CITATION: Weiler v. Workplace Safety and Insurance Appeals Tribunal, 2025 ONSC 1673
DIVISIONAL COURT FILE NO.: DC-24-389
DATE: 20250318

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Backhouse, D.L. Corbett and Charney JJ.

BETWEEN:	)	
	)	
BRAD WEILER	)	Edward S. Kim, for the Applicant
	)	
Applicant	)	
	)	
– **and** –	)	
	)	
WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL	)	Rebecca Woodrow and Stephanie Pope, for the Respondent
	)	
Respondent	)	**HEARD at Toronto:** February 12, 2025

REASONS FOR DECISION

CHARNEY J.:

[1] This is an Application for Judicial Review from the Decision of the Workplace Safety and Insurance Appeals Tribunal (the "Tribunal") dated October 30, 2023 (2023 ONWSIAT 1647) and the Tribunal Reconsideration Decision dated June 10, 2024 (2024 ONWSIAT 910).

[2] The application arises from a claim for loss of earnings ("LOE") benefits under the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A (the "WSIA"). In the October 30, 2023 decision, the Tribunal upheld the decision of the Workplace Safety and Insurance Board ("WSIB") that the Applicant is entitled to partial LOE benefits only based on his ability to work full-time for minimum wage as a Customer Service Representative. The Applicant argued that he should have entitlement to full LOE benefits to age 65 because he did not complete the full training contemplated by WSIB's Labour Market Re-entry Proposal (the "LMR Proposal" or "LMR plan"). In the Reconsideration Decision, the Tribunal denied the Applicant's request for reconsideration.

Facts

[3] The Applicant started working as a welder in 1998. On March 22, 2002, he injured his back lifting a garbage container. At the time, he was earning $18.75 per hour.

[4] The Applicant was diagnosed with thoracic lumbar strain with scoliosis. He returned to modified work with the accident employer in August 2002 and was laid off from his employment with the accident employer on May 31, 2004.

[5] The Applicant attended the Centre for Rehabilitation and Evaluation from August 11, 2003 to September 26, 2003 where he was assessed by health care professionals, who determined that he would not be able to return to work as a welder due to permanent physical restrictions including no prolonged weight bearing, sitting, standing, walking, and no heavy lifting.

[6] The WSIB conducted a Vocational Evaluation and LMR Proposal to determine an alternate Suitable Employment or Business (SEB) (also referred to as a Suitable Occupation (SO)). The LMR Proposal determined that, with academic upgrading and training, the Applicant would be qualified to work as a Customer Service Representative. The LMR plan required academic upgrading to obtain a GED diploma (high school equivalency) and customer service computer training in a Work Transition (WT) Program.

[7] The anticipated wage at the end of the LMR plan was $8.25 per hour, which was minimum wage at the time.

[8] The Applicant attended the WT Program from October 2004 to June 2005. Despite 8 months of academic upgrading, the academic site coordinator determined that the Applicant was not ready to write the GED exam. The Applicant was moved to Customer Service Training and Computer Training which he began on July 4, 2005. He attended 19 of the 20 classes, but did not pass the program.

[9] The LMR plan was to run until December 2025.

[10] The Applicant was offered a temporary position through an employment agency to work as a quality control inspector at $11.00 per hour and withdrew from the LMR training to begin working on September 12, 2005.

[11] The Applicant was laid off on November 1, 2005, and asked the Board about returning to LMR training. The Board advised the Applicant that he could not return to LMR services as there is only one opportunity given.

[12] The Applicant did not work after he was laid off on November 1, 2005. The WSIB granted him partial LOE benefits, based on an ability to earn $8.25 per hour for a 40-hour work week, effective November 1, 2005. The LOE benefit was calculated on the basis of his pre-accident income of $18.75 minus his deemed ability to earn minimum wage at $8.25.

[13] The Board conducted a final LOE benefit review on April 2, 2008, which locked in the Applicant's partial LOE benefits, based on his deemed ability to earn minimum wage working full-time until age 65.

[14] The Applicant appealed to the Board's appeals division with respect to the April 2, 2008 final LOE benefit review decision. The Applicant took the position (as he does on this Application) that his LOE benefit should be calculated on his full pre-accident income of $18.75 an hour without any deduction for his deemed ability to earn minimum wage at $8.25. In a decision dated October 26, 2021, an Appeals Resolution Officer ("ARO") upheld that decision.

