

Noteworthy Decision Summary

Decision: WCAT-2006-00480**Panel:** Elaine Murray**Decision Date:** January 31, 2006

Vocational rehabilitation – WCAT jurisdiction – Statutory interpretation – Sections 239(2)(b) and 241(1) of the Workers Compensation Act – Workers Compensation Amendment Act (No. 2), 2002 – Core Services Review of the Workers' Compensation Board

Workers' Compensation Appeal Tribunal (WCAT) does not have jurisdiction to hear appeals from decisions by the Review Division of the Workers' Compensation Board (Review Division) respecting matters referred to in section 16 of the *Workers Compensation Act* (Act), that is, vocational rehabilitation.

The Workers' Compensation Board (Board) informed the worker that her vocational rehabilitation benefits were suspended. The worker requested a review by the Review Division, which confirmed the decision. The worker appealed to WCAT.

A preliminary issue was whether WCAT had jurisdiction to hear the appeal. Section 239(2)(b) of the Act states that a decision by a review officer respecting matters referred to in section 16 may not be appealed to WCAT (section 16 of the Act relates to vocational rehabilitation). Section 241(1) of the Act addresses who may appeal a decision of a review officer.

The worker argued that, read in conjunction with section 241(1), section 239(2)(b) should only apply to persons who were not "directly affected" by a vocational rehabilitation decision. The worker's position was that whereas workers are directly affected by such decisions, employers are not. Thus, the worker argued section 239(2)(b) would only remove an employer's right to appeal a vocational rehabilitation decision.

The panel discussed the relevant principles of statutory interpretation in detail. The panel noted that the "modern principle" and the "ordinary meaning rule" apply to statutory interpretation in Canada. The panel also considered the applicability of a number of presumptions of statutory interpretation.

The panel noted that the ordinary meaning of section 239(1) is clear: it is a broad appeal-granting provision. The ordinary meaning of section 239(2) is also clear in that it narrows the scope of section 239(1) by enumerating specific decisions made by review officers that may not be appealed to WCAT. Thus, although section 241(1) is prefaced by the phrase "for the purposes of section 239", this requires a consideration of both purposes of the section: the general appeal-granting authority and the limitation purpose. The panel concluded there was no conflict in the ordinary meaning of sections 239(2)(b) and 241(1) and thus it was not necessary for section 241(1) to modify or amend section 239(2)(b). The panel further concluded that employers are directly affected by vocational rehabilitation decisions.

The panel then undertook a purposive analysis, which involved a review of the legislative history of the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63) and the *Core Services Review of the Workers' Compensation Board* (Victoria: 2002) (Winter Report). The panel concluded that the Winter Report recommendations and the legislative debates provided

compelling evidence that the legislature intended to restrict the right to appeal vocational rehabilitation decisions to WCAT by adding section 239(2)(b) to the Act.

The panel concluded WCAT does not have jurisdiction to hear appeals from review officers' decisions respecting matters referred to in section 16 of the Act.

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Panel: Elaine Murray, Vice Chair

Introduction

By decision dated June 16, 2003, an officer with the Workers' Compensation Board (Board) informed the worker that her vocational rehabilitation benefits were suspended. The worker submitted a request for review of the June 16, 2003 decision to the Board's Review Division. By decision dated November 15, 2004, a review officer confirmed the Board's decision. The worker filed a notice of appeal of the November 15, 2004 decision with the Workers' Compensation Appeal Tribunal (WCAT).

By letter dated March 3, 2005, a senior vice chair and deputy registrar at WCAT informed the worker's representative, Mr. Ishkanian, that WCAT would address the preliminary question of whether it has jurisdiction over review officers' decisions concerning vocational rehabilitation matters. The merits of the November 15, 2004 decision would be addressed at a later date, depending on the outcome of the preliminary question.

An oral hearing was held on June 10, 2005. The worker, her husband (as an observer), and Mr. Ishkanian attended. The employer was invited to participate in this appeal, but did not indicate that it wished to do so.

Issue(s)

The broad issue is whether WCAT has jurisdiction over review officers' decisions respecting vocational rehabilitation matters.

The specific issue is whether section 241(1) of the *Workers Compensation Act* (Act) limits the scope of section 239(2)(b) of the Act, which restricts appeals of decisions "respecting matters referred to in section 16" of the Act.

Preliminary Matter

I informed Mr. Ishkanian during the hearing that I did not need to hear from him about the effect of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) on the issue under appeal. Item #2.43 of the MRPP states that review officers' decisions respecting vocational rehabilitation are not appealable to WCAT. Item #2.43 is not binding upon me, and is of no assistance in deciding the issue on this appeal.

The Act

The *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63) came into effect on March 3, 2003. The Act, as amended by Bill 63, is the legislation relevant to this appeal.

Part 4 of the Act addresses “Appeals”. Division 2 of Part 4 addresses “Appeal Rights.” Section 239 of Division 2 reads as follows:

Appeal of review decisions

239 (1) Subject to subsection (2), a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section, may be appealed to the appeal tribunal.

