IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rear v. British Columbia (Workers' Compensation Appeal Tribunal),* 2023 BCSC 1513

Date: 20230828
Docket: S156142
Registry: Vancouver

Between:

Lianne Rear

Petitioner

And

Workers' Compensation Appeal Tribunal and Vancouver Island Health Authority

Respondents

Before: The Honourable Mr Justice Crerar

On judicial review from: A decision of the Workers' Compensation Appeal Tribunal, dated May 28, 2015 (WCAT-2015-01680).

Reasons for Judgment

Counsel for the Petitioner:	P. Eastwood
Counsel for the Respondent, Workers' Compensation Appeal Tribunal:	I.D. Morrison
No other appearances	
Place and Dates of Hearing:	Vancouver February 6-7, 2023
Written Submissions:	February 28, 2023
Place and Date of Judgment:	Vancouver August 28, 2023

I. INTRODUCTION

[1] The petitioner, a registered nurse, applies for judicial review of a May 28, 2015 Workers Compensation Appeal Tribunal ("**WCAT**") decision (WCAT-2015-01680) denying her claim for benefits for her wrist tendinitis that she says was caused by her use of a keyboard, mouse, and telephone in an unsuitably-configured work station, in the course of her employment.

[2] The petitioner formerly worked as an emergency room nurse, where she filled out medical charts by hand. In September and October 2012, she started work at a mental health and addiction crisis centre, as well as the psychiatric emergency department. These new positions required extended periods of typing, the use of a computer mouse, and frequent periods on the telephone, often alternating between activities and multi-tasking. In June 2013, her work week increased from two or three days per week to four days, with roughly 80 percent of her time involving computer use, and 20 percent of her time involving telephone use.

[3] From June or July 2013, she began to suffer near-constant pain in her left and right wrists and hands: first a tingling and burning when working, evolving to constant full-time pain. On August 19, 2013, Dr Francis Chan, her family doctor of five years, noted tenderness over the flexor tendons of her wrist. He recommended nerve studies, as well as an ergonomic assessment of her work station.

[4] Following on the Dr Chan consultation, on August 28, 2013, the petitioner applied for WorkSafe BC ("**WCB**" or "**Board**") benefits. Further, her employer arranged for an ergonomic assessment of her work station. Her work station configuration was changed, including lowering the keyboard to an appropriate height so that she did not have to reach upwards, and providing wrist supports. The respondent, WCAT, acknowledges that the ergonomic changes were material.

[5] Despite these changes, her conditions worsened. She consulted with a hand therapist who believed that the symptoms indicated de Quervain's tenosynovitis: a form of tendonitis where the tendons that run along the thumb side of the wrist and

attach to the base of the thumb swell and debilitate. On September 24, 2013, she stopped working.

[6] On September 20, 2013, a WCB case manager conducted a 20-minute review of her workplace activities. He took a 5-minute video of her using the keyboard and telephone. The review and video were conducted on her ergonomically modified workstation, and not on the original workstation that led to her condition.[1]

[7] On September 23, 2013, the WCB case manager provided a one–page assessment report. It noted that the petitioner made few left wrist motions each minute, with more right wrist movements each minute, but not in any awkward range or posture. Apart from that, and an infrequent right wrist owner deviation, "no other awkward postures were observed."

[8] That same day, a Board medical advisor reviewed the claim file, including the case manager report and video. The medical advisor produced a six–page report, of which the "Medical Advisor's Opinion" consisted of five paragraphs. The report recognised that the tendons and tissues associated with the diagnosed condition were involved in the petitioner's work activities. The report concluded, however, that "[a]fter reviewing the medical and ergonomic assessment, I cannot find sufficient risk factors at work to cause the diagnosis of bilateral hand tendonitis." Further, "it does not appear as though there are sufficient forces or awkward postures to precipitate or aggravate carpal tunnel syndrome." The medical advisor did not meet with or observe or assess the petitioner personally, or conduct any other assessment to arrive at the opinion.

[9] Three days later, on September 26, 2013, the Board issued its decision denying the petitioner's application for benefits. On February 19, 2014, the Board's Review Division confirmed that denial.

[10] In response to these denials, and in support of her appeal to WCAT, the petitioner, with the assistance of her union, obtained two medical reports.

[11] A September 24, 2014 letter from Dr Chan diagnosed the petitioner with bilateral tendinitis linked to her workplace activities: "[g]iven the nature of her work and the hours of time spent using a desktop computer, it would be medically reasonable that her work activities would contribute significantly to the symptoms of pain in her fingers, hands and wrists. These symptoms would be consistent with a soft tissue type injury to the affected areas and would be consistent with a tendinitis in the affected body regions."

