IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bird v. British Columbia (Workers' Compensation Appeal Tribunal),* 2023 BCSC 543

Date: 20230406
Docket: S222164
Registry: Vancouver

Between:

Susan Bird

Petitioner

And:

Workers' Compensation Appeal Tribunal and City of Nanaimo

Respondents

Before: The Honourable Madam Justice Forth

On judicial review from: An order of the Workers' Compensation Appeals Tribunal, dated June 27, 2019 (WCAT Decision Number: A1800391).

Reasons for Judgment

Counsel for the Petitioner:	D. Allen
Counsel for the Respondent Workers' Compensation Appeal Tribunal:	D. Morrison
Counsel for the Respondent City of Nanaimo:	A.I. Demerse
Place and Dates of Hearing:	Vancouver, B.C. February 22– 23, 2023
Place and Date of Judgment:	Vancouver, B.C. April 6, 2023

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I. Introduction

[1] The petitioner applies for judicial review of the decision of the Workers' Compensation Appeal Tribunal ("WCAT" or the "Tribunal") dated June 27, 2019, Decision No. A1800391 (the "WCAT Decision"). The WCAT Decision denied the petitioner's claim that her bilateral lateral epicondylitis ("tennis elbow"), both as a personal injury and as an occupational disease, arose in the course of her employment as a stenographer. As a result, she was denied all health care and wage-loss benefits, a decision that impacted her livelihood.

[2] The petitioner argues that the WCAT Decision was not made in a procedurally fair way in failing to disclose all of the evidence the Tribunal relied on when assessing the expert report of Eddie Everett, occupational therapist, dated February 26, 2019 (the "Everett Report"). She further asserts that certain findings of fact were patently unreasonable. Finally, she argues that the Tribunal made the decision about reimbursement of the Everett Report in a patently unreasonable way.

[3] The petitioner seeks an order that the WCAT Decision be set aside and WCAT be directed to re-hear the issue of the petitioner's entitlement to workers' compensation for tennis elbow. The petitioner initially sought an order directing WCAT to reimburse for the full costs of the Everett Report, however, in her reply submissions, the petitioner agreed that direction cannot be ordered.

[4] The employer, the City of Nanaimo (the "City"), opposes the petition and the relief sought by the petitioner. It argues that the WCAT Decision was reasonable and supportable.

[5] WCAT appeared for the purpose of assisting the Court in making a fully informed adjudication by setting out the legislative framework, providing some background on WCAT's practices and procedures, and addressing the standard of review and the nature of the relief sought.

[6] I will only deal with the issue of procedural fairness, since I have found that the Tribunal did not act fairly and have ordered that the matter be remitted to WCAT

for a re-hearing for the reasons listed below. I will not address issues relating to whether some findings of fact were patently unreasonable, and the question of reimbursement of the Everett Report, as it is unnecessary to do so.

II. Background

[7] In 2017, Ms. Bird was 53 years old. She worked as a stenographer for the City in the serious crimes unit of the Royal Canadian Mounted Police ("RCMP") detachment in Nanaimo. She commenced her job around August 1992. She had worked as a stenographer for 20 years. Her job for seven hours a day, five days a week, was to transcribe audio recordings of RCMP interviews with witnesses and suspects. Her duties included sitting at a keyboard throughout the day and transcribing audio recordings 95 percent of the time, typing 90 words per minute. Ms. Bird says she developed tennis elbow in both of her elbows, which she attributes to her work as a stenographer.

[8] In early 2008, Ms. Bird first began to develop pain in both of her elbows. She made a successful claim for workers' compensation benefits for bilateral tennis elbow in 2008. In approximately 2011, her claim for benefits became inactive.

[9] In 2016, Ms. Bird's elbow pain returned on an on-and-off basis. By early 2017, Ms. Bird began taking pain medication and had trouble lifting small objects after about an hour of typing. Ms. Bird was off work for an unrelated medical issue from February 22 to May 1, 2017, and she found the pain subsided significantly. She was again diagnosed with bilateral tennis elbow and made a second claim for workers' compensation benefits on May 16, 2017.

[10] On June 22, 2017, Ms. Bird completed an Activity-Related Soft Tissue Disorder (ASTD) Pre-Site Questionnaire in which she advised that she had done the same job for 20 years but "the workload/demands have increased over the years" (the "ASTD Questionnaire"). She further explained that after a considerable amount of transcription she experiences numbness in both hands.

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[11] On July 6, 2017, a case manager from the Workers' Compensation Board (the "Board") visited Ms. Bird's worksite to complete a risk assessment and activity-related soft tissue disorder worksite evaluation report (the "ASTD Evaluation Report"). During this assessment Ms. Bird reported that, in regards to her transcription work, "[t]here are more statements and they are now longer, more detailed statements". The case manager made a video recording of Ms. Bird performing her work duties.

