# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lawrence v. Workers' Compensation Appeal Tribunal,* 2023 BCSC 1695

Date: 20230928
Docket: 22398
Registry: Nelson

Between:

**Jamie Lawrence**

Petitioner

And

**Workers' Compensation Appeal Tribunal and the Corporation of the City of Nelson**

Respondents

Before: The Honourable Madam Justice Lyster

## Reasons for Judgment

| | |
|---|---|
| The Petitioner, appearing in person: | J. Lawrence |
| Counsel for the Respondent, Workers' Compensation Appeal Tribunal: | D. Oleksiuk |
| Counsel for the Respondent, Corporation of the City of Nelson: | A. Zwack<br>M. Vipond |
| Place and Dates of Hearing: | Nelson, B.C.<br>January 12–13, April 6 and May 4, 2023 |
| Place and Date of Judgment: | Nelson, B.C.<br>September 28, 2023 |

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## Introduction

[1] Jamie Lawrence filed the petition that originated this proceeding on September 16, 2022. Mr. Lawrence and his former employer, the Corporation of the City of Nelson (the "City"), had been involved in a number of proceedings before the Workers' Compensation Appeal Tribunal ("WCAT"), and it was not clear on the face of the petition which WCAT decision or decisions Mr. Lawrence was seeking to have judicially reviewed. In the course of this hearing, Mr. Lawrence clarified that the sole decision he is seeking to have reviewed is WCAT's April 22, 2022 decision (the "Reconsideration Decision"). In the Reconsideration Decision under review, WCAT denied Mr. Lawrence's request to reconsider an earlier WCAT decision, which had been rendered on March 25, 2019.

[2] Mr. Lawrence filed his petition for judicial review more than 60 days after the Reconsideration Decision had been rendered. Accordingly, the petition was filed past the time limit provided for judicial review established in s. 57(1) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*]. The City sought to have the petition dismissed on that basis. I heard the parties' submissions with respect to that preliminary issue together with their submissions on the merits of the judicial review, as there was substantial overlap between the issues raised.

[3] In this decision, I will first outline the history of the various Workers' Compensation Board (the "Board") and WCAT proceedings Mr. Lawrence and the City have been involved in, to the extent they are relevant to this judicial review. I will then summarize the Reconsideration Decision under review. I will then consider the City's application to have the petition dismissed under s. 57(1) of the *ATA*. Finally, I will consider the merits of the petition, that is, whether Mr. Lawrence has established grounds for the Reconsideration Decision to be set aside on judicial review.

[4] I note that the *Workers Compensation Act* was revised and reorganized on April 6, 2020 pursuant to the *Statute Revision Act*, R.S.B.C 196, c. 440, resulting in the *Workers Compensation Act*, R.S.B.C. 2019, c 1 [*Act*]. The former *Act* was the *Workers Compensation Act*, R.S.B.C. 1996, c. 492. Sections of the *Act* were

renumbered and some language was revised. No substantive changes were made. Some of the WCAT decisions referred to in this decision were made prior to the amendments, and refer to the former section numbers, and others were made after the amendments and refer to the new section numbers. Unless quoting directly from a decision that uses the former section numbers, I will generally refer to the current section numbers.

[5] There is no question that Mr. Lawrence has been diagnosed with a mental disorder under the *Diagnostic and Statistical Manual of Mental Disorders*, 5th Edition (Washington, DC: American Psychiatric Association, 2013). He has found his experiences with the City, WCAT, and in this Court difficult. The nub of the issue before WCAT was whether his mental disorder was compensable under the *Act* and binding Board policy. The central issues before this Court are whether WCAT's decision that his mental disorder was not compensable was patently unreasonable, or whether WCAT breached procedural fairness, and in particular was biased, in how it dealt with his claim.

## History of Proceedings

### The parties' employment relationship

[6] I provide the following brief background to put the matters in dispute in context. It is not intended to fully summarize events or the parties' positions in respect of them.

[7] Mr. Lawrence was employed by the City in its hydroelectric operations as a powerline technician starting in October 2015. Conflicts developed between Mr. Lawrence and some of his co-workers. The genesis and responsibility for those conflicts is a matter of dispute between Mr. Lawrence and the City. There is no question that Mr. Lawrence believed that his co-workers were engaging in unsafe work practices, and that it was his duty to ensure that safe work practices were followed.

[8] By the spring of 2017, Mr. Lawrence had filed bullying and harassment complaints against some of his co-workers, and some of his co-workers had filed complaints against him. It fell to the City to investigate these complaints.

[9] On April 21, 2017, the City suspended Mr. Lawrence with pay for alleged insubordination. The City held a meeting with Mr. Lawrence on May 11, 2017. The City intended to use the meeting to investigate complaints against Mr. Lawrence, which Mr. Lawrence had not understood to be the meeting's purpose. He had a panic attack and walked out. The City terminated his employment on May 19, 2017 on the basis that he had abandoned his employment.



## The Prohibited Action Complaint

### *The Board*

[10] Mr. Lawrence filed a prohibited action complaint against the City with the Board on April 24, 2017 (the "Prohibited Action Complaint"). Prohibited action complaints are also sometimes called "discriminatory action complaints."

[11] In the Prohibited Action Complaint, Mr. Lawrence alleged that he reported concerns about unsafe work practices engaged in by his co-workers to his manager, and that he also reported that he was being bullied and harassed by a co-worker. He further alleged that his conduct in reporting health and safety concerns were factors in the City's decisions first to suspend, and later to dismiss him. Mr. Lawrence later amended the Prohibited Action Complaint to include the termination of his employment.

[12] A "prohibited action" is defined in s. 47 of the *Act*, as follows:

> **Prohibited action**
>
> **47** (1)For the purposes of this Division, "prohibited action" includes any act or omission by an employer or union, or by a person acting on behalf of an employer or union, that adversely affects a worker with respect to
>
> (a) any term or condition of employment, or
>
> (b) any term or condition of membership in a union.
>
> (2) Without restricting subsection (1), prohibited action includes any of the following:

> (a) suspension, layoff or dismissal;
>
> (b) demotion or loss of opportunity for promotion;
>
> (c) transfer of duties, change of location of workplace, reduction in wages or change in working hours;
>
> (d) coercion or intimidation;
>
> (e) imposition of any discipline, reprimand or other penalty;
>
> (f) the discontinuation or elimination of the job of the worker.

[13] Section 48 of the *Act* provides that employers must not take prohibited actions against workers in the following terms:

> **Worker protection from prohibited action**
>
> **48** An employer or union, or a person acting on behalf of an employer or union, must not take or threaten a prohibited action against a worker
>
> (a) for exercising any right or carrying out any duty in accordance with the OHS provisions, the regulations or an applicable order,
>
> (b) for the reason that the worker has testified or is about to testify in any matter, inquiry or proceeding under this Act or the *Coroners Act* on an issue related to occupational health and safety or occupational environment, or
>
> (c) for the reason that the worker has given any information regarding conditions affecting the occupational health or safety or occupational environment of that worker or any other worker to
>
> (i) an employer or person acting on behalf of an employer,
>
> (ii) another worker or a union representing a worker, or
>
> (iii) an officer or any other person concerned with the administration of the OHS provisions.

[14] The Board rendered its decision on the merits of Mr. Lawrence's Prohibited Action Complaint on March 6, 2018. The Board dismissed the aspect of the Prohibited Action Complaint relating to Mr. Lawrence's earlier suspension, finding that his health and safety activities were not factors in the City's decision to suspend him. The Board accepted the City's evidence that it suspended Mr. Lawrence due to him being insubordinate and alienating himself by not following his manager's expectations, and that he was in interpersonal conflict with his co-workers and his

manager. The Board found, however, that the City's dismissal of Mr. Lawrence was a prohibited action. The Board found that the City had failed to rebut Mr. Lawrence's case that his dismissal was a prohibited action. In doing so, the Board rejected the City's position that Mr. Lawrence had abandoned his job.



[15] Following further submissions from the parties, on August 27, 2019 the Board rendered its first decision on the remedy to be ordered for the City's prohibited action. Mr. Lawrence had sought reinstatement. The Board declined to order reinstatement on the basis that it was unlikely the parties would have a successful working relationship if Mr. Lawrence were reinstated. The City argued that if it had not dismissed Mr. Lawrence on May 19, 2017, it would have dismissed him for just cause at or about that same time. The Board found that, absent the prohibited dismissal, it was reasonably foreseeable that Mr. Lawrence would have remained employed with the City for approximately eight more months, until January 26, 2018. It reduced that remedy by four weeks to take into account both Mr. Lawrence's minimal mitigation efforts immediately following his dismissal and the impact the prohibited dismissal had on his mental health. In the result, the Board held that Mr. Lawrence was entitled to compensation for 32 weeks lost income and associated benefits. The Board directed the parties to seek to agree on the amount owing, failing which the Board would consider the matter further.

[16] The parties did not agree on the amount owing. On November 7, 2019, the Board issued its supplementary remedial decision, and ordered the City to pay Mr. Lawrence $58,747.88 in lost income and vacation pay, less statutory deductions, plus $4,898.44 in interest, and to submit $5,706.01 in pension plan contributions.