(2) The following decisions made by a review officer may not be appealed to the appeal tribunal:

(a) a decision in a prescribed class of decisions respecting the conduct of a review;

(b) a decision respecting matters referred to in section 16;

(c) a decision respecting the application under section 23 (1) of rating schedules compiled under section 23 (2) where the specified percentage of impairment has no range or has a range that does not exceed 5%;

(d) a decision respecting commutations under section 35;

(e) a decision respecting an order under Part 3, other than an order

- (i) relied upon to impose an administrative penalty under section 196 (1),
- (ii) imposing an administrative penalty under section 196 (1), or
- (iii) made under section 195 to cancel or suspend a certificate.

[Emphasis added]

Sections 240(1) and (2) provide for the right to appeal certain “other Board decisions.”

Part 1 of the Act addresses “Compensation to Workers and Dependants.” Division 2 of Part 1 is entitled “Compensation.” Section 16 is found within Division 2 of Part 1. Section 16 reads as follows:

Vocational rehabilitation

16 (1) To aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap, the Board may take the measures and make the expenditures from the accident fund that it considers necessary or expedient, regardless of the date on which the worker first became entitled to compensation.

(2) Where compensation is payable under this Part as the result of the death of a worker, the Board may make provisions and expenditures for the training or retraining of a surviving dependent spouse, regardless of the date of death.

(3) The Board may, where it considers it advisable, provide counselling and placement services to dependants.

Upon reading sections 239(2)(b) and 16, a decision made by a review officer respecting matters referred to in section 16 (vocational rehabilitation matters) may not be appealed to WCAT.

Mr. Ishkanian contends, however, that section 239(2)(b) must be read in light of section 241(1), which is also found within Division 2 of Part 4 of the Act. It reads, in part, as follows:

Who may appeal

241(1) For the purposes of section 239, any of the following persons who is directly affected by a decision of the review officer in respect of a matter referred to in section 96.2(1)(a) may appeal that decision:

- (a) a worker;
- (b) a deceased worker’s dependant;
- (c) an employer.

[Emphasis added]

Sections 241(2) to (5) describe “who may appeal” in other contexts. Each subsection is prefaced with the phrase “for the purposes of” and then refers to either section 239, 240(1) or 240(2).

Sections 96.2(1)(a) and 96.3(1) are found within Division 6 of Part 1 of the Act. Division 6 is entitled “Workers Compensation Board.” Section 96.2(1) reads, in part, as follows:

Request for reviews

96.2 (1) Subject to subsection (2), a person referred to in section 96.3 may request a review officer to review the following in a specific case:

(a) a Board decision respecting a compensation or rehabilitation matter under Part 1;

(b) a Board decision under Part 1 respecting an assessment or classification matter, a monetary penalty or a payment under section 47 (2), 54 (8) or 73 (1) by an employer to the Board of compensation paid to a worker;

(c) a Board order, a refusal to make a Board order, a variation of a Board order or a cancellation of a Board order respecting an occupational health or safety matter under Part 3.

[Emphasis added]

Subsection 2 of section 96.2 addresses what assessment, prevention and reopening matters may not be reviewed by the Review Division.

Section 96.3(1) reads, in part, as follows:

Who may request a review

96.3(1) Any of the following persons who is directly affected by a decision referred to in section 96.2(1)(a) may request a review of that decision:

(a) a worker;

(b) a deceased worker’s dependants;

(c) an employer.

Sections 96.3(2) and 96.3(3) describe who is authorized to request a review of decisions described in sections 96.2(1)(b) and 96.2(1)(c), respectively.

Submissions

Mr. Ishkanian submits that section 241(1) of the Act (in conjunction with section 92.2(1)(a)) gives a worker the right to appeal a review officer's decision respecting a rehabilitation matter under Part 1 of the Act, which includes section 16 of the Act.

I interpret Mr. Ishkanian's argument as being comprised of two parts. First, he argues that section 241(1) and section 239(2)(b) are in direct conflict as section 241(1) grants a right to appeal rehabilitation decisions and section 239(2)(b) removes it. Second, he argues that the conflict is resolved not by section 239(2)(b) prevailing, but by reading the two sections harmoniously. Doing so, he submits, results in the section 239(2)(b) restriction only applying to persons who are not "directly affected" by the decision made under section 16.

In relation to the first part of his argument, Mr. Ishkanian is essentially (although not explicitly) arguing that section 241(1) grants a broad appeal right to the persons specified in the section (a worker, a deceased worker's dependants, and employer). He argues that the appeal that it grants does not explicitly restrict "decisions respecting matters referred to in section 16," rather it refers very broadly to appeals from compensation and rehabilitation decisions made under section 96.2(1)(a). Although section 241(1) refers to section 239, Mr. Ishkanian argues that section 241(1) was not intended to be made "subject to" section 239, since section 241(1) uses the phrase "for the purposes of section 239," instead of "subject to." As such, it requires one to look at the entire context and purpose of the Act before determining the scope of appeal rights to WCAT. He notes that different words are intended to have different meanings. Furthermore, he provides several authorities purportedly in support of the meaning of "for the purposes of." In his view, a purposive analysis leads to the conclusion that the legislature did not intend to remove a worker's right to appeal vocational rehabilitation decisions.

