# Court of King's Bench of Alberta

**Citation: Simonovic v Alberta (Worker's Compensation Board), 2024 ABKB 498**

**Date:** 20240816
**Docket:** 1903 17632
**Registry:** Edmonton



Between:

**Ivan Simonovic**

Applicant

- and -

**The Appeals Commission for Alberta Workers' Compensation Board and the Worker's Compensation Board of Alberta**

Respondent

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**Oral Decision**
**of the**
**Honourable Justice C.L. Arcand-Kootenay**

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## Introduction

[1] On August 28, 2019, Ivan Simonovic (the "Applicant"), filed an Originating Application for Judicial Review of Appeals Commission decision No. 2019-0083 ("the Decision") issued on March 5, 2019.

[2] The Decision held that the calculation of the Applicant's compensation rate was correct and that he was not entitled to a cost-of-living adjustment effective January 1, 1990, and January 1, 2011.

[3] The Applicant seeks statutory/judicial appeal (review) of the decision issued by the Appeals Commission.

[4] The central issue for determination in this judicial review is what is the standard of review, and whether the decision of the Appeals Commission ("AC") met that standard.

**Standard of Review**

[5] The framework for judicial review has recently been restructured and is now set out by the Supreme Court of Canada ("SCC") in ***Canada (Minister of Citizenship and Immigration) v. Vavilov,*** 2019 SCC 65 [***Vavilov***]. When a Court reviews the merits of an administrative decision there is a presumption that the standard of review is reasonableness: ***Vavilov*** *at paragraph 23.* This presumption may be rebutted where the legislature has indicated that a different standard should apply: ***Vavilov*** at para 33.

[6] The *Workers' Compensation Act,* RSA 2000, Chapter W-15, contains a statutory appeal provision that permits the Workers' Compensation Board or any person who has a direct interest in a decision of the Appeals Commission to appeal to the Court of Queen's Bench on a question of law or jurisdiction.

[7] Questions of law and jurisdiction on statutory appeal will be reviewed for correctness in accordance with the appellate standard of review arising from ***Housen v. Nikolaisen,*** 2002 SCC 33 at para 8.

[8] All arguments made by the Applicant relate to the weighing of evidence and the application and interpretation of the *Workers' Compensation Act* ("*WCA*") and the Worker's Compensation Board Policy to the facts.

[9] The applicant's arguments raise questions of mixed fact and law that do not fall under the *WCA*'s statutory appeal provision.

[10] Where a pure question of law is not readily extractible from a question of mixed fact and law, no statutory appeal is available under the *Worker's Compensation Act* and the question must be judicially reviewed under the presumption of reasonableness.

[11] In the matter before me, the standard of review I will use is reasonableness.

[12] The SCC in ***Vavilov*** specifically provides guidance on the proper application of the reasonableness standard. The focus of the reasonableness review "must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome": ***Vavilov*** at para 83.

[13] The SCC further provides that a "reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": ***Vavilov*** at para 85.

[14] My job as a reviewing court, as described in paragraph 99 of ***Vavilov,*** is to:

> …develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: ***Dunsmuir***, at paras 47 and 74; ***Catalyst***, at para 13.

[15] As set out in ***Vavilov,*** the starting point and focus for the within judicial review is the Decision itself.

[16] My role is to review the Decision and in the process of my review, refrain from deciding the issue myself.

[17] I will look at the rationale and outcome of the AC's Decision to determine whether the Decision was unreasonable, as was argued by the Applicant.

[18] As the application for judicial review in this case was brought by the Applicant, the onus is on Mr. Simonovic who is challenging the Decision, to demonstrate it is unreasonable: ***Vavilov*** at para 100.



**Issues**

1. What is the standard of review; and
2. Did the Appeals Commission meet that standard of review.

**Analysis of Facts and Law**

**A. SUBSTANTIVE REVIEW OF THE BOARDS DECISION**

1. What standard of review is applicable to the judicial review of the AC's decision;
2. Was the AC's decision reasonable, specifically:
    a. Was it reasonable for the AC to find the calculation of the worker's personal coverage compensation rate based on maximum allowable gross earnings was done correctly? and
    b. Was it reasonable for the AC to find the worker was not entitled to a Cost-of-Living Adjustment for January 1, 1990, AND January 1, 2011?

**Applying the standard of review: Reasonableness**

[19] The standard of review of the AC's decision on the merits, in the matter before me is reasonableness. Reasonableness refers to the acceptability and defensibility of the decision and the justifications offered by the AC on key points.

