Court of King's Bench of Alberta

Citation: Blanchard v Alberta (Workers' Compensation Board, Appeals Commission), 2023 ABKB 510

Date: 20230919
Docket: 2203 03813
Registry: Lethbridge

Between:

John Blanchard

Plaintiff/Applicant

- and -

Appeals Commission for the Alberta Workers' Compensation Board and the Workers' Compensation Board of Alberta

Defendants/Respondents

Corrected judgment: A corrigendum was issued on September 19, 2023; the corrections have been made to the text and the corrigendum is appended to this judgment.

Memorandum of Decision
of the
Honourable Justice D.V. Hartigan

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[1] On February 25, 2005, John Blanchard (the Applicant) suffered a workplace injury when he fell while climbing down from a truck. Mr. Blanchard claims that he continues to suffer serious consequences of that injury such that he is entitled to assistance under the ***Worker's***

Compensation Act, RSA 2000, c W-15 (the "*Act*"). He therefore appeals and/or seeks judicial review of the January 14, 2022, decision of the Appeals Commission for Alberta Workers' Compensation ("Appeals Commission") finding that a medical report from the Applicant's physician did not constitute new evidence under the policies of the Workers' Compensation Board ("WCB").

PROCEDURAL HISTORY

[2] As stated, the Applicant suffered a workplace injury on February 25, 2005. At that time, WCB accepted responsibility for back and shoulder strains arising from the accident.

[3] The WCB determined that the Applicant was fit to return to work as of April 8, 2005. The Applicant was offered return to work services but was discharged from the program due to his non-attendance. On review of the medical evidence available at the time, WCB concluded the Applicant had fully recovered from his injuries.

[4] On August 31, 2006, the Applicant's request to re-open his claim was denied by a WCB claims adjudicator. That denial was reviewed by WCB's internal review body, the Dispute Resolution and Decision Review Body (the "DRDRB"). The DRDRB issued a decision in October of 2006, concluding that the Applicant's injuries were not related to the original accident and the Applicant's request to re-open his claim was therefore denied.

[5] In August 2011, the Applicant asked the Appeals Commission to extend the one-year appeal period so that he could appeal the October, 2006 DRDRB decision. On September 23, 2011, the Appeals Commission found there was no justifiable reason for the Applicant's failure to appeal the 2006 DRDRB decision within the one-year time limit under the *Act*.

[6] In 2016, the Applicant provided to the DRDRB letters, notes, and medical reports, dated between July 2006, and February 2016, requesting that those documents be considered new evidence upon which to review the October 2006 DRDRB decision. The DRDRB concluded the presented materials were not new evidence under the appropriate WCB policy.

[7] The Applicant appealed this decision to the Appeals Commission. In February 2017, the Appeals Commission determined the letters, notes, and reports were not "new evidence" as per WCB policy. That decision was neither reviewed nor appealed.

[8] In 2019, a further medical note was submitted by the Applicant to WCB. Again, the Applicant asked that this note be considered new evidence to review the 2006 DRDRB decision. The WCB concluded this new note was not new evidence. That conclusion was confirmed by the DRDRB in July 2020. That decision was not appealed.

[9] On May 17, 2021, the Applicant submitted a letter from his physician, Dr. Verma (the "Dr. Verma Letter") to WCB and asked that it be considered new evidence to review the October 2006 DRDRB decision. WCB found the Dr. Verma Letter was not new evidence under the new evidence policy, and the DRDRB confirmed that decision on June 16, 2021.

[10] The June 16, 2021, DRDRB decision was appealed to the Appeals Commission. On January 14, 2022, the Appeals Commission ruled that the Dr. Verma Letter was not new evidence under the new evidence policy and confirmed the DRDRB decision.

[11] The Applicant filed an Originating Application seeking to review the Appeals Commission decision. That review is the subject matter of this decision.

