COPY

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20101126
Docket: S092291
Registry: Vancouver

Between:

Donna Cannon

Petitioner

And:

Workers' Compensation Appeal Tribunal

Respondent

Before: The Honourable Madam Justice Baker

Oral Reasons for Judgment

In Chambers
November 26, 2010

Counsel for the Petitioner:	Stan Guenther
Counsel for the Respondent:	V.A. Pylypchuk
Place and Date of Hearing:	Vancouver, B.C. November 25 and 26, 2010
Place and Date of Judgment:	Vancouver, B.C. November 26, 2010

[1] **THE COURT:** I am giving this decision orally and therefore reserve the right if a copy of the Reasons is ordered, to make any amendments, add to/delete from the Reasons without, of course, changing the substance of my decision. I wish to thank counsel for a well-organized and thorough presentation with a clear focus on the issues. That approach has made it possible to resolve this matter in this way.

[2] The petitioner seeks an order pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996 c. 241, that a decision of the Workers Compensation Appeal Tribunal, ("WCAT" hereafter), made October 19, 2007, number 03228, and the reconsideration decision of the WCAT made on February 26, 2009, number 2009-00576, be set aside or quashed and the matter be referred back to WCAT for a new hearing and decision.

[3] The parties are agreed that if the petitioner's arguments in relation to the October 19, 2007 decision are accepted, the 2009 decision falls. The submissions of counsel have focussed, therefore, on the 2007 decision and reasons, as I shall, in these brief Reasons.

[4] I do not wish the leave the parties in suspense and indicate now that I have determined that the 2007 WCAT decision should be set aside and the matter remitted back to the tribunal for a new hearing and decision. I have concluded that the WCAT acted unfairly in failing to grant the petitioner an oral hearing in the specific circumstances of this case. I am not persuaded that the WCAT acted in a patently unreasonable manner in its treatment of an opinion about causation provided by the petitioner's doctor, Dr. John Sun.

[5] The background and basic facts are set out in the materials provided by counsel on the hearing of this judicial review and I shall not seek to reproduce more than a basic outline of the material facts here.

[6] The petitioner is a registered nurse. In January 2006, she was 48 years old, employed full-time with the Vancouver Island Health Authority, referred to hereafter as VIHA, in the surgical/medical daycare unit at Cowichan District Hospital. Her

work involved rotating through four different jobs; three of those jobs involved work in admitting and the outpatient clinic. The fourth part of the petitioner's rotation, and the one relevant to this matter, involved assisting physicians to carry out endoscopies and colonoscopies on unconscious patients in what is referred to as the "scope" room. On January 20, 2006, the petitioner assisted a physician with a patient in the scope room during a one hour endoscopy. The manner in which the procedure was conducted placed a more than usual strain on the petitioner's lower back. During the procedure she began to experience discomfort in her low back and/or leg. Because factual determinations about pain and discomfort experienced by the petitioner are key to the matters directly within the jurisdiction of the WCAT, I shall avoid, to the extent possible, direct reference to symptoms in these brief reasons and any references I do make should not be considered to be binding on the WCAT.

[7] It is sufficient to say that because of symptoms the petitioner attributed to the activities in the scope room on January 20, 2006, the petitioner reported to her employer on January 22, 2006 that she had been injured on January 20, and she did not return to work for shifts scheduled for her on January 23, 24, and 25, during which time she sought out chiropractic treatment.

[8] From approximately January 26 to February 6, the petitioner was on a pre-arranged holiday in Costa Rica. She returned to work on February 6. She continued to work without interruption until March 31 when she sought attention in the emergency department at the hospital. On April 6, 2006, her family doctor diagnosed a suspected disc prolapse. A CT can was ordered. The CT scan, carried out on April 19, 2006, revealed a "prominent posterolateral disc protrusion on the left side at L5-S1."

