IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McHugh v. Insurance Corporation of British Columbia,* 2023 BCSC 56

Date: 20230112
Docket: S233103
Registry: New Westminster

Between:

Luisa McHugh

Petitioner

And

Insurance Corporation of British Columbia and Workers' Compensation Appeal Tribunal

Respondents

Before: The Honourable Justice Kirchner

Reasons for Judgment

Counsel for the Petitioner:	P.P. Eastwood
Counsel for the Respondent Workers Compensation Tribunal:	T.J.H. Martiniuk
Place and Dates of Hearing:	Vancouver, B.C. December 14 and 15, 2022
Place and Date of Judgment:	New Westminster, B.C. January 12, 2023

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Introduction

[1] The Petitioner, Luisa McHugh, applies for judicial review of a decision of the Workers' Compensation Appeal Tribunal (the "Tribunal") denying her claim for benefits from the Workers' Compensation Board (the "Board").

[2] At various times since 2018, Ms. McHugh has suffered from three medical conditions in both her arms: medical epicondylopathy, lateral epicondylopathy, and intermittent ulnar irritation. Essentially, these are painful conditions in the elbow and forearm. She claims her workplace activities at the Insurance Corporation of British Columbia ("ICBC") caused or contributed to these conditions. The Tribunal, like the Board before it, found otherwise and dismissed Ms. McHugh's claim for benefits.

[3] Ms. McHugh argues the Tribunal's decision is patently unreasonable in three respects:

1. The Tribunal relied on a demonstrably inadequate workplace evaluation of Ms. McHugh's work activities that did not assess her doing any actual or simulated work;

2. The Tribunal placed "very little weight" on the expert report of Dr. Dan Robinson, an ergonomist who conducted a full workplace evaluation for Ms. McHugh, including observing and assessing her doing the actual work activities she performed in the time leading up to her medical conditions; and

3. The Tribunal found that Ms. McHugh's work activities did not involve repetitive pronation or supination of her forearms.

[4] At the heart of all three grounds is the adequacy of a workplace evaluation done by a Board case manager (the "Workplace Evaluation"). The Workplace Evaluation was ordered by a Review Officer of the Board after Ms. McHugh sought a review of the Board's first decision rejecting her claim for benefits. A Board medical advisor, Dr. Dharminder Hayre, relied on the Workplace Evaluation in arriving at his

opinion that Ms. McHugh's workplace activities did not cause or contribute to her medical conditions. Both the Workplace Evaluation and Dr. Hayre's opinion feature prominently in the Tribunal's analysis and are foundational to its conclusions.

[5] For the reasons that follow, I find the Board's acceptance of the Workplace Evaluation being "reliable and valid" is patently unreasonable because the evaluation did not observe Ms. McHugh doing any actual or simulated work and it did not conform to the minimum standard required by the Review Officer. I also find the Tribunal's determination that Dr. Robinson's opinion should be given very little weight and Dr. Hayre's opinion should be preferred is clearly irrational and thus patently unreasonable. Finally, while I do not substantively address the reasonableness of the Tribunal's conclusion that Ms. McHugh's work activities did not involve repetitive pronation or supination of her forearms, I find the flawed Workplace Evaluation was material to that conclusion and it must be reconsidered.

[6] The respondent ICBC did not appear or participate in this judicial review. It was therefore left to the respondent Tribunal to defend its own decision. Counsel for Ms. McHugh did not object to the scope of the Tribunal's argument or argue it was beyond the proper scope for it to defend its own decision when ICBC did not participate.

Background

[7] Ms. McHugh started working for ICBC in 2015 as a customer service assistant. Much of her work – around 90% of her time – was data entry work seated at a computer. Most frequently she entered data on tow bills which required frequent and repetitive use the Tab key to toggle through fields in electronic forms. The evidence suggests she was very efficient at this work.

[8] In 2018, Ms. McHugh began experiencing pain and discomfort in her left elbow. This was not a pre-existing condition and she had suffered no injury outside of the workplace. She believed it was caused by her repetitive computer use at work. Her family doctor diagnosed her with a repetitive strain injury to her left elbow and recommended she cease working, which she did.

