

CANADA / JUDGMENT

Singla v. Workers' Compensation Appeal Tribunal

2020 BCSC 1227

COURT

Supreme Court of British Columbia

DECIDED

16 July 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1227 Singla v. Workers' Compensation Appeal Tribunal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Singla v. Workers' Compensation Appeal Tribunal,

2020 BCSC 1227

Date: 20200716

Docket: S1913452

Registry: Vancouver

Between:

Mohit Singla

Appellant

And

Workers' Compensation Appeal Tribunal

Respondent

Before: The Honourable Mr. Justice Brundrett

On judicial review from: Workers' Compensation Appeal Tribunal, July 23, 2019 (WCAT Decision No. A1801901)

Oral Reasons for Judgment

In Chambers

Counsel for the Appellant appearing by teleconference:

Z. Fang

Counsel for the Respondent Workers' Compensation Appeal Tribunal appearing by
teleconference:

T.J.H. Martiniuk

Counsel for the Respondent Pacific Coast Terminals Co. Ltd. appearing by teleconference:

L. Tsang

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 8, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 16, 2020

Introduction

- [1] The petitioner was a longshoreman with Pacific Coast Terminals ("PCT") who allegedly suffered a compensable injury at work on July 4, 2016. He maintained he injured his neck and right shoulder while performing the job duties of a liquid bulk operator, draining rail cars of canola oil. His compensation claim was denied by the Workers' Compensation Board ("WCB") and his appeals to the Workers' Compensation Board Review Division ("Review Division") and the Workers' Compensation Appeal Tribunal ("WCAT") were dismissed.
- [2] The petitioner applies under s. 57(2) of the Administrative Tribunals Act, S.B.C. 2004, c. 45 [ATA], for an extension of time for the filing of an application for judicial review of the WCAT decision dated July 23, 2019. He filed a generic petition on November 26, 2019, seeking a review of the WCAT decision, which amounts to just over two months beyond the 60-day limit prescribed in s. 57(1) of the ATA.
- [3] The initially-filed petition is admittedly defective, in that it does not adequately set out the grounds for relief. However, after correspondence with counsel for the respondents, in which they pointed out the shortcomings of the petition, the petitioner provided a proposed draft amended petition on March 7, 2020, setting out his grounds in detail, which I understand he intends to file if leave is granted. I am prepared to consider the grounds as stated in the proposed amended petition for the purposes of the present application.

Applicable Principles

- [4] Under s. 57(1) of the ATA, an application for judicial review of a final decision of a tribunal must be commenced within 60 days of the date the decision issued. The relatively short time limits for the review of administrative decisions are intended to motivate the parties to act promptly: *Callow v. Board of School Trustees School District No. 45 (West Vancouver)*, 2008 BCSC 778 at paras. 52-53.
- [5] In *Speckling v. British Columbia (Labour Relations Board)*, 2008 BCCA 155, Madam Justice Huddart explained the rationale underlying s. 57(1) as follows:
- [16] The rationale for requiring timely applications for judicial review rests on the need to balance the justice of an individual applicant's complaint about an exercise of a statutory power of decision with the need to preserve the integrity of the administrative scheme, make efficient use of judicial resources, avoid a multiplicity of proceedings, and avoid prejudice to any other person.
- [6] A court has the discretion to extend the time for filing of an application for judicial review. The test for an extension of time under s. 57(2) of the ATA is as follows:
57. . . (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.
- [Emphasis added.]
- [7] These criteria are separate and distinct. The court must be satisfied that each criterion is met before exercising its discretion: *Ntibarimungu v. Whistler Blackcomb/Intrawest*, 2014 BCSC 1489 at para. 8.
- [8] WCAT's jurisdiction to hear appeals from the Review Division is found in s. 239 of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 ["former WCA"], now replaced by R.S.B.C. 2019, c. 1 [WCA]. That jurisdiction is exclusive, final, and binding. Sections 254 and 255 of the former WCA (now ss. 308 and 309 of the WCA) provide a comprehensive "privative clause" intended to protect decisions from further appeal: *Webb v. Canada (Attorney General)*, 2019 BCSC 760 at para. 20 *aff'd* 2020 BCCA 34.
- [9] Section 58 of the ATA applies to WCAT by virtue of s. 296(i) of the WCA. Section 58(2)(a) of the ATA provides that the standard of patent unreasonableness applies to the tribunals findings of fact, law and exercise of discretion. This indicates a legislative intent that the standard of patent unreasonableness applies to WCAT: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Team Transport Services Ltd. v. Unifor*, 2020 BCSC 91 at paras. 14-19.

