

## Bandic v. Workers' Compensation Appeal Tribunal

### Decision Summary

Court	B.C. Supreme Court
Citation	2013 BCSC 2063
Result	Judicial Review Allowed
Judge	Mr. Justice Wong
Date of Judgment	November 14, 2013
WCAT Decision(s) Reviewed	WCAT-2012-01074

#### **Keywords:**

*Judicial review – Section 23(3) of the former Workers Compensation Act – Loss of earnings permanent partial disability award – Recurrence of disability more than three years after original injury – Section 32 of the Act – Item #70.20 of the Rehabilitation Services and Claims Manual, Volume I – Canada Pension Plan disability benefits*

#### **Summary:**

The issue before the Workers' Compensation Appeal Tribunal (WCAT) was whether the Workers' Compensation Board correctly denied the worker (petitioner) a loss of earnings award under the former provisions of the Act (as it read prior to June 30, 2002) following the reopening of the worker's claim in 1999, 18 years after the original injury. His claim was reopened after his back complaints in 1999 were accepted as a compensable consequence of his previously accepted foot and ankle injury.

The worker was unemployed prior to the reopening and had not made any efforts to work since 1987. Section 32 of the *Workers Compensation Act* and item #70.20 of the *Rehabilitation Services and Claims Manual* (RSCM I) provide that when calculating compensation for a permanent disability or an increased degree of permanent disability that occurs more than three years after the original injury, an adjudicator may use either the worker's earnings at the time of the original injury (the original wage rate) or the worker's earnings at the time of the reopening (the reopening wage rate).

The policy further provides that where the worker is unemployed at the time of the reopening an adjudicator must determine the reasons for the unemployment. If the unemployment is due to the effects of the compensable injury it is appropriate to use the original wage rate. If it is not due to the effects of the compensable injury an adjudicator must consider whether the worker was a viable entity in the workforce such that the disability could create a potential loss of earnings. The policy states that care must be taken to ensure that a decision is consistent with prior decisions on the claim. If the worker will not suffer a potential loss of earnings and the reasons for the unemployment are unrelated to the injury, the worker's reopening wage rate will be used and as it will be zero no loss of earnings award is possible.

WCAT found that in light of section 32 and item #70.20 and the worker's unemployment, the key question on the worker's appeal was whether the worker's disability following the reopening would produce a potential loss of income by removing the worker as a viable entity from the labour force. In answering that question WCAT determined that it was bound by a number of previous decisions (a decision of the former Review Board, two decisions of the former Medical Review Panel (MRP), and a WCAT decision) that effectively precluded a loss of earnings award in the worker's circumstances. WCAT found that these decisions had concluded, collectively, that the worker's back disability only became compensable in 1999 (his back complaints prior to that time not being work related) and that his compensable disabilities prior to 1999 did not preclude him from working. For these reasons, and because the worker had removed himself from the workforce (as evidenced in part by the fact that he applied for and continued to receive Canada Pension Plan disability benefits), WCAT found that the worker did not have a potential loss of earnings and was not entitled to a loss of earnings award.

The court on judicial review found WCAT's decision to be patently unreasonable, set it aside, and required WCAT to reconsider the worker's entitlement to a loss of earnings award. The court agreed with the petitioner's submissions and found that the decision was patently unreasonable for mechanically applying policy item #70.20 and in so doing failing to properly consider other evidence regarding the reason for the worker's unemployment, namely the worker's inability to work, and the worker's explanation for applying for Canada Pension Plan benefits.