[9] Ms. McHugh applied to the Board for compensation under s. 136 of the *Workers Compensation Act,* R.S.B.C. 2019, c. 1. She claimed her condition was an "occupational disease" within the meaning of the *Act* that was caused by the nature of her employment activities. The Board denied her claim on August 9, 2018 and she requested a review of that decision by a Review Officer under s. 268 of *Act*.

[10] While awaiting the Review Officer's decision, Ms. McHugh remained on medical leave until January 14, 2019 when she started a graduated return to work. She continued with the data-entry work but now her main task was inputting data into lien forms which required less use of the left arm and more use of the right, using the mouse. After some weeks of this, she began to experience pain and swelling in her right elbow. She underwent an ergonomic assessment which resulted in a special keyboard and mouse being ordered for her. Despite this, the pain worsened and, on February 26, 2019, she again applied for compensation from the Board for this condition.

[11] On March 4, 2019, the Review Officer issued his decision on the first application. He referred Ms. McHugh's claim back to the Board for reconsideration and directed the Board to conduct an Activity-Related Soft Tissue Disorder ("ASTD") workplace evaluation to assess work-related risk factors that might have caused her condition. He noted there is "no evidence depicting the worker's postures at work" and a workplace evaluation that records her working at the workstations she worked at prior to the onset of the medical condition was needed.

[12] On March 13, 2019, a Board case manager attended with Ms. McHugh at her workplace for the Workplace Evaluation. Since Ms. McHugh was on leave, her login and password combination was not active so she could not access ICBC's network to simulate the tasks she had been doing when her medical conditions arose. Despite this, the case manager told her "not to worry about it" and had her demonstrate some of the postures she used while typing, using the tab key and the mouse, and talking on the phone. At no time did the case manager have Ms. McHugh do any actual or simulated work.

[13] The case manager took several short videos during the evaluation and relied on these in his report. The videos confirm that Ms. McHugh did not perform any actual or simulated work during the evaluation. They include:

- A 3:36 video of Ms. McHugh describing her symptoms to the case manager;
- A 40-second video of Ms. McHugh unsuccessfully attempting to log into the ICBC network. She was typing her user name and password for about half of the video and the rest of the time she was idle waiting for the network to respond;
- A 40-second video in which Ms. McHugh shows the case manager how her workstation was set up. For a few seconds she has her left hand resting on the keyboard and her right hand on the mouse. Most of the time she is moving around showing the case manager the set up or turning to face him while they are speaking. She does not do any work during this segment.
- A 3:24 video which shows, at best, a few seconds of Ms. McHugh's posture and positioning at a workstation but not doing any work. This video includes:
    - a demonstration of how Ms. McHugh uses the phone, including while typing, but she did not actually type while holding the phone as she might have while working. She merely hovered her hands over the keyboard as part of the demonstration. This takes about 15 seconds;
    - a demonstration of her posture while using the phone on longer calls while not typing. This is about 20 seconds;
    - a demonstration of her posture while typing but she does not do any actual typing or work. Her body was moving around so she could make eye contact with the case manager while speaking to him so it is not a sustained demonstration of her posture. At best, it shows her posture for a few seconds without doing any actual or simulated work;

- a demonstration of how she uses the Tab key, but she was not actually tabbing through a document and it is not apparent she was even depressing the tab key. This lasts about 8 seconds;

- Ms. McHugh showing the case manager the headset she sometimes used for phone calls. She was either away from the desk or not using the keyboard or mouse during this time, which was about one minute.

- Ms. McHugh seated at the desk talking to the case manager, sometimes with her hands resting on the keyboard and/or the mouse and sometimes not.

- A 13-second video where Ms. McHugh shows the case manager the layout of another work station. She does not show any typing posture or simulated work in this video.

- A 45-second video of Ms. McHugh showing the case manager the second work station. The first 24 seconds show her walking to and getting seated at the station. At the 24-second mark we see her seated at the work station with her hands resting inactive on the keyboard. Her left arm is resting on the arm-rest. She does no typing in this video and no work.

[14] The case manager also took some still photos of her posture at the keyboard but again she was not doing work when any of these photos were taken.