[9] On April 21, 2006, the petitioner submitted an application for workers compensation benefits. Essentially, she claimed that the disc protrusion and resulting symptoms was a workplace injury that had occurred on January 20, 2006. On May 15, 2006, Ms. Cannon was interviewed by a Worker's Compensation Board

entitlement officer hereinafter referred to as "EO." The EO had a discussion with WCB medical advisor Dr. Rockfells regarding Ms. Cannon's claim, and in particular, the issue of whether Ms. Cannon's work activities on January 20 were likely to have caused the disc herniation. On May 17, 2006, the WCB accepted Ms. Cannon's claim for compensation for the three days of work missed in January 2006 on the basis that she had suffered a low back strain but rejected her claim that she had also suffered a disc herniation on that date.

[10] Ms. Cannon sought a review by the WCB Review Division and submitted a letter dated June 12, 2006, relating the details of the work activity and her symptoms. The Review Division sought an opinion from a second physician referred to as the Review Division Medical Advisor or "RDMA". Following receipt of that opinion, the Review Division upheld the original decision of the EO denying compensation for the disc herniation. On February 2, 2007, Ms. Cannon submitted a notice of appeal from the Review Decision to the WCAT. She asked for an oral hearing and gave as the reason for that request "an oral hearing is necessary because the worker will give evidence in regards to her injury and condition." Ms. Cannon sought the assistance of her union and designated Mr. James Parker of the British Columbia Nurse's Union, hereinafter referred to as "BCNU", as her representative.

[11] On May 3, 2007, the WCAT appeals coordinator informed Ms. Cannon and Mr. Parker that following a preliminary review of the appeal and "based on WCAT criteria" the appeal would proceed by way of written submissions. In other words, Ms. Cannon's request for an oral hearing was declined.

[12] WCAT policies are, by legislation, binding on its tribunals. WCAT's policy concerning the matter of conduct of appeals provides that the tribunal may conduct an appeal in the manner it considers necessary including conducting hearings in writing or orally. The rules specifically states that:

> WCAT will normally grant a request for an oral hearing where the appeal involves a significant issue of credibility. An oral hearing may also be granted where there are (a), significant factual issues to be determined.

The rule also states:

> WCAT will normally conduct an appeal on a read-and-review basis where the issues are largely medical, legal or policy-based and credibility is not an issue.

[13] Ms. Cannon's employer, VIHA, elected to participate as a party in the appeal but took no position on Ms. Cannon's request for an oral hearing.

[14] Mr. Parker filed a written submission on behalf of Ms. Cannon on May 28, 2007. In support of her claim, Mr. Parker submitted medical opinion evidence from Dr. John Sun, a neurosurgeon who had originally seen Ms. Cannon on a referral from her family doctor, and had later provided a medical opinion on causation of the disc herniation in support of Ms. Cannon's appeal. In the letter to WCAT, Mr. Parker provided information about the events on January 20, 2006, in relation to the onset of symptoms. He also stated:

> It is requested that the panel refer to the June 12, 2006 letter by Ms. Cannon in regards to the detail of the work activity and symptoms. As an oral hearing has not been granted in this appeal, it is requested that the evidence in Ms. Cannon's letter be accepted as fact.

[15] Mr. Parker also made submissions to the effect that both the Medical Advisor and the Review Division Medical Advisor the MA and the RDMA , – did not have a clear picture of the continuity of symptoms experienced by Ms. Cannon and again stated:

> If there is any question in regards to the continuity of leg symptoms between January and March 2006, an oral hearing should be held so that Ms. Cannon can provide oral evidence on this matter.

Mr. Parker made written submissions as to why Dr. Sun's opinion was more consistent with the history of Ms. Cannon's symptoms, as she had provided them, than that of the MA or the RDMA.

[16] The employer made submissions in writing on June 2, 2007. In that submission the employer stated that the history provided by Ms. Cannon and her union was "not entirely accurate." The employer referred to the fact that Ms.

Cannon had not completed an application for WCB compensation until April 21, 2006, and submitted that an inference should be drawn from that fact, and others, that any other earlier symptoms must have been minor. The employer suggested that Ms. Cannon's current evidence was "not contemporaneous" but rather "retrospective." The employer stated it would leave it to the tribunal to decide "on which accounting of the history is more accurate."

