COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Jozipovic v. British Columbia (Workers' Compensation Board),* 2012 BCCA 174

Date: 20120426
Docket: CA038929

Between:

Marko Jozipovic

Respondent
(Appellant on Cross Appeal)
(Petitioner)

And

Workers' Compensation Board

Appellant
(Respondent on Cross Appeal)
(Respondent)

And

Workers' Compensation Appeal Tribunal

Respondent
(Respondent on Cross Appeal)
(Respondent)

Corrected Judgment: The text of the judgment was corrected at paragraph 59 on April 26, 2012

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Groberman

On appeal from Supreme Court of British Columbia, March 18, 2011
(*Jozipovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2011 BCSC 329, Vancouver No. S098894)

Counsel for the Appellant: L.M. Courtenay, S.A. Nielsen

Counsel for the Respondent Jozipovic: J.K. Hadley, K. Love

Counsel for the Respondent Workers' Compensation Appeal Tribunal:	T.J.H. Martiniuk
Place and Date of Hearing:	Vancouver, British Columbia November 22 and 23, 2011
Place and Date of Judgment:	Vancouver, British Columbia April 26, 2012

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] The Workers' Compensation Board ("WCB") declared Mr. Jozipovic to be entitled to permanent partial disability benefits under the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 effective October 25, 2004, as a result of a back injury he suffered while working as a steel fabricator earlier that year. The WCB assessed his compensation entitlement using the "Functional Impairment Method", its usual approach for making such assessments. The Functional Impairment Method considers the nature and severity of the worker's injuries to determine his or her degree of functional impairment, expressed as a percentage. The percentage is then applied to the worker's average pre-injury earnings to arrive at the amount of compensation. This method does not attempt to directly assess the actual financial loss of the worker. Mr. Jozipovic sought to have his entitlement assessed by the "Loss of Earnings Method", which the Board is authorized to employ in exceptional circumstances. That method of assessment attempts to directly quantify the actual financial loss suffered by the worker as a result of his or her injuries.

[2] The assessment made by the Board was upheld on review by a reviewing officer, and on an appeal to the Workers' Compensation Appeal Tribunal ("WCAT"). Mr. Jozipovic's application for reconsideration by the WCAT was also unsuccessful. The decisions of the WCB and the WCAT to assess compensation according to the Functional Impairment Method were based on binding policy established by the board of directors of the WCB.

[3] Mr. Jozipovic applied for judicial review of the WCAT decisions on two grounds. First, he contended that the WCAT decisions underestimated the degree of his functional impairment by failing to take into account his loss of range of motion in the lumbar spine. He was successful on that argument, and no appeal has been brought in respect of the Supreme Court's order on that aspect of the case.

[4] Mr. Jozipovic also argued that the Board's policy with respect to the use of the Loss of Earnings Method is overly restrictive and not supported by the *Workers Compensation Act*. The chambers judge agreed, and declared the impugned decisions to be patently unreasonable in applying the policy. She remitted the assessment of compensation to the WCAT, with directions to reconsider the method of assessment without regard to the invalid elements of the policy.

[5] This appeal raises several issues. The appellants argue that the judge erred in finding the policy to be inconsistent with the statute, while the respondent argues (by way of cross-appeal) that she should have gone further than she did in finding inconsistency. This case also raises – not for the first time – the issue of how a person affected by a binding policy adopted by the board of directors of the WCB can challenge that policy in court.

[6] Section 251 of the *Workers Compensation Act* sets out a labyrinthine appeal route from decisions of the WCB where policies adopted by its board of directors are challenged. Ultimately, that route can culminate in the board of directors being asked by the WCAT to review its policy. In *Johnson v. British Columbia (Workers' Compensation Board)*, 2011 BCCA 255, this Court considered this internal review process and identified certain inadequacies in it. Nonetheless, the Court found that the public interest is served by requiring a party to exhaust the internal process before coming to court to challenge a policy of the WCB's board of directors.

[7] The case before us is different from *Johnson* in a crucial respect. Unlike Mr. Johnson, Mr. Jozipovic did challenge the impugned policy through the internal review process. He was unsuccessful in his attempts to persuade the WCAT that the policy of the board of directors of the WCB should not be followed, however. As a result, the internal review process ended with the WCAT, which did not require the board of directors of the WCB to conduct a review of the impugned policy.

[8] The appellant says that the chambers judge erred in engaging in a review of the board of directors' policy. It argues that the board of directors has exclusive control over the establishment of policies, and that the WCAT alone has the right to determine if those policies are patently unreasonable. At most, it says, the Supreme Court can remit the matter to the WCAT with directions to reconsider its decision not to refer the matter to the next stage of the internal review process.

[9] While I recognize that both the WCB and the WCAT are entitled to deference within their spheres of jurisdiction, I am not persuaded that the courts are consigned to the role suggested by the appellant. For reasons that follow, I am of the view that the chambers judge had jurisdiction to find the impugned policy to be invalid, and, in fact, ought to have gone further than she did in invalidating the policy. I would not give effect to the claims of the WCB and the WCAT that they alone are charged with determining the reasonableness and validity of policies established by the WCB's board of directors. Accepting such a proposition would be an abdication of the supervisory role of the superior courts vis-à-vis administrative tribunals. Indeed, it is not an exaggeration to say that to accede to all of the arguments presented by the appellant would be to deny the constitutional role of the Supreme Court of British Columbia in maintaining the rule of law in this Province.

Compensation Assessment Methods and Board Policy

[10] Section 23 of the *Workers Compensation Act* sets out the methods that the WCB must use to determine the amount of compensation a worker is entitled to in respect of a permanent partial disability:

> 23.(1) Subject to subsections (3) to (3.2) …, if a permanent partial disability results from a worker's injury, the Board must
>
> (a) estimate the impairment of earning capacity from the nature and degree of the injury, and
>
> (b) pay the worker compensation that is a periodic payment that equals 90% of the Board's estimate of the loss of average net earnings resulting from the impairment.
>
> (2) The Board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.

> (3) … [I]f
>
> (a) a permanent partial disability results from a worker's injury, and
>
> (b) the Board makes a determination under subsection (3.1) with respect to the worker,
>
> the Board may pay the worker compensation that is a periodic payment that equals 90% of the difference between
>
> (c) the average net earnings of the worker before the injury, and
>
> (d) whichever of the following amounts the Board considers better represents the worker's loss of earnings:
>
> (i) the average net earnings that the worker is earning after the injury;
>
> (ii) the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury.
>
> (3.1) A payment may be made under subsection (3) only if the Board determines that the combined effect of the worker's occupation at the time of the injury and the worker's disability resulting from the injury is so exceptional that an amount determined under subsection (1) does not appropriately compensate the worker for the injury.
>
> (3.2) In making a determination under subsection (3.1), the Board must consider the ability of the worker to continue in the worker's occupation at the time of the injury or to adapt to another suitable occupation.

[11] The usual method of assessing compensation, as established by s. 23(1), is the Functional Impairment Method. The Board has compiled a rating schedule as contemplated by s. 23(2) which sets out, as a percentage of total disability, the functional impairment deemed to arise from injuries of various types and severities. The Functional Impairment Method of calculating compensation for permanent partial disability is generic in the sense that it does not consider the nature of the worker's actual or potential employment in assessing compensation.