Statutory Framework

[15] The Applicant's LOE benefits are governed by s. 43 of the WSIA. The general formula is that a worker who suffers a loss of earnings as a result of workplace injury is entitled 85 per cent of the difference between their net average earning before the injury; and the net average earnings they earn or are able to earn in a suitable or available employment or business after the injury.

[16] The relevant provisions of s. 43 provide:

> Amount
>
> (2) Subject to subsections (2.1), (2.2), (3) and (4), the amount of the payments is 85 per cent of the difference between,
>
> (a) the worker's net average earnings before the injury; and
>
> (b) the net average earnings that the worker earns or is able to earn in suitable and available employment or business after the injury.
>
> …
>
> Earnings after injury
>
> (4) The Board shall determine the worker's earnings after the injury to be the earnings that the worker is able to earn from the employment or business that is suitable for the worker under section 42 and is available and,
>
> (a) if the worker is provided with a labour market re-entry plan, the earnings shall be determined as of the date the worker completes the plan; or
>
> (b) if the Board decides that the worker does not require a labour market re-entry plan, the earnings shall be determined as of the date the Board makes the decision. [Emphasis added.]

Workplace Safety and Insurance Appeals Tribunal Decision

[17] The Applicant appealed the ARO Decision of October 26, 2021 to the Tribunal.

[18] The appeal was heard by videoconference on February 23, 2023. There was no dispute that the Applicant was not able to continue to work in his pre-injury occupation due to the physical nature of his job or that he was not working at the time of the final LOE review in April 2008, or that he had not worked since November 2005.

[19] The sole issue in the appeal was the correct quantum of LOE benefits to which the Applicant was entitled at the date of the final review on April 2, 2008. The Applicant took the position (as he does on this Application) that his LOE benefit should be calculated on his full pre-accident income of $18.75 an hour without any deduction for his deemed ability to earn minimum wage because he never completed the WT Program. Since he did not complete the program, the Applicant argued, he was not qualified to work as Customer Service Representative and was not employable.

[20] The Tribunal held that the Applicant left the WT Program voluntarily to accept an offer of work at a higher salary, and that his voluntary withdrawal from the WT Program did not reflect an inability to perform the designated Suitable Occupation. The Tribunal stated, at para. 35:

> The worker left the WT program a few months prior to its planned closure date in December 2005, as he accepted a position as a Quality Control Inspector where he performed full time duties until November 1, 2005. While the worker's representative submits that the Customer Service Representative position was not suitable as the worker only had a grade 9/10 education and no computer skills, I do not agree. The purpose of the academic upgrading which he completed was to increase his base education level, and, furthermore he was able to secure a position in what appears to be a more challenging SEB, that of Quality Control Inspector, in September 2005 temporarily. A careful evaluation of the worker's functional limitations and educational background and transferrable skills led to the SO determination.

[21] The Tribunal concluded that there was insufficient evidence that the Applicant was not able to work at all as of April 2, 2008 due to his workplace injury.

[22] Another issue at the Tribunal hearing related to a left shoulder injury identified in March 2006.

[23] In 2007 the Applicant was found eligible to receive a Canada Pension Plan Disability benefit retroactive to 2006, based on medical evidence that he had a left shoulder labral tear and "chronic pain from the basiocciput (neck/skull base) to his sacrum".

[24] The Tribunal found that the Applicant's neck pain and shoulder tear were "subsequently arising conditions", and therefore non-compensable and not considered in assessing LOE benefits. The Tribunal stated, at paras. 44-45:

> Where a worker suffers a non-compensable condition after the workplace accident, the non-compensable condition is not considered in assessing LOE benefits [citations omitted] … The worker's neck pain and shoulder tear were subsequently arising conditions.
>
> The worker had already performed modified duties for a year and a half post-injury (November 2002 to May 2004) which he described as the same light work comparable to the Customer Service Representative SO approved for him in the WT. He had also performed duties outside his SO in a temporary position.

[25] The Tribunal therefore concluded that the Applicant's partial LOE calculation was appropriately based on the suitability of the SEB of Customer Service Representative, based on minimum wage and the ability to work a 40 hour week, and denied his appeal.

Workplace Safety and Insurance Appeals Tribunal Reconsideration

[26] The Applicant requested a reconsideration of the October 30, 2023 Tribunal decision.

