

Phillips v. Workers' Compensation Appeal Tribunal

Decision Summary

Court	B.C. Supreme Court
Citation	2011 BCSC 576
Result	Judicial review dismissed
Judge	Mr. Justice Rogers
Date of Judgment	May 3, 2011
WCAT Decision(s) Reviewed	WCAT-2009-02116

Keywords:

Permanent disability award (pension) – Average earnings (Wage rate) – #67.21 of the Rehabilitation Services and Claims Manual, Volume I – Procedural fairness and natural justice – Adequacy of reasons – Patent unreasonableness – Fettering of discretion – Sections 58(2)(a) and (3) of the Administrative Tribunals Act – Findings of fact

Summary:

The worker moved from Saskatchewan to British Columbia in 1991. She had a record of full time employment in the health care industry in Saskatchewan. She attempted to start a business in B.C. which failed. She then obtained casual employment as a care aide in a long term care facility. Her objective was to attain full time employment in B.C. at some point. However, she was injured on the job and eventually became competitively unemployable. The Workers' Compensation Board accepted her injury as compensable and granted her a 100% loss of earnings permanent disability award (pension). The Board calculated her wage rate for the award using her average earnings as a casual care aide in the one-year prior to her injury.

The worker appealed many issues to the Workers' Compensation Appeal Tribunal (WCAT), one of which was the wage rate. The worker asserted that the wage rate for pension purposes should be based on the average earnings of a full-time care aide in the facility in which she worked or the statistical average wage rate for full-time care aides.

WCAT found the Board correctly determined the wage rate. The worker sought reconsideration of WCAT's decision. The Reconsideration Panel allowed the reconsideration and directed a new hearing. The new panel reheard the appeal solely on the wage rate issue and denied the appeal. The worker sought judicial review of the latter decision.

The worker alleged a lack of adequate reasons; a fettering of discretion in the application of item #67.21 of the *Rehabilitation Services and Claims Manual, Volume I*; and a patently unreasonable finding that the worker would not achieve full time employment.

The Court found that three standards of review applied to the decision. Adequacy of reasons was a natural justice issue and the Court owed no deference to WCAT's usual practice or press of work. The exercise of discretion was subject to patent unreasonableness as defined in section 58(3) of the *Administrative Tribunals Act*, that is, whether the discretion was exercised arbitrarily, in bad faith, for an improper purpose, based on irrelevant factors, or failed to take statutory requirements into account. The finding that the worker would not achieve full time employment was subject to patent unreasonableness.

In applying these standards, the Court found that WCAT clearly described why it chose not to accept the worker's evidence and what evidence it did rely on thus articulating sufficient reasons for the decision that was made.

With regard to policy item #67.21, the Court found that WCAT recognized that the policy gave examples only, but went on to define the common grounds in the examples. WCAT then applied the common grounds to the evidence and found that the evidence did not establish that the worker shared the common characteristic. Therefore, WCAT did not improperly fetter its discretion in applying the policy.

Finally, the Court found that WCAT's decision was not patently unreasonable in the sense that it is so divorced from the record of the case heard that no amount of judicial deference could preserve it. The Court found there was evidence in the record that cast doubt on the worker's assertion that she would have achieved full-time employment and thus supported WCAT's finding that the evidence was insufficient to support the worker's contention.

As a result, the petition for judicial review was dismissed.