***WCAT***

[17] The City appealed the Board's decision on the merits of the Prohibited Action Complaint to WCAT. In a decision rendered July 9, 2020, WCAT dismissed the City's appeal and upheld the Board's decision: WCAT Decision Number: A1801327. WCAT found that the City's decision to terminate Mr. Lawrence was tainted, at least in part, by Mr. Lawrence having repeatedly raised safety concerns.

[18] Mr. Lawrence appealed the Board's August 27, 2019 remedial decision to WCAT. Mr. Lawrence sought reinstatement to his employment and full compensation for wage loss to the date of reinstatement. The City appealed both the August 27, 2019 remedial decision and the November 7, 2019 supplementary remedial decision. The City sought a reduction in the amount of compensation ordered. In a decision rendered June 1, 2021, WCAT denied the City's appeals and granted Mr. Lawrence's appeal in part: WCAT Decision A1903037. WCAT declined to order reinstatement, but increased the compensation to be paid by the City, resulting in an overall award of $76,533.21, less statutory deductions.



[19] None of the decisions related to the Prohibited Action Complaint are before this court on judicial review. However, Mr. Lawrence relies on the fact he was successful in his Prohibited Action Complaint on this judicial review, arguing, in effect, that because his Prohibited Action Complaint succeeded, his mental disorder claim should also have been accepted. I will consider that submission in the course of my analysis below.

**The Mental Disorder Claim**

[20] In 2017 Mr. Lawrence made a claim to the Board for a claim for compensation for a mental disorder resulting from bullying and harassment at work (the "Mental Disorder Claim"). In essence, Mr. Lawrence alleged that the City and his co-workers bullied and harassed him because he raised safety concerns at work, resulting in him developing a compensable mental disorder.

[21] Mental disorder claims are governed by s. 135 of the *Act*, which provides:

> **Mental disorder**
>
> **135** (1) Subject to subsection (3), a worker is entitled to compensation for a mental disorder, payable as if the mental disorder were a personal injury arising out of and in the course of a worker's employment, if that mental disorder does not result from an injury for which the worker is otherwise entitled to compensation under this Part, and only if all of the following apply:
>
> (a) the mental disorder is either
>
> (i) a reaction to one or more traumatic events arising out of and in the course of the worker's employment, or

(ii) predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment;

(b) the mental disorder is diagnosed by a psychiatrist or psychologist as a mental or physical condition that is described, at the time of diagnosis, in the most recent Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association;

(c) the mental disorder is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

(2) If a worker who is or has been employed in an eligible occupation

(a) is exposed to one or more traumatic events arising out of and in the course of the worker's employment in that eligible occupation, and

(b) has a mental disorder that, at the time of the diagnosis under subsection (1) (b), is recognized in the manual referred to in that subsection as a mental or physical condition that may arise from exposure to a traumatic event,

the mental disorder must be presumed to be a reaction to the one or more traumatic events arising out of and in the course of the worker's employment in that eligible occupation, unless the contrary is proved.

(3) The Board may require that a psychiatrist or psychologist appointed by the Board review a diagnosis made for the purposes of subsection (1) (b) and may consider that review in determining whether a worker is entitled to compensation for a mental disorder.

(4) Section 163 *[duties of physicians and qualified practitioners]* applies to a psychiatrist or psychologist who makes a diagnosis referred to in this section.

(5) In this section:

"**correctional officer**" means a correctional officer as defined by regulation of the Lieutenant Governor in Council;

"**eligible occupation**" means the occupation of correctional officer, emergency medical assistant, firefighter, police officer, sheriff or, without limitation, any other occupation prescribed by regulation of the Lieutenant Governor in Council;

"**emergency medical assistant**" means an emergency medical assistant as defined in section 1 of the *Emergency Health Services Act*;

"**police officer**" means an officer as defined in section 1 of the *Police Act*;

> "**psychiatrist**" means a physician who is recognized by the College of Physicians and Surgeons of British Columbia, or another accredited body recognized by the Board, as being a specialist in psychiatry;
>
> "**psychologis**t" means a person who is
>
> (a) a registrant of the college responsible for carrying out the objects of the *Health Professions Act* in respect of the health profession of psychology, or
>
> (b) entitled to practise as a psychologist under the laws of another province;
>
> "**sheriff**" means a person lawfully holding the office of sheriff or lawfully performing the duties of sheriff by way of delegation, substitution, temporary appointment or otherwise.



[22] The Board dismissed the Mental Disorder Claim on June 5, 2017, and the Review Division upheld that decision on December 12, 2017.

[23] Mr. Lawrence appealed the Review Division's decision to WCAT. On March 25, 2019, WCAT dismissed Mr. Lawrence's appeal: WCAT Decision Number: A1800210 (the "Original Decision").

[24] Mr. Lawrence filed for reconsideration of the Original Decision on November 18, 2019. He did so on the basis that the Vice Chair who had decided the appeal of the Mental Disorder Claim was biased, or there was a reasonable apprehension of bias, and on the basis of new evidence.

[25] On April 22, 2022, WCAT denied Mr. Lawrence's application for reconsideration of the Original Decision denying his appeal of the Board's decision denying his Mental Disorder Claim: WCAT Decision Number: A2000239. It is that Reconsideration Decision which is under judicial review in this proceeding.

## WCAT's Original Decision

[26] In order to understand the Reconsideration Decision under judicial review, it is necessary to first summarize what WCAT held in the Original Decision dismissing Mr. Lawrence's appeal from the Review Division's decision confirming that his Mental Disorder Claim would not be accepted

[27] WCAT held an oral hearing on September 5, 2018, attended by Mr. Lawrence, his then lawyer, the City, its lawyer, and three witnesses. At para. 5 of the Original Decision, the Vice Chair identified that the issue to be decided was whether Mr. Lawrence's claim met the requirements set out in what was then s. 5.1 of the *Act* for a claim for a mental disorder.

[28] At paras. 7–13, the Vice Chair summarized the factual background, including conflicts between Mr. Lawrence and his co-workers over safety issues, his April 12, 2017 bullying and harassment complaint, his April 21, 2017 suspension and May 19, 2017 termination. At paras. 14–15, the Vice Chair summarized the decisions by the Board Officer and Review Officer that Mr. Lawrence had not established a mental disorder claim within the ambit of s. 5.1 of the *Act*.

[29] At paras. 16–79, the Vice Chair summarized the oral and documentary evidence and the parties' submissions to WCAT. At para. 77, the Vice Chair summarized Mr. Lawrence's position as follows:

> [77] After the hearing I received extensive written submissions from both parties which are discussed in greater detail below. In general terms, the worker argues that a number of the incidents he describes constituted traumatic events. These were combined with bullying and harassment by his co-workers, primarily by Y but by his manager DM as well. This was the cause of the adjustment disorder he was diagnosed with by Dr. Martzke. In the alternative he argues that he was bullied and harassed by co-workers and by his manager and the Human Resources manager and that these constituted significant stressors arising from a toxic work culture. The worker submits that nothing in his behaviour contributed to or intensified the situation. The worker submits that the employer's behaviour toward him also constituted bullying and harassment; that it was threatening and intimidating and cannot be protected by the labour relations shield.

[30] At para. 78, the Vice Chair summarized the City's position as:

> [78] The employer's position is that the worker was disrespectful and insubordinate and that his behaviour and negative attitudes led to safety problems and interpersonal conflict with the crew. The employer argues that none of the incidents that were recounted by the worker constituted traumatic events nor were they significant stressors, and that the employer's responses in the form of investigations and discipline were done as part of the employer's management of its business. The employer also argues that Dr. Martzke's report does not establish that workplace bullying and harassment was a predominant cause of the worker's mental disorder.

[31] At paras. 80–84, the Vice Chair reproduced s. 5.1 of the *Act*, and referred to policy item C3-13.00 of the *Rehabilitation Services and Claims Manual, Volume II*, and Practice Directive #C3-3. The policy is binding on WCAT, while the Practice Directive provides guidance through illustrating important questions, and how terms are used, and aims to promote consistency in decision-making. As explained at para. 83, several statutory requirements must be established for a mental disorder claim to be accepted. For example, the first requirement is that there must be a diagnosis of a mental disorder by a psychologist or psychiatrist. If there is no such diagnosis, the enquiry is at an end.

[32] At paras. 85–86, the Vice Chair concluded that Mr. Lawrence had been diagnosed with a mental disorder, as required under s. 5.1(1)(b) of the *Act*. Specifically, Dr. Martzke had diagnosed Mr. Lawrence with a major depressive disorder, single episode, and an adjustment disorder with anxiety, in his April 30, 2018 report. Dr. Martzke attributed the adjustment disorder to "work related stressors", and the major depressive disorder to job loss, financial strain and the inability to secure alternative employment.

[33] At para. 87, the Vice Chair considered whether the mental disorder had been caused by a traumatic event or predominantly caused by significant workplace stressors, as required under s. 5.1(1)(a). She accepted that the events described by Mr. Lawrence occurred. The Board policy requirement that there be identifiable events was therefore met. The Vice Chair identified that "the material issue concerns the significance of these events: that is, how they were perceived by the worker and his co-workers and by management."