In relation to the second part of his argument, Mr. Ishkanian attempts to overcome the obvious objection to his analysis, namely that section 239(2)(b) appears to clearly restrict any vocational rehabilitation appeal, by arguing that on his interpretation the section 239(2)(b) restriction would still be meaningful. It would not be in all cases that sections 241(1) and 239(2)(b) would conflict, but only in those cases where the person was "directly affected" by a rehabilitation decision. He contends that it is for those cases that section 239(2)(b) was created. In other words, he argues that there would still be cases where vocational rehabilitation matters would not be appealable, namely where the person was not "directly affected." It is his position that workers are "directly affected" by vocational rehabilitation decisions and, as such, section 239(2)(b) is not

applicable to them. Since, in his view, employers are not directly affected, he maintains that section 239(2)(b) applies to them to negate an employer's right to appeal.

Mr. Ishkanian relies on Ruth Sullivan's article "Statutory Interpretation in a New Nutshell," *Canadian Bar Review*, Vol. 82 (2003) No. 1. Ms. Sullivan discusses the "modern principle" of the construction of statutes, which was first formulated by Elmer Driedger in 1974 in the first edition of the *Construction of Statutes* (Toronto: Butterworths, 1974). Mr. Ishkanian cites Driedger's "modern approach" to construction of statutes as being the preferred method of statutory interpretation. That approach is summarized by Driedger at page 67, as follows:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Mr. Ishkanian submits, however, that it is only necessary to go to secondary sources to interpret the statute, including determining the intention of Parliament, if the statute is ambiguous. He contends that there are no ambiguities and, therefore, it is not necessary to consider secondary sources. Even if one did, he argues that any relevant secondary sources are not helpful.

Mr. Ishkanian further contends that the principle derived from the authorities he has provided, in conjunction with those elucidated by Ms. Sullivan, establish the rule of construction that no single provision in a statute can be taken at face value; it must be read within the context of the whole statute, with a view to the purpose to be achieved and the mischief to be avoided. In other words, subsection 239(2)(b) must be read in the context of what follows.

In that vein, he emphasizes that workers have always had a right to appeal to any decision made by a Board officer through all levels of appeal, until Bill 63 took effect.

Mr. Ishkanian emphasizes that one of the main purposes of the compensation system, if not its main purpose, is to provide injured workers with the services they need to return to suitable employment that will maximize their earnings. He argues that this fundamental "right" has been protected with rights to appeal since 1975, and workers have a reasonable expectation of having those rights preserved, as they have had for nearly 30 years. He submits that there must be clear and unequivocal statutory language to remove those enshrined rights.

He also submits that the elimination of appeals to WCAT of matters respecting section 16 of the Act allows the Board free reign. He argues that this could bring the administration of justice into disrepute, and that his interpretation of the Act would cure that mischief.

In conclusion, he submits that on a proper construction of sections 239 and 241, a worker who is directly affected by a rehabilitation decision made by a review officer has the right to appeal to WCAT. To construe the provisions otherwise would, in Mr. Ishkanian's submission, be tantamount to re-writing the statute. He argues that vocational rehabilitation appeals could easily have been restricted if the legislators simply added "except for a decision respecting matters referred to in section 16 of the Act" after the reference to section 96.2(1)(a) in section 241(1).

Principles of Statutory Interpretation

To address the arguments on this appeal, it is necessary to discuss the relevant principles of statutory interpretation in some detail.

Modern principle

As submitted by Mr. Ishkanian, statutory interpretation in Canada is governed by the "modern principle." In 1998, the Supreme Court of Canada in *Re Rizzo and Rizzo Shoes Ltd.*¹ declared the modern principle as the preferred approach to statutory interpretation. In 2002, in *R. v. Jarvis*,² the court restated the modern principle in this way, at paragraph 77:

The approach to statutory interpretation can be easily stated: one is to seek the intent of Parliament by reading the words of the provision in context and according to their grammatical and ordinary sense, harmoniously with the scheme and the object of the statute.

Mr. Ishkanian submits that the ordinary meaning of sections 239 and 241 is clear. As earlier mentioned, he contends that there are no ambiguities in the Act with respect to WCAT's jurisdiction in this matter and, therefore, it is not necessary to consider secondary sources, such as the debates of the legislature or government reports issued prior to the tabling of Bill 63.

With respect, I disagree with Mr. Ishkanian's position. The Supreme Court of Canada has, in numerous cases, made it very clear that a statute is to be interpreted by examining the entire context of the statute and not by examining the text of the statute alone. The most recent decision of the Supreme Court which confirms this principle is *Montreal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 where the court, at paragraph nine, stated:

¹ [1998] 1 S.C.R. 27, at 41, per Iacobucci J.

