

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Currie v. British Columbia (Workers' Compensation Board)*,
2011 BCCA 445

Date: 20111104
Docket: CA039031

Between:

Anna Currie

Respondent
(Petitioner)

And

Workers' Compensation Board

Appellant
(Respondent)

And

Workers' Compensation Appeal Tribunal

Respondent
(Respondent)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Neilson

On appeal from: Supreme Court of British Columbia: April 29, 2011
(*Currie v. British Columbia (Workers' Compensation Board)*, 2011 BCSC 550,
Vancouver Docket No. S097241)

Counsel for the Appellant:

L. Courtenay
S. Neilsen

Representative for the Respondent,
A. Currie:

M. Blaxland

Counsel for the Respondent
WCAT:

K. Koles
T. Martiniuk

Place and Date of Hearing:

Vancouver, British Columbia
September 14, 2011

Place and Date of Judgment:

Vancouver, British Columbia
November 4, 2011

Written Reasons by:

The Honourable Madam Justice Neilson

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Chiasson

Reasons for Judgment of the Honourable Madam Justice Neilson:

[1] The appellant Workers' Compensation Board (the "Board") brings this appeal from the order of a Supreme Court Judge pronounced April 29, 2011, quashing a decision of the Board's Review Division that refused to provide retroactive vocational rehabilitation benefits to the respondent, Anna Currie, and remitting the matter to the Review Division for reconsideration: 2011 BCSC 550.

[2] On October 12, 2001 Ms. Currie suffered an injury to her left arm and shoulder while working as a food service aide at a hospital. That injury prevented her from returning to her employment. She accordingly sought benefits under the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 (the "Act"), which provides compensation to workers on a no-fault basis for injuries suffered in the course of employment. The benefits are paid to a statutory maximum from an accident fund financed by employer contributions.

[3] Part 1 of the *Act* deals with compensation to injured workers, and sets out an array of benefits, some of which are mandatory and some discretionary. Section 5 establishes the statutory obligation to pay compensation. Section 29 governs entitlement to temporary total disability benefits, which are mandatory but cease when a worker's disability becomes permanent. At that point ongoing compensation is provided under s. 23, which governs entitlement to permanent partial disability benefits. Section 16 covers vocational rehabilitation benefits, which are discretionary and awarded when "necessary or expedient", with the aim of getting the injured worker back to work.

[4] Ms. Currie's claim encompassed each of these benefits. Since her injury, adjudicators acting pursuant to the *Act* have made 15 decisions with respect to her entitlement to compensation. The determinations leading to this appeal dealt with denial of retroactive vocational rehabilitation benefits in the form of income continuity and retraining costs between December 8, 2003 and May 9, 2005, pursuant to s. 16 of the *Act*.

Background

[5] Immediately following Ms. Currie's injury, the Board provided her with temporary total disability benefits pursuant to s. 29 of the *Act*, as well as a variety of rehabilitation programs. On May 23, 2002, the Board advised her that these would come to an end on June 6, 2002 as there was no expectation of permanent impairment and no medical evidence that she could not return to her employment.

[6] Ms. Currie found she was unable to return to her former employment, however, and appealed the Board's decision. On March 3, 2003, while her appeal was pending, amendments restructuring the Board's appeal process came into effect: *Workers Compensation Amendment Act (No. 2)*, S.B.C. 2002, c. 56. Although Ms. Currie's injury preceded these amendments, the new appeal structure has governed decisions related to her claim. Under that framework, Board decisions are reviewed by Review Officers from an internal Review Division, and decisions of the Review Division are generally reviewed by the respondent, Workers' Compensation Appeal Tribunal ("WCAT"), an external independent tribunal representing the final level of appeal for most matters under the *Act*. There are, however, exceptions to this structure, one being that s. 239(2)(b) of the *Act* precludes WCAT from reviewing Review Division decisions respecting vocational rehabilitation benefits under s. 16.

