

# ***Bird v. British Columbia (Workers' Compensation Appeal Tribunal)***

## Decision Summary

Court	BC Supreme Court
Citation	2023 BCSC 543
Result	Petition allowed
Judge	Forth
Date of Judgment	6 April 2023
WCAT Decision Reviewed	A1800391

### **Keywords:**

*Procedural fairness - Extrinsic evidence – Expert evidence – Independent health professional referral - Surface electromyography (“sEMG”)*

### **Summary:**

The worker petitioner employed as a stenographer when she developed bilateral epicondylitis (tennis elbow). On appeal to WCAT, she retained an ergonomist who conducted an assessment of her workstation and activities, and provided a report. One of the methods used was surface electromyography (“sEMG”). The employer argued that sEMG was not reliable, and cited several prior WCAT decisions involving different workers but the same expert using sEMG.

In denying the petitioner’s appeal, the panel noted that in *WCAT-2013-02756*, WCAT obtained an opinion from an independent health professional (“IHP”), and the opinion found that sEMG was not yet a reliable method to measure stress or load on muscles. Both the ergonomist and the IHP cited research articles concerning sEMG. The panel acknowledged that the IHP opinion was not evidence in the present case, but noted that the ergonomist continued to rely upon pre-2013 research articles to support his use of sEMG. In addition to the decisions cited by the employer, the panel noted *A1801184*, which also questioned the helpfulness of sEMG data. The panel considered obtaining an IHP opinion or seeking clarifications from the ergonomist, but decided not to do so because the ergonomist had rendered a lengthy report which was sufficient to explain his methodology, including sEMG.

On judicial review, the court found that the WCAT had breached its duty of procedural fairness to the petitioner in four ways. Firstly, although the panel stated that she was not relying on the IHP opinion because it was offered in a different case, the Court found that actually she did rely on it. Failure to give the petitioner notice of such reliance constituted a breach of procedural fairness.

Secondly, the panel did not clearly identify which articles she used in assessing the helpfulness of sEMG. None of the articles cited by the ergonomist in 2013 were cited in the present case, and the article cited by the IHP was not identified in the 2013 decision. Accordingly, the petitioner was not given the opportunity to review and respond to these articles.

Thirdly, the court found that the petitioner did not have the opportunity to respond to the IHP's concerns regarding sEMG reliability. In the 2013 case, the IHP opinion was disclosed to the parties, and the worker submitted materials in response, including a response from the ergonomist. In the present case, however, the panel effectively held that it was the ergonomist's responsibility to justify his use of sEMG, and his failure to do so must be borne by the petitioner.

Fourthly, the court noted that *A1801184* was not referred to by the employer, and was rendered after the ergonomist rendered his report in the present case. Thus, neither the ergonomist nor the petitioner could fairly be faulted for not addressing it.