Noteworthy Decision Summary

Decision: WCAT-2015-03772 **Panel:** Warren Hoole **Decision Date:** December 15, 2015

Reconsideration – Procedural Fairness – Right to be heard – Power to investigate.

This was a reconsideration decision that considered whether the panel's decision to not obtain evidence from the worker's physiotherapist raised a question of procedural fairness.

The worker sought acceptance of her claim for bilateral psoriatic arthritis and carpal tunnel syndrome, which she attributed to her employment. The original panel had before it ergonomic evidence and expert medical opinion. The worker did not submit evidence from her physiotherapist, and the panel did not exercise its discretion to obtain evidence from the physiotherapist.

With her reconsideration application, the worker submitted evidence from her physiotherapist. The reconsideration panel accepted that evidence, not as "new evidence," but as evidence of the kind of information he might have obtained from the physiotherapist before making the original decision.

The panel noted that the decision in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499, (subsequently affirmed on appeal, *Workers' Compensation Appeal Tribunal v. Fraser Health Authority*, 2016 SCC 25) (Fraser Health) restricted WCAT's jurisdiction to reconsider its own decisions to two situations: where there is new evidence meeting the requirements of section 256 of the *Workers Compensation Act*, and where the decision reflects an error of procedural fairness or a true jurisdictional defect. Since the worker indicated that she was not seeking reconsideration on new evidence grounds or true jurisdictional error, the panel considered only whether the decision reflected procedural unfairness. Specifically, the panel considered whether the exercise of his discretionary authority to obtain further evidence from the physiotherapist was a procedural matter that would fall within the scope of a permissible reconsideration, or a substantive matter, which would not.

The panel referred to *Corbett Lake Country Inn Ltd. v. British Columbia (Land Reserve Commission)*, [2000] B.C.J. No. 1742 (BCSC), in which the court held that where procedural rather than substantive rights are at issue, even where the procedural issues reflect an exercise of discretion by a tribunal, the fundamental question is whether the procedure was fair, not whether the discretion was exercised in accordance with the corresponding standard of review. Applying the same approach, the panel concluded that the decision to investigate or not, although discretionary, is sufficiently connected to hearing procedure such that it is better framed as a question of fairness rather than as a question of substance. Consequently, the decision fell within the scope of a permissible reconsideration following Fraser Health.

The panel went on to conclude that in all the circumstances of the case, his decision not to obtain further evidence from the physiotherapist was fair. The panel noted that the worker could have, at first instance, submitted the evidence from the physiotherapist, but had not done so. The panel further noted that the evidence was not of much relevance and was not obviously crucial to the issue on appeal.

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Panel: Warren Hoole, Vice Chair

Introduction

[1] The worker applies to the Workers' Compensation Appeal Tribunal (WCAT) for reconsideration of my findings in *WCAT-2013-003270*, dated November 25, 2013 (the "original decision").

[2] The worker's reconsideration application does not raise significant factual complexities, questions of credibility, or any other circumstances that indicate an oral hearing is required. Therefore, in my view, the worker's request for reconsideration of the original decision can be fully and fairly addressed by way of written submissions.

Issue(s)

[3] The issue in this application is whether the original decision is void for procedural unfairness or true jurisdictional error.

Jurisdiction

[4] Section 255(1) of the *Workers Compensation Act* (Act) provides that WCAT decisions are final and are not open to question or review in any court. However, the WCAT may reconsider an earlier decision in two circumstances. The first circumstance is where new evidence is provided that satisfies the requirements of section 256 of the Act.

[5] The second circumstance is if the decision reflects an error of fairness or a "true jurisdictional" error. The meaning and scope of these terms is set out in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499. I will refer to this second type of reconsideration application as a "*Fraser Health* reconsideration." Here, the worker says she does not wish to pursue a reconsideration on the new evidence grounds. She instead indicates that she wishes to pursue a *Fraser Health* reconsideration only. I limit the scope of the current decision accordingly.

Background

[6] The background is already set out in the original decision and I need not repeat that background here. It will suffice to note that the worker developed bilateral psoriatic arthritis and carpal tunnel syndrome. She attributed these conditions to her employment and unsuccessfully sought compensation from the Workers' Compensation

Board (Board)[1]. The worker's request for review and then her appeal to the WCAT were similarly unsuccessful.

Submissions

[7] The worker has filed various packages of material in which she identifies her disagreement with the original decision. She disagrees with my weighing of the ergonomic evidence because that evidence was obtained while her hands were injured and she worked much more slowly. The worker therefore says I failed to appreciate the real extent of her exposure to occupational risk factors.

[8] The worker also says that I failed to contact her physiotherapist for her opinion as to the worker's likely exposure to occupational risk factors and for her opinion as to the likely cause of her conditions. She provided additional evidence regarding her treatment and symptoms in this regard; however, as the worker is not filing a new evidence reconsideration application, I have not considered that information as new evidence. I therefore merely take the material as an illustration of the type of information that might have been derived from contacting the physiotherapist.

[9] In addition, the worker generally disagrees with my conclusion that her employment was not of causative significance to her bilateral conditions. She says she was doing repetitive work and that her conditions came on as a result of that work.

[10] Finally, the worker notes that I failed to deal with a request for reimbursement for other appeal expenses, as set out in her submission of June 19, 2013. The worker therefore argues that the original decision is wrong and should be reconsidered.