[12] The second was a 36-page report from Eddie Everett, an occupational therapist and professional ergonomist, dated July 16, 2014. Mr Everett conducted a review on the petitioner's re-created work station as it existed before the ergonomic reconfiguration. The assessment was based upon a re-creation of a typical pre-configuration workday, including 40 minutes of computer and office work alternating between reading, typing, mousing, charting, and answering the telephone, as well as typing and mousing with wrists continually elevated above the desk surface. In addition to his observations, he used surface electromyography to measure the activation of her muscles while performing her various workplace tasks, as well as electrogoniometry to measure the extent and proportion of wrist range of motion. He also measured the petitioner's individual bodily physical dimensions, as well as those of the pre-configuration work station. He specifically identified the specific muscle groups, tendons, and joints involved the anatomical structures that were strained by the petitioner's work place activities in the former work station configuration.

[13] Mr Everett also lined his observations and measurements against the criteria set out under the specific relevant WCB benchmarks, such as Policy 27.00 ("Activity related soft tissue disorder"), 27.12 ("tendinitis/tenosynovitis"); and 27.40 ("Risk factors – location of the anatomical structure" and Risk factors – awkward postures"), Practice Directive C3-2 Appendix 1 ("risk factors – posture"), and various ASTD ("Activity-related soft tissue disorder") Reference Guide indicia. He specifically related these measurements to the risk factors identified in Board policies, including repetition, force, static load, task variability, rest breaks, rotation and grip type, local

mechanical stress, unaccustomed activity, and risk factors related to the work environment.

[14] Mr Everett concluded that the petitioner's former work station was markedly ergonomically deficient, being designed for a person taller and larger than the petitioner, thus straining her horizontal and vertical reach: "[t]hese factors resulted in "*among others, prolonged static loading, awkward postures, local mechanical stresses, and non-optimal work techniques*" (Board Policy 27.40) e.g. right wrist – forearm not aligned (and angled 25 degrees) to mouse longitudinal axis; and keyboard not aligned (and angled at 10 degrees) to desk edge; both affording increased thumb and finger extension." He identified other deficiencies, including the use of a chair with no armrests, and an angled keyboard. Mr Everett concluded that '[i]t is my professional opinion that Ms Rear's work activities, as a registered nurse working in crisis intervention, contributed to significant occupational risk factors to left and right thumbs, fingers, hands, wrists and forearms."

[15] Mr Everett also commented on the WCB case manager's assessment, and the conclusory comments of the WCB medical advisor, and explained why he reached a different conclusion. Among those observations:

a) he was unable to comment on how the case manager and medical advisor measured the extent and proportion of awkward postures, as neither described his approach, methodology or technique;

b) the case manager conducted his assessment on the modified workstation and not the original workstation used before and at the onset of the petitioner's conditions: "as such, market ergonomic deficiencies in the original workstation that adversely affected posture and work method were not identified…";

c) the case manager based his assessment on only typing and mousing, and not on the myriad and intensive multitasking performed by the petitioner,

such as answering the phone, with attendant wrist extension and radial deviation;

d) he disagreed with statements in the case manager and WCB medical reports that there "were no other awkward postures". As one example, based on his observation, and the case manager's own photographs, the petitioner's metacarpophalangeal (lower finger) joints were hyper-extended during typing and mousing;

e) he also noted that awkward thumb and finger postures are equally as important as awkward wrist postures in their effects on muscles associated with de Quervain's tendonitis. Further, "… [i]t is important to understand the motions produced by forearm extensors, forearm flexors and smaller intrinsic muscles; and the all–important mechanical connections and interactions between these muscles. Failure to understand can mean occupational risks i.e. awkward postures and increased muscle activity are not identified."

[16] In its 77-paragraph May 28, 2015 Decision, WCAT reviewed and confirmed the original decision, concluding that the petitioner's bilateral hand–wrist tendinitis was not due to the nature of her employment. WCAT based this conclusion in part on the petitioner's movements and hand placements seen in the videos provided by both the case manager and by Mr Everett.

[17] The Decision also considered the petitioner's two medical reports. It accepted several of their foundations, including, importantly, that Mr Everett's observations, measurements, and assessment were based upon the work station configuration actually in place during the development of the tendinitis. The Decision also acknowledged the difference in opinion between Dr Chan and the WCB medical report. The Decision did not consider it necessary to seek further medical evidence, including from an independent health practitioner, as "for the most part the outcome of this appeal will depend upon Board policy," and as the evidence was sufficient to arrive at a sound conclusion.