> It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to **review,** and they are, at least as a general rule, to refrain from deciding the issues themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a **de novo** analysis or seek to determine the "correct" solution to the problem.…Instead, the reviewing court must consider only whether the decision made by the administrative decision maker – including both the rationale for the decision and the outcome to which it led – was unreasonable.
>
> As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker

> communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion… ***Vavilov,*** at para 83 and 84**.**

[20] Reasonableness is an attitude of respect to the administrative decision maker, a recognition that the legislature has given it the job of deciding the merits, not the reviewing court.

[21] In assessing reasonableness under ***Vavilov***, I must examine the following:

1) The acceptability or defeasibility of the outcome. Did the decision stay within the constraints to which the administrator was subject?

2) The reasoning of the tribunal. Was it rational, logical and sufficient?

**1. On the "acceptability or defeasibility of the outcome", the governing legislation is the *Workers' Compensation Act,* RSA 2000, Chapter W-15 ("*WCA*").**

[22] Pursuant to section 13.1(1) of the *WCA*, the Appeals Commission has authority to hear and decide appeals of Dispute Resolution Decision Review Body ("DRDRB") decisions.

[23] The Applicant submitted a letter in 2005 for a review of decisions concerning his compensation rate and cost of living increases.

[24] The review was delayed while the Customer Service Department undertook further reviews and adjustments.

[25] In February 2018, the Applicant renewed his request for review, and on April 25, 2018, Kim Kalynchuk, Resolution Specialist, Dispute Resolution and Decision Review Body, confirmed that she would proceed with the following issues:

1. Was the calculation of Mr. Simonovic's benefits (compensation rate) done correctly?
2. Was the cost-of-living adjustment (COLA) applied to Mr. Simonovic's temporary total disability benefits and earnings loss payments effective January 1, 1990, AND January 1, 2011, in a manner consistent with the Worker's Compensation Act (*WCA*) and the Worker's Compensation Board (WCB) Policy?

[26] The Applicant had an in-person meeting with Ms. Kalynchuk on May 28, 2018. At the completion of the in-person meeting, the Applicant confirmed that he did not have any further information to submit and both he and Ms. Kalynchuk agreed that she would proceed with her review.

[27] Ms. Kalynchuk issued a decision on June 18, 2018, wherein she found as follows:

1. Mr. Simonovic's compensation rate is correctly set on annual gross earnings of $40,000.00 per year.

2. Mr. Simonovic is not entitled to a cost-of-living adjustment for January 1, 1990, AND January 1, 2011.

[28] Therefore, the case manager's decision(s) were unchanged.

[29] On June 29, 2018, the Applicant filed an appeal of the DRDRB's (Ms. Kalynchuk's) decision to the Appeals Commission. He confirmed the issues were:

1) The calculation of his benefit.

2) 10% cost of living increase that came into effect January 1, 1990.

[30] On August 17, 2018, Kimberly Scott, Appeals Officer, with the Appeals Commission for Alberta Workers' Compensation forwarded a letter to the Applicant which confirmed receipt of his Notice of Appeal and indicated that he was to complete a Notice of Participation if he wanted to participate in the appeal, and written reasons for participating in the appeal. Ms. Scott also stated that if the Applicant had any questions, he could contact her, and she provided her telephone number. The Applicant was also provided with the Appeals Commission for Alberta Workers' Compensation, Appeal Rules. This is a 39-page document that provides information to an applicant in getting ready for the Appeal.

[31] On February 11, 2019, the Applicant forwarded a letter and attached documents to support his Appeal to the Appeal Commission.

[32] On February 12, 2019, the Appeal was heard. The Applicant participated by telephone. The Applicant gave oral evidence to the Appeal Commission Panel on that date.

[33] On February 19, 2019, the Applicant submitted a further letter and attached documents that he indicated he "forgot to include or present at his hearing to the Appeals Commission". The Appeal Panel granted the Applicant's request to consider his letter and additional documents as they had not yet issued a final decision.

[34] On March 5, 2019, the Appeals Commission issued their decision. Both issues of appeal were denied, and the Dispute Resolution and Decision Review Board's decisions of June 18, 2018, were confirmed.

[35] On August 28, 2019, the Applicant filed his Originating Application to set aside the decision of the Appeals Commission.

[36] From my review of the Decision and the *WCA*, I find that the Appeals Commission acted within its jurisdiction pursuant to its governing legislation: s.13.1(1).

[37] The Appeals Commission took all proper steps to have the Applicant's Appeal heard before its Appeal Panel.

**2. On the reasoning of the tribunal:**

[38] I must look at the rationality, logic, and sufficiency of the reasons. The principles of justification and transparency require that an administrative decision maker's reasons reveal an "internally coherent and rational chain of analysis" on "critical points" that "meaningfully account for the central issues and concerns raised by the parties" or "meaningfully grapple with key issues or central arguments raised by the parties", ie. to "assure the parties that their concerns have been heard", demonstrate that they "have actually listened to the parties" and were "actually alert and sensitive to the matter before it": ***Vavilov***, at para 102 – 103, and 127 – 128.

