

COPY

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20110810
Docket: 11-0410
Registry: Victoria

Between:

Dorothea Steinbacher

Petitioner

And

**Ocean Blue Cedar Products Ltd.,
Workers' Compensation Appeal Tribunal**

Respondents

Before: The Honourable Mr. Justice Crawford

On judicial review of Workers' Compensation Appeal Tribunal
decision of November 29, 2010

Oral Reasons for Judgment

Counsel for the Petitioner:

R.S. Sahota

Counsel for the Respondent Workers'
Compensation Appeal Tribunal:

J.T. Lovell

Place and Date of Hearing:

Victoria, B.C.
August 10, 2011

Place and Date of Judgment:

Victoria, B.C.
August 10, 2011

[1] THE COURT: Ms. Steinbacher is a shingle worker, a shingle packer, as she is described in the petition. She petitions the Court to set aside an order or decision of the Workers' Compensation Appeal Tribunal of the 29th of November, 2010.

[2] That decision dismissed her application seeking a finding that her right knee injury that she sustained on the 20th of August, 2006, was a compensable consequence of a left knee injury she had sustained on the 22nd of November, 1999.

[3] There is some history I should set out that gives rise to the claim that occurs as a result of the accident of the 20th of August, 2006.

[4] The original left knee injury that Ms. Steinbacher acquired was dated the 22nd of November, 1998, and as a result of that she had reconstructive surgery of her knee ligaments in January of 2000 and in June of 2000. She made a return to work in November of 2000.

[5] On the 20th of August, 2006, she was walking, and she was carrying a sheet of plywood. She was walking down stairs on the outside of her house, and she slipped and fell.

[6] Dr. Crosby is one of her doctors and there is a Dr. Henderson. Dr. Henderson is a G.P., Dr. Crosby is her orthopaedic advisor and Dr. Leete is an orthopaedic surgeon.

[7] About a year later, in September 2007, Dr. Crosby noted a significant deterioration in Ms. Steinbacher's left knee, and the initial functional impairment by Workers' Compensation Board fixed that at 1.67 total disability, but Dr. Leete performed an examination on the 21st of May, 2008, and he found the left knee had markedly deteriorated at that stage, and he urged a reconsideration and indeed, the Board accepted that, and they upgraded the total disability regarding the left knee injury to 7.5 total disability.

[8] What triggered the focus on the right knee matter was Dr. Leete also opining that the left knee had buckled at the time of the incident on the 20th of August, 2006, and that caused the right knee injury.

[9] The decision that is appealed from is dated the 29th of November, 2010, and is a very carefully reasoned decision. So I turn then to the standard of review, which counsel are agreed is patently unreasonable. That has been discussed in a number of recent cases. It is governed by statute.

[10] In the British Columbia Court of Appeal decision *Lavender Co-operative Housing Association v. Ford*, 2011 BCCA 114, the Court of Appeal states that in identifying the standard of review, one looks to see whether ss. 58 and 59 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 applies, and if it does, those sections govern.

[11] In the *Workers' Compensation Act*, R.S.B.C. 1996, c. 492, s. 245.1 states s. 58 of the *Administrative Tribunals Act* applies to the Workers' Compensation Appeal Tribunal, and ss. 254 and 255 of the *Workers' Compensation Act* constitute a privative clause. Section 58(2) of the *Administrative Tribunals Act* says:

In a judicial review proceeding relating to expert tribunals . . .

(a) a finding of fact or law or an exercise of discretion . . . [with]in [the tribunal's] . . . exclusive jurisdiction . . . must not be interfered with unless it is patently unreasonable . . .

[12] There has been some judicial comment, some before and after the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, which, in effect, took away the patently unreasonable test, but that remains in force in British Columbia by force of statute. Justice Iacobucci in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, described the difference between unreasonable and patently unreasonable lying in the immediacy or obviousness of the defect. He said if the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable, but if it takes some significant searching or testing to find the defect, then the decision is unreasonable, but not patently unreasonable.

