

CANADA / JUDGMENT

Agarin v. British Columbia (Workers' Compensation Board)

2020 BCSC 739

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2020 BCSC 739 Agarin v. British Columbia (Workers' Compensation Board)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Agarin v. British Columbia (Workers' Compensation Board),

2020 BCSC 739

Date: 20200513

Docket: S126074

Registry: Kelowna

Between:

Ruvelyn Agarin

Petitioner

And

British Columbia (Workers' Compensation Board)

and Workers' Compensation Appeal Tribunal

Respondents

Before: The Honourable Mr. Justice G.P. Weatherill

On judicial review from: A decision of the

Workers' Compensation Appeal Tribunal, dated October 30, 2019

Reasons for Judgment

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Place and Date of Trial/Hearing:

Kelowna, B.C.

April 20 - 22, 2020

Place and Date of Written Submissions:

Kelowna, B.C.

April 28, 2020

Place and Date of Judgment:

Kelowna, B.C.

May 13, 2020

Introduction

- [1] This is an interim application ("Application") filed by the petitioner on April 6, 2020, in an action filed December 20, 2019 ("Petition") seeking judicial review of various decisions made by the Workers Compensation Board ("Board" or "WCB") and the Worker's Compensation Appeal Tribunal ("WCAT").
- [2] Pending the hearing of the Petition and because of her dire financial circumstances, the petitioner seeks the immediate reinstatement of wage loss and other benefits retroactive to January 18, 2018, when she says the Board wrongfully terminated them.
- [3] On April 2, 2020, Justice Church allowed the Application to be filed and heard on an urgent basis.

- [4] Save for costs, the substantive relief the petitioner seeks in the Application is against the Board. Accordingly, WCAT took no position on the Application although it filed written submissions on the issue of costs.
- [5] Throughout these reasons, references to the "Act" mean the Worker's Compensation Act, R.S.B.C. 2019, c. 1. The Act was recently amended, effective April 6, 2020, with a complete reorganization of section numbers. References to sections of the Act will be to the new section numbers with the corresponding old section numbers in square brackets for ease of reference.

The Application

- [6] The Application seeks various orders, including:
- a) That the petitioner be declared totally disabled from employment as a result of her workplace injury, within the meaning of ss. 190 and 191 [s. 22 and s. 29(1)] of the Act;
 - b) That the petitioner is entitled to immediate payment of all unpaid temporary total disability ("TTD") benefits from the inception of her claim to date;
 - c) That the petitioner is entitled to health care benefits to be paid by the Board, including the cost of psychological counselling no less than twice per week, all necessary equipment, transportation expenses and subsistence needs;
 - d) That the Board be directed to remove the petitioner's current case manager and replace her with a compassionate, worker-friendly representative in the Okanagan, instruct him or her to administer her claim in a worker-friendly manner including to assist her in locating alternative suitable accommodation of her choosing; and
 - e) That the Board fund the travel, medical and other costs associated with the petitioner flying to California for surgery to her low back to repair an annular tear and disc herniation she asserts is the cause of her ongoing disability,

("Orders Sought").

- [7] The petitioner frames the Orders Sought as an interim injunction prohibiting the Board from wrongfully terminating her compensation and other benefits.
- [8] In addition to the Orders Sought, the petitioner seeks increased or special costs against the Board for what she says is their improper handling of her claim, and against WCAT for its lack of independence and impartiality by assisting the Board in the defence of the Application.
- [9] Section 10 of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, permits the court to make interim orders it considers appropriate pending the final determination of a judicial review.

Summary of Decision

[10] For the reasons that follow, the Application is dismissed. This Court does not have the jurisdiction to make the Orders Sought on an interim basis.

Overview

[11] The circumstances resulting in the filing of the Petition and Application began on April 29, 2017, when the petitioner slipped and fell at work ("Fall"). What followed was a series of some 28 claims resulting in various Board decisions, reconsiderations, applications for review to the Board's Review Division and appeals to WCAT ("Decisions"). The petitioner disagrees with the majority of the Decisions, some of which are still working their way through the system. Some have been remitted to the Board for further consideration and/or reassessment. The claims are fluid and have evolved over time with the Board's Decisions changing as more information is received.

[12] Meanwhile, the petitioner is convinced that the Board has dropped the ball, has failed to properly assess and treat her and she has lost patience. She seeks intervention by this Court on judicial review. Specifically, she seeks orders declaring:

- a) a Board decision dated January 18, 2018, stating that the petitioner's previously accepted back strain injury suffered during the Fall had resolved ("January 18, 2018 Decision");
- b) a Review Division decision dated May 16, 2019, denying her extensions of time to apply for reviews ("May 16, 2019 Decision");
- c) a June 5, 2019 Review Division decision upholding an earlier Board decision ("June 5, 2019 Decision"); and
- d) a July 11, 2019 Review Division decision upholding an earlier Board decision ("July 11, 2019 Decision");

are "null and void and of no force or effect".

[13] Issues raised respecting certain of these decisions overlap with other decisions, reviews, appeals and reconsiderations. By any standard, the petitioner's medical issues and claims are complex.

Background

[14] The petitioner is a 47-year-old migrant worker who immigrated to Canada in around 2011. She applied for permanent residency in February 2015. She was employed as a caregiver from March 2011 through August 2011 and from July 2013 through October 2013. She then obtained employment from Park Island Holdings Ltd. which operates a Wendy's restaurant franchise in Kelowna, eventually securing a supervisory position.

[15] She says she was physically and mentally healthy until April 29, 2017.

