
CANADA / JUDGMENT

Amos v. Workers' Compensation Appeal Tribunal

2015 BCSC 425

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Supreme Court of British Columbia

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2015 BCSC 425 Amos v. Workers' Compensation Appeal Tribunal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Amos v. Workers' Compensation Appeal Tribunal,

2015 BCSC 425

Date: 20150319

Docket: S136630

Registry: New Westminster

Between:

Douglas Arthur Amos

Petitioner

And

Workers' Compensation Appeal Tribunal

Respondent

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Petitioner:

P. Eastwood

Counsel for the Respondent:

M. Bennett

Place and Date of Trial/Hearing:

Vancouver, B.C.

December 10 and 11, 2014

Written Submissions:

January 29 and February 12, 2015

Place and Date of Judgment:

Vancouver, B.C.

March 19, 2015

I. introduction

- [1] The petitioner, Douglas Amos, brings this application for a judicial review of a decision by the Workers' Compensation Appeal Tribunal ("WCAT" or the "Tribunal") concerning his ability to work in a new occupation following a serious work-related injury.
- [2] Mr. Amos was employed as a truck driver in the logging industry. On October 17, 1997, he was struck by a heavy falling log and suffered serious injury.
- [3] On August 28, 2009, in determining Mr. Amos's entitlement to a permanent disability award and whether he was able to obtain alternate work within a reasonable time, WorkSafe BC (the "Board") determined the position of trucking dispatcher was suitable and reasonably available to Mr. Amos. This finding was upheld in a reconsideration panel by the Tribunal on June 14, 2011.
- [4] There is no dispute Mr. Amos's back condition is serious or that he is precluded from returning to an unmodified full-time position as a dispatcher. WCAT, however, found this position could be modified and thus the occupation of dispatcher was suitable and reasonably available to Mr. Amos.
- [5] Mr. Amos says this finding was patently unreasonable, as it failed to apply applicable Board policies, based its conclusions solely on expert evidence that did not have a factual foundation, and incorrectly placed the onus on Mr. Amos to prove he could not be accommodated in the position.

II. The standard of review

- [6] The Tribunal and Mr. Amos agreed the focus of the review is on the original decision by the Tribunal, WCAT-2009-02265, dated August 28, 2009 (the "Original Decision"), rather than the subsequent reconsideration decision, WCAT-2011-01467, dated June 14, 2011 (the "Reconsideration Decision").

- [7] The parties agree the applicable standard of review for the judicial review of the Original Decision is patently unreasonableness, in accordance with s. 58 of the Administrative Tribunals Act, S.B.C. 2004, c. 4.
- [8] Following the hearing, the Court granted both parties leave to make further submissions in respect of two recent decisions from the B.C. Court of Appeal: Fraser Health Authority v. Workers' Compensation Appeal Tribunal, 2014 BCCA 499 ["Fraser Health"] and Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000, 2014 BCCA 496.
- [9] In those submissions, the parties agreed Fraser Health does not affect the Original Decision and agreed the Original Decision is the object of review. The applicable standard of review, as agreed to above, is patent unreasonableness.
- [10] Mr. Amos maintains the Original Decision's determination the dispatcher position was suitable and reasonably available is patently unreasonable for the following three reasons:
- First, the Tribunal failed to apply Policy #40.12 that required it to consider "competitive employability" in determining whether a position is suitable and reasonably available. The occupation of dispatcher was not suitable and not reasonably available.
 - Second, the Tribunal relied exclusively on expert evidence, the vocational rehabilitation consultant's ("VRC") evidence, that was based on incorrect facts and assumptions and therefore patently unreasonable. In particular, it maintains there is no evidence the position could be modified as assumed by the VRC.
 - Third, the Tribunal incorrectly placed the onus on Mr. Amos to demonstrate the dispatcher position could be modified to accommodate his physical limitations, contrary to the Worker's Compensation Act, R.S.B.C. 1996, c. 492 [WCA] and applicable policies.

III. issues

- [11] The petition raises three issues:
- (1) whether WCAT's application of Policy #40.12 was patently unreasonable;
 - (2) whether WCAT's reliance on the VRC's evidence was patently unreasonable; and
 - (3) whether WCAT imposed an onus on Mr. Amos to prove his case.

IV. background

- [12] The background in this matter is set out in both Mr. Amos's submissions and the record filed by the Tribunal. Initial objections to some portions of the affidavit of Mr. Amos were withdrawn, as counsel for Mr. Amos did not refer or rely upon those portions of the affidavit in support of his argument. The background is accordingly set out without reference to those materials.

- [13] Mr. Amos was employed as a truck driver in the logging industry. He grew up in logging camps and a small fishing village on the east side of Northern Vancouver Island. Starting in 1976 and for most of his working career he worked as an off-highway truck driver, primarily in the logging industry, working in remote areas and driving on isolated logging roads.
- [14] On October 17, 1997, Mr. Amos was struck from above by a heavy falling log, which knocked him forward onto his face and chest. He suffered from a concussion and was treated for several vertebra compression fractures. He applied for and was originally provided with wage loss benefits through the Board. His case was also referred to the Board's disability awards department for an assessment of his entitlement to a permanent partial disability award and was originally awarded on a loss of function basis an award based on 2.64% of total disability.
- [15] As Mr. Amos was unable to return to his pre-injury work as a truck driver on account of his injuries, in 2001, the Board referred him to a VRC, Timothy M. Jeeves. The VRC referred Mr. Amos to an occupational therapist for a Functional Capacity Evaluation ("FCE") to assess his abilities to return to work. In the letter of referral, dated January 19, 2001, the VRC referred the occupational therapist conducting the evaluation to several potential positions for consideration. One of these was listed as "NOC 1475: Dispatcher". Underneath this heading, the VRC stated:

To minimize the sitting component of this occupation, the worker could be provided a hands-free telephone to facilitate his being able to stand and move about as required. [Emphasis as per petitioner's submission.]

