

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ilinsky v. British Columbia (Workers' Compensation Appeal Tribunal)*,
2026 BCSC 1048

Date: 20260608
Docket: S241126
Registry: Vancouver

**In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241
and in the Matter of the *Workers Compensation Act*, R.S.B.C. 2019, c. 1**

Between:

Jolene Ilinsky

Petitioner

And

Workers' Compensation Appeal Tribunal

Respondent

Before: The Honourable Justice A. Ross

On judicial review from: An order of the Workers' Compensation Appeal Tribunal,
dated December 19, 2023 (WCAT-A2202410)

Reasons for Judgment

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Place and Date of Trial/Hearing: Vancouver, B.C.
March 24–25, 2026

Place and Date of Judgment: Vancouver, B.C.
June 8, 2026

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Introduction

[1] The petitioner, Jolene Ilinsky, seeks judicial review of a decision of the Workers' Compensation Appeal Tribunal ("WCAT").

[2] The decision in question (WCAT-A2202410) is dated December 19, 2023 (the "Decision"). In it, WCAT denied the petitioner's application for a reopening of her claim for benefits from the Workers' Compensation Board (the "Board"). WCAT also declined to appoint an independent health practitioner ("IHP") to review Ms. Ilinsky's claim.

[3] The petitioner seeks an order setting aside the Decision on the basis that it was patently unreasonable.

[4] For the reasons set out below, I dismiss the petition.

[5] In discussing the Decision in these reasons, I refer to the person who made that decision as the "panel". I do so to distinguish the individual decision-maker from the entity that is WCAT (which is the respondent).

Issues

[6] The petitioner challenges two aspects of the Decision:

- a) the panel's framing of the issue to be determined; and
- b) the panel's decision not to appoint an IHP pursuant to s. 302(1.1) of the *Workers Compensation Act*, R.S.B.C. 2019, c. 1 [Act] for the purposes of the appeal.

[7] The parties agree that the two legal issues are intertwined. In other words, they agree that the panel's framing of the "issue to be decided" led them to decide that the IHP was not required.

[8] The petitioner submits that the Decision was patently unreasonable for the following reasons:

- a) The panel erred in framing the issue to be considered as being limited to whether the petitioner's lower back strain injury had resolved or stabilized, and thereby not considering other issues that were before the panel, such as the medical diagnosis of the petitioner's condition and whether that condition was compensable.
- b) The panel further erred by interpreting s. 302(1.1)(c) of the *Act* as requiring the panel to be satisfied that an IHP would be of assistance in "resolving the issues before them" rather than being of assistance by resolving a medical condition at issue in the appeal.

[9] The petitioner seeks a referral of the issues back to WCAT for reconsideration with instructions.

[10] In response, WCAT submits that the Decision was not patently unreasonable. In its submission, WCAT focuses on the high hurdle faced by the petitioner. WCAT submits that the Decision does not meet the test of being "openly, clearly, evidently unreasonable": *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80 at para. 33. WCAT submits that there was at least some evidence to support the panel's conclusions. Although WCAT ultimately relies on the high hurdle faced by the petitioner, to be clear, WCAT also submits that the Decision was correct, or at least reasonable, in the circumstances. WCAT seeks a dismissal of the petition.

[11] As discussed below, one of the questions posed on this hearing is the proper interpretation of s. 302(1.1) of the *Act*. I set that section out here for convenience:

Health professional assistance in specific cases

302 ...

(1.1) Subject to subsection (8), the presiding member must retain a health professional to provide independent assistance or advice in an appeal if all of the following apply:

- (a) the appeal tribunal receives a request under subsection (1.2) from an employer, a worker or a dependant of a deceased worker;
- (b) the medical condition of the worker is at issue in the appeal;

(c) the appeal tribunal determines that the independent assistance or advice would assist in reaching a decision on the appeal.

Background

The Parties

[12] The petitioner, Jolene Ilinsky, is a licensed practical nurse who works for Northern Health, which was previously known as the Northern Health Authority (the “Employer”).

[13] WCAT is an independent administrative tribunal established under the *Act* to hear appeals from certain decisions of the Board. WCAT is independent from the Board and is subject to the provisions of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [ATA].

[14] WCAT is entitled to be a party to this application for judicial review pursuant to s. 15 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. I have discretion to determine the extent to which WCAT may participate in this proceeding. I note that, without WCAT’s participation, there would be no opposing position. I allowed WCAT to participate fully in the interests of having a fully-informed adjudication.

The Workers’ Compensation System and Judicial Review

[15] Part of WCAT’s argument points to the decision-making chain established by the *Act*. WCAT decisions must be placed within the context of the workers’ compensation system as a whole:

- a) Claims are initially submitted to, and decided by, the claims division of the Board;
- b) If dissatisfied with a decision, a party can seek a review at the Review Division of the Board;
- c) If dissatisfied with the Review Division decision, the party can appeal to WCAT;

- d) A WCAT decision can be judicially reviewed by this Court;
- e) Decisions of this Court can be appealed to the Court of Appeal.

[16] WCAT submits that, within this structure:

- a) the Board has exclusive jurisdiction to adjudicate claims; and
- b) WCAT is an appellate tribunal. Its jurisdiction is limited to hearing appeals relating to decisions that the Board has already made on a claim. It does not have original jurisdiction within the workers' compensation system nor a general supervisory jurisdiction over the Board.

[17] WCAT submits that any individual panel does not have the jurisdiction to remedy situations arising from Board decisions where those issues did not arise in the hearing that is under appeal. Further, a panel cannot decide matters that the Board has never been asked to decide. WCAT points to the reasoning in *Morris v. British Columbia (Workers' Compensation Board)*, 2019 BCSC 706:

[132] In analogous circumstances, in *Sidhu v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2010 BCSC 277 at paras. 93-95, the court accepted WCAT's counsel's submission that WCAT did not have a plenary power or roving mandate to overturn matters that have already been decided in appeal processes or were not appealed at all. The court said:

[93] WCAT does not have the power to review decisions that are not appealed. Its jurisdiction is confined to confirming, varying or cancelling a decision or order which has been appealed: s. 253(1)

[133] Equally, WCAT's decision that it did not have authority to act in circumstances where there had been no Board or Review Division decision, cannot be patently unreasonable.