- [16] On April 29, 2017, she slipped and fell on her buttocks as she was in the process of closing the restaurant for the night and suffered an injury to her low back. Despite experiencing immediate pain in her left lower back she was able to complete her shift that night as well as shifts over the next two weeks, albeit with increasing pain symptoms.
- [17] She was seen by her family doctor, Dr. Livingston on May 15, 2017, who felt she should not return to work pending further assessments. She has not worked since.
- [18] She filed a WCB claim on May 25, 2018. It was assigned number 22276999. This claim was the genesis of all other claims, decisions, reviews, appeals and issues that have arisen ("Initial Claim").
- [19] The Board accepted the Initial Claim on the basis that she suffered a lumbar sprain/strain injury. Temporary total disability wage loss benefits were initiated.
- [20] X-rays of the petitioner's back taken in May 2017 did not detect any fractures, dislocations or other abnormalities. She was prescribed exercises and physiotherapy which she says made things worse and her pain intensified.
- [21] A June 16, 2017 CT scan of her lower back disclosed a small posterior disc protrusion and moderate facet joint degeneration. Both these findings were felt to be insignificant and did not explain her ongoing pain symptoms.
- [22] Physiotherapy continued. She started a Board-sponsored, two-week graduated return to work program ending on August 25, 2017.
- [23] A September 21, 2017 MRI scan failed to assist much with the diagnosis of her ongoing and increasing pain, although it did note a left foraminal annular tear of approximately 5.5 mm at the L4/5 level that "can be associated with discogenic back pain". No findings of nerve root impingement were noted.
- [24] By October 2017, the petitioner's pain complaints had spread from her hips and lumbar area and left leg, into her upper back, neck and shoulder regions. Her case was assessed by Dr. Adrian, a physiatrist, who diagnosed soft-tissue injury involving the left buttocks and left leg. He felt it possible that she may have suffered a contusion of her left lumbosacral plexus in the Fall but he felt her presentation was atypical and unusual given the delayed onset of the leg symptoms.
- [25] On October 27, 2017, Dr. Adrian reassessed her case and diagnosed her as having a generalized pain disorder related to soft-tissue injuries. He recommended that she be given pain management and coping strategies.
- [26] On November 28, 2011, Dr. Rhine, another physiatrist, assessed her case. His impression was that her pain was consistent with mechanical low back pain. He felt that she had no findings of nerve root impingement or disc protrusion on imaging. Respecting the annular tear at L4/5, he stated:

Although the radiologist states otherwise, it is my opinion that this is unlikely to cause back pain. The disc itself is thought to be a pain-insensitive structure. Without nerve root impingement, it is unlikely that this change itself would account for her back pain.

[27] Because by that point, the petitioner had been suffering from back pain for over six months, Dr. Rhine was not optimistic that she would succeed in a rehabilitation program. He felt that her problem:

. . . had mutated to what I would call a pain management problem at this point in time. She has abnormally high scores on pain coping, kinesophobia, and the Hospital Anxiety and Depression Scale.

[28] He felt that she would best be managed in a pain management program. He did not feel that a referral to a neurosurgeon was warranted.

[29] Meanwhile, on November 17, 2017, the petitioner had been referred by the Board to Lifemark Occupational Rehabilitation in Kelowna for a rehabilitation program ("Lifemark"). Lifemark estimated that she would be discharged from the program and fit to return to work by January 11, 2018. She participated in the program until early January 2018 when she fell sick with the flu and was unable to attend the final two weeks of the program.

[30] She was summarily discharged from the Lifemark program on January 11, 2018. She did not attend the discharge testing/assessment/meeting. The discharge report was prepared by Mr. Wautier, an athletic therapist/program manager with Lifemark. Despite noting that the petitioner could not meet 9 out of 10 of her job demands he curiously concluded that she was "fit without limits". The discharge report stated:

Based on the mechanism and severity of injury, the time elapsed since injury, the treatment provided and the medical information available, Ms. Agarin is discharged as fit to return to work without limitations as it pertains to the injury accepted under this claim.

[31] The injury accepted under the claim at that point was a lumbar strain/sprain.

[32] Accepting Lifemark's discharge report, the Board concluded that the petitioner was no longer disabled and in the January 18, 2018 Decision terminated her wage loss benefits retroactive to January 14, 2018.

[33] The January 18, 2018 Decision stated:

Medical and other information indicates that your disability is no longer temporary. Your disability is considered permanent. As a result, your wage loss benefits will end on January 14, 2017 [sic].

The reason for this decision is that you have had numerous medical investigations without any cause for your back pain.

there is no indication that you continue to have a back strain injury. You continue to report pain however; there is no medical evidence to support this is from a back strain injury. There is no medical evidenced to support any back pathology.

You have reported ongoing pain. You have reported this pain would limit you from working. Your pain is subjective. This means there is no medical evidence to support anything medically wrong with your back. I have no objective medical or clinical evidence that you cannot return to work as a Wendy's manager.

[34] The petitioner was advised that she could apply within 90 days to have the January 18, 2018 Decision reviewed by the Review Division. She was also advised of the process for applying for a review.

[35] The petitioner was self-represented and had no prior involvement with the WCB system. She sought the assistance of a government supplied worker's advisor who, instead of asking for a review by the Review Division as the petitioner says she requested, sought a reconsideration by the same case manager who made the January 18, 2018 Decision.

[36] On February 27, 2018, that case manager accepted a claim for chronic back pain ("February 27, 2018 Decision"). Her letter stated:

It is my decision that the claim can be accepted for chronic back pain. The reason for this decision is that the claim was initially accepted for a back strain injury. This has now resolved and she continues to report ongoing back pain more than 6 months post injury.

[37] The claim's manager referred the matter to Disability Awards for further review.

[38] On July 24, 2018, the petitioner's advisor sought a review of the February 27, 2018 Decision to the Review Division. The Review Division rendered its decision on October 22, 2018. It concluded that it did not have sufficient and reliable information to arrive at a conclusion. It stated that:

. . . significant further investigation is required to clarify whether the worker has limitations related to her compensable chronic pain condition that prevent her from returning to her pre-injury occupation.

[39] The Review Division referred the issue back to the Board to "undertake such further investigation as it considers necessary".

[40] Meanwhile, on August 13, 2018, the Board granted the petitioner a permanent disability award of 2.5% of total disability for the accepted work-related chronic pain condition that was referenced in the February 27, 2018 Decision ("August 13, 2018 Decision").