- [16] Mr. Amos was evaluated by Mr. Jeff Padvaiskas, an occupational therapist, on February 5 and 6, 2001. The occupational therapist's report dated February 23, 2001, stated among other things:

- The petitioner had a "reasonable sitting tolerance of 1 hour at a time" and that his "sitting abilities are enhanced with opportunity to move about at his discretion and with the provision of supportive back rest for his chair";
- A "reasonable standing tolerance" for the petitioner "is presently 30 to 45 minutes at a time;
- The petitioner "is able to tolerate full-time work meeting the restrictions in this report"; and
- The dispatcher position would be appropriate for the petitioner, as it "allows flexibility in body position provided he uses a headset". [Emphasis as per petitioner's submissions.]

- [17] Much of the same information was communicated to Mr. Amos by a letter, dated April 9, 2001, from the VRC. The above-noted reference to a hands-free telephone headset was however not referenced in this letter.

Dispatcher

Research indicates substantial employer demand for Dispatchers. Trucking companies reported high turnover and 50% advised they plan to hire a Dispatcher within the next six months. Taxi companies, however, reported somewhat lower employer turnover. Review of the HRDC job bank on March 30, 2001 located 4 delivery/courier companies seeking to fill dispatch positions.

I am convinced the physical requirements of this occupation are consistent with the injuries you have sustained. Dispatchers have the option to sit or stand as required and the NOC classifies the occupation as sedentary to light. The physical abilities you demonstrated during the February 5, 2001 and February 6, 2001 Functional Capacities Evaluation further established the appropriateness of this occupation. The evaluator concluded you are capable of meeting the physical requirements of employment as a Dispatcher.

Research has confirmed your qualifications for employment as a Dispatcher. The requisite skills include good telephone manner and good English. Good people skills are also a must. A number of employers confirmed a preference for individuals like yourself, with a background in the trucking industry or ex-drivers. InterUrban Delivery suggested a professional driving background "ensures a good understanding of the nature of the business" including geographic knowledge, time requirements, and safety legislation and documentation. Your computer skills are also considered an asset.

[Emphasis as per petitioner's submissions.]

- [18] The letter also noted the decision was "based on recent labour market research conducted of Langley, Surrey, Maple Ridge and Fraser Valley employers" and that a "minimum of eight to ten employers per occupation were contacted and government labour market literature was reviewed."
- [19] On receipt of these findings, Mr. Amos advised the VRC he was not able to meet the demands of the occupations described in the FCE, that these positions were not reasonably available to him, and as they pay significantly less, the long-term earnings potential would not restore what had been accepted on his claim.
- [20] Despite this, in a memorandum dated April 11, 2001, the VRC determined the dispatcher position was suitable. As a result of the VRC's determination, the Board ceased to provide any wage-loss benefits to Mr. Amos following a 12-week job search period. During the job search period, Mr. Amos applied for at least five potential employers each day (25 per week) as required by the Board, but without success. Following the conclusion of his job search assistance benefits, Mr. Amos continued to apply for work as a dispatcher with hundreds of trucking companies between 2001 and 2004.
- [21] Following the conclusion of the wage loss and job search assistance benefits, Mr. Amos's claim was referred back to the Board's Disability Award Department for a reassessment of his permanent partial disability pension. By letter, dated January 30, 2004, the Board advised Mr. Amos it had reassessed his permanent partial disability pension as 5.7% of total

disability, including an additional 2.5% for chronic pain, plus age adaptability. The award was based on a loss of function basis, rather than a loss of earnings ("LOE") method, and referred to a previous November 21, 2001 letter by the VRC stating he possessed sufficient skills to access physically suitable employment within the next three to five years.

