

Young v. Workers' Compensation Appeal Tribunal

Decision Summary

Court	B.C. Supreme Court
Citation	2011 BCSC 1209
Result	Judicial Review Allowed
Judge	Madam Justice Humphries
Date of Judgment	September 8, 2011
WCAT Decision(s) Reviewed	WCAT-2010-01367 WCAT-2010-03282

Keywords

Loss of earnings permanent disability award (pension) – Section 23(3) of the former Workers' Compensation Act – Suitable and reasonably available occupation – Competitively employable – Item #40.10 and #40.12 of the Rehabilitation Services and Claim Manual, Volume 1 – Procedural fairness – Cross-examination of Board vocational rehabilitation consultant

Summary:

Facts:

The Petitioner, a customer service representative, was 57 years old when she was injured at work. As she was injured before the effective date of the current *Workers Compensation Act* (which was June 30, 2002), the former provisions of the *Act* applied to her claim. After a number of decisions of the Workers' Compensation Board (Board) and related appeals, the Petitioner received a loss of earnings permanent disability award (pension) under section 23(3) of the former *Act*.

The Board's pension decision was based on an employability assessment performed by a Board vocational rehabilitation consultant (VRC). The assessment was performed when the Petitioner was 64 years old. The VRC provided a report and her conclusion was that given the Petitioner's transferable skills, employment history, education, and her accepted restrictions and limitations there were other occupations that were suitable for her and reasonably available in the long term. She specifically identified the occupation of accounting bookkeeper as it capitalized on the Petitioner's skills and abilities and is a field predominantly made up of part time jobs. She noted that the Board would update the Petitioner's bookkeeping skills to today's current standards and if necessary provide ergonomic tools. The VRC concluded that the Petitioner was capable of working 20 hours per week and that over the long term she would be earning \$18.00 per hour.

The Review Division of the Board varied the Board's pension decision. While the review officer agreed with the Board that the occupation of part-time bookkeeper was suitable and reasonably available to the Petitioner and that the Petitioner was capable of working at least 20 hours a week, he found that the Petitioner's long term earnings were only \$11.85 an hour given her circumstances.

WCAT Decisions:

After conducting an oral hearing, the original WCAT decision confirmed the decision of the Review Division. The panel agreed with the review officer that the challenges that the Petitioner faced in the occupation, including her age, were compensated for by the reduction of long term earnings from \$18.00 to \$11.85 an hour. The Petitioner sought reconsideration of WCAT's decision on the basis that the original panel made patently unreasonable findings of fact in relation to the suitability and availability of the bookkeeping position and that the original panel had acted unfairly when it refused to order the attendance of two witnesses for cross examination, namely the VRC and the program advisor of a training school who advised the VRC that the Petitioner was uncooperative. WCAT denied the reconsideration request.

Court Decision:

The Court found the original WCAT decision to be both patently unreasonable and unfair. The Court set the decision aside and remitted it to WCAT for reconsideration.

The decision was patently unreasonable because it failed to consider Board policy: in particular, that portion of item #40.12 of the Board's *Rehabilitation Services and Claims Manual, Volume I* that provides:

... the phrase "available jobs" does not mean any job position in which there are vacancies. An available job means one reasonably available to the claimant in the long run. For example, a city may have several theatres, and there may be occasional job vacancies for the position of theatre usher; but if there are always numerous better qualified applicants and the realities are that a worker with the particular disability is not likely to obtain such a job, that is not a reasonably available job.

The Court found that WCAT, by relying on a VRC report based only on statistics obtained from various government databases, failed to analyze the words of the policy and therefore the question of whether the Petitioner was competitively employable. The Court stated that the very purpose of the words is to prevent a decision being made only on statistics. The Court said that neither the WCAT decision nor the VRC report references the likelihood of the Petitioner, with her particular disability, obtaining such a job if there are always better qualified applicants.

The Court also noted that no consideration was given to how many hours the Petitioner would have to work soliciting business and doing administrative work associated with running her own business in order to be able to bill for 20 hours per week of home-based bookkeeping. In addition, there was no consideration of the effect of the passage of time, which was due to errors within the Board's appeal process and not to any fault of the Petitioner, on her ability to retrain and start up a new business. WCAT mentioned that she was 60 years old at the date of the initial award, but she was 65 by the time of its decision. The Court said that whether that should form part of the relevant considerations should be addressed as well.

The decision was unfair because the original panel failed to make the VRC available for cross-examination. The Court found that the central issue in the appeal was the VRC's determination of the Petitioner's employability and the availability of bookkeeping employment. The Court found that the VRC made assumptions, did selected statistical research, and came to a deemed conclusion as to the employability of the Petitioner without apparent consideration of the applicable Board policy. It was not open to WCAT to simply prefer the expert evidence of the VRC where the VRC's report did not take into account the part of the policy that requires consideration of whether jobs are likely available to this particular worker. Failure to allow cross-examination of the VRC in these circumstances undermined the fairness of the hearing, since the Court found that WCAT simply relied on the VRC's untested report and conclusions.

The Court did not find it unfair for WCAT to refuse to order the program advisor of the training school to attend for cross examination as her interview with the Petitioner took place after the VRC performed the employability assessment and that in any event it was the effect of the advisor's impressions on the VRC and not the program advisor's impressions themselves that was relevant.