[41] The Board promptly arranged for the petitioner to attend a Functional Capacity Evaluation ("FCE") on November 20, 2018, the upshot of which was, in part, that the petitioner was:

... able to tolerate part-time work (i.e. up to 6 hours) and is best suited to working in a position where she can alternate between sitting and standing and self-pace as needed.

[42] The FCE recommended that the petitioner consult with her doctor regarding options to better manage her low back and buttock pain.

[43] The Board's medical advisor was consulted and on December 10, 2018, concluded that because her complaints had lasted some 18 months, she had been enrolled in two previous multimodal rehabilitation programs without significant improvement and had two essentially normal MRI's:

... at this point in time, it is medically reasonable to conclude that for this patient psychosocial behavioral factors are significantly in play.

... there are no medically reasonable or plausible restrictions of objective limitations to endorse.

[44] On December 18, 2018, the Board informed the petitioner of its decision that, all things considered, she was going to be referred to the Board's Vocational Rehabilitation Services department for return to work assistance ("December 18, 2018 Decision").

[45] In March 2019, the petitioner was able to retain counsel to represent her. A request to review the December 18, 2018 Decision was made. The petitioner also applied for an extension of time to apply for a review of the January 18, 2018 Decision and the August 13, 2018 Decision. Those requests for review were received by the Review Division on April 14 and 26, 2019, respectively.

[46] On May 16, 2019, the Review Division declined the petitioner's requests on the basis that no special circumstances existed, a prerequisite under the Act ("May 16, 2019 Decision"). The petitioner requested that the Review Division review the May 16, 2019 Decision, which request was declined on January 22, 2020.

[47] Following further requests by the petitioner, the Board reconsidered various issues respecting her back in terms of her work-related back complaints, including whether: i) the L4/5 annular tear; ii) nerve root impingement; iii) L5-S1 disc herniation; iv) facet joint degeneration; v) sacroiliac injury; vi) left gluteal contusion; vii) lumbar contusion; viii) left leg and left foot complaints and ix) mechanical back pain were related to the Fall.

[48] Of the nine issues, the Board accepted only the sacroiliac injury, or more correctly her chronic pain in the left SI joint, as related to the Fall ("June 12, 2019 Decision").

[49] The June 12, 2019 Decision was promptly appealed to the Review Division.

[50] Dr. Beckman, a neurologist, conducted a neurological assessment of the petitioner on October 8, 2019. He could not find a neurological cause for her complaints and diagnosed her as having a chronic pain syndrome.

- [51] Dr. Rajasekaran, a physiatrist, assessed her on December 6, 2019, noting that she was unable to walk without assistance of a walker. Because her left side felt colder than her right side with skin mottling, he queried if she was suffering from a condition known as Complex Regional Pain Syndrome ("CRPS").
- [52] Accordingly, in January 2020, the Board referred the petitioner for a Medical and Return-to-work Planning Assessment ("MARP") to determine whether she met the criteria for CRPS.
- [53] The petitioner has so far refused to attend the MARP assessment. In a lengthy letter to the Board dated January 29, 2020, which is highly critical of its handling of the petitioner's case, various reasons were cited for her refusal to attend including:
- a) That the petitioner was denied the payment of medical equipment until she attends MARP;
 - b) That the uncontroverted medical evidence on the claim file was that the petitioner is not medically fit to work;
 - c) That the Board was remiss in both completing its medical investigations early in the claim and extending surgery to the petitioner. Had the Board done so, she may well have returned to work long ago;
 - d) That CRPS is a diagnosis that may only apply when no other explanation for the pain exists. Such is not the case with the petitioner and the Board has simply ignored the imaging studies confirming the source of her back pain;
 - e) That the proposed MARP physician does not have the expertise required to adequately assess the underlying medical issues that would explain the petitioner's pain;
 - f) That the Board's failure to properly investigate the petitioner's medical condition constitutes "bad faith or at best" is "grossly negligent";
 - g) That because the Board has failed to complete its medical investigations into the full nature and extent of the petitioner's injuries, a consideration of CRPS is premature;
 - h) That by requiring the petitioner to attend the MARP, the Board is attempting to use a "cloak within which to dismiss all other possible diagnoses";
 - i) That the Board's referral to MARP is a bad faith attempt to put a label on the petitioner and thereby use that label as an excuse to avoid completing its medical explanations and evade its compensatory obligations;
 - j) That attempts to treat only the petitioner's pain without looking at other possible causes besides CRPS would be "absurd and inhumane";
 - k) That the Board provided the petitioner's potential health providers with inaccurate and incomplete medical information in advance which represented serious hurdles to, delayed, and sabotaged her ability to obtain medical treatment for her injuries; and

- l) That the Board failed to reimburse the petitioner for claimed expenses.
- [54] In sum, the petitioner continues to complain of severe pain with decreased ability to sit, stand and walk. She complains of sleep disruption, left sided sciatica and numbness in her left leg. Her condition has deteriorated to the point of her requiring the use of a rolling walker and pelvic support. Essentially, she says she is totally disabled from any type of employment. She says she is mostly bedridden and is suicidal.
- [55] Frustrated with her lack of progress and, seemingly out of desperation, she consulted Dr. Tony Mork, a California orthopaedic surgeon, by telephone. Dr. Mork has apparently reviewed the various radiologic imaging taken of the petitioner's back and has recommended that she travel to California so that he can perform a discogram and repair the foraminal annular tear. Part of what she seeks in the Application is an order directing the Board to pay the travel, medical and other expenses associated with Dr. Mork's proposed surgery ("Surgery"). The approximate all-in cost of the Surgery is USD \$30,000.
- [56] The Board has declined her request.
- [57] Since the Fall, the petitioner's medical issues have been assessed by multiple doctors including general practitioners, a neurologist (Dr. Beckman) and three physiatrists (Drs. Adrian, Nowak and Rajasekaran). None of these doctors have been able to determine the organic cause of her pain. Although she presents with a neurological disorder, assessments, which included CT scans and MRIs have been unhelpful in providing a definitive diagnosis of the problem.
- [58] The upshot is that the Board has accepted that the petitioner is suffering Fall-related sciatic pain, chronic pain and Major Depressive Disorder. She is currently receiving weekly psychological therapy funded by the Board.
- [59] In the Board's view, however, its acceptance of her chronic pain condition and Major Depressive Disorder did not equate to the petitioner being totally disabled from employment and it declined to reinstate her wage loss benefits.
- [60] All of its decisions are the subject of various applications for review to the Review Division and are in the process of working their way through the WCB system.