[18] WCAT submits that a panel cannot determine whether a worker is entitled to compensation for a condition that has not yet been accepted on a claim. The worker must first ask the Board to adjudicate these issues. WCAT notes that there is no time limit for a worker to seek such adjudication on an accepted claim. I return to this submission below.

The Initial Claim

[19] There is no dispute over the facts of the petitioner's initial claim. This recital of the facts is taken primarily from the petitioner's written submissions.

[20] In 2020, the petitioner worked as a licensed practical nurse at Rotary Manor, a long-term care facility in Dawson Creek. She has worked as a nurse since 2009.

[21] On December 22, 2020, the petitioner was injured when she was pushing a large patient in a wheelchair. The patient suddenly became agitated and put his feet down, causing the wheelchair to come to an abrupt stop. The petitioner immediately started to experience pain in her lower back. Prior to this, she had had no back issues.

[22] The petitioner reported her condition to the Employer. The Employer filed an "Employer's Report of Injury" at the Board.

[23] The petitioner made a claim for workers' compensation benefits. The petitioner's original claim was based upon a report by her family doctor, Dr. Oyedeji. His report is not in issue. It was supportive of her claim.

[24] The Board accepted the petitioner's claim for lower back lumbar strain. The Board provided wage loss benefits during the period that the petitioner was unable to work between January 23 and February 9, 2021. She returned to work on modified duties on February 9, 2021. As of March 20, 2021, the Board ceased paying wage loss benefits because she returned to her regular hours and duties.

[25] After returning to work at her regular hours, the petitioner continued to experience lower back pain. Her pain consistently increased during her work shifts, with increasing pain on the right side that would radiate into the right leg. Her statements, and her pain, are not disputed. She used sick days and vacation days to manage her lower back symptoms. Due to a shortage of doctors in her region, she was not able to consult with a doctor for these symptoms during the spring and summer of 2021.

[26] The petitioner took most of July 2021 as vacation time. She only worked two shifts in August 2021 because she began to experience a worsening of her back pain. On September 10, 2021, she contacted the Board requesting a reopening of her claim pursuant to s. 125 of the *Act* based upon the worsening of her lower back symptoms.

[27] Section 125 of the *Act* provides:

Board authority to reopen matter: recurrence of injury or significant change in medical condition

125 (1) The Board may at any time, on its own initiative or on application, reopen a matter that had been previously decided under a compensation provision by the Board or an officer or employee of the Board if, since the decision was made in the matter,

- (a) there has been a recurrence of a worker's injury, or
- (b) there has been a significant change in a worker's medical condition that the Board had previously decided was compensable.

(2) If the Board determines that the circumstances described in subsection (1) justify a change in a previous decision respecting compensation or rehabilitation, the Board may make a new decision that varies the previous decision or order.

[28] I return to this wording below.

The Application to the Board for Reopening

[29] When the petitioner applied for a reopening, the case manager requested that one of the Board's medical advisors, Dr. Workman, review the petitioner's medical records and provide an opinion concerning the diagnosis of her lower back symptoms and their relationship to the workplace incident. I have set out below the case manager's questions at length because the petitioner relies on these questions as being relevant to her current submission. The case manager asked Dr. Workman the following questions:

1. What would you describe as the diagnosis(es) in relation to the incident under this claim?
2. What would you describe as being the diagnosis(es) for the worker's current back and right leg difficulties described above?
3. What is the likelihood that the current diagnosis(es) are medically related to the incident or injury sustained under this claim?

When replying please consider as:

- a) a continuation of the original injury, or
- b) a deterioration/significant change, or
- c) a new condition (such as a compensable consequence flowing from an earlier injury or treatment under this claim)?

Please explain.

4. If the current diagnosis(es) are unrelated, when did the condition under this claim likely resolve?

5. If related as a continuation of the original injury, have (and when did) this/these condition(s) likely stabilize?

This is in relation to considering a referral to Long Term Disability Services flowing from the original injury (and in consideration of chronic pain).

6. If related as either (a) a recurrence of the original injury; or (b) a continuation with a deterioration/significant change original injury or (c) as new condition, does the medical evidence support a recurrence/significant change/onset of new condition temporally related (or in keeping with) the time loss dates provided by the worker? (off work September 2021 ongoing).

This is in relation to considering a reopening for wage loss benefits or the acceptance of a permanent partial disability condition developing at a later date. If related in any of these scenarios, please also advise the following

7. What (if any) permanent medical restrictions and/or limitations (described by the worker) would you support?

8. Would an expedited VSC neurosurgeon consult be medically reasonable based on the evidence, and if so, can this be expedited?"

[30] I note that several of the terms used in the case manager's letter have specific meanings within the administration of the *Act*. Those terms include: "resolved", "recurrence", and "deterioration/significant change". It is important to understand that the term "resolved" connotes that the physical injury (e.g., a broken bone) has healed, although the individual may continue to have symptoms (pain) in that area.

[31] In his clinical opinion dated February 23, 2022, Dr. Workman opined that the petitioner's lower back sprain/strain injury had "resolved", but she was still left with some persistent symptoms, and that those symptoms "slowly worsened and have resulted in Mechanical Back Pain." He noted that she has been unable to work due to the pain and she was unable to afford ongoing physiotherapy. She had not been referred to any sort of program.