[39] The Appeal Commission did uphold the Dispute Resolution and Decision Review Board's decisions of June 18, 2018.

[40] As set out in ***Vavilov*** at paragraphs 125 and 126:

> It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": ***CHRC***, at para 55; see also ***Khosa,*** at para 64…
>
> That being said, a reasonable decision is one that is justified in light of the facts: ***Dunsmuir***, para 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see ***Southam*** at para 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it.

[41] Based on the evidence that was before the Appeals Commission and the findings of fact that it made, I do not find that the Appeal Commission's analysis was contradictory nor internally inconsistent.

[42] The Appeal Commission's Decision demonstrates how the *Workers Compensation Act*, the WCB Policy and the evidentiary record was considered and shows how the outcome reached is justified and supported by the evidence that was before the Appeal Panel.

[43] A reasonableness review is not to be conducted as a line-by-line treasure hunt for error; however, the reasons must demonstrate connection, or a path of analysis, between the evidence and the decision made: ***Vavilov*** at paras 102 – 104.

[44] I find that the Appeal Commission's reasons demonstrate a connection between the evidence and the decision made with respect to both issues that were before it. The path of analysis and the decision made by the AC are clear from the contents of the March 5, 2019, decision.

[45] I note, the analysis and decision of Issue 1: was the calculation of the worker's compensation rate done correctly? commences on page 5, line 24 and concludes on page 9, line 42.

[46] The analysis and decision of Issue 2: Is the worker entitled to a cost-of-living adjustment for January 1, 1990, AND January 1, 2011? commences on page 10, line 46 and concludes on page 15, line 56.

## B. PROCEDURAL REVIEW OF THE BOARDS DECISION

### Was the Appeals Commission procedurally unfair in their conduct of the appeal hearing?

[47] There is no dispute that a public authority that makes an administrative decision which affects the rights, privileges and interests of an individual has a duty to act fairly: see ***Cardinal v. Director of Kent Institution*** [1985] 2 SCR 643 at 653.

[48] In Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 at para 22:

> Although the duty of fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected, 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 these 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.

[49] And further, at para 26:

> Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances…As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness.

[50] I find there was a duty of fairness owed to the Applicant.

[51] As noted above, the Applicant knew to file letters to request a review of decisions made by the Customer Service Department, was present in person before the DRDRB; and knew how to submit his appeal of the DRDRB decision; the Applicant received a letter from Ms. Scott (Appeals Officer with the Appeals Commission) with information to assist with his participation in the Appeal Panel; he knew he could submit a letter and documentation to the Appeal Panel before they convened; he participated in person via telephone on the date of the Appeal with his son; and he submitted further documents post appeal that they Appeal Panel allowed and considered before they made their decision.

[52] The process was procedurally fair. The Applicant was provided with an opportunity to actively participate and engage in the appeal process through oral submissions as well as written submissions. I note that I was also provided with a transcript from the Appeal Panel proceedings that confirms the Applicant's understanding of that process and his participation in it.

**Conclusion**

[53] The reasons given by the Appeals Commission are comprehensible, easily understood and to the very heart of the Appeal Commission's expertise: worker's compensation in Alberta.

[54] In conclusion, I find that the Appeal Commission's decision met the requisite standard of justification, transparency and intelligibility and is justified within its factual and legal constraints. Accordingly, the Appeal Commission's Decision is reasonable.

[55] The Applicant, Mr. Simonovic's application for judicial review is dismissed.

[56] I am denying the Appellant's application for an adjournment.

[57] The Appellant has taken no steps to advance his application since this date was set.

[58] For that reason, I am also going to dismiss this application, as it is an abuse or process.

[59] This is the third action commenced by the Appellant, Mr. Ivan Simonovic, regarding the same or similar issues; and as in Action No. 2103-15301, continues to be a duplication of process.

**Costs**

[60] I find that this action constitutes a duplication of proceedings and should be dismissed.

[61] If I am wrong, this action was filed more than six months from the date of the decision of the Appeals Commission. The Appeals Commission decision was issued on March 5, 2019, and this action was filed on November 1, 2021, thus this action is out of time and for this reason should be dismissed.

Heard on the 9th day of September, 2022
**Dated** at the City of Edmonton, Alberta this 16th day of August, 2024.

**C.L. Arcand-Kootenay**
**J.C.K.B.A.**

**Appearances:**

Ivan Simonovic
Self-Represented Litigant

Jay Williamson
for the Respondent
Appeals Commission for Alberta Workers' Compensation Board

Brianna White
for the Respondent
Workers' Compensation Board of Alberta