- [22] Mr. Amos requested a review of the January 30, 2004 decision to the Board's Division, the first level of appeal. In a decision dated September 27, 2004, the review officer determined Mr. Amos had the skills to obtain dispatcher work, based on the VRC's assessment that Mr. Amos "has some basic computer skills which are transferrable and experience in the trucking industry". However, she found that because of Mr. Amos's "limited computer skills", his maximized earning capacity would be in the range of \$13.00 an hour. Therefore, she found that the work of a dispatcher was "suitable and reasonably available and that the maximized earning capacity should be based on \$13.00 an hour" and referred the issue of Mr. Amos's long-term wage rate back to the Board for further investigation.
- [23] Mr. Amos appealed the September 27, 2004 Review Decision to the respondent Tribunal. An initial decision by the Tribunal was issued on February 8, 2006, but was subsequently set aside as void, after Mr. Amos successfully applied for reconsideration.
- [24] In early 2005, due to his inability to obtain a dispatcher position, Mr. Amos sent several questionnaires out to employers who had posted dispatcher positions, requesting information about the requirements of the job, including how long the dispatcher would have to sit at a desk, and whether it was possible to reduce this requirement. A few employers returned completed questionnaires to him, indicating the dispatcher position required the employee to sit for at least seven hours per day and often more, and that there was no way of modifying this other than taking breaks.
- [25] Mr. Amos also sent a further survey to several trucking companies asking them whether they would agree or disagree that "giving the Dispatcher a wireless phone-headset would reduce the amount of time a Dispatcher has to sit to perform his/her duties". The companies that responded answered that they "disagreed".
- [26] In March 2005, Mr. Amos also commissioned his own Sitting Tolerance Assessment by Julie Obodzinski ("STA"), Physiotherapist. In a report, dated March 1, 2005, she concluded Mr. Amos had the ability to tolerate sitting in a reclined position for up to two hours, but would not be able to sit for a full work day. She also noted that "[u]pright sitting was not well tolerated by Mr. Amos for more than 7 minutes at which frequent weight shifts and position changes are noted" and that he indicated pain, fatigue and shakiness if required to maintain an upright posture. Therefore, she stated that should Mr. Amos return to work, it would be necessary to sit in an easily adjustable and reclining chair.
- [27] By letter, dated April 14, 2008, the Board's disability awards department advised Mr. Amos his permanent partial disability pension would be based on the loss of function, rather than the LOE method, as this provided the higher of two figures using the two methods. The letter attached a memorandum, dated March 20, 2008, that noted as the review officer found that

the work of a dispatcher was both suitable and reasonably available, Mr. Amos's maximized earning capacity should be based on the figure of \$13.00 per hour, resulting in a pension award of \$54.21 per month.

WCAT Appeal

- [28] Mr. Amos requested a review of the April 14, 2008 decision to the Board's Review Division. In submissions, dated August 21, 2008, Mr. Amos's adviser provided copies of evidence indicating the position of a dispatcher was not physically suitable for Mr. Amos, given his identified limitations from his injury, nor reasonably available given Mr. Amos's actual job experience and skills. She submitted new evidence to the Review Division, including:
- (1) The STA that Mr. Amos had commissioned in March 2005, indicating he had the ability to tolerate sitting in a reclined position for only up to two hours, provided he had frequent rest breaks, that he would not be able to tolerate sitting for a full work day, and "[u]pright sitting was not well-tolerated by Mr. Amos for more than 7 minutes".
 - (2) The questionnaires Mr. Amos sent out to employers who had posted available dispatcher positions, requesting information about the requirements of the job, which indicated the dispatcher position required the employee to sit at a desk for at least seven hours per day, and often more, and there was no way of modifying this other than taking breaks; and
 - (3) Several of the completed surveys Mr. Amos had sent to trucking companies, indicating that they did not think that "giving the Dispatcher a wireless phone-headset would reduce the amount of time a Dispatcher has to sit to perform his/her duties".
- [29] In a review Decision, dated December 2, 2008, the review officer confirmed the April 14, 2008 decision and Mr. Amos's permanent disability wage rate on the basis that the Board's decision and reasoning were consistent with the September 27, 2004 Review Division decision that found the work of a dispatcher was both suitable and reasonably available.
- [30] Mr. Amos appealed the December 2, 2008 Review Division decision to the Tribunal. In the course of the appeal, Mr. Amos provided a letter, dated March 1, 2009, reiterating his concerns that the designation of "professional driver" by the VRC was inaccurate, as it attributed skills and knowledge that he did not have. He also advised the original FCE that had been conducted in 2001 did not appropriately evaluate him for the dispatcher position, as actually described in the National Occupational Classification (the "NOC"), as it was based on the assumption that the position could be modified to use a phone headset and that he could sit in a reclined position. This did not address the actual job requirement for a dispatcher to use a computer, which would require sitting for long periods in any event, and which would require him to lean forward rather than recline.
- [31] In his March 1, 2009 letter, Mr. Amos also advised in his research into dispatcher positions and attempts to pursue employment, he had found he may require ten years of relevant experience in the field, and dispatcher positions required numerous skills he did not have,

such as extensive knowledge of highway regulations, weights and measures, extensive geographic knowledge, working knowledge of bill and bills of lading, and familiarity with loading, unloading, and the operation of different configurations of highway vehicles. He also reiterated he did not have the required computer skills necessary for the dispatcher position, as his computer skills were limited to using the computer to go on the internet using his mouse, and leaning on his left elbow to "hunt and peck (one finger)".