[27] The WSIA provides that the Appeals Tribunal's decisions shall be final. However, section 129 of the WSIA and sections 70 and 92 of the *Workers' Compensation Act* provide that the Tribunal may reconsider its decisions "at any time if it considers it advisable to do so." Generally, the Tribunal must find that there is a significant defect in the administrative process or content of the decision which, if corrected, would probably change the result of the original decision. The error and its effects must be significant enough to outweigh the general importance of decisions being final and the prejudice to any party of the decision being re-opened*: Decision No. 871/02R2*, 2006 ONWSIAT 3023, at paras. 11-13.

[28] In dismissing the request for reconsideration, the Tribunal stated, at para. 14:

> Generally, the goal of the Board's LMR plan is to provide the worker with the skills necessary to return to the workforce in a physically suitable capacity after a work-related injury, usually in a different field of work. In situations where a worker has sufficient transferrable skills to return to remunerative employment without retraining, the Board may determine that an LMR plan is not required. In this instance, the worker did not finish the LMR plan as anticipated. However, he also demonstrated the ability to return to the workforce, and to earn a wage higher than minimum wage. It therefore follows that the worker no longer required LMR services after the worker obtained such employment. Consequently, I find that the Board's acceptance of the worker's withdrawal from the LMR plan was an implicit determination that the worker did not require such a plan in order to return to physically suitable, remunerative work. As such, I find

> that the worker falls under section 43(4)(b), rather than section 43(4)(a), of the WSIA. I also find, however, that this is not a significant change that would likely alter the result of the original Tribunal decision, as section 43(4) applies whether the worker falls under subsection (a) or (b).

[29] Finally, the Tribunal rejected the Applicant's interpretation of s. 43(4)(a) of the WSIA, stating, at para. 21:

> Additionally, I find that it would not be reasonable to interpret the applicable legislation or the Board policy in the manner suggested by the worker's representative. He argued that the worker should have entitlement to full LOE benefits to age 65 because he did not complete the full training contemplated by the LMR plan. I note, however, that he does not dispute that the worker withdrew from the LMR plan voluntarily, and that the worker did so for reasons not related to his compensable injuries. If I were to follow the representative's reasoning, it would suggest that any worker who withdrew from their LMR plan, including for reasons not related to their injuries, would be entitled to full LOE benefits, regardless of their personal or vocational characteristics or level of impairment. I find that this would be contrary to subsection 43(1) of the WSIA, which limits payment benefits to earnings that are lost as a result of the work-related injury. Consequently, I cannot agree with the worker's representative's position, as it would lead to an absurd and unfair result, and would be contrary to the WSIA.

Jurisdiction

[30] It is these two decisions of the Tribunal – the first decision delivered following a *de novo* hearing, and the second following a request for reconsideration of the first decision – that are now the subject of this Application for Judicial Review.

[31] This Court has jurisdiction to judicially review these decisions pursuant to ss. 2(1) and 6(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c J.1.

Standard of Review

[32] The standard of review of these decisions is reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65). As stated by this Court in *Radzevicius* v. *WSIAT*, 2020 ONSC 319:

> The standard of review is reasonableness. None of the questions before the Court are constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between administrative bodies. The Act also contains a robust privative clause. The Legislature has clearly signaled its intention that the Tribunal's decisions be given great deference (*Canada*

> *(Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 33, 53).

[33] The Court of Appeal for Ontario has described the Tribunal as having "the toughest privative clause known to Ontario law": see *Liverpool v. (Ontario) Workplace Safety and Insurance Appeals Tribunal*, 2023 ONSC 2286 (CanLII), at para. 28, citing *Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 719, 92 O.R. (3d) 757, at para. 22, leave to appeal refused, [2008] S.C.C.A. No. 541.

[34] The Applicant argues that the standard of review is correctness, because interpreting the meaning of s. 43(4) of the WSIA, and when any worker "completes the plan", affects all workers who may have unsuccessfully completed an LMR plan. He argues that this is a question of central importance to the legal system as a whole.

[35] This argument must be rejected. *Vavilov* explains, at para. 61, that "the mere fact that a dispute is "of wider public concern" is not sufficient for a question to fall into this category – nor is the fact that the question, even when framed in a general or abstract sense, touches on an important issue". The Court stated: "The case law reveals many examples of questions this Court has concluded are *not* general questions of law of central importance to the legal system as a whole. These include whether a certain tribunal can grant a particular type of compensation…" [Emphasis added]. The legal question in this case falls neatly into this category of cases identified by the Supreme Court as not raising a general question of law of central importance to the legal system.

