

Shamji v. Workers Compensation Appeal Tribunal

Decision Summary

Court	B.C. Supreme Court
Citation	2016 BCSC 1352
Result	Petition Dismissed
Judges	Mr. Justice Voith
Date of Judgment	July 22, 2016
WCAT Decision(s) Reviewed	WCAT-2015-02475

Keywords

Judicial review – Sections 23(3) and (3.1) of the Workers Compensation Act – Loss of earnings permanent partial disability award – Two-stage process for loss of earnings adjudication under policy items #40.00, 40.10 to 40.14 – Effect of previous decisions at the first stage of loss of earnings adjudication, on the second stage of adjudication – “three to five year period” referenced in policy item #40.12 -- Section 7 of the Workers Compensation Appeal Act Regulation – reimbursement of appeal expenses associated with attending an oral hearing

Summary

The issue before the WCAT panel was the amount to use as the worker’s post-injury (post-disability) earnings, at the assessment stage of adjudication of his entitlement to a section 23(3) loss of earnings permanent partial disability award (LOE award).

The Review Division of the Workers’ Compensation Board addressed in an earlier decision whether the worker was entitled to be assessed for a loss of earnings award. In concluding that he was, the Review Division compared the difference between (a) the worker’s pre-injury earnings, and (b) his post-injury earnings and his functional pension award. In that decision, the Review Division used an occupational class average earnings figure for the worker’s post-injury earnings.

The WCAT panel rejected the argument that the Review Division’s use of the occupational class average figure in that decision was binding upon it, such that WCAT was obliged to award the worker an LOE award based on the Review Division’s calculation. WCAT found that the decision to determine if the worker is entitled to an LOE assessment, pursuant to the test set out in section 23(3.1) of the *Act* is distinct and separate from the assessment required under section 23(3) of the *Act*. These are distinct processes set out in policy item #40.00 and policy items #40.10 to 40.14 respectively. The panel found that the worker’s post-injury earnings for section 23(3) purposes should be based on his expected earnings (that is, his earnings five years post graduation and certification in his new occupation) of \$22.50 per hour (to be

discounted to 2007 dollars), with a 37.5 hour work week. The Board implemented WCAT's decision by calculating the worker's LOE award using that figure as his post-injury earnings.

The WCAT panel declined to order reimbursement of the worker's travel costs and wage loss on the day of the hearing, because these expenses were due to the specific request of the worker's counsel to hold the hearing in Victoria, as opposed to Surrey, the city of the worker's residence.

Reasons of BC Supreme Court

The Court rejected the argument that either the two-stage methodology relied on by WCAT to address the petitioner's LOE pension claim, or its interpretation of sections 23(3), (3.1), and the relevant portions of policy #40.00, were patently unreasonable.

The Court found that these issues were addressed by the Court of Appeal in *Preast v. Workers' Compensation Appeal Tribunal*, 2015 BCCA 377. The Court in *Preast* accepted that section 23 gives rise to a two-stage process, pursuant to which an "assessment" of a worker's loss of earnings only takes place if the preconditions test set out in section 23(3.1) is satisfied.

WCAT's decision to rely on different wage figures during the "assessment" stage of its exercise than were used in the Review Division decision at the "pre-condition" stage, was not patently unreasonable. Once it is accepted, as the Court did in *Preast*, that WCAT is not legally required or bound to use the same figures or calculations as were used by earlier decision-makers, the decision by WCAT to use the petitioner's actual projected hourly wages at the "assessment" stage, as opposed to the industry-average hourly wages that had been used by decision-makers at the eligibility or "pre-condition" stage of the exercise, was both reasonable and rational.

WCAT found that the relevant timeframe for calculation of the worker's post-injury expected earnings was five years post-graduation and certification. The court found that this finding was not patently unreasonable. Policy item #40.12 refers to a worker's long term earnings potential, and says that "in most cases, "long-term" refers to 3 to 5 years." The policy does not define when the "three- to five- year period" is to commence, and thereby does not prohibit the commencement of the period from the time of a worker's certification in the field that he or she has chosen after a workplace injury. Instead, it speaks to assessing the worker's earning potential in light of all possible rehabilitation measures, including retraining.

The evidence before WCAT of the worker's rehabilitative measures and retraining was that the Board provided the worker with vocational rehabilitation assistance to become an addictions support worker. Mr. Shamji was certified in his post-injury occupation as of September 2012, obtained full-time hours in this occupation in March 2015, and expected to earn \$22.50 per hour within a couple of years. These facts provided a rational basis for WCAT's finding that the relevant timeframe for calculation of the

worker's post-injury expected earnings was five years post-graduation and certification — in other words, after the rehabilitation measures had taken place. There was a rational basis for WCAT's application of Board policy in this case, given the language of policy #40.12, and the evidence before the panel in the specific case. Thus, the WCAT Decision, in focusing on the petitioner's income five years post-graduation and certification, was not patently unreasonable.

Pursuant to section 7(1)(a) of the *Workers Compensation Act Appeal Regulation*, WCAT has the discretion to order reimbursement of a party's expenses associated with attending an oral hearing, if the party is required by WCAT to travel to the hearing. The WCAT panel did not order reimbursement of the worker's travel and wage loss on the day of the hearing, because these expenses were due to the specific request of the worker's counsel [to hold the hearing in Victoria, as opposed to Surrey, the city of the worker's residence]. The court found that nothing in the particular circumstances of this case caused this aspect of the WCAT decision to be patently unreasonable.

The court dismissed the petition.