[12] Section 23(3) of the *Act* sets out an alternative method of calculating compensation entitlement – the Loss of Earnings Method. That method considers the specific skill set and employment situation of the injured worker. It attempts to quantify the actual loss that he or she suffers. This method is, by its nature, tailored to the individual and is much more complicated to administer than the Functional Impairment Method. It is reserved for use in exceptional circumstances as set out in s. 23(3.1) of the *Act*.

[13] Section 82 of the *Act* provides for the board of directors of the WCB to set "policies" with regard to compensation. Pursuant to that section, the board of directors has established a policy governing the exercise of the discretion to use the Loss of Earnings Method of assessing compensation for permanent partial disability. The policy appears in Chapter 6 (Permanent Disability Awards) of Volume II of the *Rehabilitation Services and Claims Manual*, as Policy Item #40.00. I will refer to it, as did the chambers judge, as "Policy #40.00".

[14] The policy includes the following provisions:

> The following is a list of criteria that must be considered under section 23(3) and (3.1). Each of these criteria must be satisfied in order for a worker to be assessed under section 23(3).
>
> - The occupation at the time of injury requires specific skills which are essential to that occupation or to an occupation of a similar type or nature;
> - As a result of the compensable disability, the worker is no longer able to perform the essential skills needed to continue in the occupation at the time of injury or in an occupation of a similar type or nature;
> - The effect of the compensable disability is that the worker is unable to work in his or her occupation or in an occupation of a similar type or nature, or to adapt to another suitable occupation, without incurring a significant loss of earnings.

[15] Policies of the board of directors are in the nature of rules rather than guidelines. Under s. 99(2) of the *Act*, the WCB is required to apply the policies of the board of directors in making its decisions. The WCAT is also required to apply the policies, except as provided for in s. 251 of the *Act*:

> 251.(1) The appeal tribunal may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.
>
> (2) If, in an appeal, the appeal tribunal considers that a policy of the board of directors should not be applied, that issue must be referred to the chair and the appeal proceedings must be suspended until the chair makes a determination under subsection (4) or the board of directors makes a determination under subsection (6), as the case may be.
>
> (3) As soon as practicable after an issue is referred under subsection (2), the chair must determine whether the policy should be applied.

> (4) If the chair determines under subsection (3) that the policy should be applied, the chair must refer the matter back to the appeal tribunal and the tribunal is bound by that determination.
>
> (5) If the chair determines under subsection (3) that the policy should not be applied, the chair must
>
> > (a) send a notice of this determination, including the chair's written reasons, to the board of directors, and
> >
> > (b) suspend any other appeal proceedings that are pending before the appeal tribunal and that the chair considers to be affected by the same policy until the board of directors makes a determination under subsection (6).
>
> (6) Within 90 days after receipt of a notice under subsection (5) (a), the board of directors must review the policy and determine whether the appeal tribunal may refuse to apply it under subsection (1).
>
> (7) On a review under subsection (6), the board of directors must provide the following with an opportunity to make written submissions:
>
> > (a) the parties to the appeal referred to in subsection (2);
> >
> > (b) the parties to any appeals that were pending before the appeal tribunal on the date the chair sent a notice under subsection (5) (a) and that were suspended under subsection (5) (b).
>
> (8) After the board of directors makes a determination under subsection (6), the board of directors must refer the matter back to the appeal tribunal, and the appeal tribunal is bound by that determination.
>
> ...

The Decisions of the Workers' Compensation Board

[16] In deciding whether the WCB had discretion to assess Mr. Jozipovic's compensation entitlement by the Loss of Earnings Method, the claims adjuster accepted that Mr. Jozipovic satisfied the first of the three criteria set out in Policy #40.00. His occupation at the time of the injury (that of a "Structural Metal and Plate Work Fabricator") required specific skills that were essential to the occupation.

[17] The adjuster further accepted that Mr. Jozipovic would be unable to return to his pre-accident occupation:

> The worker retains the essential skills (learned application of knowledge and ability) of the occupation. However, the limitations accepted as a result of the permanent conditions accepted under this claim have impacted on the worker's ability to return to his full pre-accident job. I have considered the worker's ability to perform his occupation and note that the NOC [National Occupational Classification] classification for this occupation identifies other

> positions within the occupation. In my review of the other positions I note that same all require a strength rating of heavy with regard to physical activities.

[18] He found, however, that Mr. Jozipovic's skills could be transferred to a different, but similar occupation:

> In this case, I note that the worker retains his specific essential skills which are essential to his occupation or to an occupation of a similar type or nature. In this case the NOC Code of 7263 notes that similar occupations would include welders and related machine operators, 7265. The physical activity rating for this position is light. This would be within the worker's limitations. Consequently, as the worker retains his essential skills to perform the occupation or an occupation of a similar type or nature …, I must conclude that he could perform any number of jobs within the occupation or an occupation of a similar type or nature ….
>
> As the worker retains his skills as noted above and he has the ability to perform these essential skills, it is apparent that the second criteria of the test has not been met…. I am unable to conclude that it is impossible for this worker to continue in the occupation or an occupation of a similar type or nature as a result of the permanent residual effects his injury has left him with. Consequently, I find that the combined effects of the disability and the occupation at the time of the injury are not so exceptional as to warrant consideration under Section 23(3) of the *Act*. The functional award under Section 23(1) is the appropriate compensation.

[19] Having found that the second criterion under Policy #40.00 had not been met, the adjuster did not consider it necessary to determine whether Mr. Jozipovic would suffer a significant loss of earnings as a result of his injury. Mr. Jozipovic's compensation was assessed on the basis of the Functional Impairment Method. He was assessed as having a 2.5% disability.

[20] Mr. Jozipovic was not satisfied with the decision, and requested a review under s. 96.2 of the *Act*. The review officer confirmed the Board's original decision.

Original Proceedings before the WCAT

[21] Mr. Jozipovic appealed the review decision to the WCAT. In his appeal submissions he raised two issues. The first, concerning the extent of his functional impairment, is not germane to this appeal. The second was stated as follows:

> Is … Mr. Jozipovic's loss of earnings so exceptional [as] to justify a permanent pension award calculated on this basis [*i.e.* under ss. 23(3) and (3.1) of the *Act*]?

[22] While the appeal raised the issue of Mr. Jozipovic's entitlement to have his compensation assessed using the Loss of Earnings Method, his submissions did not directly attack Policy #40.00. Instead, they challenged the Board's interpretation of the policy. The WCAT dismissed the appeal (WCAT Decision 2006-02312). In so doing, it accepted that Mr. Jozipovic failed to meet the second criterion in Policy #40.00 for the application of the Loss of Earnings Method:

> [T]he work of the vocational rehabilitation consultant shows … the worker still has the ability to perform a sufficient proportion of those essential skills that he could still perform in one of a number of occupations of a type similar to the pre-injury occupation from which he has a number of documented transferable skills…. [W]hile she has identified only one occupation which requires no more than "light" work, the only relevant limitation with which the worker is credited is to not engage in heavy lifting; there is a large range of work in the "medium" category and I accept the well-supported report of the vocational rehabilitation consultant showing numerous occupations suitable for this worker.

