IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cima v. Workers Compensation Appeal Tribunal,* 2016 BCSC 931

Date: 20160525
Docket: S157146
Registry: Vancouver

IN THE MATTER of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241;
IN THE MATTER of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492; and
IN THE MATTER OF the Decision of the Workers Compensation Appeal Tribunal rendered on 3 July 2015, Decision No. WCAT-2015-02101

Between:

Giorgio Cima

Petitioner

And:

Workers Compensation Appeal Tribunal and Intact Distributors Inc.

Respondents

Before: The Honourable Madam Justice Young

Reasons for Judgment

Counsel for the Worker:	S. Anderson S. Shir
Counsel for the Respondent:	K. Koles
Place and Date of Hearing:	Vancouver, B.C. February 19 and March 24, 2016
Place and Date of Judgment:	Vancouver, B.C. May 25, 2016

INTRODUCTION

[1] Mr. Cima, who I will refer to as "the worker", has filed a petition seeking a judicial review of WCAT Decision 2015-02101, dated July 3, 2015 (the "Decision"), denying his appeal and his claim for benefits arising out of a mental disorder as provided for in s. 5.1(1)(a) of the *Worker's Compensation Act*, R.S.B.C. 1996, c. 492 [*Act*]. The worker says that he has suffered from a mental disorder, namely depression, arising out of traumatic events that constituted bullying and harassment. There were a number of events but the most significant event occurred on December 25, 2013 when he received an offensive text message from his immediate supervisor.

[2] Workers Compensation Appeal Tribunal ("WCAT") denied the worker's claim on the basis that the events complained of, including the receipt of the December 25, 2013 text message, neither constituted a traumatic event nor a significant work-related stressor.

[3] WCAT said that the definition of traumatic event is intended to capture a much more serious event than the receipt of this text message, however objectionable its contents may have been to the worker. For that reason the claim was denied.

[4] The worker says that the Decision is patently unreasonable because it is based on no evidence of what his reaction was to the event. WCAT has relied on an absurd interpretation of policy and no evidence to come to this conclusion.

[5] The worker seeks the following relief:

1. A declaration that the Decision is patently unreasonable;
2. An order remitting the Decision for reconsideration on the merits, before a different adjudicator; and
3. An order that the worker be awarded costs.

[6] WCAT opposes the relief set out at para. 1 declaring the Decision to be patently unreasonable. WCAT takes no position on whether the panel's finding that

the supervisor could not have reasonably been expected to know that the worker would interpret the text message as humiliating or degrading, is patently unreasonable because the panel failed to consider specific evidence in this regard.

[7] The respondent, Intact Distributors Inc. ("Intact") has not participated in this judicial review.

FACTUAL BACKGROUND

[8] The facts are not in dispute and are helpfully summarized in the worker's outline of argument which I am relying on.

[9] The worker was employed by Intact as a sales representative.

[10] Mr. Simmons was co-owner of Intact and the worker's immediate supervisor ("the supervisor").

[11] During 2013, the worker developed a slurred speech disorder which progressively worsened. The worker actively sought a medical diagnosis and underwent a number of diagnostic tests. However, his attending physicians were unable to diagnose any medical condition causing his slurred speech disorder in 2013.

[12] By December 2013, the worker's undiagnosed speech disorder made it difficult for others to understand what he was saying. Intact accommodated the worker's speech disorder by allowing him to continue to perform his regular duties and to communicate with the supervisor, his peers, customers and suppliers via email and text messages.

[13] The worker's cognitive function was not affected by this condition and he was able to perform his duties.

[14] The worker's working relationship with the supervisor did not involve the mutual exchange of jokes and pranks. The worker describes his relationship with the supervisor as strictly a business relationship – they were not friends.

[15] The worker alleged that at times he felt the supervisor treated him like a child and spoke to him in a condescending manner. The worker asserted that when the supervisor treated him in this way he would tell the supervisor that he was "neither stupid nor a retard".

[16] As his speech disorder progressed in the months prior to December 2013, the supervisor would repeatedly use phrases like "what you don't understand is"; "do you understand?" and "do you comprehend what I am saying to you?". A work colleague, Mr. Cooper, often reminded the supervisor that the worker was losing his voice not his intelligence (p. 155 of the Certified Record).

[17] While enjoying supper on Christmas Day in 2013, the worker received a text message from the supervisor which stated as follows:

> Merry Xmas a buddy! Not every flower can say love, but a rose can. Not every plant survives a thirst, but a cactus can. Not every retard can read, but look at you go, little buddy!! Today you should take a moment and send an encouraging message to a fucked up friend, just as I have done. I don't care if you lick windows, or fuck farm animals. You hang in there cupcake, because you're fucking special to me, and you are my friend. Look at you smiling at your phone, you crayon eating mother fucker! Merry Christmas.