[12] Dr. Karrel, a medical doctor employed by the Board, reviewed the petitioner's claim file, including the ASTD Questionnaire, the ASTD Evaluation Report, and the worksite video. In his clinical opinion report dated July 21, 2017, Dr. Karrel concluded, based on his review of the worksite video, that he observed "both of the worker's wrists and elbows were predominantly in neutral postures for the vast majority of the time". He opined that:

> …according to the evidence provided there were no significant ergonomic risk factors in the worker's activities capable to cause tissue damage or significant strain in both wrists and elbows.

[13] Dr. Karrel acknowledged that the worker experienced the symptoms during the work activity, but that the temporal relation alone cannot support a causal link. Dr. Karrel concluded "…the work activities described did not appear to involve risk factors considered medically significant in the development or aggravation of bilateral tennis elbow."

[14] In a decision dated July 24, 2017, the Board found no evidence of a work incident or a series of incidents to support a claim and disallowed the petitioner's claim ("Board Decision").

[15] On January 9, 2018, the Review Division confirmed the Board Decision ("Review Division Decision").

[16] The petitioner appealed the Review Division Decision to WCAT. The appeal was heard by WCAT by way of written submissions. The petitioner was represented by an advocate from the petitioner's union. The City participated in the appeal.

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[17] On March 19, 2019, the petitioner submitted written submissions in the appeal and provided the Everett Report in support. The Everett Report consisted of 29 pages and was based on an ergonomic risk assessment of Ms. Bird's work activities as a stenographer. The assessment was conducted on January 24, 2019. As part of his assessment he used surface electromyograph ("sEMG") to measure muscle-electrical activity emanating from different parts of Ms. Bird's right and left arms. Mr. Everett concluded:

> In closing, it is my professional opinion, based on my findings, that Ms. Bird was exposed to significant ergonomic stressors, that, alone and or in combination, and more likely than not, contributed to a marked reduction in safety and a marked risk to the musculoskeletal structures of both the right and left upper extremities.

[18] The cost of the Everett Report was $4,458.04. The petitioner asked WCAT to reimburse her for the cost of the report.

[19] On April 12, 2019, the City submitted written submissions in reply to the appeal. The written submissions were prepared by Susannah Luck of Morneau Shepell. The City commented on the weight to be given to the Everett Report, and in particular, on the use of sEMG, noting that:

> The use of sEMG is not a practical way to conduct jobsite visits and it's completely unnecessary. We have certainly never seen another professional in this field use it for a jobsite visit. Mr. Everett's use of sEMG remains controversial.

[20] Ms. Luck then referenced two WCAT decisions: the first one being WCAT A1802187 in which she quotes from paras. 42 to 44, and the second one being WCAT 2013-02756 quoting para. 23. Both WCAT decisions comment on the use of sEMG by Mr. Everett. These decisions are publicly available.

[21] On April 29, 2019, the petitioner made rebuttal submissions to the City's reply. In reply, the petitioner's union representative noted that the City's representative was expressing her opinion on the methods used by Mr. Everett for which she had no expertise. The reply states:

> We submit that the methods that Mr. Everett uses enables him to arrive at an informed opinion that is based on objective measurements and backed by scientific literature. …The employer representative makes the argument that the method and approaches that Mr. Everett uses are simply not necessary and a waste of time. They ask the vice chair to accept and place more weight on an assessment that had no measurements.

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[22] The reply submissions note that there were a handful of vice chairs who in 2013 were critical of Mr. Everett's reports and his methods, but he has since streamlined his reporting and tried to make a technical report more reader friendly. The petitioner did not seek to submit a further report addressing any concerns with the Everett Report.

[23] On June 27, 2019, vice chair Ellen Riley (the "decision maker"), issued the WCAT Decision dismissing the petitioner's appeal and exercising the discretion to partially reimburse the cost of the Everett Report in the amount of $2,104.75.

III. Statutory Framework

[24] The *Workers Compensation Act,* R.S.B.C. 1996, c. 492 [*WCA*] establishes a comprehensive no-fault insurance scheme for the Province of British Columbia under which the Workers' Compensation Board (the "WCB") pays compensation for personal injury or death arising out of and in the course of employment caused to a worker, and, in return, the worker or the worker's estate loses the right to sue an employer or another worker in respect of such injury or death. The scheme is wholly funded by British Columbia employers and administered by WCB: *Franzke v. Workers' Compensation Appeal Tribunal*, 2011 BCSC 1145 at para. 8.