CHARACTERIZATION OF ISSUES

[12] There is some discrepancy between the basis for review and/or appeal in this matter between the Originating Application and the Applicant's brief. The bases set out in the Originating Application are:

1) The Appeals Commission for Alberta Workers' Compensation Board erred in the interpretation and application of Section 24(1), Section 24(2), Section 56(5) of the *Workers' Compensation Act*, and Policy 01-08. The interpretation of Section 24(1), Section 24(4), Section 56(5), and Policy 01-18 was neither correct nor reasonable.
2) The decision No. 2022-0001 dated January 14, 2022, of the Appeals Commission did not properly interpret the provisions of the *Workers' Compensation Act*, nor did it give effect to its intended purpose under the *Act*.
3) The decision No. 2022-0001 dated January 14, 2022, of the Appeals Commission, which is contrary to the provisions of the *Workers' Compensation Act* and the principles of natural justice.
4) The Appeals Commission hearing and resulting decision were procedurally unfair and did not comply with the rule of natural justice as the Appeals Commission failed to consider the evidence provided by the Applicant and completely ignored it, which is against the principles of administrative law, equity, and natural justice.

[13] The Applicant's brief characterizes the issues in two different ways. Under the heading of "Issues", the issues are stated as follows:

1) Did the Appeals Commission err in the interpretation and application of Section 24(1), Section 24(2), Section 56(5) of the *Workers' Compensation Act*...WCB Policy 01-08, and relevant provision and policies of the Workers' Compensation Board;
2) Did the Appeals Commission fail to conduct a proper reasonableness review by ignoring all of the evidence that supported the Applicant's position;
3) Was the Appeals Commission procedurally unfair; and
4) Did the Appeals Commission fail to comply with the rules of natural justice by not giving proper weight to the medical evidence presented before them?

[14] Notwithstanding the above four issues identified in the brief, the Applicant argues two issues which are characterized as "Grounds of Appeal":

1) The Appeals Commission erred in its interpretation and application of the law in general, the Workers' Compensation Act, and the policy enacted thereunder.
2) The Appeals Commission Decision was unreasonable having regard to the facts and medical evidence before it.

[15] The nature of the grounds of the Application/Appeal must be identified in order to properly determine the appropriate standard of review to be applied to the Appeal Commission's decision.

STANDARD OF REVIEW: PRINCIPLES

[16] The presumptive standard of review for administrative decisions is reasonableness: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at para 23 [***Vavilov***]. That presumption of reasonableness can be rebutted in two types of situations:

1) Where the legislature has indicated that it intends a different standard to apply:
    (i) where the legislature explicitly prescribes the applicable standard of review;
    (ii) where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signaling the legislature's intent that appellate standards apply when a court reviews the decision.
2) Where the rule of law requires that the standard of correctness be applied:
    (i) constitutional questions;
    (ii) general questions of law of central importance to the legal system as a whole; and
    (iii) questions related to the jurisdictional boundaries between two or more administrative bodies.

[17] Section 13.4 of the *Act* provides for a statutory appeal, but only on a question of law or jurisdiction. All other issues, such as those involving questions of facts or mixed facts and law, are subject to the reasonableness standard.

[18] Where there is an allegation that there has been a breach of natural justice, that allegation is reviewable on the correctness standard: ***Johnston v Alberta (Director of Vital Statistics)***, 2008 ABCA 188 at para 12 and ***Sanderson v Alberta (Criminal Injuries Review Board)***, 2010 ABCA 167 at para 10. Similarly, the standard for determining whether the decision makers complied with the duty of procedural fairness is correctness: ***Khela v Mission Institution***, 2014 SCC 24 at para 79; ***Anand v Anand***, 2016 ABCA 23 at para 8; ***Tartaglia v Alberta (Workers' Compensation Board Appeals Commission)***, 2012 ABCA 186 at para 23; ***Thompson Brothers (Construction) Ltd v Alberta (Appeals Commission for Alberta Workers' Compensation)***, 2012 ABCA 78 at para 17 [***Thompson Brothers***]; and ***Allsop v Alberta (WCB Appeals Commission)***, 2011 ABCA 323 at para 21 (See also ***Zarooben v Workers' Compensation Board***, 2021 ABQB 232 paras 73 and 74; and ***Matys v Alberta (Appeals Commission for Alberta Workers' Compensation***, 2021 ABQB 542 at para 11).

THE APPROPRIATE STANDARD OF REVIEW IN THE PRESENT CASE

[19] Notwithstanding the inclusion of allegations of breaches of natural justice and procedural fairness in the originating application and in the headings contained in the Applicants brief, there are no specific allegations of such breaches in the Applicant's materials.