[7] Ms. Currie's appeal came before WCAT under the transitional provisions of the amendments. While awaiting that decision she underwent surgery on her left shoulder on July 18, 2003. In September 2004, on her own initiative, she commenced a two-year hospitality program in an attempt to retrain. She had to withdraw from this after seven months, however, when she realized she would be unable to meet the physical demands of that industry due to her shoulder injury.

[8] On May 9, 2005 WCAT allowed Ms. Currie's appeal from the Board's decision. It found her injuries had not resolved by June 6, 2002, and that she had a potential permanent disability. WCAT directed the appropriate Board officers to determine her entitlement to further benefits by way of wage loss, health care, vocational rehabilitation, and permanent disability.

[9] As a result of the WCAT decision, on August 4, 2005 the Board extended Ms. Currie's temporary total disability benefits under s. 29 of the *Act* from June 6, 2002 to December 8, 2003, the date when medical evidence indicated her condition had stabilized after her surgery.

[10] On September 21, 2006 the Board decided Ms. Currie was entitled to a permanent partial disability pension under s. 23(1) of the *Act* from December 8, 2003 for life. This was assessed at 4.4% of total disability.

[11] On May 13, 2005 Ms. Currie was referred to a Vocational Rehabilitation Consultant to "determine [her] entitlement to benefits retroactively and prospectively". She underwent a vocational assessment on June 13, 2006, and on August 22, 2006 the Board decided she was entitled to assistance in the form of wage replacement and retraining costs while she underwent a 26-week course directed at becoming an administrative assistant, followed by 12 weeks of job search assistance. These benefits were initiated as of June 13, 2006 and lasted to March 11, 2007.

[12] Ms. Currie successfully completed that course and obtained a position as an administrative assistant in which she earned more than she had in her former employment as a food service aide. Thus, she has no ongoing claim for loss of income due to her injury.

[13] These decisions of the Board resulted in a period between December 8, 2003 and June 12, 2006 during which Ms. Currie received only the 4.4% permanent partial disability award. She was dissatisfied with this gap in her income continuity, and so sought a review by the Review Division of the Board's decisions regarding her permanent partial disability and vocational rehabilitation benefits. With respect to vocational rehabilitation benefits, she sought reimbursement for lost income during that gap, and the cost of the hospitality course she had taken.

[14] On February 21, 2007 a Review Officer rejected Ms. Currie's appeal of her 4.4% permanent partial disability award. He declined to review the Board's decision

of August 22, 2006 dealing with vocational rehabilitation benefits because the Board had not addressed her claims for retroactive benefits in its decision, and thus there was nothing to be reviewed.

[15] Ms. Currie therefore applied to the Board to obtain a decision on retroactive vocational rehabilitation benefits, but also appealed the Review Division's decision to WCAT. On August 28, 2007 WCAT dismissed her appeal. It affirmed that neither the *Act* nor Board policy permitted payment of a temporary permanent partial disability award to fill the income gap. As to retroactive vocational rehabilitation benefits, WCAT observed that these may be payable in some circumstances, but noted Ms. Currie's request for a decision from the Board on that issue remained outstanding.

[16] On April 8, 2008 the Board awarded Ms. Currie retroactive vocational rehabilitation benefits in the form of wage replacement, but limited these to the period between May 9, 2005, when WCAT allowed her initial appeal, and June 12, 2006, when her vocational rehabilitation benefits had commenced, stating Ms. Currie "should not be faulted for the delay in arranging the [initial vocational assessment]". As to the remaining gap in income continuity the Board stated:

You are not entitled to vocational rehabilitation benefits from December 8, 2003 (the date of plateau) to May 8, 2005. Prior to the May 9, 2005 WCAT decision, no [PPD] had been accepted and you had not been referred to vocational rehabilitation services. Aside from attending a Hospitality Management Program for one school year (Sept 2004 to April 2005) there is no evidence that you were participating in a job search or other VR activities. The Hospitality Program was ultimately determined to be physically unsuitable and would not have been a program which WorkSafe would have sponsored you in.