WCAT and Board of Directors' Proceedings in the Parallel Case

[23] Mr. Jozipovic sought a reconsideration of the WCAT decision. The reconsideration application unequivocally raised the issue of the validity of Policy #40.00, but did not provide any detailed analysis of the issue. It stated:

> It is submitted that Policy #40.00 is an unlawful interpretation of section 23 of the Act and has no application. The current Chair referral on that issue supports the worker's position.

[24] The reference to the "current Chair referral" is a reference to a challenge to Policy #40.00 in an appeal brought by another injured worker. I will refer to that other appeal as the "parallel proceeding". In that proceeding, the worker argued that Policy #40.00 should not be applied by the WCAT on the ground that it was "patently unreasonable and not supported by the legislation". Pursuant to s. 251(1) of the *Act*, that is the only basis upon which the WCAT can refuse to apply a policy of the board of directors.

[25] A Vice Chair of the WCAT agreed that Policy #40.00 should not be applied. He gave five reasons for finding the policy to be patently unreasonable. Mr. Jozipovic emphasizes three of those reasons on this appeal:

> - The policy adopts a definition of "occupation" which is inconsistent with the ordinary meaning of that term [and with] its use in the statutory context
>
> - The policy introduces a category of "occupation" (an "occupation of similar type or nature") that is not contemplated by sections 23(3), (3.1) and (3.2)
>
> - [T]he policy prevents consideration of the worker's loss of earnings if it occurs within the same occupation as at the time of injury, or within an occupation of a similar type [or] nature. As long as the worker is capable of performing the [essential] skills of the original occupation, or an occupation of similar type or nature, the policy does not permit any consideration of a loss of earnings resulting from the injury, and presumes that the compensation under section 23(1) is appropriate….

[26] As required by s. 251(2), the Vice Chair's decision in the parallel proceeding was referred to the Chair of the WCAT, in order for her to determine whether or not Policy #40.00 should be applied.

[27] Mr. Jozipovic apparently learned of the parallel proceeding after his own unsuccessful appeal to the WCAT, which is why he first raised the issue of Policy #40.00's validity on his application to have the WCAT reconsider its decision. At the time Mr. Jozipovic raised the issue, the validity of Policy #40.00 had not yet been considered by the Chair of the WCAT in the parallel proceeding. His reference to the "current Chair referral", therefore, is a reference to the reasons given by the Vice Chair in referring the matter to the Chair of the WCAT in the parallel proceeding.

[28] The Chair of the WCAT ultimately provided extensive reasons in the parallel proceeding agreeing that Policy #40.00 is patently unreasonable and ought not to be applied (WCAT Decision No. 2007-03809). At p. 38 of her reasons, she found that the definition of "occupation" in the policy was unreasonable:

> The question is whether, in defining occupation as "a collection of jobs or employments that are characterized by a similarity of skills", item #40.00 is founded on a patently unreasonable definition of the term occupation in section 23(3.1). This question turns on whether there is a rational basis for characterizing a worker's time of injury occupation solely on the basis of its skills. I find that the definition of occupation in item #40.00 excludes consideration of the physical requirements of the occupation. Given the

> objects of the Act, the purpose of section 23, the ordinary meaning of occupation and its use in other sections of the Act, and the requirements of section 23(3.2), I find no support for defining occupation in section 23(3.1) in this manner. In my view, item #40.00 is patently unreasonable because it establishes a worker's time of injury occupation by grouping jobs with similar skills without also considering the physical requirements of a worker's time of injury job and the jobs that are grouped with it to define the occupation.
>
> In addition, I find item #40.00 is patently unreasonable because the operation of the definitions of occupation and skills in the policy, coupled with the three so exceptional criteria, limit consideration of the effect of the disability on a worker's time of injury occupation to the effect of the disability on the worker's ability to perform the essential skills. Given that the Act is premised on the payment of compensation to workers on the basis of physical (or psychological) disability, I find that it is patently unreasonable for the governing body to have created a policy pursuant to section 23(3.1) that does not consider the physical requirements of a worker's occupation when considering the "combined effect" of a worker's time of injury occupation and his or her compensable disability. It could not have been the legislature's intention to limit section 23(3.1) in this way.

[29] The Chair of the WCAT did not come to any conclusion as to whether the use of the concept of an "occupation of a similar type or nature" in Policy #40.00 was patently unreasonable, as she found that the question did not arise in the parallel proceeding.

[30] Having found the policy to be patently unreasonable, the Chair referred the matter to the board of directors of the WCB as required by s. 251(5)(a) of the *Act*. Because Mr. Jozipovic's application for reconsideration also raised the issue of whether Policy #40.00 was valid, the reconsideration of his case was suspended pending a determination of the board of directors in the parallel case pursuant to s. 251(5)(b).

[31] The board of directors of the WCB did not agree with the WCAT's finding that Policy #40.00 was patently unreasonable. In a decision taken at its March 2008 meeting, it determined that Policy #40.00 should continue to be applied. It provided its reasons for the decision by letter dated April 15, 2008. It said:

> Section 23(3.1) of the *Act* creates a discretion to award compensation based on a loss of earnings when compensation based on loss of function will not appropriately compensate the worker for injury, not when the latter method will not adequately compensate the worker. This distinction authorizes the Board to use its judgment as to when compensation based on the worker's individual circumstances rather than the nature and degree of the injury is appropriate within the overall policy objectives of the workers' compensation system.
>
> The Policy takes into account a worker's transferable skills and a worker's post-injury ability to perform those skills. Exceptional cases are those in which the injury makes it impossible for the worker to continue in the occupation at the time of injury or transfer his or her skills to another suitable occupation. The Policy does not ensure that the loss of earnings method is available in every case in which the loss of function method may not provide adequate compensation. A shortfall in compensation under the loss of function method, even an "exceptional" shortfall – on its own – will not necessarily ensure that the loss of earning method will be applied.

The Reconsideration Decision

[32] Following the issuance of the board of directors' reasons in the parallel proceeding, the WCAT issued its reconsideration decision in Mr. Jozipovic's case (WCAT Decision No. 2009-02631). The Vice Chair responsible for the reconsideration decision had, initially, expressed doubt as to whether he could consider the validity of Policy #40.00, as the issue had not been raised by Mr. Jozipovic in his argument to the WCAT in his original appeal. In his decision, however, the Vice Chair proceeded on the basis that the matter was properly before him:

> [55] … For the purposes of my decision, I will proceed on an assumption that the question as to whether a WCAT decision was patently unreasonable in not initiating a referral under section 251 of the Act is one which may be addressed in an application for reconsideration on the common law grounds.

