. The reconsideration panel held that the new report did not set out a significantly different basis for supporting the Petitioner's claim. It was similar in substance to earlier medical opinions that had been considered by the panel at the original hearing. Thus, although the report was prepared subsequent to the original decision, it concerned evidence which existed at the time of the original decision and which could have been discovered through the exercise of reasonable diligence. The Court found that this conclusion was not patently unreasonable.

The application for judicial review was dismissed.