[34] At paras. 88–93, the Vice Chair considered whether Mr. Lawrence had experienced "traumatic events". She concluded that while Mr. Lawrence found the events distressing and upsetting, they were not "an emotionally shocking event" as required by Board policy to satisfy what was then s. 5.1(1)(a)(i) of the *Act*. As a result, she concluded that his claim was based on bullying and harassment alleged to be significant workplace stressors under what was then s. 5.1(1)(a)(ii) of the *Act*.

[35] At paras. 94–139, the Vice Chair considered whether Mr. Lawrence had experienced "significant workplace stressors". At para. 96, the Vice Chair referred to the Practice Directive, which states that a "subjective and objective analysis" of workplace stressors is required to decide they are significant. In that analysis, she wrote that "a Board officer 'considers whether a reasonable person, in the worker's situation and with the general characteristics of the worker' would expect to find an event traumatic or a work stressor significant." At para. 97, the Vice Chair referred to WCAT Decision Number: A1800567 for the proposition that the "general characteristics" of a worker "means the physical or mental characteristics of a worker, including their life experiences or exposures in the past". At para. 98, she cited WCAT Decision Number: A1800049 for examples of "general characteristics" that would likely make a worker particularly sensitive to certain events.

[36] At para. 100, the Vice Chair referred to Dr. Martzke's report for a brief outline of Mr. Lawrence's early life, including exposure to childhood stressors. At para. 101, she noted a comment from Dr. Martzke that "it was unlikely that the worker would have developed the diagnosed conditions but for the work place stress and job loss."

[37] At para. 102, the Vice Chair concluded that Mr. Lawrence did not have any "'general characteristics' that affect the weight to be given to the analysis about the interpersonal conflict that developed between the worker and his co-workers."

[38] At para. 117, the Vice Chair considered the evidence provided by the witnesses. She found Mr. Lawrence's co-workers'

> …behaviours are rude and indicative of interpersonal conflict; however, the policy and the practice directive contemplate that this behaviour is part of the normal pressures and tensions of a workplace. I am unable to conclude that this kind of rude general conduct equates to threatening or abusive behaviour.

[39] The Vice Chair then reviewed the incidents relied upon by Mr. Lawrence. At para. 134, she described the context in which the incidents occurred as follows:

> [134] However, as is now clear, these differences of opinion expanded and formed the backdrop of the worker's claim. I consider that this comment in the worker's letter, submitted to the Board with his

> application, encapsulates his perception of the differences between the way his crew worked and what he was used to:
>
> > …this is an environment where seniority rules and where experience and ideas are scorned or shrugged off as an attempt to degrade the status quo. It appeared the utility followed the idea that they are free to do what they want and don't necessarily need to follow the modern or updated safety standard protocol. This mentality stood in sharp contrast to my past work experience, one where collaborations with coworkers, regardless of seniority or experience was fundamental to getting a job done safely and efficiently.



[40] At para. 135, the Vice Chair concluded that "this conflict did not rise to the level of bullying and harassment, notwithstanding the worker's perception otherwise and that this was part of the normal pressures and tension of the workplace." As a result, she found that Mr. Lawrence had not experienced "significant stressors".

[41] At paras. 140–164, the Vice Chair considered Mr. Lawrence's claims that he had been bullied and harassed by his employer, the City. This required the Vice Chair to consider what was then s. 5.1(1)(c) of the *Act*, which excluded mental disorders "caused by decisions made by the employer about the worker's employment, its nature, the working conditions or decisions to discipline, amend, or terminate the worker's employment." This is known as the "labour relations exclusion" or "management exclusion" clause.

[42] At para. 142, the Vice Chair stated that:

> … while there may be a shield or immunity against claims for mental disorders arising from decisions made by an employer about the terms and conditions of a worker's employment, the practice directive envisions that shield is not absolute. I agree with prior WCAT panels who have found that employer conduct which is abusive, physically or psychologically threatening, or criminal is not protected under the Act.

[43] At para. 147, the Vice Chair noted Mr. Lawrence's argument that "his successful filing of a discriminatory action complaint confirms that the employer's decisions were made and then communicated in an abusive and threatening form."

She rejected this argument at para. 148, finding that Mr. Lawrence's successful discriminatory action complaint:

> … does not require me to conclude that the employer's conduct toward the worker was abusive or threatening. The investigations legal officer (ILO) was considering an entirely separate matter, which was whether the raising of a safety concern played any part in the employer's decision initially to suspend the worker (in April 2017) and then subsequently to terminate his employment in May 2017.

[44] At para. 149, the Vice Chair stated that the "discriminatory action decision is concerned with whether the worker was disciplined in some way for raising a safety concern and nothing more."

[45] At para. 152, the Vice Chair held that the April 19 and 20, 2019 meetings were part of the City's investigation of the allegations of harassment and bullying, and thus fell within the realm of workplace management. The fact Mr. Lawrence profoundly disagreed that he was contributing to the workplace situation did not make the City's statements to him threatening, coercive or abusive. She found there was no targeted harassment. Similarly, at para. 158, she found that Mr. Lawrence's reaction to the City suspending him did not mean that the City was being abusive or threatening.

[46] At paras. 159–160, the Vice Chair addressed the May 11, 2019 meeting. She did not find that the manner in which the City conducted the meeting was threatening or abusive. Mr. Lawrence had a panic attack in reaction to the issues the City wished to discuss, and walked out of the meeting. The City called the police and asked them to conduct a wellness check on Mr. Lawrence. The Vice Chair did not find the City's conduct in doing so threatening or abusive, given Mr. Lawrence's emotional state when he left the meeting.

[47] At para. 163, the Vice Chair concluded that, "while I accept that there were workplace difficulties in the form of significant interpersonal conflict between the worker and his co-workers and to a lesser extent the worker and DM [his manager], I find that these stressors did not exceed the normal pressures and tensions of the workplace. I conclude they were not significant." At para. 164, she added that:

> I reach the same conclusion about the employer's conduct of their investigations into the worker's bullying and harassment complaint and the complaints of the co-workers about the worker. The employer's behaviour with respect to these investigations was not egregious or outrageous and consequently, I find that the exclusion applies to those interactions.

[48] As a result of these conclusions, she did not need to consider the issue of the causation of Mr. Lawrence's mental disorder.

[49] In the result, the Vice Chair denied Mr. Lawrence's appeal.

**WCAT's Reconsideration Decision**

[50] Mr. Lawrence applied for reconsideration of WCAT's Original Decision with respect to his Mental Disorder Claim. It is WCAT's decision dismissing his application of reconsideration that is the subject matter of this judicial review. In this part of my judgment, I summarize the Reconsideration Decision.

[51] Mr. Lawrence represented himself before WCAT for the Reconsideration Decision, while the City continued to be represented by counsel. The Vice Chair was the same Vice Chair who had decided the Original Decision. Neither party requested an oral hearing, and the Vice Chair determined one was not required. The parties provided their submissions in writing.

[52] At para. 3 of the Reconsideration Decision, the Vice Chair identified the issues as:

- Should my original decision be set aside and void on the basis that there was a breach of procedural fairness.
- Have new evidence grounds been established?

[53] At paras. 4–6, the Vice Chair discussed WCAT's jurisdiction on reconsideration. Section 309(1) of the *Act* provides that WCAT decisions are final and not open to review in any court. Section 310 provides an exception whereunder reconsideration may be available where there is new evidence that is material and substantial and not available at the time of the original decision. At para. 5, the Vice Chair referred to *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*,

2014 BCCA 499 [*Fraser Health*] as authority for the proposition that, in addition, WCAT has jurisdiction to reconsider a decision to correct an error of jurisdiction.

[54] Only the original panel has the jurisdiction to reconsider its original decision for these limited purposes and, as a result, the same Vice Chair was assigned the reconsideration application. At para. 6, the Vice Chair recognized that this was particularly awkward when a party is submitting that the original decision was biased, acted unfairly, or misapprehended the evidence.

[55] At paras. 7–17, the Vice Chair briefly reviewed the Original Decision, as well as the proceedings related to the Prohibited Action Complaint.

[56] At paras. 19–22, the Vice Chair discussed the scope of WCAT's jurisdiction to cure jurisdictional errors. There are two kinds of jurisdictional errors WCAT can cure on reconsideration: breaches of procedural fairness and "narrow jurisdictional error", which she defined at para. 21 as "where the tribunal decides a matter that it had no power to decide or fails to decide a matter that it was required to decide."

[57] At para. 22, the Vice Chair noted that a reconsideration hearing is not a rehearing or redeciding of the matter under appeal.

[58] At para. 23, the Vice Chair identified that in his June 24, 2021 submission Mr. Lawrence made statements which she took to be arguments that she had breached procedural fairness, in particular that she was biased. At paras. 24–25, the Vice Chair considered what constitutes a reasonable apprehension of bias, and how it is to be proven.

[59] At para. 26, the Vice Chair stated that Mr. Lawrence argued that she "demonstrated bias when [she] 'ignored' the evidence of Dr. Martzke." Mr. Lawrence submitted that the Vice Chair had disregarded Dr. Martzke's report and his conclusion that Mr. Lawrence's mental disorder was related to bullying and harassment at work. At para. 27, the Vice Chair wrote:

> I understand the worker to be saying that I was required to accept Dr. Martzke's diagnosis, his attribution of causation, and his employment-related

> recommendations. This is not an argument about bias. Rather it is a disagreement with and a misunderstanding of the function or place of a psychological opinion in the adjudication of a mental disorder claim.

