

Weiss v. Workers' Compensation Appeal Tribunal

Decision Summary

Court	B.C. Supreme Court
Citation	2021 BCSC 231
Result	Petition allowed
Judge	Mr. Justice Branch
Date of Judgment	February 12, 2021 (corrected on April 21, 2021)
WCAT Decision Reviewed	WCAT Decision No. A1602380 and A1602383 (December 14, 2018)

Keywords

Judicial review – Standard of review – Procedural Fairness – Section 257 [now 311] of the Workers Compensation Act – Item 7.5 of WCAT's Manual of Rules of Practice and Procedure – Use of interrogatories – Policy items # C3-14.00, # C3-19.00 of the Rehabilitation Services and Claims Manual Vol. II – Arising out of and in the course of employment

Background

The Workers' Compensation Appeal Tribunal (WCAT) decision numbered A1602380 and A1602383, issued December 14, 2018 (the "WCAT Decision"), was a determination made pursuant to section 257 of the *Workers Compensation Act* [RSBC 1996], c. 492 (now section 311 of the *Workers Compensation Act* [RSBC 2019], c. 1).

Mr. Weiss and Ms. Weissova were a married couple. They lived in the basement of Ms. Weissova's father's home (Mr. Cermak). Mr. Cermak had a newspaper route and the couple occasionally delivered the papers for Mr. Cermak.

On May 12, 2011 Mr. Weiss was driving Ms. Weissova and himself, when the couple was injured in a motor vehicle accident. In June 2015, Ms. Weissova applied to WCAT for a section 257 [now 311] determination. Mr. Weiss requested that WCAT hold an oral hearing. The couple's evidence on discovery was that they could not recall if they had delivered the newspapers prior to the accident. Their evidence was that the accident occurred when they were returning to their home after dropping off Ms. Weissova's sister at her boyfriend's house. There was other evidence that supported that the couple had delivered the newspapers that day, and had not driven Ms. Weissova's sister to her boyfriend's house.

In a memorandum to the parties the panel acknowledged there were inconsistencies in the evidence, but was not convinced that an oral hearing six years after the accident would be particularly helpful to assessing credibility and/or resolving the inconsistencies.

WCAT directed that the application proceed in writing, but allowed for interrogatory evidence. At WCAT's request, Mr. Weiss provided a list of witnesses to whom interrogatories would be posed, and questions for those witnesses. Ms. Weissova, Mr. Cermak and Mr. Miller (the sister's boyfriend) responded to the interrogatory questions.

In the WCAT Decision, the panel acknowledged that there were significant contradictions in the evidence with respect to whether an employment relationship existed between Mr. Cermak and the couple. However, the panel essentially assumed for purposes of its decision that Ms. Weissova and Mr. Weiss were workers. The panel acknowledged that there were also significant contradictions in the evidence with respect to the activities of the couple on the morning of the accident. However, the panel essentially assumed that the couple did deliver newspapers that morning, and were driving home from the newspaper route at the time of the accident.

The panel applied Board policy #C3-14.00, "Arising Out of and in the Course of the Employment" and policy #C3-19.00, "Work-Related Travel", and concluded that the accident did not occur when the couple were in the course of their employment as contemplated by those policies. With respect to policy #C3-19.00, the panel concluded that the couple were travelling employees, and had ended their work day and had left the last work location on their "regular commute" home when the accident occurred. Thus, any injuries suffered by Ms. Weissova did not arise out of and in the course of her employment. Any action or conduct by Mr. Weiss that caused the alleged breach of duty of care resulting in the accident did not arise out of and in the course of his employment.

Reasons of the BC Supreme Court

The Court noted that item 7.5 of WCAT's Manual of Rules of Practice and Procedure ("MRPP") provides that oral hearings will "normally" be held where the appeal involves a significant issue of credibility, but also provides that a hearing will "normally" be held by written submissions for section 257 certifications. The court said this item presumes a written hearing for section 257 certifications, but the presumption should reverse if there is a significant issue of credibility. Credibility is best "tested" at an oral hearing. This same rationale applies to a section 257 hearing.

The Court said that, even if it approached the issue neutrally, without the benefit of any presumptions, it would still conclude that it was unfair for WCAT not to hold an oral hearing. The panel's own stated ground for its determination not to hold an oral hearing was flawed. The fact that the accident had occurred six years prior was not a reasonable basis on its own to reject outright the concept of an oral hearing.

Furthermore, there were clear credibility disputes that required an oral hearing. The credibility issues included (1) whether Ms. Weissova had been delivering newspapers on the day of the accident, (2) whether the accident occurred during the course of her paper delivery responsibilities, and (3) whether she was paid for her work. There were gaps in the evidence that needed to be filled on these and on other points.

It was not possible to say that a full oral hearing would not possibly have made a difference to the WCAT Decision. Policy #C3-14.00 outlines a broad scope for the “arising out of and in the course of employment” inquiry. Several potentially relevant lines of inquiry relating to the factors in that policy, and relating to policy #C3-19.00, could have been pursued at an oral hearing. These lines of inquiry included the possible benefit to Mr. Cermak of the couple delivering the newspapers; whether Mr. Cermak had instructed the couple to return home after the delivery; and the nature of the payment Mr. Cermak provided to the couple for delivering the newspapers. As it was, there were various gaps in the evidence before the panel.

Courts have long recognized the difficulty in testing credibility through the mechanism of interrogatories. Thus, proceeding by way of interrogatories was not an adequate procedural safeguard.

The court allowed the petition. It set the WCAT Decision aside, and remitted the matter back to WCAT for a new hearing.