

Jozipovic v. Workers' Compensation Appeal Tribunal

Decision Summary

Court	B.C. Court of Appeal
Citation	2012 BCCA 174
Result	Appeal Denied Cross Appeal Allowed
Judge	Madam Justice Newbury Madam Justice Kirkpatrick Mr. Justice Groberman
Date of Judgment	April 26, 2012
WCAT Decision(s) Reviewed	WCAT-2006-02312 WCAT-2009-02631

Keywords:

Judicial review – Loss of earnings permanent disability awards – Sections 23(1), 23(3), 23(3.1) of the Workers Compensation Act – Item #40.00 Rehabilitation Services and Claims Manual (RSCM II) – Lawfulness of policy – Section 251 of the Workers Compensation Act – Direct review of lawfulness of policy by court – Core jurisdiction of court on judicial review

Summary:

The B.C. Court of Appeal issued a declaration that item #40.00 of the Workers' Compensation Board's *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) is of no force and effect to the extent that it precludes the Board and the Workers' Compensation Appeal Tribunal (WCAT) from considering the appropriateness of the amount of compensation that is awarded under section 23(1) of the *Workers Compensation Act* when determining whether a worker's circumstances are "so exceptional" under section 23(3.1) and therefore whether the worker may be entitled to a loss of earnings award. The policy precludes considering the appropriateness of the amount of compensation in all cases where the worker is able to return to his previous occupation with a diminished capacity or is able to seek employment in an "occupation of a similar type or nature". The Court concluded that it was not reasonable to ignore the financial detriment that a worker will suffer as a result of such an adaptation. The Court found that, to this extent, the policy is inconsistent with section 23 of the Act.

The Court of Appeal also determined that the power of a superior court to intervene to prevent a tribunal from unreasonable exercises of its statutory powers is part of the irreducible core of its jurisdiction, and cannot be ousted by provincial statute. Therefore, a court on judicial review has the power to review a policy of the board of directors of the Board directly on an unreasonableness standard. It found that while it is not unconstitutional for the Legislature to allow WCAT to consider the reasonableness of a policy, it would be unconstitutional for it to create a statutory scheme that gives WCAT exclusive or final authority to determine that

question. Given the power of the court to review policy directly, it was an error for the chambers judge not to issue a declaration respecting the invalid aspects of the policy once they were determined to be invalid.

Facts:

In the underlying judicial review, the B.C. Supreme Court considered two WCAT decisions that related to the worker's entitlement to a permanent disability award under section 23(1) and section 23(3) of the Act. In the first decision, WCAT denied the worker's appeal from the Review Division of the Board. In the second decision, WCAT denied the worker's request for reconsideration of the first decision.

In the first decision, WCAT determined that the worker's permanent disability award arising from a low back injury had been correctly limited to a chronic pain award of 2.5% of a totally disabled person. WCAT also determined that the worker, who was a steel fabricator at the time of his injury, was not entitled to a loss of earnings permanent disability award under section 23(3) of the Act. WCAT found that although the first criterion of the loss of earnings award test set out in item #40.00 of the RSCM II was satisfied, the second criterion was not satisfied. All three item #40.00 criteria must be satisfied for a worker to be assessed for a loss of earnings award. The first criterion provides that the worker's occupation at the time of his injury requires specific skills which are essential to the occupation or to an occupation of a similar type or nature. The second criterion provides that as a result of the compensable disability the worker must not be able to perform the essential skills needed to continue in the occupation at the time of the injury or in an occupation of a similar type or nature. WCAT found that the worker did not satisfy the second criterion because he had a number of transferable skills and was physically able to continue in an occupation of a similar type or nature. In support of this conclusion, WCAT relied on the fact that the only relevant limitation the worker had was to avoid heavy lifting and there were a number of similar occupations that did not require heavy lifting.

In the second decision, WCAT denied the worker's application for reconsideration. The worker raised the issue of the lawfulness of policy item #40.00 for the first time on reconsideration stating that he was relying on reasons set out in a section 251 referral by a vice chair to the WCAT chair in a parallel but unrelated case. WCAT found that the policy was not patently unreasonable.

On judicial review, the Court set aside both decisions as patently unreasonable and ordered WCAT to rehear the worker's appeal. The Court found that those portions of item #40.00 that require an adjudicator to consider whether a worker has the essential skills of "an occupation of a similar type or nature" as a precondition to eligibility for an award under section 23(3) are unreasonable as they cannot be rationally supported by the Act.

On review, the B.C. Supreme Court addressed two primary questions. The first was whether WCAT's decision in respect of the worker's functional permanent disability award was patently unreasonable. The second was whether policy item #40.00 was unreasonable. On the first question, the court found that the award was patently unreasonable. That result was not appealed and therefore not before the Court of Appeal. On the second question the court found that the second criterion of item #40.00 (the similar occupation criterion) was patently unreasonable as it went beyond the language of section 23. The Court declined to declare that aspect of the policy invalid and instead directed WCAT not to apply it in the rehearing of the

worker's case. Given the Court's conclusion, the Court did not address whether WCAT's application of item #40.00 to the worker's case was patently unreasonable.

The Board appealed the decision to the Court of Appeal and raised four issues. First, that the worker failed to exhaust internal remedies before WCAT and that therefore the chambers judge erred when she found that the worker had challenged the policy before the WCAT reconsideration panel on the same grounds as he raised on judicial review. Second, that the object of judicial review should be WCAT's decision regarding the lawfulness of policy and not the policy itself. Third, that the standard of review of the policy, if reviewed directly, should be patent unreasonableness and not reasonableness. Lastly, that item #40.00 was not patently unreasonable. The worker cross-appealed and argued that the chambers judge erred when she declined to make a declaration regarding the invalid aspects of the policy.

On the exhaustion issue, the B.C. Court of Appeal found that the worker had exhausted internal remedies, having found that the issues raised in this case had been canvassed before WCAT as well as the board of directors of the Board in the parallel proceeding. The Court found that the issues raised by the worker in this case and in the parallel proceeding were precisely the same.

On the issue of the standard of review, the Court determined that reasonableness must be the appropriate standard as the focus is on the validity of the policy of the board of directors, not on WCAT's decision, and section 58 of the *Administrative Tribunals Act* (which creates a statutory patent unreasonableness standard for WCAT) does not apply to the Board.

The Court's conclusion in relation to the other issues are set out above under "summary".