

# Jozipovic v. Workers' Compensation Appeal Tribunal

## Decision Summary

Court	B.C. Supreme Court
Citation	2011 BCSC 329
Result	Judicial Review Allowed
Judge	Madam Justice Bruce
Date of Judgment	March 18, 2011
WCAT Decision(s) Reviewed	WCAT-2006-02312 WCAT-2009-02631

### **Keywords:**

*Judicial review – Chronic pain – Loss of range of motion – Loss of function permanent disability awards – Loss of earnings permanent disability awards – Sections 23(1) and 23(3) of the Workers Compensation Act – Item #40.00 Rehabilitation Services and Claims Manual (RSCM II) – Policy challenge – Section 251 of the Workers Compensation Act*

### **Summary:**

In this judicial review the Court considered two decisions of the Workers' Compensation Appeal Tribunal (WCAT) that related to the Petitioner's entitlement to a permanent disability award under section 23(1) and section 23(3) of the *Workers Compensation Act*. In the first decision (WCAT-2006-02312), WCAT denied the Petitioner's appeal from the Review Division of the Workers' Compensation Board (operating as WorkSafeBC). In the second decision (WCAT-2009-02631), WCAT denied the Petitioner's request for reconsideration of the first decision. On judicial review, the Court set aside both decisions as patently unreasonable and ordered WCAT to rehear the Petitioner's appeal. The Court also found that those portions of item #40.00 of the Board's *Rehabilitation Services and Claims Manual*, Volume II (RSCM II) that require an adjudicator to consider whether a worker has the essential skills of "an occupation of a similar type or nature" as a precondition to eligibility for an award under section 23(3) are unreasonable as they cannot be rationally supported by the Act.

In the first decision, WCAT determined that the Board and the Review Division had correctly assessed the Petitioner's permanent disability award arising from a low back injury. The Board had accepted an L5-S1 vertebral disc protrusion and chronic pain as permanent injuries on the claim. WCAT determined that the Petitioner's permanent disability award for his injuries, calculated on a permanent functional impairment basis under section 23(1) of the *Workers Compensation Act*, was correctly limited to a chronic pain award of 2.5% of a totally disabled person. Chronic pain awards are fixed at 2.5% pursuant to item #39.02 of the RSCM II. WCAT determined that the Petitioner was not entitled to any further functional award on the basis of a loss of range of motion in his low back as there was no reliable evidence of any such loss given that his restrictions were attributed to the Petitioner's complaints of pain and fear of re-injury.

WCAT also determined that the Petitioner, who was a steel fabricator at the time of his injury, was not entitled to a loss of earnings permanent disability award under section 23(3) of the Act. WCAT found that although the first criterion of the loss of earnings award test set out in item #40.00 of the RSCM II was satisfied, the second criterion was not satisfied. All three item #40.00 criteria must be satisfied for a worker to be assessed for a loss of earnings award. The first criterion provides that the worker's

occupation at the time of his injury requires specific skills which are essential to the occupation or to an occupation of a similar type or nature. The second criterion provides that as a result of the compensable disability the worker must not be able to perform the essential skills needed to continue in the occupation at the time of the injury or in an occupation of a similar type or nature. WCAT found that the Petitioner did not satisfy the second criterion because he had a number of transferable skills and was physically able to continue in an occupation of a similar type or nature. In support of this conclusion, WCAT relied on that fact that the only relevant limitation the Petitioner had was to avoid heavy lifting and there were a number of similar occupations that did not require heavy lifting.

In the second decision, WCAT denied the Petitioner's application for reconsideration. That application was brought on the basis that the first WCAT decision contained jurisdictional errors and was procedurally unfair. The reconsideration panel found that there was evidence to support the WCAT decision to limit the Petitioner's section 23(1) award to a chronic pain award and there was also evidence to support the decision that the Petitioner was not entitled to a section 23(3) assessment. As there was evidence to support these decisions the decision was not patently unreasonable. The reconsideration panel also found that the decision was not patently unreasonable by virtue of its application of the policy contained at item #40.00.

On review, the Court addressed two primary questions. The first was whether WCAT's decision in respect of the Petitioner's functional permanent disability award was patently unreasonable. The second was whether policy item #40.00 was unreasonable. Given the Court's conclusion in respect of policy item #40.00, as set out below, the Court did not address whether WCAT's decision in respect of the Petitioner's loss of earnings permanent disability award was otherwise patently unreasonable or procedurally unfair.

On the functional permanent disability award issue, the Court found that the first WCAT decision was patently unreasonable. In relation to the questions of fact that the issue raised, the Court found that the WCAT decision was not patently unreasonable. There was at least some evidence before WCAT to support its conclusion that the Petitioner's reduction in range of motion was due to "complaints of pain and fear of re-injury" as opposed to any "mechanical or neurological explanation". However, the WCAT decision was patently unreasonable as it involved a patently unreasonable interpretation of the Act, namely the conclusion that a worker is precluded from a functional permanent disability award on the basis of a loss of range of motion in cases where the loss of range of motion is due to chronic pain. Further, the Court found that it is not sufficient to say that there was no evidence of functional impairment due to the unreliability of the range of motion measurements. If chronic pain can lead to a compensable loss of range of motion, it was circular to say that no range of motion award could be made because the range of motion measurements were unreliable because of chronic pain.

On the policy issue, the Court found one aspect of item #40.00 to be unreasonable as it is not capable of being rationally supported by the Act. It is that aspect which requires an adjudicator to consider occupations of a similar type or nature. The Court noted that there is nothing in the Act that contemplates consideration of other occupations "of the same type or nature" as the occupation performed by the worker prior to his injury. The only reference to other employment is the statutory requirement to consider "suitable occupations". The Court found that to import into sections (3.1) or (3.2) consideration of "other occupations of the same type or nature" goes beyond the language of the provisions and is ostensibly redundant. In this regard, when the Board assesses whether a worker is able to adapt to another suitable occupation, it may consider other occupations that are similar in type or nature to the worker's occupation prior to the injury. The Court determined that there is no rationale for expanding the term "occupation" to include other occupations of a "similar nature or type". The additional criterion is inconsistent with section (3.2) which requires the Board to consider the worker's ability to continue in his occupation at the time of the injury and not in any other similar occupations except in the context of adapting to another suitable occupation. Lastly, the Court found that the additional criterion was not rationally connected to the purposes of section 23(3) because the expansive definition of

“occupation” itself found in policy accomplished the objective of the board of directors in limiting section 23(3) awards to exceptional cases.

The Court found two other aspects of item #40.00 were rationally supported by the Act. First, it found that the board of directors of the Board could establish an “impossibility” standard in regard to the question of whether the worker is able to continue in his own occupation. The Court noted that the Act sets no standard and that the inquiry invites a “yes” or a “no” answer. Secondly, the Court found that there is nothing in the Act that precludes the board of directors from defining what is meant by “occupation”. To define “occupation”, as the board of directors have done in item #40.00, as “a collection of jobs or employments that are characterized by a similarity of skills” is not inconsistent with the Act or its purposes. A definition of occupation that goes beyond the worker’s actual pre-injury job can be rationally supported by the underlying purpose of section 23(3) which is to determine whether there are extraordinary circumstances that would render a functional impairment calculation of the worker’s award inappropriate.