

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

Decision Summary

Court	B.C. Supreme Court
Citation	2014 BCSC 864
Result	Petition Dismissed
Judge	Mr. Justice Johnston
Date of Judgment	May 16, 2014
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 #40.13, 68.70 and 68.90 of the Rehabilitation Services and Claims Manual, Volume II (RSCM II) – Evidence – section 250(4) of the Act – Item #97.00 of the RSCM II – Whether findings of fact in previous, unappealed Workers' Compensation Board (Board) and Review Division decisions are binding on the Workers' Compensation Appeal Tribunal (WCAT)

Summary:

The worker was a self-employed farmer and agribusiness executive 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 for his shoulder calculated on a functional basis, pursuant to section 23(1) of the *Workers' Compensation Act (Act)*. In 2010, the Review Division of the Board (reversing an earlier Board decision) 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 implemented the 2010 Review Division Decision. It assessed the worker and decided that he was not entitled to a loss of earnings award. The Review Division confirmed the Board's decision. It concluded that the worker's post-injury income exceeded the maximum set by the Board, and therefore a loss of earnings award would not be granted.

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.

The worker applied for judicial review of WCAT's decision.

Reasons of the court

Findings of fact in lower decisions not binding on WCAT's loss of earnings decision

The court rejected the argument that findings of fact in certain unappealed Board and Review Division decisions were binding on WCAT when making its loss of earnings decision. Specifically, the worker argued that the findings in the Board's long term wage rate decision, and in the Review Division's decision regarding the method of calculation of the worker's temporary partial disability benefits, were binding on WCAT when making its loss of earnings decision. The court found that this argument ignored the discretionary aspect of the loss of earnings award under section 23(3) of the Act, as well as the exceptional nature of this type of award, as expressed in section 23(3.1).

The 2010 Review Division Decision found that the worker was eligible for a loss of earnings assessment, because he could not work in his own occupation or adapt to another suitable occupation without incurring a significant loss of earnings. Specifically, the Review Division found that the worker could not reasonably attain and perform the skills in the occupations identified as suitable by the Board.

The court rejected the argument that the finding in the 2010 Review Division Decision regarding the worker's inability to work in his own occupation or to adapt to another suitable occupation was binding on WCAT when it considered his entitlement to a loss of earnings pension.

The court noted that section 23(3.2) of the Act required consideration of the worker's ability to continue in the worker's occupation at the time of the injury or to adapt to another suitable occupation. WCAT complied with ss. (3.2) in its loss of earnings decision, as it considered the worker's ability to continue in his pre-injury occupation, or to adapt to another suitable occupation. The court also distinguished between a decision regarding a worker's entitlement to be assessed for a loss of earnings award, and a decision regarding actual entitlement to an award. WCAT was not bound by the 2010 Review Division Decision's finding that the worker could not continue in his pre-injury occupation, and could not perform another suitable occupation, because the Review Division was considering whether to assess the worker for a loss of earnings award, whereas WCAT was deciding his actual entitlement to such an award.

Whether or not WCAT should be bound by facts found by lower decision makers is for WCAT to decide.

WCAT's choice of applicable Board policy

The court found that knowledge of Board policies and how they should be applied is central to WCAT's expertise, and ought to receive the highest level of deference. It is for WCAT to determine which policies apply to an appeal before it, not the court on judicial review.

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

The court rejected the argument that WCAT had failed to apply policy item #68.90 (Principals – Composition of Earnings) of RSCM II. That policy says, in part, that when determining a principal's average earnings, the Board may consider dividends as earnings where the amount represents payment for the principal's labour. The court said that WCAT had found that the dividends paid to the worker represented payment for his labour. The court found that there was ample evidence in the record upon which this finding could be made and thus this result could not be said to be patently unreasonable.

WCAT's finding regarding payment to substitutes not patently unreasonable

The court rejected the argument that WCAT had failed to apply policy item #68.70 (Payment to Substitutes). The court noted the discretionary nature of this policy, which says that payments to substitute workers employed post-injury to carry on part of a principal's pre-injury functions *may* be a factor in valuing an injured principal's post-injury work.

WCAT addressed this issue when it found that the worker had not established that a substitute was directly hired by his farm to perform the physical duties that he could no longer perform. The court found that WCAT's finding in this regard amounted to a finding of insufficient evidence. A finding of insufficient evidence did not place a burden on the worker that was contrary to policy #97.00, because that policy contemplated some form of evidentiary burden. The court noted that in any event WCAT had gone on to conclude that, even if the evidence had been sufficient on the points, then if the amount paid to the substitute was notionally subtracted from what the worker had earned in wages and dividends, the worker would still have been over the Board statutory maximum.

WCAT did not impose an inappropriate burden of proof on the worker, or impose a standard of proof higher than the standard in section 250(4) of the Act

WCAT found that certain evidence did not provide "absolute" verification or indication of points in contention. The court found that, while WCAT's use of the term "absolute" was unfortunate, when read in context, the passages in which WCAT used those terms did not establish that WCAT either placed an inappropriate burden of proof on the worker, or employed a standard of proof higher than the standard set out in section 250(4) of the Act. The worker's focus on certain terms used by WCAT parsed the reasons of WCAT too closely.

Conclusion

The court dismissed the petition, finding that the result reached in the WCAT decision was not patently unreasonable.