[17] Mr. Parker replied to the employer's submissions. He noted that the employer was disputing matters of fact on which Ms. Cannon had direct knowledge. He stated that all of the information submitted by Ms. Cannon should be accepted as accurate and specifically stated:

> If there is any question on the accuracy of any evidence or if any matter turns on evidence that is not accepted as fact then there should be an oral hearing as originally requested.

Mr. Parker stressed that in his view the critical issue was whether the events as reported by Ms. Cannon were accurate. He also stated:

> If there is any material event in which her evidence is not accepted than an oral hearing should be held.

Mr. Parker enclosed with his letter a brief letter from Ms. Cannon to him dated June 15, 2007, providing additional details of symptoms she said she had experienced while travelling to Costa Rica and while on vacation there in late January and early February 2006. She specifically challenged an assertion made by the employer that she had admitted to being very physically active while on vacation and the employer's assertion that any discomfort she had experienced during the trip to Costa Rica by automobile and airplane was likely caused by sitting for a prolonged period.

[18] It is clear from reading the medical opinions provided by the MA, the RDMA, and Dr. Sun, and the submissions of the parties to the tribunal that the location, onset, duration, continuity and severity of symptoms of pain or discomfort in Ms. Cannon's lower back and left leg would be key to a determination of the weight to be

given to the conflicting medical opinions about when the disc herniation either occurred or, if it predated January 20, 2006, when it became symptomatic, and therefore, whether either the herniation itself or exacerbation of symptoms from a pre-existing but asymptomatic condition were the result of a workplace event.

[19] The last word went to the employer. In a letter dated August 29, 2007, the employer responded to Ms. Cannon's June 15, 2007 letter. The employer's submission, in my view, directly put Ms. Cannon's credibility in issue, as follows:

> The comments from the worker are entirely too self-serving to be accepted as accurate.

[20] The employer elaborated on why it submitted that Ms. Cannon's current assertions about the severity of the symptoms she had experienced in January, February, and March 2006, should be rejected.

[21] No oral hearing was granted. On October 19, 2007, the WCAT in the person of one of its Vice Chairs issued the decision that the petitioner seeks to quash, dismissing her appeal. The Tribunal specifically found that Ms. Cannon had pre-existing degeneration in her lumbar spine at the location of the herniation but that it was asymptomatic prior to January 20, 2006. The WCAT accepted Dr. Sun's opinion that the herniation was the cause of Ms. Cannon's symptoms. The Tribunal rejected Dr. Sun's opinion about causation and stated it was not persuaded that there was sufficient evidence that the disc herniation arose out of, and in the course of the employment, or as a consequence of a compensable injury.

[22] In my view, the Tribunal chose to accept the opinion of the RDMA in preference to that of Dr. Sun relating to causation. The Tribunal stated that if it accepted as fact the information provided by Ms. Cannon that the onset of leg pain occurred closer in time to January 20, 2006, that could alter the weight that could be given to the RDMA's opinion. The Tribunal then made what I conclude was an adverse credibility finding in relation to Ms. Cannon and rejected her evidence that in the days following the events of January 20, 2006, and in particular en route to and during her vacation, she had experienced significant discomfort. In rejecting this

information the Tribunal emphasized that it had not concluded that Ms. Cannon was, in effect, lying or prevaricating, but that her current recollection was inaccurate or unreliable. In effect, the Tribunal accepted that Ms. Cannon's previous out-of-court statements to third parties were more accurate than her assertions to the Tribunal.

[23] The Tribunal acknowledged that if it had concluded that Ms. Cannon was "altering the facts to fit the situation," she would be entitled to an oral hearing to defend her credibility. But as the Tribunal had concluded only that her memory was flawed or unreliable, she was not similarly entitled. I agree with the submissions of counsel for the WCAT that courts have held that issues involving credibility can sometimes be resolved without the trier of fact having the benefit of seeing and hearing a witness; or having that witness's testimony elicited through direct oral examination and tested through cross-examination. Counsel for the Tribunal provided the court with authorities in that regard.