[18] Following receipt of the text message, the worker began to experience the following symptoms: headaches, poor focus, anger, humiliation, sadness, depressed mood and poor sleep.

[19] Following receipt of the December 25, 2013 text message, the worker did not return to work.

[20] The supervisor admits to sending the text on December 25, 2013. He apparently sent the same text message to a group of people. This fact was not known by the worker until his Worker's Compensation claim was commenced.

[21] The supervisor did send a written apology to the worker saying that he was shocked and mortified to hear that the text sent to the worker had affected him in the way it had. He described sending it to other people. He said at no time was this meant as a personal attack on the worker. He said he was extremely sorry if he

offended the worker and anyway, he also said he hoped he could make it up to the worker and hoped that the worker got better and returned to work soon. This text message was sent January 15, 2014.

[22] Other incidents of harassment the worker complained about included the supervisor using profanity in text communications, calling the worker a liar in front of a customer and sending the worker a cartoon about a black goat which the worker considered to be a racial insult (contained in a letter dated January 27, 2014 from the worker's lawyer).

[23] The worker was assessed by his family physician, Dr. Brian Yong, on January 8, 2014. Dr. Yong diagnosed the worker with a major depressive disorder as a result of the receipt of the supervisor's offensive text message. In a progress report dated April 28, 2014, Dr. Yong opined that the worker continued to be depressed, with no change in his symptoms.

[24] The worker filed his application for WCB benefits on January 10, 2014. The worker advised WorkSafe BC that he had received a text message from the supervisor that referred to him as a "retard".

[25] WorkSafe's case manager asked the field investigator to interview both the supervisor and a customer named Mr. Vandermey.

[26] The worker was never interviewed.

[27] The worker's employment did not provide a benefit plan providing payment for an assessment by a psychologist. The WCB case manager said that WorkSafeBC would arrange for an assessment by a psychiatrist or psychologist. However, WorkSafeBC never made the arrangements for such an assessment before the worker's claim was denied. The lack of evidence from either a psychologist or a psychiatrist is not a factor relied on in the denial of the worker's claim.

[28] The worker was diagnosed with amyotrophic lateral sclerosis ('ALS") by a treatment team at G.F. Strong Rehabilitation Centre in a report dated January 28, 2014.

[29] In an appeal of the denial of the claim to the Review Division, the review officer held that while the supervisor's actions were "in bad taste" and an exercise of poor judgment and unprofessional, they did not constitute bullying and harassment, because the review officer was not persuaded that conduct was intended to, or should reasonably have been known would intimidate, humiliate or degrade the worker.

[30] The review officer understood that at the material time in 2013, the worker was particularly vulnerable due to symptoms of the as yet undiagnosed ALS. However, she rejected that his vulnerability rendered the worker's receipt of the text message to be a traumatic event. She concluded that the definition of traumatic is intended to capture events much more serious or more traumatic than the receipt of a text message, however objectionable its contents may have been to the worker.

STANDARD OF REVIEW OF THE WCAT DECISION

[31] Both counsel agree that the standard of review of WCAT's findings of fact or law or exercise of discretion is patent unreasonableness. For that reason I will only briefly set out a summary of law as provided by WCAT's counsel.

[32] WCAT's decisions are final and conclusive. WCAT's enabling legislation; the *Act* contains two provisions that jointly constitute a privative clause: ss. 254 and 255.

[33] Section 58(1) of the *Administrative Tribunals Act*, S.B.C. 2004 c. 45 [*ATA*] provides that a tribunal, subject to a privative clause, must be considered to be an expert tribunal relative to the courts in relation to all matters over which it has exclusive jurisdiction. WCAT has explicit jurisdiction over claims for mental disorder under the ATA: ss. 5.1, 96(1), 96.2(1)(a), 239(1), 254(a), and 255. WCAT has exclusive jurisdiction over questions of entitlement to compensation: *Jensen v.*

Workers' Compensation Appeal Tribunal, 2010 BCSC 266 at para. 77 aff'd 2011 BCCA 310.

[34] Patently unreasonable means "clearly irrational": *Pacific Newspaper Group Inc. v. Communication, Energy and Paperworkers Union of Canada Local 2000*, 2014 BCCA 496 at paras. 39 and 48. A patently unreasonable decision is one which "the result must almost border on the absurd": *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92,* 2004 SCC 23 as cited in *Vandale* v. *Workers' Compensation Appeal Tribunal*, 2013 BCCA 391 at para. 41.