[15] On this judicial review, the Tribunal places particular reliance on the 40-second video of Ms. McHugh attempting to log into the ICBC network. It argues this video shows her doing some typing and demonstrates her posture. The Tribunal also relies on part of one of the longer videos in which Ms. McHugh demonstrates her typing posture and her use of the tab key.

[16] For the reasons I have just outlined, I do not accept these snippets are representative of her “working at her workstation” as the Review Officer required. She does no actual or simulated work during these brief demonstrations. (I consider

simulated work to be performing the tasks she actually did as an employee such as toggling through tow forms and typing data into the electronic documents.) I am not persuaded that attempting to log into to the network *before* a work activity simulation was to begin is an indicator of her posture and arm movement when she did her actual work activity.

[17] The case manager prepared a report in which he described various details about Ms. McHugh's body movements and posture, purportedly while working. For example:

- The case manager reports that when Ms. McHugh is working at the customer service desk or at the phone queue, her wrist movements can occur at rates of 5 to 15 times per minute. He records measurements of her posture, including wrist and elbow extensions during various work tasks. I can only assume these measurements were taken from the videos or photographs. There is no evidence of how he took measurements and, since he did not observe he actually working, they are not taken while she was doing any actual or simulated work.

- The case manager records that Ms. McHugh can sustain postures while working at the customer service desk for 45 seconds or less. He records that when she is in the extreme of keyboarding and using the mouse, her postures are sustained for two seconds or less. There is no evidence in the videos of the case manager making these observations. At no time in the videos did she sustain any posture for 45 seconds. It may be that the case manager gathered this information from Ms. McHugh's own report but it certainly did not come from an observation of her working.

- The case manager recorded that Ms. McHugh rested her left elbow on the armrest, which is shown in the 45-second video, but she is not doing any typing or otherwise working in that video.

- The case manager states: “90% of the time the worker is keyboarding where she is resting her inside of her forearm on the armrest.” Given that the case manager did not see Ms. McHugh doing any work, there is no apparent basis for the conclusion that she rests her arm on the armrest 90% of the time she is keyboarding.

[18] After receiving the Workplace Evaluation report, the Board asked Dr. Hayre to provide an opinion on four questions which I paraphrase as follows:

1. What is the confirmed or best working diagnosis for Ms. McHugh’s condition?

2. Is the condition associated with activities she performed at work?

3. Are those work activities a cause or contributing factor to her condition?

4. Are there any non-occupational factors that have affected the condition?

[19] Dr. Hayre did not examine Ms. McHugh or observe her working or performing any tasks at work. He relied on the existing medical records and the Workplace Evaluation, including the videos and photos taken during the evaluation and the case manager’s report.

[20] Dr. Hayre accepted that Ms. McHugh suffers from bilateral epicondylitis and bilateral ulnar neuropathy at the elbow but concluded that “insufficient risk factors have been identified at her workplace that are capable of stressing the tissues” associated with the condition. He said her symptoms cannot be explained by work-related activity. He concludes that the nature of Ms. McHugh’s condition “is suggestive of a personal cause.” He does not explain this term but he clearly opines it is not work-related. Since he acknowledges there is no pre-existing condition or other trauma that may have caused the injury, I infer that “personal cause” means some naturally developed condition.

[21] The Board dismissed both of Ms. McHugh's clams in decisions dated March 22, 2019 and April 3, 2019. Those decisions were confirmed by a Review Officer on September 19, 2019.

[22] On September 25, 2019 Ms. McHugh appealed the decision to the Tribunal. That appeal was heard with an oral hearing by telephone at which Ms. McHugh gave evidence. She also tendered Dr. Robinson's report. Pursuant to s. 298 of the *Act,* the Tribunal may receive new evidence at the appeal stage.

[23] Unlike Dr. Hayre, Dr. Robinson conducted his own workplace evaluation of Ms. McHugh and, unlike the case manager's Workplace Evaluation, he had Ms. McHugh perform the tasks she actually did while working in the time leading to her arm conditions. This included inputting data in the tow and lien forms as she had done while working.

[24] Dr. Robinson opined that the case manager's Workplace Evaluation did not provide an adequate or accurate assessment of the risk factors for Ms. McHugh's work activity because no actual or simulated work was observed during the assessment. He opines:

> It is not possible to assess the postures that are required to perform work without observing active work that uses the keyboard and mouse in the manner that is required to perform Ms. McHugh's job.