[18] Specifically, the Decision found that the petitioner's workplace conditions and movements did not indicate a qualifying causal link to her conditions, under the then-applicable[2] *Workers Compensation Act*, RSBC 1996, c 492 (the "***Act***") or WCB policies.

[19] The Decision first found the evidence did not support the presumption under subsection 6(3) of the *Act*. That provision deems a disease to have been caused by the nature of the worker's employment unless the contrary is proved, if the worker, at or immediately before the date of the disablement, was employed in a process mentioned in the second column of Schedule B. Schedule B, s.13, lists the conditions for "Hand-wrist tendinopathy":

> Where there is use of the affected tendon(s) to perform a task or series of tasks that involves ***any two of the following***:
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> > (1) frequently repeated motions or muscle contractions that place strain on the affected tendon(s);
> >
> > (2) significant flexion, extension, ulnar deviation or radial deviation of the affected hand or wrist;
> >
> > (3) forceful exertion of the muscles utilized in handling or moving tools or other objects with the affected hand or wrist;
>
> and where such activity represents a significant component of the employment.
>
> [emphasis added]

[20] The Decision also found that the petitioner's appeal failed under s. 6(1) of the *Act*, as being due to the nature of the employment, regardless of any presumption.

[21] The Decision cited WCB policies that inform the adjudication of tendinitis claims. These included Policy 27.12, which sets out that a worker who is performing the same work tasks repeatedly without interruption or a rest in between, likely performs "frequently repeated motions or muscle contractions". The policy states that, "….generally, tasks that place strain on the affected tendon(s) that are considered to involve "frequently repeated motions or muscle contractions" include: ones that are repeated at least once every 30 seconds; or ones that are repeated and where at least 50% of the work cycle is spent performing the same motions or muscle contractions and where the affected muscle/tendon groups have less than

50% of the work cycle to return to a relaxed or resting state." The Decision also cited non-binding but persuasive WCB Practice Directives, such as Practice Directive #C3 –2, which indicates that "wrist movements at the rate of 10 per minute for greater than two hours are considered repetitive."

[22] While WCAT accepted Mr Everett's assessment that the pre-reconfigured work station forced the petitioner to reach, both horizontally and vertically, it found that reaching was not a risk factor for hand/wrist tendinitis. WCAT also accepted that the pre-reconfigured work station caused "significant mechanical stress and painful nodules," but that the affected tendons were not "sufficiently close to the pisiform bone[3] to demonstrate a relationship between contact pressure on the pisiform and the worker's symptoms from her tendinitis."

[23] The Decision rejected Dr Chan's medical opinion based on its specific wording: "…. Dr Chan's opinion merely indicates the work activities would have contributed to the worker's symptoms, rather than to the diagnosed condition itself." The Decision would have rejected Dr Chan's opinion even if it had been phrased differently, as it was a "…blanket statement, without discussion of specific risk factors..."

[24] The Decision thus concluded:

> [63] In summary, I find the criteria set out in Schedule B of the Act are not met. I also find the occupational risk factors identified in this case are not sufficient to support a conclusion that the worker's diagnosed bilateral hand/wrist tendinitis was due to the nature of her employment. Although I accept the worker's evidence that she noticed her symptoms at work, particularly when typing, and that her symptoms worsened throughout each day, I find the occupational exposures were not of causative significance cause in the development of the underlying condition(s).

[25] For the reasons that follow, the judicial review is allowed. Even with the required deference afforded to the tribunal, it was patently unreasonable for WCAT to base its decision on observations of the ergonomically-improved workstation, as in the assessment report and, by extension, the WCB medical opinion. There were only two wholly applicable medical opinions before WCAT: those presented by the

petitioner, based on her work station as it existed during the development of her condition. It would have been open to WCAT to distinguish the petitioner's reports based on a new independent medical report, which it expressly opted not to obtain. In denying causation, the Decision relies in part on the WCB medical report, with its fundamental limitations. More profoundly, however, the tribunal, not medically trained, reaches medical conclusions as to the causation and persistence of the conditions on its own: an impermissible exercise. It is a patently unreasonable error, allowing judicial intervention, where an adjudicator reaches a conclusion requiring medical analysis in the face of uncontradicted medical evidence.