[25] After the WCAT Decision was issued, there was a revision to the *WCA*, effective April 6, 2020, pursuant to *Statute Revision Act*, R.S.B.C. 1996, c. 440, that resulted in a renumbering of the *WCA*'s parts, divisions, and section numbers under the new *Workers Compensation Act*, R.S.B.C. 2019, c. 1. In these reasons, I will refer to the sections in force at the time under the former *WCA*, and to the current sections under the new *WCA* in brackets.

[26] WCAT is an administrative tribunal established by s. 232 (now s. 278) of the *WCA*. It is an expert tribunal and is the final level of appeal for the decisions made by the Board regarding workers' compensation: *Franzke* at para. 11. Any decision made by the Tribunal under Part 4 (now Part 7) of the *WCA* is final and conclusive, and not open to question or review of the court.

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[27] WCAT is not part of the Board. It is headed by a chair and members called "vice chairs". Appeals are usually heard by a single vice chair: s. 232 (now s. 278) and s. 238 (now s. 285). The appeal may be conducted by way of written submissions or oral hearing, and WCAT may receive and accept information that it considers relevant, necessary, and appropriate, whether or not the information would be admissible in a court of law: ss. 245 (now s. 295), 246 (now s. 297), and 246.1 (now s. 298).

[28] Section 250 (now s. 303) of the *WCA* provides that WCAT:

- May consider all questions of fact and law arising from the appeal, but is not bound by legal precedent: s. 250(1) (now 303(1)).
- Must make the decision based on the merits and justice of the case, but in so doing must apply a policy of the board of directors that is applicable in the case: s. 250(2) (now s. 303(2)).
- In a compensation appeal, if the evidence supporting a different finding on an issue is evenly weighted in that case, WCAT must resolve that issue in a manner that favours the worker: s. 250(4) (now s. 303(4)).

[29] As such, a precedent is not binding as the Court of Appeal noted in *Browne v. Workers' Compensation Appeal Tribunal*, 2013 BCCA 487:

> [35] A WCAT decision cannot be said to be patently unreasonable because it is arguably inconsistent with another WCAT decision. The Board's decisions are not binding and the principle of *stare decisis* has no application. As noted above, s. 250 of the *Act* explicitly provides that WCAT is not bound by legal precedent….

[30] A WCAT proceeding is hybrid, neither strictly a trial *de novo* nor an appeal on the record. WCAT does not have to defer to the Board's decision, but can substitute its own: *Steadman v. Workers' Compensation Appeal Tribunal*, 2021 BCSC 477 at para. 39.

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[31] Section 82 (now s. 320 and s. 319) allows the Board's board of directors to set and revise policies. These policies are binding on the Board and WCAT pursuant to s. 99 (now s. 339) and s. 250(2) (now s. 303(2)).

[32] Pursuant to s. 245.1(d) (now s. 296(d)(i)) of the *WCA,* s. 11 of the *Administrative Tribunals Act,* S.B.C. 2004, c. 45 [*ATA*] applies to WCAT. WCAT has the power to control its own processes and the authority to establish practices and procedures, and has published these on its public website in a manual titled *Manual of Rules of Practice and Procedure* ("MRPP").

[33] As set out in Item 1.2., the MRPP consists of elements:

- Rules (indicated in **bold**), which are binding;
- Practice directives (indicated in *italics*), which are generally followed but are not binding; and
- Guidance (in regular typeface), which is not binding.

[34] WCAT is not limited to evidence in the Board's file and the evidence provided by the parties. Pursuant to s. 246(2)(c) (now s. 297(2)(a)) of the *WCA*, WCAT has the discretion to inquire and obtain information. However, Item 9.1 of the MRPP states that:

> While WCAT has inquiry power, and the discretion to seek further evidence, it is not obliged to do so. The question as to whether the evidence is sufficiently complete and reliable to arrive at a sound conclusion with confidence is one which rests with the panel. It is not WCAT's responsibility to evaluate the appeal and then notify parties of the weaknesses in the case for the purpose of obtaining further evidence.

[35] Under section 1.5.3.1. of the MRPP, WCAT has set out its obligations of procedural fairness and the right to be heard:

> The right to be heard means that a person who may be directly affected by a decision has the right to receive notice that a decision may be made, the right to know what matters will be decided, and the right to be given a fair opportunity to state their case and to correct or contradict relevant statements or evidence with which they disagree. This right will usually require:
>
> a. disclosure to a party of all documents that were before the Board and, if applicable, the Review Division, at the time the appealed decision(s) was made;
>
> b. disclosure to a party of all material that is before the decision maker, whenever received by the decision maker, including any written submissions from other parties;
>
> c. an opportunity to provide submissions in relation to all disclosed material and to respond to the written submissions of other parties;
>
> d. the right to a reasonable amount of time to prepare for an oral hearing or to provide written submissions, and to be advised of any relevant submission due dates;
>
> e. the right to present evidence;
>
> f. the right to test adverse evidence (e.g. cross-examination);
>
> …