[32] The case manager then arranged for a consultation with one of the Board's Visiting Specialist Clinic ("VSC") neurosurgeons, Dr. Nicolas Dea. Dr. Dea provided a report dated May 9, 2022. He opined that the petitioner was "very incapacitated" by "severe low back pain," but there was nothing he could offer in terms of neurosurgical treatments:

In summary, I am afraid I will not be able to help this poor patient. She is very incapacitated with severe low back pain, but without any structural anomaly on the MRI and without any neurological deficit. I think this patient would clearly benefit from a multidisciplinary pain program. It is starting to impact multiple areas and spheres of her life and I believe to see a medical doctor, a psychologist, and also perhaps an anaesthetist in a multidisciplinary pain clinic setup would be best for her.

[33] On May 19, 2022, the Board denied the petitioner's request for a reopening.

[34] The petitioner requested a review of that decision to the Board's Review Division.

The Review Division Decision

[35] On November 4, 2022, a Review Officer released the review decision, noting that the Board had determined that the petitioner's lower back sprain injury had resolved.

[36] The Review Officer ruled that the petitioner was not entitled to a referral to Long Term Disability Services for consideration of a possible permanent disability benefit. The Review Officer further determined that the petitioner was not entitled to a reopening of wage-loss benefits or a referral to Long Term Disability Services (the "Review Decision").

[37] The Review Decision (declining to reopen the petitioner's claim) is the decision that was appealed to WCAT; hence, it is the underpinning of the Decision now subject to this judicial review.

[38] A subsequent decision by the Board dated June 2, 2023, accepted that the petitioner's ongoing presentation after March 2021 was attributable to chronic lumbar pain. That decision is not subject to this judicial review.

The Appeal to WCAT

[39] The petitioner appealed the Review Decision to WCAT.

[40] In the course of the appeal, the petitioner's union representative submitted a letter dated May 2, 2023. That letter enclosed a new independent medical report written by an occupational medicine specialist, Dr. John Sehmer, dated January 10, 2023.

[41] In his report, Dr. Sehmer indicated that, in his view, it was more than 50% likely that the petitioner's worsened back condition as of September 2021 was related to the December 22, 2020, work injury. He wrote (in response to the questions posed which are set out in bold):

2. Is Ms. Ilinsky's back condition as of September 2021 related to the December 22, 2020 work incident under this claim? Please provide reasoning for your conclusion.

Unfortunately the documentation related to the December 2020 work claim is poor. It is unclear the diagnosis at that time. Ms. Ilinsky has been consistent in reporting symptoms in her right lower back that at times radiates down into her right leg. It is unusual that the first worker's compensation report from her family physician related to the December 22, 2020 injury was not until January 29, 2021, but it has become increasingly difficult to see a family physician likely more so in Dawson Creek than the lower mainland. Ms. Ilinsky states she did attend her physiotherapist, Jen Rudko, prior to seeing her chiropractor on January 13, 2021, and her family physician initially on January 20, 2021, but documentation from Ms. Rudko is not currently on file.

It is possible that Ms. Ilinsky did have a right sacroiliac injury as a result of the December 2020 injury.

There is no medical documentation on file from March 2021 until September 2021. The fact that she did not seek medical care during this time does not necessarily mean she was asymptomatic particularly given the reported lack of medical resources in Dawson Creek and her family physician, Dr. Roux, had moved away.

When seen in September and onwards, she complained of ongoing low back symptoms radiating down her right leg. The MRI scan of the lumbar spine was reported as normal; however, the sacroiliac joints were not imaged. It is possible that Ms. Ilinsky injured her right sacroiliac joint due to the injury of December 2020 and has had recurrent symptoms since that time.

Alternatively she may have had an L5-S1 facet injury. It is unclear if her sacroiliac joint has been examined by any of her attending physicians or by Dr. Dea at the Worksafe BC Visiting Specialist Clinic.

Ms. Ilinsky reports her symptoms have been the same in September 2021 as they were in December 2020 and in my opinion, the limited available medical documentation documents confirms similar symptoms. In my opinion, there is well more than a 50% chance the two claims are related.

3. What is the diagnosis of Ms. Ilinsky's low back condition as of September 2021?

Ms. Ilinsky appears to be consistent in her reports of location of symptoms in the right lower back. A right-sided sacroiliitis or inflammatory facet condition cannot be ruled out.

[Underlining added.]

[42] Dr. Sehmer noted that he was unable to provide a definitive diagnosis for the petitioner's back condition as of March 20, 2021. However, he recommended further medical assessment in relation to a possible inflammatory condition (right-sided sacroiliitis or inflammatory facet condition). In the report, Dr. Sehmer suggested an assessment by a rheumatologist:

4. Has there been a significant change or recurrence of Ms. Ilinsky's low back condition accepted as a sprain/strain under claim #21847098?

Unfortunately, due to the very limited medical documentation on file I cannot make a definitive diagnosis or address this question. I believe it would be most helpful for Ms. Ilinsky to be assessed by a rheumatologist, perhaps at the Worksafe BC Visiting Specialist Clinic to establish the diagnosis. Dr. Dea, in his assessment, has ruled out neurosurgical pathology but this does not rule out a chronic inflammatory back condition such as a sacroiliitis. Similarly, the current normal imaging as reviewed does not rule out the latter diagnosis.

I regret I cannot be more definitive in my assessment.

[43] On the basis of Dr. Sehmer's report, the petitioner's representative wrote on May 2, 2023, to request that WCAT seek the assistance of an IHP. This request was based on the provisions of s. 302(1.1) of the *Act* noted above.

[44] The petitioner's representative submitted that:

- a) the petitioner had made a request;
- b) the petitioner's medical condition was at issue in the appeal;
- c) the panel, on these facts, is required to determine that the independent assistance or advice would assist in reaching a decision on the appeal;

d) hence, the petitioner's representative argued, on the basis of s. 302(1.1), that "the presiding member must retain a health professional".