Vocational Rehabilitation Services sponsored you an [sic] Administrative Assistant at the Academy of Learning. Labour market information shows that such positions are readily available and will be within your physical limitations. You are therefore not entitled to VR benefits for the period of the Hospitality Management Program nor for the tuition/supplies costs associated with this program.

[17] Ms. Currie appealed that decision to the Review Division. On August 12, 2008 the Review Officer dismissed her appeal. The Officer noted the permissive wording

of s. 16 and Board policy item #86.00, which governed eligibility for rehabilitation assistance, and held the nature and extent of Ms. Currie's entitlement to vocational rehabilitation benefits was a discretionary matter for the Board to determine. She stated:

Board policy does not provide specific direction on the issue of retroactive VR benefits. Consequently, when making a determination on this issue, a worker's entitlement must be reviewed in relation to the mandate and objectives of VR services. Specifically, in accordance with section 16 of the *Act*, it must be established that the VR services and benefits being provided are "necessary or expedient" to getting the worker back to work, or in lessening or removing the resulting handicap. Additionally, it must be determined whether the VR services and benefits being provided contribute towards the services objectives under policy item #85.40.

One of the service objectives is to assist workers in their efforts to return to their pre-injury employer or to an occupational category comparable in terms of earnings capacity to the pre-injury occupation. The second objective is to provide the assistance considered reasonably necessary to overcome the immediate and long term vocational impact of the compensable injury. Finally, the last objective is to provide the worker with reassurance, encouragement, and counseling to help the worker maintain a positive outlook and remain motivated toward future economic and social compatibility.

[18] The Review Officer declined to accept Ms. Currie's argument that she should be reimbursed for her unsuccessful attempt at retraining in 2004 at her own expense, stating:

I fully acknowledge the worker's well-intended efforts in her own training and rehabilitation. I also recognize that in accordance with policy item #85.30, the Board should provide the necessary assistance to the worker without delay. VR benefits are intended to be offered prospectively, based on what is necessary and expedient at the time the worker is assessed by the VRC. The fact that VR services were not initially provided to the worker in 2002/2003 does not now entitle the worker to retroactive VR benefits from the date wage loss concluded. It also does not mean that the worker is entitled to more VR assistance than she would have otherwise received had VR services been provided in the first instance.

...

I interpret the Review Division's decision [confirming the Board's decision of August 22, 2006] to mean that the VR services provided to the worker achieved the Board's mandate and service objectives under section 16 of the *Act* and policy item #85.40. While the assistance provided may have been delayed, the worker received the services and benefits considered reasonably necessary to overcome the immediate and long term vocational

impact of her compensable injury. In addition, she also received retroactive VR benefits from May 9, 2005, in recognition of the delay in implementing the VR entitlement that flowed from the WCAT decision.

Whether a worker's VR entitlement is contemplated and provided prospectively or retrospectively, the VR mandate and service objectives remain the same. I therefore conclude that the Board's decision of April 8, 2008 was determined in accordance with the accepted facts, evidence, applicable law, and Board policy. As a result I deny the worker's request.

[19] Ms. Currie appealed that decision, and others related to her permanent partial disability award of 4.4%, to WCAT. On September 30, 2008 WCAT's Registrar determined it had no jurisdiction to hear the appeal with respect to vocational rehabilitation benefits as s. 239(2)(b) of the *Act* provides that a Review Officer's decision respecting matters referred to in s. 16 may not be appealed to WCAT. On September 14, 2009 WCAT affirmed that provisional decision and also dismissed Ms. Currie's appeal of her permanent partial disability award.

[20] As a result, a gap remained in Ms. Currie's income continuity from December 8, 2003 to May 9, 2005. She therefore brought a petition seeking judicial review of WCAT's decision of September 14, 2009.

