Noteworthy Decision Summary

Decision: WCAT-2009-00113 **Panel:** Jill Callan **Decision Date:** January 14, 2009

Sections 16 and 239(2)(b) of the Workers Compensation Act - Items #89.11 and #89.12 of the Rehabilitation Services and Claims Manual, Volume I – Jurisdiction to consider an appeal regarding income continuity benefits

This decision is noteworthy as it provides an analysis of whether WCAT has jurisdiction to consider an appeal regarding income continuity benefits in light of section 239(2)(b) of the *Workers Compensation Act* (Act).

The worker sustained a compensable back injury in December 1994. In October 2007, a vocational rehabilitation consultant informed the worker that the Workers' Compensation Board, operating as WorkSafeBC (Board), would not grant him any further income continuity benefits under item #89.11 of *Rehabilitation Services and Claims Manual, Volume I* (RSCM I). A review officer at the Review Division of the Board confirmed the decision of the vocational rehabilitation consultant. The worker appealed the Review Division decision to WCAT. In April, 2008 the registrar of WCAT concluded that WCAT does not have jurisdiction to consider the appeal of the Review Division decision regarding continuity of income benefits. The worker sought reconsideration of the WCAT registrar's decision (registrar's decision).

The reconsideration panel found that the worker had not established common law grounds to set aside and reconsider the registrar's decision. Section 239(2) of the Act provides that WCAT does not have the authority to consider appeals when the review officer has made a decision regarding workers' compensation benefits authorized by section 16 of the Act. The policies of the board of directors regarding continuity of income benefits (items #89.11 and #89.12) are in chapter 11 of RSCM I, which contains the policies regarding vocational rehabilitation benefits paid under section 16 of the Act. Item #89.11 characterizes continuity of income benefits as a rehabilitation allowance which is provided to workers who are not actively engaged in the vocational rehabilitation process but are awaiting the assessment of their permanent disability pension.

The reconsideration panel found that the policies of the board of directors establish that continuity of income benefits are vocational rehabilitation benefits under section 16 of the Act. They cannot be characterized as short-term disability or wage loss benefits, which are paid under sections 29 and 30 of the Act, because a worker is only eligible to receive continuity of income benefits if his or her condition has stabilized. Since continuity of income benefits are paid before a worker is assessed for entitlement to a permanent partial disability pension payable under section 22 or 23 of the Act, they do not constitute permanent disability benefits. The reconsideration panel concluded that the registrar's decision was reasonable, and correct.

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Panel: Jill Callan, Chair

Introduction

[1] The worker applies to have an April 4, 2008 decision of the registrar of the Workers' Compensation Appeal Tribunal (WCAT) set aside on common law grounds and reconsidered. In that decision, the registrar confirmed WCAT's March 28, 2008 provisional decision that WCAT does not have jurisdiction to consider his appeal of a February 27, 2008 decision of the Review Division of the Workers' Compensation Board, operating as WorkSafeBC (Board) (*Review Decision #R0085369*). Specifically, the registrar concluded that the Review Division decision related to a matter referred to under section 16 of the *Workers Compensation Act* (Act) which, by virtue of section 239(2)(b) of the Act, is not appealable to WCAT.

[2] By letter dated November 5, 2008, a WCAT appeal coordinator informed the worker that he could bring an application to reconsider the registrar's decision on common law grounds on one occasion only.

[3] The worker is self-represented. Although invited to do so, the employer is not participating in this application.

[4] The worker has provided a written submission. Given that this application turns on questions of law, I find it can be fully and fairly considered without an oral hearing.

Jurisdiction

[5] Section 255(1) of the Act provides that a WCAT decision is final and conclusive and is not open to question or review in any court. In keeping with the legislative intent that WCAT decisions be final, they may not be set aside and reconsidered except on the basis of new evidence as set out in section 256 of the Act, or on the basis of a jurisdictional error (which goes to the question of whether a valid decision has been provided). A tribunal's common law authority to set aside one of its decisions on the basis of jurisdictional error was confirmed by the British Columbia Court of Appeal in the August 27, 2003 decision in *Powell Estate v. WCB (BC)*, 2003 BCCA 470, [2003] B.C.J. No. 1985, (2003) 186 B.C.A.C. 83, 19 WCR 211. This authority is further confirmed by section 253.1(5) of the Act.