[45] In response to this request, the panel advised the petitioner by letter dated May 8, 2023, that the panel had decided to reserve its decision on the necessity of an IHP until after the oral hearing. That hearing would include the petitioner's evidence.

[46] There were further exchanges between the petitioner's representative and the panel relating to the possible retainer of an IHP. Ultimately, the panel did not retain an IHP.

[47] On June 8, 2023, the petitioner sent another letter, enclosing a further report of Dr. Sehmer dated June 7, 2023. The report commented on a recent MRI report that had not been available at the time of Dr. Sehmer's original report. In this report, Dr. Sehmer noted:

As per my January 10, 2023 report, given the description of her symptoms, and Dr. Oyedeji's dated December 2021 description of discomfort in the back of right leg and over the coccyx, trauma to the right sacroiliac joint as a result of the December 2020 injury cannot be ruled out.

The WSBC visiting specialist, Dr. Nicholas Dea, in his assessment May 9, 2022, does not document if he examined the sacroiliac joints.

The imaging Ms. Ilinsky has had has all been of the lumbar spine. She has had no imaging of the sacroiliac joints. An MRI or bone scan of the sacroiliac joints would be needed to assess for sacroiliitis but even at times the imaging can be normal. An assessment by a rheumatologist or physical medicine specialist for their opinion regarding the diagnosis, and if they felt further imaging appropriate, would likely be the best way to definitely assess. I do not believe either are available in the Dawson Creek area.

[48] An oral hearing occurred on July 27, 2023, by videoconference. During the hearing, the petitioner testified concerning her injury and the worsening of her back condition during 2021.

[49] Following the hearing, the petitioner's representative sent a written submission dated August 3, 2023. That submission again took the position that all of the conditions in s. 302(1.1) were met. The submission also explored the legislative

history of s. 302 and argued that the intent of the subsection was to increase access to independent medical opinions. Hence, the petitioner argued, the panel should retain an IHP.

The WCAT Decision

[50] In the Decision dated December 19, 2023, the panel addressed the preliminary issue of the petitioner's request for an IHP as follows:

[15] The worker's representative argues that all three requirements have been met under subsection 302(1.1) of the Act.

[16] The worker's representative refers to prior correspondence sent to WCAT on May 2, 18, 2023 and July 25, 2023 where he explained why he believed a report from an IHP would be assistive. In each of the three pieces of correspondence, he noted that an aspect to whether the worker's claim should be reopened for an additional period of wage-loss entitlement is intertwined with understanding of what diagnoses are responsible for her symptoms as of September 2021 and whether such diagnoses are related to the workplace incident. Additionally, the worker's representative submits that given Dr. Sehmer's suggestion that there has been unclear documentation in the medical evidence to determine whether the worker's treating physicians have examined her fully and considered alternate diagnosis, it would be assistive to me in my deliberations.

[17] I agree with the worker's representatives that the first two requirements of subsection 302(1.1) have been met in this case. However, I find that the third criterion has not been satisfied for the reasons I will set out.

[18] As noted by the worker's representative, at the time the Board adjudicated on the issue of a reopening, it considered whether the worker's accepted lumbar strain injury has recurred or significantly changed. The Board had considered the medical investigations that had occurred up until May 19, 2022 and concluded that the worker's symptoms of ongoing back pain was not due to the accepted condition. A subsequent decision by the Board has accepted that the worker's ongoing lumbar pain presentation after March 2021 was attributable to chronic lumbar pain. I note that decision is not before me and I am unable to address the Board's entitlement decisions set out in that June 2, 2023 decision letter.

[19] As it relates to the matter before me, the worker's representative submits that the medical investigations have not been fulsome and that further inquiries in the form of a referral to a rheumatologist should occur, given Dr. Sehmer's recommendation. He submits such evidence would be assistive to me in determining whether the worker sustained greater injuries than appreciated by the Board.

[20] The worker's representative referred to the WCAT noteworthy decision *WCAT-2004-04309* where the panel found WCAT has a number of options when there is a new diagnosis if the range of symptoms addressed

by the diagnosis was “of a similar nature (i.e. involving the same symptoms complex),” to the diagnosis under appeal. The options are:

- referring the matter back to the Board under section 246(3) (now section 297(3)) of the Act for a matter that should have been determined, but was not;
- suspending the matter pending the Board’s decision respecting a matter that is related to the appeal that is pending;
- issuing a narrow decision expressly defining and limiting the scope of what is being addressed;
- following the approach taken in *Appeal Division Decision #96-0046* and in *WCAT-2003-02677-RB* that broadly set out that a panel has jurisdiction to consider different diagnoses when the worker’s symptoms could have been caused by either or both diagnoses (where initial adjudication only dealt with one of two diagnoses);
- exercising discretionary authority under section 246(2) (now section 297(2)(b)) of the Act to request the Board to investigate further and report back; or
- requesting an IHP under section 249 (now section 301).

[21] The reasoning in *WCAT-2004-04309* has been adopted in numerous subsequent decisions. I agree with it and adopt it here concerning the options that are available to me.

[22] I find the suggested diagnosis of a sacroiliac joint injury in the form of possible sacroiliitis, or an inflammatory facet condition, has not been raised in the evidence until the report was provided by Dr. Sehmer. Given the chronology, I do not find it can be said that the Board, at first instance, should have determined whether a sacroiliac joint injury had arisen due to a personal injury as a compensable consequence of the workplace incident when determining the worker’s entitlement to a reopening. Accordingly, I do not find it would be appropriate for me to return this matter to the Board under section 297(3).

[23] While the Board has subsequently adjudicated on the compensability of the worker’s ongoing lumbar pain symptoms as related to chronic pain, that June 2, 2023 decision letter is not before me, nor has the worker sought a review of the decision. I note that the June 2, 2023 decision letter addressed the worker’s entitlement to further wage-loss benefits for this condition. The worker did not file a [sic] of the decision and is now outside the statutory timeframe to do so without seeking an extension of time. As such, I do not find there is a decision pending at the Board or Review Division, such that it is appropriate to suspend the appeal.

