

Colwill v. Workers' Compensation Board

Decision Summary

Court	B.C. Supreme Court
Citation	2019 BCSC 826
Result	Petition Allowed
Judge	Madam Justice Warren
Date of Judgment	May 27, 2019
WCAT Decision(s) Reviewed	A1607114

Keywords:

Judicial review – Judicial review of Workers' Compensation Board policy – Workers Compensation Act, sections 22 and 23 – Permanent total disability – Rehabilitation Services and Claims Manual, Volume II, policy item #37.21 – Minimum compensation for permanent total disability not payable to injured worker found to be less than 100% disabled under loss of function method – Policy unlawful

Judicial review – Judicial review of Workers' Compensation Board policy – Workers Compensation Act, section 251 – Lawfulness of Board policy – Board policy directly reviewable by court after Workers' Compensation Appeal Tribunal decision finding policy lawful

Summary:

The court held that policy item #37.21 of the *Rehabilitation Services and Claims Manual, Volume II* is inconsistent with any reasonable interpretation of the *Workers Compensation Act* and declared the policy (and a corresponding part of policy #39.30) is of no force and effect. In the course of reaching its decision, the court confirmed that a policy of the Workers' Compensation Board can be directly reviewed by the court after the Workers' Compensation Appeal Tribunal (WCAT) has made a decision under section 251 of the *Act* that policy is lawful.

Section 22 of the *Workers Compensation Act* establishes the basis upon which compensation is payable to an injured worker who is permanently totally disabled. Subsection 22(2) provides for a minimum amount of compensation awarded under section 22. Policy item #37.21 said that that minimum only applies in cases where a worker is found to be 100% disabled under the section 23(1) method of permanent disability assessment (*i.e.*, the functional impairment method).

The worker was determined to be 73% disabled under the functional impairment method but was also found by the Board to be unemployable under the section 23(3) method of assessment (*i.e.*, the loss of earnings method). He claims that he is entitled to the minimum compensation payable under section 22(2) because the impairment of his earnings is the same whether he is found 100% disabled under the functional impairment method or unemployable under the loss of earnings method of assessment. The Board and its Review Division found that they were bound by policy item #37.21 and denied the worker's request. On appeal to WCAT, the worker invoked section 251 of the *Workers Compensation Act* and asked the tribunal to find that the policy was so patently unreasonable that it is not capable of being supported by the *Act* and its regulations.

The section 251 process for challenging the lawfulness of Board policy before WCAT first requires the WCAT panel to which the appeal is assigned to determine if the policy is so patently unreasonable that it is not capable of being supported by the *Act* and its regulations. If the panel so finds, the question is referred to the Chair of WCAT, who can either agree or disagree with the panel. If he agrees, the matter is then referred to the board of directors of the Workers' Compensation Board, which renders a final decision. In this case, however, the panel found that the policy was viable under the *Act* because it tracked the distinction drawn in the legislation between total and partial disability.

The Board and WCAT were both respondents to the petition for judicial review. Both respondents argued that because the section 251 process did not go past the first stage of a consideration by the WCAT panel, the court could not directly review the policy but, instead, could only consider whether the WCAT decision was patently unreasonable. The court disagreed, finding that earlier Court of Appeal jurisprudence (*Jozipovic v. British Columbia (Workers' Compensation Board)*, 2012 BCCA 174) had already made clear that policy could be directly reviewed by the court after WCAT had found the policy to be lawful and regardless of whether the Board's board of directors had rendered a decision on the question.

In finding that the policy was inconsistent with the *Workers Compensation Act* and therefore unreasonable, the court read the *Act* as clearly leaving open the possibility that a worker can be permanently totally disabled even where the worker is not found to be 100% disabled under the functional impairment method. The court noted that sections 22 and 23 create a legislative intent to differentiate between total and partial disability and the estimate of impairment of earning capacity using the functional impairment method is based on the average worker. It follows that a worker may be rated less than 100% disabled under that method, yet be totally disabled in light of that worker's particular circumstances. The court said that the Legislature did not intend the loss of function method to also be determinative in resolving the question of whether a worker's disability is partial or total. The Board must first determine which section applies: section 22 or section 23.