Standard of Review

[6] Section 58 of the *Administrative Tribunals Act* (ATA) sets out the standards of review applicable when the courts deal with petitions for judicial review of WCAT decisions. It provides, in part:

> (2) In a judicial review proceeding relating to [tribunals such as WCAT]
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> >
> > (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
> >
> > (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
>
> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
>
> > (a) is exercised arbitrarily or in bad faith,
> >
> > (b) is exercised for an improper purpose,
> >
> > (c) is based entirely or predominantly on irrelevant factors, or
> >
> > (d) fails to take statutory requirements into account.

[7] Item #15.24 (Reconsideration on Common Law Grounds) of WCAT's *Manual of Rules of Practice and Procedure* provides that WCAT will apply the same standards of review to reconsiderations on common law grounds as would be applied by the court on judicial review.

[8] Section 58 of the ATA establishes that the rather stringent standard of patent unreasonableness is applicable when the courts review findings of fact or law or an exercise of discretion by WCAT. However, in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9, March 7, 2008, the Supreme Court of Canada held that the standard of patent unreasonableness would be replaced with the standard of reasonableness. For the most part, this means that, in provinces (unlike British

Columbia) where there is no statutory provision like section 58 of the ATA, the courts will apply the standard of unreasonableness rather than patent unreasonableness in reviewing the decisions of administrative tribunals. At this point, courts in British Columbia have concluded that the standard established by section 58(3) of the ATA is applicable to discretionary decisions of WCAT. However, it is unclear as to whether the courts will apply the standard of patent unreasonableness or that of unreasonableness in determining whether WCAT decisions contain errors of fact or law. In addition, to date there is insufficient judicial commentary to clarify the differences, if any, between the standards of patent unreasonableness and unreasonableness.

[9] I have decided to proceed with my decision on this application and apply the standard of unreasonableness in considering the worker's arguments. For the purposes of this decision, I will assume that the standard of unreasonableness is less stringent than the standard of patent unreasonableness and therefore potentially makes it easier for the worker to establish that the registrar's decision ought to be set aside and reconsidered. In making this assumption, I have not reached any conclusions as to how the standard of review has been affected by *Dunsmuir.* However, in the circumstances of this case, I find it is appropriate to grant the worker the benefit of a lower standard instead of delaying my consideration of his reconsideration application. Accordingly, I have not invited submissions from the worker on the effect of *Dunsmuir* on the applicable standard of review in British Columbia.

The Provisions of the Act and the Policies

[10] Section 16 of the Act provides, in part:

> **Vocational rehabilitation**
>
> (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.

[11] The policies regarding vocational rehabilitation services relevant to the worker's claim are contained in chapter 11 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I). Item #89.11 of RSCM I provides:

> **Continuity of Income Pending Assessment of Permanent Disability Pension**
>
> **The Board may pay a rehabilitation allowance to assist workers who are not actively engaged in the rehabilitation process but who are**

awaiting assessment of their disability pension. This allowance will be considered for workers

- whose disability has stabilized,
- who are unemployed or, effective July 16, 1998, employed at a reduced income level due to their compensable disability,
- who are not entitled to temporary wage-loss benefits,
- who are not receiving other wage-loss equivalency benefits from the Board, and
- who are likely to receive either a significant permanent partial disability pension award based upon the Permanent Disability Evaluation Schedule or a pension calculated on the worker's potential loss of earnings under Section 23(3).

In view of their obvious need, these cases will be given priority handling in the assessment of their pension entitlement. **Consideration will be given to the payment of a rehabilitation allowance between the end of wage-loss or other wage replacement payments and the commencement of the permanent disability pension.** These income continuity payments will be considered by the Vocational Rehabilitation Consultant following discussions with the Case Manager and other appropriate Board officers.