[24] I could take broad jurisdiction of differing diagnosis if such existed. At this time, Dr. Sehmer’s opinion is speculative based on his review of the medical evidence. I note that he has not examined the worker which I find significant in weighing his opinion when contemplating the best approach in this appeal. Additionally, while I accept that the sacroiliac joint is close in anatomy to the lumbar spine, I find Dr. Sehmer’s suggestion that there may

be other underlying pathologies attributable to inflammation results in additional causative considerations than what is in issue before me. Given both the parties submissions that there can be multiple causes for inflammatory processes, I do not find it appropriate to take a broad jurisdiction of Dr. Sehmer's suggested pathologies.

[25] I note I could direct the Board to investigate further into the worker's ongoing lumbar symptom presentation, but as set out in the worker's representative's submissions, he believes the most appropriate recourse is to seek the assistance of the IHP. I do not believe such an approach is appropriate in the context of this appeal.

[26] There is also the option to keep my issue narrow and limit the scope of the issue to whether a reopening, due to a recurrence or significant change occurred, specific to the accepted lumbar strain injury.

[27] In order for the IHP to be useful in this appeal, I would have to take a broad approach to the extent of the worker's possible injuries. I find such an approach is not useful in this appeal given my findings about Dr. Sehmer's opinion as I have just stated. As stated, I have found his opinion to be speculative. I also note that if an additional diagnosis is found to be contributing to the worker's low back presentation, it would require additional consideration of whether the new diagnosis arose out of and in the course of the worker's employment. I do not believe, in this matter, it is appropriate to resolve those issues given the evidence before me. Given my findings, I do not find an IHP would be helpful in this appeal.

[28] I find it appropriate to keep my jurisdiction narrow on the issues before me. This option leaves it open to the worker to request adjudication by the Board of further diagnoses if she wishes. Additionally, once a decision is rendered by the Board, she would have the opportunity to seek both a review and an appeal of any unfavourable findings. The ability to seek a review of an unfavourable decision by the Board would be precluded if I sought out an IHP and take broader jurisdiction of additional diagnoses for which I did not find in the worker's favour.

[29] I acknowledge the worker's representative's argument that taking a narrow view of my jurisdiction to whether the accepted condition recurred or significantly worsened would be speculative without undertaking a fuller examination of what possible diagnosis are causing her symptoms. I considered this argument and do not agree with this view. In this matter, the Board has sought an opinion from its medical advisor and referred the worker to a neurosurgeon, as will be discussed below. While recent medical opinion of Dr. Sehmer suggests other conditions may be involved, I find at the time of the Board's adjudication of whether to reopen the worker's claim, such diagnoses were not referred to in the medical evidence. Irrespective of whether the worker may have additional conditions, there is no barriers or preclusion for her to approach the Board for adjudication of them and further considerations of what, if any, medical investigations are required to confirm whether additional diagnosis are contributing to her low back symptoms.

[30] I also acknowledge the worker's representative's thorough summary of the legislative history supporting the necessity of IHP during the appeal process. I note his reference to such contextual information was intended to

assist in interpreting and applying subsection 302(1.1). I do not find it necessary to address such information other than to note the Hansard's transcripts of Minister Bains' speech during the second reading of Bill 41 on November 1, 2022. The quote below articulates that the legislative intent to section 302 was to improve peace of mind and confidence to the parties that consideration of an IHP would be contemplated if requested.

The second amendment that is directly related to confidence, certainly, and even peace of mind is the issue of independent medical opinions. The provisions in Bill 41 will allow worker- or employer-initiated independent medical opinions to be requested as part of an appeal to the external Workers Compensation Appeal Tribunal. Such a request will be permitted after the avenues to address medical disputes at WorkSafeBC and its internal review divisions have been pursued. The provisions will increase both worker and employer confidence in the appeal system when the worker's medical condition is at issue.

The worker or employer will be able to request that the tribunal retain an independent health professional. This health professional will provide additional advice and assistance on the medical issue, which the tribunal will consider when deciding the appeal...

[31] I agree with the worker's representative that the intent of the legislature was to provide a mechanism to ensure all parties are clearly afforded the opportunity to make an IHP request. Item #12.1 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) was revised on April 3, 2023 date to set out the ability of parties to make such a request. WCAT has also updated its website to direct parties to a form specific for requesting the assistance of an IHP⁴. However, the statutory requirement set out in subsection 302(1.1)(c) still requires that the panel be satisfied that an IHP would be assistive in resolving the issues before them.

[32] The worker's representative suggests that a panel's interpretation of subsection 302(1.1) (c), should be applied fairly, largely, and liberally given section 8 of the *Interpretation Act* given Minister Bain's comments. He submits the denying of an IHP request when there is a medical issue in dispute creates obstruction and barriers to justice.

[33] I agree with the worker's representative to the extent that panel's need to interpret the Act that best ensures the attainment of its objective. This is consistent with the court's decisions in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 S.C.R. 27 and the *British Columbia Hydro and Power Authority v. Workers' Compensation Board of British Columbia*, 2014 BCCA 353. Both decisions state that the rules of statutory interpretation require consideration of the provision under consideration according to their grammatical and ordinary sense, in their entire context, and in harmony with the scheme and object of the provision in question as well as the Act more generally. This is commonly referred to as the "modern principle" of statutory interpretation.

[34] However, I find the interpretation suggested by the worker's representative to suggest that as long as the first two requirements of the subsection 302(1.1) are met, then the panel must find an IHP would be assistive to the issue before them. I do not agree with such position. In this

matter, given how I resolved my jurisdiction and the issues before me, I do not find further medical investigations would assist me in resolving the appeal.

