Date: 20010911
Docket: CA 168849

NOVA SCOTIA COURT OF APPEAL

[Cite as: Meechan v. Nova Scotia (Workers' Compensation Board), 2001 NSCA 124]

Hallett, Bateman and Saunders, JJ.A.

BETWEEN:

MICHAEL MEECHAN

Appellant

- and -

THE NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL and THE WORKERS' COMPENSATION BOARD OF NOVA SCOTIA

Respondents

REASONS FOR JUDGMENT

Counsel:	Cathy L. Dalziel for the appellant Louanne Labelle for the respondent, WCAT Janet E. Curry and Catherine Gaulton for the respondent, WCB
Appeal Heard:	May 15, 2001
Judgment Delivered:	September 11, 2001
THE COURT:	Appeal allowed per reasons for judgment of Bateman, J.A.; Hallett, J.A. concurring; Saunders, J.A. concurring in the result by separate reasons.

Saunders, J.A.: (Concurring in the result by separate reasons.)

INTRODUCTION

[1] The appellant, Michael Meechan, seeks a permanent medical impairment (PMI) assessment for an injury to his back suffered 25 years ago when he fell off a ladder while at work. His request has been refused at every level, most recently in a decision of the Workers' Compensation Appeals Tribunal (WCAT) dated December 19, 2000.

[2] It is from that decision that Mr. Meechan now appeals. The primary issues here are whether Mr. Meechan's claim is barred by non-compliance with certain statutory obligations or the passage of time.

[3] Before addressing those issues, I will set out the chronology and material facts of this most unfortunate and unusual case.

FACTUAL BACKGROUND

[4] The appellant is almost 56 years of age. He was a thirty-year-old craftsman when he suffered the injury to his back, prompting such a long history of requests for compensation which lies at the heart of this appeal.

[5] On Christmas Eve, Friday, December 24, 1976, Mr. Meechan was working for Maritime Tel and Tel Company Co. Ltd. (MT&T) in their building on Prince Street, Sydney, Nova Scotia. During the course of his duties he fell eight feet onto a concrete floor. The ladder on which he was standing broke free from its mounting track. These ladders, all made of oak and steel, were mounted on tracks from the ceiling and were twelve to fourteen feet in length. The person using the ladder could be advanced back and forth along the aisles using hand controls.

[6] Prior to Mr. Meechan scaling the ladder, workers with Northern Telecom Canada Limited (Nortel) had temporarily removed the ladder to allow certain equipment to be moved down the aisles of the building. When reinstalling the ladder they failed to replace a vital piece of the ladder mechanism - known as a rubber bumper stopper - thus causing the accident. Without the stopper in place, the ladder ran off its track throwing Mr. Meechan into the air, crashing to the floor with the ladder on top of him. He landed on his back with the ladder striking the floor and then bouncing and landing on top of him. The incident is best described by Mr. Meechan at the hearing before WCAT held December 5, 2000:

> ... the employees of Northern Telecom ... didn't install what is known as a rubber bumper stopper. This allowed the end of the track, the ladder track, to be able to keep going. In other words, the bumper stopper wasn't there to stop it ... These ladders are made of oak ... They're a substantial weight ... They have handrails on them, wide stairs ... So, when they would go on the run, the weight of them alone would cost (sic) quite a bit of damage as it did to the floor where it fell. I happen (sic) to be on this particular ladder this day when they neglected to put the stopper in. When I advanced the ladder, the ladder went on the run. Our ladders when they're taken down and put back up again, they go through a process of having been checked out. This ladder had a cardboard display that said the ladder was fit for use. So, at that stage anybody looking at that ladder wouldn't have to do anything with it, because the ladder is sanctioned as being okay for appropriate use.

[7] Mr. Meechan was badly shaken up. He was able to leave the building on his own after first completing both an accident report for MT&T and a Workers' Compensation Board (WCB) report. Many people witnessed the accident and confirmed the appellant's version of events in subsequent statements or affidavits. Mr. Melvin Currie was standing fifteen feet away from where the appellant was working. In his affidavit sworn April 21, 1998, he deposed that:

> ... The weight of the ladder took pieces out of not only the tile floor, but also the cement floor, which is beneath the tile floor.
>
> When I heard the noise I cam (sic) from my work position to see what had happened. Mike was on the floor on his back. The ladder was lying across him. He had taken quite a fall and those ladders are quite heavy ...
>
> We were on Holidays for the next number of days, because December 24, 1976 was Christmas Eve. Mike was back to work on January 2, 1977, because that was the day he drew to work over the Holidays. I was told he was working on a ladder on that day, turned and put his back out.
>
> Mike was off for a long time over these mishaps. I know from working with him that he has a lot of back discomfort. He has missed a lot of time...

