

Skrepetz v. Workers' Compensation Appeal Tribunal

Decision Summary

Court	B.C. Supreme Court
Citation	2015 BCSC 2458
Result	Judicial Review Allowed
Judge	Mr. Justice Leask
Date of Judgment	December 10, 2015
WCAT Decision(s) Reviewed	WCAT-2013-03348

Keywords

Judicial review – Evidence – Sufficiency of evidence – Item #97.00 of the Rehabilitation Services and Claims Manual, Volume II – Patently unreasonable to accept as sufficient evidence of a worker's condition unreliable neuropsychological assessments

Summary:

The petitioner, a tree faller, claims to have a permanent cognitive impairment as a result of head injuries he sustained while in the course of his employment. Two neuropsychologists assessed the petitioner and said that the results of their assessments were unreliable because the petitioner had not provided sufficient effort in the testing. On the basis of these reports, the Workers' Compensation Appeal Tribunal (WCAT) found that there was insufficient evidence of a cognitive impairment and it upheld decisions of the Workers' Compensation Board (the Board) denying this aspect of the petitioner's claim. The Court allowed the petition for judicial review, finding that it was patently unreasonable for WCAT to base its conclusion that the worker did not have a cognitive disorder on the neuropsychological reports, the test results of which WCAT had found to be unreliable.

The petitioner had been assessed twice by the same neuropsychologist and, on both occasions, the expert concluded that the petitioner had failed validity of effort tests in the assessments. She said that the results of the assessments, which portrayed the worker as severely disabled, were not reliable and did not accord with her observations of the worker's abilities. After the second assessment, the neuropsychologist thought it possible that the petitioner was malingering. The Board subsequently sent the worker for another assessment from a different neuropsychologist. Again, the neuropsychologist said that the results of the assessment could not be relied upon.

In the appeal that resulted in the impugned decision, WCAT rejected the idea of sending the worker for further testing, noting that there was no reason to expect a different

result. The worker had not presented any expert evidence in support of his claim or appeal. The WCAT panel determined that the existing evidence was sufficient to form the basis of a sound conclusion and found that the petitioner did not have a cognitive impairment.

The worker applied to the Court for judicial review of WCAT's decision. He argued that WCAT's decision was patently unreasonable by reaching its conclusion on no evidence and by failing to accept the petitioner's own evidence of his head injury. The Court rejected the latter argument, noting that WCAT is not obliged to accept suggestions made by the worker or his representative as reliable evidence of the worker's condition. However, the Court determined that given that WCAT had "found that 'none of the neuropsychological tests provided a reliable result,' it was patently unreasonable to rely on extracts from those same reports to come to the conclusion 'the worker does not have a cognitive disorder'". Because of WCAT's findings respecting the reliability of the results of the assessments, the Court also held that WCAT's conclusion that the evidence was sufficient was patently unreasonable.

The Court set aside WCAT's decision and expressed its view that policy item #97.00 of the Board's *Rehabilitation Services and Claims Manual* will be relevant to WCAT's reconsideration of the appeal. That policy says that where the evidence is not sufficiently complete and reliable to arrive at a sound conclusion with confidence, the Board should consider what other evidence might be obtained and must take the initiative in seeking further evidence.

Although the Court did not consider it necessary for it to do so, it said that the absence of reliable evidence means that WCAT's decision not to order further medical assessment using the tribunal's discretion under section 249 of the *Workers Compensation Act* was arbitrary and therefore patently unreasonable.