[Emphasis added.]

[51] I have underlined the portions of these paragraphs that are important to my decision. The remainder of these paragraphs provide the necessary context.

[52] The WCAT panel concluded:

[38] For these reasons, I decline the worker's request for an IHP. I find such a report would not assist me in resolving the issue as I have defined it.

[53] In the remainder of the Decision (at paras. 69–84), the panel went on to deny the petitioner's substantive appeal, finding that the petitioner was not entitled to a reopening of her claim or a referral to Long Term Disability Services given the finding that her accepted lumbar strain injury had resolved. At para. 73, the panel wrote:

In reviewed [*sic*] the evidence, I place significant weight on the chart notes from Dr. Oyedeji, the consultation report from Dr. Dea, the medical-legal opinion report from Dr. Sehmer, and the clinical opinion from Dr. Workman. I find it persuasive that none have diagnosed the worker's presentation after September 2021 as attributable to the accepted lumbar strain injury.

[54] The petitioner now applies for judicial review of the Decision.

Standard of Review

[55] There is no dispute between the parties on the standard of review. As usual in this type of hearing, each party emphasizes either the more stringent, or the more relaxed, wording from prior cases.

[56] The applicable standard of review for WCAT decisions is set out in s. 58(2) of the *ATA*. The standard is "patently unreasonable".

[57] WCAT relies on the description of that term as explained by Justice Newbury in *Speckling* at para. 38: patently unreasonable means "openly, clearly, evidently unreasonable".

[58] WCAT acknowledges that this high standard must be applied to both the reasons (logic) and the result (order). As outlined by Justice Crerar in *Byelkova v. Fraser Health Authority*, 2021 BCSC 1312, the Supreme Court of Canada's requirement for administrative reasoning that is rational and logical is applicable even when using the patent unreasonableness standard:

[16] Both the reasons and the result must be examined on judicial review: *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at paras 62–74. *Vavilov*, albeit in the context of reasonableness review, demands administrative reasoning that is both rational and logical, and confirms this principle: paras 86–87, 102–104.

...

[22] If, after such a deferential reading of a decision, the court concludes that its reasoning contains a fundamental gap or other defect, which renders the decision (patently) unreasonable, the reviewing court cannot rehabilitate or buttress the decision by substituting its own reasons achieving the same result. This is because both the reasons and result must be considered: *Vavilov* at para 96.

[59] The petitioner submits, and I accept, that I am to review the panel's reasons as a whole to assess whether the "pathway to the conclusion is reasonable": *Kenyon v. British Columbia (Superintendent of Motor Vehicles)*, 2015 BCCA 485 at para. 54.

Positions of the Parties

[60] The petitioner says that the panel erred in the Decision by:

- a) characterizing (or framing) the issue to be considered as being limited to whether the petitioner's lower back strain injury had resolved or stabilized and not considering other issues that were clearly before the panel, such as the diagnosis of her condition and whether it had worsened; and
- b) interpreting s. 302(1.1)(c) of the *Act* as requiring the panel to be satisfied that an IHP would be of assistance in "resolving the issues before them" (at para. 31 of the Decision) rather than being of assistance in resolving a medical condition at issue in the appeal as outlined in subsection (b).

[61] The petitioner says that these errors were patently unreasonable.

[62] In response, WCAT argues that the conclusion reached in the Decision in respect of the decision not to reopen under s. 125 was not patently unreasonable. It was not clearly irrational. WCAT submits that the panel's conclusion on that "framing" question was reasonable in the circumstances of this case.

[63] Put another way, WCAT submits that it was not patently unreasonable for the panel to choose to decide the narrow issue of whether the September 2021 disability was a recurrence or a significant change to the lumbar back strain that had been accepted on the claim.

[64] WCAT further submits that the related decision not to retain an IHP depended entirely on the panel's assessment of the question that was before it.

The Petitioner's Submissions

[65] The petitioner's submissions address the issues in reverse order (*i.e.*, the IHP first and the framing issue second). For the sake of continuity, I have included the parties' submissions in the same order throughout these reasons. Following a recitation of the parties' submissions, I have analyzed the intertwined issues together.

Framing of the Issue

[66] The petitioner submits that the panel erred by limiting the issue to be considered. She submits that, by characterizing the issue as only whether the petitioner's lower back strain injury had resolved or stabilized, the panel avoided addressing other issues, such as the diagnosis of her condition and whether it had worsened.

[67] The petitioner submits that the diagnosis of her lower back condition had been at issue during all stages of the Board's consideration of her claim. This was pointed out by her representative in the correspondence noted above. Further, the diagnosis was clearly in issue in the original questions posed by the case manager to the Board Medical Advisor.

[68] On that basis, the petitioner submits that the diagnosis of her lower back pain was one of the issues before the panel.

[69] The petitioner submits that the panel was required to consider all of the medical issues raised by the underlying Board and Review Division decisions. She relies on s. 3.3.1 of WCAT's Manual of Rules of Practice and Procedure:

3.3.1 Issues in Decision(s) Appealed

Where a decision of the Review Division is appealed to WCAT, WCAT has jurisdiction to address any issue determined in either the Review Division decision or the Board decision(s) which was under review, subject to the statutory limits on WCAT's jurisdiction. Similarly, when considering appeals of Board decisions which are appealable directly to WCAT, WCAT has jurisdiction to address any issue determined in the decision appealed.

WCAT will generally restrict its decision to the issues raised by the appellant in the notice of appeal and the appellant's submissions to WCAT. The appellant is entitled by right to a decision on the issues expressly raised in the appeal.

[Emphasis added.]

[70] On that basis, the petitioner submits that her medical condition and diagnosis were under review in the Board and Review Division decisions. Hence, it was patently unreasonable for the panel not to address that issue.