II. LAW

[26] Both parties accept that the decision is to be reviewed on a standard of patent unreasonableness, pursuant to s.58(2) of the *Administrative Tribunals Act*, SBC 2004, c 45, s. 58.

[27] In *McHugh v. Insurance Corporation of British Columbia*, 2023 BCSC 56, the closest case to the present, Kirchner J canvassed some of the oft-cited jurisprudential statements emphasising the highly deferential standard of review represented by "patently unreasonable":

> [29] The parties agree the standard of review for the Tribunal's decision is patent unreasonableness pursuant to s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45. That is "the most deferential standard of review known to Canadian law": *The College of Physicians and Surgeons of British Columbia v. The Health Professions Review Board*, 2022 BCCA 10 at para. 130. It has been variously described as "openly, clearly, evidently unreasonable" (*Speckling v. British Columbia (Workers' Compensation Board*), 2005 BCCA 80), "clearly irrational", or "evidently not in accordance with reason" (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52).
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> [30] Findings of fact are supportable on a patently unreasonable standard where there is evidence capable of supporting the finding. A patently unreasonable finding of fact is one where the evidence, "viewed reasonably, is incapable of supporting a tribunal's findings of fact". Insufficient evidence in the mind of the reviewing court is not enough to meet this standard and the court is not to reweigh the evidence: *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 at para. 30; *Speckling…* at para. 37). "Only if there is no evidence to support the findings or the decision is 'openly, clearly, evidently unreasonable', can it be said to be patently unreasonable": *Speckling,* para. 37.

[28] Both parties cited and endorsed the summary of judicial review process set out in *Byelkova v. Fraser Health Authority*, 2021 BCSC 1312, appeal dismissed as moot, 2022 BCCA 205:

> [16] Both the reasons and the result must be examined on judicial review: *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at paras 62–74. *Vavilov* [*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65], albeit in the context of reasonableness review, demands administrative reasoning that is both rational and logical, and confirms this principle: paras 86–87, 102–104.
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> [17] The burden is on the party challenging the decision to show that it is unreasonable (or, in the present case, patently unreasonable): *Vavilov* at para 100.
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> [18] A judicial review is not an appeal. The court should not ask itself how it would have resolved an issue, and substitute its own opinion: *Vavilov* at paras 75, 83; *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 at paras 13–14.
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> [19] The court must strive to understand how the tribunal reached its conclusion, based on a holistic and contextual reading of the entire decision. The decision must be read in the light of the history and context of the proceeding, including the evidence and submissions, as well as the role and restraints of the tribunal: *Vavilov* at paras 94, 97, 105–108.
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> [20] The court should presume that the tribunal considered all of the evidence and argument, even if not all are recited in the reasons: *CS v. British Columbia (Human Rights Tribunal)*, 2017 BCSC 1268 at para 219, aff'd 2018 BCCA 264, leave to appeal ref'd 2019 CanLii 23870.
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> [21] On an application for judicial review, the petitioner bears the onus of displacing the presumption of regularity on the part of the tribunal. The court must first seek to understand alleged defects through a contextual reading of a decision, within the contextual recognition of the tribunal's expertise, all viewed through a deferential lens: *Edgewater Casino v. Chubb-Kennedy*, 2015 BCCA 9 at para 19.
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> [22] If, after such a deferential reading of a decision, the court concludes that its reasoning contains a fundamental gap or other defect, which renders the decision (patently) unreasonable, the reviewing court cannot rehabilitate or buttress the decision by substituting its own reasons achieving the same result. This is because both the reasons and result must be considered: *Vavilov* at para 96.

III. DECISION AND DISCUSSION

[29] The present decision can be largely determined by reference to the recent decision in *McHugh*, the benefit of which, to be fair, WCAT did not have when it made its 2015 decision.

[30] The *McHugh* facts and conclusions are markedly similar to the present. The petitioner successfully applied for a judicial review of WCAT's decision to deny her claim for benefits for a claimed activity-related soft tissue disorder, as here. In his brief assessment, the case manager simply asked the petitioner to demonstrate some of the postures she used while typing, mousing, and talking on the telephone. He did not have the petitioner do any actual or stimulated work: para. 12. The WCB medical advisor did not conduct his own assessment of the petitioner, but relied upon the workplace assessment video and report. Kirchner J concluded that it was patently unreasonable for WCAT to rely upon the workplace assessment and the WCB medical report based upon that unstable foundation:

> [31] In my view, ***it was patently unreasonable for the Tribunal to rely on the Workplace Evaluation and, by extension, Dr. Hayre's opinions based on it***. As the videos make obvious, the Workplace Evaluation did not simulate any of the work or work activities that Ms. McHugh actually performed in the time leading to either her left or right arm conditions. It therefore cannot provide a reasonable basis by any standard on which to assess whether Ms. McHugh's work activity was a causative factor in her conditions.
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> [32] This is not a case where there is some evidence of Ms. McHugh working at her work station. She gave brief demonstrations (measured in seconds) of the postures she assumed when typing and how she used the tab key, but she did not simulate any of the work tasks she had done in the time leading to her conditions. I agree with Ms. McHugh's submission that a ***"work simulation that does not actually simulate the worker's work does not provide any evidentiary basis for an assessment of a worker's job activities".***
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> [emphasis added]

[31] This Court reaches an identical conclusion. The tribunal's reliance on the WCB assessment report and the WCB medical opinion based, as they were, on the ergonomically reconfigured station, was patently unreasonable.

[32] The Decision is also patently unreasonable in that it rejects and rebuts the expert Everett and Chan opinions not through a contrary expert opinion, but through inferences and conclusions with respect to medical causation, requiring medical expertise. The Decision, not written by a medical expert, reaches conclusions largely based upon its own observations of the videos and its own analysis, largely of a medical nature, of whether the viewed activities, often considering fingers in isolation

from related tendons and tissues, would place strain on the worker's fingers, tendons and tissues, and thereby cause the petitioner's condition, or constitute a risk factor. In so doing, it purports to contradict the petitioner's medical opinions, and make medical conclusions about the cause, progression, and significance of the petitioner's symptoms. Some examples:

> [42] … Mr. Everett's report (including "Figure 30") indicates the worker's wrists moved into ulnar and radial deviation when typing, as well as at times with handling the telephone and performing other tasks such as reading and multitasking. However, these movements, while combined with repetitive finger (not thumb) movement, ***were not combined with awkward wrist postures or with forceful exertion, and so would not have placed strain on the affected tendons***. Schedule B requires that the activities must use the affected tendon(s) the evidence does not support such a conclusion. ***Rather, the frequently repeated motion involves the worker's fingers rather than the flexor tendons (the area of tenderness identified by Dr. Chan) or the tendons at the base of the thumb (as in deQuervain's).*** As a result, I find the evidence is not sufficient to satisfy the criteria for the presumption in Schedule B of the Act.
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> ….
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> [48] … However, at the time of the case manager's site visit and at the hearing, the worker indicated her symptoms were on the opposite side of the wrist (or in the flexor tendons of the wrist as set out by Dr. Chan) and ***I find these were not sufficiently close to the pisiform bone to demonstrate a relationship between contact pressure on the pisiform and the worker's symptoms from her tendinitis***. Consistent with this, neither the policy nor the practice directive indicates that contact stress on the ulnar side of the hand is a risk factor for symptoms on the radial side of the hand/wrist…
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> ….
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> [52] Mr. Everett cited policy item #27.40 regarding awkward posture, which identifies postures where loads are supported by passive tissues or muscle tension is required to hold the posture (such as by holding the arm straight out at shoulder height). ***However, in this case, any load placed on the thumb was held against the computer mouse and not, I find, supported by passive tissues or muscle tension.…***
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> ….
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> [54] ***Mr. Everett compares the worker's ulnar radial deviation to the Finkelstein's test, which is used as a clinical test for deQuervain's. However, this test (confirmed in his Figure 5) is conducted with the thumb inside a clenched fist, where as the worker was noted to type with her thumbs extended. I therefore place little weight on Mr. Everett's statement that the worker's forearm extensor and flexor compartments and intrinsic muscles were co-contracted, and would have been provocative for deQuervain's.…***
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> ….

