

Date: 19980616

Docket: C.A. 145401

NOVA SCOTIA COURT OF APPEAL

Cite as: Nova Scotia (Workers' Compensation Board) v. Walsh, 1998 NSCA
136

Chipman, Roscoe and Cromwell, JJ.A.

BETWEEN:

WORKERS' COMPENSATION BOARD OF)
NOVA SCOTIA)

Appellant)

- and -)

WORKERS' COMPENSATION APPEALS)
TRIBUNAL OF NOVA SCOTIA and LARRY)
WALSH)

Respondents)

John R. Ratchford
for the Appellant

Respondent Tribunal
not appearing

K.H. (Kenny) LeBlanc
for the Respondent Walsh

Appeal Heard:
June 16, 1998

Judgment Delivered:
June 16, 1998

THE COURT: Appeal dismissed per oral reasons for judgment of Cromwell,
J.A. Chipman and Roscoe, JJ.A. concurring.

CROMWELL, J.A.: (Orally)

In 1984, the appellant, Mr. Walsh, received a permanent disability award of 2.7% plus the cost of a prescribed hearing aid. The award was made as a result of work-related hearing loss. Mr. Walsh retired in 1984 or 1985. His partial disability award was increased by the Workers' Compensation Appeal Board in 1987 with effect from December 1, 1986. That award also included a provision that required hearing aids be supplied to Mr. Walsh.

Mr. Walsh subsequently sought a further increase in his disability award on the basis that his hearing deteriorated after he left his employment. A Hearing Officer denied the claim in November of 1995 on the basis that on the evidence there was no reasonable inference that the further deterioration of his hearing was a result of his exposure to noise at work. The Hearing Officer decided, in essence, that the deterioration after Mr. Walsh stopped being exposed to noise at work could not be related to the nature of his employment.

Mr. Walsh appealed to the Tribunal which allowed the appeal, increased the permanent impairment rating and directed that Mr. Walsh be assessed by a hearing specialist to assess his need for hearing aids commensurate with his level of hearing loss and that any hearing aids prescribed be paid for by the Board.

The Board now appeals to this Court on two grounds.

The first is that the Tribunal erred in its application of the burden of proof and, in particular, in awarding compensation in what the Board submits to be an absence of evidence that the deterioration was caused by exposure to noise at work. The essence of this ground of appeal is that the Tribunal misapplied s. 24 of the former **Act** to the evidence before it. Assuming without deciding that this could constitute jurisdictional error, this ground cannot succeed. The basis for the argument is that deterioration of hearing after Mr. Walsh left his employment in 1984 or 1985 could not have been caused by his work. The Tribunal's decision to the contrary is consistent with the decision of the Appeal Board in 1987 to increase the disability award as a result of post retirement deterioration. It is supported by the medical opinion of Dr. Murphy in February of 1987 that Mr. Walsh "... had a prolonged history of noise exposure and the most likely cause for the hearing loss [i.e. further deterioration after he left his employment] is occupational nerve deafness." Even assuming that an absence of evidence is a jurisdictional matter (a point we do not need to decide here), the Tribunal did have evidence before it on which to base its conclusion.

The second ground is that the Tribunal erred in ordering the Board to pay for hearing aids that might be prescribed since the payment of medical aid is within the sole discretion of the Board. This issue is largely governed by the decision of this Court in **Workers' Compensation Board of Nova Scotia v.**

Workers' Compensation Appeals Tribunal and Brenda MacLeod (May 21, 1998). The request for the new hearing aid for Mr. Walsh was filed with the Board in February of 1995. There is no mention of it in the decision of the Hearing Officer in November of 1995, presumably because the claim for an increase in the permanent partial disability award was denied. The Board made no submissions specific to this appeal before the Tribunal. These circumstances are similar to those in **MacLeod**. In addition, both the Board's award in 1984 and the Appeal Board decision increasing the disability award in 1987 made provision for the cost of needed hearing aids. The Tribunal made no jurisdictional error in its disposition of the issue.

The appeal is therefore dismissed.

Cromwell, J.A.

Concurred in:

Chipman, J.A.

Roscoe, J.A.

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WORKERS' COMPENSATION APPEALS
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REASONS FOR
JUDGMENT BY:

CROMWELL, J.A.