

Vandale v. Workers' Compensation Appeal Tribunal

Decision Summary

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| Court | B.C. Supreme Court |
| Citation | 2012 BCSC 831 |
| Result | Judicial Review Allowed |
| Judge | Madam Justice Griffin |
| Date of Judgment | June 5, 2012 |
| WCAT Decision(s) Reviewed | WCAT-2004-04388 WCAT-2010-02774 |

Keywords:

Permanent disability awards (section 23(1)) – Policy item #29.20, Rehabilitation Services and Claims Manual, Vol. I – Workers Compensation Act, sections 242, 250(1), 250(4) – Former Appeal Bodies – Appeal Division – Jurisdiction

Background:

The Petitioner claimed for workers' compensation benefits for respiratory difficulties. The former Appeal Division of the Workers' Compensation Board, operating as WorkSafeBC (Board) found that the Petitioner had chronic obstructive pulmonary disease (COPD), which consisted of an asthmatic component that had been caused by work, and a bronchitis and/or emphysema component, which had not been caused by work. In a subsequent decision, the Board found the Petitioner's asthma to be permanent, and awarded the Petitioner a 13% permanent partial disability award (pension) for this condition. The Petitioner appealed to the Review Board, seeking a greater pension amount. The Review Board affirmed the 13% pension, and awarded an earlier effective date than that found by the Board. The Petitioner appealed to the Workers' Compensation Appeal Tribunal (WCAT), again seeking to increase the 13% pension.

The WCAT original panel revoked the Petitioner's pension. It found that the asthmatic component of the Petitioner's COPD was not permanent, but was reversible with the use of a bronchodilator. Therefore, pursuant to policy item #29.20 of the *Rehabilitation Services and Claims Manual*, Vol. I, a pension was not payable. A reconsideration panel issued two decisions: one dismissing the Petitioner's application for reconsideration on grounds of jurisdictional defect, and one dismissing his application on new evidence grounds. The original decision and reconsideration decision regarding jurisdictional defect were challenged on judicial review.

Reasons of the Court:

WCAT did not exceed its jurisdiction when it revoked the Petitioner's pension. WCAT's inquiry authority permits it to engage all issues that are part of a decision chain in an appeal, whether or

not they are expressly raised by an appellant or respondent on appeal. In this regard, the Court noted section 250(1) of the *Workers Compensation Act* (Act), which grants WCAT the jurisdiction to address “all questions of fact and law arising in an appeal”. Section 242 of the Act does not limit WCAT’s jurisdiction, but simply establishes what information must be contained in a notice of appeal. In this case, WCAT’s jurisdiction to consider all issues of fact and law arising on appeal included the basis and size of the Petitioner’s pension. WCAT was not limited to the way that the Petitioner had framed the issues before it. The Court noted that the original panel had given the Petitioner notice that it would consider his entitlement to a pension, and allowed for further submissions on this point.

With respect to the merits of the original decision, the Court confirmed that section 250(4) of the Act is inapplicable in the absence of a finding by WCAT that the evidence on an issue is evenly weighted. There was no such finding in this case. The panel’s interpretation of policy item #29.20 was not patently unreasonable, because in finding that the asthma component of the Petitioner’s COPD was reversed through the use of a bronchodilator, the panel found that the worker’s symptoms did entirely resolve. Therefore, the panel had implicitly rejected the notion that the exception in policy #29.20 (which provides in part that a disability award may be granted where symptoms do not entirely resolve) applied here.

The Court then considered whether the original panel’s findings of fact were contrary to the Appeal Division’s binding findings of fact. This issue had not been raised before either the original panel or the reconsideration panel. The Court found that, while generally courts should be reluctant to deal with new issues on judicial review, exceptional circumstances justified consideration of this issue in the instant case.

The pivotal finding in the WCAT original decision was the finding of fact that the Petitioner’s asthma was a completely reversible condition, severable from the COPD. This conclusion was essential to WCAT’s determination that the Petitioner was not entitled to a pension, because it meant that the exception in policy item #29.20 did not apply. This exception provided that a disability award may be granted where symptoms do not entirely resolve, and where a worker is left with a permanent impairment of the respiratory system.

The Court held that the Appeal Division had found that the Petitioner’s asthma was not completely reversible, and was an indivisible component of his COPD. The Appeal Division decision could not be rationally interpreted as finding that the Petitioner’s asthma was reversible, and was a separate and divisible component of his COPD.

Given that the original panel’s findings of fact were contrary to the Appeal Division’s binding findings of fact, and given that the original panel did not have the jurisdiction to vary the findings of fact of the Appeal Division, the original decision was patently unreasonable. It followed that the reconsideration decision regarding jurisdictional defect was incorrect.