

# Shamji v. Workers' Compensation Appeal Tribunal

## Decision Summary

Court	B.C. Court of Appeal
Citation	2018 BCCA 73
Result	Appeal Dismissed
Judges	Madam Justice Newbury Madam Justice Kirkpatrick <b>Madam Justice Fisher</b>
Date of Judgment	March 1, 2018
WCAT Decision Reviewed	WCAT-2015-02475 (August 10, 2015)

### 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*

### 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.

### **Reasons of BC Supreme Court**

The Court rejected the petitioner's (worker's) 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 *Prest v. Workers' Compensation Appeal Tribunal*, 2015 BCCA 377. The Court in *Prest* 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 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 *Prest*, 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, 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.

The Court dismissed the petition.

The petitioner appealed to the Court of Appeal.

### **Reasons of the Court of Appeal**

The Court found that the reviewing judge was correct in concluding that the WCAT decision was not patently unreasonable.

Specifically, the reviewing judge was correct in concluding that the Court of Appeal, in *Prest*, confirmed that section 23 of the *Act* gives rise to a two-stage process that contemplates an "assessment" of a worker's LOE taking place only if the "preconditions" test in section 23(3.1) is satisfied. It followed that the reviewing judge was also correct in concluding that WCAT's interpretation of sections 23(3) and (3.1) of the *Act* and the relevant portions of policy #40.00, and its reliance on the two-stage methodology to address the appellant's LOE claim, were not patently unreasonable.

The Court found that the WCAT decision was a decision under section 23(3) of the *Act*, and WCAT was not bound by the calculations used by the Board and the Review Division in the decision under section 23(3.1). WCAT's decision to use the appellant's actual projected hourly wages at the "assessment" stage, rather than the industry-average hourly wages used by decision makers at the eligibility or "pre-condition" stage, was both reasonable and rational.

The Court also addressed WCAT's decision that the relevant timeframe for calculation of the worker's post-injury expected earnings was five years post-graduation and certification. The Court said that that decision was not patently unreasonable. Policy #40.12 did not establish a firm three-to-five year timeframe but rather a guideline as to what should normally be considered long-term. While the WCAT panel did not explain why it chose five years as the relevant time frame under policy #40.12, its reasons demonstrate that its objective was to determine, as accurately as possible, the expected earnings the appellant was likely to earn in the long term. The panel's conclusion on that issue was not patently unreasonable.

The Court dismissed the appeal.