

Squires v. Workers' Compensation Appeal Tribunal

Decision Summary

Court	B.C. Supreme Court
Citation	2011 BCSC 556
Result	Judicial Review Allowed
Judge	Mr. Justice Silverman
Date of Judgment	May 3, 2011
WCAT Decision(s) Reviewed	WCAT-2009-00446 WCAT-2010-00808

Keywords:

Judicial review – Procedural fairness – Method of hearing – Credibility – Refusal to postpone oral hearing – Medical problems – Failure to provide reasons – Items #8.90 and #9.21 of the Manual of Rules of Practice and Procedure

Summary:

The Petitioner, an automobile detailer, injured his left knee at work. The Workers' Compensation Board, operating as WorkSafeBC (Board), accepted his claim for compensation for a left knee injury and a minor low back strain. The Board referred the Petitioner to an occupational rehabilitation program (OR2) in order to maximize his function for a return to work. The program was suspended as the Petitioner had acquired an Achilles tendinitis condition in his right calf, which the Petitioner claimed arose as a result of his involvement in the program. The Board suspended his temporary wage loss benefits after concluding that his Achilles tendinitis was not a consequence of the OR2 program. In arriving at this conclusion, the Board relied primarily on the medical documentation that indicated that the Petitioner reported the onset of calf pain on a day when he was not attending the OR2 program and had not attended for several days, as well as the Board's assessment that the OR2 program activities did not have the necessary risk factors that would be considered causative of Achilles tendinitis. The Petitioner requested a review of the Board's decision from the Review Division of the Board and the Review Division confirmed the Board's decision. The Petitioner appealed to the Worker's Compensation Appeal Tribunal (WCAT). Among other things, he argued that he had complained of right calf pain earlier than was recorded in the medical documentation relied upon by the Board.

The Petitioner filed a Notice of Appeal at WCAT and requested an oral hearing on the basis that he wished to testify about the mechanism of injury. WCAT scheduled an oral hearing and notified the Petitioner on more than one occasion of the hearing date. On the morning of the scheduled oral hearing, the Petitioner's representative advised the WCAT panel by letter that the Petitioner was unable to attend or participate in the hearing due to two serious medical conditions (an eye condition diagnosed a few months earlier and a more recently diagnosed asbestos-related condition). He requested that the oral hearing be postponed. WCAT denied

the postponement request and advised the Petitioner that the hearing would proceed on the basis of written submissions. The Petitioner subsequently provided written submissions to WCAT. In those submissions the Petitioner did not object to the method of hearing. As reasons for denying the Petitioner's postponement request, the panel in its decision noted that the Petitioner's notice to WCAT was short. The panel also said that the Petitioner's medical conditions seemed unlikely to resolve quickly, if at all, and that if they had prevented the Petitioner from attending the scheduled oral hearing they were likely to continue to do so.

WCAT denied the Petitioner's appeal. The panel found that the OR2 program was not of causative significance. The panel noted that there was no documentation of Achilles tendon pain at the beginning of the OR2 program when it might have been expected and that the risk factors in the OR2 program were not intensive enough to have caused an activity-related soft tissue disorder. The panel preferred the evidence of a Board medical advisor on the matter of causation over that of other doctors. The Petitioner requested a reconsideration of the original decision on a number of bases, including that the original panel had acted unfairly when it refused to postpone the oral hearing. WCAT denied the reconsideration request.

The Petitioner sought judicial review of both WCAT decisions and the Court remitted the matter back to WCAT with directions. The Court determined that the original WCAT panel breached the rules of procedural fairness and natural justice by denying the Petitioner's request to postpone the oral hearing and by proceeding without holding an oral hearing. It found that the WCAT reconsideration decision was not capable of remedying the breach in the original decision. The Court ordered WCAT to rehear the Petitioner's appeal and to provide the Petitioner with an opportunity to give oral evidence.

The Court determined that the original decision was unfair because the original panel did not follow the rules, practices and procedures set out in WCAT's *Manual of Rules of Practice and Procedure* (MRPP), specifically former item #8.90 ("Method of Hearing") and former item #9.21 ("Postponements").

Item #8.90 provided that "WCAT will normally grant a request for an oral hearing where the appeal involves a significant issue of credibility". The Court found that the Petitioner's credibility was central to the appeal as it turned largely on weighing the medical evidence which supported the Petitioner's view of what caused his leg injury against the Board medical advisor's evidence and on the question of when the Petitioner's right calf pain started.

Item #9.21 set out seven criteria that WCAT could consider in determining whether a postponement should be granted. The Court found that the original panel only considered one of the seven, namely, how far in advance the request was made. At least three other criteria were relevant but appear to have not been considered. First, the Petitioner had "serious medical problems" which "may not permit timely notice to WCAT". While the original panel commented upon the medical problems it did not do so in the context of why the Petitioner had not made the request in a timely way. Second, there was no prejudice to any other party if the postponement was granted as there was no other participating party. Third, WCAT had not granted a prior postponement.

The Court also found that the original panel had failed to provide the Petitioner with an opportunity to make submissions or to provide adequate reasons in respect of its finding that the Petitioner's medical conditions "seemed unlikely to resolve quickly, if at all" and on its decision to cancel the oral hearing. Lastly, the Court concluded that the Petitioner could not be said to

have waived his right to an oral hearing by failing to challenge WCAT's decision to proceed with the hearing on the basis of written submissions. WCAT's decision in this respect was communicated to the Petitioner in a letter that presented itself as a decision already made, with no hint of a suggestion that it might be reconsidered.