STATUTORY AND POLICY FRAMEWORK

[35] The *Act* establishes a comprehensive insurance scheme in British Columbia under which the Worker's Compensation Board (the "Board") pays compensation for personal injury or death "arising out of and in the course of employment" (See s. 5(1) of the *Act*)

[36] "Mental disorder" is a specific type of personal injury that is addressed in section 5.1 of the *Act* which says:

> Mental disorder
>
> **5.1** (1) Subject to subsection (2), a worker is entitled to compensation for a mental disorder that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental disorder
>
> (a) either
>
> (i) is a reaction to one or more traumatic events arising out of and in the course of the worker's employment, or
>
> (ii) is predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment,
>
> (b) is diagnosed by a psychiatrist or psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and
>
> (c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

> (2) The Board may require that a psychiatrist or psychologist appointed by the Board review a diagnosis made for the purposes of subsection (1) (b) and may consider that review in determining whether a worker is entitled to compensation for a mental disorder.
>
> (3) Section 56 (1) applies to a psychiatrist or psychologist who makes a diagnosis referred to in this section.
>
> (4) In this section:
>
> > **"psychiatrist"** means a physician who is recognized by the College of Physicians and Surgeons of British Columbia, or another accredited body recognized by the Board, as being a specialist in psychiatry;
> >
> > **"psychologist"** means a person who is registered as a member of the College of Psychologists of British Columbia established under section 15 (1) of the *Health Professions Act* or a person who is entitled to practise as a psychologist under the laws of another province.

[37] The Board of Directors of the Board is obliged to set Board policy on compensation matters under s. 82(1) of the *Act*. Board policy is binding on WCAT pursuant to s. 250(2) of the *Act*.

[38] Rehabilitation Services and Claims Manual Volume II (the "RSCM") Policy C3–13.00 (the "Policy") sets out the Board's policy on mental disorder. It is seven pages in length and therefore I will not reproduce it here but I will summarize certain relevant policies from it below:

a) The Policy is to provide guidance on adjudication of claims for mental disorders where the disorder either is a reaction to one or more traumatic events arising out of and in the course of the worker's employment or is predominantly caused by a significant work-related stressor or a cumulative series of significant work-related stressors arising out of and in the course of the worker's employment.

b) Section 5.1 of the *Act* requires more than the normal reactions to traumatic events such as being unsatisfied with work, upset or experiencing distress, frustration, anxiety or sadness. It requires that a worker's mental disorder be diagnosed by a psychiatrist or psychologist as a condition described in the most recent Diagnostic and Statistical Manual of Mental Disorders (DSM).

c) These stressors or cumulative series of stressors must be identifiable.

d) Under the heading "Was the Event Traumatic or the Work-related Stressor Significant" the Policy says all workers are exposed to normal

pressures and tensions at work which are associated with the duties and interpersonal relationships connected with the worker's employment.

e) The worker's subjective statements and response to the event or stressor are considered; however, this question is not determined solely by the worker's subjective belief about the event or stressor. The Board also verifies the events or stressors through information or knowledge of the events or stressors provided by co-workers, supervisory staff or others.

f) For the purpose of this Policy, a "traumatic" event is an emotionally shocking event, which is generally unusual and distinct from the duties and interpersonal relations of a worker's employment. However, this does not preclude a worker who, due to the nature of his or her occupation, is exposed to traumatic events as part of their work (e.g. emergency workers).

g) In most cases the worker must have suffered or witnessed the traumatic event first hand. The reaction to the traumatic event or events is typically immediate and identifiable. In some situations however the reaction may be delayed.

h) A work-related stressor is considered significant when it is excessive in intensity and/or duration from what is experienced in the normal pressures or tensions of a worker's employment.

i) Interpersonal conflicts between a worker and his or her supervisors, co-workers or customers are not generally considered significant unless the conflict resulted in behaviour that is considered threatening or abusive.

j) Examples of significant work-related stressors may include exposure to workplace bullying or harassment.

k) While specific reference is made to emergency workers under traumatic events above, this does not preclude consideration of emergency workers under the significant stressor provision.

[39] The Policy goes on to consider causation. In this case the Board has not yet assessed causation and so it is not necessary to review those sections of the Policy for this appeal.