[33] The Vice Chair noted that the issue of whether it was unreasonable for Policy #40.00 to preclude resort to the Loss of Earnings Method where a worker was capable of engaging in "an occupation of a similar type or nature" had not been expressly determined by the Chair of the WCAT or by the board of directors of the WCB in the parallel proceeding. Nonetheless, the Vice Chair recognized that the reasoning of the board of directors in the parallel proceeding was, by extension, also applicable to the argument before him:

> [62] The WCAT decision was made without reference to the earnings associated with the alternative positions identified as suitable for the worker. It might be argued that the failure to take such information into account is problematic, for similar reasons to those outlined in the … section 251 referral memorandum [in the parallel proceeding]. It is evident, however, that item #40.00 is directed to identifying those situations where the combined effect of the worker's occupation at the time of the injury and the worker's disability resulting from the injury is so exceptional that an award under section 23(3) is warranted.
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> …
>
> [68] The April 15, 2008 determination by the board of directors expressly acknowledged that the policy does not ensure that the loss of earnings method is available in every case in which the loss of function method may not provide adequate compensation. They stated: "A shortfall in compensation under the loss of function method, even an 'exceptional' shortfall – on its own – will not necessarily ensure that the loss of earning method will be applied."

[34] The Vice Chair considered the legislative history of the Loss of Earnings Method, noting that it was introduced into legislation in 1954 following recommendations in the Sloan Report in 1952. The Loss of Earnings Method was, at that time, available whenever the Board considered it to be "more equitable" than the Functional Impairment Method.

[35] In March 2002, the report of the *Core Services Review of the Workers' Compensation Board* considered the use of the Loss of Earnings Method. At para. 77, the Vice Chair quoted from the recommendations at p. 202 of the *Core Services Review*:

> (i) The Dual System of calculating pension entitlement in BC, as provided for in Sections 23(1) and (3) of the *Act*, should be retained. However, in my opinion, the emphasis of the WCB's published policies must be placed upon utilizing the loss of function method when determining the pension entitlement of a permanently disabled worker. As will be discussed below, the loss of earnings method should only be used in those "special instances" when the pension award calculated pursuant to the loss of function method is considered to be significantly inadequate insofar as the individual worker's particular circumstances are concerned.
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> As a result of the mandatory application of Section 23(3) of the *Act* in every case where a pension award is assessed, as required by the existing published policies of the WCB, the BC workers' compensation pension system has become a de facto "actual loss of earnings" system, with the loss of function method providing a guaranteed minimum level of pension in each

> case. In my opinion, this was not the legislative intent with respect to the application of Sections 23(1) and (3) of the *Act*.
>
> (ii) The payment of compensation benefits for permanent impairment, based on the "actual loss of earnings" method and the provision of a "non-economic loss" benefit, should not be adopted in the legislation.

[36] At para. 78 of his reasons, the Vice Chair noted that the *Core Services Review* had not recommended a change to s. 23(3) of the *Act*. He quoted its report as follows:

> It has been suggested that I should recommend a revision to Section 23(3) to narrow its application, rather than leave the issue to the determination of the new Board of Directors. I obviously have not accepted this suggestion. In my opinion, the current provision in the *Act* adequately captures the initial intent to permit the WCB to apply the loss of earnings method in those "special instances" where the WCB considers it is equitable to do so. To revise the legislation to narrow the focus of Section 23(3) (for example, by replacing the words "where the board considers it more equitable" with "in those exceptional circumstances as determined by the board") would unnecessarily restrict the broad discretion currently provided to the governing body of the WCB to respond to emerging circumstances.

[37] The Vice Chair then noted that this recommendation of the *Review* had not been followed:

> [79] Significantly, the June 30, 2002 changes to section 23 of the Act did not follow the recommendation by the core reviewer (to reject the proposal that the words "where the board considers it more equitable" be replaced with "in those exceptional circumstances as determined by the board"). The legislature chose to constrain the degree of discretion conferred on the policy-makers, by limiting the Board's authority to consider a loss of earnings pension award to those circumstances where "the Board determines that the combined effect of the worker's occupation at the time of the injury and the worker's disability resulting from the injury is so exceptional that an amount determined under subsection (1) does not appropriately compensate the worker for the injury." It may readily be inferred, therefore, that there was an express legislative intent to guide or constrain the Board's discretion in relation to the application of the dual system. Section 23(3) and 23(3.1) both require the Board to make a determination under section 23(3.1), as a prerequisite to considering an award under section 23(3) of the Act.
>
> [80] Subject to these statutory provisions, the board of directors has authority to provide policy guidance regarding the meaning of the "so exceptional" test. It is evident from subsections 250(2) and 251(1) that the legislature intended that WCAT show a high degree of deference to the policy-making authority of the board of directors.

[38] The Vice Chair concluded that the board of directors of the WCB did not act in a patently unreasonable manner in establishing Policy #40.00:

> [87] Upon consideration of all of the foregoing, I am not persuaded that *WCAT-2006-02312* was patently unreasonable, by virtue of its application of the policy contained at item #40.00. My analysis regarding the lawfulness of this policy is limited to those aspects of the policy which were necessary to the WCAT decision, in the particular circumstances of the worker's appeal, and not part of the April 15, 2008 determination of the board of directors under section 251(8) of the Act, or the determination by the WCAT chair under section 251(3) of the Act concerning the viability of the two step process under the Act (*WCAT-2007-03809*). The April 15, 2008 determination of the board of directors regarding the lawfulness of item #40.00 is binding on WCAT, in respect of the matters addressed in that determination (as is the determination of the WCAT chair regarding the two-step process under item #40.00).
>
> [88] It is not within my jurisdiction to address whether the current policies best achieve the legislative purposes. The authority of the board of directors under section 82 of the Act to set policy includes the authority to choose from a range of policy options, and it is not for WCAT to second-guess that choice so long as it is one which is viable under the Act.

Judicial Review

[39] Mr. Jozipovic sought judicial review of the WCAT decisions in the Supreme Court, and was successful. The chambers judge concluded that the board of directors of the WCB exceeded its policy-making discretion in establishing Policy #40.00:

> [136]...[T]here is nothing in ss. 23(3), (3.1) or (3.2) of the *Workers Compensation Act* that contemplates consideration of other occupations "of the same type or nature" as the occupation performed by the worker prior to his injury. The only reference to other employment is in (3.2), where the WCB is mandated to consider whether the worker can adapt to "another suitable occupation." To import into (3.1) or (3.2) consideration of "other occupations of the same type or nature" goes beyond the language of the provisions and is ostensibly redundant. In this regard, when the WCB assesses whether the worker is able to adapt to another suitable occupation, it may consider other occupations that are similar in type or nature to the worker's occupation prior to the injury. There is no rationale for expanding the term "occupation" to include other occupations of a "similar nature or type". This additional criterion is also inconsistent with (3.2) which requires the WCB to consider the worker's ability to continue in his occupation at the time of the injury and not in any other similar occupations except in the context of adapting to another suitable occupation.

> [137] I am also unable to conclude that this additional requirement is rationally connected to the purposes of the workers' compensation scheme generally or s. 23(3) in particular. By including in the definition of occupation a broad collection of jobs and employments characterized by similar skills, the WCB has effectively accomplished its objective to limit pensions under s. 23(3) to exceptional cases. If under this expanded definition of occupation the worker proves it is impossible to return to work, the WCB must still go on to consider his ability to adapt to other occupations. Thus requiring the worker to prove he cannot perform the essential skills of all similar occupations is not necessary to accomplish the objectives of s. 23(3) described above.
>
> [138] Accordingly, I find that portion of Policy #40.00 which requires the WCB to consider whether the worker can perform the essential skills of "an occupation of a similar type or nature" as a precondition to eligibility for an award under s. 23(3) is unreasonable because it is not rationally supported by the legislation.