[60] At para. 29, the Vice Chair noted that Mr. Lawrence argued that she was biased because she did not accept that the diagnosed mental disorder was caused by work-related stressors. She addressed this argument at para. 30, where she wrote:

> [30] It is the job of the decision-maker to decide whether the circumstances being put forward in the claim were either significant work-related stressors or traumatic events. Only if I accepted that they were one or the other would the psychologist's opinion on causation become significant. The issue before me was not whether the worker's psychological condition was due to the workplace events he described. I accept that they were. The question was whether those workplace events were traumatic events, and I found they were not, or significant workplace stressors, and I also found they were not. These are legal questions for the adjudicator to answer.

[61] At para. 31, the Vice Chair addressed Mr. Lawrence's argument that she was biased because she applied the labour relations exclusion clause to the May 11, 2017 meeting:

> [31] The worker also argues that I was biased because I "applied the exclusion clause to the meeting on May 11, 2017." The submission goes on to describe what took place and argues that the employer exclusion clause "only applies to the discipline and for cause termination." This is not true. The exclusion clause, which protects the employer's right to manage the workplace is not restricted to those matters. It covers the actions of employers related to *all* of the terms and conditions of employment. The worker is, in effect, arguing that I reached the wrong conclusion about whether the employer exclusion (then contained in section 5.1(c)) covered the actions of the employer that that the worker took issue with. This is discussed in detail from paragraph 140 onward. The worker is disagreeing with the conclusion I reached and that is not what a reconsideration decision can consider. The fact that the worker disagrees with my conclusion is not evidence that I was biased.
>
> [Emphasis in original.]

[62] At paras. 32–33, the Vice Chair addressed Mr. Lawrence's argument that she was biased because she did not accept that the discriminatory action decision demonstrated bullying, harassment, and intimidation towards him by the City. She

reiterated that the two types of claims are distinct, and rejected the argument that her acceptance of the distinction meant she was biased.

[63] At para. 34, the Vice Chair referred to Mr. Lawrence's argument that the City's legal counsel was "politically connected" to WCAT, and that "this political influence comprised WCAT's 'integrity as a fair and impartial tribunal.'" She referred to his submissions that the City's counsel and WCAT were aware that the City had fabricated evidence and suborned witnesses. She dealt with these submissions summarily at para. 35, holding that Mr. Lawrence had failed to establish that she was biased or that there was a reasonable apprehension of bias. At para. 36, she similarly found that there was no basis to find any other sort of breach of procedural fairness.

[64] Starting at para. 37, the Vice Chair turned to a consideration of Mr. Lawrence's new evidence application. At para. 38, she referred to s. 310 of the *Act*, which addresses when new evidence may form the basis for reconsideration. It provides:

> **Reconsideration of appeal tribunal decision**
>
> **310** (1) This section applies to the following:
>
> (a) a decision in a completed appeal by the appeal tribunal under this Part or under Part 2 *[Transitional Provisions]* of the *Workers Compensation Amendment Act (No. 2), 2002*;
>
> (b) a decision in a completed appeal by the appeal division under a former enactment or under Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002*.
>
> (2) A party to a completed appeal may apply to the chair for reconsideration of the decision in that appeal if new evidence has become available or been discovered.
>
> (3) On receiving an application under subsection (2), the chair may refer the decision to the appeal tribunal for reconsideration if the chair is satisfied that the evidence referred to in the application
>
> (a) is substantial and material to the decision, and
>
> (b) did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.
>
> (4) Each party to a completed appeal may apply for reconsideration of a decision under this section on one occasion only.

[65] The Vice Chair summarized when new evidence may form the basis for a reconsideration in these terms:

> [39] So, the new evidence must not only be substantial and material, but it *could not* have existed at the time of the original decision *or* if it did exist, it could not have been easily discoverable by someone acting with reasonable diligence. If the evidence is not relevant to the matter at issue in the appeal or if it would make no difference to the outcome of the appeal, then it cannot be the basis for a reconsideration to proceed.
>
> [40] The concept of "reasonable diligence" was discussed in WCAT 2003-01116-AD and has been accepted by others, including me as capturing what is meant by this term or the more commonly used phrase "due diligence". In particular, I refer to the former Chair's conclusion about the conduct of the prudent and reasonable appellant:
>
> [41] The requirement of "due diligence" is more properly interpreted as referring to the degree of care which a prudent and reasonable appellant would have exercised in ensuring that the Appeal Division had all relevant information necessary to the proper consideration of their appeal.
>
> [42] This applies to the person requesting reconsideration and not to the decision-maker. It places onus on the party bringing the appeal in the first instance to put forward the 'best' case with information that is as complete as possible.
>
> [Emphasis in original.]

[66] At para. 44, the Vice Chair listed and considered the documents which Mr. Lawrence had submitted as new evidence. In general terms, at para. 45, she found that the documents in question were either not new, could have been obtained with the exercise of reasonable due diligence, or were not substantial or material evidence.

[67] At para. 46, the Vice Chair denied the reconsideration application.

## Scope of Judicial Review

[68] It is difficult to identify and succinctly state the grounds upon which Mr. Lawrence submits that the Reconsideration Decision should be judicially reviewed. In part, this is because, in his petition for judicial review, Mr. Lawrence was seeking to judicially review all of WCAT's decisions. Further, he sought a wide range of orders, most of which are not legally open to this court to order on a judicial review. This included, but is not limited to, orders such as:

- A declaration WCAT wrongfully impugned Mr. Lawrence's professional reputation;

- An order that the City make a public apology for attacks on his honour and reputation;

- A declaration that the City acted in bad faith flowing from a defamatory decision and negligent conduct;

- An order that the City and WCAT "make all accommodations and restitution related to the violation of the Petitioners Human Rights"; and

- An order that there be a criminal investigation of the City and WCAT for *Criminal Code* and other statutory violations.

[69] To be clear, a court's remedial jurisdiction under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*] is generally limited to setting aside the decision made by the statutory tribunal, and remitting it to that tribunal for reconsideration in accordance with any directions the court might make. In limited circumstances, the court may substitute its decision for that of the tribunal. The court does not have jurisdiction in a judicial review proceeding to order damages against the tribunal, to order apologies, to order human rights remedies, or to order criminal investigations.

[70] The task of identifying the grounds for judicial review is also rendered challenging by the manner in which Mr. Lawrence addressed his submissions in his "petition factum" and in his oral submissions to the court. Mr. Lawrence is self-represented, and he continues to experience mental health challenges. He says, and I accept, that this made it difficult for him to frame his submissions.

[71] At the hearing of this judicial review, Mr. Lawrence clarified that he was only seeking judicial review of the Reconsideration Decision. This was very helpful in determining the scope of this judicial review. The court can and does disregard the

parts of the petition and petition factum challenging the Prohibited Action Complaint decisions, and the Original Decision.

[72] It is helpful in attempting to frame Mr. Lawrence's grounds for judicial review to consider the statutory framework that establishes the standard of review of WCAT decisions. Section 308 of the *Act* provides:

> **Exclusive jurisdiction of appeal tribunal**
>
> **308** The appeal tribunal 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 under this Part and to make any order permitted to be made, including the following:
>
> (a) all appeals from review decisions as permitted under section 288 *[review decisions that may be appealed]*;
>
> (b) all appeals from Board decisions or orders as permitted under section 289 *[other Board decisions that may be appealed]*;
>
> (c) all matters that the appeal tribunal is requested to determine under section 311 *[request for certification to court]*;
>
> (d) all other matters for which a regulation under section 315 *[regulations respecting this Part]* permits an appeal to the appeal tribunal under this Part.

[73] Section 309 of the *Act* provides that WCAT decisions are final and conclusive.

[74] Section 58(2)(a) of the *ATA* defines the standard of review applicable to the substance of WCAT decisions as follows:

> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (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

[75] In essence, this means that insofar as Mr. Lawrence is challenging the substance of the Reconsideration Decision, the standard of review is whether the decision was patently unreasonable. This is a highly deferential standard of review, which has been defined by the Court of Appeal in *Shamji v. Workers' Compensation Appeal Tribunal*, 2018 BCCA 73, at para. 37 as "'clearly irrational' or 'evidently not in

accordance with reason.'" To the extent Mr. Lawrence challenges WCAT's findings of fact, they will be found to be patently unreasonable only if "the evidence, viewed reasonably, is incapable of supporting" the findings: *British Columbia (Workers' Compensation Appeal Tribunal v. Fraser Health Authority*, 2016 SCC 25 at para. 30.

[76] Where procedural fairness is in issue, s. 58(2)(b) of the *ATA* states that the standard is whether WCAT acted fairly, having regard to all of the circumstances.

[77] This is the standard of review that applies to Mr. Lawrence's challenges to the fairness of the procedures followed by WCAT in this case, in particular his allegations of bias.