Reasons and Findings

[11] A *Fraser Health* reconsideration application is of a very narrow scope. In essence, the focus is on whether the original decision reflects an error of procedural fairness. The alternative ground of a "true jurisdictional" error is so exceptional as to not merit further discussion other than to say it is not present in this case.

[12] In her submissions, the worker does not specifically characterize whether my alleged errors involve procedural unfairness of true jurisdictional errors. In my view, the bulk of the worker's arguments are really directed at my weighing of the evidence in the original decision. Such argument falls outside the scope of a *Fraser Health* reconsideration application. Consequently, although I understand that the worker believes I wrongly evaluated the ergonomic evidence and the medical opinion evidence, any such error falls outside the scope of a *Fraser Health* reconsideration and therefore does not assist the worker.

[1] operating as WorkSafeBC

[13] In my view, the worker has raised only two areas of potential error that might fall within the scope of a *Fraser Health* reconsideration. I will address each in turn.

[14] First, the worker says that I erred by not seeking an opinion from her physiotherapist and not seeking additional evidence from her about the worker's exposure to occupational risk factors.

[15] It might be said my discretionary authority to conduct further investigations reflects an element of procedural fairness and is therefore properly within the scope of a *Fraser Health* reconsideration. On the other hand, it might also be said that such an exercise of discretion is a substantive matter rather than a procedural matter and therefore not properly within the scope of a *Fraser Health* reconsideration application. The framing of whether or not the decision to investigate is "discretionary" or "procedural" is of significance because only the latter is properly within the scope of a *Fraser Health* reconsideration.

[16] There is some uncertainty about this distinction; however, I note Sigurdson J.'s helpful discussion at paragraphs 60 to 97 in *Corbett Lake Country Inn Ltd. v. British Columbia (Land Reserve Commission)*, [2000] B.C.J. No. 1742 (S.C.). The court held that where procedural rather than substantive rights are at issue, even where the procedural issues reflect an exercise of discretion by a tribunal, the fundamental question is whether the procedure was fair, not whether the discretion was exercised in accordance with the corresponding standard of review.

[17] Applying the same approach to the current matter, I consider that the decision to investigate or not, although certainly discretionary, is sufficiently connected to hearing procedure such that it is better framed as a question of fairness rather than as a question of substance. I therefore conclude that the worker's concerns about my failure to investigate by contacting her physiotherapist fall within even the narrow scope of a *Fraser Health* reconsideration.

[18] In this regard, procedural fairness requires that, in all the circumstances I acted fairly by not making the investigation in question. I conclude I did. The record before me already included ergonomic evidence taken from actually observing the worker. The record also included medical opinion evidence based on those observations and provided by people with greater qualifications and expertise than the physiotherapist in question. I therefore did not need additional evidence to reach a conclusion in the worker's appeal.

[19] In any event, the physiotherapist had little of relevance to add. She had not observed the worker's job duties and is not qualified to provide an expert opinion as to the cause of the worker's injuries. Her evidence was therefore of little value and it was not necessary for me to secure it. This is particularly so in light of the guidance in *Schulmeister v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2007 BCSC 1589, where Hinkson J. indicated that the WCAT's decision not to access

its investigatory powers merits considerable deference and a failure to investigate will only amount to reviewable error if the WCAT failed to investigate "obviously crucial evidence." The evidence here was likely not even of much relevance, let alone "obviously crucial."

[20] In addition, fairness does not require me to make the worker's case for her by investigating a matter that she had not thought to include in her own appeal. It was open for the worker to have filed this evidence if she wished and she cannot now complain that I did not do it for her. I therefore do not agree with the worker that it was "in all the circumstances unfair" for me not to have further investigated her appeal by asking her physiotherapist to file additional evidence. It follows that the first of the two relevant arguments raised by the worker in her reconsideration application cannot succeed.

[21] The second area of potential error that might properly fall within the scope of a *Fraser Health* reconsideration is the worker's allegation that I failed to deal with her request for appeal expenses. Such a failing might well breach the worker's entitlement to have that part of her appeal heard. Had I failed to address the worker's entitlement to such expenses I would have little difficulty in voiding that part of the original decision.

[22] However, it is apparent from the worker's June 19, 2013 letter to the WCAT that the only appeal expense for which she requested reimbursement was the opinion of her family physician. The worker also filed some claims for health care; however, those expenses were unrelated to appeal expenses. Rather, those expenses were health care benefits that the worker believed should be payable on the grounds that her claim should have been accepted. The worker did not incur those expenses for the purposes of the appeal and it was therefore not necessary to address them as such. Because it was not necessary to address expenses obviously unrelated to the appeal it follows that the worker's right to procedural fairness was not breached in that regard.

[23] It follows that the second ground of procedural unfairness that the worker alleges is not well-founded. As already noted, the remainder of the worker's concerns reflects her disagreement with how I weighed the evidence. Such disagreement is simply outside the scope of a *Fraser Health* reconsideration and I therefore cannot consider those aspects of the worker's application.

[24] As a result, I deny the worker's reconsideration application.

Conclusion

[25] I deny the worker's application for reconsideration of the original decision on the grounds of procedural unfairness or an error of true jurisdiction. The original decision remains final and conclusive.

[26] No expenses were requested or apparent and I therefore make no order for the reimbursement of expenses in relation to the worker's reconsideration application.

Warren Hoole
Vice Chair

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