² [2002] 3 S.C.R. 757, 2002 SCC 73, per Iacobucci J. and Major J.

...as recognized in *Rizzo & Rizzo Shoes* “statutory interpretation cannot be founded on the wording of the legislation alone” (at para. 21).

Similarly, the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, at paragraph 27, wrote:

The grammatical and ordinary sense of the words employed in s. 70(1)(b) is not determinative, however, as **this Court has long rejected a literal approach to statutory interpretation**. Instead, s. 70(1)(b) must be read in its entire context. This inquiry involves examining the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and Parliament's intent both in enacting the Act as a whole, and in enacting the particular provision at issue.

[Emphasis added]

Further, on the use of extrinsic aids in statutory interpretation where ambiguity has not first been established, Ms. Sullivan writes at page 470 of *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: The Butterworth Group of Companies, 2002) (*Construction of Statutes*):

It is sometimes said that the courts should not look to extrinsic materials, even though the material otherwise would be admissible, unless the legislation to be interpreted is ambiguous. Arguably, this constraint is pointless and misleading and should be abandoned. It is a vestige of the plain meaning rule.

To say that a provision is not ambiguous, that its meaning is clear or “plain”, is a conclusion reached at the end of interpretation, not a threshold test. It is a judgment that can appropriately be made only in light of all the available evidence of legislative meaning and intent. The issue, then, is whether the assistance afforded by extrinsic materials...should be included in the initial work of interpretation. It is hard to see why it should be excluded.

No doubt, there are occasions where the text is precise and clear.... In such cases, the apparent meaning of the text properly outweighs evidence of a contrary intention derived from extrinsic materials. There are also occasions when ambiguity in a text is convincingly resolved through textual or scheme analysis. Again, in such cases the extrinsic materials would probably be dismissed. But even in cases of this sort there is no reason why those materials should not be consulted and given their appropriate weight having regard to all relevant circumstances and considerations.

Rather than insisting on ambiguity, it is arguable that courts should accept the admissibility of extrinsic material subject only to the standard criteria of relevance and reliability. If the materials appear to be helpful and credible, they may be taken into account. However, their impact will depend on various factors, including the source and cogency of the materials, the clarity of the legislative text and the weight of other indicators of meaning and intent.

In her discussion of the plain meaning rule, Ms. Sullivan states at page 10 of *Construction of Statutes* that “the modern principle calls for the words of the text to be read in their *entire* context in *every* case, not just in cases where the words seem ambiguous” (emphasis in original) and that “incompatibility between the modern principle and the plain meaning rule was effectively acknowledged by the Supreme Court of Canada in what has become the leading case on statutory interpretation, *Re Rizzo and Rizzo Shoes Ltd.*”

Specifically in relation to legislative debates, the Supreme Court of Canada in *Re Rizzo* stated at paragraph 35, “although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation.”

At page 469 of *Construction of Statutes*, however, Ms. Sullivan specifically addresses the use of statements recorded in the Debates of the Legislative Assembly (*Hansard*), and states:

Where the purpose of a provision is explained or its meaning discussed during the enactment process, and the legislation is then passed on that understanding, the explanation or discussion offers direct (if not conclusive) evidence of the legislature’s intent.

Based on the above, I am satisfied that it is appropriate to refer to extrinsic materials in this matter, and will do so later in this decision.

Ordinary Meaning Rule

While the plain meaning rule no longer applies to statutory interpretation, the ordinary meaning rule is at its foundation. Unlike the plain meaning rule, which, when applied, terminates the process of statutory interpretation upon a determination that the meaning of the impugned text is plain, the ordinary meaning rule is a strong but rebuttable presumption in favour of an interpretation consistent with the ordinary meaning of the impugned text.

At page 20 of *Construction of Statutes*, Sullivan describes the ordinary meaning rule and explains how it relates to the modern principle:

As understood and applied by modern courts the ordinary meaning rule consists of the following propositions:

1. It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.
2. Even if the ordinary meaning is plain, courts must consider the purpose and scheme of the legislation, and relevant legal norms. They must consider the entire context.
3. In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.

This formulation of the ordinary meaning rule is closely related to Driedger's modern principle. It emphasizes that interpretation properly begins with ordinary meaning – with reading words in their grammatical and ordinary sense – but it does not stop there. Interpreters are obliged to consider the total context of the words to be interpreted in every case, no matter how plain those words may seem upon initial reading.

Ms. Sullivan goes on to discuss what is meant by ordinary meaning, at page 21:

The expression “ordinary meaning” is much used in statutory interpretation, but not in any consistent way. Sometimes it is identified with dictionary meaning, sometimes with literal meaning and sometimes with the meaning that results after the words to be interpreted are read in total context. Most often, however, it refers to the reader's first impression meaning, the understanding that spontaneously emerges when words are read in their immediate context – in the words of Gonthier J.³, the ordinary meaning is “the natural meaning which appears when the provision is simply read through.”