[78] Considering Mr. Lawrence's petition, his petition factum, and his oral submissions against this statutory framework, I would attempt to summarize the grounds upon which he seeks judicial review of the Reconsideration Decision as follows:

[79] WCAT's Reconsideration Decision was inconsistent with its decision accepting the Prohibited Action Complaint and therefore patently unreasonable;

- WCAT's decision that Mr. Lawrence's mental disorder was not caused by a traumatic event or significant work-related stressors within the meaning of s. 135(1)(a)(i) or (ii) of the *Act* was patently unreasonable;
- WCAT's reliance on Mr. Lawrence's "general characteristics" was patently unreasonable as the characteristics relied upon were irrelevant;
- WCAT's decision to "overrule" Dr. Martzke's medical report with respect to causation was patently unreasonable;
- WCAT interpreted the management exclusion clause in s. 135(1)(c) of the *Act* in a manner that was patently unreasonable;

- WCAT breached the duty of procedural fairness in that both WCAT, as an institution, and the Vice Chair, were biased against Mr. Lawrence due to their relationship with the City's legal counsel's law firm;

- The assignment of the same Vice Chair who had decided the Original Decision to decide the reconsideration application gave rise to a reasonable apprehension of bias;

- WCAT's failure to consider the City's alleged "perjury" breached procedural fairness or resulted in a patently unreasonable decision; and

- WCAT breached procedural fairness or otherwise erred in dealing with Mr. Lawrence's application to adduce new evidence.



**Petition filed after 60-day time limit**

[80] The City submits that the petition should be dismissed on the basis that it was filed past the 60-day time period provided in s. 57(1) of the *ATA*. That section of the *ATA* applies to judicial reviews of WCAT decisions pursuant to s. 296(i) of the *Act*. Section 57 of the *ATA* provides as follows:

> **Time limit for judicial review**
>
> **57** (1) Unless this Act or the tribunal's enabling Act provides otherwise, an application for judicial review of a final decision of the tribunal must be commenced within 60 days of the date the decision is issued.
>
> (2) Despite subsection (1), either before or after expiration of the time, the court may extend the time for making the application on terms the court considers proper, if it is satisfied that there are serious grounds for relief, there is a reasonable explanation for the delay and no substantial prejudice or hardship will result to a person affected by the delay.

[81] The Reconsideration Decision was rendered April 22, 2022, and Mr. Lawrence filed the petition on September 16, 2022. Accordingly, the petition was filed nearly three months past the statutory time limit.

[82] Pursuant to s. 57(2), the court may extend the time for filing provided three conditions are met: (1) it is satisfied there are serious grounds for relief; (2) there is a

reasonable explanation for the delay; and (3) no substantial prejudice or hardship will result to a person affected by the delay.

[83] Mr. Lawrence provided medical information to the court and the respondents with respect to his mental health during the relevant period. On the basis of that medical information, the City does not dispute that there is a reasonable explanation for the delay, and I find that there is a reasonable explanation for the delay. The City does not submit that it would suffer substantial prejudice or hardship as a result of the delay, and I find that no one would suffer substantial prejudice or hardship as a result of the relatively brief delay in filing Mr. Lawrence's petition.

[84] The sole issue for determination with respect to whether the court should exercise its discretion to extend the time for filing is whether Mr. Lawrence has established there are serious grounds for relief. The City submits he has not, while Mr. Lawrence submits that he has.

[85] This issue was argued together with the merits of the judicial review. This made sense in the circumstances, given the overlap between the two issues. The two issues are not identical, however. The standard under s. 57(2) was described by Justice Adair in *Van Dam v. Workers' Compensation Appeal Tribunal*, 2017 BCSC 227 [*Van Dam*] as follows:

> [39] "Serious grounds for relief" has been interpreted as a "reasonable likelihood or prospect that the petition will succeed": see *Vause*, at para. 65. The court is not to embark upon the actual judicial review at this stage but rather must make "a judgment call" about the case that would eventually be presented if leave were granted: see *Vause*, at para. 69; *Andrews v. British Columbia (Labour Relations Board*, 2005 BCSC 746; and *J.J. v. School District No. 43 (Coquitlam)*, 2009 BCSC 984, aff'd 2011 BCCA 343. At the same time, as Pitfield J. stated in *J.J.*, at para. 21:
>
> > . . . [B]ecause s. 57(2) of the *Administrative Tribunals Act* requires the court to be satisfied that there is a serious ground for relief, the court cannot ignore the tribunal's decision and the process and reasoning which led to the result. The court must consider whether there is a reasonable prospect or likelihood that the petition will succeed [citation omitted].

[86] In *Van Dam*, the respondent, Fraser Health Authority, filed a preliminary application, which was heard separately from the judicial review itself, to have the petition dismissed under s. 57. The court dismissed the petition. In *Webb v. Canada (Attorney General)*, 2019 BCSC 760, which relied upon *Van Dam*, the petitioner brought a preliminary application to extend the time for filing his petition. The court denied the application for an extension. In neither case, therefore, was the court asked to consider the timeliness issue at the same time as the petition itself.

[87] In the present case, the City asks the court both to dismiss the petition on the basis that it was filed late, and on the merits. It does so because it wants the court's decision to make clear that there is no merit to the petition.

[88] In my view, the interests of judicial economy favour not considering the preliminary timeliness issue. There would be no value for this court to engage in the largely duplicative exercises of determining first whether there are serious grounds for relief, and second whether relief should be granted. I accept that there might have been utility in considering the timeliness argument if the question of whether to exercise the court's discretion to extend the time limit would have turned on the reasons for the delay or substantial prejudice. As neither of those elements is in issue, I decline to consider whether Mr. Lawrence has established serious grounds for relief. Instead, I will proceed directly to considering whether he has established any basis for the Reconsideration Decision to be set aside on judicial review.

## Analysis

### Was WCAT's Reconsideration Decision inconsistent with its decision accepting the Prohibited Action Complaint and therefore patently unreasonable?

[89] As discussed, WCAT upheld Mr. Lawrence's Prohibited Action Complaint. Mr. Lawrence submits that WCAT's Reconsideration Decision on the mental disorder complaint was inconsistent with the Prohibited Action Complaint decision and, therefore, patently unreasonable.

[90] In the Original Decision, WCAT addressed the relationship between the two complaints at paras. 147–49. The Vice Chair noted at para. 147 Mr. Lawrence's argument that the "successful filing of a discriminatory action complaint confirms that the employer's decisions were made and then communicated in an abusive and threatening form." At para. 148 the Vice Chair held:

> [148] The worker's successful discriminatory action complaint does not require me to conclude that the employer's conduct toward the worker was abusive or threatening. The investigations legal officer (ILO) was considering an entirely separate matter, which was whether the raising of a safety concern played any part in the employer's decision initially to suspend the worker (in April 2017) and then subsequently to terminate his employment in May 2017.

[91] At para. 149, the Vice Chair concluded on this point that the "discriminatory action decision is concerned with whether the worker was disciplined in some way for raising a safety issue and nothing more."

[92] In the Reconsideration Decision at paras. 32–33, the Vice Chair summarily addressed Mr. Lawrence's argument that she was biased because she did not "accept that the discriminatory action decision … clearly demonstrated bullying, harassment, and intentional intimidation toward him by the employer." She referred to the passage in the Original Decision I just summarized and stated that "the fact that the worker disagrees that this distinction exists is not evidence of bias on my part."

[93] I agree with the Vice Chair that disagreeing with her on a point of law is not evidence of bias. More fundamentally, given that this argument is really about the substance of the Reconsideration Decision, and not an allegation of bias, I find that the distinction drawn by the Vice Chair between prohibited action (or discriminatory action) complaints and mental disorder complaints is not patently unreasonable. Both kinds of complaints can, as in the present case, arise out of the same set of factual circumstances. But they are subject to different statutory provisions and legal analyses. The fact that Mr. Lawrence's Prohibited Action Complaint was successful does not mean that his Mental Disorder Claim ought also to have been successful.

**Was WCAT's decision that Mr. Lawrence's mental disorder was not caused by a traumatic event or significant work-related stressors within the meaning of s. 135(1)(a)(i) or (ii) of the *Act* patently unreasonable?**

[94] Under s. 135(1)(a) and (b) of the *Act*, a mental disorder is only compensable if:

> (a) the mental disorder is either
>
> > (i) a reaction to one or more traumatic events arising out of and in the course of the worker's employment, or
> >
> > (ii) predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment;
>
> (b) the mental disorder is diagnosed by a psychiatrist or psychologist as a mental or physical condition that is described, at the time of diagnosis, in the most recent Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association;

[95] In the Original Decision, the Vice Chair considered whether Mr. Lawrence's mental disorder fell into either of these two categories at paras. 88–139. She found it was neither. She found that Mr. Lawrence did not experience a traumatic event or series of events, nor did he experience significant workplace stressors.

[96] In the Reconsideration Decision under review, the Vice Chair referred to these issues at para. 30 in considering Mr. Lawrence's submissions that she ignored Dr. Martzke's opinion. There is no analysis of whether Mr. Lawrence experienced a traumatic event or significant workplace stressors in the Reconsideration Decision, only a repetition of the Vice Chair's original finding that he did not.

[97] On judicial review, Mr. Lawrence takes issue with the Vice Chair's findings that he did not experience traumatic events or significant workplace stressors. I did not receive any submissions as to whether these are questions of fact or mixed fact and law. Regardless of how they are characterized, the Vice Chair's findings on these issues are subject to review on the patent unreasonableness standard.

