

# British Columbia Court of Appeal considers application of Workers Compensation Act to out-of-Province injury suffered by non-resident employee

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A recent decision of the British Columbia Court of Appeal (the “BCCA”) highlights the complexities that may arise when applying workers compensation legislation to out-of-province injuries and non-resident employees. In [\*Air Canada v. British Columbia \(Workers’ Compensation Appeal Tribunal\)\*](#) (October, 2018), the claimant, Ms. Zechel, was a flight attendant employed by Air Canada. Although she resided in Winnipeg, her flight assignments originated and terminated at the Vancouver International Airport. Most of Ms. Zechel’s working hours were spent aboard flights in airspace outside of British Columbia (“BC”).

In May 2012, while flying outside of BC airspace, Ms. Zechel detected an acrid odour in the aircraft cabin. The flight was given priority landing in Vancouver and the smell was eventually found to have been caused by overheated wiring in the inflight entertainment system. Ms. Zechel suffered a stress reaction, as she was aware of a deadly aircraft crash caused by overheated wiring. Ms. Zechel missed a few days of work, for which she claimed lost wages under the BC *Workers Compensation Act* (the “Act”). Sections 5 and 5.1 of the Act state:

## ***Compensation for personal injury***

**5** (1) *Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part must be paid by the Board out of the accident fund. [...]*

## ***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*

- *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,*
- *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*

- *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. [...]*

The BC Workers' Compensation Board (the "Board") accepted Ms. Zechel's claim. Air Canada appealed the Board's decision to the Workers' Compensation Appeal Tribunal (the "Tribunal" or "WCAT"), contending that no compensable injury had been sustained.

On its own initiative, the Tribunal identified a jurisdictional issue arising from section 8(1) of the Act, which provides:

### ***Injuries happening out of Province***

**8 (1)***Where the injury of a worker occurs while the worker is working elsewhere than in the Province which would entitle the worker or the worker's dependants to compensation under this Part if it occurred in the Province, the Board must pay compensation under this Part if*

- *a place of business of the employer is situate in the Province;*
- *the residence and usual place of employment of the worker are in the Province;*
- *the employment is such that the worker is required to work both in and out of the Province;*  
*and*
- *the employment of the worker out of the Province has immediately followed the worker's employment by the same employer within the Province and has lasted less than 6 months,*

*but not otherwise.*

Given that the injury occurred outside of the province and that Ms. Zechel did not reside in BC, the Tribunal concluded that Ms. Zechel could not make a claim under the Act. Both Ms. Zechel and Air Canada sought judicial review of the Tribunal's decision.

On review, the chambers judge found that the Tribunal had not undertaken a complete interpretation of the Act and the relevant policies. In particular, the Tribunal failed to consider sections 5 or 5.1 and whether those provisions allowed the claim notwithstanding section 8. The judge also concluded that the Tribunal's interpretation of the Act led to "absurd" results, since two workers suffering the same injury under the same circumstances could be treated differently on the basis of their province of residence. The chambers judge concluded that the Tribunal's decision was patently unreasonable. The Tribunal appealed.

The BCCA agreed with the chambers judge that the Tribunal's exercise in statutory interpretation was inadequate. Not only had it failed to consider the underlying purpose of the statute as a whole, including sections 5 and 5.1, but it also failed to consider analogous situations in the case law and

the Board's policies.

Notwithstanding this conclusion, the BCCA did not agree that the Tribunal's decision was "absurd." It noted that section 8 of the Act was meant to apply to some claims. Where it applied, the province of residence would be a "decisive factor". While the BCCA acknowledged that this may be a curious legislative choice, it was nevertheless "a legislative line-drawing exercise." The BCCA concluded:

Though the reasons provided by the WCAT do not stand up to scrutiny, I am not, at present, convinced that the result reached by the tribunal is clearly wrong. Accordingly, I am unable to endorse the chambers judge's implicit direction to the tribunal that it must assume that Ms. Zechel's claim, if substantiated, will entitle her to compensation. On the other hand, the chambers judge's rationale for finding Ms. Zechel to be eligible to make a claim under s. 5.1 of the *Workers Compensation Act* is a reasonable interpretation of the statute, and is one that is open to the WCAT.

The BCCA remitted the matter to the Tribunal to engage in a proper exercise of statutory interpretation to determine whether Ms. Zechel was covered by the Act.

## **In our view**

This decision is interesting not only for its consideration of residency and out-of-province injuries in the context of the Act, but also because it illustrates the deference afforded to tribunals in their role as interpreters of their respective statutes. Although the decision of the Tribunal could not stand due to its flawed reasoning (the interpretation of the Act), the BCCA was careful not to mandate a particular interpretation of the statute, as the chambers judge had. Instead, the matter was remitted to the Tribunal for a proper interpretation of the Act, with an acknowledgement that the Tribunal may come to the same decision.

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