IV. <u>WCAT Decision</u>

[36] The WCAT decision consists of 107 paragraphs. Of particular significance on the issue of procedural fairness are the following paragraphs:

> [43] Policy item #97.34 (Conflict of Medical Opinion) notes that:
>
> > It should never be assumed that there is a conflict of medical opinion simply because the opinions of different doctors indicate different conclusions. A difference in conclusion between doctors may or may not result from a difference in medical opinion. For example, the difference could result from different assumptions of non-medical fact. Where there are two or more medical reports or memos on file from physicians, indicating different conclusions, the Board will not simply select among them as a first step. The Board should first think about why they are different and consider whether the relevant non-medical facts have been clearly established. The Board may seek advice to determine whether the best medical evidence has been obtained, and, for example, find out if any appropriate medical procedures can be instituted that would assist in arriving at a more definite conclusion.
>
> …

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[56] The *Occupational Therapists Regulation* defines the scope of the practice of occupational therapy as involving the assessment of occupational performance and modification of human and environmental conditions to maintain, restore or enhance occupational performance and health. In my view, that includes assessing what movements might be involved in particular activities.

[57] There are no doubt numerous situations in which the use of an expert to assess ergonomic risk factors will be required. However, the purpose of an expert report is to assist the panel in understanding complex information so that the panel can make findings of fact and draw its own reasonable conclusions. The panel must not blindly accept the expert report.

…

[59] In weighing Mr. Everett's expert evidence against the other evidence on the file, such as the evidence from the Board officer and the worker and the opinion of Dr. Karrel, I have analyzed the conflicts as best as possible on each issue and arrived at my conclusions about where the weight of the evidence lies. I have considered whether differences in opinion may be based on different findings with respect to non-medical facts. Ultimately, the question of what risk factors are present is a question of fact that must be decided by the adjudicator looking at all of the evidence.

…

[62] I also have some concerns about the methodology used. For example, Mr. Everett wrote that he used sEMG to measure internal muscle forces and determine which muscles were activated, and when. He used an electrogoniometer to measure, ten times per second, the range and frequency of the worker's motion. The fact that Mr. Everett uses equipment does not mean that his report should be preferred. I conclude below that Mr. Everett unnecessarily used equipment to obtain measurements which were not helpful for the purposes of the decision I must make.

…

[64] However, no physician, policy or guideline describes the risk factors for lateral epicondylitis in the terms of the number of internal muscle movements or muscle activations. The evidence before me does not establish that small displacements of the writs undetected by the naked eye or muscle activation, as measured by a sEMG or an electrogoniometer, are recognized risk factors for lateral epicondylitis.

[65] Other panels, such as the panel in *WCAT A1801184*, have expressed hesitancy about such as the helpfulness of sEMG data. Prior WCAT decisions are not binding, however are useful for adjudicative guidance.

[66] In *WCAT-2013-02756*, the panel requested an Independent Health Professional's (IHP) comment on Mr. Everett's methods and the use of sEMG assessments. The IHP concluded that using

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electromyography to detect muscle motor unit activation was not yet a reliable method of directly measuring the stress or load on muscles, and it was not possible to make a definitive clinical judgement about ergonomic stressors using that methodology. Though the medical opinion was offered in that particular case, and is not a basis to draw conclusions in the worker's case, it is notable that Mr. Everett continues to rely on research articles that well pre-dating the 2013 WCAT decision to support his use of sEMG and has not addressed in his current report the problems identified by the IHP in *WCAT-2013-02756*.

[67] The panel in *WCAT A1802932* noted Mr. Everett had justified his use of a sEMG as a means of measuring movement and muscle activity, by quoting out of context a journal article entitled, Normalization of surface EMG amplitude from the upper trapezius muscle in ergonomic studies – A review (Journal of Electromyography and Kinesiology. Vol. 5 No. 4 pp. 197-226. 1995 Mathiassen E., et al.). The panel noted on closer reading the article indicated that the use of sEMG data might be justified to study the effects of short-term interventions but a sEMG from a specific muscle is influenced by conditions that differ systematically between individuals and therefore comparisons between groups and/or days is of limited validity. The panel in WCAT *A1802932* noted that Mr. Everett had not commented on the limitations in translating sEMG measurements into biomechanical variables in his report.