Relation of Presumptions of Statutory Interpretation to the Modern Approach

In her article “Statutory Interpretation in a New Nutshell” (supra), Ms. Sullivan addresses the role that the rules of statutory interpretation play in the modern approach to statutory interpretation. She states at page 55:

³ *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735.

In my view, although we no longer imagine that interpretation disputes are resolved by applying rules to texts, we continue to rely on the old rules and to develop new ones because they help to structure interpretation, and they aid communication. The rules operate as a checklist of relevant considerations. They suggest different lines of inquiry and ensure that no possibility has been overlooked.

Accordingly, I consider it valuable to bear in mind the following presumptions of statutory interpretation, which Ms. Sullivan addresses in *Construction of Statutes*.

a) *Presumption of Consistent Expression*

Ms. Sullivan writes at pages 162-163:

It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it then makes sense to infer that where a different form of expression is used, a different meaning is intended.

b) *Presumption of Coherence*

Ms. Sullivan writes at pages 168-169:

It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal. This presumption is the basis for analyzing legislative schemes, which is often the most persuasive form of analysis. The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other.

...

The presumption of coherence is strong and virtually impossible to rebut. It is unthinkable that the legislature would impose contradictory rules on its citizens. When inconsistency occurs, either the drafter had made a mistake which the court must correct or the law must be interpreted in a way that solves the dispute in a definitive fashion. Contradiction or inconsistency cannot be tolerated; some method of reconciliation must be found.

c) Presumption Against Absurdity

Ms. Sullivan writes at page 132:

Sometimes it is possible to give meaning to a provision, but that meaning is so absurd that, in the view of the court, it cannot have been intended. If there is no way to interpret the provision so as to avoid the absurdity, the court has no choice but to redraft it.

There are several recognized categories of absurdity. One such category is where the ordinary meaning of the impugned provision (or one possible interpretation) clearly defeats the purpose of the Act. Ms. Sullivan discusses this at page 243, where she writes:

Statutory interpretation is founded on the assumption that legislatures are rational agents. They enact legislation to achieve a particular mix of purposes, and each provision in the Act or regulation contributes to realizing those purposes in a specific way. An interpretation that would tend to frustrate the purpose of legislation or the realization of the legislative scheme is likely to be labeled absurd.

Jurisdiction to Adopt Strained Interpretation

I also include a brief description of “strained interpretation,” as Mr. Ishkanian’s arguments may lead to that approach.

At page 126, Ms. Sullivan describes a strained interpretation as:

...one that departs from the ordinary meaning of the text to a noticeable extent, but is nonetheless judged to be plausible; it is an interpretation the text can bear, as opposed to one that amends it. The jurisdiction to adopt a strained interpretation is frequently exercised although it is somewhat less frequently acknowledged.

...

There is a legally significant difference between strained (yet plausible) interpretations, implausible interpretations and corrected mistakes, but in practice it is difficult to distinguish between these three categories.

...

The jurisdiction to adopt a strained interpretation in order to promote the purpose of legislation or to avoid absurdity is well established and frequently exercised.

Analysis

Although one must examine the statutory provisions in question within a broad context, the first step in the interpretation process is to determine their ordinary meaning.

Textual Analysis - Ordinary Meaning

The ordinary meaning of section 239(1) of the Act is clear. It is a broad appeal-granting provision, which provides that “subject to” section 239(2) a final decision by a review officer in a review under section 96.2 is appealable to WCAT. The reference to section 96.2 is effectively a reference to section 96.2(1), which provides a right to request a review of certain broad classes of Board decisions, including Board decisions “respecting a compensation or rehabilitation matter under Part 1.” Section 239(1) only speaks of what may be appealed not who may appeal. (Section 241(1), in contrast, refers to who may appeal.)

The ordinary meaning of section 239(2) also appears to be clear. By setting out what “may not be appealed to the appeal tribunal,” section 239(2) narrows the scope of section 239(1) by enumerating specific decisions made by review officers that may not be appealed to WCAT. Section 239(2)(b) clearly sets out that “matters referred to in section 16” are not appealable. (For purposes of this appeal, I accept that “matters referred to in section 16” refers to vocational rehabilitation matters.)

Turning to section 241(1), one notes that the section is prefaced by the phrase “for the purposes of section 239.” Mr. Ishkanian contends that the ordinary meaning of the phrase “for the purposes of” is such that it qualifies the section to which it refers. Thus, he argues that section 239 is modified or amended by section 241(1), and not the converse. According to his argument, if the legislature had intended section 241(1) to be limited by section 239, it would have used the phrase “subject to” and not “for the purposes of.” Since the legislature chose not to use “subject to,” he argues that the presumption of consistent expression should be invoked.