- [10] Of the respondents, WCAT only takes issue with the serious grounds for relief aspect of the test for an extension of time in s. 57(2) of the ATA. PCT disputes all three branches of the test.

Analysis

i. Reasonable Explanation for the Delay

- [11] As noted, the WCAT decision was released on July 23, 2019. The petitioner filed his judicial review on November 26, 2019, approximately 66 days out of time.
- [12] During the 60-day appeal period, the petitioner flew to India on August 25, 2019, to look after his ill mother.
- [13] While in India, the petitioner's union representative communicated with him by email on September 4, 2019. That representative gave the petitioner advice about his remedies. Specifically, the petitioner was incorrectly told that "the only recourse is to request a reconsideration, but that just goes back to the same person who made the original decision."
- [14] I note that the WCAT decision came with an advisory note indicating that its decision was final and conclusive and could not be appealed. While this language appears to be consistent with s. 309 of the WCA, there is no mention in the advisory note or in the advice from the union representative of the possibility of a judicial review.
- [15] The petitioner flew back to Canada on October 15, 2019. He retained counsel on October 28 or 30. His petition for judicial review was filed a little under a month later.
- [16] The respondent PCT pointed out that there is little evidence from the petitioner as to the steps he took in the intervening time during the appeal period, and in the immediate period after it expired. It faults the petitioner for not being more diligent in the timely exercise of his duties in filing his petition for judicial review.
- [17] I recognize the respondent's arguments, but it seems to me here that the petitioner was likely led into error by his union representative. The trip to India, and the fact that English is the petitioner's second language, may also have contributed to the delay in correcting his misunderstanding, which is what seems to have occurred after he returned from India and soon thereafter sought advice from counsel.
- [18] In all the circumstances, I am satisfied that the petitioner has provided a reasonable explanation for the delay in filing his petition.

ii. Lack of Resulting Substantial Prejudice or Hardship

- [19] Concerning whether there will be substantial prejudice or hardship resulting to a person, the respondent PCT took issue with this aspect by pointing to general prejudice arising from the long history of proceedings and the need for finality.

[20] The length of the delay in filing was in the form of just over two months. The respondents are sophisticated parties who have not pointed to any specific resulting prejudice. I cannot find that any prejudice rises to the level of substantial prejudice or hardship to a person affected by the delay here with the respondents being the only potential two persons being so affected.

[21] Therefore, the petitioner has met this branch of the test.

iii. Grounds for Relief

[22] The remaining branch of the test at s. 57(2) of the ATA deals with whether there are serious grounds for relief.

[23] Mr. Justice MacKenzie discussed the meaning of this phrase in *Denton v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2016 BCSC 1219 aff'd 2017 BCCA 403, leave to appeal ref'd [2018] S.C.C.A. No. 12:

[37] In this regard, the parties agree that a "serious grounds for relief" has been interpreted as a "reasonable likelihood or prospect that the petition will succeed," and also note that, given the nature of both applications, the court is not to embark upon the actual judicial review but rather must make "a judgment call" about the case that would eventually be presented if leave was 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 at para. 21 in *J.J.*:

In assessing this claim, the court must be careful not to embark upon the judicial review that will proceed in the event that leave is granted. At the same time, because 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 results.

In her petition for judicial review, Ms. Denton alleges the WCAT made reviewable errors in its interpretation and application of the relevant portions of s. 5.1 of the Act. She also raises Charter issues and challenges which the respondents point out were not raised before the Review Division. Because of the interplay of Charter issues with the more usual administrative issues surrounding WCAT decisions, the parties have described the issues as somewhat complicated and wide ranging. In addition, some of the issues raised in this analysis involve anticipating whether a judge on review, assuming I had concluded there was a reasonable explanation for the delay, would exercise his or her discretion in favour of the petitioner.

[24] The petitioner claims that he was injured on July 4, 2016, while he was performing duties related to draining rail cars of canola oil. The petitioner's work-related duties are described in the WCAT decision as heavy, awkward work requiring the lifting of hoses weighing between 40-100 pounds or perhaps more, and crawling under numerous rail cars to connect or disconnect seals and caps, sometimes with a pipe wrench. Workers doing this type of work also apparently had to adjust hoses and unclog blockages. A WCB officer described the

job duties as involving frequent and repetitive right shoulder movements in relation to the heavy hoses. The PCT acknowledged that the duties that the petitioner performed have the potential for injury.