Petitioner's Position

- [61] The petitioner seeks orders staying the Board's decisions pending judicial review. She says her benefits should never have been terminated and should be reinstated retroactive to January 18, 2018. She says that because there is no explanation for her chronic pain condition, causation must be inferred: *Fraser Health Authority v. WCAT*, 2016 SCC 25 at paras. 31, 32 and 38. Even if there was evidence supporting different findings on causation, if that evidence was evenly divided, the Board was required to resolve the issue in the petitioner's favour: Act, ss. 303 and 339 [ss. 250(4) and 99(3)].

- [62] She points to the recent comments of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 77, 79 [Vavilov] to the effect that administrative tribunals, like the Board, owe individuals like the petitioner, an extremely high duty of fairness. The petitioner complains that the Board failed or refused to properly investigate her physical and psychological complaints and that such failure was an egregious breach of its statutory duties: *Greig v. Desjardins Financial Security Life Assurance Company*, 2019 BCSC 1758 at para. 151; *Djakovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2010 BCSC 1279 at paras. 44, 48, and 56.
- [63] She strongly asserts that the issue of access to justice is squarely invoked in this case and that the Act is to be interpreted in a manner which facilitates access to justice, particularly because it involves a vulnerable petitioner. The Board, she asserts, has demonstrated a pattern of attempting to evade its statutory obligations to compensate the petitioner and has failed to administer her claim in a manner consistent with its obligations. She cites *Pasiechnyk v. Saskatchewan (Worker's Compensation Board)*, [1997] 2 S.C.R. 890 at para. 27 in support.
- [64] She argues that an injunction is required at this stage to hold the Board to account, level the playing field, assure that the Board complies with its statutory obligations and provide the petitioner with a subsistence level of secure compensation and other benefits.
- [65] In short, she says that when she slipped and fell at work on April 29, 2017, and landed on her buttocks, she suffered injuries that have resulted in steadily increasing symptoms that have prevented her from being able to return to work. She says that the WCB system has failed her completely by failing to consider, investigate and accept the injuries she says she has, including an annular tear to the L4-5 disc and herniated disc that were disclosed on imaging. She says she has been left to fend for herself at a subsistence level, is functionally disabled, is about to be evicted from her rental accommodation because she has been unable to pay her rent, has become depressed and is suicidal. She says she is in desperate need of financial and medical help.
- [66] In the petition, the petitioner asserts that the Board made "countless errors which profoundly impact virtually all aspects of the Claim", including conflating "injury" with "compensation". She was injured at work and just because the injury has not yet been pinpointed, does not mean she is not entitled to compensation. She is entitled to benefits and the Board must pay her. She asserts these errors meet the unreasonableness standard of review.
- [67] She says her claim went sideways when her claim's manager accepted the pre-determined and internally inconsistent comments of an athletic therapist with Lifemark who did not have appropriate medical qualifications, and improperly "bootstrapped" them into the January 18, 2018 Decision terminating her benefits. The flawed January 18, 2018 Decision was then relied on as the basis for all subsequent decisions. She says that the entire Board process will be found by this Court on judicial review to have been unreasonable.

- [68] She says it is not her fault that an application to review the January 18, 2018 Decision was not made. Contrary to her request, her government appointed worker's advisor failed to do so.
- [69] She says the Board and its Review Division failed to properly consider its own processes, ignored its own policies and failed to grapple with whether they hindered, delayed or impeded the petitioner's claim. She criticizes the Board's medical advisors as preparing inadequate, erroneous "throwaway reports".
- [70] She argues that the Board's decisions are patently unreasonable and incorrect. She asserts its failures have resulted in significant delay, severe hardship and depression. She likens her case to the facts of Greig where the court was quite critical of how a private long-term disability insurer treated a claimant with psychological injuries. The court held that the insurer's failure to investigate obvious mental health aspects of the claimant's disability was an egregious breach of its duty of good faith and that its focus on secondary-gain issues and its insistence on objective evidence of disability was improper.
- [71] Even though Greig is not a WCB case, she argues that the legal principles are the same. She says the Board is in a monopoly position by statute and has special responsibilities and duties to injured workers, no less than the high standards required of private insurers. This is particularly true of claimants who are impoverished and suffer mental distress: *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329.
- [72] She says the matter is urgent. She was hopeful that her petition for judicial review could be heard quickly but the COVID-19 crisis has delayed and further fractured her claim. She is at wits' end and cannot wait for the Board, the Review Division or the WCAT any longer. She seeks an end to the "merry-go-round" she is on. She wants this Court to step in and restore her benefits and make orders for medical treatment pending the judicial review hearing.
- [73] She frames the Application as being for an interim injunction that the Board "refrain from denying" her benefits. She relies on the well-known test for injunctive relief and says she has a serious question to be tried, failure to grant the relief will result in her suffering irreparable harm and that the balance of convenience favours her case: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311.
- [74] She seeks to bypass the WCB process and obtain immediate financial and other relief from the Court, including an order that the Board fund the Surgery. She asserts that the WCB process is intended to protect workers who are injured at work, but the process will only work if the Board complies with the law. She argues that her case is very clear and is worthy of compensation. She has a long work history, was physically and mentally healthy prior to the Fall, had no prior medical history, slipped and fell on her buttocks and now cannot work. She says the fall caused a disc protrusion and "severe" annular tear in her low back.