- [32] Mr. Amos's workers' advisor subsequently sent further submissions to the WCAT dated April 23, 2009. In these submissions, she reiterated Mr. Amos lacked the skills and qualifications for the dispatcher position given his lack of knowledge and relevant experience in the trucking industry, limited computer skills, and his identified physical limitations for sitting more than one and a half hours or two hours, as outlined in the 2001 FCE and the March 2005 STA.
- [33] Along with her letter, Mr. Amos's workers' advisor enclosed copies of the March 2005 Sitting Tolerance Assessment, surveys and questionnaires Mr. Amos had received from trucking companies, indicating dispatchers were required to sit for seven hours a day and a phone headset would not reduce the amount of time a dispatcher would have to sit. She also provided copies of sample job dispatcher job postings from the HRDC website, showing that dispatcher positions required knowledge of specific computer software programs that Mr. Amos did not have.
- [34] On August 28, 2009, in the Original Decision at issue in this judicial review the WCAT Vice Chair confirmed the December 2, 2008 Review Division decision, finding that the position of a dispatcher was physically suitable and reasonably available to Mr. Amos over the long term.
- [35] Mr. Amos requested a reconsideration of the Original Decision, submitting the decision contained a jurisdictional defect in relation to its conclusion that the position of a dispatcher was suitable and reasonably available to him over the long term.
- [36] On June 14, 2011, a reconsideration panel of the WCAT issued its decision, confirming the Original Decision. The parties have agreed the Reconsideration Decision is not the object of review in this case (see Fraser Health).
- [37] Mr. Amos brought his judicial review of these decisions by the Tribunal. The judicial review is however, as agreed by the parties, focused on the Original Decision of August 28, 2009.

V. statutory framework

- [38] The statutory framework and policies were helpfully outlined by counsel for the Tribunal. I will set that out in part below.

- [39] The WCA was significantly changed by amendments in 2002. The Workers Compensation Amendment Act, S.B.C. 2002, c. 56, changed benefits levels from 75% of gross average earnings to 90% of average net earnings and limited entitlement to LOE awards only to exceptional circumstances. The Workers Compensation Amendment Act (No. 2), S.B.C. 2002, c. 66, changed the review and appeal structure, and created WCAT.
- [40] Mr. Amos was injured in 1997. Therefore, under the transitional provisions set out in s. 35.1 of the current WCA, sections of the WCA (and Board policy) relating to permanent disability awards in force at the time of his injury apply to the present matter.
- [41] The WCA establishes a comprehensive no-fault insurance scheme in BC, under which the Board pays compensation for injuries arising out of, and in the course of, a worker's employment: s. 5(1). The scheme is wholly funded by BC employers and administered by the Board.
- [42] The WCA establishes and empowers the Board to administer workers' compensation in BC. The Board has exclusive jurisdiction to make decisions and set policies regarding compensation, assessment, vocational rehabilitation, and occupational health and safety.
- [43] Part 1 of the WCA contains the compensation scheme, empowers the Board including its policy making function, and contains the Board's internal review process.
- [44] At the time of Mr. Amos' injury, s. 16 of the WCA provided the Board may take measures to aid injured workers with their return to work.
- [45] At the time of Mr. Amos' injury, s. 23(1) of the WCA provided where a worker had permanent partial disability resulting from a work injury, the Board was obliged to estimate the worker's resulting percentage of permanent impairment and pay the worker compensation accordingly.
- [46] At the time of Mr. Amos' injury, s. 23(2) of the WCA provided the Board could compile a rating schedule for percentages of permanent impairment resulting from an injury. At the time of Mr. Amos' injury, s. 23(3) of the WCA provided that where the Board considered it more equitable, it could award compensation based on 75% of a worker's LOE. LOE is measured by comparing the worker's pre-injury average weekly earnings against either actual or estimated post-injury average weekly earnings.
- [47] Section 96.2 of the current WCA provides for internal review of decisions through the Review Division of the Board.
- [48] Part 4 of the current WCA enables WCAT, and contains the appeals process. WCAT is an external and independent appeal body established under the WCA, and has exclusive jurisdiction to hear appeals from decisions of the Board. WCAT's decisions are final and binding.

- [49] An appeal to WCAT is described by counsel for the Tribunal as a hybrid proceeding often referred to as a "rehearing". The panel considers the evidence on the record as well as the proceedings before the Review Division (s. 245(3), current WCA), and may receive new evidence "whether or not that information would be admissible in a court of law": s. 246.1(1) of the WCA; *Goghari v. Saarela*, 2014 BCSC 1667 at para. 83.
- [50] Section 246 of the WCA establishes procedure for WCAT appeals. Section 246(2)(c) gives WCAT power to inquire into the matter under appeal. Section 246(2)(d) allows WCAT to request the Board to further investigate a matter relating to an appeal. Section 246(3) allows WCAT to refer a matter back to the Board for determination if it should have been, but was not, previously determined.
- [51] Section 250(2) provides that WCAT "must make its decision based on the merits and justice of the case, but in doing so the appeal tribunal must apply a policy of the board of directors that is applicable in that case."

Policies

- [52] The policies applicable to Mr. Amos's claim are found in the Rehabilitation Services and Claims Manual Vol. I ("RSCM I"); the policy manual in force at the time of his injury.
- [53] Policy 40.00 directs the Board to assess pensions using a "dual system". This involves measuring the worker's permanent functional impairment under Policy 39.00 ("PFI Award"), and then calculating the worker's projected LOE pursuant to Policy 40.10 ("LOE Award"). The Board then compares the PFI and LOE Awards, and grants the worker the higher of the two.
- [54] Pursuant to Policy 40.10, the Board calculates the LOE Award by establishing the worker's pre-injury average earnings and then comparing pre-injury average earnings to projected post-injury earnings. Projected post-injury earnings are calculated by establishing a worker's long-term estimated average earnings in a suitable and reasonably available occupation. The possible LOE Award is 75% of the difference between pre and post-injury average earnings.
- [55] Policy 40.12 provides guidance to the Board in determining suitable and reasonably available occupations. This policy is particularly germane to the present matter. It states in part:

The purpose of direction 2 in the assessment formula set out in #40.10 is to arrive at a long-term projection of the earning capacity of the worker. The evidence of the Rehabilitation Consultant should relate to jobs that are suitable and reasonably available to the claimant in the long run and the conclusion of the Adjudicator in Disability Awards should be concerned with such of those jobs as will maximize the claimant's long-term earnings potential.