[20] In the ***Thompson Brothers*** case at para 17, the Alberta Court of Appeal held that the procedural rules contained in the *Act* are sufficiently detailed to establish the appropriate standards of fairness required. Where the Appeals Commission is interpreting and applying its procedural rules, the standard of review is reasonableness. Whether the overall conduct of the hearing met an acceptable standard of fairness is reviewed for correctness.

[21] The Appeals Commission is bound by s. 13.2 of the *Act* in conducting appeals. This section places a number of obligations on an appeal panel, which I will not itemize here. Further, the Appeals Commission also has the authority under the *Act* to make rules governing the practice and procedure applicable to proceedings before it. The Appeals Commission has enacted a set of Appeal Rules which incorporate the requirements set out in s. 13.2 of the *Act,* which again needn't be listed here. Provided the Appeals Commission applied and followed the procedural requirements set out in the *Act*, the Appeal Rules, and the Appeal Guidelines, it will have met its procedural fairness obligations ***(Johnson v Alberta (Appeals Commission for Alberta Workers' Compensation))***, 2011 ABCA 345).

[22] The burden of establishing procedural unfairness rests with the Applicant. The Applicant has demonstrated no procedural unfairness on the record. From a review of the Record and the transcript of the hearing, it is clear the Appeals Commission fully complied with its procedural fairness requirements. Again, no specific procedural breaches are identified by the Applicant.

[23] As to the allegation of a breach of the rules of natural justice, the only allegation articulated by the Applicant is that the Commission "fail[ed] to comply with the rules of natural justice by not giving proper weight to the medial evidence presented before them." (Brief of the Applicant, para 9). Issues with respect to the weight given to any part of the evidence involve questions of fact or mixed fact and law. As such issues do not involve error of law or jurisdiction, the appellate standard of review, namely correctness, is not engaged (***Georgopoulos v Alberta (Workers' Compensation Board, Appeals Commission))***, 2022 ABKB 633 at para 32).

[24] There being no appellate issues to review, the remaining issues would be governed by the default standard of review of reasonableness.

[25] It should be noted, that notwithstanding reference to natural justice and procedural fairness breaches, the Appellant appears to concede that the standard of review in this hearing is properly reasonableness (Brief of the Applicant, para10).

WAS THE DECISION OF THE APPELLATE COMMISSION REASONABLE?

[26] The Applicant characterized the matters for reasonableness review as both the Appeals Commission erring in its interpretation and application of the law in general, the *Act* and the policy enacted thereunder, and that the decision was unreasonable having regard to the facts and evidence before the Commission. The interpretation and application of the law on the evidence involves questions of mixed fact and law, for which the reasonableness standard applies. Similarly, and obviously, so does the reasonableness of the decision on the evidence. Although expressed as two distinct issues, both ultimately relate to the overall reasonableness of the decision as a whole. I will therefore address my review to the question of whether the decision of the Appellate Commission was reasonable.

THE LEGISLATIVE AND POLICY FRAMEWORK

[27] WCB is an administrative tribunal with exclusive legislative authority to administer the *Act*. The Supreme Court of Canada has affirmed the expertise and exclusive jurisdiction of workers' compensation boards to determine entitlement, rehabilitation, and compensation for work related injuries: ***Pasiechnyk v Saskatchewan (Workers' Compensation Board)***, 1997 CanLII 316 (SCC), [1997] 2 SCR 890 at paras 32 and 38, (1997), 149 DLR (4th) 577.

[28] The *Act* provides a complete statutory code for the provision of compensation to workers who are injured in workplace accidents. The purpose of the workers' compensation system is to provide injured workers with compensation that is independent of "fault" for an accident and the ability of an employer to pay. In exchange, the injured worker loses his or her common law right to sue employers or other workers.

[29] Pursuant to Section 13.1(1) of the *Act*, the Appeals Commission has exclusive jurisdiction to inquire into and examine all matters and questions arising under the *Act* in respect of appeals from decisions made by the WCB review body.

[30] In making its decisions, the Appeals Commission is bound by relevant legislation, WCB policy and jurisprudence: s. 13.2(6)(b).

