

Davis v. WorkSafe BC

Decision Summary

Court	B.C. Supreme Court
Citation	2013 BCSC 476
Result	Judicial Review Dismissed
Judge	Mr. Justice Weatherill
Date of Judgment	March 19, 2013
WCAT Decision(s) Reviewed	WCAT-2005-06898, WCAT-2005-06899, WCAT-2005-06900, WCAT-2005-06901, WCAT-2007-02852, WCAT-2010-03110, and WCAT-2012-00656

Keywords

Judicial review – Permanent disability – Cumulative effect of compensable injuries and work activities

Judicial review – Permanent disability – Pre-existing condition – Items #26.50 and #26.55 of the Rehabilitation Services & Claims Manual

Judicial review – Standard of review – Patently unreasonable – Causative significance – Weighing medical opinion

Tribunal authority to reconsider for jurisdictional defect – Authority of Workers' Compensation Appeal Tribunal to reconsider for patently unreasonable errors of fact, law, or discretion – Section 253.1 of the Workers Compensation Act

Summary:

The petitioner sought judicial review of a Workers' Compensation Appeal Tribunal (WCAT) decision that concluded her several compensable injuries did not culminate in a permanent disability to her low back. This, WCAT found, was true whether one considered the cumulative effect of just the injuries or the injuries combined with the petitioner's work activities. The court dismissed the petition having found no patently unreasonable error in the WCAT decision. The court also had to consider whether WCAT possesses a common law authority to reconsider one of its own decisions for a patently unreasonable error. In concluding that WCAT continues to have such

authority, the chambers judge distinguished the Court of Appeal's judgment in *Lysohirka v. British Columbia (Workers' Compensation Board)*, 2012 BCCA 457.

The petitioner received workers' compensation benefits for each of several injuries she suffered between 1999 and 2004. She has not worked since then. Some of the injuries were to the petitioner's neck and upper back and some were to her lower back. The record demonstrated that during this period, the petitioner also began experiencing disability resulting from a non-compensable deterioration of her lumbar spine. The petitioner claimed with the Workers' Compensation Board, operating as WorkSafeBC (Board), that her low back was permanently disabled and that disability was due in part to her previous compensable injuries. Her claim was supported by medical opinions from specialists. Weighing against these opinions was the opinion of a Review Division medical advisor who considered that none of the compensable injuries would have put enough force on the petitioner's low back to exacerbate her pre-existing degenerative condition. WCAT preferred the medical advisor's opinion because it was the only one to address the requirement in policy item #26.55 of the *Rehabilitation Services & Claims Manual* that evidence must establish that a pre-existing disease has been "significantly accelerated, activated, or advanced" by work activities before the conditions can be found to be compensable.

The petitioner had also made a separate claim that her low back condition was exacerbated by the combined effect of her injuries and her work activities with two employers. One of her specialists, Dr. Fisher, had opined that this combined effect was sufficient to result in a permanent aggravation of her pre-existing condition. WCAT noted that the findings of two workplace evaluations cast doubt upon Dr. Fisher's assumptions about the strenuousness of the petitioner's work activities. WCAT therefore did not accept his opinion.

The chambers judge found that the applicable standard of review was that of patent unreasonableness. Although the chambers judge commented that he might disagree with WCAT's conclusion, there was ample evidence upon which the conclusion could be based and, therefore, it could not be said that the WCAT decision was patently unreasonable.

The WCAT decision was, in part, a reconsideration of an appeal after WCAT had set aside one of its earlier decisions because the earlier decision contained a patently unreasonable error. The court had to consider whether WCAT possesses the authority to reconsider one of its own decisions for patently unreasonable errors of fact, law, or discretion. The issue arose because of the judgment in *Lysohirka*, where the Court of Appeal held that the Board did not have authority based in the common law to reconsider one of its own decisions for unreasonable errors of fact, law, or discretion.

The court determined that *Lysohirka* could be distinguished on the basis that there was sufficient indication in the *Workers Compensation Act* that the legislature intended WCAT to retain a common law authority to conduct such reconsiderations of its own decisions. Specifically, section 253.1(5) of the *Act* purports not to limit "the tribunal's ability, on request of a party, to reopen an appeal in order to cure a jurisdictional defect".

The court found that when this provision was enacted in 2004, the legislature would have understood WCAT to possess the common law authority to reconsider for patently unreasonable errors. Although the Court of Appeal has since held that the common law authority has been limited by the Supreme Court of Canada, WCAT's common law authority remains more robust because of the indication in section 253.1 (which does not apply to the Review Division) that it ought to be. The court found that such a conclusion is warranted by the Supreme Court of Canada's reasons in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.