- [25] The petitioner did not report his injury to his employer immediately. He saw his family physician on July 7, 2016, and reported right shoulder and neck pain. He was diagnosed with a cervical strain and prescribed medication. He saw a physiotherapist the next day and received treatment from various care providers throughout July and August and following. The treatment notes of the initial care providers are mostly lacking as to the cause of injury, though there is a suggestion in the July 26, 2016 note of pain developing after hot yoga. The petitioner later maintained that his work duties were the cause of his injuries.
- [26] After receiving an MRI in August, he was diagnosed with a disc herniation in his neck.
- [27] The petitioner first applied for workers' compensation benefits on August 19, 2016. He remained off work as a longshoreman for many months and only later returned to light duties.
- [28] The issue before WCAT was whether, on July 4, 2016, the petitioner sustained a cervical disc herniation arising out of and in the course of his employment, thereby entitling him to compensation under the former WCA.
- [29] In the course of its reasons, WCAT stated as follows:
- [99] I agree with the employer that the issue on this appeal can be boiled down to whether or not the evidence supports a conclusion that this worker suffered an injury as seen in his MRIs as a result of his job duties on July 4, 2016. The law that would apply to this issue is section 5(1) of the Act. Section 5(1) specifies that a worker's personal injury must arise out of and in the course of the employment. The policy which provides some explanation for this section is policy item C3-14.00. This policy provides that, before a worker becomes entitled to compensation for an injury under section 5(1) of the Act, the injury must occur during, or be reasonably incidental to, the worker's employment. The worker's activities must also be of causative significance, meaning they were more than trivial or insignificant aspects of the injury.
- [30] WCAT denied the petitioner's appeal and affirmed the Review Division's decision of June 19, 2018. It found that the petitioner did not develop a cervical herniation arising out of and in the course of his employment on July 4, 2016.
- [31] The respondents submit that the petitioner has not advanced serious grounds for relief. They submit WCAT fully considered the positions of the parties and the statutory requirements, and that it was not unreasonable for WCAT to find that there was insufficient medical evidence to establish that the petitioner's condition was compensable. They submit the petitioner is asking this court to reweigh the evidence and substitute its view on the merits for that of WCAT.

[32] The petitioner has taken me through his proposed grounds for relief in the amended petition:

- 1) the failure to have regard to or further investigate key evidence provided by two independent witnesses, being coworkers;
- 2) WCAT's alleged unreasonable reliance on Dr. O'Driscoll's opinion in failing to find a causative link;
- 3) the alleged failure of WCAT to apply s. 250(4) (now s. 303(5)), of the former Workers' Compensation Act (tipping the balance of evenly-weighted evidence in the favour of the worker); and
- 4) WCAT's failure to address issues under s. 6 of the former Workers' Compensation Act (now s. 136 of the Workers' Compensation Act) with respect to the petitioner suffering from an occupational disease.

[33] On the first ground of appeal with respect to the failure to have sufficient regard to the coworkers' evidence, the WCAT stated as follows:

[29] The Board interviewed two co-workers who were on shift with the worker on July 4, 2016. Their interview is summarized as well as recorded. The summary reflects the content of the recordings. Both interviews took place over a year after the events in question. A third co-worker was also interviewed, but he could not provide any relevant information except that he recalled working with three other longshoreman on July 4, 2016.

[30] The first co-worker recalled that the worker mentioned to him that he had hurt his shoulder while at work on July 4, 2016. He recalled the worker complaining about his shoulder near the end of the shift. The worker did not discuss with this co-worker any specific activities which had led to the symptoms in his right shoulder.

[31] The second co-worker the Board interviewed also recalled the worker mentioning symptoms on July 4, 2016. The worker had mentioned a shooting pain in his shoulder, neck and upper body about one hour into the shift. The co-worker did not recall the exact duties the worker was performing on the railcars, and he could not recall anything extraordinary about their duties that day.

[32] The Board also interviewed the worker's foreman a year after the events in question. The foreman did not hear or recall anything about the worker suffering any sort of an injury on July 4, 2016. No one, not even the worker, came to him to indicate the worker had suffered any type of an injury on July 4, 2016. The foreman could not recall any extraordinary duties or circumstances on July 4, 2016 that may have contributed to an injury.