[40] Practice Directive #C3–3 ("Practice Directive") accompanies the Policy. Again this Practice Directive is seven pages in length so I will not fully reproduce it in this decision but I will summarize the relevant sections:

a) Under the heading of "Adjudicative Guidelines", the Practice Directive says the Board officer should consider the worker's entitlement under both the "traumatic event" and "significant stressor" provisions.

b) Traumatic event stressors must be clear and *objectively* identifiable.

c) The Policy states that the workers *subjective statements* in response to events or stressors are considered but the question is not determined *solely* on the workers subjective belief about the event stressors.

d) The Board officer should also verify the events or stressors through information provided by the worker, co-workers, supervisory staff, employers or others.

e) The Practice Directive says that it is to be anticipated that some workers might be psychologically fragile. When managing claims for psychologically fragile workers the adjudicator is directed to Practice Directive #C12–8, Managing Claims of Psychologically Fragile Workers.

f) Under the heading "Traumatic Event(s)" the directive notes that the Policy does not give *examples* of traumatic events and says that each case *must be determined based upon the specific facts*. Neither "emotionally shocking" nor "traumatic" are defined in the Policy. A guideline in interpreting those terms is an element of emotional intensity as well as distinctiveness from the ordinary course of events. Black's Law dictionary defines "shock" as a profound and sudden disturbance of the physical or mental senses, a sudden and violent physical or mental impression. "Mental shock" is more specifically defined as shock caused by agitation of mental senses and resulting in extreme grief or joy.…

g) Policy Item C3–13.00 recognizes that some workers, due to the nature of their occupation, may be exposed to traumatic events on a relatively frequent basis using the example of emergency workers. *The Policy is intended to emphasize that employment in high stress occupation is not a bar to compensation under section 5.1 of the Act. Compensation for mental disorder may be provided even if the emergency worker was able to tolerate traumatic events in the past.*

h) The Practice Directive points out that the reaction to trauma or stress might be immediate or delayed and that there is no longer a requirement that the reaction be "acute".

i) Under the heading "Significant Stressors" work-related stress is considered significant when it is excessive in intensity and duration from what is experienced in the normal pressures and tensions of worker's employment. *Adjudicating the claim will require obtaining a detailed understanding of the working conditions and specific stressors of the worker.*

j) Interpersonal conflicts with workers and supervisors not generally considered significant unless the conflict, results in behaviour that is considered threatening or abusive. The *Act* states that significant work-related stressor's includes bullying and harassment.

k) Bullying and harassment is not defined. In general terms bullying and harassment *reflect conduct that is intended, to or should reasonably have been known, would intimidate, humiliate or degrade an individual*.

l) Although bullying and harassment are generally considered terms of a pattern of ongoing behaviour, it does not preclude acceptance of a claim for mental disorder based on one single event.

m) A single event of bullying such as a threat of physical harm, or a single act of harassment may be more appropriately adjudicated as a traumatic event rather than a single work-related stressor depending on the nature of the event.

n) Not all interpersonal conflict or conduct that is rude or thoughtless will be considered abusive behaviour. *Each case will need to be investigated to determine the details and nature of the interpersonal conflict. However conduct that is determined to be threatening or abusive is a significant work-related stressor*.

(emphasis added)

SUMMARY OF THE DECISION

Panel: Janice Hight – Vice Chair (the "Vice Chair")

[41] At para. 34 of the Decision, the Vice Chair accepted the following four events outlined by the worker as identified stressors:

1. An April 2013 text from the supervisor saying "give us a fucking chance".

2. A June 2013 telephone conversation between the supervisor and a customer during which the supervisor called the worker a liar.

3. A September 2013 email containing a cartoon which the worker says has a racial insult.

4. The December 25, 2013 text message.

[42] She then analysed whether the events were traumatic or whether the work-related stressors were significant.

[43] At para. 37 of the Decision, the Vice Chair accepts that the worker was vulnerable due to symptoms related to his ALS which was not formally diagnosed until January 2014. *S*he did not, however, agree that this vulnerability rendered his receipt of the text message traumatic within the meaning of the Policy.

[44] She agreed that the December 25, 2013 text message was highly offensive and could not imagine on what basis a supervisor considered the message to be an appropriate Christmas greeting. She said that it was an understatement to say the supervisor exhibited poor judgment.

[45] However, the Vice Chair agreed with the review officer that the definition of "traumatic" is intended to capture events much more serious than the receipt of this text message however objectionable its contents may have been to the worker.

[46] The Vice Chair agreed with what the review officer said at page 3 of the Review Division decision:

> …. in my view the policy's reference to emergency workers (who routinely witness events that the general public would view as traumatic) suggests that the definition is intended to capture events more serious or traumatic than the receipt of the text message however objectionable its contents may have been to the worker (Certified Record volume 1 p. 15).

[47] The Vice Chair says at paras. 38 and 39 of the Decision that:

> [38] If the receipt of the text message had been an emotionally shocking traumatic event, I would have expected to see a much more significant reaction within a short time of the worker having received the text message. Based on the evidence, it appears the worker saw his lawyer before he

> sought medical attention and that he did not seek medical attention until about two weeks after he received the text message

[48] At para. 41 the Vice Chair refers to the Practice Directive's description of bullying and harassment which includes the following:

> [41] ... In general terms, both bullying and harassment, reflect conduct that is intended to, or should reasonably have been known would intimidate, humiliate, or degrade an individual.