[31] In order to determine under which circumstances WCB will reconsider any matter previously decided, WCB applies Policy 01-8, Part I:

> **1 New Evidence** New evidence is new information that may affect the outcome of a workers' compensation decision. It must meet two basic criteria:
>
> (i) the evidence is material (relevant) to the issue in question
>
> (ii) the evidence is substantive – it gives new information that was not previously available to the decision maker and could affect the outcome of the decision

[32] Information is not new evidence when it simply summarizes or reformats information that was considered by the decision-maker when the decision was made. For example, a medical report is not new evidence if it consists of the same clinical findings, by either the same or another physician, already taken into account by the decision maker. A medical report may be new evidence if, for example, new clinical findings lead to a change in diagnosis.

[33] New evidence includes:

- health information
- work-relatedness
- fitness to work earnings information
- information about employer operations
- administrative review findings that identify previous errors or omissions
- appeal findings
- various other relevant facts

[34] The principles of fairness and natural justice generally require that WCB considers all relevant evidence, new or otherwise, when reviewing a decision. However, WCB expects that interested parties will make all reasonable efforts to provide all relevant information when the initial decision is made. If new evidence was reasonably available to the party at the time of the initial decision, WCB will take into consideration why the information was not provided at the time. Depending on the circumstances, WCB may decide not to accept the information as new evidence.

WCB Policy 01-08, Part I

THE APPEALS COMMISSION DECISION

[35] The issue before the Appeals Commission was framed as follows by the Commission: "Is the April 27, 2021, medical report from (the worker's new general practitioner) considered new evidence to reconsider the October 9, 2006, decision that the worker's low back and right shoulder issues were not a continuation or recurrence of disability resulting from the February 25, 2005, work accident?"

[36] The medical report the Applicant sought to adduce as new evidence (the Dr. Varma Letter) was relatively brief, and I will therefore reproduce its content in full:

> "This is in response to your letter dated November 16, 2020.
>
> The above named patient started attending this clinic on October 2, 2020 and his most recent visit was on April 9, 2021.
>
> He had a work related injury on February 25, 2005. He is having ongoing chronic pain neck, right shoulder and lower back with radiation to right leg above knee.
>
> On examination during visit on April 9, 2021, he had diffuse tenderness over posterolateral neck muscles, decreased and painful range of motion neck in all planes. Examination of right shoulder reveals decreased and painful range of motion – abduction 90 degrees, flexion 75 degrees, ext. 45 degrees. Examination of lower back revealed – tenderness over paralumbar region bilateral. Range of motion: flexion, extension, lateral flexion and rotation very limited and painful.
>
> He is having ongoing chronic pain neck, right shoulder and lower back related to injuries sustained.
>
> Currently he is taking: 1. Dilaudid 8 mg, 2 tablets qld with some relief.
>
> The pain does affect his daily activities.
>
> Hope this will be of some help."

[37] The Commission found the opinion evidence contained in the Dr. Varma Letter was not substantive, and therefore not new information which could have affected the outcome of the 2006 decision. It found as follows:

> It [the Dr. Varma Letter] does not relay that the worker's new general practitioner was aware of the mechanism of injury or the compensable injuries accepted;
>
> It does not provide actual diagnoses, and does not rebut (with analysis) accepted medical reporting and opinion on the worker's claim file that refuted any causal relationship to the compensable accident;
>
> It does not convey an understanding of any prior WCB or Appeals Commission decisions or rebut their conclusions;
>
> It does not convey an understanding of WCB legislation and policy on ongoing responsibility, recurrence, and new evidence.

> Without further analysis and explanation from the worker's new general practitioner, or any other medical specialist, in the context of the above, we find the information is not substantive.
>
> The information presented in the April 27, 2021, letter was essentially no different than the information that has been presented in the 2006 DRDRB hearing and the February 8, 2019, Appeals Commission 2017 Appeals Commission hearing.