The Reasons for Judgment

[21] The chambers judge accepted the arguments of the Board and WCAT that Ms. Currie was no longer eligible for temporary total disability benefits under s. 29 of the *Act*, and that there was no jurisdiction under s. 23 to make a temporary permanent partial disability award to fill the gap in her income. He therefore determined that if Ms. Currie were entitled to income continuity at all this would derive from s. 16 of the *Act*. Since WCAT had no jurisdiction to review s. 16 benefits, he decided his review was limited to the August 12, 2008 decision of the Review Division. He invited Ms. Currie's counsel to amend the petition accordingly during the hearing. When this appeal was heard, that had not yet been done.

[22] The chambers judge accepted the appropriate standard for review of the internal Review Division decision was reasonableness, referring to *Dunsmuir v. New*

Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190 and *Petro Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 98 B.C.L.R. (4th) 1. In applying that standard, he acknowledged he must examine whether the Review Officer's reasons as a whole justified a result that fell within a range of reasonable outcomes, and whether they were intelligible and transparent.

[23] The chambers judge began his analysis by setting out portions of an earlier WCAT decision, WCAT-2003-01744-RB, that he said had determined that vocational rehabilitation benefits were payable retroactively. He stated:

[42] Vocational rehabilitation benefits became payable on a retroactive basis following an appellate decision in WCAT-2003-01744-RB. The panel in WCAT-2003-01744-RB said:

It would not be fair in every case to hold an unsupported worker to the more demanding standard of proof of active rehabilitation effort required by the Board of a worker who is in receipt of ongoing rehabilitation assistance. Ongoing financial and other assistance provided through the Board's rehabilitation services department enables a worker to mount a far more comprehensive job search, and gives access to significant resources that are not reasonably available to an unsupported worker.

...

I hold that a worker should be eligible for retroactive payment of rehabilitation assistance where there is evidence of meaningful and purposive rehabilitation efforts on the part of that worker during the period in question. The sufficiency of the worker's efforts must be assessed in the context of each case. Factors to be considered include the extent of effort exerted by the worker in the context of available resources, the nature of the effort expended, the duration of the effort, and whether the effort was undertaken in good faith.

[Emphasis in original.]

[24] The chambers judge was critical of the Board and the Review Division for failing to consider this decision. He observed that Ms. Currie had provided evidence of her rehabilitation efforts, and held the Board and the Review Division discounted these endeavours without a reasoned analysis.

[25] The chambers judge noted the Board rejected Ms. Currie's request for retroactive vocational rehabilitation benefits because it would not have approved the

hospitality management program she undertook in 2004. He found that, in doing so, the Board failed to follow the earlier WCAT decision, and wrongly employed the same standard in evaluating Ms. Currie's own rehabilitation efforts as that used to evaluate a worker who had the Board's full support.

[26] As to the Review Division decision, the chambers judge found the Review Officer gave no reasoned analysis as to why the retroactive vocational rehabilitation benefits that she awarded should be cut off at May 9, 2005. He observed that her rationale for making the retroactive award was that Ms. Currie was not responsible for the delay between WCAT's decision of that date and the commencement of her vocational rehabilitation benefits on June 13, 2006. On this basis, he noted that it was difficult to see how Ms. Currie could be any more at fault for the remaining gap in income benefits.

[27] The chambers judge then set out in more detail the two problems he identified in the Review Officer's decision to deny Ms. Currie retroactive income benefits between December 8, 2003 and May 8, 2005:

[48] ... The first problem is that no reasoned justification for choosing May 8, 2005 has ever been provided. The significance of May 8, 2005 is that it was on May 9, 2005 that WCAT overturned the Board decision terminating the applicant's benefits. This fact does not appear to provide a reasonable basis for distinguishing between a period of eligibility and ineligibility for benefits. No justification has been put forward in any of the decisions affecting this applicant for choosing that date.