[25] Based on his own observations and analysis, Dr. Robinson concluded that there are "sufficient risk factors present in Ms. McHugh's work activities" in the period leading up to her left arm condition to support the biological plausibility of those activities causing the condition. He noted there were highly repetitive movements and strained awkward postures of the left-hand, wrist, and forearm that were observable during her primary work tasks and awkward left wrist and forearm postures are sustained for most of her work.

[26] He also opined that the switching activity from processing mostly tow bills to processing liens after her graduated return to work resulted in an increase in the duration of sustained awkward postures of the right forearm and wrist and an

increase in the rate of repetition of right wrist awkward postures. He opined that there were sufficient risk factors present to support the biological plausibility that Ms. McHugh's right elbow condition was caused by her work activity.

[27] Dr. Robinson also opined that awkward postures are observable in the Workplace Evaluation videos and these postures are not consistent with the description of awkward postures in the Workplace Evaluation report.

[28] The Tribunal gave "very little weight" to Dr. Robinson's opinion and preferred Dr. Hayre's opinion. Relying on Dr. Hayre's opinion, the Workplace Evaluation report and videos, and Ms. McHugh's description of how she works, the Tribunal found Ms. McHugh's workplace activities did not have any causal significance to her conditions. I provide more details of the Tribunal's reasons in my analysis of the issues.

Analysis

Standard of Review

[29] The parties agree the standard of review for the Tribunal's decision is patent unreasonableness pursuant to s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45. That is "the most deferential standard of review known to Canadian law": *The College of Physicians and Surgeons of British Columbia v. The Health Professions Review Board*, 2022 BCCA 10 at para. 130. It has been variously described as "openly, clearly, evidently unreasonable" (*Speckling v. British Columbia (Workers' Compensation Board),* 2005 BCCA 80), "clearly irrational", or "evidently not in accordance with reason" (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52).

[30] Findings of fact are supportable on a patently unreasonable standard where there is evidence capable of supporting the finding. A patently unreasonable finding of fact is one where the evidence, "viewed reasonably, is incapable of supporting a tribunal's findings of fact". Insufficient evidence in the mind of the reviewing court is not enough to meet this standard and the court is not to reweigh the evidence:

British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority, 2016 SCC 25 at para. 30; *Speckling v. Workers' Compensation Board,* 2005 BCCA 80 at para. 37). "Only if there is no evidence to support the findings or the decision is 'openly, clearly, evidently unreasonable', can it be said to be patently unreasonable": *Speckling*, para. 37.

First Issue: Is the Tribunal's (and Dr. Hayre's) reliance on the Workplace Evaluation patently unreasonable?

[31] In my view, it was patently unreasonable for the Tribunal to rely on the Workplace Evaluation and, by extension, Dr. Hayre's opinions based on it. As the videos make obvious, the Workplace Evaluation did not simulate any of the work or work activities that Ms. McHugh actually performed in the time leading to either her left or right arm conditions. It therefore cannot provide a reasonable basis by any standard on which to assess whether Ms. McHugh's work activity was a causative factor in her conditions.

[32] This is not a case where there is some evidence of Ms. McHugh working at her work station. She gave brief demonstrations (measured in seconds) of the postures she assumed when typing and how she used the tab key, but she did not simulate any of the work tasks she had done in the time leading to her conditions. I agree with Ms. McHugh's submission that a "work simulation that does not actually simulate the worker's work does not provide any evidentiary basis for an assessment of a worker's job activities".

[33] Moreover, the Tribunal's reliance on the Workplace Evaluation is patently unreasonable because it plainly and obviously does not meet the minimum standard required by the Review Officer who ordered it. The Review Officer set aside the Board's original rejection of Ms. McHugh's claim because the Board had failed to conduct a workplace visit to observe and record Ms. McHugh's "work behaviours and work environment". It considered this necessary to measure the degree to which her job duties exposed her to risk factors for the development of her conditions. The Review Officer said with "no evidence depicting the worker's postures at work, I am

unable to determine whether her work activity exposes her to risk factors for the development of a left elbow condition." [Emphasis added.]

