

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

## Decision Summary

Court	B.C. Supreme Court
Citation	2019 BCSC 1659
Result	Petition Allowed
Judge	Madam Justice Fleming
Date of Judgment	September 30, 2019
WCAT Decision(s) Reviewed	A1606325

### **Keywords:**

*Judicial review – Standard of review – Patent unreasonableness – Workers Compensation Act, section 33.3 – Average earnings and long term wage rate where employed less than 12 months – Whether employed on other than a casual or temporary basis – General principles of contractual interpretation – Patently unreasonable not to consider parties' express agreement or objective intention at time contract was formed*

### **Summary:**

The petitioner was injured on her first day at a new job as a heavy equipment operator. The issue before the Workers' Compensation Appeal Tribunal (WCAT) was whether the petitioner's employment was permanent or temporary in order to determine whether section 33.3 of the *Workers Compensation Act* would apply to the calculation of her long term wage rate. WCAT determined that the petitioner's employment was temporary. The court allowed the petition on the basis that WCAT's decision was patently unreasonable for not reviewing the available evidence pertaining to the terms of the employment contract. The appeal was remitted to WCAT.

Ms. Sherstobitoff was hired to operate a haul truck by a contractor on the Site C Dam project. The petitioner had sent the employer a copy of her resume and the hiring process was completed by way of a telephone interview. The resume and the employer's records of the interview provided some evidence of the parties' agreement as to the terms of employment. The employer had a contract for specific work on the dam project. Evidence on the record before WCAT indicated that the employer had no other projects in British Columbia when its work on the dam finished.

Before the Workers' Compensation Board and WCAT, the petitioner had argued that she was hired as a permanent employee and, accordingly, her long term wage rate should be

based on the earnings for the 12 month period preceding the date of injury of a person doing the same work for the employer rather than her own earnings over the previous 12 months. Long term wage rates are usually calculated based on the injured worker's own earnings history, but section 33.3 of the *Act* provides a mandatory exception where the worker had been employed for less than 12 months prior to their injury and their employment was on other than a casual or temporary basis. The employer said that it had hired the petitioner on a temporary basis.

The court said that it could not think of any way to determine the nature of the petitioner's employment except by considering the general principles of contractual interpretation, where the goal is always to determine objectively the parties' intention at the time the contract was formed. The court found that while there was some evidence on the record before WCAT pertaining to the terms of the agreement, WCAT did not attempt to ascertain the words exchanged by the contacting parties and instead based its decision on surrounding circumstances such as the petitioner's employment history and the limited scope of the employer's work at the dam site. The court observed that evidence of these circumstances, to the extent that it was known to the parties at the time the employment contract was made, could only be relevant to clarify the parties' express agreement or their objective intention.