The Issues on this Appeal

[40] The appellant raises several arguments on the appeal. First, it says that the chambers judge erred in entertaining arguments about the legality of Policy #40.00 at all, because Mr. Jozipovic did not raise the issue in his original appeal to the WCAT, and because when he did raise the issue on the reconsideration hearing, he did not fully argue it. The appellant says that Mr. Jozipovic's failure to fully raise and argue the matter constitutes a failure to take advantage of the internal appeal and review mechanisms set out in the *Workers Compensation Act*. Such a failure, they say, disentitled him from bringing the matter forward as an issue on judicial review.

[41] Next, the appellant says that the judicial review should have been treated as a review of the decisions of the WCAT only, and not a direct review of the policy of the board of directors of the WCB. The chambers judge should, it says, have limited herself to the question of whether the WCAT panels erred in failing to refer the matter of the legality of Policy #40.00 to the Chair of the WCAT under s. 251(2) of the *Act*. If she found that the WCAT erred, then the only remedy that she could appropriately grant would be to remit the matter to the WCAT, with directions that it reconsider whether to refer the issue to its Chair.

[42] The third issue raised by the appellant is the standard of review applicable to the judicial review. The appellant says that the appropriate standard was one of "patent unreasonableness". Further, it says that even if the chambers judge was correct in finding the standard of review to be one of "reasonableness", she failed, in her application of that standard, to accord appropriate deference to the policy-making function of the board of directors of the WCB.

[43] Finally, the appellant contends that the judge erred in finding Policy #40.00 to be inconsistent with the language and intent of s. 23 of the *Act*.

[44] Mr. Jozipovic resists all of the appellant's arguments, and also contends that the chambers judge did not go far enough in finding the impugned policy to be inconsistent with the statute. By way of cross-appeal, he seeks a declaration that Policy #40.00 is, in its entirety, of no force and effect.

Exhaustion of Internal Remedies

[45] The appellant argues that it was inappropriate for Mr. Jozipovic to be allowed to raise the issue of the legal validity of Policy #40.00 for the first time on the reconsideration hearing. It further contends that Mr. Jozipovic did not fully argue the issue before the reconsideration panel, and so the panel did not have the benefit of the sort of comprehensive submissions that it was entitled to. Accordingly, it says, the chambers judge should not have entertained a judicial review application challenging the policy.

[46] The fact that a party has raised an issue late in the day will not always be fatal to its arguments. The Supreme Court of Canada has recently indicated, in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, that even where arguments have not been addressed to a tribunal *at all*, there are circumstances where they may be allowed to be advanced on judicial review.

[47] In the case before us, the WCAT had ample opportunities to deal with the issue of the validity of Policy #40.00. The issue was squarely raised on the reconsideration hearing. The Vice Chair who undertook the reconsideration, while initially expressing doubts as to whether the matter was properly before him, did, in the end, fully consider the matter. In doing so, he did not express any reservations with respect to the adequacy of the record before him or the sufficiency of the arguments that Mr. Jozipovic had presented. He did not find it necessary to exercise his discretion to order an oral hearing.

[48] It is also significant that the validity of Policy #40.00 had recently been considered by the WCAT, its Chair, and the board of directors of the WCB in the parallel proceeding. The issues raised by Mr. Jozipovic were precisely the same as the ones raised in that proceeding. While the board of directors did not find it necessary to deal with all of the issues raised in the parallel proceeding, those that were not specifically dealt with were analogous to the issues that were fully considered.

[49] In the parallel proceeding, the board of directors justified its policy by drawing a distinction between situations in which the Functional Impairment Method fails to "adequately" compensate the worker and those in which it fails to "appropriately" compensate the worker. It held that even where inadequate compensation would result in an "'exceptional' shortfall", the board of directors could, as a matter of policy, find the compensation to be "appropriate".

[50] On the reconsideration in this case, the Vice Chair indicated that he considered himself bound by the board of directors' decision in the parallel proceeding, and refused to address the issues that had already been decided by that board. With respect to the issues that had not been formally decided by the board of directors, the Vice Chair concluded, by analogy to the decision in the parallel proceeding, that the policy was reasonable. Like the board of directors of the WCB in the parallel proceeding, he drew a distinction between the "appropriateness"

of compensation and its "adequacy". He found Policy #40.00 to be a policy representing a reasonable exercise of the discretion provided for in the statute.

[51] Examined in context, it cannot be said that the issues raised by Mr. Jozipovic on judicial review were new in the sense that they had not been raised in the internal review process. There is, further, no basis for suggesting that either the WCAT or the WCB was somehow blindsided by the judicial review.

[52] I am entirely in agreement with the chambers judge's conclusion that the substance of the matter before her had been canvassed before the WCAT. Indeed, it had also effectively been canvassed at the level of the board of directors of the WCB, albeit in the parallel proceeding rather than in the one brought by Mr. Jozipovic.

[53] In the circumstances I would not accede to the appellant's contention that Mr. Jozipovic should have been denied the right to judicially review the decisions of the WCAT and the WCB with respect to the validity of Policy #40.00 by reason of his failure to raise issues in the internal appeal processes.

Direct Review by the Courts

[54] The appellant contends that the chambers judge erred in directly considering the legality of the policy established by the board of directors. It says that she ought to have confined herself to the issue of whether the WCAT erred in not referring the matter to its Chair under s. 251(2) of the *Act*.

[55] I note that both the WCB and the WCAT are parties to these proceedings, and that Mr. Jozipovic has challenged both the decisions of the WCAT and a policy of the board of directors of the WCB. The appellant's objection to direct review of the board of directors' policy is not based on a technical defect in the petition. Instead, it is based on a view that the *Workers Compensation Act* precludes direct challenges to the board of directors' policies in the courts.

[56] The issue of the proper scope of the judicial review in this case is not a straightforward one. The internal appeal and review provisions of the *Workers Compensation Act* are convoluted, and in some respects bizarre. They appear, on their face, to give the WCAT a very limited function in reviewing policies of the board of directors of the WCB, but a function that in many ways closely resembles the traditional role of the superior courts on judicial review.

[57] The Board argues that "the question of whether a Board of Directors policy is supported by the Act and Regulations is a matter assigned to the exclusive jurisdiction of WCAT under s. 251 of the Act and protected by the full privative clauses in ss. 254 and 255, which provide that the WCAT has exclusive jurisdiction to determine all matters and questions of fact, law arising under Part 4 of the Act." It argues, based on *Johnson*, *supra*, that the binding policies of the board of directors of the WCB can never be directly judicially reviewed by the courts.

[58] The proposition put forward by the appellant in this case is extraordinary. It suggests that the judicial review function ordinarily exercised by the Supreme Court of British Columbia has been vested exclusively in the WCAT by provincial legislation.