[34] The Review Officer ordered the Workplace Evaluation. He left it to the Board to conduct whatever further investigations it considered appropriate but said at a "minimum" the Workplace Evaluation "must include reliable video or photographic evidence of the worker working at the workstation she worked at…" [Emphasis added].

[35] At no time during the Workplace Evaluation was Ms. McHugh asked to *work* at her workstation. In my view, it is patently unreasonable to rely on an evaluation that plainly and obviously does not meet the minimum requirements set by the Review Officer who ordered it.

[36] It follows that the Tribunal's acceptance of that Workplace Evaluation as "reliable and valid" is patently unreasonable and the Tribunal's decision should be set aside on this ground.

Second Issue: Is the Tribunal's conclusion that Dr. Robinson's report should be given "very little weight" patently unreasonable?

[37] It follows from my conclusion on the first issue that it was patently unreasonable for the Tribunal to give "very little weight" to Dr. Robinson's report and prefer Dr. Hayre's. Dr. Hayre's report is substantially based on the Workplace Evaluation that did not simulate any of Ms. McHugh's work activity or meet the minimum standard set by the Review Officer. Dr. Hayre did no further investigations or examinations of his own apart from reviewing the medical records. The factual basis for his opinion therefore does not meet the minimum standard required by the Review Officer.

[38] The Tribunal's reasoning on this issue is also clearly irrational and thus patently unreasonable. It found that Dr. Hayre had a better understanding of Ms. McHugh's typing postures than did Dr. Robinson because Dr. Robinson wrongly understood that Ms. McHugh rests her arms on the armrest while typing. This, the

Tribunal said, is contrary to Ms. McHugh's own evidence which it accepted. It went on to say:

> [78] I find the evidence overall, and in particular the worker's evidence to the case manager, the Review Division, and at the [Tribunal's] oral hearing, consistently supports a conclusion that she did not usually lean or otherwise rest her arms on the chair when typing. As a result, I place very little weight on the evidence and conclusions from Dr. Robinson's report.
>
> [79] I prefer the opinion of Dr. Hayre, as he had a better understanding of the postures than did Dr. Okunola and Dr. Robinson, who did not accept the findings from the case manager's site visit.
>
> [Emphasis added.]

[39] There are at least two critical flaws in the Tribunal's reasoning, either of which makes this conclusion patently unreasonable.

[40] First, nowhere in his report does Dr. Robinson state or imply that Ms. McHugh rests her arms on the armrest while typing. The Tribunal infers this from the photographs in his report but I find that inference is unsupported by any reasonable examination of the report as a whole. While some (but not all) of the photographs in Dr. Robinson's report appear to show Ms. McHugh's elbow making contact with the armrest, they do not reveal that she is resting her elbow on the armrest.

[41] In fact, figure B24 of Dr. Robinson's report states otherwise. That photo appears to show Ms. McHugh's elbow on the armrest but it also shows her wrist sitting on the edge of the desk below the keyboard. The caption under the photograph states:

> Processing tow bills – left keyboard use; right mouse use. Right and left forearm pronation >80°. Right wrist extension >45°. Left wrist extension ~40°; contact stress on wrist at edge of desk.
>
> [Emphasis added]

[42] Thus, while it appears in this photograph that Ms. McHugh's elbow is on the armrest, Dr. Robinson states that her wrist that is bearing the weight of her arm. In the absence of Dr. Robinson stating anywhere in his report that Ms. McHugh rests her arm on the armrest while typing, I find there is no evidentiary basis in the report for the Tribunal to impute this misunderstanding on Dr. Robinson.

[43] Second, even if Dr. Robinson incorrectly thought Ms. McHugh used the armrest while typing, Dr. Hayre was under the same misapprehension. If that misunderstanding justified giving Dr. Robinson's report very little weight, the Tribunal should have been equally dismissive of Dr. Hayre's report.