Prior to implementing an income continuity payment, the Vocational Rehabilitation Consultant must have considered and offered to the worker all rehabilitation measures which are reasonable and might be of assistance to the worker.

[emphasis added]

[12] Item #89.12 (Amount of Payment) deals with the rate at which income continuity benefits are paid.

[13] Section 239 of the Act provides:

Appeal of [Review Division] decisions

(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 [WCAT].

(2) **The following decisions made by a review officer may not be appealed to [WCAT]**:

...

(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%; …

[emphasis added]

Background

[14] The worker sustained a compensable back injury in December 1994. The history of his claim is documented in previous decisions of the workers' compensation appeal bodies. The appeal bodies that have issued the previous decisions include the Workers' Compensation Review Board and the Appeal Division of the Board, which were appellate bodies in the workers' compensation appeal system prior to March 2003.

[15] The matter before me relates to the narrow question of whether WCAT has the authority to hear appeals from Review Division decisions regarding continuity of income benefits. Therefore, I do not find it necessary to set out a detailed history. I will simply refer to the history that is most relevant to the matters raised by the worker in this application.

[16] In *Appeal Division Decision #99-0688*, dated April 28, 1999, an Appeal Division panel considered whether the worker was entitled to short term disability benefits beyond April 7, 1996. The panel decided that the worker was entitled to benefits under section 30 of the Act for the period from April 7, 1996 to April 8, 1997. The panel also stated:

> The panel has determined although the worker is no longer temporarily disabled, he remains disabled from returning to his regular work and he should now be assessed for a permanent functional impairment award as well as a loss of earnings assessment. It appears the worker may sustain a loss of earnings greater than that compensated for by the physical impairment assessment and therefore, **he should receive income continuity benefits until the loss of earnings assessment has taken place, as contemplated for in item #89.11 of the [*Rehabilitation Services and Claims*] *Manual*.**
>
> [emphasis added]

[17] The Board implemented the 1999 Appeal Division decision and, for various periods subsequent to that decision, paid various types of vocational rehabilitation benefits to the worker including income continuity benefits under item #89.11. In *Appeal Division Decision #2002-0066,* dated January 11, 2002, an Appeal Division panel determined, among other things, that the Board had correctly terminated the worker's vocational rehabilitation benefits on July 2, 2002. In *WCAT Decision #2006-03929*, dated October 18, 2006, a WCAT panel determined that the worker had provided new evidence for reconsideration of another matter decided in the 2002 Appeal Division decision.

[18] By decision dated October 31, 2007, a vocational rehabilitation consultant informed the worker that the Board would not grant him any further income continuity benefits under item #89.11 of RSCM I. In the February 27, 2008 Review Division decision, the review officer confirmed the decision of the vocational rehabilitation consultant. The February 27, 2008 covering letter for the Review Division decision included a note which stated that vocational rehabilitation decisions are not appealable to WCAT.

[19] The worker initiated an appeal of the February 27, 2008 decision to WCAT. In the March 28, 2008 provisional decision, a WCAT assessment officer noted that section 239(2)(b) of the Act provides that a Review Division decision regarding a matter referred to in section 16 of the Act may not be appealed to WCAT. She further noted that, since continuity of income benefits are paid under section 16 of the Act, the February 27, 2008 Review Division decision was not appealable to WCAT. Accordingly, WCAT had concluded that the worker's appeal would be dismissed because WCAT did not have the authority to consider it. In accordance with section 31(2) of the ATA, the assessment officer invited the worker's submissions on the question of whether WCAT had authority to consider the appeal.

[20] The worker provided a submission dated April 2, 2008 in which he argued that the February 27, 2008 Review Division decision was appealable to WCAT by virtue of section 239(1) of the Act.

