

# Rutter v. British Columbia (Workers' Compensation Appeal Tribunal)

## Decision Summary

Court	B.C. Supreme Court
Citation	2015 BCSC 862
Result	Judicial Review Allowed
Judge	Mr. Justice MacKenzie
Date of Judgment	May 25, 2015
WCAT Decision(s) Reviewed	WCAT-2013-03319

### **Keywords**

*Judicial review – Compensable consequence – Item C3-22.00 of the Rehabilitation Services Claims Manual, Volume II*

*Judicial review – Occupational disease – Bursitis and tendinitis/tenosynovitis – Section 6 of the Workers Compensation Act – Item #27.20 of the Rehabilitation Services Claims Manual, Volume II*

*Judicial review – Causation – Evidence – Independent health professional – Section 249 of the Workers Compensation Act*

*Judicial review – Procedural fairness – Referrals to the Workers' Compensation Board – Activity-related soft tissue disorder worksite evaluation report – Section 246(3) of the Workers Compensation Act*

### **Summary:**

The worker was receiving workers' compensation for a right shoulder injury when he returned to part-time work. Over time, he experienced pain and weakness in his left shoulder. Claiming that he was favouring his disabled right shoulder and over using his left, the worker applied to the Workers' Compensation Board (the Board) to have his left shoulder bursitis and tendinitis accepted as a compensable consequence of his right shoulder injury. The Board and its Review Division both denied the worker's claim. On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the worker asked that WCAT exercise its discretion under section 249 of the *Workers Compensation Act* to get an opinion from an independent health professional. WCAT referred the matter back to the Board under section 246(3) for a determination on whether the worker's left shoulder condition was an occupational disease compensable under section 6 of the *Act*. Subsequently, the same Board officer conducted an evaluation of the worker's

work activities and then issued the determination that the work activities were not a significant cause of the worker's left shoulder problems. The Board officer based his decision on his investigations into the work activities and on the opinion of a Board medical advisor. In response to the Board's determination, the worker submitted to WCAT the opinion of another doctor who considered that the worker's left shoulder condition was at least in part caused by the repetitive nature of his work and by favouring of his right shoulder. WCAT preferred the evidence of the Board medical advisor and found that the worker's employment did not significantly contribute to his left shoulder complaints.

The Court allowed the petition, finding that WCAT was patently unreasonable in its characterization of the opinion of the worker's medical expert and for not explaining in its decision why it did not seek the assistance of an independent health professional.

Board policy #27.20 governing the adjudication of bursitis and tendinitis claims requires attention to various risk factors in the worker's employment. The presence of more than a single risk factor is relevant to the assessment of such activity-related soft tissue disorders. Whereas WCAT had found that the worker's expert had based his opinion on the presence of only one risk factor – frequent shoulder movement – the Court thought that it was clear that the doctor had identified the presence of several risk factors, including the likely effect of the worker's previous right shoulder injury. Where only a single risk factor is present, the policy says that it must be particularly frequent, intense, or prolonged. While WCAT accepted that the work required frequent shoulder movement, it found that the movement could not be said to be particularly intense. The Court said that this was a misreading of the policy to require that the risk factor be both particularly frequent and intense. The Court also held that WCAT's finding that the worker's doctor did not address certain relevant facts about the work was in error because it was contrary to the evidence and in particular to the contents of the doctor's report.

The Court determined that in the circumstances of this matter, it was also patently unreasonable for WCAT not to have explained in its decision why it did not seek the assistance of an independent health professional.

The Court rejected the worker's argument that statistical or epidemiological evidence is irrelevant to determining whether an activity-related soft tissue disorder is a compensable occupational disease. The Court also disagreed with the worker's contention that WCAT's process was unfair because the same Board officer both gathered evidence and made a determination in response to WCAT's referral of the matter back to the Board.