IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sanders v. British Columbia (Workers' Compensation Appeal Tribunal),* 2023 BCSC 1

Date: 20230103
Docket: S2110599
Registry: Vancouver

Between:

Cashel Loughrea Anne Sanders

Petitioner

And

Workers' Compensation Appeal Tribunal

Respondent

Before: The Honourable Justice Funt

On judicial review from: A decision of the Workers' Compensation Appeal Tribunal dated June 7, 2021 (WCAT Decision No.: A2001776)

Reasons for Judgment

The Petitioner, appearing in person:	C. Sanders
Counsel for the Respondent:	I.D. Morrison
Place and Dates of Hearing:	Vancouver, B.C. November 3 and 4, 2022
Place and Date of Judgment:	Vancouver, B.C. January 3, 2023

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1. INTRODUCTION

[1] The petitioner has requested the judicial review of the decision of the Workers' Compensation Appeal Tribunal ("WCAT") dated June 7, 2021 involving the petitioner: A2001776 (Re), 2021 CanLII 60249 (BC WCAT) (the "June 7, 2021 decision").

[2] The petitioner says that she was not afforded procedural fairness and that WCAT's decision is patently unreasonable.

[3] The petitioner seeks an order setting aside the June 7, 2021 decision and remitting it for redetermination with several specific directions, including the holding of an oral hearing to "decide on the issue of credibility" and to conclude "that the petitioner's concussion remained disabling after October 16, 2019".

[4] For the reasons that follow, the petition is dismissed.

2. PROCEDURAL HISTORY

[5] In the June 7, 2021 decision, WCAT summarizes the procedural history as follows:

> [1] The worker was head-butted in the back of her head while providing child and youth services on May 10, 2019. The Workers' Compensation Board (Board), operating as WorkSafeBC, accepted the worker's claim for a concussion.
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> [2] In an October 8, 2019 decision, the Board declined to provide temporary disability (wage-loss) benefits in relation to the worker's concussion injury, finding that it had not disabled her. The Board also concluded that the worker had not aggravated a pre-existing concussion condition, and that her compensable concussion injury of May 10, 2019 had resolved.
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> [3] The worker disagreed with the decision to not pay her any wage-loss benefits. She requested a review. She submitted to the Review Division that she was temporarily disabled by her concussion-related headaches from June 26, 2019 until October 15, 2019, by which time her concussion injury had resolved.
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> [4] In *Review Reference #R0259163* dated May 22, 2020, a review officer varied the Board's decision so as to grant the worker the remedy she requested. The review officer found the worker was entitled to wage-loss benefits until October 15, 2019, at which point her compensable injury had resolved.

> [5] The worker has now filed an appeal of the review officer's decision with the Workers' Compensation Appeal Tribunal (WCAT). In her notice of appeal, she indicated that her concussion had not resolved on October 15. 2019 as she was still suffering from headaches as a result of her May 2019 injury. She advised that she was seeking financial compensation in the form of wage-loss and/or a long-term disability award, in addition to further treatment coverage.
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> [6] The employer is not participating in this appeal. The worker is represented by the Workers' Advisers Office. The worker asked that her appeal proceed by way of written submissions. Her representative provided new evidence and a submission on this appeal.
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> [Footnote omitted.]

[6] For the hearing leading to WCAT's June 7, 2021 decision, the petitioner was represented by a "workers' adviser". She was also represented by a workers' adviser with respect to the Review Reference #R0259163 leading to a "review officer's" decision dated May 22, 2020 (the "May 22, 2020 Review Decision"). The petitioner represented herself in obtaining an extension of time to appeal to WCAT.

[7] A "review officer" is appointed under s. 330 of the *Workers Compensation Act*, R.S.B.C. 2019, c. 1 [*WC Act*], and reviews decisions of the Workers' Compensation Board: *WC Act*, s. 330.

3. WORKERS' ADVISERS

[8] Under s. 350 of the *WC Act*, a ministry employee may be appointed as a "workers' adviser". The *WC Act* further provides:

> 351 A workers' adviser must
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> (a) give assistance to a worker or dependant having a claim under this Act, unless the workers' adviser considers the claim has no merit,
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> (b) on claims matters, communicate with or appear before the Board and the appeal tribunal on behalf of a worker or dependant if the adviser considers assistance is required, and
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> (c) advise workers and dependants regarding the interpretation and administration of this Act or any regulations or decisions made under this Act.

[9] On January 25, 2021, the petitioner's workers' adviser made a written submission (the "January 25, 2021 submission") to WCAT, in support of the

petitioner's appeal of the May 22, 2020 Review Decision that had not granted the petitioner benefits beyond October 15, 2019.

[10] Under the May 22, 2020 Review Decision, the petitioner's workers' adviser was wholly successful in obtaining the relief the petitioner sought (wage-loss benefits until October 15, 2019).

[11] The petitioner's appeal to WCAT was from the complete success achieved under the May 22, 2020 Review Decision.

[12] On appeal of the May 22, 2020 Review Decision, the petitioner sought further financial compensation and treatment coverage based on her stating that she was still suffering from the May 10, 2019 injury.