Appointment of an IHP

[71] The petitioner's second position flows from the panel's decision to narrow the scope of the Decision. She focusses on the wording of s. 302(1.1)(c). She submits that the panel ignored the plain meaning of the wording, "the appeal tribunal determines that the independent assistance or advice would assist in reaching a decision on the appeal". She says that those words must be considered in the context of that section, the statute, and the scheme and objects of the *Act*. She submits that the intention of the legislature indicates that an IHP must be retained where:

- a) a worker requests an IHP and their medical condition is at issue in the appeal; and

- b) the tribunal determines the assistance, or advice would assist in determining the issues concerning their medical condition.

[72] The petitioner situates the provisions of s. 302 within the purposes of the *Act*. The *Act* is designed to provide compensation to injured workers to replace their common law right to bring tort actions against their employers. The panel was required to construe these provisions as remedial and give them such fair, large, and liberal construction and interpretation as best ensures the attainment of their objects. The words of the statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intentions of the legislature: *Bendera v. Workers' Compensation Appeal Tribunal*, 2018 BCSC 552 at paras. 67–68.

[73] The petitioner submits that the plain meaning of the language in s. 302(1.1)(c), in the context of the statute as a whole, indicates that where a worker requests an IHP and their medical condition is at issue in the appeal, and where the tribunal determines the assistance or advice would assist in determining the issues concerning their medical condition, the IHP must be retained.

[74] The petitioner submits that the panel's interpretation of s. 302(1.1)(c) was patently unreasonable. She submits that, if upheld, the panel's interpretation would only require an IHP to be appointed after the panel determines the issue to be decided. She submits that s. 302(1.1)(c) must be read in concert with s. 302(1.1)(b) such that, if the medical condition of the worker is at issue, and if an IHP would assist in clarifying that medical condition, then the IHP must be appointed.

[75] Hence, she submits, it was an error to consider the other issues that the panel considered. The panel was required to interpret the *Act* in a manner that would pursue the object of ensuring that workers (and employers) have the right to an IHP when independent medical advice would assist in reaching a decision concerning the medical condition of the worker. It was patently unreasonable to interpret s. 302(1.1) (as a whole) as creating an independent discretion for the panel to refuse an IHP if it feels the IHP would not assist with the panel's formulation of

the issue on appeal. She submits that the only reasonable interpretation would require the panel to appoint an IHP if the worker's medical condition is at issue.

[76] On those two grounds, the petitioner says that the Decision was patently unreasonable.

WCAT's Submissions

Framing of the Issue

[77] WCAT submits that the panel's decision to narrow the scope of its review was not patently unreasonable. Put another way, it was reasonable for the panel to restrict the issue to the question of whether the September 2021 disability was a recurrence or a significant change to the lumbar back strain that has been accepted by the Board.

[78] WCAT submits that, with respect to its "narrow" scope, the Decision must be read within the confines of the issues that the panel could decide. The panel was bound by s. 125 of the *Act* which does not empower the Board or WCAT to adjudicate new conditions. The sacroiliitis posited by Dr. Sehmer would have been a new diagnosis.

[79] WCAT submits that the decision to narrow the scope of its review was in line with the Board's Practice Directives. Those Practice Directives are not binding on WCAT panels, but they do indicate that the decision to narrow was in line with the Board's approach to these issues. As such, the Decision could not have been patently unreasonable.

[80] WCAT points to the following Practice Directives:

a) Practice Directive C14-3 "Reopenings" provides, in part:

Section 125 of the Workers Compensation Act (the "Act") enables WorkSafeBC to reopen a matter previously decided if there has been a significant change in a worker's medical condition that WorkSafeBC previously decided was compensable, or if there has been a recurrence of a worker's compensable injury. If either of these two grounds is met,

WorkSafeBC may make a new decision that varies the previous decision. Only matters previously decided may be reopened.

...

In determining a possible reopening, WorkSafeBC officers should consider whether there has been a change in the worker's compensable medical condition that has significantly altered the degree of disability.

...

(G) New Medical Evidence Indicates Misdiagnosis.

New medical information may indicate that a worker's medical condition was originally misdiagnosed. The reopening grounds are not met in such a case because there has been no recurrence and/or no significant change in the worker's medical condition; there has only been a change in WorkSafeBC's knowledge regarding the condition.

The WorkSafeBC officer may adjudicate the acceptability of any additional medical conditions evidenced by new medical information and may consider further health care benefit entitlement. These are new matters not previously decided (see RSCM Item C14-101.01, Changing Previous Decisions – General). If a WorkSafeBC officer wants to accept an additional medical condition that had previously been denied, the reconsideration provisions apply.

[Emphasis added.]

b) Practice Directive Item C14-101.01 provides, in part:

This policy clarifies the types of decisions that do not constitute a reconsideration or a reopening of a previous decision.

(a) New matters not previously decided

The need to adjudicate new matters not previously decided and make decisions on these matters may occur at various points during the adjudication of a claim. The limits in the Act on the Board's ability to change previous decisions through a reconsideration or a reopening are not intended to restrict the Board's ability to make new decisions in accordance with the Act and policy that do not question previous decisions.

Situations in which the Board may make a new decision on a matter not previously decided may generally include, but are not limited to the following:...

Acceptability of additional medical conditions identified during the adjudication of a claim or acceptability of further injury or disease that arises as a consequence of a work injury.

[81] Hence, WCAT argues:

- a) The petitioner's appeal to WCAT included Dr. Sehmer's report which raised the possibility that her pain was caused by a condition that had not been diagnosed. Thus, it was a new condition.
- b) On that basis, the facts of the petitioner's appeal to WCAT could not be considered as a reopening. Board policy directs that a decision-maker cannot reopen a previous decision under s. 125 to accept a new condition.
- c) Section 125 does not empower the Board or any other body to adjudicate new conditions. It only permits the reopening of a matter that had been previously decided.
- d) Item C14-101.01 directs that the adjudication of a new condition does not constitute a reconsideration or a reopening of a previous decision.
- e) Hence, if Dr. Sehmer's speculation were correct (*i.e.*, if there was another condition that was responsible for the petitioner's pain), then that condition must be submitted as a new claim to the Board.