- [75] In support of her assertion that this Court has the jurisdiction to grant the orders she seeks, she relies on the comments of the Court of Appeal in *Jozipovic v. British Columbia (Worker's Compensation Board)*, 2012 BCCA 174 at paras. 9, 58-59 and 67 that this Court has jurisdiction over the Board:
- [9] While I recognize that both the WCB and the WCAT are entitled to deference within their spheres of jurisdiction, I am not persuaded that the courts are consigned to the role suggested by the appellant. For reasons that follow, I am of the view that the chambers judge had jurisdiction to find the impugned policy to be invalid, and, in fact, ought to have gone further than she did in invalidating the policy. I would not give effect to the claims of the WCB and the WCAT that they alone are charged with determining the reasonableness and validity of policies established by the WCB's board of directors. Accepting such a proposition would be an abdication of the supervisory role of the superior courts vis-à-vis administrative tribunals. Indeed, it is not an exaggeration to say that to accede to all of the arguments presented by the appellant would be to deny the constitutional role of the Supreme Court of British Columbia in maintaining the rule of law in this Province.
- ...
- [58] The proposition put forward by the appellant in this case is extraordinary. It suggests that the judicial review function ordinarily exercised by the Supreme Court of British Columbia has been vested exclusively in the WCAT by provincial legislation.
- [59] Supervisory jurisdiction over inferior tribunals is a core function of a superior court. Any attempt to remove that function in respect of a particular tribunal would violate s. 96 of the Constitution Act, 1867. In *Crevier v. A.G. (Quebec)*, [1981] 2 S.C.R. 220, the Supreme Court of Canada considered the degree to which a province may, through the use of a privative clause, insulate an administrative tribunal from judicial review. It held that while privative clauses may validly restrict courts from reviewing tribunal decisions for errors of fact and law, they may not oust the power of superior courts to review tribunal decisions for errors of jurisdiction.
- ...
- [67] It follows that I do not accept the appellant's argument that the Supreme Court lacked jurisdiction to embark on a direct review of the board of directors' policy.
- [76] She asserts that these passages give this Court jurisdiction to step in and override the Board's Decisions, even though the claims process is ongoing, and make the interim declarations and orders she seeks.

Board's Position

- [77] The Board says that the various claims being made by the petitioner are matters wholly within the jurisdiction of the Board and this Court cannot intervene no matter how sympathetic a case the petitioner may present. The issues being dealt with are complex and are the subject of ongoing investigations.
- [78] The Board says that it has fully complied with the legislative processes, policies and procedures that guide the WCB scheme. It says that it has done everything it is obliged to do for the petitioner and is continuing to do so.
- [79] It says there is no basis in law for the Orders Sought.
- [80] The Board argues that in reality, the petitioner is seeking an interim "stay" of the January 18, 2018 Decision which is not before the Court in the Petition. Until the May 16, 2019 Decision is set aside (which is what is sought by the petitioner) this Court cannot weigh in on the January 18, 2018 Decision.
- [81] Furthermore, the Board points out that the January 18, 2018 Decision has almost entirely been overturned by two further decisions of the Board. The only matter that remains respecting the January 18, 2018 Decision is whether the lumbar strain/sprain (which is the only claim that was accepted in the first instance) has resolved. That matter is still before the Board.
- [82] Respecting the disability award of 2.5% which was the subject of the August 13, 2018 Decision, the Board has no ability to alter its decision. The petitioner must be successful in overturning the March 16, 2019 Review Decision and be successful in a review of the August 13, 2018 Decision, at WCAT or on judicial review.
- [83] Additionally, the Board points out that the petitioner's claim has recently been re-opened on her entitlement of wage loss related to accepted conditions and the matter is in the process of being re-assessed. Likewise, the Review Division has recently accepted the petitioner's Major Depressive Disorder condition and has remitted the matter back to the Board for further investigation.
- [84] The petitioner alleges a number of other conditions that she says should be accepted as work-related injuries. On June 12, 2019, the Board rejected most of those conditions including the annular tear, nerve impingement, disc protrusion and facet joint osteoarthritis. On April 2, 2020, the Review Division upheld the June 12, 2019 Decision. The petitioner is now required to appeal to WCAT before seeking judicial review of that decision.
- [85] Under the Act the Board has exclusive jurisdiction over all decisions related to adjudication of entitlement. Section 122 [formerly s. 96(1)] contains a strongly worded privative clause:

122 (1) Subject to sections 288 and 289 [appeals to appeal tribunal], the Board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising or required to be determined under the compensation provisions, and the action or decision of the Board on them is final and conclusive and is not open to question or review in any court.

(2) Without restricting the generality of subsection (1), the Board has exclusive jurisdiction to inquire into, hear and determine the following:

- (a) whether a worker's injury has arisen out of or in the course of an employment within the scope of the compensation provisions;
- (b) the existence and degree of a worker's disability by reason of an injury;
- (c) the permanence of a worker's disability by reason of an injury;
- (d) the degree of impairment of a worker's earning capacity by reason of an injury; . . .

[86] Accordingly, the Board argues, many of the issues that are the basis of the Application are not properly before the Court because they are subject to ongoing administrative decision making. The impugned decisions are within the protected jurisdiction of the Board and the petitioner has to exhaust internal remedies available to her before the Court can intervene on judicial review.

[87] Even at the judicial review level, the Court's role is supervisory and is limited to determining whether or not the tribunal's decisions fall within the acceptable standard of review.

[88] The Board strongly asserts that this Court cannot direct what the Board's decisions should be. Additionally, the Court must be limited to considering only the issues that are the subject of the impugned decisions under judicial review: *Von Rummelhoff v. Workers' Compensation Appeal Tribunal*, 2015 BCSC 246 at para. 37.

Basic Overview of the Legislative Framework

[89] The Board is a creature of statute. It is created by and charged with the administration of the Act. It is independent of both workers and employers. The Act sets out the Board's responsibility and authority regarding adjudication of claims and payment of benefits. The Board is required to administer claims and pay compensation in accordance with the Act and the policies and procedures implemented by its Board of Directors set out in its Rehabilitation Services and Claims Manual as amended from time to time.

[90] Justice Voith nicely summarized the WCB system in *Djakovic* at paras. 8-13:

[8] The Workers Compensation Act, R.S.B.C. 1996, c. 492 (the "Act") establishes a comprehensive no-fault insurance scheme in British Columbia under which the Workers' Compensation Board (the "Board") pays compensation for personal injury or death arising out of and in the course of employment caused to a worker. The scheme is wholly funded by employers through assessments levied by the Board.