[98] I find that the Vice Chair's findings that Mr. Lawrence did not experience traumatic events or significant workplace stressors are not patently unreasonable. In

the Original Decision, the Vice Chair considered the evidence on these issues at length. The evidence before the Vice Chair was capable of supporting her conclusions.

> **Was WCAT's reliance on Mr. Lawrence's "general characteristics" patently unreasonable as the characteristics relied upon were irrelevant?**

[99] Mr. Lawrence submits that the Vice Chair's assessment of his "general characteristics" was based entirely on irrelevant factors and failed to consider March 20, 2017 clinical notes from a counsellor that were referred to in Dr. Martzke's report.

[100] The concept of "general characteristics" was discussed by the Vice Chair at paras. 96–102 of the Original Decision. As explained by the Vice Chair at para. 96, the Practice Directive states that a "subjective and objective analysis" of workplace stressors is required when determining if they are "significant". The assessment "considers whether a reasonable person, in the worker's situation and with the general characteristics of the worker" would expect to find the event traumatic or the work stressor significant. At paras. 97–98, the Vice Chair considered two previous WCAT decisions interpreting "general characteristics". They include whether the worker has a physical characteristic that would make them particularly sensitive to comments or past life characteristics that cause them to view events as more stressful. Specifically, at para. 99, the Vice Chair wrote:

> [99] I agree with the panel's conclusion that general characteristics refers to the physical and mental characteristics of a worker including any significant life events or experiences that served to shape temperament, personality and specific vulnerabilities in such a way that the worker would view an event or behaviour as more stressful than would other lacking those "general" characteristics.

[101] The Vice Chair then considered Dr. Martzke's report, which contained a brief outline of Mr. Lawrence's early life, including being bullied as a child for being "different". Dr. Martzke noted that these experiences did not cause any significant problems. The childhood bullying might have made him more vulnerable to the "effects of bullying", but in Dr. Martzke's opinion it was not a causal factor. Dr.

Martzke concluded that it was unlikely Mr. Lawrence would have developed a mental disorder but for workplace stress and job loss.

[102] At para. 102, the Vice Chair concluded that Mr. Lawrence did not have any "general characteristics" that affected the weight to be given to the analysis of the interpersonal conflicts in the workplace.

[103] This issue was addressed in the Reconsideration Decision in the context of considering a December 2, 2020 report from Dr. Martzke that Mr. Lawrence wanted to introduce as new evidence. This was one of the pieces of evidence considered by the Vice Chair at para. 44 of the Reconsideration Decision. The Vice Chair wrote that in the December 2, 2020 report, Dr. Martzke reported that Mr. Lawrence reported having been bullied as a child, which might have made him more vulnerable. The Vice Chair held that this comment was not "new", as it was a repetition of what he had reported in the April 2018 report.

[104] I confess to some difficulty understanding the nature of Mr. Lawrence's concerns on this issue. He says that the Vice Chair's assessment of general characteristics in the Original Decision was based on irrelevant factors, namely having been bullied as a child. The Vice Chair held, in effect, that having been bullied as a child did not cause or contribute to his mental disorder, nor was it a "general characteristic" that made him more vulnerable to bullying at work. I do not understand Mr. Lawrence to disagree with these conclusions.

[105] From submissions he made orally, I believe Mr. Lawrence may take the position that the Vice Chair ought to have considered the distress he was experiencing from repeatedly raising safety concerns as part of his "general characteristics". The concept of "general characteristics" is a matter of Board practice, not policy. It is, therefore, not a binding concept which a Vice Chair is legally obliged to apply in considering whether workplace stressors were significant. The phrase appears to be understood to refer to pre-existing characteristics, such as a physical disability or past abuse, not to current characteristics developed in response to the alleged workplace stressors. It is a means of ensuring that the

analysis contains the subjective element required under decisions such as *Cima v. Workers Compensation Appeal Tribunal*, 2016 BCSC 931 [*Cima*].

[106] A review of the Original Decision makes clear that the Vice Chair was aware of the necessity of conducting a subjective and objective analysis. Further, she in fact did take Mr. Lawrence's subjective experience and perspective into account in her analysis. She concluded at para. 135 that the conflict he experienced did not rise to the level of bullying and harassment notwithstanding Mr. Lawrence's perception to the contrary.

[107] Mr. Lawrence complains that the Vice Chair failed to consider the March 20, 2017 clinical notes referred to in Dr. Martzke's April 2018 report. I have not located a specific reference to those notes in the Original Decision, although the Vice Chair did note at para. 11 of the Original Decision that Mr. Lawrence had gone to see a counsellor in March 2017, that he had called in sick, was not sleeping and was having nightmares. The clinical notes in question include what Mr. Lawrence reported to the counsellor about events at work and the stress he was feeling related to his job. Those issues were fully canvassed by the Vice Chair in the Original Decision. She was under no obligation to refer to each and every piece of evidence submitted in her decision.

[108] More fundamentally for present purposes, this is a judicial review of the Reconsideration Decision, not the Original Decision. There is no discussion of the clinical notes in the Reconsideration Decision. Rather, the Vice Chair discusses Mr. Lawrence's request to have Dr. Martzke's December 2, 2020 report accepted as new evidence. I have already recounted the Vice Chair's reasons for holding that Dr. Martzke's December 2, 2020 report was not "new". I do not see any error in her reasoning on this point.

**Was WCAT's decision to "overrule" Dr. Martzke's medical report with respect to causation patently unreasonable?**

[109] Dr. Martzke assessed Mr. Lawrence and wrote a report dated April 30, 2018. That report was considered by WCAT in its decision on the Prohibited Action

Complaint and in both the Original Decision and Reconsideration Decision dealing with Mr. Lawrence's Mental Disorder Claim. Mr. Lawrence submits that WCAT's decision in the Reconsideration Decision under review that Dr. Martzke's report did not establish that his mental disorder was caused predominantly by a significant work-related stressor, as required under s.135(1)(a)(ii) of the *Act,* was patently unreasonable.

[110] In the Original Decision, the Vice Chair stated at para. 85 that Mr. Lawrence had been diagnosed by Dr. Martzke with a major depressive disorder, single episode, and an adjustment disorder with anxiety. At para. 86 she referred to Dr. Martzke's report, and found on the basis of it that the requirement in the *Act* for a DSM diagnosis had been fulfilled, in the following words:

> [86] Dr. Martzke attributed the development and maintenance of the adjustment disorder to "work related stressors". Job loss, financial strain and inability to secure alternate employment were identified as significant in the development and maintenance of the major depressive disorder. I consider that this requirement of section 5.1 of the Act has been met.

[111] On reconsideration, Mr. Lawrence argued that the Vice Chair ignored Dr. Martzke's report, and Dr. Martzke's conclusion that Mr. Lawrence's mental disorder was related to the bullying and harassment at work. As stated at para. 26 of the Reconsideration Decision, Mr. Lawrence argued that this showed the Vice Chair was biased.

[112] The Vice Chair addressed this argument in the following terms at para. 27 of the Reconsideration Decision:

> [27] I understand the worker to be saying that I was required to accept Dr. Martzke's diagnosis, his attribution of causation, and his employment-related recommendations. This is not an argument about bias. Rather it is a disagreement with and a misunderstanding of the function or place of a psychological opinion in the adjudication of a mental disorder claim.

[113] At para. 30, the Vice Chair went on to write:

> [30] It is the job of the decision-maker to decide whether the circumstances being put forward in the claim were either significant work-related stressors or traumatic events. Only if I accepted that they were one or

> the other would the psychologist's opinion on causation become significant. The issue before me was not whether the worker's psychological condition was due to the workplace events he describe. I accept that they were. The question was whether those workplace events were traumatic events, and I found they were not, or significant workplace stressors, and I also found they were not. These are questions for the adjudicator to answer.

[114] On judicial review, Mr. Lawrence challenges this part of the Reconsideration Decision, arguing that the Vice Chair "overruled" Dr. Martzke's opinion on causation. In this regard, he relies on the decision of this court in *Cima*.

[115] In *Cima*, at para. 86, Justice Young held that WCAT disregarded the opinion of the worker's family doctor that his depression was triggered by a traumatic work-related event. At para. 90, Young J. noted that while WCAT is presumed to be an expert tribunal in relation to matters over which it has exclusive jurisdiction, it is not presumed to have medical expertise. At para. 93, she held that the WCAT decision in issue was patently unreasonable for a number of reasons, including that the Vice Chair disregarded the doctor's opinion without the benefit of a conflicting medical opinion.

[116] In my view, the Vice Chair in the decision under review did not "overrule" Dr. Martzke's opinion on causation. As she explicitly said at para. 30, she accepted Dr. Martzke's opinion that Mr. Lawrence's mental disorder was due to workplace events. The Vice Chair did not find that those workplace events were either significant work-related stressors or traumatic events. As she wrote, it was only if she found that the workplace events were significant work-related stressors or traumatic events that Dr. Martzke's opinion on causation would become significant.

[117] The situation is not analogous to *Cima*. The Vice Chair in the present case did not disregard or ignore Dr. Martzke's medical opinion. To the contrary, she accepted his opinion that Mr. Lawrence had a mental disorder which was caused by work-related events. There was no need to ask for or consider an additional medical report.

