



Workers' Compensation
Appeal Tribunal

Hot Topics in Workers' Compensation Law (British Columbia)

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WSIAT A2J Symposium

Occupational Disease: Repetitive Work

McHugh v. ICBC and WCAT, 2023 BCSC 56

Rear v. British Columbia (WCAT), 2023 BCSC 1513

- ▶ A medical opinion based on a fundamentally flawed factual foundation is also fundamentally flawed.
- ▶ A worksite risk assessment that does not examine the worker's work activities (or a reasonable simulation of them) that existed at the relevant time, or does so in an inadequate fashion, should be treated with great caution.
- ▶ A decision based on such an opinion is likely to be patently unreasonable



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- ▶ A decision will also be patently unreasonable if “it rejects and rebuts the expert [ergonomist and physician] opinions not through a contrary expert opinion, but through inferences and conclusions with respect to medical causation, requiring medical expertise.”



McHugh v. ICBC and WCAT, 2023 BCSC 56

- ▶ Worker was a data entry clerk with no prior elbow problems who attributed her elbow pain to excessive mousing and tabbing
- ▶ During a recorded visit by a Board case manager to the workplace the worker was unable to log in to her workstation so demonstrated some of the postures used but did not do any actual work.
- ▶ Case manager reported on worker's wrist and elbow postures and rates of repetition but does not provide evidence of how the measurements were taken.
- ▶ Reported that the worker rested her left elbow on the arm rest 90% of the time when using the keyboard, but there was no apparent basis for the conclusion.



McHugh v. ICBC and WCAT, 2023 BCSC 56

- ▶ Based only on the case manager's report, a Board doctor concludes that there are insufficient work-related risk factors identified capable of causing the condition
- ▶ Worker provided an ergonomist report that includes observations of actual work
- ▶ While noting the “unfortunate brevity” of the case manager's evaluation, WCAT found it to be reliable and valid and preferred the Board doctor's opinion as having a better understanding of the risk factors
- ▶ The court found that the evaluation did not simulate any of the work or work activities. It cannot provide a reasonable basis on which to assess whether the worker's activity was a causative factor in her condition.



Bird v. British Columbia (WCAT), 2023 BCSC 543

- ▶ It is procedurally unfair to rely, without notice to the parties, on opinion evidence relating to the reliability of certain testing methods that had only been described in prior tribunal decisions (here, surface electromyograph measurements (sEMG))
- ▶ It is procedurally unfair to expect an expert (or a party) to respond to a WCAT decision that is critical of the expert that was issued after the expert report was written in the subject case.
- ▶ “I question whether parties should be expected to monitor every WCAT decision with such close attention, particularly as precedent is not binding on WCAT. “



Mental Disorders: Bullying and Harassment

Pastega v. British Columbia (WCAT), 2022 BCSC 2264

- ▶ It was not patently unreasonable for WCAT to interpret the Act and related Board policies in such a way that bullying and harassment by **social media** was excluded from coverage, if the social media postings were made outside of work time, and outside the workplace.
- ▶ WCAT had found that the posts were significant stressors, constituted bullying and harassment, related to events that had happened the same day at work, and were viewed during work hours



Mental Disorders: Bullying and Harassment

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- ▶ It was reasonable for WCAT to find that neither creating nor viewing social media posts were “an activity that is consistent with, or reasonably incidental to, the obligations and expectations of the worker’s employment”, especially in circumstances where there was evidence that the employer prohibited or discouraged the use of social media on office computers.