[21] In her April 4, 2008 decision, the registrar noted that, although section 239(1) of the Act grants WCAT the authority to decide appeals from Review Division decisions, that authority is subject to the restrictions in section 239(2). Those restrictions include one which provides that WCAT does not have the authority to consider appeals when the review officer has made a decision regarding the workers' compensation benefits authorized by section 16 of the Act. The registrar further explained:

> Income continuity benefits are a form of vocational rehabilitation benefits that the Board pays under the general authority conferred on it by section 16 of the Act. A number of WCAT panels have similarly concluded that the payment of income continuity benefits is a matter

respecting section 16 of the Act (see, for example, WCAT #2006-00752 and WCAT #2006-01760; these decisions can be found on WCAT's website: www.wcat.bc.ca).

In my view, income continuity benefits are appropriately characterized in RSCM I item #89.11 as "a rehabilitation allowance" provided by the Board under the general discretionary authority granted by section 16 of the Act. I note that both items #89.11 and #89.12 are found in chapter 11, *Vocational Rehabilitation Services,* of the RSCM I. The introduction to chapter 11 cites section 16 of the Act as the guiding legislation for Vocational Rehabilitation Services.

Submissions and Analysis

[22] In his submissions, the worker notes that section 239(2)(c) of the Act provides that a review officer's decision regarding a worker's permanent functional impairment may not be appealed to WCAT "where the specified percentage of impairment has no range or has a range that does not exceed 5%". He states that his permanent disability exceeds 5% and, accordingly, the review officer's February 27, 2008 decision must be appealable to WCAT.

[23] Under section 82(1)(a) of the Act, the board of directors of the Board is required to establish the policies of the Board. Under section 250(1), WCAT is required to apply the policies established by the board of directors.

[24] The policies of the board of directors regarding continuity of income benefits (items #89.11 and #89.12) are contained in chapter 11 of RSCM I, which contains the policies regarding vocational rehabilitation benefits paid under section 16 of the Act. Item #89.11 characterizes continuity of income benefits as a rehabilitation allowance which is provided to workers who are not actively engaged in the vocational rehabilitation process but are awaiting the assessment of their permanent disability pension. There are certain criteria set out in item #89.11 that must be met in order for a worker to be eligible for continuity of income benefits.

[25] In my view, it is clear that the policies of the board of directors establish that continuity of income benefits are vocational rehabilitation benefits under section 16 of the Act. They cannot be characterized as short-term disability or wage loss benefits, which are paid under sections 29 and 30 of the Act, because a worker is only eligible to receive continuity of income benefits if his or her condition has stabilized (thus rendering him or her ineligible to receive benefits under section 29 or 30 because those benefits are only payable when the condition is temporary). Since continuity of income benefits are paid before a worker is assessed for entitlement to a permanent partial disability pension payable under section 22 or 23 of the Act, they do not constitute permanent disability benefits.

[26] Many provisions of the Act resulted from the recommendations made in the *Core Services Review of the Workers' Compensation Board* by A. Winter (British Columbia: Ministry of Skills Development and Labour, 2002). Mr. Winter made recommendations regarding vocational rehabilitation benefits in chapter 12 of his report. At pages 271 and 272, he noted that Board officers who issue vocational rehabilitation decisions are exercising a very broad discretion in doing so. In light of this broad discretion, he recommended that there not be a right to appeal Review Division decisions regarding vocational rehabilitation benefits to WCAT.

[27] The legislature implemented Mr. Winter's recommendation by enacting section 239(2)(b) of the Act, which clearly provides that decisions of review officers regarding vocational rehabilitation benefits are not appealable to WCAT. I find the registrar's April 4, 2008 decision that the February 27, 2008 decision is not appealable to WCAT is entirely reasonable. In fact, I find her decision is correct.

Conclusion

[28] The worker has not established common law grounds to set aside and reconsider the WCAT registrar's April 4, 2008 decision. The registrar's decision stands as final and conclusive in accordance with section 255(1) of the Act.

Jill Callan
Chair

JC/it

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