As for the meaning of the phrase “for the purposes of,” Mr. Ishkanian refers to four cases in his submissions: *The Queen v. Ward, Attorney General et al.*, [2002] 210 D.L.R. (4th) 42 (SCC); *Dechow v. The Queen*, [1978] 40 C.R.N.S. 129 (SCC); *Lamont Management Ltd. v. R.*, 2000 D.T.C. 6256 (Federal Court of Appeal); and *Loring et al. v. Victoria (City) et al.*, [1989] 48 M.P.L.R. 113 (BCSC).

Mr. Ishkanian argues that the cases considered together stand for the proposition that “no single provision in a statute can be taken at face value, but...must be read within the context of the whole statute, with a view to the purpose to be achieved and the mischief to be avoided.” While that statement properly describes the interpretive process, I do not think that it directly addresses the task for which the cases were purportedly provided, namely, considering the meaning of “for the purpose of.”

I find these cases to be of limited assistance. To the extent that they address the meaning of the phrase “for the purpose of” at all, they say that where the phrase is found, one has to consider the context and purpose of the section referred to, and little more. In fact, while the entire context of a provision is always a consideration, it is critical to note that section 241(1) specifically refers to section 239 and not to the entire Act. Thus, since the section reads “for the purposes of section 239” this means that we interpret section 241(1) much more narrowly than if it read “for the purposes of the Act” (as was the case in *Dechow*).

What is the meaning of “for the purposes of”? The *Concise Oxford English Dictionary*, 10th ed. revised (New York: Oxford University Press, 2002) defines “purpose” as “the reason for which something is done or for which something exists.” *Black’s Law Dictionary*, 8th ed., (St. Pauls: West, a Thompson Business, 2004) defines “purpose” as “an objective, goal, or end” and “for purpose of” as “with the intention of.” In my mind, the ordinary meaning of the phrase “for the purposes of section X” simply requires that one consider the section that is being referred to, specifically its purpose, before determining the scope of the application of the section being interpreted.

Section 239 could be said to either have one general purpose, namely, to set out the scope of the right to appeal to WCAT, or two more specific purposes, namely, to set out a general right to appeal and also to set out specific limits to that right to appeal. Thus, one ought to read the phrase “for the purposes of section 239” as requiring one to consider *both* purposes of the section, i.e. not just the general appeal-granting authority, but also the limitation purpose.

In addition, the phrase “for the purposes of section 239,” as found in section 241, amongst other things, may also have been intended to distinguish between those decisions that can be appealed by virtue of section 239 and those that can be appealed by virtue of section 240 (see sections 241(4) and (5)).

In sum, I am not persuaded by Mr. Ishkanian's argument that the ordinary meaning of sections 239(2)(b) and 241(1) results in a conflict. In the absence of a conflict, it is not necessary for section 241(1) to modify or amend section 239(2)(b).

Although I do not see a conflict between the two sections, I have also considered the meaning of "directly affected." Mr. Ishkanian argues that the conflict he sees between section 239(2)(b) and section 241(1) is resolved not by section 239(2)(b) prevailing, but by reading the two sections harmoniously. Doing so results in the section 239(2)(b) restriction only applying to persons who have not been "directly affected" by the rehabilitation decision. In his view, only workers are directly affected by vocational rehabilitation decisions.

During the oral hearing, I questioned how it could be said that employers are not also directly affected by vocational rehabilitation decisions. While I recognize that workers are more directly affected by Board decisions respecting vocational rehabilitation than employers, those decisions also directly affect an employer's claim costs and experience rating. In my view, that is sufficient to qualify the employer as someone who is also "directly affected" by vocational rehabilitation decisions.

Furthermore, section 96.3(1) allows an employer who is "directly affected" by a Board decision respecting a compensation or rehabilitation matter under Part 1 of the Act to request a review by the Review Division. To conclude that employers are not directly affected by vocational rehabilitation decisions could preclude employers from even requesting the Review Division to review a vocational rehabilitation decision. They would not have any right to request a review or launch an appeal on Mr. Ishkanian's interpretation of "directly affected."

Moreover, under section 96.3(1), Mr. Ishkanian's narrow interpretation of "directly affected" could effectively preclude employers from requesting a review of many, if not all, compensation decisions. If employers are not directly affected by claims costs or experience ratings, in what circumstances would they be directly affected so as to have the right to request a review? I am satisfied that the term "directly affected" must be interpreted somewhat broadly. In my view, the intent of the legislature to limit the right to request a review or launch an appeal to "directly affected" persons was to ensure that only persons with some real personal involvement in a matter are able to do so. The impact on claims costs and experience ratings reflects some real personal involvement in the matter on the part of the employer.

Furthermore, Mr. Ishkanian's argument fails, in my view, because the issue is not whether a person's right to appeal is conditional on that person being "directly affected" by the decision being appealed from. That condition clearly exists, but it exists independently of any further restriction on a person's right to appeal created by section 239(2)(b). In other words, if the legislature intended to restrict an employer's

right to request a review or commence an appeal, I suspect that it would have done so by some other means than use of the phrase “directly affected.”