> [60] While there may be some ulnar or radial deviation, I find that throughout most of the worker's typing demonstrations these were nowhere near the end ranges. At times, Mr. Everett had the worker move her wrists into such postures (apparently related to calibrating the measuring tools) during these brief times, the worker demonstrated both ulnar and radial deviation at or near and range. ***I find that when typing, she demonstrated movements that were nowhere near those end ranges and, therefore, this was not a factor in the development for condition.***
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> [61] Mr. Everett said the worker's wrists were elevated against gravity when she was typing. I acknowledge that this is a factor identified in the practice directive, but I find this factor on its own would not play strain on the tissues involved in the worker's hand/wrist condition. ***That is, it is not clear how holding one's wrists in a relatively neutral position against gravity might stress the tissues involved in hand/wrist tendinitis.*** I find ***Mr. Everett's explanation is not sufficient to explain how holding her wrists against, even combined with ulnar or radial deviation, might injure the tissues involved in tendinitis.***
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> ….
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> [63] In summary, I find the criteria set out in Schedule B of the Act are not met. I also find the ***occupational risk factors identified in this case are not sufficient to support a conclusion that the worker's diagnosed bilateral hand/wrist tendinitis was due to the nature of her employment***. Although I accept the worker's evidence that she noticed her symptoms at work, particularly when typing, and that her symptoms worsened throughout each day, ***I find the occupational exposures were not of causative significance cause in the development of the underlying condition(s).***
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> [emphasis added]

[33] In rejecting the Chan and Everett opinions, the Decision also strays into etiological conclusions that could only be supported (and would on their face likely be refuted) by a medical opinion. For example, in rejecting Mr Everett's identified risk factor of typing with elevated wrists, the Decision states that "I observed that the worker types at a relatively quick speed…so that at all times some of her fingers were touching the keyboard and would have relieved the forces of gravity." The Decision also hypothesises that the petitioner's condition was not caused by the former work station configuration, as the tendonitis symptoms continued after implementation of the ergonomic improvements:

> [49] ***I also accept the worker's evidence that she did not experience symptoms over the ten months that she performed her work using the workstation set up in the manner depicted Mr. Everett's video recordings, and that she began to notice symptoms in August 2013 without any change to the workstation setup***. I also accept her testimony

> that her symptoms did not change after she altered the manner in which the workstation was set. ***This is some evidence that supports a conclusion against the notion that the manner in which the workstation was setup posed an occupational risk factor for the development of the worker's condition.***
>
> ***[50] However, after the changes to the workstation, the worker's body and tissues no longer contacted the desk, and yet her symptoms continued.*** …[4]
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> [emphasis added]

[34] To be fair, as indicated, the Decision cites WCB policies and directives in reference to many of these observations and findings. The Decision's interpretations of and conclusions about the medical effects of isolated anatomical movements, based on brief video observations, however, in the face of expert medical opinions to the contrary, lead it into the realm of the unreasonable.

[35] A WCAT decision may be patently unreasonable if it "rejects a medical opinion before it in the absence of appropriate opinions to the contrary, preferring instead to arrive at its own medical diagnosis in the absence of supporting expert evidence": *Kostiuk v Workers' Compensation Appeal Tribunal*, 2019 BCSC 363 at para. 104(a). As stated by C. Hinkson J (as he then was) in *Page v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 493:

> [62] ***While the Hearing Panel is presumed to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction, it is not presumed to have medical expertise.***
>
> [63] ***Where a WCAT panel is faced with a medical diagnosis as to a mental condition*** that is described in the *DSM-IV* at the time of the diagnosis, ***it is not equipped to reject that diagnosis, without an appropriate opinion to the contrary.***
>
> [64] Here, the Hearing Panel had a diagnosis of PTSD by Dr. Jhetam, a qualified psychiatrist, that it recognized was not "contradicted by other psychiatric or psychological opinion evidence". Although it was open to the Hearing Panel to require that a physician or psychologist appointed by WCAT review Dr. Jhetam's diagnosis, it instead rejected Dr. Jhetam's uncontradicted opinion by presuming that Dr. Meloche, who had not seen the petitioner since 1995, would have disagreed with the opinion of Dr. Jhetam in 2000, and thereafter. Moreover, the Hearing Panel rejected Dr. Jhetam's opinion in the face of his evidence, also uncontradicted, that Dr. Meloche's 1995 diagnosis of Adjustment Disorder with Anxiety "frequently precedes PTSD".

> [65] This is not a case of the respondent's panel preferring one diagnosis to another. As there was no psychiatric or psychological opinion that contradicted the only opinion before them as to the petitioner's condition***, this is a case of the Hearing Panel making its own diagnosis, when it clearly has no expertise upon which to do so.***
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> [66] ***I find that such reasoning and the resulting findings are based upon the arbitrary exercise of the WCAT's discretion in terms of the use of the evidence before it, particularly its reliance predominantly if not entirely on an irrelevant factor, the 1995 opinion evidence of Dr. Meloche***. In the result I find that the WCAT's decision on this issue is patently unreasonable.
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> [emphasis added]

[36] This Court reaches a similar conclusion to that in *Page*. The WCB medical opinion, predating the Chan and Everett opinions, inherently could not rebut those opinions, and nothing in the WCB medical opinion conclusively contradicts those medical opinions. Again, the WCB medical opinion did not categorically rule out that the petitioner's work caused her conditions; rather, it did not find sufficient evidence to conclusively support such a diagnosis. Further, insofar as the WCB medical opinion was based on the post-ergonomic reconfiguration, it is largely irrelevant, similar to the dated five-year old medical report, WCAT's reliance on which was rejected in *Page*.