[59] Supervisory jurisdiction over inferior tribunals is a core function of a superior court. Any attempt to remove that function in respect of a particular tribunal would violate s. 96 of the *Constitution Act, 1867*. In *Crevier v. A.G. (Quebec)*, [1981] 2 S.C.R. 220, the Supreme Court of Canada considered the degree to which a province may, through the use of a privative clause, insulate an administrative tribunal from judicial review. It held that while privative clauses may validly restrict courts from reviewing tribunal decisions for errors of fact and law, they may not oust the power of superior courts to review tribunal decisions for errors of jurisdiction.

[60] The language used in *Crevier* reflects a taxonomy of administrative law that is no longer prevalent. At the time, judicial review was commonly classified as dealing with three distinct types of error – errors of law, errors of fact, and errors of jurisdiction. This method of classification was subsequently overtaken by the

"pragmatic and functional analysis" first discussed in *U.E.S., Local 298 v. Bibeault,* [1988] 2 S.C.R. 1048, and, more recently, by the "standard of review analysis" (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190). The concept of an "error of jurisdiction" as that phrase was used in *Crevier*, then, may require some explanation.

[61] Today, there is a tendency to use the term "jurisdiction" in its narrowest sense, as described in *Dunsmuir* at para. 59:

> "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction...

[62] Such a precise and narrow meaning for the term "jurisdiction" is useful in the context of the standard of review analysis because it defines those issues upon which a tribunal must be reviewed on a standard of correctness. In speaking of "error of jurisdiction" in *Crevier*, however, Laskin C.J.C. had in mind the somewhat broader notion of "error of jurisdiction" described *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227. In that case, at p. 237, the Court recognized that a tribunal acts beyond its jurisdiction when it interprets its enabling statute in a manner that is "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court".

[63] In finding judicial review for "error of jurisdiction" to be part of the irreducible core of functions entrusted to a superior court under s. 96 of the *Constitution Act, 1867*, *Crevier* stands for the proposition that no administrative tribunal can have the power to finally determine whether an interpretation of a statute is "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation".

[64] In *Dunsmuir*, the Supreme Court of Canada re-emphasized the constitutionally-protected right to judicial review as a fundamental feature of the rule of law as it is understood in Canada:

> [27] As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.
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> [28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.
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> [29] Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21.
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> [30] In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" ("Appellate Review: Policy and Pragmatism", in *2006 Isaac Pitblado Lectures,*

> *Appellate Courts: Policy, Law and Practice*, V-1, at p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.
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> [31] The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, at p. 127). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits….
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> [Emphasis added.]

[65] The question that the WCAT is required to consider under s. 251(1) of the *Workers Compensation Act* is whether "a policy of the board of directors … is so patently unreasonable that it is not capable of being supported by the Act and its regulations." That question lies within the core of a s. 96 court's jurisdiction, and cannot be finally answered by an administrative tribunal.

[66] There is, on this appeal, no challenge to the constitutionality of s. 251(1). In any event, I do not suggest that it is unconstitutional for the Legislature to allow the WCAT to consider the reasonableness of the board of directors' interpretation of the statute in fulfilling its functions. It would, however, be unconstitutional to give the WCAT exclusive or final authority to determine that issue.

[67] It follows that I do not accept the appellant's argument that the Supreme Court lacked jurisdiction to embark on a direct review of the board of directors' policy.

[68] In saying this, I do not ignore this Court's decision in *Johnson*. In *Johnson*, Ryan J.A. commented on the daunting challenge faced by any person who wishes to test the validity of a policy established by the WCB board of directors:

> [28] The striking feature of this process is that WCAT cannot act on or make any enforceable order premised on its own finding that a policy of the board of directors is patently unreasonable. For a worker or employer to succeed when a policy of the board of directors is in question, that person must not only convince WCAT that the policy is patently unreasonable and its chair that the policy should be reviewed, he or she must also persuade the policy-maker that its policy should be varied, amended or disregarded entirely.
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> …
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> [30] As a result of this process, the worker or employer who successfully contests the legality of a policy of the board of directors will have obtained a thorough review of the policy through the various stages of the internal appeal procedure but the success will not provide him or her with a binding ruling of invalidity from a body independent of the board of directors. To put it another way, the decision-maker (WCAT) has no effective decision-making ability or remedial capacity when a policy is at issue; that decision is left to the policy-maker itself.

[69] Despite these difficulties, however, the Court was satisfied that the positive attributes of the system justified deference toward it. Until the internal process has run its course, the Court ought to adopt a "hands off" approach:

> [39] The effect of this stringent regime is that it is not immediately rewarding to the individual who appeals but cannot convince the board of directors to vary or amend its policy. To ultimately succeed, the individual must seek judicial review. That said, three benefits are achieved for the system: consistency for all workers and employers affected by the policy; an opportunity for the board of directors in the first instance to adjust its policy to make it compliant with the [*Workers Compensation Act*] (or simply to change the policy if it is convinced by the argument that there is a better one); and finally, a record is created containing the expert views of WCAT, the chair of WCAT and the board of directors as to the validity of the policy in question.
>
> [40] In my view, the benefits provided by the internal appeal provisions at least equal the disadvantage they present in failing to deliver an immediate remedy to the person who does not convince the board of directors that one of its policies is wrong.

[70] While the Court in *Johnson* accepted, on balance, that the disadvantages of the processes under s. 251 of the *Act* are "at least balanced" by its advantages, I do not read the decision as suggesting that the Court must subordinate itself completely to the unwieldy regime, or adopt an approach that will make the already-protracted process an interminable one. Rather, the Court accepted that once a litigant has unsuccessfully followed the process set out in s. 251, he or she must ultimately be allowed to come to the Court to seek relief.

[71] I see nothing in *Johnson* that suggests that the courts are to eschew their constitutional responsibility to supervise the board of directors' exercise of its policy-making discretion by way of judicial review once the procedures in s. 251 have been exhausted. The chambers judge did not err in embarking on a judicial review of Policy #40.00.

Standard of Review

[72] The chambers judge purported to apply a standard of "reasonableness" in reviewing the policy of the board of directors of the WCB. The appellant argues that the appropriate standard was one of "patent unreasonableness". Further, it argues that the judge misapplied the reasonableness standard.

[73] The appellant argues that the standard of "patent unreasonableness" is statutorily mandated in this case, citing s. 251 of the *Workers Compensation Act*. In support of that proposition, it cites a series of cases from the Supreme Court of British Columbia that applied that standard in reviewing board of directors' policies: *Western Stevedoring Co. v. British Columbia (Workers' Compensation Board)*, 2005 BCSC 1650; *Cowburn v. British Columbia (Workers' Compensation Board)*, 2006 BCSC 722; *Hill v. British Columbia (Workers' Compensation Board)*, 2007 BCSC 1187; and *Johnson v. British Columbia (Workers' Compensation Board)*, 2007 BCSC 1410.

[74] In my view, those cases do not assist the appellant. In *Western Stevedoring*, the court expressly indicated that it was applying the "pragmatic and functional approach" rather than a statutorily mandated standard of review (see paras. 62-63).

As the pragmatic and functional approach has been superseded by the standard of review analysis, and as the common law "patent unreasonableness" standard has vanished, the reasoning in *Western Stevedoring* can no longer be said to support the application of that standard.

