Puar v. Workers' Compensation Appeal Tribunal

Decision Summary

Court	B.C. Supreme Court
Citation	2015 BCSC 827
Result	Judicial Review Denied
Judge	Mr. Justice Gaul
Date of Judgment	May 15, 2015
WCAT Decisions Reviewed	WCAT-2009-00294 WCAT-2012-02410

Keywords:

Judicial review – Loss of earnings award – Former Workers Compensation Act – Reasonably available occupation – Competitively employable – item #40.12 of the Rehabilitation Services and Claims Manual, Volume I – Evidence

Summary:

The petitioner, a lumber grader who fractured his ankle at work and was unable to return to his previous occupation, received from the Workers' Compensation Board (operating as WorkSafeBC) a partial loss of earnings permanent disability award under section 23(3) of the *Workers Compensation Act*, as it read prior to June 30, 2002. The Board determined that three occupations were suitable and reasonably available to the petitioner: parking lot attendant, parking enforcement officer, and light production assembly. It found that the petitioner could maximize his long term earnings potential as a parking enforcement officer working full time at $15 an hour. The petitioner maintained that he was unemployable.

The Review Division of the Board confirmed the Board's decision. On appeal, WCAT increased the petitioner's award. WCAT found that the petitioner had maximum tolerances for sitting, standing, and walking. It determined that all three occupations identified by the Board were physically suitable and reasonably available but that the petitioner would be limited to part time work (20 hours a week) at a reduced wage ($10 an hour). The petitioner's application for reconsideration was denied on the basis that the WCAT decision was not patently unreasonable.

On judicial review, the court determined that the WCAT original decision was not patently unreasonable and denied the request to have it set aside. It found that the WCAT reconsideration decision was of no force or effect as the B.C. Court of Appeal had subsequently determined in an unrelated decision that WCAT lacked the jurisdiction to reconsider its own decisions on the grounds of patent unreasonableness.[1]

[1] WCAT has applied for leave to appeal the B.C. Court of Appeal decision to the Supreme Court of Canada

In respect of the WCAT original decision, the petitioner made several arguments.

First, the petitioner argued that WCAT lacked the expertise and authority to determine a worker's employability. He argued that WCAT is limited to either rejecting or accepting the Board's specific conclusion regarding a worker's employability. Having found that the Board's decision was wrong, he said that WCAT should have returned the issue to the Board for a new adjudication instead of setting the appropriate level of earnings. The court rejected this argument, finding that WCAT has the authority to assess and determine a worker's employability pursuant to section 250(1) of the Act, which provides that WCAT has the authority to consider all questions of fact and law arising from an appeal.

Second, the petitioner argued that WCAT's conclusion regarding the petitioner's ability to work part time was contrary to the evidence and therefore patently unreasonable. He relied on a functional capacity evaluation (FCE) report prepared at his request and a report from his physician that indicated that the petitioner would experience difficulty sustaining durable employment without significant accommodations. The court rejected this argument, finding that the question on judicial review is not whether there is any evidence that the petitioner was unemployable but rather whether there was any evidence that supports WCAT's decision that the petitioner was employable. WCAT did not ignore the evidence to the contrary. The court found that there was some evidence, including the same FCE report that had stated that the petitioner had the standing capacity to perform between sedentary to modified medium level tasks on an occasional, part time basis. Further, there was evidence that he had been employed for 15 weeks, part time, in a job that required some moving and standing and which ended for reasons unrelated to his ability to move or stand. There was also evidence that an employer would have hired him as a parking lot attendant after the petitioner attended a work orientation.

Third, the petitioner argued that WCAT failed to properly interpret and apply the provisions of item #40.12 of the *Rehabilitation Services and Claims Manual*, Volume I, which requires an adjudicator to assess whether a worker could realistically obtain a job in an occupation that is physically suitable. He maintained that an earlier B.C. Supreme Court decision - *Young v. Workers' Compensation Appeal Tribunal* - forbid the Board or WCAT from relying on government labour statistics or its own knowledge or past experience in order to determine whether there was reasonably available employment. He argued that in order to be found competitive for an occupation an adjudicator must have before it persuasive evidence that potential employers, knowing the specific details of the worker's limitations, would hire that worker.

The court found that WCAT did not fail to properly consider and apply item #40.12. It determined that two broad propositions of law can be drawn from the facts and analysis in *Young*. First, in determining whether there is employment reasonably available to a worker, the Board and WCAT must properly consider and apply the competitiveness principle set out in item #40.12; and second, that obligation will not have been fulfilled if the only evidence considered consists of statistics that suggest a certain occupation simply exists in the labour market. The court rejected the petitioner's submission that the court in *Young* concluded that in determining whether a potential employer has a reasonably available position for the worker and would hire the worker the vocational rehabilitation consultant (VRC) must first inform the employer of all of the specific details of the worker's condition. Beyond its remarks regarding statistical evidence, the court in *Young* did not opine on the type or nature of evidence that would be needed to satisfy the competiveness requirement.

The court found that in this case WCAT had more than just statistics before it. In its view the VRC was well positioned to incorporate evidence of a more general nature, including his own knowledge and experience, into determining whether the petitioner was employable over the long term. The court noted that the assessment of whether a reasonably available position exists over the long term does not require that a particular position be immediately available. In any event, the VRC did contact potential employers who he knew had a history of hiring workers with profiles similar to the petitioner and that at least one of them indicated it would have been interested in hiring the petitioner had he been willing to work. Therefore, there was evidence that potential employers were aware that the petitioner was disabled and were still prepared to offer him employment.

The court also rejected the petitioner's argument that before finding there is reasonably available employment for the worker there must be evidence from potential employers that there might be less disabled candidates applying. The court found that WCAT can assume that such candidates exist. If one does not start from that assumption one would not need to even consider the competiveness question because all workers would be equally competitive.