- [34] The two co-workers were important because they claimed that the petitioner complained of an injury on July 4, 2016, his last day on the job. A third witness, the petitioner's foreman, had no memory of the petitioner's injury. The evidence provided by two out of the three witnesses corroborated the petitioner's evidence. The petitioner submits that WCAT failed to determine the credibility of the two independent witnesses through an oral hearing.
- [35] It appears that WCAT was prepared to accept the evidence from the petitioner (and the two witnesses) that he developed pain on the job. If believed, this evidence would tend to support his claim that there was something in the petitioner's employment that had causative significance in producing his injury. In this regard, WCAT ultimately concluded as follows:
- [108] Even if I accept the worker's position that he developed symptoms in his right shoulder on July 4, 2016 and even if I accept they occurred within the first two hours of his shift on that date, I am still left with medical evidence that does not establish the worker's position that his cervical disc herniation is compensable. Therefore, I will not try to reconcile the worker's testimony which appeared to be inconsistent during the oral hearing and inconsistent when compared to some of the documents in his claim file.
- [109] Dr. O'Driscoll did suggest that, had the worker reported his symptoms right after an event on July 4, 2016, the Board would have likely accepted the claim. However, Dr. O'Driscoll did not mention exactly what condition the Board would have accepted. In this appeal, the worker was specific that he wanted compensation for a cervical disc herniation. Dr. O'Driscoll opined the primary diagnosis would appear to be a possible symptomatic C6-7 or C7-T1 disc with a right C7 radiculopathy in the presence of underlying spondylosis. For this condition, Dr. O'Driscoll opined it was difficult or almost impossible in the absence of an identified specific event to identify the heralding event which would cause a disc herniation. Dr. O'Driscoll further opined that insufficient evidence was present to support that a specific incident or series of incidents on July 4, 2016 or the accustomed work tasks of July 4, 2016 " support that this worker's work activities of that specific day were causative of his July and worsening symptoms in August 2016."
- [110] Therefore, even given the best case scenario for the worker, that is, that I accept he had shoulder pain within the first two hours of his shift and he noticed it in the locker room, Dr. O'Driscoll would still not find a causative link, given her opinion.
- [36] The absence of medical documentation recording a work-related cause in the days following July 4th seems to have represented a stumbling block to the medical experts and WCAT drawing the necessary causative link. But what appears to have particularly troubled WCAT in its ultimate conclusions in paragraphs 108 and 110 was the lack of expert medical evidence supporting a compensable claim which is an issue related to the second and third proposed grounds of review.

- [37] On the second ground, unreasonable reliance on Dr. O'Driscoll's opinion in failing to find a causative link, the WCAT decision characterizes her opinion as not supporting a causative link. WCAT found as follows:
- [70] In an opinion dated October 3, 2017, Dr. O'Driscoll commented that, if this worker had reported neck pain or arm pain when performing his regular assigned tasks of handling hoses full of canola oil then a causative link would likely have been accepted. The hot yoga would not have been as significant. Dr. O'Driscoll further opined that significant forces are necessary, cadaveric studies suggest over a 1000 pounds, to cause a disc protrusion in a young healthy disc. Once the disc becomes diseased then a herniation, protrusion, or bulge can happen insidiously. A heralding minor event, such as turning over in bed, or a heralding significant event, such as lifting several 100 pounds, can precede it. Dr. O'Driscoll opined it was difficult or almost impossible in the absence of an identified specific event to identify the heralding event.
- [71] In an opinion dated December 11, 2017, two months after this opinion, Dr. O'Driscoll reviewed the worker's medical information again and identified the diagnosis. Dr. O'Driscoll opined the primary diagnosis would appear to be a possible symptomatic C6-7 or C7-T1 disc with a right C7 radiculopathy in the presence of underlying spondylosis.
- [72] Dr. O'Driscoll further opined that insufficient evidence was present to support that a specific incident or series of incidents on July 4, 2016 or the accustomed work tasks of July 4, 2016 " support that this worker's work activities of that specific day were causative of his July and worsening symptoms in August 2016."

[Emphasis added.]