[49] At para. 44 of the Decision, the Vice Chair says that she accepts the worker's evidence with respect to the stressors and how they affected him. However, she is not convinced the supervisor could reasonably have been expected to know the worker would interpret these events as humiliating or degrading. She agrees with the review officer that the supervisor's behaviour reflected bad taste, poor judgment and unprofessionalism but did not cross the line into bullying or harassment. She therefore concludes that:

> [44] ...this series of the work-related stressors was not significant within the meaning of the policy as the supervisor's behaviour was not intended to be threatening or abusive and would not reasonably have been seen to be so.

[50] At para. 45 of the Decision, the Vice Chair reviewed the supervisor's evidence and says she is not convinced he intended to humiliate or degrade the worker.

[51] At para. 47 of the Decision, the Vice Chair refers to the worker's lawyer's submissions and says that she accepts the worker's evidence that he was deeply offended by the "retard" reference given the difficulties he had been experiencing with his speech over the previous year. However, she did not accept that the supervisor intended the text message to be threatening or abusive or that he could reasonably have anticipated the effects the message had on the worker.

[52] At para. 48 of the Decision, the Vice Chair reviews the supervisor's apology and finds that the supervisor misjudged the nature of his relationship with the worker. She concludes that the supervisor's failure to appreciate how the worker

would react to the text message was not unreasonable. The sending of the December 25, 2013 text message was an example of very bad judgment but did not cross the line into bullying and harassment.

[53] Given that the Vice Chair decided the event did not meet the threshold of trauma or significant work-related stressors she did not need to review any further evidence related to causation.

ANALYSIS

[54] The Vice Chair has decided that a traumatic event needs to be more serious than the receipt of the December 25, 2013 text in order to be compensable. Despite the fact that the Vice Chair accepted that the worker was vulnerable and that he was deeply offended by the "retard" reference given the difficulties he had been experiencing with his speech over the previous year, it appears to me that she relied entirely on an objective standard of what one might consider traumatic.

[55] The Policy interpreted by the Vice Chair directed the adjudicator to conduct a subjective analysis with caution that she should not rely entirely on a subjective analysis but that she should also obtain information from other sources. It is not clear to me that the case manager, review officer or Vice Chair applied a subjective analysis at all.

[56] Objectively, the average person could easily be offended by the December 25, 2013 text message from a work supervisor but not to the point of developing a mental disorder. The average person who was not suffering from ALS would also have the option of getting angry with his supervisor and quitting his job. A person in the worker's position is trapped. With his speech in the condition it was in and his suspected ALS he was not in a position to find another job. His options are to work with the person who sent him this offensive message or stay home from work.

[57] The word "traumatic" itself has to reflect back to the victim. Psychological trauma is a type of damage to the victim's psyche that occurs as a result of a

severely distressing event. It begs the question: Distressing to whom?; It is not distressing to the average person on the street but to the victim who alleges the distress. It is imperative that the victim be interviewed at the adjudication stage to determine what effect the event had on him and that there is some subjectivity to the analysis.

[58] WCAT's lawyer submits that the Vice Chair did consider the evidence of the worker's vulnerability but her conclusion that his receipt of the text message was not traumatic turned on WCAT's interpretation of the Policy. The Vice Chair accepted the review division's decision that traumatic was intended to capture more serious events because of the reference to emergency workers.

[59] As counsel for the worker submitted, the reference to emergency workers in the Policy is an example of workers who would not be excluded merely because they are routinely exposed to traumatic events. It does not limit the finding of traumatic events to those who are exposed to trauma on a daily basis. It expands the definition to include them. It is a parenthetical example not intended to restrict the application of the Policy.

[60] I find the review division's interpretation of the reference to emergency workers in the Policy to be irrational, however, by itself that is not sufficient to grant the relief sought because I am directed to refrain from replacing the Vice Chair's interpretation of Policy with my own.

[61] At para. 38, the Vice Chair, possibly in an attempt to subjectively assess the worker's reaction, has this to say:

> [38] If the receipt of the text message had been an emotionally shocking traumatic event, I would have expected to see a much more significant reaction within a short time of the worker having received the text message.

[62] The only evidence the Vice Chair has is the worker's lawyer's submissions and Dr. Yong's letter. The worker was never interviewed.

[63] The Vice Chair has drawn a conclusion about the worker's initial reaction based on no evidence from the worker and she has disregarded what Dr. Yong said.

[64] The Vice Chair had no evidence before her of when the worker *sought* medical attention. She does have evidence of when his appointment occurred but not when he tried to book the appointment.

