

# ***Prest v. British Columbia (Workers' Compensation Appeal Tribunal)***

## Decision Summary

Court	B.C. Court of Appeal
Citation	2015 BCCA 377
Result	Appeal Dismissed
Judge	Mr. Justice Donald Mr. Justice Lowry <b>Madam Justice Bennett</b>
Date of Judgment	September 9, 2015
WCAT Decision Reviewed	WCAT-2012-03342

### **Keywords:**

*Judicial review – Section 23(3) of the Workers Compensation Act (Act) – Loss of earnings permanent partial disability award – Items #40.00, 40.10, 40.12, 40.13 of the Rehabilitation Services and Claims Manual, Volume II (RSCM II) – Whether findings of fact in previous, unappealed Review Division decisions are binding on the Workers' Compensation Appeal Tribunal (WCAT)*

### **Summary:**

The worker was a self-employed farmer who owns and operates farms with his brother through a number of limited companies. In 2007, the worker injured his shoulder while working. In 2009, the Workers' Compensation Board (Board) awarded him a permanent partial disability award calculated on a functional basis, pursuant to section 23(1) of the *Workers' Compensation Act* (Act). In 2010, the Review Division of the Board found that the worker was entitled to be assessed for a loss of earnings award pursuant to section 23(3) of the Act (the "2010 Review Division Decision").

The Board then assessed the worker and decided that he was not entitled to a loss of earnings award. The Review Division confirmed the Board's decision.

WCAT denied the worker's appeal. Policy #40.13 provides that no loss of earnings award can be made where, following the injury, the worker is earning or is able to earn at or above the maximum wage rate set by the Board.

WCAT considered three different methods for determining the worker's post injury earnings. Each method resulted in the conclusion that his post injury earnings exceeded the statutory maximum. Therefore, the worker was not entitled to a loss of earnings award.

The three methods were as follows: (1) determining the total earnings paid to the worker from the company post injury; (2) subtracting the company's cost of paying another worker to do the work that the worker was unable to do because of his injury, from the amount the company paid to the worker; and (3) determining what the worker could earn in a suitable occupation outside of the corporate family business.

In respect of the first method, WCAT found that the worker's gross earnings post injury should include

both the employment income and dividends he received from the company each year.

In respect of the second method, WCAT found that, even if it accepted that a substitute was hired to do the physical work that the worker could no longer do, then if one subtracted the amount paid to a substitute from the worker's earnings, the worker's income would still have been in excess of Board maximum.

In respect of the third method, WCAT found that the worker would be able to find employment outside the family business because he had management experience in a complex business environment. Even if the worker could only earn half of the average wage of the senior management occupational code identified as suitable by the Review Division, that figure would still be in excess of Board maximum and thus the worker would not be entitled to a loss of earnings award.

On judicial review, the B.C. Supreme Court found that the WCAT decision was not patently unreasonable.

The B.C. Court of Appeal dismissed the worker's appeal.

### **Reasons of the Court of Appeal**

*Findings of fact made by the Review Division in previous decisions not binding on WCAT in subsequent decisions*

The court rejected the argument that findings of fact in certain previous Review Division decisions were binding on WCAT when making its loss of earnings decision.

Specifically, the worker argued that a finding regarding the amount of his 2008 earnings in the 2008 Review Division decision regarding the method of calculation of his temporary partial disability benefits, was binding on WCAT when making its loss of earnings decision.

The 2010 Review Division decision found that that the worker was entitled to a loss of earnings assessment. The worker argued that the Review Division's finding, namely, that he was unable to work in his own occupation or to adapt to another suitable occupation, without incurring a significant loss of income, was binding on WCAT when it considered his loss of earnings entitlement.

The Court found that pursuant to section 254 of the *Act*, WCAT has exclusive jurisdiction to make any findings of fact relevant to the appeal before it so long as the findings are not patently unreasonable.

The WCAT panel's conclusion that the previous Review Division decisions were answering different questions and addressing different criteria, rather than the question before WCAT, was not patently unreasonable.

*WCAT's determination of which Board policy to apply was not patently unreasonable*

The Court found that the chambers judge had correctly found that it is for WCAT to determine which policies apply to an appeal before it, not the court on judicial review. The question for the court is simply whether WCAT's determination in this regard is patently unreasonable.

The chambers judge correctly found that WCAT's determination of which policies apply and how those policies should be interpreted was not patently unreasonable.

*Jozipovic v. British Columbia (Workers' Compensation Board), 2012 BCCA 174*

The worker was found to be entitled to a “loss of earnings” assessment in the 2010 Review Division decision. That is, he met the preconditions for such an assessment. The WCAT decision dealt with the loss of earnings assessment itself.

The worker’s claim was not affected by the decision in *Jozipovic* nor the resulting change in policy 40.00. *Jozipovic* and policy 40.00 do not apply at the assessment stage. *Jozipovic* and policy 40.00 dealt with the preconditions for an assessment. Different policies apply at the assessment stage (policies #40.10, 40.12, 40.13). Therefore, the Court rejected the argument that WCAT had failed to apply the decision in *Jozipovic* and the related policy #40.00 in its decision.

*WCAT’s finding that dividends are to be included in income not patently unreasonable*

The Court found that WCAT’s conclusion that the dividends received by the worker were remuneration for managerial labour was a reasonable conclusion on the evidence before WCAT. The fact that the worker began receiving dividends after his accident in an amount that approximately equaled his previous wage suggested that the worker was continuing to be compensated for his managerial work in the form of dividends rather than wages.

*Conclusion*

The court dismissed the appeal, finding that the chambers judge had correctly found that the WCAT decision was not patently unreasonable.