[8] By completing the documents given to him and delivering both a company accident report and a WCB report to his employer, MT&T, Mr. Meechan assumed that matters would proceed in the usual course. Twenty-two years later he discovered they had not.

[9] He was scheduled to report back for work on Sunday, January 2, 1977. He had drawn that shift for the holidays. His duties that day required that he

climb a ladder to remove heat coils so that they could be tested. While doing that he turned and felt a sharp pain in his back. He could neither straighten up, nor could he step down from the ladder. He had to slide down, hobble to his vehicle and get himself home. Once again he advised his foreman and completed the documentation given to him, both an MT&T incident report as well as a WCB report. On both occasions, that is December 24, 1976 and January 2, 1977, Mr. Meechan handed the completed reports to the manager, Mr. George Lohnes, and believed that he had turned them over to officials at MT&T and the WCB. It was only in 1998 that the appellant discovered the December 24, 1976 accident had never been reported to the WCB. He learned that officials at MT&T had deliberately withheld the report.

[10] On January 5, 1977, the appellant visited St. Joseph's Hospital in Glace Bay, Nova Scotia, for X-rays of his chest, dorsal and lumbar spine. As the Board's handling of the appellant's file really begins with these X-rays, I will reproduce the operative text from the report signed by the radiologist, Dr. Walker, verbatim and say more about that later.

> Chest: Examination is compared with the previous study of June 14, 1973 demonstrates no significant interval change. No active pulmonary inflammatory lung lesion is identified.
>
> Lumbar Spine: There is now interspace narrowing between L5 and S1. The vertebral body alignment is normal. The head of the vertebral body alignment is preserved. No significant osteophyte formation is identified. There are five lumbar segments with intact neural arches.
>
> Opinion: Ther (sic) pertinent finding is the presence of interspace narrowing between L5 and S1.
>
> Dorsal Spine: There is a slight scolio of the dorsal spine convex to the right with the apex at the D6 and a compensatory curve to the left of the apex at D8. There (sic) 12th thoracic segments with intact nerual (sic) arches. No pathological fracture are (sic) identified, but small osteophytes are noted in relation to the end plates of the vertebral bodies of the mid and lower thoracic spine.

[11] The appellant was referred to Dr. H. G. Malik in Halifax for an assessment. By letter dated March 31, 1977, Dr. Malik reported to Dr. D. G. MacDonald, the WCB medical officer. In his letter Dr. Malik refers to his physical examination of the appellant as well as the X-rays furnished earlier by Dr. MacDonald, those being the ones taken at St. Joseph's Hospital on January

5, 1977. In his reporting letter to Dr. MacDonald, Dr. Malik makes a critical error. He begins:

> ... As you know, this 31 year old gentleman who works with Maritime Tel & Tel was well until about four of five years ago when he was on a ladder, at the office where he works and he fell from a height of about 7 or 8 feet. He seemed to hurt his back. He took rest for a few days and was then able to go back to his usual work.... He was well thereafter until January 2, 1977 when he was on a ladder and turned and developed pain in his back which so severe that he could not move. He has been getting a course of physiotherapy as an out-patient for 2 weeks and has been taking it easy at home, but has not improved appreciably.
>
> Since the end of January, 1977, he has been having pain radiating down the left leg to the lateral aspect of the left thigh, and it has occasionally hurt to cough or laugh.
>
> ... There was minimal lumbar paravertebral muscular spasm. He seemed to be tender at the lumbo-sacral junction. Naffzigger's sign was negative. Pelvic flexion seemed to make him more comfortable.
>
> I reviewed the x-rays of the lumbar spine which you had so kindly sent with him. There are 5 lumbar vertebrae. L5, sits low on the sacrum and seems to be partly sacralized. The L5-S1 disc space is narrow. The L4-5 disc space also appears to be slightly narrow. The facet joints appear to be within normal limits.
>
> I feel that this gentleman's problem is due to a degenerated L4-5 disc and he may have had a lumbar sprain....
>
> [Underlining mine.]