[82] Hence, WCAT submits, the panel acted correctly, or at least reasonably, when it narrowed its consideration of the issues before it.

Appointment of an IHP

[83] WCAT couches its submission on the IHP issue within the panel's decision to narrow the issue as discussed above.

[84] WCAT submits that, given the panel's choice to narrow the issue to be considered, it was not patently unreasonable to then conclude that an IHP opinion on possible other causes (*i.e.*, sacroiliitis) would not assist the panel.

[85] By framing the issue narrowly, the panel had limited the scope of the appeal. Having taken that step, the only relevant medical evidence consisted of opinions that touched upon whether the petitioner's physical impairment in September 2021 arose from her lumbar strain.

[86] In answer to the petitioner's interpretation of s. 302(1.1)(c), WCAT submits that section does not require WCAT to retain an IHP if a party requests one and there is a medical condition at issue. There is clearly a third criterium. The panel must conclude that an IHP opinion would assist in reaching a decision on the appeal.

[87] WCAT submits that the petitioner's interpretation of the section would render subsection (c) meaningless. Further, WCAT submits that the panel's interpretation of s. 302(1.1)(c) is not clearly irrational. Hence, it cannot be patently unreasonable.

Analysis

[88] As noted above, the petitioner says that the panel unreasonably narrowed the issues before it. The panel chose to consider only the narrow issue of whether the petitioner's low back sprain/strain injury had resolved or stabilized.

[89] The petitioner submits that s. 125 required the panel to consider whether there had been a "significant change" in her medical condition that was previously accepted. She submits that there was medical uncertainty about the cause of her worsened back condition. Hence, the panel was required to consider what her condition was so that it could consider whether this was related to the original back injury in September 2021.

[90] I do not accept that argument. Again, I see the two issues as being intertwined.

[91] The petitioner requested the retainer of the IHP in order to determine whether there was an (as yet undiagnosed) condition causing the petitioner's low back pain. While it may have been possible for the panel to pursue that avenue, the panel was not required to pursue that avenue. As outlined above, the panel was not entitled to adjudicate an issue that had not been decided in the Review Decision. The Review Division at the time of its decision did not have Dr. Sehmer's report which speculated that the cause may have been sacroiliitis.

[92] In this regard, in my opinion, the panel followed a permissible train of logic:

- a) At para. 18, it noted that the question before the Review Division was whether the lumbar strain had recurred or significantly changed;
- b) At para. 19, it noted that the petitioner's position was that the medical investigation was not fulsome, and thus required further inquiries;
- c) At para. 20, it noted that the petitioner had provided the decision in WCAT-2004-04309 which says that if a panel is considering a new diagnosis of a similar nature, the panel has six separate choices on how to proceed;
- d) At paras. 21–22, it accepted the reasoning in WCAT-2004-04309 and the six avenues that the panel could pursue. However, the panel noted that the Review Division could not have considered the sacroiliac joint condition (because it had not been suggested). Thus, the panel decided not to refer the matter back to the Review Division;
- e) At para. 24, it considered whether to take a broad approach, but decided that that approach was only warranted where there was a differential diagnosis. Dr. Sehmer did not provide a differential diagnosis. He merely speculated at a possible diagnosis. Further, a finding of sacroiliitis would lead to a further question about causation. Hence, it would not answer the ultimate question of whether the condition was compensable;
- f) At para. 25, it considered whether to refer the matter back to the Board, but noted that the petitioner wanted an IHP;
- g) At para. 26, it noted that it had the option of keeping the issue narrow;
- h) At para. 27, based upon the fact that:
 - i. Dr. Sehmer's opinion was speculative, and

ii. the issue of causation would not be concluded,

it decided to keep his inquiry narrow; and

- i) Finally, at para. 28, it noted that by keeping the issue narrow, the petitioner was at liberty to pursue a claim for sacroiliitis at the Board level, if the evidence ultimately supported it.

[93] In my opinion, that logic is well-explained, cogent, and reaches a reasonable result.

[94] Looking at the matter from another angle, the decision in WCAT-2004-04309 set out six options that were available for the panel in addressing the issues.

[95] Given the fact that a prior influential decision provided for those six avenues, it would seem that the Decision, in which the panel follows one of those avenues, would, by definition, fall within the spectrum of reasonable results.

[96] Again, I note that one of the reasons set out by the panel for pursuing the “narrow” avenue, was that the petitioner would then have the ability to undertake further investigations of whether she has sacroiliitis and submit a claim to the Board on that basis; Hence, the panel’s decision specifically kept open one avenue of claim for the petitioner.

[97] I note that the petitioner submits that she may not have the resources to pursue such an investigation. That may be the case. However, it does not make the Decision patently unreasonable.

[98] Having decided to pursue the narrow approach (which I have found to be reasonable), the panel decided that an opinion from an IHP would not assist.

[99] As noted, at para. 73 of the Decision, the panel acknowledged that none of the doctors had diagnosed the petitioner’s presentation after September 2021 as attributable to the accepted lumbar strain injury. Hence, it was logical to conclude

that any opinion from an IHP could only answer questions that were not before the panel (and which had not been before the Board).

[100] Hence, I find that the decision not to retain an IHP was not patently unreasonable.

Conclusion

[101] On the basis of my analysis set out above, I find:

- a) the decision to choose to narrow the issue was not patently unreasonable;
and
- b) the decision to decline to retain an IHP was not patently unreasonable.

[102] It follows that the petition is dismissed.

“A. Ross J.”