It is not satisfactory simply to take the wage rate in a job to which the claimant actually returns. For a variety of reasons, the long-term employment prospects of a claimant may be different from the most immediate job opportunities. On the other hand, 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.

In advising on the suitability of the claimant for reasonably available jobs, the Rehabilitation Consultant must have regard to the limitations imposed by the residual compensable disabilities of the claimant and assess the claimant's earnings potential in light of all possible rehabilitation measures that might be of assistance, including the possibility of retraining or other measures that may be appropriate to the particular worker.

The guidelines set out below are followed in determining suitable and reasonably available jobs for a claimant:

2. Regard may be had to other jobs than the present one with the same employer to which the worker might in future progress and this is not limited to jobs which the claimant has a right to because of seniority. The fact that there is a formal or informal competition for a higher job is not a bar to its being considered. On the other hand, it would not be fair to assume that a claimant will receive all possible promotions that might theoretically be open. The Board is only concerned with jobs that are, in practice, reasonably available. Thus, the Board will, in general, only have regard to higher paying jobs which a person in the claimant's present job would ordinarily be expected to obtain.
3. A reasonably available job must be one that the worker is fit to undertake, and which would not involve adverse health consequences either immediately or in the long run compared with other jobs.
4. Where a suitable job is reasonably available over the long term, it is taken into consideration even though it is not reasonably available at the time of assessment because of general economic conditions.

[Emphasis added.]

[56] The Board's decision that Mr. Amos could return to work as a dispatcher is based on a vocational rehabilitation plan. The objective of vocational rehabilitation services is to assist injured workers return to work, and provide assistance reasonably necessary to overcome the vocational impact of a worker's injury: Policy 85.40. The vocational rehabilitation process has five sequential phases; each provides escalating levels of vocational training and assistance: Policy 87.20. In the case at bar, Mr. Amos was provided with Phase III vocational rehabilitation, which provides assistance with returning to work in the same or related industrial sector, and capitalizes on the worker's directly transferrable skills.

VI. The original decision

[57] The Decision at issue in this case reads in part as follows:

- [65] On the issue of whether the position of dispatcher was suitable and reasonably available to the worker, the appeal is denied and the decision of the Review Division is confirmed.
- [66] The vocational rehabilitation consultant (VRC) determined the worker had the physical capacity to work as a dispatcher, noting the physical limitations identified in the FCE, which said the worker had a sitting tolerance of approximately one hour and a standing tolerance of 30 to 45 minutes. The FCE report said that according to the NOC criteria, the worker was capable of limited, light and medium strength work demands. His limitations were noted in the report, and the functional capacity evaluator concluded the worker was capable of working as a dispatcher, as it allowed flexibility in body position.
- [67] The Review Division, in its September 27, 2004 decision, accepted the functional capacity evaluator's opinion on that matter, although it disagreed with the conclusion that a driving instructor position would also be suitable. The Review Division noted that any type of work that would require sitting for long periods would not be appropriate. The Review Division said the worker had advised the VCR that he was computer literate and worked extensively on his computer in his leisure time. The Review Division noted that employers had identified experience in trucking as a preferred factor as well. The Review Division concluded the dispatcher job was both suitable and reasonably available to the worker and he would maximize his earnings at that job at \$13.00 an hour.
- [68] At the time of its decision, the Review Division did not have the benefit of the sitting tolerance assessment. That report said the worker demonstrated the ability to sit in a chair for a total of 2 hours during his assessment, during which he was able to sit for 1 ½ hours at a time before taking a break. He was, the report said, able to sit in a reclined position, but tolerated upright sitting less well. The report said the worker could sit in an adjustable chair that could be positioned in and out of a reclined position, and that he would not be able to tolerate sitting for an entire work day, at that time. The report said the worker would benefit from a rehabilitation program that would increase his sitting endurance.
- [69] The worker's representative has argued that this evidence supports a conclusion the dispatcher job is not physically suitable for the worker. I do not agree. The sitting tolerance report indicates, in fact, the worker has a sitting tolerance somewhat longer than that identified in the FCE. While I acknowledge the worker will have challenges returning to the workforce after a prolonged absence, and as the sitting tolerance report indicated, he may need additional rehabilitation to allow him to reach longer sitting tolerance hours, the evidence, on the whole, supports the conclusion the dispatcher job is physically suitable for the worker. He may have to be accommodated, of course, by means of a chair that can recline. I do not see any indication in the survey results from employers that were provided by the worker's representative, that they would not be able to accommodate him in that matter. I do not find the sitting-tolerance report is materially different than the conclusions of the FCE and I accept the VRC's opinion that a position of dispatcher would be physically suitable for the worker.