- [38] As noted in this passage, Dr. O'Driscoll seemed to rule out hot yoga as having causative significance. The emphasized text above indicates she would have been prepared to support the petitioner's claim had he made more timely reporting of a work-related cause. The petitioner argues that WCAT relied on Dr. O'Driscoll's opinion to deny the petitioner's appeal when that opinion is actually supportive of a causative link between the petitioner's injuries and his work.
- [39] As for the evidence from the other experts, WCAT found Dr. Lochub's opinion did not support the petitioner. It stated as follows:
- [68] Dr. Lochub wrote a one page letter dated March 7, 2018. Dr. Lochub stated as follows with respect to the cause of the worker's symptoms:

Based on the nature of his work and increasing workload he endorsed sudden onset and worsening pain and discomfort in the region of the neck and the upper extremity. As per [the worker], he was very healthy prior to the rather sudden onset of his pain.

He had worked in the field of Longshoreman for about 10 years without issues and no other contributing factors can be noted prior to his sudden onset of pain and inability to work.

...

[104] A number of physicians have examined the worker. None of the worker's physicians indicated that his cervical condition as seen on MRI was work related. Even Dr. Lochub did not offer this opinion. I find the text that I quoted from Dr. Lochub's report does not support the worker's position that a cervical disc herniation is compensable. Dr. Lochub's opinion is not really an opinion in my view. He simply is restating the worker's position. In any event, Dr. Lochub does not provide any detailed reasons why the worker's job duties would cause a cervical disc herniation. I do not place any weight on it.

[105] I have opinions from two different Board medical advisors, and I place weight on them. They considered the worker's condition in his neck and considered what type of activities could cause it. Dr. O'Driscoll, in particular, even referred to cadaver studies in her opinion. If I am wrong to place weight on the two Board medical advisors' opinions, then there is simply insufficient medical evidence to establish that the worker's cervical disc herniation is compensable.

[Emphasis added.]

[40] As noted, Dr. Lochub stated that "no other contributing factors can be noted prior to his sudden onset of pain and inability to work," and that he was very healthy prior to the onset of his pain. The absence of other contributing factors would seem to be indirect positive support for the petitioner's claim, though WCAT chose not to place any weight on it.

[41] As for Dr. Hare, the other board medical advisor in addition to Dr. O'Driscoll, his evidence in his report dated January 4, 2018, was summarized as follows:

[73] In an opinion dated January 4, 2018, Dr. Hare considered the cause of the worker's cervical radiculopathy with underlying spondylosis and degenerative disc disease as well as central and foraminal stenosis. According to Dr. Hare, the worker's neck issues were, mostly, non-occupational in nature. There were no confirmed occupational risk factors for the neck related diagnoses. None of them were considered activity related.

[42] Ultimately then, WCAT found, in paragraph 105, "insufficient medical evidence to establish that the worker's cervical disc herniation is compensable."

[43] The third ground raised by the petitioner is that WCAT failed to apply s. 250(4) of the former WCA (s. 303(5) of the WCA), tipping the balance of evenly-weighted evidence in favour of the worker. Section 250(4) provided as follows:

250 . . . (4) If the appeal tribunal is hearing an appeal respecting the compensation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the appeal tribunal must resolve that issue in a manner that favours the worker.

- [44] WCAT quoted this principle at paragraph 96 of its reasons, but did not otherwise explicitly refer again to the principle nor to the passages in its policy manual that further explain the principle.
- [45] The respondents submit that before s. 250(4) can be engaged, WCAT must make a finding that the evidence is evenly weighed, citing *Erskine v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2013 BCSC 1583 at para. 22. With respect, that proposition seems to me to be somewhat of an overstatement of the principle in *Erskine* where the court referenced s. 250(4) in more modest language:
- [22] WCAT made no finding that the evidence was incomplete or unreliable which, if it had, would have imposed an obligation to seek further evidence. In my opinion WCAT was not obliged to make that finding. Nor did WCAT find that upon weighing the evidence, the "disputed possibilities are evenly balanced" which would have led to a favourable outcome for the petitioner. The search for truth can never be said to be entirely complete in any judicial or quasi-judicial proceeding. There are always further lines of inquiry, however faint, that might be followed. WCAT is required only to consider if the evidence is "sufficiently" complete and reliable permitting it to reach a "sound conclusion with confidence." In my opinion WCAT had no obligation to consider other evidence that might be obtained and, in particular, was not obliged to seek further evidence from Dr. Kassa.
- [Emphasis added]
- [46] In *Spottiswood v. Worksafe BC*, 2018 BCSC 809 at para. 64, the court referenced the principles in these terms:
- [64] As in *Vandale*, there was no finding by the WCAT panel in this case that the evidence was evenly weighted, nor even an allegation by Ms. Spottiswood that it was patently unreasonable for the WCAT panel not to have made such a finding. I therefore agree with WCAT that s. 250(4) is inapplicable here.
- [47] A finding to the effect that the weight of the evidence suggesting an employment-related cause is evenly weighted with the evidence suggesting non-employment causes certainly assists in determining whether s. 250(4) ought to apply. But I do not read these decisions as standing for the proposition that the absence of a label, in the form of an explicit statement that the evidence is evenly weighted, precludes the application of s. 250(4) when the reasons as a whole support such a characterization.
- [48] The Supreme Court of Canada referenced s. 250(4) of the former WCA in *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 ("*Fraser Health Authority*"), a case in which the court held that the presence or absence of opinion evidence from an expert positing or refuting a causal link was not determinative of causation. At para. 7, the court held as follows:

- [7] Section 250(4) of the Act provides that, where the Tribunal is hearing an appeal respecting the compensation of a worker and the evidence is "evenly weighted" on an issue, the Tribunal must resolve that issue "in a manner that favours the worker". In other words, the applicable burden of proof is not the civil burden of "balance of probabilities". Where the evidence leads to a draw, the finding must favour the worker. This extends to deciding whether the occupational disease is "due to" the nature of employment -- that is, to the issue of causation: ". . . if the weight of the evidence suggesting the disease was caused by the employment is roughly equally balanced with evidence suggesting non-employment causes, the issue of causation will be resolved in favour of the worker" (RSCM II, Chapter 4, policy item #26.22).
- [49] In addition, at para. 32, the court commented on the difference between scientific conclusions and the burden on workers under s. 250(4) of the former WCA:
- [32] Section 250(4)'s standard of proof contrasts sharply with the "scientific" standards employed by the authors of the OHSAAH reports. Their inability "to reach scientific conclusions" (Final Report, at p. iii) to support the causal association between workplace conditions and the workers' breast cancers, or to "find any scientific evidence for the plausibility of a laboratory work-related etiological hypothesis regarding breast cancer" (p. iv), spoke not to the burden imposed upon the workers by s. 250(4), nor even to the burden imposed upon plaintiffs in a civil tort claim (Ediger, at para. 36; Clements v. Clements, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 9; Snell, at pp. 328-30), but to a standard of scientific certainty. The majority of the Tribunal considered that the OHSAAH reports thus imposed a too stringent standard of proof. I agree. This standard is wholly inapplicable to determining causation in the workers' claims (R. W. Wright, "Proving Causation: Probability versus Belief", in R. Goldberg, ed., Perspectives On Causation (2011), 195; S. Haack, Evidence Matters: Science, Proof, and Truth in the Law (2014), at p. 22). In my respectful view, therefore, in relying upon the inconclusive quality of the OHSAAH reports' findings as determinative of whether a causal link was established between the workers' breast cancers and their employment, the chambers judge and the majority of the Court of Appeal erred in law.
- [Emphasis added.]
- [50] And finally at para. 38, the court similarly stated the following:
- [38] The presence or absence of opinion evidence from an expert positing (or refuting) a causal link is not, therefore, determinative of causation (e.g. Snell, at pp. 330 and 335). It is open to a trier of fact to consider, as this Tribunal considered, other evidence in determining whether it supported an inference that the workers' breast cancers were caused by their employment. This goes to the chambers judge's reliance upon the Court of Appeal's decisions in Sam and Moore and to Goepel J.A.'s statement that there must be "positive evidence" linking their breast cancers to workplace conditions. Howsoever "positive evidence" was intended to be understood in those decisions, it should not obscure the fact that causation can be inferred -- even in the face of inconclusive or contrary expert evidence

-- from other evidence, including merely circumstantial evidence. This does not mean that evidence of relevant historical exposures followed by a statistically significant cluster of cases will, on its own, always suffice to support a finding that a worker's breast cancer was caused by an occupational disease. It does mean, however, that it may suffice. Whether or not it does so depends on how the trier of fact, in the exercise of his or her own judgment, chooses to weigh the evidence. And, I reiterate: Subject to the applicable standard of review, that task of weighing evidence rests with the trier of fact -- in this case, with the Tribunal.

[Emphasis added.]