[37] WCAT argues that it was entitled to reach the conclusions it did, notwithstanding the absence of a responsive medical report specifically denying that the petitioner's tendinitis was caused by her workplace activities, and that the tribunal may consider other evidence in determining whether it supported an inference of causation or non-causation. It cites *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 ("***FHA***"):

> [38] ***The presence or absence of opinion evidence from an expert positing (or refuting) a causal link is not, therefore, determinative of causation*** (e.g. *Snell*, at pp. 330 and 335). ***It is open to a trier of fact to consider, as this Tribunal considered, other evidence in determining whether it supported an inference that the workers' breast cancers were caused by their employment.*** This goes to the chambers judge's reliance upon the Court of Appeal's decisions in *Sam* and *Moore* and to Goepel J.A.'s statement that there must be "positive evidence" linking their breast cancers to workplace conditions. ***Howsoever "positive evidence" was intended to be understood in those decisions, it should not obscure the fact that***

> ***causation can be inferred — even in the face of inconclusive or contrary expert evidence — from other evidence, including merely circumstantial evidence.*** This does not mean that evidence of relevant historical exposures followed by a statistically significant cluster of cases will, on its own, always suffice to support a finding that a worker's breast cancer was caused by an occupational disease. It does mean, however, that it may suffice. Whether or not it does so depends on how the trier of fact, in the exercise of his or her own judgment, chooses to weigh the evidence***. And, I reiterate: Subject to the applicable standard of review, that task of weighing evidence rests with the trier of fact — in this case, with the Tribunal.***
>
> [39] In light of the foregoing, the Tribunal's original decision cannot be said to have been "patently unreasonable". ***While the record on which that decision was based did not include confirmatory expert evidence, the Tribunal nonetheless relied upon other evidence which, viewed reasonably, was capable of supporting its finding of a causal link between the workers' breast cancers and workplace conditions.***
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> [emphasis added]

[38] In *FHA*, the initial Appeal Tribunal decision had found a causal link between the workers' laboratory employment and breast cancer, even though medical reports in the record concluded that there was an inadequate scientific basis to do so. The Supreme Court of Canada concluded that the initial Appeal Tribunal decision was entitled to reach its conclusion in reliance on the evidence as a whole, including, specifically and importantly, those same medical reports:

> [34] As I have recounted, the evidence before the Tribunal on causation comprised, principally, the OHSAH reports (supported by the reports of Dr. Beach and Dr. Yamanaka), which (1) ***confirmed a "statistically significant cluster" of breast cancer, with a standard incidence ratio approximately eight times the rate of breast cancer in the general population***; and (2) noted that past occupational chemical exposures were likely "much higher" than current exposures, and included one known carcinogen; but also (3) reported that they were unable "to reach scientific conclusions to support the association between work-related exposures and breast cancer in this cluster" (Final Report, at p. iii). ***Consequently, the OHSAH reports would only speculate that the increased incidence of breast cancer among the laboratory workers may have been due to non-occupational risk factors, to occupational risk factors such as chemical carcinogens or ionizing radiation, or to a statistical anomaly.***
>
> [35] The Tribunal, in lengthy and comprehensive reasons explaining why it found "causative significance" in the evidence of past carcinogenic exposure and in the statistically significant cluster of breast cancer cases, gave careful consideration to the OHSAH reports. ***It correctly noted that the OHSAH reports "did not exclude the possibility of occupational causation", and that the Tribunal did not have before it "much detailed evidence as to historical exposures"*** (J.R., vol. 1, at p. 47). And, it acknowledged that "it is