Finally, if the purpose of the amendment was to restrict the number of appeals, in my view, the purpose would be better achieved by curtailing workers’ appeals, and not employers’, since workers tend to appeal vocational rehabilitation decisions more than employers do.

Purposive analysis

I now turn to the purposive analysis of statutory interpretation, which involves a review of the legislative history of Bill 63.

Prior to Bill 63 amending the Act, the provincial government commissioned a report from Alan Winter, who reviewed the workers’ compensation system in British Columbia (*Core Services Review of the Workers’ Compensation Board* (Victoria: 2002)) (Winter Report) [accessible at: www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf].

At pages 50 to 51 of his report, Mr. Winter recommended that the decision of the internal review process be final and conclusive, and that no further appeal be brought to the external appeal tribunal with respect to certain issues, which included “any vocational rehabilitation decisions made by the WCB concerning the eligibility, nature and extent of vocational rehabilitation services provided to disabled workers (pursuant to Section 16(1) of the *Act*) or to surviving dependants of a deceased worker (pursuant to Sections 16(2) and (3) of the *Act*).”

At page 271 of his report, Mr. Winter explained the reasoning behind his recommendation. He noted that a decision concerning vocational rehabilitation benefits was at the discretion of the Board, and that such decisions could be overturned on appeal merely on the basis of different judgment. This was so even where the original decision was made in good faith and involved the application of the relevant policies. He identified two alternatives to address this concern: (1) the broad discretion provided under the Act could be narrowed, or (2) the scope of review upon appeal from the initial decision-maker’s determination could be limited.

At page 271, he stated as follows:

With respect to the VR determinations made by the WCB, I do not believe it would be appropriate to narrow the discretion exercised by the Vocational Rehabilitation Consultants (for the reasons I had previously discussed under the heading “VR Services to disabled workers – should

they be discretionary or mandatory?”⁴). Accordingly, it is my opinion that the scope of review by subsequent decision-makers must be limited.

Section 16 of the Act was not changed in any way by Bill 63 and, as such, the “broad discretion provided under the Act” was not narrowed. However, section 239(2)(b) was added to the Act by Bill 63, which meant that the “scope of review upon appeal” was limited.

I now turn to *Hansard* (the *Hansard* index is accessible at <http://www/leg.bc.ca/37th3rd/hansard>). The British Columbia legislature debated section 239(2)(b) of the Act in the Committee of the Whole House on October 29, 2002. The relevant excerpts from *Hansard* start at page 4126 (J. MacPhail for the opposition and Hon. G. Bruce for the government):

J. MacPhail: This is the second division of the whole appeal process. It's entitled “Appeal Rights.” I have two areas of concern. The first is under sections 239(2)(b) and (c). When you read this, on the face of it, it is of concern, and I will tell you that it is the one area that we have had a substantial amount of feedback on. Sections 239(2)(b) and (c) say that a decision made under section 16, which is vocational rehabilitation, will not be appealable. These decisions were appealable before. A vocational rehabilitation is the work that the Workers Compensation Board does with an injured worker to return that person to work. Why was the change made to make this not appealable now?

Hon. G. Bruce: In respect to 239(2)(b), which I believe is where we're at, **this speaks to the vocational rehabilitation, and because this is discretionary, we've taken that from being an appealable issue.**

...

Hon. G. Bruce: We're not limiting vocational rehab here. **What we are limiting is the appeal process to voc rehab.** One of the service delivery aspects of things with the new board of directors will be how to make sure you can move someone quickly to voc rehab, physio or whatever is required, even if decisions haven't been rendered as to who's to blame here, so we can get that person back to work. Let's worry more afterwards about the decision as to who pays, as long as we're focusing on making sure that the injured worker is given whatever training or rehab is beneficial to them.

⁴ At page 258, Winters states: “decisions concerning the provision of VR services to disabled workers often involve difficult choices to be made, and can therefore be quite contentious. In my opinion, the WCB must retain the discretionary authority it currently has...”

...

Also, keep in mind when we're talking about the appeal process here, as I think I've stated before, there are somewhere in the neighbourhood of 180,000 cases a year. I think it's somewhere between 178,000 and 182,000 cases in a year. This past year we saw about 14,000 to 15,000 appeals in those 180,000 cases. There is the potential of some two million appealable decisions.

In this instance here, we are clearly stating that we're not.... I want to be clear. We're talking at this point about the appeal section. Sometimes I get confused. Were we talking about the appeal process, or were we talking about what's the initial direction here? The initial direction is to give that injured worker the service they need to be able to heal, to get whole again and get back to work.

What we're doing is saying, in respect to the vocational rehab, that vocational rehab is discretionary. You may need different things for whatever your injury may be, but that is not going to then be an appealable decision on what has been rendered as the level of vocational rehab that's brought down by the board.