[49] The second issue that arises from the Board's vocational rehabilitation decision and the subsequent review of that decision is that the Board treats the petitioner, who through no fault of her own was not able to access the Board's vocational rehabilitation services until 2006, in the same manner as they would treat a worker whose disability had been recognized immediately by the Board.

[50] The Board's own jurisprudence indicates that it is inappropriate to treat a worker who attempts rehabilitation without the assistance of the Board in the same manner as one who does not have that assistance.

[51] Considerable emphasis in the April 8, 2008 decision was put on the VRC's finding that "[t]he Hospitality Program was ultimately determined to be physically unsuitable and would not have been a program which WorkSafe would have sponsored [the petitioner] in." However there is no discussion in the April 8, 2008 decision, the August 12, 2008 Review Division decision, nor in the appeal to WCAT or the review of that decision, about the distinction

between a worker who has the assistance of the vocational rehabilitation department while they are trying to retrain or find alternative employment, and a worker, who through an uncorrected error of the Board, is left to their own resources and devices in the rehabilitation process. In short, the fact that WorkSafe would not have sponsored the petitioner in the Hospitality Program is of considerably less importance when WorkSafe, at the time in question, would not sponsor her in any rehabilitative program.

[28] The chambers judge found these decisions suggested workers were only entitled to the s. 16 benefits necessary to allow them to get back to work, and a failure to receive them in a timely way was not the Board's problem, no matter what self-initiated steps an employee took towards rehabilitation. He concluded:

[53] To the extent that the Board failed to make any distinction between a worker in the place of the petitioner and a worker who is able to avail themselves of the vocational rehabilitation services of the Board, I find that they acted unreasonably. In doing so I would suggest that it would have been appropriate for the Board to engage in the analysis set out in WCAT-2003-01744-RB. In particular I think the Board should consider the factors set out in that decision when analysing the sufficiency of the worker's rehabilitative efforts: extent of effort exerted by the worker in the context of available resources; the nature of the effort expended; the duration of the effort; and whether the effort was undertaken in good faith.

[54] The result of the 15 decisions of the Board dealing with the injuries sustained by the petitioner nearly 11 years ago, is that she has not been compensated fully for the period in which she was without income as a result of her injuries, despite the fact that she was making good faith, self-help efforts to rehabilitate and retrain to get back into the work force. I find that this result is not reasonable.

[29] The chambers judge quashed the August 12, 2008 Review Division decision and ordered that the matter of Ms. Currie's retroactive vocational rehabilitation benefits be remitted with a direction that the Review Division "give explicit consideration to the reasoning in WCAT-2003-01744-RB". He dismissed that part of Ms. Currie's petition seeking review of WCAT's decision of September 14, 2009.

Issues on Appeal

[30] The appellant argues the chambers judge erred in finding the August 12, 2008 decision of the Review Division was unreasonable, in particular:

1. that he erred in finding the Review Division gave no reasoned justification for choosing not to provide retroactive vocational rehabilitation benefits prior to May 9, 2005; and
2. that he erred in directing the Review Division to explicitly consider the decision in WCAT-2003-01744-RB.

Analysis

[31] The Board argues that while the chambers judge said he conducted his review using a standard of reasonableness, he in fact applied the more onerous standard of correctness, and wrongly substituted his own views for those of the Review Officer. The Board maintains that, in doing so, the chambers judge erred by failing to recognize the discretionary nature of vocational rehabilitation benefits, and proceeding on the basis that Ms. Currie had a presumptive entitlement to such benefits. As well, the Board says that by explicitly directing the Review Division to consider WCAT-2003-01744-RB in its reconsideration, the chambers judge ignored s. 99 of the *Act*, and wrongly elevated that decision to the status of Board policy or precedent, improperly fettering the Review Division's broad discretion under s. 16 to decide the appropriate nature and extent of Ms. Currie's vocational rehabilitation benefits. The Board argues that if the Review Officer's decision is reviewed on the appropriate standard, with the high degree of deference attendant on discretionary decisions, and in the context of its legislative framework and mandate, it provides a reasoned justification for choosing May 8, 2005 as the cut-off date for Ms. Currie's retroactive vocational rehabilitation benefits and should be restored.