- [9] The Board is established under the Act and is empowered to administer the Act. The Board has the exclusive jurisdiction to make decisions and promulgate policies respecting compensation, assessment, vocational rehabilitation, and occupational health and safety.
- [10] Part 1 of the Act contains the compensation scheme, sets out the Board's powers, including its quasi-legislative policy making function (s. 82), and contains an internal review process (s. 96.2). The Review Division is the Board's internal review body under Part 1 of the Act.
- [11] When a worker is injured, the worker is first eligible to claim temporary disability benefits (referred to as wage loss benefits): ss. 29, 30 of the Act. Once the injury stabilizes (plateaus), the worker is eligible to claim permanent disability benefits (pension) for any residual permanent disability: s. 23 of the Act. There are two types of pensions available under s. 23.
- [12] Part 4 of the Act establishes WCAT and contains a process for appeals to WCAT. WCAT is an external, independent appellate body and is the final level of appeal from most decisions of the Board. Both the Review Division and WCAT are integral parts of the workers' compensation appellate scheme.
- [13] WCAT has the exclusive jurisdiction to hear appeals from decisions of the Board. WCAT may "confirm, vary or cancel the appealed decision or order": s. 253(1) of the Act. The power to vary means that WCAT can substitute its decision for that of the decision-maker below on the issue before it.
- [91] Once a claim has been accepted, an injured worker is entitled to wage loss benefits as prescribed in the Act and to discretionary rehabilitation benefits and healthcare costs also as prescribed in the Act.
- [92] The Board first determines whether a worker's injury is temporary or permanent. If temporary, the Board pays wage loss benefits until the injury resolves or is deemed permanent. If the Board determines that an injury is permanent, either a total or partial pension is paid to either age 65 or a later date based on the worker's accepted retirement age.
- [93] The Board has limited jurisdiction under the Act to review its own decisions. Additionally, its decisions are subject to review by the Review Division, provided requests for review are filed within 90 days of the decision at issue. Time extensions are granted if the Review Division is satisfied that special circumstances exist and an injustice would result if the review is not granted.
- [94] The Review Division also has jurisdiction to reconsider its own decisions.
- [95] The WCAT is also a creature of the Act. Subject to a few exceptions, decisions of the Review Division can be appealed to the WCAT.

Discussion

- [96] It is apparent that the petitioner is extremely frustrated with the WCB's handling of her claim and has lost all confidence in the Board. She is weary and her patience has run out.
- [97] As frustrated and desperate as she may be, the WCB system generally does not give the petitioner the ability to ask this Court to step in and make the Orders Sought at this stage. It is important for the Board to fully consider all of her claims, and for her to exhaust all available remedies first so that the Court has a complete record on judicial review. Her lack of trust or faith in the worker's compensation system is not reason for her to circumvent the system: *Morris v. British Columbia (Workers' Compensation Board)*, 2019 BCSC 706 at paras. 86-87.
- [98] To review, the petitioner's claim was initially accepted for a lumbar strain/sprain injury. On January 18, 2018 the Board decided that that injury had resolved. On February 27, 2018, the Board accepted a chronic pain condition. On June 12, 2019, the Board accepted a further condition of chronic left sacroiliac joint pain. On September 6, 2019, the Board accepted that she was suffering from a Major Depressive Disorder.
- [99] In reality, what the petitioner seeks in this Application is an adjudication of her claim on an interim basis when this Court has no jurisdiction to weigh in until final decisions have been made and appealed within the WCB system. The legislature has delegated the issue to the Board. The Board has exclusive jurisdiction. Once the Board has made its decision and the petitioner has exhausted her remedies, including appeals to WCAT, then, and only then, is she permitted to ask this Court to review those decisions on a reasonableness standard.
- [100] This Court will not make compensation decisions for the Board: *Morris* at paras. 139-140; *Von Rummelhoff*, paras. 38 and 40; *Davis v. Workers' Compensation Appeal Tribunal*, 2013 BCCA 418, paras. 8 and 10.
- [101] In other words, despite the plaintiff's passionate plea, this Court cannot make the Orders Sought. To do so would be an unprecedented invasion into the WCB system and legislative scheme. Any rights, benefits or compensation the petitioner may be entitled to, are statutory in nature. In *Von Rummelhoff*, Justice Punnett wrote:
- [38] Given the power of a Court on a judicial review is generally limited to setting aside the tribunal decision and remitting it for reconsideration the Court in any event does not have the power to direct the result of any reconsideration. That is, the Court does not have the power to actually decide issues under the Act: (See *Testa v. British Columbia (Workers' Compensation Board)* (1989), 36 B.C.L.R. (2d) 129 at 143 (C.A.); *Cactus Cafe Turner Road Ltd. v. British Columbia (General Manager Liquor Control and Licensing Branch)*, 2011 BCCA 414 at paras. 28-32.
- [39] Hence, even if this were a judicial review, that review would be limited to setting aside the WCAT s. 55 decision and remitting it for reconsideration. Only if WCAT in such reconsideration concluded that special circumstances applied would the worker then be

able to proceed with his application for benefits such as temporary disability benefits known as wage loss benefits in Board policy. It would then be for the Board, (and WCAT on appeal), to exercise its exclusive jurisdiction to adjudicate the plaintiff's entitlement to Part 1 benefits: (see ss. 96(1), 96.2(1)(a), 254 and 255 of the Act).