- [51] The respondents submit that because the petitioner did not argue before WCAT that the evidence was evenly weighted and WCAT did not make such a finding, that WCAT did not err by failing to apply the presumption in s. 250(4). This argument may ultimately be successful, but on my reading, the WCAT decision, with its heavy reliance on the lack of expert medical opinion supporting a causative link and little to no consideration of other possible causes, could also be read as effectively concluding that the evidence weighed evenly in support of work-related and non-work-related injury.
- [52] Standing back and looking at the first, second, and third grounds of review together, it appears to me that a reasonable argument can be made that WCAT fell into error in assessing the petitioner's claim.
- [53] I make this comment with the understanding that, upon review, the court's task is not to engage in a reweighing of the evidence in a hindsight application of s. 250(4): *Vandale v. Workers' Compensation Appeal Tribunal*, 2012 BCSC 831 at para. 92.
- [54] In this particular context, the medical experts had difficulty identifying the precise cause of the petitioner's injury. There existed a lack of timely medical documentation of a cause of the petitioner's injuries, and the petitioner's ability to articulate himself may have been hampered by English being his second language. The petitioner was previously healthy and hot yoga seemed to be ruled out as a cause. WCAT was prepared to accept the petitioner's evidence that he developed pain in the first two hours of his final shift on July 4, 2016. The coworkers' evidence supporting an at-work injury was not explicitly rejected, and Dr. O'Driscoll testified that if the worker reported neck and arm pain while performing regular work tasks, a causative link would have been established.
- [55] The WCAT decision refers to a lack of expert medical evidence that the petitioner's disc herniation was compensable, but places little to no significance upon the surrounding circumstances, including the temporal relationship between the work activity and the injury, the risk of injury inherent in the petitioner's duties, the petitioner's previous good health, and the lack of other causative explanations. It does not appear to be a situation where there was no evidence that inferentially supported a conclusion that the petitioner's neck and shoulder injuries were causally related to his work-related duties. Those duties unquestionably involved frequent, continuous, and repetitive right shoulder movements when connecting and disconnecting heavy hoses.

- [56] The surrounding circumstances referred to in the WCAT decision arguably make a work-related explanation for the petitioner's symptoms at least as likely as a non-work-related explanation, even if the medical evidence did not directly establish the necessary link: Fraser Health Authority at paras. 7, 38. In other words, it could be argued that WCAT unreasonably treated the absence of expert medical evidence of a work-related cause as evidence of absence.
- [57] I would resist making any definitive pronouncement on these issues. However, the petitioner has convinced me that his arguments have met the standard of a reasonable likelihood that his petition will succeed.
- [58] Given my findings above, I need not address the fourth potential ground of appeal related to the issue of occupational disease under s. 6 of the former WCA. However, I tend to agree with the respondents that the fact that this issue was not argued at the hearing would present a challenge to its success on appeal: Van Dam v. Workers' Compensation Appeal Tribunal, 2017 BCSC 227 at paras. 46-48.
- [59] In assessing the petitioner's likelihood of success, I am mindful that the former WCA contains a privative clause and that WCAT is an expert tribunal whose decisions will attract deference.
- [60] I am also aware that my task is not to embark upon a full judicial review at this stage, and that on judicial review, the task of the court is not to reweigh evidence.
- [61] However, approaching the first three grounds of review with those caveats, and having regard to the applicable principles, and being mindful of the deferential standard of review, I find nevertheless that the petitioner has made out the criterion of serious grounds for relief. Put another way, I find that the proposed petition rises to the level of being sufficiently arguable that it carries a reasonable likelihood of success at a full hearing.

Conclusion

- [62] With all three grounds under s. 57(2) being satisfied, the application for an extension of time to file the petition is granted.
- [63] All right, counsel, I am proposing to grant the extension of time to perhaps Friday, so that the amended petition can be filed, so it would be granted to tomorrow, which is July 17, 2020. Any issue with that?
- [64] MR. FANG: No issue, My Lord.
- [65] THE COURT: All right, thank you. The order will go in that form. Is there any submission as to costs for this application?
- [66] MR. FANG: No, we're not seeking costs.
- [67] THE COURT: All right. Anything else, counsel?

[68] MR. FANG: No, My Lord.

[69] THE COURT: All right, thank you for attending by telephone. We will adjourn.

Brundrett J.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/12/2020BCSC1227.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/singla-v-workers-compensation-appeal-tribunal-2020>

Prepared on 25 October 2026 · Esheria