> possible that the breast cancer cluster is a statistical anomaly", and that "this matter is not without some uncertainty" (p. 48). ***The Tribunal chose, however, to "attach weight" to the reports' observations that past exposures were "likely much higher"*** (p. 47), ***leading it to find that the likelihood of a statistical anomaly did not exceed the likelihood that the workers' breast cancers were an occupational disease caused by the nature of their employment.*** As it explained:
>
> > Perhaps the most compelling evidence for us involves the fact that the workers with breast cancer were exposed to carcinogens and there is a very elevated statistically significant [standardized incidence ratio] for breast cancer. Our decision does not simply rest on the occurrence of a very elevated statistically significant [standardized incidence ratio] for breast cancer.
> >
> > ***That [standardized incidence ratio] occurs against the backdrop of the particular standard of proof employed by us, the workers' exposure to carcinogens, and the comments of [the Final Report] to the effect that all cancer causing agents have the potential to initiate and promote cancer, little is known about the possible synergistic, additive or antagonistic effects of multiple chemical exposures, and past exposures were likely much higher***….
> >
> > [emphasis added]

[39] Further, the outcome in *FHA* turns significantly on the statutorily-lowered burden of proof to establish causation: s. 250(4) dictates that where the evidence is evenly weighted on causation, that issue must be resolved in the worker's favour:

> [31] ….This less stringent burden of proof, like the *RSCM II*'s direction that the workplace need only be of "causative significance" or "more than a trivial or insignificant aspect" in the development of a worker's illness, furthers at least one of the core policy goals of workers' compensation schemes …. to have "compensation to injured workers provided quickly without court proceedings". Section 250(4) therefore reflects the legislature's intention that workers should obtain compensation for occupational diseases without having to satisfy the requirements of a civil tort claim.

[40] Accordingly, the *FHA* scientific reports' hesitance in finding that the workplace conditions conclusively caused the breast cancer would not in itself rule out causation under the *Act*. The initial Appeal Tribunal Decision was entitled to look to the evidence as a whole to infer causation, concordant with the statutorily-lowered burden of proof. Again, importantly, the main evidence supporting a causal link between the workplace conditions and the breast cancer was found in those same medical reports, rather than purely or primarily from the tribunal's non-medical findings, or its purported findings in the nature of medical expertise.

[41] Of course, the present Decision under review reaches the opposite result from *FHA*, concluding that workplace conditions did not cause or pose risk factors for the condition, notwithstanding the statutorily-lowered burden of proof in favour of the worker, and notwithstanding that the workplace conditions need only provide "causative significance" or "more than a trivial or insignificant aspect" in the development of a worker's illness. It specifically concludes that the petitioner's workplace motions, flexions, and exertions did not cause her tendinitis or place strain on the affected tendons.

[42] The Decision reaches this conclusion not, for the most part, by referring to the medical record before it, in the manner of the *FHA* initial Appeal Tribunal. Indeed, given the WCB medical opinion's brevity, and its near–fatal reliance upon the pre-ergonomically reconfigured workplace, it is unsurprising that the Decision would make minimal reference to that report. The tribunal was not equipped to reject the Chan and Everett medical opinions, without an appropriate medical opinion to the contrary. Instead, it unreasonably relied upon its own ergonomic and medical observations and conclusions to contradict those medical experts' conclusions that the petitioner's actions would have caused significant flexion, extension, ulnar deviation or radial deviations, or constituted forceful exertion or strain on the affected tendons. That issue of whether certain body movements and postures placed strain on specific tendons, and could have caused or contributed the petitioner's condition, is a matter of ergonomic and medical expertise going beyond the tribunal's reference to its own observations and WCB policies and directives.

IV. CONCLUSION

[43] The Court grants the remedy sought: the matter is remitted back to the original decision-maker for reconsideration. Specifically, the tribunal is to base its decision upon medical opinions based upon the actual work configuration and conditions and activities in place at or immediately prior the date of the petitioner's disablement. Any contradictions of the Chan and Everett opinions as to whether the petitioner's movements and postures in her original work place configuration could

have strained her tendons or tissues, or caused or contributed to her condition, going beyond the expertise and mandate of the tribunal, should be supported by a medical opinion.

[44] As is usual, neither party sought costs, and none are ordered.

[45] The Court commends both counsel for their responsible, balanced, and thorough submissions.

"Crerar J"

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[1] As noted in the Decision, to be fair to the case assessment manager, ambiguities in the worker's statements about her work station may have led him to believe that it had not been reconfigured.
[2] Repealed April 6, 2020 and replaced by the *Workers Compensation Act*, RSBC 2019, c 1. Section 6 is now section 136.
[3] A small bone on the outside of the wrist.
[4] As set out in Mr Everett's report, tendinitis is a condition that develops over time, through long–term aggravation of tissues and tendons, thereby changing the "muscle geometry", which aggravation and symptoms will not necessarily disappear, or disappear immediately, upon a changed work station.