[68] In the February 26, 2019 ergonomic assessment which Mr. Everett prepared for the worker herein, he cited this same article in support of his use of sEMG. He did not address the limitations of application described in the article and identified by the panel in *WCAT A1802932*. Neither did he address how in the current appeal an article related to the upper trapezius muscle would assist me in reaching a conclusion that sEMG data would be useful for the purpose of determining risk factors related to lateral epicondylitis.

[69] As indicated above, other WCAT panels were unable to give significant weight to Mr. Everett's reports which relied upon sEMG readings. I too consider his dependence on this sort of evidence to result in unreliable conclusions.

[70] Similar to the panel in *WCAT A1802932*, it remains unclear to me the extent to which these repetitive motions and muscle activations identified by a sEMG and/or an electrogoniometer are significant. Mr. Everett does not provide information as to how minutely sensitive the electrogoniometer was calibrated to be. Mr. Everett does no give information on whether subtle movements are negated from the electrogoniometer results. It is not clear to me that the movements counted by the electrogoniometer can be seen with a naked eye or can otherwise be compared to data collected by conventional observation. I am unable to place significant weight on this data and Mr. Everett's resulting analysis.

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> [71] In the absence of other evidence to verify the risk factors, I do not accept on the basis of sEMG and electrogoniometry data that the worker was exposed to repetitive elbow or wrist movements and/or forceful elbow or wrist movements that are reasonably capable of stressing the inflamed tissues of the arm affected by epicondylopathy. I do not find this aspect of Mr. Everett's report helpful. I find visible movements of the wrists and elbows altering the angle of a joint, more reliable than the movements or activations of individual muscles, invisible to the naked eye.
>
> [72] I have considered whether I ought to seek clarification of my concerns from Mr. Everett or else seek the opinion of an IHP under section 249 of the Act. I have decided to do neither of these. The worker has been afforded procedural fairness by having the opportunity to submit Mr. Everett's report. That I have placed little weight on his sEMG and electrogoniometry measurements is, in my view, not a reason to call Mr. Everett as a witness to give further evidence on the use of this information. Mr. Everett has provided a detailed ergonomic report, 29 pages in length. I consider that this was sufficient for Mr. Everett to explain his methodology, including why he believed these measurements of the worker's upper limbs were of value. The point of an IHP is not to bolster the evidentiary deficiencies a panel may find in the parties' evidence; rather, it is to provide advice or assistance to the panel in making a decision. I find that I can fully and fairly decide this appeal without the need for an IHP report. Both Mr. Everett and the case manager have provided other methodologies which I consider worthy of greater consideration.
>
> …
>
> [76] A report from one expert does not stand instead of a report from a different expert. While Mr. Everett is able to identify factors which he believes could be modified to enhance the workers' performance and factors which he believes present an ergonomic risk, he is not qualified to offer an opinion regarding whether those risks factors were of causative significance in the development of the worker's condition.
>
> [77] Ultimately, I give greater weight to the July 21, 2017 clinical opinion of Dr. Karrel. As a medical doctor, he has the qualifications to provide an opinion on causation. …

V. <u>The Parties' Positions</u>

The Petitioner's Position

[37] The petitioner identifies the following aspects of the WCAT Decision that she submits breach her right to procedural fairness.

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[38] WCAT's criticisms of Mr. Everett's methods crossed the line of procedural fairness at para. 66 when the decision maker imports a piece of expert evidence from another worker's case, relies on the expert evidence even though it was never properly admitted into evidence into Ms. Bird's case, and fails to disclose the expert evidence to Ms. Bird before making a decision.

[39] The petitioner submits that she was not given the chance to access or read the IHP's expert opinion in *WCAT-2013-02756* and further that the vice chair was engaging directly against Mr. Everett as if he was a party to the proceeding. The decision maker criticizes Mr. Everett for not addressing alleged problems with his methodologies identified by another expert in a case six years previous.

[40] The failure of WCAT to disclose all evidence it relied upon is a breach of the common law, the enabling legislation, and its own rules of practice and procedure. The petitioner argues that she should have been given an opportunity to make submissions or obtain additional expert evidence in response to the IHP expert opinion from *WCAT-2013-02756*.

[41] The petitioner argues that the WCAT decision maker let her dissatisfaction of Mr. Everett as an expert trump her duty to Ms. Bird to give her a fair hearing.

The City's Position

[42] The City argues that there was no breach of procedural fairness in that WCAT is allowed to choose the procedures it wishes to follow and it has expertise in making such decisions, which requires the Court to give weight to the choice of procedures it has selected. The petitioner was given an opportunity to submit expert evidence and argument and was given the opportunity in rebuttal to respond to the City's submissions before WCAT made the decision.

