

# McHugh v. Insurance Corporation of British Columbia

## Decision Summary

Court	B.C. Supreme Court
Citation	2023 BCSC 56
Result	Judicial Review Allowed
Justice	Mr. Justice Kirchner
Date of Judgment	January 12, 2023
WCAT Decision Reviewed	A1902514 (September 15, 2020)

### **Keywords:**

*Judicial review – Occupational Disease – Section 136 of the Workers Compensation Act - Activity-Related Soft Tissue Disorder (ASTD) – Epicondylitis – Ulnar Neuropathy – Keyboarding – Worksite Evaluation – Expert Evidence*

### **Summary:**

The petitioner’s work primarily involved keyboarding, which she had been doing for three years. The Workers’ Compensation Appeal Tribunal (WCAT) determined that her bilateral elbow epicondylitis and ulnar neuropathy were not occupational diseases that were due to the nature of her employment, and therefore the petitioner was not entitled to compensation under section 136 of the *Workers Compensation Act*. The WCAT panel gave less weight to an ergonomist report obtained by the petitioner and preferred a report by a Board Medical Advisor (BMA) after concluding that the BMA had a better understanding of the work postures. The BMA had relied on evidence from a workplace evaluation by a Board case manager. The ergonomist had done his own workplace evaluation.

The court found WCAT’s decision was patently unreasonable for relying on the workplace evaluation (and by extension the BMA’s report) as the evaluation did not simulate any actual work activity. In substantially rejecting the ergonomist report and preferring the BMA report, the decision was also patently unreasonable as the WCAT panel misunderstood the ergonomists report and failed to take into account that the BMA report was based on the same assumption that the panel found the ergonomist had incorrectly made. The appeal was returned to WCAT for reconsideration in a new hearing.

In respect of the Board’s worksite evaluation report, it included photographs and videos of the petitioner at her workstation unsuccessfully attempting to log in to her computer. The court found while the videos briefly showed the petitioner’s posture and positioning at her workstation, they confirm that the petitioner did not perform any actual or simulated work during the evaluation. The court concluded that the “brief snippets” of demonstrated posture, including her attempt to log into her computer, were not representative of the petitioner working at her workstation and noted that the evaluation was inconsistent with the direction of an earlier Review Division decision of the Board requiring the Board, at a “minimum”, to obtain further evidence of the petitioner “working at her workstation”. Further, the resulting evaluation report

contained conclusions about the petitioner's work, such as the number of wrist movements per minute and the duration of sustained postures, that do not appear to come from observations of her working.

The court concluded that the worksite evaluation cannot form a reasonable basis "by any standard" on which to assess whether the petitioner's work activity was a causative factor in her conditions. This is not a case where there is "some evidence" of the petitioner working at her workstation. The WCAT panel's reliance on the worksite evaluation is also patently unreasonable because the evaluation "plainly and obviously" does not meet the minimum standard required by the Review Division.

In respect of the ergonomist report, the WCAT panel stated that it gave "very little weight" to the report because the ergonomist wrongly understood that the petitioner rested her arms on the armrests while typing. The panel found that this was contrary to the petitioner's own evidence, which it accepted. The court found that there were two critical flaws with the panel's reasoning.

First, the court concluded that in the absence of the ergonomist stating anywhere in his report that the petitioner rested her arm on the armrest while typing, there was no evidentiary support in the report to impute this misunderstanding to the ergonomist. The ergonomist did not state or imply in his report that the petitioner rested her arms on the armrest while typing. The panel inferred this from the fact that in some of the photographs relied on by the ergonomist the petitioner's arms appear to make contact with the armrests. The court found the panel's inference was unsupported by any reasonable examination of the report as a whole. Only some of the photographs showed contact and in respect of one, the ergonomist states that her wrist was bearing the weight of her arm.

Second, even if the ergonomist incorrectly thought the petitioner used the armrest while typing, the BMA was under the same misapprehension, and the panel should have been equally dismissive of the BMA report as that was the sole ground upon which WCAT substantially rejected the ergonomist's report. The BMA report stated that "the worker's forearm does often rest on the arm-rest" and the worksite evaluation upon which the BMA relied stated that "90% of the time the worker is keyboarding where she is resting her inside of her forearm on the armrest". The court found that given that the ergonomist did not make the same assumption, the only reasonable outcome of applying the panel's logic would have been to prefer the ergonomist report and give the BMA report very little weight.

Lastly, the court set aside the panel's conclusion that the petitioner's work did not involve repetitive pronation or supination of her forearms on the basis that it too depended on the workplace evaluation which the court already found was patently unreasonable to rely upon. While there was other evidence the panel relied upon for this conclusion (including the petitioner's evidence to WCAT) the panel did not find that this other evidence, standing alone, supported the conclusion that the petitioner's work activities did not involve repetitive pronation or supination. The court read the panel's decision as considering the worksite evaluation as necessary evidence to support the conclusion. Also, the earlier Review Division decision, which was not appealed to WCAT, found that an evaluation was essential to the question of causation.