[24] I am satisfied, however, that in the circumstances of this case Ms. Cannon's credibility was a significant issue and fairness required that she be heard at an oral hearing. There were conflicting medical opinions on the key issue of causation of the symptoms complained of. In order to properly assess and weigh those medical opinions, the Tribunal had to make crucial findings of fact about when symptoms arose, where Ms. Cannon experienced pain or discomfort, how severe the symptoms were, how continuous they were, the duration of the symptoms, and factors contributing to the amelioration or aggravation of symptoms.

[25] It is clear that the medical opinions to a significant and relevant extent were based on differing understandings and interpretations of the factors I have mentioned. The RDMA, for example, appeared to consider it important to know whether the low back symptoms and the symptoms of pain or discomfort radiating into the leg coincided. Neither the MA or the RDMA had ever spoken with Ms. Cannon directly and they had had to rely on a brief summary of information elicted from Ms. Cannon by the EO. An oral hearing would have provided Ms. Cannon with

the opportunity to clarify and either confirm or deny the accuracy of the factual assumptions on which the medical witnesses had provided their input.

[26] In my view, it is also clear that the Tribunal placed great emphasis on whether Ms. Cannon considered her discomfort to be significant as opposed to whether the discomfort was medically significant. Ms. Cannon might be stoic. Her delay in advancing a claim for compensation is as compatible with that conclusion as with the conclusion that she was not experiencing discomfort significant enough to prompt her to make a claim. Yet the Tribunal had no opportunity to assess whether Ms. Cannon's perception of discomfort accorded with descriptions that the medical witnesses would consider relevant and significant.

[27] It was open to the Tribunal at the end of the day to reject Ms. Cannon's testimony about the relevant factors and to conclude that her memory was unreliable in view of possible inconsistencies between her earliest reports and later accounts. However, before rejecting her testimony about her symptoms the factual basis of all of the medical opinions – fairness demanded that she have an opportunity to clear up any areas of ambiguity or apparent inconsistency. Credibility, as the authorities referred to confirm, involves more than an assessment of whether a witness is knowingly or intentionally giving false or misleading testimony or distorting or shading facts. It also involves the assessment of the reliability of testimony; whether a witness has a good memory or bad; whether the witness had actually made statements attributed to him or her; whether there are convincing explanations for apparent inconsistencies that could otherwise undermine confidence in the accuracy or reliability of the witness's recollection of events; whether an interpretation placed on statements attributed to the witness about her symptoms and the impact of the symptoms on her level of function may be erroneous. I note in this case, for example, the ambiguity inherent in a portion of the EO's notes on which both the MA and the RDMA relied. The EO wrote:

> She went on vacation for 10 days and then returned to work. She said her back was fine at this time but she did have some aching symptoms in her leg.

Was this understood to mean that Ms. Cannon's back was "fine" both while on vacation and after her initial return to work or while on vacation only or after her return to work only? Does the description of her back as "fine" mean she was symptom-free or only that her symptoms were sufficiently minor that she could ignore them? This is the sort of ambiguity that could and likely would have been clarified at an oral hearing.

[28] In summary, in my view in the context of this specific case, the petitioner's credibility was a key and central issue. If the Tribunal accepted her assertion that she had had "noticeable discomfort", in the words of the Tribunal, or that she experienced the discomfort she was having in late January and early February 2006 as being significant, then that evidence "could be said to alter the balance" in relation to acceptance of and reliance on the RDMA's opinion as opposed to that of Dr. Sun. In such circumstances the Tribunal's own policy and Rules provided for an an oral hearing to be granted.

[29] I conclude that it was unfair to deny the petitioner an oral hearing in these circumstances and that accordingly I must set aside the decision of the Tribunal and remit the matter for a new hearing and decision. I do not think I should fetter the discretion or jurisdiction of the Tribunal by attempting to provide any more specific directions about how the new hearing should be conducted. The parties are agreed that each party shall bear its own costs.

The Honourable Madam Justice Baker