

NOVA SCOTIA COURT OF APPEAL

Cite as: Hunter v. Nova Scotia (Workers' Compensation Board), 1999 NSCA 87

Freeman, Pugsley and Cromwell, JJ.A.

BETWEEN:

DAVID HUNTER	)	Kenneth H. LeBlanc and
Workers' Compensation Claimant	)	Linda L. Zambolin
(Claim No. 1460308)	)	for the appellant
)	
Appellant	)	Sarah Bradfield
	)	for the respondent Tribunal
- and -)	
	)	David P.S. Farrar and
THE WORKERS' COMPENSATION	)	John R. Ratchford
APPEALS TRIBUNAL and THE	)	for the respondent Board
WORKERS' COMPENSATION BOARD)	
OF NOVA SCOTIA)	
)	
Respondents)	
)	
)	
	)	Appeal heard:
	)	March 18, 1999
)	
	)	Judgment delivered:
	)	June 10, 1999
)	
)	

THE COURT: Appeal dismissed per reasons for judgment of Cromwell, J.A.;
Freeman and Pugsley, JJ.A. concurring.

CROMWELL J.A.:

[1] David Hunter appeals to this Court from the decision of the Workers' Compensation Appeals Tribunal which dealt with his claim for benefits for chronic pain in accordance with the Functional Restoration (Multi-Faceted Pain Services) Program Regulations. (These are referred to as the FRP Regulations.) This Court granted leave to appeal that decision and set out three questions to be considered:

1. On this appeal to the Court of Appeal pursuant to s. 256 of the **Workers' Compensation Act**, S.N.S. 1994-5, c. 10 (the "**Act**"), may the Court pronounce upon whether the **Functional Restoration (Multi-Faceted Pain Services) Program Regulations** (the "**FRP Regulations**") or a part thereof are inconsistent with the **Act** and therefore *ultra vires*?
2. If the answer to question 1 is yes, did the Workers' Compensation Appeals Tribunal commit jurisdictional error in this case by basing its decision on *ultra vires* **FRP Regulations**?
3. If the answer to question 2 is yes, what order should the Court make on appeal?

[2] Mr. Hunter injured his back in February of 1991 when he slipped on ice and fell while employed as a mechanic with G & R Kelly Enterprises Limited. He stopped work on February 26, 1991. While he received compensation including temporary total disability for certain periods up to August of 1992, his application for benefits beyond that date was denied by the Board. On appeal to WCAT, the Tribunal found that Mr.

Hunter's claim was governed by the FRP Regulations. He was, therefore, not entitled to benefits because section 6 of the Regulations denies benefits where, as here, more than 12 months have elapsed since the injury.

[3] The appeal to this Court was heard and judgment reserved on March 18, 1999. While the matter was under consideration by the Court, amendments to the **Act** were passed and proclaimed in force. The parties were asked for submissions concerning the effect, if any, of these amendments on the appeal and those submissions have now been received and considered.

[4] Most relevant to this case is the new section 10E of the Act which provides:

10E Where a worker

- (a) was injured on or after March 23, 1990, and before February 1, 1996;
- (b) has chronic pain that commenced following the injury referred to in clause (a);
- and
- (c) as of November 25, 1998, was in receipt of temporary earnings-replacement benefits; or
- (d) as of November 25, 1998, had a claim under appeal

- (i) for reconsideration
- (ii) to a hearing officer,
- (iii) to the Appeals Tribunal, or
- (iv) to the Nova Scotia Court of Appeal,

or whose appeal period with respect to an appeal referred to in subclauses (i) to (iv) had not expired,

the Board shall pay to the worker a permanent-impairment benefit based on a permanent medical impairment award of twenty-five per cent multiplied by fifty per cent, and an extended earnings replacement benefit, if payable pursuant to Sections 37 to 49, multiplied by fifty per cent and any appeal referred to in clause (d) is null and void regardless of the issue or issues on appeal.

[5] In their submissions to the Court, counsel for Mr. Hunter and counsel for the Board are in agreement that Mr. Hunter's case falls under section 10E of the amended **Act** because he was injured on or after March 23, 1990 and before February 1, 1996, had chronic pain that commenced following the injury and, as of November 25, 1998, had a claim under appeal. Counsel for Mr. Hunter submits that we should, therefore, make an order requiring the Board to pay the benefits as set out in section 10E. Counsel for the Board takes the position that we should not do so, because section 10E specifically provides that this appeal is "...null and void regardless of the issue or issues on appeal" and that it is the Board, not this Court, which is to address in the first instance what benefits, if any, are payable to Mr. Hunter under the amended legislation.

[6] In my view, the position of the Board is the correct one. Section 10E provides that this appeal is null and void and counsel for Mr. Hunter acknowledges that this section is applicable to this appeal. That being the case, there is no basis upon which the Court may make any order other than one dismissing the appeal. I would, therefore, dismiss the appeal. In doing so, I express the hope that the Board will deal promptly with the question of Mr. Hunter's entitlement to benefits under the amended legislation.

Cromwell J.A.

Concurred in:

Freeman, J.A.

Pugsley, J.A.