Bodman v. Workers' Compensation Appeal Tribunal

Decision Summary

Court	B.C. Supreme Court
Citation	2016 BCSC 2436
Result	Judicial Review Allowed
Judge	Mr. Justice Abrioux
Date of Judgment	December 30, 2016
WCAT Decision(s) Reviewed	WCAT-2012-01908

Keywords:

Judicial review – Duration of benefits – Age 65 – Section 23(1) of the Workers Compensation Act – Former item #41.00 of the Rehabilitation Services and Claims Manual, *Volume II – Independent verifiable evidence – Intention at time of injury – Procedural fairness – Investigation*

Summary:

The Workers' Compensation Appeal Tribunal (WCAT) determined that the petitioner's benefits would end when he reached the age of 65, pursuant to section 23(1) of the *Workers Compensation Act*, as that is the age at which the panel determined that the petitioner would have retired had the accident not occurred. The panel concluded that there was insufficient evidence to conclude that he would have retired later. The petitioner had provided evidence that he had had conversations with his employer and others prior to the accident in which he expressed an intention to retire later than 65. The panel also determined that item #41.00 of the *Rehabilitation Services and Claims Manual*, Volume II (RSCM II) (the version in effect prior to June 1, 2014) was not patently unreasonable.

On judicial review, the court determined that the panel's interpretation of the policy was not patently unreasonable and so dismissed the relief sought regarding the policy. The court agreed with all of the parties that the policy does not create a presumption that a worker will retire at the age of 65 but rather sets age 65 as the minimum retirement age. The court found that it was not patently unreasonable for the panel to interpret the policy such that in most circumstances the relevant date for considering the worker's intentions regarding retirement was the date of injury.

It was also not patently unreasonable for the panel to interpret the policy as requiring that a worker's subjective statements be verified by an independent source if that evidence is available. As the Act does not prescribe the type of evidence necessary to make a finding of fact, the Legislature left it open to the Workers' Compensation Board to determine what type of evidence is necessary in its fact finding investigation. The court found that the use of the words "would retire" in s. 23.1 as opposed to words such as "might", "may", or "intended" indicate that there must be positive evidence to establish when in fact the worker would actually have retired. The section requires more than the mere possibility, or simply the capacity, to continue working beyond age 65. A subjective intention is not the only consideration.

The court did find however, that the WCAT panel acted unfairly when it did not contact the petitioner's employer for information before issuing the decision.

During the appeal process the petitioner told the panel that he had attempted to obtain a written statement from his employer regarding discussions that they had about the petitioner's plans to retire after the age of 65, and that the employer had changed his mind and was no longer prepared to make a statement. The panel had extended the statutory time limit for making a decision on the basis that the panel needed to write to the employer to obtain further information, but then issued the decision without doing so.

The court found that the panel was unfair because it ought to have exercised its discretionary investigative powers. The court noted that not doing so meant that the petitioner gave second hand evidence as to the prospects of his employment post age 65 with this employer. It was unfair for the panel not to have taken the steps that it identified as being required and to then conclude that the petitioner's evidence was insufficient to permit it to conclude that he would have worked beyond age 65. The petitioner would have a legitimate expectation that the panel would have taken the necessary steps to garner the evidence. The fact that the petitioner was unaware of the panel's thought processes at the point that the time was extended was irrelevant as in the circumstances of this case investigation was required. It is reasonable to conclude that the employer may have been more prepared to provide a statement if that request came from WCAT. The court remitted the decision to WCAT and directed WCAT to make reasonable attempts to determine from the employer whether he has independent verifiable evidence to give as to the petitioner's intentions to work past age 65 as at the date of injury.