[65] Decisions regarding interpretation of policy and how they should be applied are to receive the highest level of deference by the court: *Preast v. Workers' Compensation Appeal Tribunal*, 2015 BCCA 377 at paras. 52-54. However, decisions based on *no* evidence are patently unreasonable.

[66] In *Speckling v. British Columbia (Worker's Compensation Board)*, 2005 BCCA 80 at para. 37, the British Columbia Court of Appeal says that it is not open to the Court to set aside a decision on the basis that the panel should have given greater or lesser weight to aspects of the evidence before it but it can do so if there is no evidence to support the findings:

> [37] As the chambers judge noted, a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. *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. That is not the case here.
>
> (Emphasis added)

[67] At para. 74 in *Lalli* v. *British Columbia (Workers' Compensation Appeal Tribunal),* 2010 BCSC 1501, the British Columbia Supreme Court set aside a WCAT decision based on a finding that the material facts found by the tribunal were unsupported by evidence and that was patently unreasonable.

> [74] Where a court finds that material facts found by a tribunal are unsupported by evidence, that comes within the meaning of patent unreasonableness. In such a case, the court should award the appropriate remedy, and overturn the decision. Findings of fact by any court or tribunal must be based on evidence.

[68] In *Fraser Health Authority* v. *Workers' Compensation Appeal Tribunal*, 2013 BCSC 524, Mr. Justice Savage of the British Columbia Supreme Court found at para. 49, that, although there was some evidence to support causation there was no "positive evidence" and, in the face of expert opinion to the contrary, the WCAT decision was patently unreasonable.

> [49] There was no positive evidence that the respondents' cancer was caused by occupational factors. By finding causation in the absence of any evidence and in the face of expert opinion to the contrary, the WCAT's decision was patently unreasonable.

[69] The majority of the British Columbia Court of Appeal supported that conclusion at *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499, a decision of Justices Newbury, Chiasson, Frankel, Bennett and Goepel (leave to appeal to the Supreme Court of Canada decision is pending). They said at paras. 199 and 216:

> [199] I agree with these comments insofar as they suggest that there was some evidence to support the Original Decision, but I agree with Goepel J.A. that something more is required. As was stated by Iacobucci J. in *Canada (Director of Investigation and Research) v. Southam Inc*., [1997] 1 S.C.R. 748, a decision is patently unreasonable when the defect is obvious, that is, when it is openly, evidently and clearly wrong. I am left with the view that the only support for the Original Decision is the statistical anomaly. That is not a sustainable basis for the decision.
>
> [216] I agree with the chambers judge's conclusion that there is no positive evidence that the claimant's cancer was caused by occupational factors. In finding causation in the absence of any evidence and in the face of expert opinion to the contrary, the decision was in my opinion openly, clearly, evidentially unreasonable and by definition patently unreasonable.

[70] Having reviewed the authorities, I find that it is open to me to evaluate the findings of the panel to determine whether there is any evidence or whether there is positive evidence to support its finding that the worker did not suffer trauma in the face of his doctor's opinion to the contrary.

[71] I find that there is no evidence from the worker to describe what his immediate reaction to the receipt of the text message was. The reason there is no evidence from him is because the investigator intentionally did not interview the worker because the worker had legal representation and a speech impediment.

This comment is contained in the report from the field investigator at page 217 of volume 2 of the Certified Record. The fact that the worker had a speech impediment is no reason to refuse to speak to him when investigating his own claim. It is in fact discriminatory. The fact that the worker had a lawyer is also no reason to refuse to speak to him. The worker's lawyer invited an interview with his client and left voicemail messages for the case manager on more than one occasion to determine when the call would come. Telephone numbers were provided to the case manager.

[72] WCAT's counsel says that the worker did not request an oral hearing at the WCAT appeal. That does not dispense with my concern. The interview should have taken place and the adjudication phase and the decision should have been overturned because the claim was not properly adjudicated. Adducing new evidence at the WCAT hearing may have been accepted by the Vice Chair but it does not rectify the previous error.

[73] The following submissions found at paras. 2.6 page 051 of the Certified Record were made on the worker's behalf but were apparently ignored:

> In light of Mr. Cima's personal circumstances, the receipt of the text message had an immediate and profound detrimental effect on Mr. Cima's mental health, self-worth and self-esteem. In the days following the receipt of the message, Mr. Cima became emotionally distraught especially at the thought of having to return to work and meet with Mr. Simmons. As a result of the mental shock Mr. Cima suffered upon receiving the message he started to have difficulty sleeping and concentrating.

[74] The supervisor who sent the egregious email, was thoroughly interviewed at the adjudication phase and his evidence was accepted by the review officer and the Vice Chair.

[75] As the worker's lawyer says in his submissions, the worker was never questioned by a case manager, field investigator, review officer or WCAT adjudicator as to why he did not see his family doctor before January 8, 2014.