- [40] As a result the apparent remedy of a monetary order sought in the notice of claim is beyond the jurisdiction of this Court to entertain. There has been no decision of entitlement to benefits; hence that issue is not before this Court. The right to benefits under the Act is statutory and it is the statute that determines how benefits are to be assessed: (see *Davis v. Workers' Compensation Appeal Tribunal*, 2013 BCCA 418). The claim for a monetary order has no reasonable prospect of success, and in fact is bound to fail.
- [102] To date, the various medical assessments and reviews have been unable to measure or confirm the existence or severity of the petitioner's pain. It is unclear whether she is consciously or unconsciously exaggerating her pain or has become unduly focussed on it. The Board is currently attempting to get to the bottom of it.
- [103] It is also apparent that the petitioner has drawn a line in the sand and will not accept anything less than immediate and full compensation for her lost wages and full medical benefits from the Board. She is convinced that the source of her pain is the annular tear in her L4-5 disc that was identified early on by MRI. She seeks funding by the Board of the Surgery. She firmly believes that once she has the Surgery, her pain issues will resolve and she will be able to return to work.
- [104] The Board's medical assessors, which includes three physiatrists and a neurologist, are not persuaded that the source of her pain is either the annular tear or small disc herniation disclosed on MRI and believe them to be incidental findings. The Board's investigation into her medical issues is ongoing.
- [105] The petitioner cannot bypass the processes and procedures prescribed by the Act and obtain relief directly from the Court before her remedies under the WCB system are exhausted. The Court will rarely engage in a judicial review until that has been done: *Lockyer-Kash v. Workers' Compensation Board*, 2015 BCCA 70 at para. 36.
- [106] A clear statement of the law is set out in *Davis* at paras. 10 and 11. In that case, a self-represented worker sought judicial review of the decisions of the WCAT denying her a pension respecting a claimed lower back injury. The WCAT had determined that the injury was not work related. The chambers judge found that the decision was not unreasonable and dismissed the application for judicial review. In dismissing Ms. Davis' appeal the Court stated:
- [10] Further, Ms. Davis's contention that she has a right to have her entitlement to compensation determined by a court is incorrect. The right to benefits under the Workers Compensation Act, R.S.B.C. 1996, c. 492, is statutory, and it is the statute that determines how benefits are to be assessed. The statute prescribes a detailed administrative scheme for assessment of

compensation, and specifically provides, in s. 254, that the WCAT has exclusive jurisdiction to review compensation decisions of the sort complained of by Ms. Davis. Section 255 provides that decisions of the WCAT are final and binding, and not subject to review by a court.

- [11] It is true that the rule of law, which is incorporated as a fundamental principle in Canada's unwritten constitution, requires that courts exercise a residual supervisory jurisdiction over tribunals. For that reason, courts can intervene where a tribunal has embarked on decision-making that is outside of its statutory mandate, or reached a conclusion in a manner that transcends the limits of curial deference (see *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220; *Dunsmuir v. New Brunswick*, 2008 SCC 9; *Jozipovic v. British Columbia (Workers' Compensation Board)*, 2012 BCCA 174). The supervisory jurisdiction of the courts does not extend further than that.
- [107] Along similar lines is the later decision of the Court of Appeal in *Lockyer-Kash* where the Court confirmed its role on judicial review is to determine whether the decision of the Board is patently unreasonable and if so, to remit the matter to the Board for reconsideration. The Court stated:
- [30] . . . Section 7 of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, provides that the court may set aside the decision of the tribunal and s. 5 of that Act provides that the court may direct the tribunal to reconsider the matter (with or without directions from the court).
- [31] It is not the role of the court to make the ultimate decision. The court's task in this proceeding is to determine whether policy #50.00 implemented by the WCB's board of directors is patently unreasonable and, if it is, to refer the matter back to the board of directors. This point was made by Mr. Justice Groberman in the decision of this Court dismissing the appeal from the order striking out Ms. Lockyer-Kash's previous action (2013 BCCA 459):
- [25] An action in the Supreme Court that asks the court to make declarations of rights to workers' compensation is an invitation to the court to trench on the exclusive jurisdiction of the WCB and WCAT in a manner that is contrary to ss. 96, 254 and 255 of the Act. The court cannot accept such an invitation. Accordingly, a declaratory action of the sort advanced by Ms. Lockyer-Kash in this case is appropriately struck out as under Rule 9-5(1) on the basis that it does not disclose a reasonable claim.
- [108] In my view, these statements remain the law in British Columbia and have not been changed by *Vavilov*. In short, and subject to its supervisory role to ensure the Board and WCAT do not act unreasonably, this Court cannot not step in and make decisions for or substitute its decisions for, those of the Board. If this Court were to intervene and the petitioner were to satisfy the reviewing judge that the Board's conduct was unreasonable, the Court would be obliged to refer the matter back to the Board for reassessment in any event. This Court cannot order or direct the Board to make payment of compensation or rehabilitation benefits: *Morris* at para. 139. This Court has no power to decide issues, such

as "declaring the petitioner to be disabled", that are wholly within the jurisdiction of the WCB under the Act: Von Rummelhoff at para. 38. Whatever rights the petitioner may have for wage loss benefits, medical benefits or rehabilitation benefits, they are statutory rights conferred to her by the Act. It is the Act that determines how those wages, benefits and other rights are assessed, not this Court.

[109] Respecting her claim for an injunction, or as she puts it, a "stay" of the January 18, 2018 Decision, the petitioner must show:

- a) That she has a strong prima facie case that she will succeed on her judicial review. She must show a strong likelihood on the law and evidence that she will ultimately be successful in proving the allegations set out in the petition;
- b) That irreparable harm will result if the relief she seeks is not granted; and
- c) That the balance of convenience favours granting the mandatory injunction,

R. v. Canadian Broadcasting Corp, 2018 SCC 5 at paras. 16, 18.

[110] She must show that the Board can be compelled by this Court to perform a duty it is legally obliged to perform, namely, pay her the benefits she seeks: Myer Franks Agencies Ltd. v. Vancouver (City), 2010 BCSC 1637 at para. 11. She must show that:

- a) She has a clear legal right to the wage loss and other benefits she seeks;
- b) The payments must be due and incumbent;
- c) The duty on the WCB that creates its obligation to pay is purely ministerial in nature, concerning which there are no discretionary powers; and
- d) She has demanded and the WCB has refused to pay,

Thomas v. Workers' Compensation Board of B.C., 2002 BCSC 866 at para. 25.

[111] In my view, she has failed to demonstrate these requirements.