[43] The City disputes that it is not an issue of fairness but rather the petitioner objects to WCAT weighing the medical evidence before it and providing reasons preferring one opinion over the other. In support, the City references the decisions in *Shawnigan Residents Association v. British Columbia (Director, Environmental*

Management Act), 2017 BCSC 107 at paras. 79–81 and *Global Agriculture Trans-Loading Inc. v. Lobo*, 2016 BCSC 1556 at para. 56. Both of these cases stand for the proposition that a court should be cautious against characterizing inadequacy of reasons or procedural errors as demonstrating a lack of fairness.

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[44] The City further submits that WCAT's reasoning and decisions regarding the preference of one medical opinion over another is a matter of weighing the evidence before it, which is generally not a reviewable error and one the Court should not readily disturb or otherwise interfere with.

VI. Analysis

A. Standard of Review

[45] The parties agree that s. 58 of the *ATA* sets out the standard of review for Tribunal decisions, being patent unreasonableness or procedural fairness:

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

[46] The Supreme Court of Canada decision *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 653 [*Vavilov*], revises the framework for determining the standards of review in the judicial review of administrative decisions. However, *Vavilov* does not alter the analysis with respect to the standard of review when the standard is explicitly prescribed through statute, as in the *ATA,* within the limits imposed by the rule of law: *Vavilov* at para. 35.

B. Duty of Procedural Fairness

[47] Any individual whose rights, interests, or privileges are affected by a decision of a quasi-judicial or administrative decision maker is owed a duty of fairness: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at 653, 1985 CanLII 23.

[48] In the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699, the Court recognized that all tribunals owe a duty of procedural fairness in their decisions but "the existence of a duty of fairness …does not determine what requirements will be applicable in a given set of circumstances…the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case": at para. 21.

[49] In *Baker* at paras. 23–27, the Court provided a non-exhaustive list of factors for the Court to consider in determining the requisite content of the duty of fairness in a particular context. The *Baker* factors are:

- The nature of the decision being made and the process followed in making it.
- The nature of the statutory scheme and the terms of the statute pursuant to which the body operates.
- The importance of the decision to the individual or individuals affected.
- The legitimate expectations of the person challenging the decision.
- The administrator's choice of procedure and usual practices.

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[50] In applying the *Baker* factors, it is clear that a duty of fairness arises in the context of an appeal to WCAT. The Court further emphasized the purpose of the factors at para. 22:

> …it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all the factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

C. What degree of fairness is owed?

[51] While the City argues that the petitioner has not addressed the five *Baker* factors to establish she was owed procedural fairness, reviewing the statute, caselaw, and the circumstances of this case in light of the *Baker* factors, it is clear that the petitioner was owed a high degree of procedural fairness. Previous decisions have confirmed that WCAT proceedings strongly resemble court proceedings and the statutory scheme offers no further appeals from WCAT decisions: *Djakovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2010 BCSC 1279 at para. 44. Further, the decision had a large impact on the petitioner's livelihood, making it a decision of particular importance.

[52] As noted in paragraph 35, section 1.5.3.1. of the MRPP sets out WCAT's obligations of procedural fairness and the right to be heard.

[53] The Tribunal had an obligation to make a decision in a procedurally fair way which required the Tribunal to: a) give each party the opportunity to know or understand the case it had to meet; and b) give each party the opportunity to respond to the case before the decision maker reached a decision: *Djakovic* at para. 39.

[54] *Paleos v. Workers' Compensation Appeal Tribunal*, 2019 BCSC 1113 at para. 51, explains that the reviewing court is to assess whether the decision maker correctly applied the principles of natural justice and procedural fairness.

D. Was the procedure followed by the Tribunal fair?

[55] Did the Tribunal fulfill its duty of fairness in the circumstances of the case? I have concluded that WCAT did breach its duty of fairness to Ms. Bird in the following four areas.

Did the Tribunal rely on extrinsic evidence?

[56] An administrative tribunal cannot base its decision on extrinsic evidence without first disclosing and giving a complainant an opportunity to respond: *Pfizer Co. Ltd. v. Deputy Minister of National Revenue,* [1977] 1 S.C.R. 456 at 463, 1975 CanLII 194.

[57] The decision maker would not have the expertise to make a finding on the reliability of sEMG, but would need to rely on expert evidence. The only expert evidence in the record, aside from the Everett Report, was that of Dr. Karrel. Dr. Karrel makes no reference to the use of sEMG. The only expert evidence on the use of sEMG that the decision maker relied on was a report referenced in another WCAT decision, *WCAT-2013-02756*, being that of Dr. Hamm.