[13] Counsel have referred me to two recent cases in the Supreme Court in British Columbia. Heather Holmes J. in *Viking Logistics Ltd. v. British Columbia (Workers' Compensation Board)*, 2010 BCSC 1340, put it this way:

Standing at the upper end of the "reasonableness" spectrum, the "patently unreasonable" standard in s. 58(2)(a) nonetheless requires that the decision under review be defensible in respect of the facts and the law. It is in the inquiry into whether the decision is so "defensible" that the decision will enjoy the high degree of deference the legislator intended.

[14] In *Jones v. Industrial Wood and Allied Workers of Canada*, 2011 BCSC 929, Maisonville J. said this, in talking about patently unreasonable:

This requires that the petitioner establish that the decisions . . .

There she was speaking of the Labour Relations Board.

. . . respecting the Union's representation of Mr. Jones are irrational and unsupported by the evidence in order to be successful.

[15] Here I find the issue is plainly one of fact. What gave rise to the issue was the opinion of Dr. Leete in May of 2008. He dictated the opinion on the 21st of May 2008. He noted the request was to review her left knee situation with regard to the compensable award made the 11th of February, 2008, and I have already set out, indeed, he had a positive effect in that regard, that he found the effect of her impairment was much more than the 1.67.

[16] He noted that he had seen her as far back as December 1999, and he was instrumental in getting her through her two surgeries in 2000. He notes at the bottom of page 2:

Over the years, however, she has had increasing discomfort in the knee and has noted the knee has tended to buckle and let her down. This, in fact, resulted in her sustaining a tear of her right anterior cruciate which was dealt with by Dr. Andrew Crosby.

[17] Now that is a reference to the August 2006 incident, but he continues then with the left knee issue, and he makes a full examination, and he finds a significant varus deformity; in other words, it means when you look at her, it would appear to be bowlegged. He found a good deal of laxity in the medial collateral ligament and he

said there had been a partial failure of repairs, and he arranged for fresh x-rays which showed a marked narrowing at the medial joint space on the left side consistent with end stage osteoarthritis.

[18] So his main opinion goes towards the ongoing degeneration of Ms. Steinbacher's left knee, but he turns from that to say this, and this is the second-last paragraph of his opinion at page 4:

In addition to her left knee difficulties, she also has a failed anterior cruciate reconstruction on the right side. The cause of the right anterior cruciate deficiency was the left knee buckling and letting her down, causing her right knee to be injured. The Board, I think, should look at this aspect of her ongoing problems also.

[19] In reviewing the material it struck me what must be plain, and was plain before the Tribunal, and that is, "What is there to support Dr. Leete's opinion?". Mr. Sahota was frank in telling me that he found nothing in the prior medical evidence on what I would call the "buckling issue", either from Ms. Steinbacher or in the medical evidence.

[20] When I look to the decision of the Tribunal I find a good deal of care and attention to the detail of the history going to that same issue. In paragraph 10 there is reference to Dr. Henderson, who sees Ms. Steinbacher and his note soon after, said to be August 24th, 2006:

On Aug 20 [the worker] slipped on stairs at home while she was carrying a sheet of plywood and suffered injury to the right knee and ankle.

[21] Dr. Leete saw Ms. Steinbacher November 15th, and he notes this:

She was carrying a sheet of plywood at the time and twisted the knee. The knee went sideways and to use her words, made a terrible noise.

[22] Dr. Crosby saw her the same day, and provided this note:

Essentially on August 21st . . .

[23] So we have got two dates here, but by the way, no one is arguing about whether it occurred August 21st or 20th.

. . . she was walking down a set of stairs carrying a sheet of plywood, she tripped and she suffered an ACL rupture.

[24] I will not go through the detail in much of the remainder of the report, which focuses back on the changes that started to occur in Ms. Steinbacher's left knee, and as I have noted, the focus then on what was the extent of the disability, but the next history given is with the case manager on July 11th, 2007.

[25] Ms. Steinbacher had surgery on her right knee on the 1st of June, so this is some six weeks later. She said she was limping, the knee exercises were making her left knee more painful and she had an appointment to see Dr. Crosby about both knees. The case manager made this note:

[The worker] said that she sustained her noncompensable right knee injury when she was walking down stairs at home and caught a heel. She fell down the stairs and injured her right knee. She denies injuring her left knee at the time.