[12] Dr. Malik's reference to the fall off the ladder as being "four or five years ago" was a most unfortunate slip. His mistake coupled with MT&T's decision to withhold reporting the fall off the ladder to WCB led to a string of potentially inaccurate assessments and assumptions in the handling of the appellant's claim. Only through Mr. Meechan's perseverence did he manage to get to the bottom of it.

[13] It was not until December 1998 that the appellant first learned the report of his fall off the ladder in December 1976 had never been passed on to the Board. Mr. Meechan could not understand the Board's reticence. In his eyes officials refused to believe that anything had happened to him while on the job in December 1976. Mr. Meechan tried to reconstruct events in his own mind. He recalled that a Mr. Ted Atkinson was the on-site supervisor for

Nortel. One night in 1998 while "channel hopping" on the television, he just happened to catch an interview with Mr. Atkinson, by then running his own company in New Brunswick. After searching telephone directories and the Internet, the appellant finally tracked him down. Their serendipitous meeting on the telephone is best described by Mr. Meechan in his own words at the hearing before the WCAT:

> I introduced myself as to who I was, and the first thing that came out of his mouth was, "Mike Meechan from Sydney, Maritime Tel & Tel, came off a ladder December 24, 1976." And I said, "Well, you do remember me." He said, "I certainly do, and I felt bad about that ever since." And I said, "Oh?" He said, "Yeah." And I said, "Why?" He said, "Well, you know, your report never went to the Workers' Compensation Board." I said, "What?" He said, "The report for that accident never went to the Board." And I said, "How do you know that?" He said, "Because I was there when the decision was made not to send it." And I said, "Oh?" He said, "When I came back from vacation in January of 1977, I was summoned to George Lohnes's office." And George Lohnes was known as George [inaudible]. And he called Ted in – as Ted indicated to me – and said, "What the hell are you people doing? Do you know one of my men got hurt?" And he said, "He really chewed me out about it," and so on, and then he said, "Look, we have a Workers' Compensation report written up on it, and he said, 'I'll tell you what I'm going to do about it.'" Now I'm just quoting as to what was said to me on the phone. And I said "Oh?" He said, "Yeah. He said – he indicated to me that because our company was an outside company and because we would have paid highly for Workmen compensation, if we were to enter the province again, after having a worker's report filed against me, that he was going to renege on sending it to the Board," and he said, I would be covered because of the second accident. The second accident being that one of January 2, 1977. So, as Ted indicated to me that's the way it was done.

[14] By his own doggedness and incredible patience, the appellant had finally learned how his claim had "gone off the rails" twenty-two years earlier.

HISTORY OF THE CLAIM

[15] Satisfied that Mr. Meechan suffered a lower back injury on January 2, 1977, the Board awarded him temporary total disability benefits from January 5, 1977 to June 6, 1977. Mr. Meechan subsequently sought a PMI assessment. His request was ultimately dealt with at the Hearing Officer level. By decision dated August 28, 1996 the officer determined that the appellant was not entitled to a PMI assessment.

[16] Mr. Meechan appealed that rejection to the WCAT. By decision dated October 28, 1999 the WCAT refused Mr. Meechan's claim for compensation on the basis that it was statute barred, being outside the time limitations set forth in s. 83 of the **Workers' Compensation Act**, S.N.S. 1994-5, c. 10, as amended by S.N.S. 1999, c. 1. Following an appeal to this court based upon new evidence, the matter was remitted back to the Board for further consideration. By decision dated May 18, 2000 the case manager determined that the appellant's claim for compensation was statute barred for non compliance with the **Act**. The appellant again appealed that decision to the Hearing Officer level. By decision dated August 9, 2000 the officer upheld the case manager's decision. Mr. Meechan appealed the Hearing Officer's decision to WCAT. A hearing was held December 5, 2000. The appellant was the only person to testify, the Board and the employer having elected not to call evidence.

[17] By decision dated December 19, 2000 (the decision) WCAT found that the appellant was injured during the course of his employment on December 24, 1976 but that his claim for benefits in relation to that injury was barred by s. 83 of the **Act**. As a result Mr. Meechan's request that he be given a PMI assessment was refused.

[18] It is from that decision that Mr. Meechan appeals to this court.

REASONS

[19] Appeals to this court from a decision of the WCAT are limited to matters of jurisdiction or questions of law. Section 256 of the **Act** provides:

> (1) Any participant in a final order, ruling or decision of the Appeals Tribunal may appeal to the Nova Scotia Court of Appeal on any question as to the jurisdiction of the Appeals Tribunal or on any question of law but on no question of fact.

