

THE SUPREME COURT OF CANADA AFFIRMS WCAT IS OWED CURIAL DEFERENCE

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The Supreme Court of Canada (the "SCC") clearly states in the recent decision of *British Columbia (Workers' Compensation Appeal Tribunal) v Fraser Health Authority*^[1] that decisions of the British Columbia Workers' Compensation Appeal Tribunal ("WCAT" or the "Tribunal") are owed curial deference. In a 6 to 1 decision, the SCC upheld a 2010 WCAT decision, which found that seven health workers' breast cancers were compensable under the British Columbia *Workers' Compensation Act* (the "Act").

Background

Beginning almost 15 years ago, seven lab technicians at a hospital were diagnosed with breast cancer. These workers claimed compensation from the Workers' Compensation Board (the "Board") on the basis that cancer was an "occupational disease" under the Act.

Payment of compensation for a worker's disease is conditional upon the employment having been of causative significance in the development of the disease, which means the employment was more than a trivial or insignificant aspect of the disease. Where the evidence is evenly weighted, the issue must be resolved in the worker's favour, which is distinct from the civil tort standard of proof that causation must be proved on a balance of probabilities.

A review officer of the Board denied the workers' claims for compensation, finding that there was insufficient evidence to conclude that the employment played a significant role in causing their breast cancers. The workers appealed to WCAT.

Standard of review

The Act confers on WCAT exclusive jurisdiction to inquire, hear and determine all matters and questions of fact, law and discretion arising or required to be determined on appeals under the Act.^[2] A reviewing court may not interfere with a finding of fact or law made by the Tribunal in respect of a matter over which the Tribunal has exclusive jurisdiction unless it is patently unreasonable. Patent unreasonableness is not established where the reviewing court considers the evidence merely to be insufficient.^[3]

WCAT decision

The Tribunal concluded that the workers' breast cancers were indeed occupational diseases. In making its determination the Tribunal considered expert scientific reports, which concluded that the workers' instances of breast cancers represented a "statistically significant cluster" and that it was plausible that this could have been caused by carcinogens they were exposed to in the workplace. However, these reports also concluded that there lacked a sufficient scientific basis to causally link the breast cancers to the workers' employment.

The Tribunal acknowledged the need for positive evidence linking the disease to employment and affirmed the fact finder's ability to draw a common sense inference of causation in the absence of scientific proof of causation, with scientific standards being more rigorous than the standards required under the Act. The Tribunal held that the evidence of past carcinogenic exposure, coupled with the statistically significant cluster of breast cancer cases among laboratory workers, comprised positive evidence supporting a conclusion that it was as likely as not that the workers' breast cancers were caused by workplace exposure.^[4]

Fraser Health sought reconsideration of this decision to the Tribunal. On reconsideration, the Tribunal concluded that the original Tribunal decision was not patently unreasonable.

Decisions of the lower courts

Both the BC Supreme Court and the majority of the BC Court of Appeal concluded that WCAT's decision was patently unreasonable. The Court of Appeal held that the reconsideration by the Tribunal was a nullity.

The workers' appealed to the SCC.

SCC decision

On appeal to the SCC, Fraser Health took the position that the majority of the BC Court of Appeal correctly characterized the Tribunal's reconsideration decision as a nullity, and given this position the SCC saw no basis for interfering with the Court of Appeal's decision on this issue.

With respect to causation, the SCC agreed with the Tribunal that the inability of the reports to reach scientific conclusions to support a causal connection between employment and the workers' breast cancers did not speak to the standard of proof required under the Act to determine causation.

The SCC concluded that the presence or absence of opinion evidence from an expert positing (or refuting) a causal link is not determinative of causation as the Tribunal can consider other evidence in determining whether it supported an inference that the workers' breast cancers were caused by their employment.^[5] Furthermore, the SCC stated that "Causation can be inferred [by WCAT] – even in the face of inconclusive or contrary expert evidence – from other evidence, including merely circumstantial evidence. [This depends on]

how the trier of fact chooses to weigh the evidence."^[6]

The SCC held that while the record upon which the Tribunal made its decision did not include confirmatory expert evidence, the Tribunal relied upon other evidence which, viewed reasonably, was capable of supporting a causal link between the workers' employment and their breast cancers.^[7] The SCC restored the Tribunal's original decision after finding it not patently unreasonable.

Conclusion

Canada's highest court has affirmed that WCAT has exclusive jurisdiction to determine, on appeal under the Act, whether the employment was of causative significance in the development of the worker's disease. The SCC has made it clear that WCAT decisions are owed deference unless patently unreasonable, and patent unreasonableness will not be established where the reviewing court considers the evidence merely to be insufficient because a court must defer where there is evidence capable of supporting (as opposed to conclusively demonstrating) a finding of fact.

Furthermore, the SCC confirms that expert opinion evidence is not determinative of the issue of causation as it is open to the Tribunal to consider other evidence in determining whether the employment was of causative significance in the development of the worker's disease.

by Natalie Cuthill and Grace Shaw (Temporary Articled Student)

1. [*British Columbia \(Workers' Compensation Appeal Tribunal\) v Fraser Health Authority*](#), 2016 SCC 25 [Fraser Health].
2. Act at section 254.
3. Fraser Health at paragraph 30.
4. Fraser Health at paragraph 15.
5. Fraser Health at paragraph 38.
6. Fraser Health at paragraph 38.
7. Fraser Health at paragraph 39.