

## ***Colwill v. Workers' Compensation Board***

### Decision Summary

Court	B.C. Court of Appeal
Citation	2019 BCCA 453
Result	Appeal Allowed
Judges	<b>Mr. Justice Groberman</b> Madam Justice Garson Madam Justice Fenlon
Date of Judgment	December 11, 2019
WCAT Decision(s) Reviewed	A1607114

#### **Keywords:**

*Appeal – 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 reasonable*

*Appeal – 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 of Appeal allowed this appeal brought by the Workers' Compensation Board (Board) from an order declaring policy item #37.21 of the *Rehabilitation Services and Claims Manual, Volume II* to be of no force or effect. The court found that the policy constitutes a reasonable way to distinguish between a total disability and a partial disability. The Court of Appeal confirmed that a policy of the Board can be directly reviewed by the B.C. Supreme Court after the Workers' Compensation Appeal Tribunal (WCAT) has made a decision under section 251 of the *Act* that the 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 provides 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 claimed entitlement 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 Board, which renders a final decision. In this case, however, the panel found that the policy was viable under the *Act* and did not refer the matter to the Chair.

Following its own jurisprudence in *Jozipovic v. British Columbia (Workers' Compensation Board)*, 2012 BCCA 174, the Court of Appeal confirmed that a policy of the Board's Board of Directors can be directly reviewed under the *Judicial Review Procedure Act*. Furthermore, there is no reason for a reviewing court not to exercise its discretion to directly review a policy if the person challenging the lawfulness of the policy has exhausted the internal remedy provided by section 251 of the *Workers Compensation Act*, regardless of whether the procedure results in a decision of the Board of Directors. On such direct judicial review, the policy is reviewed on the standard of *reasonableness*.

In this case, the Court of Appeal said that policy item #37.21 of the *Rehabilitation Services and Claims Manual, Volume II* (and a corresponding part of policy #39.30), when read in context, gives meaning to the term "total disability", which is not defined in the *Workers Compensation Act*. As the permanent functional impairment method of assessing disability is based on the nature and extent of an injury, it constitutes an objective basis for determining the degree of disability experienced by a worker. The decision of the Board of Directors to define "total disability" according to the objective rating schedule is not unreasonable.