[20] Thus while questions of law as well as mistakes made in relation to the interpretation or application of the Tribunal's own jurisdiction will amount to errors reviewable by this court, questions of fact fall within the exclusive purview of the WCAT and the Board. Here the appellant has characterized mistakes alleged to have been made by the Board as being either errors of law or jurisdiction.

[21] In **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] S.C.J. No. 39, the court recognized that judicial review for error of law is appropriately viewed as a spectrum; that is to say certain administrative

decisions are entitled to more deference than others. Justice L'Heureux-Dubé articulated a "pragmatic and functional" approach to be applied when setting the appropriate standard for review of decisions made by an administrative tribunal. She wrote:

> ... The pragmatic and functional approach takes into account considerations such as the expertise of the tribunal, the nature of the decision being made, and the language of the provision and the surrounding legislation. It includes factors such as whether a decision is "polycentric" and the intention revealed by the statutory language. The amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made are also important considerations in the analysis....

[22] Justice Chipman described the scope of judicial review for jurisdictional error in **Doward v. Workers' Compensation Appeals Tribunal**, [1997] N.S.J. No. 171. Although his decision predates the substantial overhaul of the **Act** in 1999, his remarks are still apt. At §47 he observed:

> On the limited appeal from the Tribunal to this Court, a jurisdictional error appears if the Tribunal incorrectly interprets provisions of the current **Act** limiting its appellate jurisdiction. A jurisdictional error also appears if the Tribunal errs in a patently unreasonable manner in resolving a question of law within its jurisdiction.

[23] Mr. Meechan's 25-year-long quest for a proper and complete review of his claim for compensation stems from two incidents, a week apart, causing injury to his lower back. The first mishap occurred on December 24, 1976 when he fell eight feet off a ladder onto a concrete floor. The second occurred January 2, 1977 when he turned to his right while standing on a ladder and immediately experienced excruciating and incapacitating pain in his back. He was then off work on total temporary disability for six months.

[24] Some controversy exists as to which statutory regime ought to be applied to the appellant's claim, whether the legislation in place at the time or the substantially revised version proclaimed in force in 1999. The appellant argues that the former legislation, the **Workman's Compensation Act**, R.S.N.S. 1967, c. 343, ought to apply as being the law in force at the time he was injured.

[25] The appellant's assertion cannot be sustained. The matter was settled by the decision of this court in **Walsh v. Nova Scotia (Workers' Compensation Appeals Tribunal)** [2001] N.S.J. No. 11. There Flinn, J.A. applied the

provisions, including the stipulated time limitations of the **Workers' Compensation Act**, S.N.S. 1994-5, c. 10, as amended by S.N.S. 1999, c. 1 (the **Act**) to a claim for compensation filed 22 years after that claimant broke her leg while working as a truck driver in 1977. Accordingly I apply the **Act** in force today to Mr. Meechan's claim for compensation.

[26] I will now consider the operative provisions of the **Act** material to this case.

[27] Section 82 provides:

> Where a worker is eligible to apply for compensation pursuant to this Part, the worker shall forthwith file with the Board
>
> (a) a claim for compensation;
>
> (b) the attending physician's report; and
>
> (c) any further evidence of the claim as may be required from time to time by the Board.

[28] Section 83 states:

> (1**)** In the case of an injury that is not an occupational disease, the Board shall not pay compensation except where
>
> (a) the worker has given the employer notice of the accident as soon as practicable after the happening of the accident and before the worker has voluntarily left the employment where the worker was injured; and
>
> (b) the worker's claim for compensation is made within twelve months of the happening of the accident.
>
> **(2)** In the case of an occupational disease, the Board shall not pay compensation except where
>
> (a) the worker has given the employer notice of the injury as soon as practicable after the worker learns that the worker suffers from an occupational disease; and

(b) the worker's claim for compensation is made within twelve months after the worker learns that the worker suffers from the occupational disease for which the worker is claiming compensation.

(3) The notice required pursuant to clause (1)(a) shall

(a) give the name and address of the worker; and

(b) state the cause of the accident and the place the accident happened.

(4) The notice required pursuant to clause (2)(a) shall contain the particulars set out in subsection (3) and is to be given to the employer who last employed the worker in the employment causing the disease.