[32] Ms. Currie replies that under s. 5 of the *Act* the Board is statutorily obliged to compensate workers for 100% of lost wages due to a work-related injury, up to the statutory maximum. She says the chambers judge properly recognized it was unfair to leave a gap in her income continuity just because the Board's first decision terminating her claim was wrong and there was a delay of almost three years before WCAT corrected it. She maintains the chambers judge properly found she should not be penalized for that delay, and made no error in remitting the issue so the

Review Division could remedy this by applying the decision in WCAT-2003-01744-RB to her circumstances.

[33] For the following reasons I am persuaded the chambers judge's review of the Review Division's decision was misguided in two respects. First, his analysis failed to recognize the statutory scheme that governed the decision. Second, he misapprehended the precedential import of WCAT-2003-01744-RB. Consequently, his decision rested on an erroneous premise of entitlement to retroactive vocational rehabilitation benefits that is not supported by the *Act*, or the Board's mandate and policies. I am satisfied these errors played a fundamental role in his conclusion that the Review Division's decision should be quashed as unreasonable.

[34] Unlike damages awarded in tortious claims, the benefits provided by no-fault Workers Compensation schemes may fall short of fully compensating a worker for losses arising from work-related injuries. Although s. 5 of the *Act* creates a statutory obligation to provide compensation to injured workers, not all forms of compensation are mandatory. Notably, s. 16, which governed Ms. Currie's claim for vocational rehabilitation assistance states:

16 (1) To aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap, the Board may take the measures and make the expenditures from the accident fund that it considers necessary or expedient, regardless of the date on which the worker first became entitled to compensation.

Thus the Board has a broad discretion to take measures and make expenditures that it considers "necessary and expedient" to get injured workers back to work.

[35] Chapter 11 of the Board's *Rehabilitation and Services Claims Manual* (the "*RSCM*") sets out the policies that govern provision of vocational rehabilitation benefits. These deal with the principles of vocational rehabilitation, service objectives, eligibility, details of the rehabilitation process, and services and programs. A review of these policies affirms their discretionary, variable and prospective nature. There is no policy dealing with retroactive vocational

rehabilitation benefits. Policy item #85.40 sets out the vocational rehabilitation service objectives:

The objectives of Vocational Rehabilitation Services are:

1. To assist workers in their efforts to return to their pre-injury employment or to an occupational category comparable in terms of earning capacity to the pre-injury occupation.
2. To provide the assistance considered reasonably necessary to overcome the immediate and long-term vocational impact of the compensable injury, occupational disease or fatality.
3. To provide reassurance, encouragement and counselling to help the worker maintain a positive outlook and remain motivated toward future economic and social capability.

[36] The reasons of the chambers judge do not mention s. 16 or the policies in Chapter 11 of the *RSCM*. I am persuaded that these omissions led him to misapprehend the scope of his review. Review on a standard of reasonableness envisages a range of possible reasonable alternatives. When the decision under review is discretionary, the range of those alternatives broadens. Deference to the administrative decision-maker is required, unless that person or tribunal considered irrelevant matters, failed to consider relevant factors, or reached an irrational and unacceptable conclusion.