[70] On the question of whether that occupation would be reasonably available to the worker, again, I accept the opinion of the VRC. The worker's concern that his driving experience is limited to off-highway driving does not appear to be a bar to his employment, based on the qualifications identified by the VRC. The worker's lack of experience in urban areas is something that could be overcome by additional training or experience, as is any increase in the level of his computer skills. The test set out in policy item #40.12 of the RSCM I is, as the worker's representative noted, whether the occupation is reasonably available to the worker in the long term. Given the worker's job experience and other skills, as identified in the VRC, I find the position of dispatcher is reasonably available to the worker over the long term.

VII. analysis

[58] The applicable standard of review of the Original Decision is patent unreasonableness. A useful summary of the principles to be applied by the court under the patently unreasonable test is set out at para. 33 of *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80 [Speckling]. In that case, Levine J.A. said:

[33] Having confirmed the correctness of the patently unreasonable standard of review, I agree with the chambers judge's summary of the approach to be taken in applying that standard. He noted the following principles (at para. 8):

1. The standard of review is that of patent unreasonableness: *Canada (Attorney General) v. P.S.A.C.* (1993), 101 D.L.R. (4th) 673 (S.C.C.).
2. "Patently unreasonable" means openly, clearly, evidently unreasonable: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
3. The review test must be applied to the result not to the reasons leading to the result: *Kovach v. British Columbia (Workers' Compensation Board)* (2000), 184 D.L.R. (4th) 415 (S.C.C.).
4. The privative clause set out in s. 96(1) of the Act requires the highest level of curial deference: *Canada Safeway v. B.C. (Workers' Compensation Board)* (1998), 59 B.C.L.R. (3d) 317 (C.A.)
5. A decision may only be set aside where the board commits jurisdiction error.
6. A decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not: *Douglas Aircraft Co. of Canada Ltd. v. McConnell*, [1980] 1 S.C.R. 245, and *Board of Education for the City of Toronto v. Ontario Secondary School Teachers' Federation et al* (1997), 144 D.L.R. (4th) 385 (S.C.C.).

[59] The WCA requires a high level of curial defence. The review test must be applied to the result; not to the reasons leading to the result.

- [60] The Tribunal essentially argues the record and the result establish there was some evidence for the conclusion at issue. The petition therefore should be dismissed. It references *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 16:
- [61] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
- [61] In response to Mr. Amos's argument that WCAT failed to apply applicable policies in the RSCM I, the respondent says the question of whether WCAT's interpretation and application of Policy 40.12 is patently unreasonable is a finding of mixed fact and law and is entitled to significant deference from this Court: see *Combs v. Teck Cominco Metals Ltd.*, 2014 BCSC 572 at paras. 87-91.
- [62] The respondent say Policy 40.12, read with s. 250(4) of the WCA, requires WCAT to consider whether it is at least as likely than not that a particular occupation is suitable and reasonably available to a worker in the long term. It follows from *Young v. British Columbia (Worker's Compensation Appeal Tribunal)*, 2011 BCSC 1209 [Young] and *Othen v. Worker's Compensation Appeal Tribunal*, 2012 BCSC 818 [Othen] this Court must consider whether there is some evidence on which WCAT could have relied in determining Mr. Amos would likely obtain employment as a dispatcher over the long term.
- [63] The respondent notes there is conflicting evidence in the petitioner's file as to whether the occupation of dispatcher is suitable and reasonably available. The question however for the reviewing court is whether there is some evidence in the record on which WCAT's findings are based: *Speckling* at paras. 33, 37.
- [64] In support of its position, the respondent pointed to the record and referred to a number of items, including:
- A Physical Capacity Evaluation of December 10, 1998;
 - Dr. Cameron's consult report of August 24, 2000;
 - Dr. Milewski's physician's progress report of November 2, 2000;
 - Dr. Evan's November 28, 2000 memo;

- An FCE report dated February 23, 2001, which was relied upon by WCAT in coming to its decision and referenced in para. 66;
- A Career Redirection Final Report Addendum;
- A March 22, 2001 memo from the VRC;
- An April 11, 2001 memo;
- An April 12, 2001 letter from the VRC, the contents of which are reiterated in an August 9, 2011 letter;
- A May 14, 2001 memo from the VRC;
- A June 14, 2001 consult report;
- A July 10, 2001 physician's progress report;
- A specialist's report from Dr. Patel of July 26, 2011;
- An August 21, 2001 phone memo from the VRC;
- Two memos dated November 2 and 13, 2001, from the VRC;
- A permanent Functional Impairment examination report dated December 4, 2005;
- A STA of March 1, 2005, provided by Mr. Amos to WCAT in support of his appeal and discussed at para. 68 of the WCAT decision; and
- A phone memo of November 25, 2008.

[65] In response to Mr. Amos's argument that WCAT solely relied on the VRC's opinion, WCAT notes the panel discussed and relied on both the VRC's evidence and on other evidence in the claim file. At paras. 68 and 69 of the Original Decision, WCAT noted the STA provided by Mr. Amos to WCAT supports the VRC's opinion. At para. 66, the panel discussed the results of the FCE and explained this evidence supports the VRC's conclusion. WCAT also noted the FCE had suggested the dispatcher job could be modified with a headset.