[76] Another area of concern I have with the Decision is the Vice Chair's reliance on the supervisor's lack of intent to harm in finding that sending the text message did not constitute bullying. Intent to harm is not a requirement for a finding that an act constitutes bullying. If it were, then the ignorant would routinely be exonerated. The test is whether the perpetrator knew *or ought to have known* that the action would intimidate, humiliate or degrade an individual.

[77] It appears on the evidence that the supervisor did not know that his inappropriate conduct would be degrading to the worker, so subjectively he did not intend to cause harm.

[78] The question is whether he *ought t*o have known and that is an objective test.

[79] The Vice Chair was not convinced the supervisor could reasonably have been expected to know the worker would interpret the events as humiliating or degrading. There is no analysis on how the Vice Chair came to this conclusion. She apparently did not rely on evidence to make this conclusion.

[80] The question should have been asked: based on what the supervisor knew at the time, would a reasonable person have known that the text message would be offensive and belittling?

[81] The supervisor had been working with the worker for over two years and had watched the gradual deterioration in the worker's speech abilities. Intact had accommodated the worker and allowed him to communicate primarily by text and email.

[82] In his submissions, the worker's lawyer said at paras. 2.2 page 050 of the Certified Record:

> In the past nine months of Mr. Cima's employment with Intact, Mr. Cima's speech disability worsened progressively. In the course of communicating with Mr. Cima, Mr. Simmons would repeatedly use phrases such as " What you don't understand is …" "Do you understand?" and "Do you comprehend what I am trying to say?" Prior to the development of his speech disability,

> these types of demeaning statements were never made to Mr. Cima. Furthermore, Mr. Simmons' belittling and condescending behaviour towards of [sic] Mr. Cima was witnessed by Mr. Cooper. Mr. Cima states that Mr. Cooper would often remind Mr. Simmons that although Mr. Cima is losing his voice, he is not losing his intelligence. .

[83] Given all of this information, the supervisor ought to have known that a text message calling the worker a "retard" would be viewed as offensive and belittling. The customer, Mr. Vandermay, commented that it was a terrible thing to send to the worker given the difficulty the worker had with speech and thought it was degrading (p. 226 of the Certified Record).

[84] Counsel for WCAT takes no position on whether this conclusion that the supervisor could not reasonably have been expected to know the worker would interpret the events as humiliating or degrading is patently unreasonable because the Vice Chair failed to consider specific evidence in this regard. I do find this conclusion patently unreasonable for that reason.

[85] I find the Vice Chair's objective analysis of what constitutes trauma plus the board investigator's failure to interview the worker in the investigation of this claim because he had a speech impediment and because conclusions about his reaction were drawn without supporting evidence all to be patently unreasonable.

[86] The panel also disregarded the opinion of the family doctor that the worker's depression was triggered by the traumatic work-related event. Dr. Yong said at p. 105 of the disclosure:

> As you are aware, Mr. Cima has been absent from work since December 25 2013 for an incident with his employer that involved workplace harassment. He first presented to my clinic in January 2014 with regards to the incident and has been seeing me on a regular basis thereafter. Mr. Cima has presented with symptoms consistent with a major depressive episode secondary to the aforementioned incident and as such I have advised that he remain off work especially given that he would be in close proximity to the employer who had instigated the incident tin the first place.

[87] I understand that the panel did not get as far as assessing causation but this was evidence of the worker's reaction to the December 25, 2013 text and it was completely ignored.

[88] Had the worker been assessed by a board psychologist or psychiatrist, then there may have been sufficient evidence before WCAT to support a finding that the event was traumatic or significant but the Board denied the claim on its definition of traumatic event and declined to have the worker assessed.

[89] It is not clear that the finding of "significant workplace stressor" does require a medical opinion. Dr. Yong was of the opinion that the workplace harassment led to the depressive disorder. In disregarding Dr. Yong's opinion, the Vice Chair preferred her expertise in assessing the significance of the event to the worker over the expertise of the medical doctor who had actually spoken with and treated the worker.

[90] While the hearing panel is presumed to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction, it is not presumed to have medical expertise.

[91] In *Page v British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 493, Hinkson J., as he then was, found at paras. 63 and 65:

> [63] Where a WCAT panel is faced with a medical diagnosis as to a mental condition that is described in the *DSM-IV* at the time of the diagnosis, it is not equipped to reject that diagnosis, without an appropriate opinion to the contrary.
>
> [65] This is not a case of the respondent's panel preferring one diagnosis to another. As there was no psychiatric or psychological opinion that contradicted the only opinion before them as to the worker's condition, this is a case of the Hearing Panel making its own diagnosis, when it clearly has no expertise upon which to do so.