[118] Mr. Lawrence's submissions conflate the factual question of whether the workplace events caused his mental disorder with the legal question of whether those workplace events were significant work-related stressors or traumatic events. Dr. Martzke's opinion on the factual question was accepted by the Vice Chair. It is not the role of a psychologist or psychiatrist providing an opinion to the Board or WCAT to decide if workplace events were significant work-related stressors or traumatic events. Those are questions of law or mixed fact and law which are for the Board, at first instance, and WCAT, on appeal, to decide. The Vice Chair's decision with respect to the significance of Dr. Martzke's opinion to the legal issues she had to decide was not patently unreasonable.



**Did WCAT interpret the management exclusion clause in s. 135(1)(c) of the *Act* in a manner that was patently unreasonable?**

[119] Section 135(1)(c) of the *Act* provides that a mental disorder is compensable if:

> (c) the mental disorder is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

[120] The Vice Chair addressed the application of what was then s. 5.1(1)(c) of the *Act* at paras. 140–164 of the Original Decision. She held that the management exclusion clause applied to the City's conduct at the April 19 and 20, and May 11, 2017 meetings and its investigations of Mr. Lawrence's bullying and harassment complaint and the complaints against him by his co-worker.

[121] In the Reconsideration Decision under review, the Vice Chair addressed this issue at para. 31, where she wrote:

> [31] The worker also argues that I was biased because I "applied the exclusion clause to the meeting on May 11, 2017." The submission goes on to describe what took place and argues that the employer exclusion clause "only applies to discipline and for cause termination." This is not true. The exclusion clause, which protects the employer's right to manage the workplace is not restricted to those matters. It covers the actions of employers related to *all* of the terms and conditions of employment. The worker is, in effect, arguing that I reached the wrong conclusion about whether the employer exclusion (then contained in section 5.1(c)) covered the actions of the employer that the worker took issue with. This is discussed

> in detail from paragraph 140 onward. The worker is disagreeing with the conclusions I reached and that is not what a reconsideration decision can consider. The fact that the worker disagrees with my conclusion is not evidence that I was biased.
>
> [Emphasis in original.]



[122] Mr. Lawrence submits on judicial review that the Vice Chair's decision with respect to the application of the management exclusion clause was absurd. He also submits that her decision on this point is indicative of bias. In this regard, he cites the decision of Justice Marzari in *Bendera v. Workers' Compensation Appeal Tribunal*, 2018 BCSC 552 [*Bendera*]. In that case, the court judicially reviewed a WCAT decision that interpreted the then s. 5.1(1)(c) as excluding compensation "if the worker's mental disorder is brought about, made to happen, or arises from the action or decision of the employer relating to the worker's employment" (quoted at para. 58). Therefore, WCAT concluded that as "the worker's significant work-related stressor was caused by a decision of her employer that related to her employment, by necessity the worker's resulting mental disorder is excluded from compensation" (quoted at para. 58). WCAT reached that conclusion despite the fact that it found the employer's conduct to be coercive and threatening.

[123] The court in *Bendera* held WCAT's interpretation of the management exclusion clause was patently unreasonable as follows:

> [72] The Tribunal found itself compelled to disregard WCB policy based on perceived constraints in the language of s. 5.1(1)(c) that are not stated in that provision. Furthermore, I find that the Tribunal's statutory interpretation of s. 5.1(1)(c) is fundamentally inconsistent with the legislature's stated purpose for introducing s. 5.1, and the scheme of the *WCA* as a whole.
>
> [73] It is incongruous to the overall scheme of the *WCA* that bullying and harassing conduct would be compensable *unless* that bullying and harassment was conducted by the worker's employer in the context of an employment-related matter.
>
> [74] One can easily imagine harassment in the context of demands concomitant upon threats to a worker's continued employment that are more egregious than the conduct in this case.
>
> [75] This interpretation could result in a situation where an employer, who is in a particular position of power at the workplace, is afforded an exemption to threaten, intimidate, bully and harass, provided that their behaviour is related to the worker's employment status. On the other hand, coworkers'

> bullying and harassing behaviour that gives rise to a mental disorder would not fall under the s. 5.1(1)(c) exception.
>
> [76] This is an absurd result, and the Tribunal's Decision must be quashed in this case, not simply on the basis that it did not expressly engage in a full contextual analysis of the provision, but on the basis that its interpretation of s. 5.1(1)(c) so as to preclude all actions, conduct, and language of an employer from giving rise to compensation in all cases involving employment related decisions is so incompatible with the language of the provision, the scheme of the *WCA*, and its legislative intent, as to be patently unreasonable.

[124] The Vice Chair in this case did not fall into the same error identified in *Bendera*. In the Original Decision at paras. 141–42, the Vice Chair recognized that the management exclusion clause does not create an absolute shield for all employer decisions about a worker's employment. She stated that she agreed with previous WCAT panels that had found that "employer conduct which is abusive, physically or psychologically threatening, or criminal is not protected under the Act." At para. 152, the Vice Chair addressed the April 19 and 20, 2017 meetings, which she held were part of the City's investigation of allegations of harassment and bullying. She recognized that Mr. Lawrence was unhappy to hear from management that they thought he was contributing to the conflict at work. But she found that the City's statements to him were not threatening, coercive or abusive, and that he was not subject to targeted harassment. Similarly, at para. 158, the Vice Chair considered the City's delivery to Mr. Lawrence of the suspension letter. She found that the City was not being abusive or threatening. At para. 164, she found that the City's conduct with respect to its investigations was not egregious or outrageous, and that the management exclusion therefore applied.

[125] In the Reconsideration Decision under review at para. 31, the Vice Chair referred to her earlier analysis, and held that Mr. Lawrence was disagreeing with her conclusions, which was not a proper basis for reconsideration, nor evidence that she was biased.

[126] Mr. Lawrence points in particular to the passage at para. 31 in which the Vice Chair wrote that the exclusion clause "covers the actions of employers related to *all*

of the terms and conditions of employment" (emphasis in original). He submits that the exclusion clause does not apply to all terms and conditions of employment.

[127] While Mr. Lawrence continues to refer to bias in relation to this issue, this is not in substance an argument that the Vice Chair was biased; it is in substance an argument that her decision with respect to the application of the management exclusion clause was patently unreasonable.

[128] The sentence referred to by Mr. Lawrence might give rise to concerns, taken in isolation. But in context, it does not. The Vice Chair was responding to Mr. Lawrence's submission that the exclusion clause "only applies to discipline and for cause termination". The Vice Chair, correctly, pointed out that it is not so limited. The exclusion clause is intended to protect the employer's right to manage the workplace by making decisions relating to a worker's employment, including but not limited to discipline and termination decisions.

[129] I find that the Vice Chair's interpretation and application of the management exclusion clause was not patently unreasonable. She clearly recognized that it is not an absolute shield, and in particular that it does not shield employer conduct that is abusive or threatening. The Vice Chair found that the City's conduct was not abusive or threatening. There was evidence before the Vice Chair upon which she could reasonably have reached that conclusion. Having found that the City's conduct was not abusive or threatening, and that its conduct related to Mr. Lawrence's terms and conditions of employment, it was open to the Vice Chair to conclude that the management exclusion clause rendered his mental disorder non-compensable.

**Did WCAT breach the duty of procedural fairness because either WCAT, as an institution, or the Vice Chair, were biased against Mr. Lawrence due to their relationship with the City's legal counsel's law firm?**

[130] Mr. Lawrence submitted that that there was both institutional and personal bias, or a reasonable apprehension of bias, arising from the relationship between WCAT and the City's legal counsel's law firm. This argument is based on the fact that Gordon Campbell, the former Premier of British Columbia, is listed as "counsel"

on the law firm's website. Mr. Lawrence submits that Mr. Campbell's government created WCAT and appointed the Vice Chair who decided the Reconsideration Decision and others at WCAT, and that this gives rise to an apparent conflict of interest.



[131] WCAT was created by the *Workers Compensation Amendment Act (No. 2) 2002*, effective March 3, 2003. According to WCAT's website, the Vice Chair was appointed in March 2003. Mr. Campbell was Premier at that time.

[132] In *Speckling v. Local 76 of the Communications, Energy and Paperworkers' Union of Canada*, 2023 BCSC 26, Justice Iyer provided the following useful summary of the law related to allegations of bias:

> [14] The test for bias, regardless of whether a reasonable apprehension of bias or actual bias is alleged, is well-settled: Would a reasonable and informed person, with knowledge of all relevant circumstances, viewing the matter realistically and practically, think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly?: *R. v. S. (R.D.),* 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para. 31.
>
> [15] In *Taylor Ventures Ltd. (Trustee of) v. Taylor*, 2005 BCCA 350 at para. 7, the Court of Appeal set out the legal principles to be considered on a bias and recusal application:
>
> > [7] The leading case on recusal is *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (CanLII), [2003] 2 S.C.R. 259. Counsel for the respondent correctly identified the principles governing the reasonable apprehension of bias concept as discussed in *Wewaykum* and I quote from his factum:
> >
> > > 7. These principles are:
> > >
> > > (i) a judge's impartiality is presumed;
> > >
> > > (ii) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;
> > >
> > > (iii) the criterion of disqualification is the reasonable apprehension of bias;
> > >
> > > (iv) the question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;
> > >
> > > (v) the test for disqualification is not satisfied unless it is proved that the informed,

> reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly;
>
> (vi) the test requires demonstration of serious grounds on which to base the apprehension;
>
> (vii) each case must be examined contextually and the inquiry is fact-specific.
>
> [Emphasis in original.]