[26] During the course of the hearing before the Tribunal on July 20th, 2010, Ms. Steinbacher said this, and in the record I have been given today, that is at p. 239 of the certified Workers' Compensation Appeal Tribunal record:

WILLIAMS: Okay. Can you tell me what happened? You were carrying the plywood and then, what happened?

STEINBACHER: I slipped. All of a sudden I went down and I heard this horrible sound in my right knee. And I'm pretty sure that I caught the heel of my left boot on the steps. It was probably just not lifting it far enough. When I, as I moved my left leg, moving downwards. I don't know. Have you ever fallen and tried to describe it afterwards?

WILLIAMS: I know it's very difficult.

STEINBACHER: The plywood, plywood took off, but I didn't catch myself on time.

She talks about falling a lot more often.

WILLIAMS: I wanted to say, be very specific to this. The plywood left your arms when you slipped.

STEINBACHER: Yeah, and slid down.

WILLIAMS: And slid down.

STEINBACHER: But by the time I found my, like I didn't tumble down the [stairs]. I kind of landed on my butt.

[27] That is the evidence before the Tribunal. It was not developed in any way in Ms. Steinbacher's affidavit, where she was content to rely on what she had said to the doctors.

[28] So in terms of finding whether or not there is compensable injury to the right knee, and that flows from policy number 22 of the Board, which allows compensation for injuries that are said to have flowed from prior workplace injuries, the Tribunal was faced on the one hand with the opinion of Dr. Leete as to the right knee injury being caused by a buckling in the left knee, and the various descriptions that Ms. Steinbacher had given of the slip and fall, and I would add to that, a lack of any other medical evidence.

[29] The conclusion the Tribunal came to is this at paragraph 46: [as read in]

Something untoward occurred while the worker was carrying a large and heavy weight down a set of stairs. Given the worker's above-mentioned reports and her evidence at the oral hearing, I do not accept Dr. Leete's May 21st, 2008 description of the mechanism of injury as being the left knee buckling and letting her down. Given the lack of evidence of that occurring on that day or of incidents of the left knee buckling prior to the August 2006 accident, I find it would be speculative to conclude the left knee gave way causing the right knee injury.

[30] Paragraph 47:

While there is a possibility the left knee injury contributed in some way to the accident and injury to the right knee, the weight of the evidence does not support that possibility. Therefore, I find the right knee injury was not a compensable consequence of the left knee injury.

[31] Although I will not specify it, in fact the causation requirements in policy 22 do require there to be a significantly straight line between cause and effect. When I come back to Dr. Leete's opinion, an opinion has to be based on fact, and with respect, his opinion appears to be based on his findings on the examination of May 2008. There is no prior medical record or a note of a doctor saying there has been buckling in Ms. Steinbacher's left knee and nor does her own description indicate a failure of the left knee causing the fall.

[32] Accordingly, I find the Tribunal decision is not patently unreasonable and I dismiss the petition.

[33] Mr. Lovell said that the Tribunal does not seek costs, and I will order there be no costs.

[34] I thank counsel for their submissions.

[35] MR. LOVELL: My Lord.

[36] THE COURT: Yes.

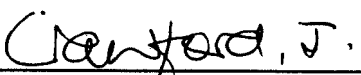
[37] MR. LOVELL: Sorry. Is it appropriate to ask for a ruling with respect to the -- whether this review also applies to the reconsideration decision?

[38] THE COURT: Well, I did not understand Mr. Sahota was raising that as a concern today. I am not sure where that goes, it has not been argued before me. You raised it because you are concerned that was an aspect, but in terms of reconsideration, it has not been raised by Mr. Sahota and it seems to cover the same ground. I am not quite sure ...

[39] MR. LOVELL: I suppose it may be a distinction without a difference.

[40] THE COURT: Right. In any event, I mean, if effectively it closes both doors, then I would say that my ruling covers both decisions of the Tribunal.

[41] MR. LOVELL: Thank you, My Lord.



The Honourable Mr. Justice Crawford