[44] Dr. Hayre states in his report:

> No awkward postures noted for the wrist. The worker's forearm does often rest on the arm-rest but this is not expected to stress the ulnar never at the elbow.
>
> [Emphasis added]

[45] The Workplace Evaluation report on which Dr. Hayre relies also states that Ms. McHugh rests her arm on the armrest:

> 90% of the time the worker is keyboarding where she is resting her inside of her forearm on the armrest.
>
> [Emphasis added]

[46] As this was the sole ground on which the Tribunal substantially rejected Dr. Robinson's report and preferred Dr. Hayre's report, the conclusion is "clearly irrational" and patently "not in accordance with reason": *Law Society of New Brunswick,* para. 30.

[47] In fact, since Dr. Robinson *does not* find that Ms. McHugh rests her arm on the armrest but Dr. Hayre does, the only reasonable outcome of applying the Tribunal's logic would have been to prefer Dr. Robinson's opinion and give Dr. Hayre's opinion very little weight.

[48] For these reasons, I find the Tribunal's substantial rejection of Dr. Robinson's report (giving it very little weight) and preferring Dr. Hayre's report is patently unreasonable and I would set aside the Tribunal's decision on this second ground.

Third Issue: Are the Tribunal's findings that Ms. McHugh's work activities did not involve repetitive pronation or supination of her forearms patently unreasonable?

[49] Ms. McHugh argues the Tribunal's finding of fact that her work activities did not involve repetitive pronation or supination of her forearms is patently unreasonable. Pronation refers to the forearm being rotated so that the palm of the hand is facing down while supination is when the forearm is rotated with the palm up.

[50] The Tribunal concluded that Ms. McHugh's work activity, and particularly the frequent use of the Tab key while entering data in the tow forms, did not involve pronating or supinating her arm or deviating her wrist movement to hit the Tab key. This was based on the Tribunal's observation of Ms. McHugh using the Tab key in the brief demonstration in one of the Workplace Evaluation videos, Ms. McHugh's report to the case manager as recorded in the videos, Ms. McHugh's submissions to the Review Board, and her description of her work activity to the Tribunal. The Tribunal states at para. 72:

> [72] In particular, the worker testified that, when tabbing, she held her fingers on the keyboard keys in the same manner as when she was typing, and her pinky finger "shoots out" to depress the tab key. I find her testimony in this regard fits with her consistent evidence to the Board that she typed with both hands and with her demonstration at the time of the case manager's visit, although admittedly very brief, of holding both hands over the keyboard in the usual touch-typing position. From this, I find the work activities did not involve repetitive pronation or supination of the worker's forearms.
>
> [Emphasis added.]

[51] Given my conclusion on the first two grounds for review, I find it is not necessary to deal substantively with this third ground. It is clear that the Workplace Evaluation was material to the Tribunal's finding that Ms. McHugh's work activities did not involve repetitive pronation or supination of her forearms. I have already found it was patently unreasonable for the Tribunal to rely on that report. While the Tribunal referred to other evidence in support of this conclusion, including Ms. McHugh's evidence to the Tribunal, it did not find that other evidence, standing

alone, supported the conclusion that Ms. McHugh's work activities did not involve repetitive pronation or supination of her forearms. On my read of the Tribunal's decision, the Workplace Evaluation was necessary evidence to support the conclusion. Moreover, the Review Officer's March 4, 2019 decision, which was not appealed to the Tribunal, finds that a Workplace Evaluation is essential to determining whether Ms. McHugh's work activities caused or contributed to her conditions. Since I have found it was patently unreasonable for the Tribunal to rely on the Workplace Evaluation that was performed, a finding of fact that depends on that evaluation cannot stand.

[52] For this reason I would set aside the Tribunal's decision on this third ground of review but I reach no conclusion on whether Ms. McHugh's work activities involve repetitive pronation or supination of her forearms. That is a question for the Tribunal to reconsider.

Conclusion

[53] For these reasons, the application for judicial review is allowed. The Tribunal's decision is set aside and remitted back to the Tribunal for reconsideration in a new hearing.

[54] The usual practice in judicial review is that costs are not awarded to or payable by the statutory decision-maker whose decision is under review: *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494. Ms. McHugh seeks costs in her petition but not in her argument. Although ICBC did not appear at the judicial review and it was left to Tribunal to defend its own decision, Ms. McHugh did not seek to persuade the Court to depart from the usual approach. I therefore order that the parties bear their own costs of this judicial review.

"Kirchner J."