[92] Hinkson J. found that such reasoning and the resulting findings were based upon the arbitrary exercise of the WCAT's discretion in terms of the use of the evidence before it, particularly its reliance predominantly, if not entirely, on an

irrelevant factor, the 1995 opinion evidence of Dr. Meloche. In the result, he found that the WCAT's decision on this issue was patently unreasonable.

SUMMARY OF FINDINGS

[93] In the case before me, I find that the Decision is patently unreasonable because :

1. The Vice Chair disregarded any subjective evidence of the worker's reaction to the event.
2. The Board failed to interview the worker because he had a speech impediment and was represented by a lawyer.
3. The Vice Chair drew conclusions about the worker's reaction from irrelevant factors and without supporting evidence.
4. The Vice Chair concluded that the supervisor could not reasonably have been expected to know the worker would interpret the events as humiliating or degrading based on no evidence or analysis.
5. The Vice Chair disregarded Dr. Yong's opinion without the benefit of a conflicting medical opinion.

OTHER GROUNDS

[94] In his submissions in support of the judicial review, counsel for the worker spent some time setting out statutory obligations for employers to provide a safe workplace for their employees and what WCB's workplace bullying and harassment policies are under the Occupational Health & Safety division of the *Act*. I have not addressed any of the submissions because these arguments were not made before WCAT and so should not form part of my decision.

REMEDY

[95] I have referred to *Lalli*, *Page* and *Fraser Health* to determine the correct approach to ordering a reconsideration. In *Lalli*, Morrison J. said at para. 77:

> [77] In my view, the decision is patently unreasonable, and the decision of April 22, 2008 is set aside. The Tribunal is directed to rehear and re-determine the worker's appeal, in accordance with the reasons of this court.

[96] In *Page*, Hinkson J. explicitly contemplated that new evidence might be raised to contradict an expert's previously uncontradicted opinion:

> [86] I have concluded that the Hearing Panel could not reject the opinion of Dr. Jhetam on the basis that it did, and I have found no evidence that could reasonably be said to contradict Dr. Jhetam's opinion. *Nonetheless I have reluctantly come to the conclusion that I must afford the respondent or the WCB the opportunity to deal with the worker's claim by appropriate means; that is, to obtain a psychiatric or psychological opinion, if either chooses to do so, given my review of the Hearing Panel's decision.*
>
> [Emphasis added]

[97] In *Fraser Health*, Savage J. said that even when the court determines that a tribunal's decision was based on no evidence, or that an expert's opinion was uncontradicted, the matter should still generally be remitted to the WCAT for determination (as opposed to being determined by the court on review). The following are excerpts from Savage J.'s decision:

> [52] The general rule is that where a party succeeds on judicial review, the appropriate remedy is to order a rehearing or reconsideration before the administrative decision-maker: *Workers' Compensation Appeal Tribunal v. Hill,* 2011 BCCA 49 at para. 51, 16 B.C.L.R. (5th) 142. The court is given this power under ss. 5 and 6 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

[98] Further determination can take place after new evidence is obtained.

> [51] The respondents and counsel for the WCAT agree that WCAT is an inquisitorial body. It may consider new evidence should I remit this matter to it. Since new evidence could be considered during rehearing, the outcome of that hearing is not certain. Thus this matter should be remitted to the WCAT for rehearing.

[99] WCAT has the power to obtain further medical evidence before further determination:

> [54] The WCAT has inquisitorial powers that include the power to request further medical evidence in order to decide an appeal. This information can be requested from a health professional who has treated the worker or whom the worker has consulted. The WCAT also has the express authority under s. 249 of the *Act* to request independent medical evidence, advice, or assistance from a health professional (or a panel of professionals): Heather McDonald et al, *Workers' Compensation in British Columbia*, loose-leaf (consulted on 20 March 2013), (Markham, Ontario: LexisNexis Canada Inc., 2009) ch. 16 at 71.

CONCLUSION

[100] Given that I have found certain conclusions drawn by WCAT to be patently unreasonable, I am remitting this claim back to WCAT to be reconsidered on the merits.

[101] The worker should be interviewed first. The worker should also be assessed by a board psychologist or psychiatrist if the Board intends to challenge the opinion of Dr. Yong. That assessment may shed some light on whether or not the event was traumatic or a significant stressor.

[102] I will not direct that the matter be reheard by a different panel. Following the direction in *Lalli:*

> [78] I do not think it appropriate for this court to direct the Tribunal to appoint any particular panel for the rehearing. That is a decision for the chair of the Tribunal. A different panel might be seen to be more appropriate and fair under the circumstances, but that is a decision for the Tribunal, not for this court.

[103] The worker has been successful in this judicial review and should be entitled to recover his party and party costs at Scale B.

"Young J."