(5) Failure to give notice pursuant to this Section bars the right to compensation unless, upon the application of the worker, the Board determines that

(a) any right of the worker's employer pursuant to this Part; and

(b) the subrogated interest of the Board,

has not been prejudiced by the failure, in which case the Board may extend the time for filing a claim.

(6) Subsection (5) does not apply where five years or more have elapsed from

(a) the happening of the accident; or

(b) the date when the worker learns that the worker suffers from an occupational disease,

as the case may be.
[Underlining mine.]

[29] Finally, s. 190 of the **Act** speaks to extension of time limits under Part I A. Section 190 provides:

> Subject to Section 83, the Board may, at any time, extend any time limit prescribed by this Part or the regulations where, in the opinion of the Board, an injustice would otherwise result.

[30] In its decision dated December 19, 2000, the WCAT found that on December 24, 1976 the appellant sustained an injury arising out of and in the course of his employment. It was also found that on December 24, 1976 the appellant completed a workman's report of accident and handed it to the employer. The WCAT found that the employer, MT&T, did not forward that document on to the Board. In its reasons the WCAT said it "found the Appellant to be a very credible witness." No challenge is made by either party to these specific findings of fact made by the WCAT.

[31] There is no dispute that because of the employer's actions, the Board never received either a workman's report of accident or an employer's report of accident regarding Mr. Meechan's fall on Christmas Eve, December 24, 1976.

[32] The WCAT rejected the appellant's submission that by providing his employer, MT&T, with the completed workman's report of accident, he met his obligations under s. 82 of the **Act** to forthwith file with the Board a claim for compensation and the further requirement under s. 83(1)(b) of the **Act** to make a claim for compensation within 12 months of the accident. WCAT's reasons for rejecting the appellant's claim were expressed in these terms:

> I do not accept the position advanced by the Appellant. My interpretation of Section 82 is that a claim for compensation is filed with the Board when the Board actually receives the report of accident. Similarly, I find that a worker's claim for compensation cannot be considered to have been "made", for the purposes of Section 83(1)(b), until the Board is notified of the claim for compensation. In the ordinary course, the Board receives reports of accident from a worker and the worker's employer and is thereby notified of the accident. In the present case, the Board never received a report of accident from the Appellant or Employer regarding the December 24, 1976 accident. Even though the Appellant provided the Employer with a completed Workman's Report of Accident regarding the December 24, 1976 accident, this does not constitute filing or making a claim for compensation with the Board. The Employer and the Board are separate entities. This being the case, the Appellant has not satisfied Section 83(1)(b) of the **Act** since his claim for compensation was not made within 12 months of the December 24, 1976 accident.

> On the facts of this case, I am unable to find any provision of the **Act** which would offer relief from the time limit specified in Section 83(1) of the **Act**. Section 83(5) of the **Act** allows for relief from the time requirements in Section 83(1) if to do so would not prejudice any right of the Employer or the subrogated interest of the Board. However, according to Section 83(6), Section 83(5) is not applicable where five or more years have elapsed from the happening of the accident, as is the case in the present appeal. I note that Section 190 of the **Act** indicates that any time limit may be extended where "an injustice would otherwise result". However, Section 190 expressly states that the ability to extend time limits is subject to Section 83. Finally, I note that Section 186 of the **Act** indicates that decisions must always be based on the "real merits and justice of the case", but it also states that decisions must be made in accordance with the **Act**. Therefore, I cannot ignore the plain reading of Section 83 and its impact on the present appeal. I find that the Appellant's claim for benefits in relation to the December 24, 1976 injury is barred pursuant to Section 83 of the **Act**.
> [Underlining mine.]

[33] In reaching such a conclusion and rejecting the appellant's claim for compensation, I find that the WCAT erred in law.

[34] Critical and common to not only the WCAT decision but to practically every other official rejection of the appellant's repeated requests for relief has been the notion that his claim is statute barred as it *was not made* within 12 months of the December 24, 1976 mishap. In my respectful view, such a conclusion stems from too narrow an interpretation of the notification requirements set out in ss. 82-83 of the **Act** and ignores what in fact happened in this case.

[35] Section 82 provides *inter alia*:

> Where a worker is eligible to apply for compensation ... the worker shall forthwith file with the Board
>
> (a) a claim for compensation;

[36] In this case WCAT interpreted s. 82 to mean:

> ... that a claim for compensation is filed with the Board when the Board actually receives the report of accident.