APPLICATION OF THE REASONABLENESS STANDARD IN JUDICIAL REVIEW

[38] The Alberta Court of Appeal has recently summarized the test to be applied when assessing the reasonableness of a decision in ***Zarooben v The Workers' Compensation Board***, 2022 ABCA 50:

> [36] Elements that would be relevant in evaluating whether a decision is reasonable include the governing statutory scheme; other relevant statutory or common law; principles of statutory interpretation; evidence before the decision-maker and facts of which the decision-maker may take notice; submissions of the parties; past practices and decisions of the administrative body; and potential impact of the decision on the individual to whom it applies: *Vavilov*, para 106; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, para 34, 441 DLR (4th) 269; *Edmonton (City of) v Edmonton Police Association*, 2020 ABCA 182, para 31.
>
> [37] ...[A] reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision-maker", replacing the commission's weighing of the evidence with its own. In *Vavilov*, para 15, the Court said:
>
> > In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.
>
> See also *Vavilov*, paras 81, 86, 94-96, 98-100, 136.
>
> [38] The Supreme Court identified instances in which a decision could be said to be unreasonable: where there is a failure of rationality internal to the reasoning process; and where the decision "is in some respect untenable in light of the relevant factual and legal constraints that bear on it". To be reasonable, a decision must be based on reasoning that is both rational and logical, and there must be a line of analysis within the reasons "that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived". The internal rationality of a decision may be called into question if the reasons exhibit "clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise", or the decision-maker has fundamentally

misapprehended or failed to account for the evidence before it: *Vavilov*, paras 101, 102, 104, 126.

[39] It is expected that a reasonableness review would consider "the impact of a decision on an individual's rights and interests". When the impact threatens an individual's life, liberty, dignity or livelihood, "the reasons provided to that individual must reflect the stakes": *Vavilov*, para 133.

ANALYSIS

[39] The Applicant contends the Appeal Commission's decision was unreasonable. The Applicant argues the Commission should have reconsidered and reweighed the previous medical information and reports which were the subject matter of the 2020 DRDRB Decision, notwithstanding that that particular decision was not appealed. Also, he suggests that the Appeals Commission should have established a medical panel pursuant to s. 46.3 of the *Act* due to the inconsistencies in the evidence regarding his injuries.

[40] The difficulty for the applicant is that both of these arguments beg the question that was before the panel, namely, does the Dr. Varma Letter constitute new evidence within the meaning of the new evidence policy?

[41] Clearly, new medical evidence in a matter such as this could lead a tribunal to a reasonable re-examination of prior medical evidence or information. But in order to do so, that new proposed evidence must be shown to be relevant and probative in and of itself. The Appeals Commission determined that the Dr. Varma Letter did not sufficiently address the issue of causation of the Applicant's current symptoms. Dr. Varma does not provide a causal link between the workplace incident in 2005 and the reported and observed symptoms of the Applicant. The Dr. Varma Letter did not provide substantive information on the issue of causation of symptoms that was not previously available to WCB. As such, it could not have affected the outcome of the 2006 decision.

[42] The Applicant argued, both in his brief and in oral argument, that this case was analogous to the circumstances in Z***arooben***. With respect, that analogy cannot be drawn. In ***Zarooben***, the Court found a decision unreasonable where there was contradictory medical evidence before the decision maker as to the ongoing effects of a workplace injury. The Court held that rejecting the claim in the face of unresolved contradictory evidence was unreasonable, and that further medical investigation was required.

[43] In this case, there is no contradictory evidence in relation to the causation of the Applicant's current injuries. The decision of 2006, briefly summarized, was that the injuries from the workplace accident had resolved, and that any further symptoms were not the result of the injuries sustained in the accident. The Dr. Varma Letter only describes further ongoing physical difficulties experienced by the Applicant. It does not conflict with, contradict nor provide an opinion as to the resolution of the original injuries contrary to the medical information upon which the DRDRB originally relied.

CONCLUSION

[44] Given the above, I find the decision of the Appeals Commission in this matter was reasonable and the Application is dismissed.

COSTS

[45] As the Workers' Compensation Board was the successful party in this matter, costs are awarded to the Board in the application pursuant to Schedule C, Column 1 of the *Alberta Rules of Court*

Heard on the 5th day of May, 2023.
Dated at the City of Lethbridge, Alberta this 7th day of September, 2023.

D.V. Hartigan
J.C.K.B.A.

Appearances:

Viqar A. Quraishi, K.C.
for the Applicant

Jay Williamson
for the Respondent, Appeals Commission

Bryanna J. White
for the Respondent, Workers' Compensation Board

Corrigendum of the Memorandum of Decision
of
The Honourable Justice D.V. Hartigan

Minor formatting changes throughout the judgment

Date of the judgment changed from 23rd day of August, 2023. to 7th day of September, 2023.