[112] Firstly, the Petition does not support a mandatory injunction. The issue of the petitioner's entitlement to benefits or compensation is not before the Court in the Petition. It cannot therefore be considered here.

[113] Secondly, the petitioner has not shown that she has a clear legal right to compensation for the wage loss and other benefits. That matter is still before the Board. The nature and severity of her health issues, disability and causation continue to be live issues within the WCB's administrative system and fall within the discretionary decision making powers of the Board. Reviews and investigations are ongoing. Until that process is complete and she has exhausted all her remedies within the WCB system, the petitioner cannot force the Board to pay through judicial review: Morris at para. 82.

- [114] In sum, as a matter of law the relief the petitioner seeks is not available to her in the Application. The Decisions she seeks to have stayed are within the exclusive jurisdiction of the Board. The court's function on judicial review is supervisory and to ensure the Board has operated within its legal parameters. In doing so, courts are not to undertake a fresh examination of the substantive issues but rather review what went on in arriving at the impugned decisions: *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at para. 34. Accordingly, evidence the petitioner submits that was not before the Board or the Review Division when they made their impugned decisions is not something that can be considered in the Application.
- [115] Further, the petitioner has not exhausted the internal remedies available to her and the Decisions are therefore not reviewable by this Court on judicial review.
- [116] There is a very strong privative clause in the Act that provides that while this Court has the jurisdiction to review the Board's and WCAT's decision for reasonableness, it cannot weigh into the underlying decision making process. As was recently stated by Madam Justice MacNaughton in *Morris*:
- [139] I agree with the Board's and WCAT's submissions that it is a long-standing legal principle that the court cannot direct the payment of compensation benefits. In *Davis v. Workers' Compensation Appeal Tribunal*, 2013 BCCA 418, the Court of Appeal said:
- [10] Further, Ms. Davis's contention that she has a right to have her entitlement to compensation determined by a court is incorrect. The right to benefits under the Workers Compensation Act, R.S.B.C. 1996, c. 492, is statutory, and it is the statute that determines how benefits are to be assessed. The statute prescribes a detailed administrative scheme for assessment of compensation, and specifically provides, in s. 254, that the WCAT has exclusive jurisdiction to review compensation decisions of the sort complained of by Ms. Davis. Section 255 provides that decisions of the WCAT are final and binding, and not subject to review by a court.
- [140] In a judicial review proceeding, s. 7 of the JRPA provides that the court may set aside the decision of the tribunal, and s. 5 provides that the court may direct the tribunal to reconsider the matter, with or without directions from the court. It is not the court's role to make the ultimate entitlement decision or to direct the result of any reconsideration that it has ordered: see *Von Rummelhoff* at para. 38 and the cases cited therein.
- [117] On judicial review, the only remedy that is available to the petitioner is for this Court to refer the impugned decisions back to the Review Division for reconsideration.

Summary

- [118] In my view, the Application must be dismissed because:

- a) The Petition is premature. The Board is continuing to investigate and assess the petitioner's claims and the petitioner has not exhausted the remedies available to her under the WCB scheme;
- b) The Application is in the nature of a mandatory interlocutory injunction and the petitioner has not demonstrated a strong likelihood on the law and evidence that she will succeed on judicial review. At best, she has shown at strong likelihood that she will succeed on obtaining the extension of time she seeks but even assuming that success, the matter will be remitted back to the Board for further consideration and assessment of her claims and disabilities. She has not shown that the balance of convenience favours granting the orders she seeks. Regardless of the petitioner's circumstances, the orders she seeks in the Application are not available to her.

[119] Despite how the petitioner frames the Application, in reality it is an application in the nature of mandamus seeking to force the Board to pay benefits and take other positive action. She presents her Application in terms of need for immediate financial and other assistance. As compelling a case as she presents, this Court is unable to assist her at this juncture.

[120] Regrettably for the petitioner, this Court cannot weigh in to her dispute with the Board and WCAT at this stage. Jozipovic and Vavilov do not assist her at this stage. As "piece-meal" as the approach the Board takes may be, that is the scheme set out by the Act, and it must be followed until it is exhausted.

[121] In the result, the application must be dismissed.

Costs

[122] Notwithstanding that the Application seeks interim relief against the Board only, the petitioner seeks special or increased costs against both the Board and WCAT. Alternatively, she seeks Scale C costs.

[123] Neither the Board nor WCAT seek costs against the petitioner.

[124] Respecting the petitioner's claim for costs against the Board, the Application has been dismissed. Despite the petitioner's urgings, I see no basis to award costs against the Board.

[125] Respecting the petitioner's claim for costs against WCAT, she submitted supplemental submissions arguing that special, increased or at the very least Scale C costs ought to be ordered against WCAT because of her suspicion that it has not been impartial during the lead up to the Application. She argues that WCAT improperly sided with and actively assisted the Board and is therefore guilty of misconduct. The basis for this assertion is that the WCAT's counsel forwarded the petitioner's counsel's written argument to the Board the weekend before the hearing of the Application. That action, she says, compromised WCAT's impartiality.

- [126] WCAT's counsel has explained that on April 17, 2020, she made an email request of the petitioner's counsel to be provided a copy of her written argument that was referenced in the application record. The petitioner's counsel complied. She did not suggest the argument was confidential and did not request that it not be shared with the Board. Noting that the petitioner's counsel did not "reply all" to her email, and determining that the Board's counsel had not been provided a copy of the petitioner's argument, she forwarded to the Board's counsel.
- [127] In essence the petitioner says that the Board and WCAT "ganged up" on the petitioner, an unsophisticated, vulnerable and disabled litigant, to defeat the Application.
- [128] The petitioner's submission has no merit. As a matter of good practise, counsel are encouraged to exchange written arguments in advance of applications wherever and whenever possible. Written arguments are not to be considered secrets to be used to ambush the other side during the hearing or just before, giving opposing counsel little time to react. Such practise does little to promote the object of the rules of court.
- [129] The petitioner's application for costs against WCAT is dismissed.

"G.P. Weatherill J."

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