[58] The report of Dr. Hamm was not part of this record. The petitioner was not given any notice that any type of reliance would be placed on an expert report made in another proceeding. The decision maker recognized that it cannot use a report from another proceeding at para. 66: "the medical opinion was offered in that particular case, and is not a basis to draw a conclusion in the worker's case". However, I find that is precisely what the decision maker did. The decision maker found that because other WCAT panels were unable to give weight to Mr. Everett's reports which relied on sEMG readings, the decision maker too would not give any weight to it: see para. 69. The only expert evidence that the decision maker referenced in the WCAT Decision that commented adversely on the use of sEMG was Dr. Hamm's report. I find that the WCAT Decision arises from the opinion of Dr. Hamm. If it did not, then it is based on no evidence on the invalidity of sEMG, since I find that the decision maker is not qualified to opine on the validity of sEMG.

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[59] In my view, the failure of the decision maker to give notice to the petitioner that reliance would be placed on the opinion of Dr. Hamm violated her right to fair notice. I find that the Tribunal did not act fairly with respect to the reliance on Dr. Hamm's opinion without specific notice being provided.

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Did the Tribunal refer to unidentified "research articles*"?*

[60] The decision maker commented on the use of articles by Mr. Everett that he says support his use of sEMG as a means of measuring movement and muscle activity. The decision maker seems to propose that since an IHP in a previous WCAT decision has indicated that these articles do not ground Mr. Everett's use of sEMG, Mr. Everett ought to have provided further evidence supporting his methodologies or cease reporting on sEMG. The decision maker concluded that: "it is notable that Mr. Everett continues to rely on research articles that well pre-dating the 2013 WCAT decision to support his use of sEMG and has not addressed in his current report the problems identified by the IHP in *WCAT-2013-02756.*"

[61] It is not clear to me what the Tribunal is being critical of, except that it appears to be referencing research articles cited in *WCAT-2013-02756*. In that WCAT decision dated October 3, 2013, the issue was a worker who had claimed compensation for left shoulder tendinitis. The decision maker noted that Mr. Everett had cited three articles in support for his evaluation, at paras. 11 to 13, the articles being described as:

- Judy Village and Catherine Trask, "Ergonomic Analysis of Postural and Muscular Loads to Diagnostic Sonographers" (2007) 37 International Journal of Industrial Ergonomics 781–789;
- Judy Village, "Ergonomic and Biomechanical Analysis of Postural and Muscular Loading to Diagnostic Medical Sonographers" (2007); and
- Dr. Quan, "A Systemic Review of the Association between Musculoskeletal Disorders and Sonographers".

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[62] There is no reference to any of these articles in the Everett Report.

[63] In *WCAT-2013-02756*, a summary of Dr. Hamm's opinion is provided, which includes reference to an unidentified article. It states that:

> Consequently, the literature offers cautionary advice about using electromyography as a tool to measure muscle loading. He cited a caution from a recent article evaluating the relationship between electromyography and muscle force which noted the correlation between force and surface contraction was not well understood and there was a lack of consensus on methodology to measure force on the muscle. The article concluded the various affects of these identified factors results in only an indicator of the rough level of force on the muscle.

[64] If the decision maker was referencing this or these articles, there is no information given on the particulars of the articles being referenced. As such, the petitioner was given no opportunity to review and respond to the contents of these articles.

[65] I find that the decision maker's reference to unidentified research articles without providing the petitioner with any ability to respond was unfair.

Was the petitioner given the opportunity to respond?

[66] A person must be given the opportunity to respond to the allegations made. Did Ms. Bird have notice of the issues raised about Mr. Everett's reliance on sEMG such that she had the opportunity to respond to them? In my view, she did not. I say this regardless of the fact that the City's submissions were critical of the Everett Report.

[67] The petitioner would have had no knowledge that, in the past, some WCAT panels had been critical of the use of sEMG by Mr. Everett at the time she made her appeal and submitted the Everett Report.

[68] I note that the procedure followed in *WCAT-2013-02756* differed from Ms. Bird's experience. It is significant that:

1. A board medical advisor, Dr. Vizsolyi, opined that there were insufficient awkward postures to have caused an occupational disease: at para. 8;

2. Mr. Everett provided an ergonomic evaluation and relied on sEMG to measure the load on the worker's left shoulder: at para. 10;

3. The vice chair noted that she "did not find the scientific methodology used by Mr. Everett to measure the load on the worker's muscles to be well explained" so she engaged Dr. Hamm, an occupational medicine specialist, to evaluate Mr. Everett's reporting on the science he utilized and the articles cited in his report, and to provide an independent health professional opinion regarding the contribution of the worker's job activities to her diagnosed conditions: at para. 20;

4. Dr. Hamm was specifically asked a number of questions related to the use of electromyograph: at para. 21;

5. Dr. Hamm provided a report and concluded that "electromyography is not yet a reliable method of directly measuring the stress or load on muscles and one cannot make a definitive clinical judgment about ergonomic stressors using that methodology": at para. 23;