[66] The respondent says WCAT was entitled, in any event, to rely upon the expert opinion of the VRC in coming to its decision. As explained in *Martin v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2013 BCSC 2210 at para. 42 [Martin]:

The WCAT panel on the Original Decision was Vice-Chair Michael Carleton. He had before him a body of materials, including the Employability Assessment dated June 15, 2001, which was prepared by the vocational rehabilitation consultant, Vincent Russell. The WCAT panel was entitled to rely on the experience and expertise of the vocational rehabilitation consultant with respect to issues relating to the question of what types of employment would be suitable for Mr. Martin in light of his disabilities, and what training or other rehabilitation he would need for such employment. [Emphasis added.]

- [67] In summary, the respondent says, there is some evidence in the record on which WCAT could have found that the occupation of dispatcher was suitable for Mr. Amos. Mr. Amos had some tolerance for sitting which was improved when he was able to alternate between sitting and standing, and sit in a reclined position. There is some evidence suggesting Mr. Amos did in fact sit for several hours a day doing computer work on his own. There is also evidence from the VRC and from the FCE that a dispatcher job could be modified to be suitable for Mr. Amos.
- [68] There appears to be an overlap between the issues as formulated by the parties. That will become apparent as part of my analysis.
- [69] I will deal first with the issue of whether WCAT's application of Policy 40.12 was patently unreasonable. In this context, the Court in Young considered whether it was patently unreasonable for the Tribunal to rely on a VRC opinion that was only based on labour market statistics about the availability of jobs in general; without considering whether the worker in that case was "competitively employable". The Court concluded the Tribunal was required to apply policies such as RSCM I 40.2, and a failure to address whether a worker is competitively employable renders a decision patently unreasonable.
- [70] The Court in Young said at paras. 64-66:
- [64] The Vice Chairman did not address the concept contained in the policy - that is, whether the petitioner is competitively employable. It is not enough to refer only to the petitioner's subjective belief about barriers, something that may indeed be reasonable to discount. In his decision, a portion of which is set out above, he refers at para. 78 to the VRC's expertise, and accepts her opinion. Reference to the VRC's reasons, also set out above, demonstrates that she considered only statistics from government job sites. In neither decision is reference made to the likelihood of the petitioner, with her particular disability, obtaining such a job if there are always numerous better qualified applicants. That, according to Policy #40.12, is the essential consideration when determining if a job is "reasonably available."
- [65] The Board does not have to show that the petitioner would get immediate employment, or even that she would get employment within a reasonable time of completing her training. However, they must consider whether over the long term, given the petitioner's age, lack of experience, and functional limitations, including distractibility, impatience, fatigue and concentration deficit, is it even a possibility, let alone "likely" that anyone would ever hire her as a bookkeeper if there are other part time bookkeepers available?
- [66] That question must be addressed and answered by WCAT by reference to their policy which they are bound to apply. It was not. To fail to do so renders the decision patently unreasonable.
- [71] Policy 40.12 requires the Tribunal to consider the real likelihood of this particular worker getting a job. RSCM I 40.12 notes amongst other similar comments that: "the Board is only concerned with jobs that are, in practice, reasonably available".

- [72] In this case, I conclude a review of the material establishes the Vice Chair in the Original Decision failed, as required by Policy 40.12, to consider the competitive employability of Mr. Amos. As set out in the policy, a reasonably available job is one that is available to the claimant; not just any job positions in which there are vacancies. That question must be answered as per the policy by considering whether the worker with the particular disability is likely to obtain such a job. In this case, as in *Young*, I do not find relevant characterizations such as "age, lack of experience and functional limitations" to have been taken into account.
- [73] It is apparent from the record that generalizations were utilized about the availability of dispatch jobs in general, without any consideration of whether it was likely that Mr. Amos, with his personal characteristics, would be "likely" to be hired. As in *Young*, reference is made to statistics and market research. There is simply no consideration of the competitiveness or employability of an individual who requires modifications to the dispatch position.
- [74] This undermines the fundamental conclusion that the position of trucking dispatcher was suitable and reasonably available to Mr. Amos. The Tribunal's failure to consider whether it was likely that a trucking company would hire Mr. Amos is a similar error to that in *Young*. There is no reference in the decision to the likelihood of Mr. Amos, with his particular disability and the need for the job to be modified, that anyone would hire him as a dispatcher. The extensive material from the record referred to by the respondent did not correct or reflect any evidence that would support this critical point.
- [75] Moreover, it is apparent from a review of the decision the Vice Chair in effect relied solely on the opinion of the VRC. This is similar to the defect found to be apparent in *Young*. The Vice Chair acknowledged challenges for Mr. Amos but accepted the VRC's opinion, both that a position of dispatcher would be physically suitable for the worker and the occupation would be reasonably available.
- [76] This, I note, overlaps with the argument of Mr. Amos that the Tribunal's decision was based primarily on the VCR's opinion - which was based on facts not proven. This, Mr. Amos argues, also renders the decision patently unreasonable.
- [77] I agree, as per the respondent's argument, it is within WCAT's exclusive jurisdiction to weigh evidence and make findings of fact based on the evidence. On judicial review, this Court is not to reweigh the evidence that was before WCAT and make its own findings regarding this evidence: *Davis v. WorkSafe BC*, 2013 BCSC 476, at para. 74, *aff'd* 2013 BCCA 418 at para. 8. The question for this Court is simply whether there was some evidence before WCAT supportive of an impugned finding. As per *Speckling*, only if there is no evidence, can the decision be found to be patently unreasonable. In this case, the respondent says the Tribunal based its decision on other evidence as well and referenced in particular the FCE.

