

Whetung v. Workers' Compensation Appeal Tribunal

Decision Summary

Court	B.C. Supreme Court
Citation	2012 BCSC 1850
Result	Judicial Review Allowed
Judge	Madam Justice Fisher
Date of Judgment	December 7, 2012
WCAT Decision(s) Reviewed	WCAT-2010-02795

Keywords

Subrogation – Section 10 of the Workers Compensation Act (Act) – Same disability found to be compensable under the Act also found to be entirely caused by tort – Double recovery

Judicial review – Standard of review – Patently unreasonable – Determining expertise of Workers' Compensation Appeal Tribunal (WCAT) – Section 58 of the Administrative Tribunals Act – Sections 254 and 255 of the Act

Judicial review – Standard of review – Patently unreasonable – WCAT finding determining its own jurisdiction – Decision respecting compensation – Sections 96.2 and 239 of the Act

Summary:

The court found the decision of the Workers' Compensation Appeal Tribunal (WCAT) to be patently unreasonable insofar as it confirmed the ability of the Workers' Compensation Board, operating as WorkSafeBC (Board), to stop paying benefits for a worker's disability where that worker had also been awarded damages in a civil suit for the same disability and where the judge in the civil action had found that the disability was entirely caused by the non-work-related event. The judge hearing the judicial review held that because the Board was not a party to the civil proceeding and because tort law and workers' compensation law were different in important respects (including in respect of causation), the Board had no right to rely as it did on the comments made in the trial judgment.

Jessica Whetung suffered separate injuries in a short span of time. Two of her injuries happened at work and another was not work-related. Ms. Whetung claimed and received workers' compensation benefits which included compensation for a serious neurological impairment called dystonia. Separately, a court awarded Ms. Whetung

damages in a civil suit against the occupier of the premises where she suffered her non-workplace injury. In that case, the trial judge found that the defendant was entirely responsible for Ms. Whetung's dystonia. Specifically, the judge declined to deduct from the damages payable by the defendant in the civil action any amount on account of the workers' compensation benefits Ms. Whetung had been receiving. The trial judge commented that the Board was subrogated for that part of the coverage attributable to the effects of the dystonia.

Although the Board was not a party to the civil proceeding, it considered the trial judge'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 Ms. Whetung's benefits attributable to her dystonia because she was fully compensated for her losses by the trial judgment and the trial judge had clearly intended that Ms. Whetung not recover twice for the same injury. WCAT observed that the Board could not, as the trial judge seemed to indicate, have a subrogated interest in the damages awarded to Ms. Whetung. Section 10 of the *Workers Compensation Act (Act)* could not bear such an interpretation. WCAT considered, however, that the trial judge's findings did give rise to a trust-like relationship which enabled and required the Board's action.

The chambers judge allowed Ms. Whetung's petition for judicial review of the WCAT decision on the basis that it was patently unreasonable for WCAT to apply equitable principles to explain the Board's authority when that authority must be found in the *Act*. Ms. Whetung had argued that the application of principles of equity is not a subject about which WCAT had expertise relative to the court and that WCAT's findings should therefore be reviewed on the standard of *correctness* rather than *patent unreasonableness*. The chambers judge disagreed and, following *Kerton v. Workers' Compensation Appeal Tribunal*, 2011 BCCA 7, noted that under section 58(1) of the *Administrative Tribunals Act*, WCAT's expertise, for the purpose of selecting the appropriate standard of review, is determined by whether the matter under consideration is one that falls within the tribunal's exclusive jurisdiction under WCAT's privative clause (i.e., sections 254 and 255 of the *Workers Compensation Act*).

The chambers judge also found that it was patently unreasonable for WCAT to determine that the Board was bound to follow the trial judge's comments. The Board was not a party to the civil action, the workplace injuries and the injury in the tort action were separate, and the different legal tests for causation under the *Act* and in tort were all factors in the chambers judge's judgment. Although she recognized that the Board may have some basis upon which to seek recovery from Ms. Whetung, the judge hearing the judicial review found no rational basis for the Board taking action based solely on the trial judge's comment that the Board was subrogated.

The Board was a party to the judicial review and argued that WCAT lacked the jurisdiction to hear an appeal from the Board's 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*. On judicial review, 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 chambers judge found that the question of whether the matter was one respecting compensation was within WCAT's exclusive jurisdiction to determine, as was a refusal by the Review Division to conduct a review. Therefore, notwithstanding that by answering the question WCAT was effectively determining its own jurisdiction to hear the appeal, WCAT's determination was entitled to deference. The judge found that WCAT's determination that the matter was reviewable was not patently unreasonable.