

In the Supreme Court of British Columbia

Between:

Don Smith

Petitioner

And:

Workers' Compensation Appeal Tribunal

Respondent

PETITION TO THE COURT

ON NOTICE TO:

Workers' Compensation Appeal Tribunal
150-4600 Jacombs Road
Richmond, BC V6V 3B1

ABC Auto Repairs
4321 XYZ Street,
Vancouver, BC V6T 1J1

Deputy Attorney General
Ministry of Justice
PO Box 9290 Stn Prov Govt
Victoria, BC V8W 9J7

This proceeding is brought for the relief set out in Part 1 below, by

the person named as petitioner in the style of proceedings above

.....[name(s)]..... (the petitioner(s))

If you intend to respond to this petition, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

(b) serve on the petitioner(s)

(i) 2 copies of the filed response to petition, and

(ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you,

without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1) The address of the registry is:

The Law Courts
800 Smithe Street
Vancouver, BC V6Z 2E1

(2) The ADDRESS FOR SERVICE of the petitioners is:

Don Smith
9876 Main Street
Vancouver, BC V1V 2V2

Fax number address for service (if any) of the petitioner: N/A

E-mail address for service (if any) of the petitioner: dsmith@email.ca

(3) The name and office address of the petitioner's lawyer is: N/A

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. An Order setting aside Workers' Compensation Appeal Tribunal ("WCAT") decision number A1712345 issued by Vice-Chair H. Hetter on May 25, 2017 (the "WCAT Decision");
2. An Order remitting the appeal at issue in the WCAT Decision back to WCAT for redetermination with directions to hold an oral hearing and such other directions as the Court deems just;
3. Costs; and

4. Any other order the Court deems just.

Part 2: FACTUAL BASIS

1. The petitioner is a 48 year old mechanic. He was employed by ABC Auto Repairs from August of 2000 until May of 2016.

The Petitioner's Osteoarthritis

2. The petitioner's job with ABC Auto Repair required that he kneel on a concrete floor on a regular basis for extended periods of time.
3. In or around January of 2016, the petitioner began experiencing knee pain at work.
4. Over the following months the petitioner experienced recurring pain in both knees that persisted throughout the day and which made it difficult for him to walk and work.
5. On May 18, 2016, the petitioner consulted Dr. Jones, his family physician. Dr. Jones provided an opinion stating that the petitioner's pain was a result of osteoarthritis. Dr. Jones stated that his newly developed osteoarthritis was most likely irritated by constant kneeling at work because the petitioner had no family history of arthritis. Dr. Jones recommended that the petitioner take prescription medication and attend regular physiotherapy.

The Petitioner's WCB Claim

6. On June 1, 2016, the petitioner filed an application for compensation with the Worker's Compensation Board ("WCB").
7. On July 2, 2016, an occupational therapist produced a job demands analysis with respect to the petitioner's employment. The job demands analysis identified kneeling as a potential risk factor for the development of osteoarthritis in the knees and detailed the petitioner's job demands that would require kneeling.

8. On July 10, 2016, a Board Medical Advisor (the “BMA”) gave an opinion agreeing with the job demands analysis that kneeling was a potential risk factor for arthritis. However, the BMA believed that the petitioner did not do the amount of kneeling required to cause the onset of osteoarthritis. The BMA also stated that the petitioner’s arthritis arose earlier than the petitioner claimed and that it arose outside of his work at ABC Repair Shop.
9. On July 30, 2016, the WCB denied the petitioner’s claim for osteoarthritis (the “WCB Decision”). The petitioner applied to WCB’s Review Division (the “Review Division”) for a review of the WCB Decision.
10. On November 27, 2016, the Review Division denied the petitioner’s request for review (the “Review Decision”). The Review Decision found that kneeling is an activity that can aggravate osteoarthritis. However, the Review Decision concluded that the amount of kneeling required by petitioner’s employment did not cause his osteoarthritis and that it did not arise because of the demands of his work.

The WCAT Appeal

11. On December 14, 2016, the petitioner appealed the Review Decision to WCAT. The petitioner requested an oral hearing.
12. WCAT denied the petitioner’s request for an oral hearing, instead asking for written submissions.
13. On May 25, 2017, WCAT issued the Decision, which denied the petitioner’s appeal (the “WCAT Decision”).
14. WCAT interpreted the BMA’s opinion as stating that kneeling cannot cause osteoarthritis or aggravate an underlying condition. WCAT made no reference to the occupational therapist’s job demands analysis.
15. WCAT stated that the petitioner was over exaggerating the amount of time he spent kneeling at work. WCAT also stated that the petitioner’s osteoarthritis likely began before the petitioner said that it did.

16. WCAT concluded that Dr. Jones' report did not support a finding that the petitioner's work demands caused his osteoarthritis. WCAT concluded that Dr. Jones' opinion that kneeling irritated the petitioner's osteoarthritis meant that it merely caused the petitioner to notice his existing osteoarthritis.

Part 3: LEGAL BASIS

The Petitioner will rely on:

1. The *Rules of Court*, B.C. Reg. 168 / 2009, O.C. 302/2009;
2. The *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241;
3. The *Workers' Compensation Act*, R.S.B.C. 1996, c. 492;
4. The *Administrative Tribunals Act*, S.B.C. 2004, c. 45;
5. The *Rehabilitation Services and Claims Manual II*;
6. The *Interpretation Act*, R.S.B.C. 1996, c. 238; and
7. The inherent jurisdiction of the Court.

The grounds on which this application is brought are as follows:

Procedural Fairness

1. WCAT breached the rules of procedural fairness by denying the petitioner's request for an oral hearing.
2. WCAT stated that the petitioner was over exaggerating the amount of time he spent kneeling at work, and doubted the petitioner's claim about when his osteoarthritis began. These are both issues of credibility. When credibility is a central issue in an appeal, fairness requires an oral hearing.

The Decision is patently unreasonable

3. WCAT's conclusion that the petitioner's osteoarthritis of the knee is not a compensable occupational disease under the *Workers' Compensation Act* is patently unreasonable.

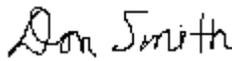
4. WCAT concluded that kneeling cannot cause or aggravate osteoarthritis in the knee. There is no evidence that can rationally support this finding. The petitioner's family physician, occupational therapist, and the BMA all stated that kneeling is a risk factor for the development of osteoarthritis of the knee. No expert gave a contrary opinion.
5. WCAT's conclusion that Dr. Jones' opinion did not support workplace causation is also patently unreasonable. Dr. Jones stated that kneeling at work "irritated" the petitioner's osteoarthritis. It is irrational to conclude that this opinion stating the petitioner's osteoarthritis was "irritated" by kneeling at work is somehow not an opinion supporting workplace causation.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit # 1 of Don Smith made June 3, 2017; and
2. The record that was before WCAT.

The petitioner estimates that the hearing of the petition will take 2 days.

Date: June 3, 2017



Signature of
 petitioner lawyer for petitioner(s)

Don Smith

To be completed by the court only:

Order made

in the terms requested in paragraphs of Part 1 of this petition

with the following variations and additional terms:

.....

Date:

.....
 Signature of Judge Master