[75] In *Cowburn*, the court applied a patent unreasonableness standard as a result of its assumption that s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, applied to the board of directors of the WCB (see paras. 22-23). Section 58, in fact, has not been made applicable to the WCB or to its board of directors.

[76] In *Hill*, the court applied the patent unreasonableness standard on two alternative grounds – on the basis that s. 58 of the *Administrative Tribunals Act* applies to the WCAT (see paras. 12-17) and on the basis of the pragmatic and functional approach (see para. 18). Similarly, in *Johnson* (a decision which was subsequently overruled by this Court in a judgment already cited), the chambers judge noted, at para. 29, that s. 58 of the *Administrative Tribunals Act* applies to the WCAT. Her application of the "patently unreasonable" standard in respect of the board of directors of the WCB appears to have been based on the parties' agreement that that was the appropriate standard (see para. 53). While the basis for that agreement is not explicitly referred to in the judgment, it could only have been on the basis of the pragmatic and functional approach.

[77] The focus in this case is on the validity of the policy of the board of directors of the WCB, not on the WCAT's determination to follow that policy. Accordingly, the fact that s. 58 of the *Administrative Tribunals Act* applies to decisions of the WCAT does not help to determine the appropriate standard of review.

[78] The standard of review applicable to the board or directors of the WCB is, in my view, easily identified. In *Dunsmuir*, the Supreme Court of Canada established that there are, at common law, only two available standards of judicial review – a deferential standard, described as "reasonableness", and a non-deferential standard, described as "correctness". The former division of the reasonableness standards into "reasonableness *simpliciter*" and "patent unreasonableness" has

been eliminated. As the policies of the board of directors are to be reviewed on a common law standard, it cannot be a standard of "patent unreasonableness".

[79] It is apparent that the *Workers Compensation Act* intends the courts to give deference to the policies of the board of directors of the WCB, and therefore the deferential standard is the appropriate standard of review. Accordingly, the chambers judge was right to select a standard of reasonableness.

The Chambers Judge's Application of the Reasonableness Standard

[80] The appellant argues that, even if reasonableness was the appropriate standard, the chambers judge erred by interpreting that standard in a way that was insufficiently deferential. In particular, it contends that she erred in finding that s. 96(1) of the *Workers Compensation Act*, which is a privative clause applying to the WCB, does not apply to the formulation of policy by the board of directors. It also asserts that the chambers judge erred in characterizing the reasonableness standard as akin to the pre-*Dunsmuir* "reasonableness *simpliciter*" standard.

[81] In my view, these issues do not merit extensive analysis. It is abundantly clear that the board of directors of the WCB is entrusted with policy making under the *Act*, and that the courts must afford it full power to make policies, so long as they are in keeping with the provisions of the statute. I do not read the chambers judge's reasons as doubting that proposition. In the end, the judge concluded that the policy adopted by the board of directors of the WCB was incompatible with the plain intent of s. 23 of the *Act*. That incompatibility transcends any degree of deference that might be accorded the board. In the end, the board was not entitled to adopt a policy that was so dissonant with the statute as to be unreasonable.

[82] Turning to the specific arguments put forward by the appellant, I am not convinced that the judge's conclusion that the privative clause was inapplicable to the policy-making function of the board of directors of the WCB had any effect on her analysis. The presence or absence of a privative clause may assist the court in determining what standard of review is to be applied, but it does not in any way alter the standard itself. Thus, the question of whether or not the statute's privative clause

was applicable was of no moment once the judge accepted that the deferential standard of reasonableness was to be applied.

[83] The appellant's contention that the chambers judge wrongly treated the reasonableness standard as akin to the pre-*Dunsmuir* standard of "reasonableness *simpliciter*" is also without merit.

[84] As I read *Dunsmuir*, its purpose was to create a single, simple deferential standard known as "reasonableness". The Court recognized that any minute distinction between the former standards of "reasonableness *simplicter*" and "patent unreasonableness" was otiose:

> [39] The operation of three standards of review has not been without practical and theoretical difficulties, neither has it been free of criticism. One major problem lies in distinguishing between the patent unreasonableness standard and the reasonableness *simpliciter* standard. The difficulty in distinguishing between those standards contributes to the problem of choosing the right standard of review. An even greater problem lies in the application of the patent unreasonableness standard, which at times seems to require parties to accept an unreasonable decision.
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> [40] The definitions of the patent unreasonableness standard that arise from the case law tend to focus on the magnitude of the defect and on the immediacy of the defect (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, at para. 78, *per* LeBel J.). Those two hallmarks of review under the patent unreasonableness standard have been used consistently in the jurisprudence to distinguish it from review under the standard of reasonableness *simpliciter*. As it had become clear that, after *Southam*, lower courts were struggling with the conceptual distinction between patent unreasonableness and reasonableness *simpliciter*, Iacobucci J., writing for the Court in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, attempted to bring some clarity to the issue. He explained the different operations of the two deferential standards as follows, at paras. 52-53:
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> > [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" . . . . A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
> >
> > A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to

> show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

[41] As discussed by LeBel J. at length in *Toronto (City) v. C.U.P.E.*, notwithstanding the increased clarity that *Ryan* brought to the issue and the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, a review of the cases reveals that any actual difference between them in terms of their operation appears to be illusory (see also the comments of Abella J. in *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 650, 2007 SCC 15, at paras. 101-3). Indeed, even this Court divided when attempting to determine whether a particular decision was "patently unreasonable", although this should have been self-evident under the existing test (see *C.U.P.E. v. Ontario (Minister of Labour)*). This result is explained by the fact that both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported. Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. As Mullan has explained:

> [T]o maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality.
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> See D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 25.

[42] Moreover, even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*. It is also inconsistent with the rule of law to retain an irrational decision. As LeBel J. explained in his concurring reasons in *Toronto (City) v. C.U.P.E.*, at para. 108:

> In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness …

[85] At least where common law standards of review apply, *Dunsmuir* signals the end to the idea that courts in administrative law cases must apply a spectrum of standards of review. *Dunsmuir* sets out a single deferential standard of review – that

of reasonableness. Nothing is to be gained by comparing that standard to the former standards known as "reasonableness *simpliciter*" and "patent unreasonableness", standards which proved to be practically indistinguishable.

[86] As I read the judgment below, the chambers judge understood and applied a deferential standard to the case. In any event, nothing is to be gained by a detailed examination of her description of the reasonableness standard. The question of whether the board of directors' interpretation of its powers was reasonable is a question of law, on which this Court need not defer to the chambers judge's determination in any event.

Is Policy #40.00 Unreasonable?

[87] I turn, then, to the question of whether policy #40.00 could validly be adopted by the board of directors of the WCB. In short, is the policy consistent with the scheme set out in s. 23 of the legislation?

[88] The chambers judge found the policy to be inconsistent with the statute in that it imported into the analysis a requirement that the worker be unable to perform the functions of an occupation similar to his or her occupation at the time of the accident. At paras. 136-138, she found the concept of an "'occupation of the same type or nature' as the occupation performed by the worker at the time of his injury" to be foreign to the statutory scheme, and not rationally connected to it.

