

DANIEL V. (BRITISH COLUMBIA) WORKERS' COMPENSATION APPEAL TRIBUNAL

Decision Summary

Court	B.C. Supreme Court
Citation	2007 BCSC 1005
Result	Judicial Review Allowed
Judge	Madam Justice Bennett
Date of Judgment	July 6, 2007
WCAT Decision(s) Reviewed	WCAT-2004-05439-RB, WCAT-2006-02602

Keywords:

Calculation of average earnings – Employability – Vocational rehabilitation – New evidence on reconsideration – Standard of review – Patent unreasonableness

In this judicial review the Court considered a Workers' Compensation Appeal Tribunal (WCAT) decision which dealt with the issues of average earnings calculation and the employability of a worker, as well as the effect of new evidence on a reconsideration application.

The Petitioner suffered an injury to her right shoulder while employed at a grocery store and her condition was accepted as compensable by the Workers' Compensation Board, operating as WorkSafeBC (Board). After the Petitioner's condition had plateaued a Board employability assessment determined that the Petitioner would be capable of sedentary work after receiving Board sponsored vocational rehabilitation. The Petitioner did not participate in the vocational rehabilitation that the Board offered to her, with the result that the Board reduced her income continuity benefits to account for the amount it determined she could have earned in a sedentary position. The Board calculated the Petitioner's average earnings based on her taxation year prior to injury as opposed to the three-month period. WCAT confirmed both Board decisions (original decision). A WCAT reconsideration panel considered new evidence provided by the Petitioner following a subsequent surgery and upheld the original decision.

The Court granted the Petitioner's application to set aside both the original decision and reconsideration decision and remitted the matters back to WCAT for rehearing. The Court found that the standard of review was patent unreasonableness. The original decision was patently unreasonable as there was no evidence that the Petitioner had voluntarily withdrawn from the workforce, and the panel failed to follow Board policy and the statute by determining average earnings based on her 1999 taxation year rather than on her wages earned in the three months or the twelve months pre-injury. The reconsideration decision was patently unreasonable in relation to findings of fact in failing to consider the impact of new evidence (medical report) on the Petitioner's employability.