[37] Instead of examining the Review Division's decision in its statutory context, the chambers judge appears to have given decisive weight to the decision of WCAT-2003-01744-RB. That decision involved a worker who was initially denied vocational rehabilitation benefits because the Board believed non-compensable factors were paramount in his continuing disability. About a year and a half later, a further medical assessment led to reversal of that decision and the worker received vocational rehabilitation assistance in the form of retraining and job search assistance. He sought a retroactive vocational rehabilitation allowance as well, on the basis that the Vocational Rehabilitation Counsellor had not acted reasonably in failing to provide vocational rehabilitation assistance earlier. Prior to the portions of the decision cited by the chambers judge (set out at paragraph 23 of this judgment) the WCAT adjudicator observed that most rehabilitation measures can only be offered

prospectively, and noted the absence of a specific policy concerning payment of retroactive rehabilitation allowances. He then stated:

... Prior Review Board and the Appeal Division panels have both found that retroactive vocational rehabilitation benefits can be paid under certain circumstances, consistent with the very broad discretion provided under section 16(1) of the Act. In order to consider payment of retroactive vocational rehabilitation benefits, it has generally been held that a worker must demonstrate active involvement in vocational rehabilitation efforts during the period in question, consistent with the principles of vocational rehabilitation as set out in item #85.30 of the RSCM. The second and fifth principles have particular relevance to the issue of retroactive vocational rehabilitation benefits:

- Successful vocational rehabilitation requires that workers be motivated to take an active interest and initiative in their own rehabilitation. Vocational programs and services should, therefore, be offered and sustained in direct response to the commitment and determination of workers to re-establish themselves.
- Effective vocational rehabilitation recognizes workers' personal preferences and their accountability for independent vocational choices and outcomes.

I agree with the approach adopted by the prior Review Board and Appeal Division panels, and find that it should be applied to the circumstances of this case. [Emphasis added.]

[38] After setting out those parts of the decision quoted by the chambers judge, the adjudicator declined to award retroactive payments to the worker because he had failed to make reasonable efforts to pursue a credible job search or undertake some form of retraining during the gap in benefits.

[39] Here, the chambers judge began his analysis by stating that this case decided that vocational rehabilitation benefits are payable on a retroactive basis. Later, he referred to it as part of "the Board's own jurisprudence". He criticized the Board and the Review Division for failing to consider it in dealing with Ms. Currie's claim.

[40] It is apparent from those comments that the chambers judge failed to recognize WCAT decisions do not have precedential force for the Review Division in the area of vocational rehabilitation benefits. The only reason WCAT dealt with

vocational rehabilitation benefits in WCAT-2003-01744-RB was because the issue arose under the transitional provisions of the 2002 amendments. Thereafter, s. 239(2)(b) of the amendments precluded appeals of s. 16 benefits to WCAT. Thus, WCAT decisions dealing with vocational rehabilitation benefits are few in number, and the Review Division is the final arbiter of such benefits under the *Act*. Moreover, s. 99 of the *Act* provides that “the Board is not bound by legal precedent”, further limiting the import of this WCAT decision for the Board. Thus, while the Review Division may consider and adopt the reasoning of WCAT decisions on vocational rehabilitation benefits if it finds them useful, it is not required to do so. In short, it is incorrect to describe these decisions as “the Board’s own jurisprudence”.

[41] It was therefore inappropriate for the chambers judge to treat the decision in WCAT-2003-01744-RB as having precedential value, and to conclude the Review Division’s decision was unreasonable in part because it failed to follow the WCAT holding. As well, the chambers judge’s direction to the Review Division to consider this decision in the context of Ms. Currie’s claim was misguided. I agree with the Board that this direction inappropriately fettered the Review Division’s broad discretion under s. 16, and wrongly elevated the WCAT decision to the status of Board policy.

[42] I conclude that, while the chambers judge acknowledged the parameters of “reasonableness” established in *Dunsmuir*, his failure to consider the discretionary nature of vocational rehabilitation benefits, as well as the unwarranted import he gave to WCAT-2003-01744-RB, led him to wrongly restrict the range of acceptable and rational conclusions available to the Review Division in considering Ms. Currie’s claim for retroactive vocational rehabilitation benefits.

