

Whetung v. British Columbia (Workers' Compensation Appeal Tribunal)

Decision Summary

Court	B.C. Court of Appeal
Citation	2013 BCCA 350
Result	Appeal Dismissed
Judges	Madam Justice Prowse Mr. Justice Lowry Madam Justice D. Smith
Date of Judgment	July 26, 2013
WCAT Decision(s) Reviewed	WCAT-2010-02795

Keywords

Changing final decisions (functus officio) – Section 96 of the Workers Compensation Act (Act) – Workers' Compensation Board (Board) may not reconsider a decision more than 75 days after it was made – Exceptions not applicable – Comment in reasons for judgment in a related but separate civil proceeding not binding upon Board or the parties

Reviewable and appealable decisions of Board – Sections 96.2 and 239 of the Act – Decision that worker no longer entitled to compensation benefits on the basis of a perceived right of subrogation still a decision respecting compensation

Summary:

The Court of Appeal dismissed an appeal by the Workers' Compensation Board, operating as WorkSafeBC (Board), and confirmed the finding of the B.C. Supreme Court (see 2012 BCSC 1850) that the Workers' Compensation Appeal Tribunal (WCAT) had made a patently unreasonable error when it determined that the Board could change a decision it had already made on the basis of comments made by a judge in a related but separate court action.

Ms. Whetung was receiving workers' compensation benefits for a condition called dystonia. She subsequently was awarded damages in a separate court action, which was premised on the finding that her dystonia was entirely attributable to a non-work-related accident at issue in the action. In ruling that the benefits paid by the Board were not deductible from the award of damages, the B.C. Supreme Court in the action stated that the Board was "subrogated for that part of the [compensation benefits] attributable to the effects of dystonia". Relying on this comment, the Board stopped paying benefits

to Ms. Whetung. On appeal of that decision, WCAT held that, notwithstanding that it had been more than 75 days since the Board's decision, section 96 of the *Workers Compensation Act (Act)* did not prevent the Board from giving effect to the direction of the trial judge. The Court of Appeal found this part of WCAT's decision to be patently unreasonable.

Although the Board was not a party to the court action, it considered the court's finding to be a direction entitling it to stop Ms. Whetung's workers' compensation benefits. Ms. Whetung challenged the Board's decision and the matter came before WCAT, which decided that the Board was entitled to stop the benefits attributable to her dystonia because she was fully compensated for her losses by the damages awarded in the action and the court had clearly intended that Ms. Whetung not recover twice for the same injury. WCAT observed that the Board could not as a matter of law have a subrogated interest in the damages awarded to Ms. Whetung, despite what the court in the action seemed to indicate. Section 10 of the *Act* could not bear such an interpretation. WCAT considered, however, that the judge's findings did give rise to a trust-like relationship which enabled and required the Board's action.

The Court of Appeal agreed with the B.C. Supreme Court in the judicial review proceeding in finding that it was patently unreasonable for WCAT to determine that the Board was bound to follow the comments of the court in the action. The Board was not a party to the action and the workplace injuries and the injury in the action were separate. The *Act* provides no basis upon which the Board could decide that Ms. Whetung was not entitled to the disability benefits already awarded. According to the Court, no question of subrogation could arise despite what was said by the court in the action.

The Board had also argued that WCAT lacked the jurisdiction to hear an appeal from its decision to stop Ms. Whetung's benefits. When the matter was before the Board's Review Division, the review officer found that the Board's decision was not one respecting compensation and, therefore, was not reviewable by the Review Division under section 96.2 of the *Act*. The Board argued that if the matter was not reviewable by the Review Division, it could not be appealed to WCAT under section 239. The Court of Appeal found the Board's decision to be one respecting a compensation matter and, therefore, one which was both reviewable and appealable.