> [16] The strong presumption of judicial impartiality is not easily displaced. The party alleging bias bears the onus of establishing that the grounds for recusal are serious, cogent, and convincing enough to justify disqualification. The inquiry into a judge's conduct is contextual and fact-specific. Importantly, a judge must not be too quick to recuse themselves without an adequate evidentiary basis, both because of the delay to the proceedings and, for a judge to recuse themselves without an evidentiary basis can impact public respect for the administration of justice: *A.B. v. C.D. and E.F.*, 2019 BCSC 1057, at paras. 9-10.

[133] The facts that Mr. Campbell was Premier at the time WCAT was created and the Vice Chair was appointed, and that he is counsel with the firm representing the City of Nelson in these proceedings, does not give rise to a reasonable apprehension of bias. An informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, would not conclude it more likely than not that the Vice Chair, whether consciously or unconsciously, would not decide Mr. Lawrence's Mental Disorder Claim fairly. The fact that a person was a member of a government who created a tribunal and appointed an adjudicator twenty years ago, and is also associated with a legal firm representing parties before that tribunal, is not a serious ground for alleging bias against that tribunal or that adjudicator. If it were, members of the law firm in question would be barred from representing clients before WCAT, and likely a number of other administrative tribunals, in perpetuity. These circumstances do not give rise to a reasonable apprehension of bias.

**Did the assignment of the same Vice Chair who had decided the Original Decision to decide the reconsideration application give rise to a reasonable apprehension of bias?**

[134] As I understand his position, Mr. Lawrence does not dispute that in the normal course the Court of Appeal's decision in *Fraser Health* means that the same vice chair who heard and decided an appeal must decide a reconsideration application arising from their decision. However, I believe he submits that where it is alleged that a vice chair is biased or in a conflict of interest, then they should not decide the reconsideration application.

[135] In *Fraser Health*, Justice Chiasson, writing for the majority of the Court of Appeal, held at para. 178 that only the vice chair who was assigned to decide an appeal has the authority "to amend its decision in limited circumstance and to cure a jurisdictional defect in its proceedings". At para. 179, he held that the Chair did not have the authority to appoint a vice chair to reopen an appeal. On appeal to the Supreme Court of Canada, this aspect of the Court of Appeal's decision was not interfered with.

[136] In my view, the rule in *Fraser Health* applies. Only the vice chair who decided an appeal has the authority to cure jurisdictional defects, including breaches of procedural fairness. Administrative decision-makers and judges routinely hear and decide applications that they should recuse themselves due to allegations of bias. Therefore, the appointment of the same Vice Chair to decide Mr. Lawrence's reconsideration application was required under *Fraser Health*, and does not give rise to a reasonable apprehension of bias.

**Did WCAT's failure to consider the City's alleged "perjury" breach procedural fairness or result in a patently unreasonable decision?**

[137] Mr. Lawrence submits that the City committed "perjury" in the WCAT proceedings, and that the Vice Chair failed to consider his arguments about this alleged perjury.

[138] As I understand this submission, Mr. Lawrence argues that the City, with the knowledge of its counsel, manufactured documents to substantiate its position that he engaged in inappropriate workplace conduct, such as coming at his manager and poking him in the chest, which he says never occurred. He submits that if he had engaged in the kind of behaviour alleged by the City, he would have been disciplined, and would not have received a positive performance appraisal.

[139] In the Original Decision at para. 106, the Vice Chair stated that there were areas in which the evidence given by witnesses conflicted. This included the finger poking incident. At para. 109, she referred to Mr. Lawrence's evidence with respect to this incident. At para. 111, she found that Mr. Lawrence's frustrations at having what he believed to be legitimate safety concerns dismissed did manifest in behaviours such as swearing and finger-pointing. More generally, at para. 113, the Vice Chair found that the witnesses gave their personal perceptions of events, that there was interpersonal conflict, and that they had different perceptions of the same events.

[140] In my view, Mr. Lawrence is seeking, through the allegation that the City committed perjury that the Vice Chair failed to address, to relitigate the factual findings made by the Vice Chair. It is not the role of this court on judicial review to sift through the evidence and determine if it would have made the same findings of fact that the Vice Chair did. As long as there is some evidence upon which the Vice Chair could have made the findings of fact she did, the decision is not patently unreasonable. I conclude that there was evidence before the Vice Chair upon which she could have made her findings.

**Did WCAT breach procedural fairness or otherwise err in dealing with Mr. Lawrence's application to adduce new evidence?**

[141] Mr. Lawrence raises a concern about the process employed by WCAT in dealing with his application to adduce new evidence in his application for reconsideration of the Original Decision. As I understand his position, he submits that the WCAT Chair already determined that the evidence he wished to adduce was

properly admissible before referring his application for reconsideration to the Vice Chair. As a result, the Vice Chair erred in considering whether the evidence was admissible and determining that it was not on reconsideration.

[142] The relevant provision of the *Act* is s. 310. Subsections (2) and (3) provide as follows:

> (2) A party to a completed appeal may apply to the chair for reconsideration of the decision in that appeal if new evidence has become available or been discovered.
>
> (3) On receiving an application under subsection (2), the chair may refer the decision to the appeal tribunal for reconsideration if the chair is satisfied that the evidence referred to in the application
>
> > (a) is substantial and material to the decision, and
> >
> > (b) did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

[143] Looking at s. 310 in isolation, Mr. Lawrence's position would appear to have merit. On its face, it indicates that the Chair is to make the decision whether the evidence is substantial and material, and did not exist or could not have been discovered with reasonable diligence, and that having made that decision, then may refer the decision to a vice chair for reconsideration.

[144] Counsel for WCAT brought to the attention of the court and the other parties a series of delegation decisions made by the Chair. In these decisions, the Chair delegates certain powers held by the Chair to other persons within WCAT on an ongoing basis. Decision No. 28, made July 29, 2021, is representative. At para. 6 the Chair refers to s. 281 of the *Act*, which authorizes the Chair to delegate powers or duties to other members or officers of WCAT. "Member(s)" is defined to include Vice Chairs. At para. 26, the Chair delegates their power under s. 310 of the *Act*, in the following terms:

> I delegate the authority of the chair under section 310, to refer an appeal tribunal or appeal division decision to the appeal tribunal for reconsideration to the following position (upon assignment by the chair, vice chair or deputy registrar):
>
> > member.

[145] Counsel for WCAT submitted, and I accept, that the effect of this delegation decision is to delegate to the vice chair assigned to decide a reconsideration application the Chair's power under s. 310 of the *Act* to decide if evidence is material and substantial and is new or could not have been discovered with reasonable diligence at the time of the original decision. Delegation decisions of this type were in place at all relevant times.

[146] I therefore find that the Chair had not already made the decision about the "new evidence" Mr. Lawrence sought to submit, and that it was within the authority of the Vice Chair deciding his reconsideration application to make that decision.

[147] I am not certain if Mr. Lawrence also takes the position that the substance of the Vice Chair's decision with respect to the evidence he wished to adduce on reconsideration was patently unreasonable. For the sake of completeness, I find that the Vice Chair's decision with respect to the evidence Mr. Lawrence sought to adduce was not patently unreasonable. The Vice Chair reproduced s. 310 at para. 38 of the Reconsideration Decision, and set out the applicable interpretive principles at paras. 39–43. At para. 44, she addressed each of the pieces of evidence Mr. Lawrence sought to have considered. In each case she made a reasoned determination of whether the evidence in question was new or could have been obtained with reasonable diligence. Where appropriate, she also considered whether the evidence was material or substantial to the questions in issue. No basis has been established upon which this court could conclude that any of these determinations was patently unreasonable.

## Conclusion

[148] For the reasons given I have found that there is no basis upon which the Reconsideration Decision under judicial review could be found to be patently unreasonable. The process employed by WCAT met its duty of procedural fairness. In particular, there was no bias nor any reasonable apprehension of bias on the part of the Vice Chair or WCAT as an institution.

[149] While I have addressed each of the individual concerns raised by Mr. Lawrence separately, I would add that, considering the Reconsideration Decision as a whole, I find that it is not patently unreasonable, and that WCAT acted in accordance with procedural fairness.

[150] I therefore dismiss the petition for judicial review.

[151] I appreciate that this proceeding was difficult for Mr. Lawrence, and that he will be deeply disappointed in this decision. However, I am satisfied that he was accorded a fair and non-biased process by WCAT, and that the Reconsideration Decision was not patently unreasonable.

[152] In accordance with normal practice, WCAT did not seek costs and asked to have no costs ordered against it. The City submitted that it was entitled to its costs, but in recognition of Mr. Lawrence's personal circumstances, did not seek an order that Mr. Lawrence pay its costs.

[153] No costs are ordered.

"L.M. Lyster J."

LYSTER J.