[43] The chambers judge found the decision of the Review Division unreasonable in two respects. First, he said the Review Division gave “no reasoned justification” for terminating Ms. Currie’s vocational rehabilitation benefits on May 9, 2005. Second, he found that, in assessing the rehabilitation initiatives Ms. Currie had undertaken on her own, the Review Division unreasonably treated her in the same

way as a worker who had vocational rehabilitation support from the Board, and provided no reasoned analysis for finding her efforts did not justify retroactive vocational rehabilitation benefits.

[44] The second point is based on the chambers judge's view that the Review Division should have followed the decision in WCAT-2003-01744-RB, a matter I have dealt with above. Even viewed in the context of the principles established in that case, however, I am unable to accept that the chambers judge was correct in finding the decision of the Review Decision unreasonable.

[45] The Review Officer found that in the absence of direction as to retroactive vocational rehabilitation benefits in the *Act* or Board policies, Ms. Currie's entitlement to such benefits was a discretionary matter for the Board to determine. She then proceeded to examine whether the Board's discretion had been exercised in accordance with the mandate and objectives of vocational rehabilitation services. I am satisfied this was an entirely reasonable approach.

[46] The Review Officer noted Ms. Currie had received vocational rehabilitation benefits that allowed her to re-enter the workforce in a position that overcame the immediate and long-term vocational impact of her injury, thereby accomplishing the main objective of such benefits. She recognized the delay in providing these benefits, and the resulting gap this created in Ms. Currie's income continuity. She noted, however, that vocational rehabilitation benefits are intended to be prospective. She also observed that, while the delay did not entitle Ms. Currie to retroactive wage loss, the Board nevertheless exercised its discretion in a manner that provided Ms. Currie with some retroactive vocational rehabilitation benefits in recognition of the delay.

[47] Further, the Review Officer accepted the Board's view that Ms. Currie's own efforts at rehabilitation during the gap in income continuity did not merit retroactive vocational rehabilitation benefits. I do not agree this aspect of the decision subjected Ms. Currie to a more demanding standard than workers in receipt of vocational rehabilitation assistance. The Board simply conducted an assessment of her

individual circumstances, particularly the nature and extent of her efforts at vocational rehabilitation between 2003 and 2005. It found that, while undertaken in good faith, these failed to establish “meaningful and purposeful rehabilitation efforts” that would justify retroactive vocational rehabilitation benefits. This was precisely the process employed in WCAT-2003-01744-RB, with the same result.

[48] In my view, that result was not unreasonable. Ms. Currie apparently chose a retraining program that, after seven months, she found to be physically beyond her. Moreover, she provided no evidence of activities directed to vocational rehabilitation during the remaining ten months of the gap. Nothing in the *Act* or the Board’s mandate required it to provide retroactive benefits to Ms. Currie for a period during which she failed to take steps to advance her vocational rehabilitation. The selection of May 9, 2005 as the starting point for retroactive vocational rehabilitation benefits coincided with the WCAT decision of that date, and represented the earliest possible date that Ms. Currie could have undergone an initial vocational rehabilitation consultation that, in turn, would have led to the initiation of vocational rehabilitation benefits.

[49] In short, I am satisfied the chambers judge erred in finding there was no “reasonable justification” for denying retroactive vocational rehabilitation benefits to Ms. Currie between December 8, 2003 and May 8, 2005. The decision of the Review Officer was supported by the evidence; her decision-making process was justified, transparent, and intelligible; and the result fell within the range of acceptable and rational conclusions.

[50] I would accordingly allow the appeal and restore the August 12, 2008 decision of the Review Division.

[51] As mentioned in paragraph 21, the amended petition referred to in the judge's reasons, which formed the basis of the order appealed, has not been filed. On October 4, 2011 Ms. Currie submitted a properly amended petition, which was not accepted for filing in the Supreme Court of British Columbia. It is important to this Court that the foundational document for the order appealed, and for this appeal, be lodged in the correct place, and accordingly I would direct it to be filed in the Supreme Court of British Columbia to regularize the proceeding below.

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Chiasson"