[13] The January 25, 2021 appeal submission of the petitioner's workers' adviser, without enclosures other than the petitioner's one page statement, was approximately ten pages. The other enclosures consist of approximately 150 pages of medical documentation.

[14] The petitioner is shown as being copied with the January 25, 2021 submission.

[15] On the review leading to the May 22, 2020 Review Decision, the petitioner's workers' adviser prepared a written submission dated February 13, 2020 which enclosed an eight-page written argument by the petitioner dated November 4, 2019. In the petitioner's written argument, she stated (in part):

> […] Contrary to the clinical opinion and the final decision released by WorkSafe dated October 8 and 10, 2019, respectively, my symptoms did not get worse but gradually and progressively got better up until they were resolved on October 15, 2019. […]

[16] The petitioner's reference to the fact that her symptoms did not get worse is in apparent response to the October 8, 2019 Workers' Compensation Board (the "Board") decision denying her claim, where the Board stated:

> I place significant weight on the WSBC Medical Advisor's opinion that the natural history of concussions is that symptoms are maximal at the time of injury and improve continuously thereafter and that it is not medically plausible that your symptoms would appear or would worsen two months after the date of injury. I also place significant weight on your attending physician agreement that his medical record did not support ongoing concussion symptoms since the date of injury.

[17] In the petitioner's one-page statement submitted to WCAT as part of the January 25, 2021 submission, she stated (in part):

> My headaches associated with this workplace accident are [cervicogenic] (from the head/neck trauma associated with being head butted in the back of the head), as indicated extensively in the medical, massage, and physio therapy records. They feel like tension along the whole right side of [my] head and happened at least several times a week after October 15, 2019, at which point they would be debilitating. Between these major incidents of headache post October 15, 2019, would be bouts of head tension and confusion related to the head trauma of the had butt and associated concussive symptoms. This would happen almost daily thereafter, and most often be associated with increased interaction and stimuli.

[18] As noted above, representing herself, the petitioner had been granted an extension of time to appeal the May 22, 2020 Review Decision.

[19] In seeking the extension, the petitioner specifically checked the box on the applicable form, which she submitted on July 21, 2020, showing that she wished to have written submissions as the method of appeal: Certified Record, p. 266.

[20] By letter dated October 29, 2020, WCAT wrote to the petitioner's workers' adviser, with a copy to the petitioner, confirming that the petitioner's appeal would proceed by written submissions: Certified Record, p. 243.

4. STANDARD OF REVIEW

[21] Sections 308 and 309 of the *WC Act* provide that WCAT has "exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law, and discretion arising or required to be determined" and that its decision is "final and conclusive and is not open to question or review in any court."

[22] Sections 308 and 309 constitute a strong privative clause. Accordingly, s. 58(2) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 is engaged: *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 27.

[23] Sections 58(2) and (3) of the *Administrative Tribunals Act* read:

> 58 […]
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> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
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> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
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> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
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> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
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> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
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> (b) is exercised for an improper purpose,
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> (c) is based entirely or predominantly on irrelevant factors, or
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> (d) fails to take statutory requirements into account.

[24] In the case at bar, questions of natural justice and procedural fairness are determined based on whether WCAT "acted fairly". The standard of "patently unreasonable" applies to a finding of fact or law or an exercise of discretion.

[25] With respect to procedural fairness, our Court of Appeal in *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc*., 2013 BCCA 55 stated:

> [52] I agree with the submissions of Seaspan (with which BCFS is in substantial agreement) that the standard of review applicable to issues of procedural fairness is best described as simply a standard of "fairness". A tribunal is entitled to choose its own procedures, as long as those procedures are consistent with statutory requirements. On review, the courts will determine whether the procedures that the tribunal adopted conformed with the requirements of procedural fairness. In making that assessment, the

> courts do not owe deference to the tribunal's own assessment that its procedures were fair. On the other hand, where a court concludes that the procedures met the requirements of procedural fairness, it will not interfere with the tribunal's choice of procedures.

[26] With respect to patently unreasonable, the Supreme Court of Canada in *West Fraser* stated:

> [28] A legal determination like the interpretation of a statute will be patently unreasonable where it "almost border[s] on the absurd": *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, [2004] 1 S.C.R. 609, at para. 18. In the workers' compensation context in British Columbia, a patently unreasonable decision is one that is "openly, clearly, evidently unreasonable": *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80, 46 B.C.L.R. (4th) 77, at para. 33; *Vandale v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2013 BCCA 391, 342 B.C.A.C. 112, at para. 42 (emphasis deleted).
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> [29] By stipulating the standard of patent unreasonableness, the Legislature has indicated that courts should accord the utmost deference to the Tribunal's interpretation of the legislation and its decision.

5. ANALYSIS

a) Procedural fairness

[27] The petitioner refers to discrimination by WCAT towards her. The allegation is made without supporting detail. Without more than vague assertions, the Court cannot find that there was not procedural fairness based on discrimination.