6. Dr. Hamm's opinion was provided to the parties and they were invited to respond. The worker provided a response from Mr. Everett, as well as additional research materials: para. 27;

7. A report dated July 21, 2012 from a Dr. Keir, kinesiologist, was provided which stated that the use of electromyograph is an appropriate tool for ergonomic analysis and does assess surface muscles: para. 28;

8. The decision maker relied on Mr. Everett's report to support the worker's entitlement to compensation based on his observations and measurements of arm movement: at para. 35; and

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9. The decision maker noted she preferred the report of Dr. Hamm over Dr. Vizsolyi, and in part relied on the electromyography test results which demonstrated the worker's shoulder worked at an elevated level over the course of the day: at para. 40.

[69] The result of that decision was the Board's decision was varied and the worker's appeal allowed: at para. 42.

[70] In considering reimbursement for Mr. Everett's report, the decision maker does note that some of the report was unnecessary and states:

> [52] As another example, Mr. Everett's description of the science of electromyography does not include any of the limitations of that science or his methodology: the "cross talk" noted by both Drs. Hamm and Keir, the positioning of electrodes, and the need to use needles versus surface electrodes. Nor does Mr. Everett's report contain any acknowledgement of the qualifications recommended for drawing conclusions based on electromyography, as noted by Dr. Hamm.

[71] What is clear is that the worker that retained Mr. Everett in *WCAT-2013-02718* was given an opportunity to respond to the concerns raised about the use of sEMG, whereas Ms. Bird was not. It is my view that Ms. Bird was denied the opportunity to put forward her views and evidence fully, respecting the opinion expressed by Dr. Hamm.

[72] The decision maker considered whether she should give such an opportunity, but decided that Ms. Bird had been afforded "procedural fairness" by having an opportunity to submit the Everett Report. The Tribunal essentially found that it was Mr. Everett's responsibility to explain why he used sEMG and electrogoniometry and his failure to do so must be borne by the worker.

[73] I find that WCAT has relied on expert evidence that was not before the Tribunal and failed to provide the worker with the opportunity to respond, which was a breach of procedural fairness. In my view, WCAT did not act fairly towards the petitioner.

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Did the Tribunal act unfairly in reliance on WCAT A1802932?

[74] The Tribunal referenced *WCAT A1802932*, a decision not relied on by the City, which commented on how Mr. Everett had justified his use of sEMG as a means of measuring movement and activity, by quoting, out of context, a journal article by Mathiassen E., et al. from 1995: WCAT Decision at paras. 68–68.

[75] The decision in *WCAT A1802932* is dated March 21, 2019, which is after the Everett Report in Ms. Bird's case is written, being February 26, 2019. The decision maker notes at para. 68 that Mr. Everett: "did not address the limitations of the application described in the article and identified by the panel in *WCAT A1802932"*. It is not clear how an expert is supposed to address an issue identified in reasons that were issued after his report was written. I note that the decision maker did not request Mr. Everett to attend to explain why he referenced that article: WCAT Decision at para. 72. In my view this is a serious shortcoming of the decision-making process that was followed.

[76] As such, Mr. Everett could not have been aware of the criticism that was forthcoming by WCAT on March 21, 2019, at the time he wrote the report, just shy of one month earlier. While the petitioner did not submit her materials until April 12, 2019, and might have possibly become aware of *WCAT A1802932*, I question whether parties should be expected to monitor every WCAT decision with such close attention, particularly as precedent is not binding on WCAT.

[77] It is my view that the decision maker's reference to the need for Mr. Everett to respond to a WCAT decision that did not exist at the time he wrote his report is unjust and unfair.

Conclusion

[78] In order to ensure the fairness of the administrative process and its outcome, I am of the view Ms. Bird is entitled to a re-hearing where all the evidence that the Tribunal is going to rely upon is disclosed to her. As noted in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 129, "a fair procedure is said to be the handmaiden

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of justice…Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process".

[79] On this ground, I set aside the WCAT Decision and remit the matter back to WCAT for a re-hearing on the petitioner's entitlement to workers' compensation benefits for bilateral lateral epicondylitis.

[80] Given my findings on the fairness issue, I do not find it necessary to decide whether some of the factual findings made in the WCAT Decision contradicted each other and, as such, were patently unreasonable.

[81] The issue respecting the cost of the Everett Report I will leave for WCAT to consider on the re-hearing.

[82] The petitioner is entitled to her costs against the City. There will be no costs ordered against WCAT for the role they played in the petition. I note the submissions provided by all counsel were of assistance to the Court.

"Forth J."

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