

# Lissimore v. Workers' Compensation Appeal Tribunal

## Decision Summary

Court	B.C. Supreme Court
Citation	2019 BCSC 444
Result	Petition dismissed
Judges	Madam Justice MacNaughton
Date of Judgment	March 27, 2019
WCAT Decisions Reviewed	WCAT Decision No. WCAT-2016-00128

### **Keywords:**

*Judicial review – Patent unreasonableness – Sections 23(1) and 251 of the Workers Compensation Act – Policy items #38.00, #39.00, #39.10 of the Rehabilitation Services Claims Manual Vol. II – Permanent Disability Evaluation Schedule (PDES) – Challenge to the lawfulness of item (B) #6 of the PDES*

### **Summary:**

The petitioner, a licensed practical nurse, sustained a left shoulder strain arising out of her employment on March 16, 2010. The Workers' Compensation Board ("Board") accepted her claim for compensation. The Board eventually determined that the petitioner had a permanent impairment in her left shoulder equal to 7.6% of total disability. The petitioner requested a review of this decision from the Review Division of the Board. The request for review was denied, and the petitioner then brought an appeal to WCAT.

The chair of WCAT appointed a three member non-precedent panel to hear the appeal. Relevant to the matter before the Court, the petitioner argued to WCAT that her permanent functional impairment award was insufficient, and that the Permanent Disability Evaluation Schedule (PDES) was patently unreasonable pursuant to section 251 of the *Workers Compensation Act*, RSBC 1996 c. 492 (Act).

WCAT denied the appeal. It found it did not have jurisdiction to consider the lawfulness of the entire PDES, but it could consider the specific policy item applied to calculate the petitioner's permanent functional impairment (PFI) award. WCAT found that item (B) #6 of the PDES was not patently unreasonable, and applied it in the appeal before it.

The petitioner applied for a judicial review of the WCAT decision, arguing that WCAT erred when it determined that item (B) #6 in the PDES was not patently unreasonable. In particular, the petitioner argued that the WCAT's decision was patently unreasonable because it failed to inquire into her specific impairment of earning capacity, and failed to consider her actual loss of earnings capacity as a result of the injury. The petitioner also argued that tort principles should be considered in assessing loss of income capacity under section 23(1) of the Act.

The chambers judge found that the petition raised a question of statutory interpretation. That is, whether the words of section 23(1) require an estimate of a worker's actual loss. The modern principle of statutory interpretation applied to this question, and required the Court to consider the entire context and grammatical and ordinary sense of the words, harmoniously with the scheme and object of the Act, and the intention of the legislature.

The chambers judge found that section 23(1) required an estimation of the impairment of earning capacity from the nature and degree of *the* injury, not the specific impact of the impairment of earning capacity on a specific worker. The latter question was considered in relation to section 23(3) awards.

The meaning of section 23(1) had to be reviewed in its historical context, which is set out in part in *Decision #8*, (1973) 1 WCR 27. The historical context to section 23(1) is set out in *Decision #95*, (1975) WCR 6, and *Decision #394*, (1985) 6 WCR 23, as well as a number of decisions from the former Appeal Division, the *Royal Commission Report*, and the *Winter Report*.

The Court found that the historical context made it clear that section 23(1) was not meant to compensate for the specific loss of an individual worker, but was meant to compensate for the average loss of the average worker. Although the historical context was not explicit in the WCAT decision, it was clear from the petitioner's submissions to WCAT that she was aware of the dual system of awards and its history. Her complaint was essentially that there was injustice in the average because section 23(3) awards were awarded less frequently following the 2002 amendments to the Act.

The Court found that the petitioner's arguments did not reflect the fact that WCAT had no jurisdiction to overturn the Act through the section 251 process. The only relevant consideration for WCAT was whether item (B) #6 of the PDES was consistent with the requirements of section 23(1) of the Act.

The principles of statutory interpretation required the Board to consider whether the average worker with the petitioner's shoulder injury would be expected to have reduced earning capacity, with reference to the PDES. The Board was empowered to take this approach by section 23(2).

It was not patently unreasonable for WCAT to determine that the use of the PDES to measure loss of earning capacity was not unlawful. It was also not patently unreasonable for WCAT to not consider the petitioner's actual loss of earnings as a relevant factor in determining her award under section 23(1) because section 23(1) awards do not consider actual loss of earnings. In the result, the petition was dismissed.