[36] The proper interpretation of the phrase "completes the plan" in s. 43(4)(a) of WSIA is not a "general question of law" that is of "fundamental importance and broad applicability", "with significant legal consequences for the justice system as a whole or for other institutions of government": *Vavilov*, at para. 59. While the question is important to the Applicant, and may be relevant in future cases, it does not have any impact outside the interpretation of this particular phrase in very specific circumstances.

[37] The meaning of the reasonableness standard was explained in *Vavilov*, at para. 15, as follows:

> In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

[38] A court reviewing a question of statutory interpretation in a judicial review must be careful to not "conduct a *de novo* interpretation nor attempt to determine a range of reasonable interpretations against which to compare the decision of the administrative decision

maker*." Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, at para. 40.

Position of the Applicant

[39] The Applicant argues that the Tribunal erred in interpreting the phrase "the date the worker completes the plan" in s. 43(4)(a) of WSIA.

[40] The Applicant argues that common sense dictates that a plan is completed when all aspects of the plan are successfully completed. In this case the Applicant did not successfully complete either the Academic Upgrading or the Computer Literacy program components of his LMR plan. Since he did not complete the plan, the Tribunal erred in finding that he could earn minimum wage and in deducting that amount from his LOE benefits.

[41] The Applicant further argues that he should not be penalized for voluntarily leaving the LMR in order to take a temporary job and earn income, since return to employment is one of the goals of the WSIA. Finally, he argues that once this temporary employment ended, he tried to return to the program to complete it but was told that this was contrary to the WSIB policy that only one opportunity is provided. Accordingly, it was not his voluntary departure, but the WSIB policy, that prevented him from completing the plan.

Analysis

[42] This case involves a specialized and expert provincial tribunal interpreting and applying its home statute and related Board policy. At para. 31 of *Vavilov*, the Supreme Court states that "expertise remains a relevant consideration in conducting [a] reasonableness review."

[43] In *Turkiewicz (Tomasz Turkiewicz Custom Masonry Homes) v. Bricklayers, Masons Independent Union of Canada, Local 1*, 2022 ONCA 780, at para. 61 (application for leave to appeal dismissed, 2023 CanLII 67201 (SCC)), the Ontario Court of Appeal elaborated on this principle:

> Moreover, decision makers' specialized expertise may lead them to rely, when conducting statutory interpretation, on "considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise" (para. 119). As such, relevant expertise of the administrative decision maker must be borne in mind by a court conducting a reasonableness review, both when examining the rationality and logic of the decision maker's reasoning process and the decision itself, in light of the factual and legal constraints bearing on it.

[44] In my view, the Tribunal's decisions are reasonable when assessed using the *Vavilov* directives. The Tribunal engaged in a transparent and intelligible analysis to arrive at a reasonable interpretation of s. 43(4). Section 43(4)(a) does not use the words "successfully completes the plan", and I cannot, therefore, conclude that the Tribunal's decision that a worker has completed the plan by withdrawing from it to obtain work is an unreasonable interpretation of that provision.

[45] In addition, the Reconsideration Decision did not rest on s. 43(4)(a), but relied on s. 43(4)(b), holding that "the worker's withdrawal from the LMR plan was an implicit determination that the worker did not require such a plan in order to return to physically suitable, remunerative work." In reaching this conclusion, the Tribunal drew on its institutional experience and expertise, ensuring the interpretation aligned with the Board's operations and objectives of the legislation. Based on the factual findings of the Tribunal, which were not challenged in this application, that was a reasonable application of the statutory provision to the Applicant's circumstances.

[46] In particular, the Tribunal found that the Applicant's neck pain and shoulder tear were subsequently arising conditions and therefore non-compensable. This finding was based on the evidence presented before the Tribunal, was not challenged in this Application, and is a reasonable one available on that evidence.

Conclusion

[47] The Application is dismissed. In accordance with the parties' agreement, there will be no order as to costs.

"Charney J."

I agree: "Backhouse J."

I agree: "D.L. Corbett J."

Released: March 18, 2025

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BRAD WEILER

Applicant

– and –

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

Respondent

REASONS FOR DECISION

Justice R.E. Charney

Released: March 18, 2025