[78] I turn to a consideration of that evidence. In a letter, dated January 19, 2001, the VCR refers Mr. Amos for an FCE. He notes four possible occupations, including dispatcher. As part of that, he says:

To minimize the sitting component of this occupation, the worker could be provided a hands-free telephone to facilitate his being able to stand and move about as required.

[79] This comment is the extent of the evidence that the job could be modified. Unlike the other positions outlined in his letter of reference for the FCE, the VRC did not provide any further information concerning this position. He provided no explanation of what basis he was making these comments concerning the use of a hands-free telephone.

[80] On February 23, 2011, the FCE referenced the provision of a headset when noting the dispatcher position "allows flexibility in body position provided he uses a headset". This, in turn, was based on the VRC's statement of January 19, 2001, that "the worker could be provided a hands-free telephone" to minimize the sitting component of the dispatcher position.

[81] On April 11, 2001, the VRC repeated his original statement in his ultimate conclusion the dispatcher position was suitable and would be reasonably available to the worker. He said:

Availability

Research indicates this job is fairly available. Companies contacted in the trucking industry reported high turnover and 50% advised they plan to hire a Dispatcher within the next six months. Taxi companies, however, reported lower employee turnover. Review of the HRDC [Human Resources Development Canada] job bank on March 30, 2001 located 4 delivery/courier companies seeking to fill dispatch positions.

Suitability

This occupation is suitable as it is within all of the worker's medical restrictions and limitations. The worker has the option to sit or stand as required. This occupation is classified in the limited category (sedentary to light) by the NOC. Mr. Amos demonstrated abilities as observed during the February 5, 2001 and February 6, 2001 Functional Capacities Evaluation clearly established he possesses the physical abilities to meet this occupation.

The February 23, 2001 FCE Report concluded the worker's demonstrated physical abilities are consistent with the occupation Dispatcher. It is noted "this position allows flexibility of position provided he uses a headset. He would benefit from standing at his discretion." The worker would not be exposed to prolonged sitting or standing.

Qualifications

Mr. Amos is qualified to access employment as a Dispatcher. The requisite skills include good telephone manner and good English. Good people skills are also a must. A number of employers confirmed a preference for individuals with a background in the trucking industry or ex-drivers. InterUrban Delivery suggested a professional driving background "ensures a good understanding of the nature of the business" including geographic knowledge, time requirements, and safety legislation and documentation. Computer skills are an asset. Mr. Amos has reported he is computer literate and works extensively on his computer during his leisure time.

[Emphasis per petitioner's submissions.]

- [82] There appears to be, as the factual basis for this opinion, simply a comment the dispatcher position could be modified through the use of the headset. There is nothing to reference the reality of this being an acceptable modification in the context of dispatching duties and the requirement for sitting a large part of the work day. The VRC does not provide an essential opinion as to the reality of this modification in the context of this position.
- [83] The sole basis for the conclusion the dispatcher position could be modified was the original comment from the VRC. This demonstrates the circular pattern evident in this conclusion. The original comment does not have any factual basis and permeates the entire matter from this time forward.
- [84] The role of the Court in reviewing the evidence of the Tribunal is not to second-guess or assess sufficiency of evidence of the Tribunal and the Tribunal can accept proper expert evidence. This particular statement, however, is crucial to and underpins the entire decision. While the Tribunal may have an ability to accept evidence that is not accepted in court, a fundamental problem occurs if there is no factual basis evident on the record for this conclusion.
- [85] As per Martin, the WCAT panel was entitled to rely on the experience and expertise of the VRC with respect to the types of employment suitable for Mr. Amos in light of his disabilities. WCAT examined and accepted the factual underpinnings of the VRC's opinion as part of its conclusion. The fundamental assumption that permeated his opinion, however, had no evidence to support his conclusion the position in question could be modified. It was accordingly an assumption without factual foundation. A review of the record extensively referred to by the Tribunal, does not reveal any evidence supportive of this conclusion. Indeed, the record simply repeats this initial rather fundamental assumption of fact.
- [86] As noted in Young, there is no onus on the Board to demonstrate that Mr. Amos had the prospect of immediate employment. The Tribunal, however, must consider whether, given the particular characteristics and functional limitations, it was likely that Mr. Amos would be hired as a dispatcher. Policy 40.12 read with s. 250(4) of the WCA requires WCAT to consider whether it is at least as likely than not that a particular occupation is suitable and reasonably available to the worker in the long term. The Tribunal failed to consider whether

it was "likely" a trucking company would hire the petitioner given his personal circumstances, including his need for an "accommodated" dispatch position. The consideration in this case, in my view, did not reference his personal circumstances, including the need for a modification of the position at issue.

[87] I conclude therefore the Original Decision concerning Mr. Amos's entitlement to a LOE pension is patently unreasonable because of a failure by WCAT to apply Board policies and consider the merits of the case within those policies: see Young at para. 51. It is therefore unnecessary for me to deal with the final issue of a reverse onus, as identified by Mr. Amos in this matter.

[88] The decision of WCAT that the position of dispatcher was suitable and reasonably available is accordingly set aside. The issue of Mr. Amos's pension entitlement is referred to a differently constituted WCAT panel for a hearing de novo.

[89] As neither party sought costs, there will be no order for costs.

"Burke J."

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