[28] The petitioner also suggests that WCAT, in handling the petitioner's appeal, was acting in its own self-interests, presumably as a cost-saving measure.

[29] WCAT and its members are independent of the Board and have no interests in the outcome of an appeal: *Demings v. Workers' Compensation Appeal Tribunal*, 2012 BCSC 475 at paras. 7, 51. Accordingly, the Court finds no basis for the petitioner's suggestion that WCAT acted in its own self-interests to the petitioner's detriment.

[30] The petitioner says that she should have been afforded an oral hearing because WCAT made adverse findings as to her credibility.

[31] As noted, the petitioner requested that the appeal be by written submissions which WCAT later confirmed.

[32] In her petition, the petitioner stated (in part):

> 5. I was unaware of the fact that I could request an oral hearing. My [Worker's Adviser] did not mention this was an option to me, nor did I understand the implication of not asking for one. I did not know it was an option, and if I had of I would have asked for an oral hearing.

[33] I find it difficult to accept the foregoing statement having regard to the petitioner previously completing and submitting a form requesting a hearing by written submissions where the form clearly has an adjacent box for the request for an oral hearing.

[34] In her petition, the petitioner stated (in part):

> 1. WCAT breached the rules of procedural fairness by denying me an opportunity to explain and defend myself in an oral hearing, after calling my credibility into question in the June 7, 2021 decision. I had no way of knowing that my credibility would have been called into question as I was not well at the time of my Worker's [Adviser] writing the submission to the [Review Division] and WCAT, and I did not have access to proper assessment, medical care, or therapeutic supports. WCAT also ought to have convened an oral hearing at its own initiative though I did not request one, therefore, ultimately the hearing was unfair as a result.

[35] I cannot accept that the WCAT was not procedurally fair where the petitioner, with a choice, chose an appeal by written submissions.

[36] I also cannot accept that the petitioner had "no way of knowing that her credibility may have been called into question". In her November 4, 2019 statement accompanying the February 13, 2020 submission leading to the May 22, 2020 Review Decision, the petitioner had stated that her symptoms had resolved by October 15, 2019 but then submitted to WCAT, on further appeal, as part of the January 25, 2021 written submission, that her injuries had not resolved by October 2019.

[37] Where a person provides inconsistent statements or evidence, it cannot be said that the person's credibility will not be suspect, and accordingly, scrutinized.

[38] In sum, the petitioner had a full and fair opportunity to make her case before WCAT.

b) Not patently unreasonable

[39] The petitioner's essential complaint is WCAT's findings on her credibility.

[40] For ease of reference, paragraphs 106 to 110 of WCAT's reasons for its June 7, 2021 decision read:

> 106. I find the worker's evidence is not in harmony with the preponderance of probabilities, which a practical and informed person would recognize as reasonable in that place and in those circumstances.
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> 107. My conclusion in this regard is buttressed by the fact that the worker maintained this alleged deception to the Review Division when she was seeking payment of wage-loss benefits as a remedy. She had the opportunity at the Review Division to explain that she had been disabled by her concussion and remained disabled at that time. There was no need to limit her request for wage-loss benefits to October 15, 2019, particularly when the need to clear her for work with her then employer was unnecessary.
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> 108. I recognize the worker signed her statement to the Review Division on November 8, 2019, but I find it likely that she was already looking for a new job (or may in fact have already been hired by her new employer by that time). Further, her representative sent that statement to the Review Division on February 1, 2020, and copied the submission to the worker. There was ample opportunity for the worker to alert her representative by then, at the latest, that she had not recovered. And, there was certainly no reason to maintain the alleged deception when she was fully employed and had been since November 18, 2019.
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> 109. For the above-noted reasons, the worker's contention that she essentially lied to Dr. Woodburn (and to the Review Division) in October/November 2019 strains credulity. The worker now contends that she had debilitating headaches at least several times a week after October 15, 2019, and between these bouts of headaches after October 15, 2019, she would have almost daily bouts of head tension and confusion. She explains that this is not documented in any contemporaneous medical reports/records because she had moved and had no family physician or medical clinic. Yet, as earlier noted, during December 2019 she was in the city where she could have seen Dr. Woodburn or attended at any number of medical clinics if she was having such debilitating headaches.
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> 110. I also cannot ignore that the first documented medical attention she received after November 2019 was not until February 1, 2020 when she attended at emergency. If she had been having ongoing

> headaches or other symptoms, she could have attended at emergency before then.

[41] In paragraph 109, there is one error. That is, in December 2019, the petitioner was not living in the same city as Dr. Woodburn. That said, the relevant sentence refers to the fact the petitioner could have "attended at any number of medical clinics if she was having such debilitating headaches".

[42] In accordance with *West Fraser*, I do not find WCAT's decision to be "openly, clearly, evidently unreasonable". WCAT's reasoning is well within the boundaries of a reasonable credibility finding based on the materials before it and the submissions made, especially having regard to WCAT's expertise with respect to work-related injuries.

6. CONCLUSION

[43] The petition is dismissed.

7. COSTS

[44] WCAT does not seek costs. Accordingly, I will not award costs.

"Funt J."