[Emphasis added]

The Winter Report recommendations and the legislative debates provide compelling evidence that the legislature intended to restrict the right to appeal vocational rehabilitation decisions to WCAT by adding section 239(2)(b) to the Act.

Summary

In my view, the structure and formulation of sections 239(2)(b) and 241(1) of the Act reflect the legislature's intention to restrict the right to appeal all vocational rehabilitation decisions to WCAT. Section 239(1) is intended to provide a general right to appeal Review Division decisions. As it is evident that the legislature wished to restrict the right to appeal to specific people in certain circumstances it was necessary to add several different provisions to accomplish that purpose – one for each type of appealable decision. Section 239(1) is silent on who is granted which right, as is section 96.2(1), presumably because it would significantly clutter the structure of the section to do so. Thus a "who may appeal" section was necessary to spell out both the general right to appeal and the restrictions on that right.

I recognize that there is significant debate about the appropriateness of using headings in a statute as interpretive tools and, for that reason, I have not considered the

headings in my analysis. Yet, the heading of section 241, if nothing else, merely confirms what otherwise seems obvious: *who* may appeal. Section 239, on the other hand, sets out *what* may be appealed.

Mr. Ishkanian's suggestion that section 241(1) creates a general right to appeal is, in my view, untenable. It would render section 239(1) (but not section 239(2)) largely redundant since sections 241(1) to (3) would provide the right to appeal (I say largely because section 239(1) does refer to "final" decisions and decisions declining to conduct a review which would otherwise not be found anywhere in the Act). According to the presumption of coherence, each statutory provision forms part of the functioning whole; one should not be left with spare parts. Thus, if I were to accept Mr. Ishkanian's argument, section 239(1) would essentially be a "spare part."

Mr. Ishkanian argues that it would have been a simple matter to draft the Act so that it expressly excluded a worker's right to appeal a vocational rehabilitation decision. For example, the legislature could have drafted the Act this way:

241(1) For the purposes of section 239, any of the following persons who is directly affected by a decision of the review officer in respect of a matter referred to in section 96.2(1)(a), **except for a decision respecting matters referred to in section 16 of the Act**, may appeal that decision:

[Emphasis added]

In my view, this wording, aside from being redundant (since the reference to section 239 includes a reference to section 239(2)(b)), would be insufficient. The section would have to include additional clauses, each corresponding to the exceptions created by section 239(2)(a) to (d). It would need to read as follows:

241(1) For the purposes of section 239, any of the following persons who is directly affected by a decision of the review officer in respect of a matter referred to in section 96.2(1)(a), **except for a decision in a prescribed class of decisions respecting the conduct of a review, a decision respecting matters referred to in section 16 of the Act, a decision respecting the application under section 23(1) of rating schedules compiled under section 23(2) where the specified percentage of impairment has no range or has a range that does not exceed 5%, or a decision respecting commutations under section 35**, may appeal that decision:

[Emphasis added]

Furthermore, in my view, it would be an error to conclude that simply because section 241(1) refers to section 96.2(1)(a) that section 241(1) was intended to create a

right to appeal all decisions referenced in 96.2(1)(a). A more reasonable explanation for the reference to section 96.2(1)(a) in section 241(1) is that it distinguishes between the different types of “final decisions” mentioned in section 239(1), so that it could describe who could potentially appeal them. Since section 96.2(1) had already defined the different types of final decisions, it was unnecessary to repeat the language of each within section 241(1).

I find that the ordinary meaning of sections 239(2)(b) and 241(1) is inconsistent with Mr. Ishkanian’s argument. A purposive analysis of those sections removes, in my view, any doubt that vocational rehabilitation decisions cannot be appealed to WCAT. Furthermore, it is not just a strained interpretation but an implausible one to interpret section 241(1) as granting a general right to appeal compensation and rehabilitation decisions. Although courts may impose a strained interpretation of a statutory provision, it is only appropriate to promote the purpose of the legislation or to avoid absurdity. Mr. Ishkanian’s proposed interpretation does the opposite, since it defeats the obvious purpose of the legislation.

The purpose of Bill 63 is clear in terms of appealing vocational rehabilitation matters; the legislature intended to eliminate any appeal to WCAT. Furthermore, there is no indication that the legislature intended to preserve workers’, but not employers’, rights to appeal vocational rehabilitation matters, as suggested by Mr. Ishkanian. I am satisfied that sections 239(2)(b) and 241(1), when read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature, do not provide WCAT with jurisdiction over review officer’s decisions respecting vocational rehabilitation matters.

Conclusion

I find that WCAT does not have jurisdiction to hear appeals from review officers’ decisions respecting matters referred to in section 16 of the Act.

No expenses were requested on this particular appeal, and none are awarded. The worker requested expenses in relation to several other appeals, which were addressed during the same oral hearing on June 10, 2005. Those expenses were dealt with in the decision concerning the other appeals (see *WCAT Decision # 2005-05756*).

Elaine Murray
Vice Chair

EM/ml