[89] While I agree that the concept of an "occupation of the same type or nature" is not referred to in the statute, it does not seem to me that the importation of that concept into Policy #40.00 lies at the heart of the problem with the policy. As the chambers judge noted, the Board is permitted (and indeed required) to consider the worker's prospects in occupations other than the one he or she engaged in at the time of the injury. That would include (though not be confined to) occupations that are similar to the one in which the worker was injured.

[90] We have before us both an appeal and a cross-appeal from the judge's determination, and it is therefore open to this Court to fully consider all aspects of Policy #40.00 in determining its reasonableness.

[91] In my view, Policy #40.00 is unreasonable because, at a very fundamental level, it misconstrues the statute.

[92] It will be recalled that ss. 23(1) and (2) establish the Functional Impairment Method of assessing compensation. Section 23(3) allows the Board to assess compensation, instead, by the Loss of Earnings Method, but only if it has made a determination under s. 23(3.1), which I set out, again, for convenience:

> 23(3.1) A payment may be made under subsection (3) only if the Board determines that the combined effect of the worker's occupation at the time of the injury and the worker's disability resulting from the injury is so exceptional that an amount determined under subsection (1) does not appropriately compensate the worker for the injury.
>
> (3.2) In making a determination under subsection (3.1), the Board must consider the ability of the worker to continue in the worker's occupation at the time of the injury or to adapt to another suitable occupation.

[93] These provisions, on their face, are straightforward. They require the Board to consider whether the Functional Impairment Method yields a particular result – a failure to appropriately compensate the worker. If it yields that result because of a combination of two factors – the worker's occupation at the time of the injury and the disability that he or she suffers as a result of the injury – then the Board has discretion to apply the Loss of Earnings Method. Subsection (3.2) ensures that in determining the appropriateness of compensation, the Board considers not only what the worker can earn working at the occupation he or she had at the time of the injury, but also at any suitable occupation to which he or she might adapt.

[94] Policy #40.00 prevents the Board from making a key determination that it is required to make under s. 23(3). It prohibits the Board from considering the appropriateness of the amount of compensation in any case where the worker retains the essential skills of his or her pre-injury occupation, or those of another occupation which is similar to it. Nothing in s. 23 authorizes the Board to ignore the

inadequacy of compensation simply because the worker is able, at some level, to continue in an occupation, or adapt to an occupation that is, in some respects, similar to it.

[95] The board of directors, in its decision in the parallel proceeding, attempted to justify Policy #40.00 by differentiating between "appropriate" compensation and "adequate" compensation. It held, in effect, that even inadequate compensation may be "appropriate" when considered in the context of the Board's overall mandate.

[96] That reasoning clearly misconstrues s. 23(3.1). The section is not concerned with an abstract concept of "appropriateness" – rather, it is focussed on the question of whether *the amount* appropriately *compensates* the worker. It is obvious that compensation that is wholly inadequate will be in "an amount … [that] does not appropriately compensate the worker for the injury." The board of directors cannot, through policy, prohibit the Board from reaching the conclusion that "inadequate" compensation is "inappropriate".

[97] The board of directors seems also to have misunderstood the effect of its policy:

> Exceptional cases are those in which the injury makes it impossible for the worker to continue in the occupation at the time of injury or transfer his or her skills to another suitable occupation. The Policy does not ensure that the loss of earnings method is available in every case in which the loss of function method may not provide adequate compensation. A shortfall in compensation under the loss of function method, even an "exceptional" shortfall – on its own – *will not necessarily* ensure that the loss of earning method will be applied. [Emphasis added.]

[98] This statement suggests that the board of directors was under the impression that Policy #40.00 left the Board with a discretion (but not an obligation) to apply the Loss of Earnings Method in cases where the Functional Impairment Method resulted in an exceptional shortfall, but where one or more of the criteria in Policy #40.00 was not met. Such a result might be in keeping with the statutory regime, because a determination under s. 23(3.1) only gives the Board discretion (rather than an obligation) to apply the Loss of Earnings Method under s. 23(3).

[99] Policy #40.00 does not, in fact, leave the Board with any discretion to apply the Loss of Earnings Method where an exceptional shortfall of compensation stands "on its own". It purports to eliminate discretion in those situations where a worker is able to return to his or her former occupation, or a similar one, even if he or she suffers an exceptional loss of earnings.

[100] The language of ss. 23(3.1) and (3.2) does not allow the Board to make a finding that the amount of compensation assessed under the Functional Impairment Method is "appropriate" simply because a worker has the ability to retrain so as to work in an occupation that is, in some respects, similar to that which he or she performed at the time of the accident. It is not reasonable, in determining the appropriateness of the amount of compensation, to ignore the financial detriment that a worker will suffer as a result of such an adaptation.

[101] While I would, therefore, characterize its defects more broadly than did the chambers judge, I agree with her conclusion that Policy #40.00 is inconsistent with the provisions of the *Workers Compensation Act*, and that it must not be used to restrict the ability of the WCB or the WCAT to make the determination that it is required to make under s. 23(3.1) of the *Act*.

Remedy

[102] The chambers judge remitted the issue of Mr. Jozipovic's compensation to the WCAT, with instructions that it be determined "with due regard to the principles outlined in [her] reasons for judgment." She refrained from making a declaration to the effect that Policy #40.00 was of no force and effect, saying:

> [143] … I am not satisfied that I should grant a declaration that Policy #40.00 is of no force and effect. It is apparent that, insofar as the offending portions of the policy have an impact on the WCAT's reconsideration of the petitioner's pension entitlement under s. 23(3) of the *Workers Compensation Act*, WCAT must have regard to the principles outlined in these reasons for judgment. However, whether my conclusions with respect to Policy #40.00 should have a more general application is an issue that should be left with WCAT and the board of directors pursuant to the s. 251 review process.

[103] While declaratory relief is discretionary, it is difficult to understand the basis on which the chambers judge refused to exercise her discretion in favour of granting such relief. Her finding that Policy #40.00 was inconsistent with the *Workers Compensation Act* was not dependent on any factual matrix specific to Mr. Jozipovic's case. In the circumstances, there was no basis for refusing to declare Policy #40.00 to be of no force and effect to the extent of the inconsistency.

[104] Despite its inconsistency with the statute, it has not been shown that Policy #40.00 is, in its entirety, invalid. In my view, it is only inconsistent with the statute because in certain circumstances, it prevents the Board and the WCAT from considering whether the Functional Impairment Method fails to provide the worker with appropriate compensation. It does so in all cases where the worker is able to return to his previous occupation (albeit with diminished capacity) or able to seek employment in an "occupation of a similar type or nature". The policy is, to that extent, inconsistent with s. 23 of the *Workers Compensation Act.*

[105] In the result, I would dismiss the appeal and allow the cross-appeal. I would amend the chambers judge's order by adding a declaration that Policy #40.00 is of no force and effect to the extent that it precludes the Board and the WCAT from considering the appropriateness of the amount of compensation that would be awarded under the Functional Impairment Method in accordance with ss. 23(3) and (3.1) of the *Workers Compensation Act*.

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice Kirkpatrick"