Further the WCAT determined that in order for a claim to have been made, the Board must be "notified" of the claim. I disagree.

[37] A clear statement of the modern principle of statutory interpretation may be found in *Dreidger on the Construction of Statutes* (3rd edition, 1994, Butterworths):

> ***The modern rule.*** There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.
> (at p. 131)

I adopt this analysis and apply it to this case.

[38] The provisions of ss. 82 and 83 relating to a worker's claim for compensation must be read together and in such a way as is consistent with the clear intent of the legislation. Bogus, delinquent or unsubstantiated claims will be rejected. Legitimate claims taken to the Board will be honoured. Here the WCAT applied far too restrictive a definition by divining and adding the words "when the Board actually receives the report of accident" and "until the Board is notified of the claim." Such words are not to be found in the statute and place an unfair obligation upon the appellant.

[39] The triggering event in a request for compensation contemplated by s. 82 is that the worker's claim come to the attention of the Board. That was clearly done in this case. From January 2, 1977 onwards, the Board was well aware of Mr. Meechan's claim for compensation. The fact that in the Board's (mistaken) eyes the claim related to the January 2, 1977 incident as opposed to the fall from the ladder a week earlier is irrelevant, given the very unusual circumstances of this case. First, each episode occurred within days and both concerned injury and pain to the appellant's back. Second, the medical reports on file, for example, reports from Drs. Malick, Chaturvedi, Tompkins, Orrell and Reardon all clearly indicate that the appellant was injured after falling off a ladder. But for Dr. Malick's error in misstating the date (as being four or five "years" rather than months earlier), the physicians

all describe the fall off the ladder as having occurred in 1977. Third, considering the fact that Mr. Meechan received temporary total disability benefits from the Board for the first six and one-half months of 1977, there can be no question that the Board *had notice of his claim* and fully understood that the claim related to his injured back from having fallen off a ladder. Under such circumstances it would be disingenuous and most unfair for the Board to be heard to say that the appellant had failed to file his claim on time.

[40] The interpretation I have given to the operative words in s. 82 and s. 83 is supported by acknowledgments made to us by counsel representing the WCAT during argument. When we inquired as to the various ways the WCB would become aware of a claim, we were advised that there are generally three means by which such an event comes to the attention of the Board. First and most likely, the Board receives a report of accident from an individual worker. Second, it may come in from an employer or, third, a medical report or other documentation will be sent in to the Board by a physician. In Mr. Meechan's case, the physicians' letters provided the Board with whatever notification it needed to consider his claim for compensation.

[41] Having found that the appellant's claim complied with all material requirements in the **Act**, I need not go on to consider the other statutory provisions which, in certain circumstances, permit the Board to extend the time for filing a claim.

[42] The appellant's claim for benefits in relation to the December 24, 1976 injury is not barred by ss. 82 or 83 of the **Act**. It is a fact that he suffered a work injury on December 24, 1976 and he ought to finally have his entitlement to a PMI assessment properly considered.

[43] In so ordering, I wish to emphasize some of the same points that Mr. Meechan sought to have heard and acted upon over the years.

[44] Happily, the misstated date for the fall off the ladder, or whether the episode ever occurred, are no longer in dispute. The record discloses that for several years Mr. Meechan's credibility, or at least the reliability attached to his version of events, was seriously undermined by other people's mistakes. Caseworkers' frequent references to it being "confusing as to the circumstances of the injury" were first set in motion by his employer's neglect in failing to turn over to the Board all reports of the December 24, 1976 mishap. MT&T's conduct, coupled with Dr. Malik's misstated reference to the date of the fall in his first report to the Board's medical

officers, all worked against Mr. Meechan ever having his claim and personal health properly assessed.

[45] In the result and with respect, it appears to me that officials have misunderstood the genesis of Mr. Meechan's complaint or have been distracted by the "notice" features of his case as to preclude a full inquiry into the connection between both work related injuries and the appellant's ongoing claim for a permanent medical assessment rating.

[46] To illustrate I need only refer to the Hearing Officer's decision of August 28, 1996 wherein she rejected Mr. Meechan's entitlement to any permanent medical impairment assessment. Restricting, as she did, her investigation to the January 2, 1977 incident, she felt that his injury "was soft tissue in nature" leading her to conclude that he suffered from degenerative disk disease long before any workplace injury on January 2, 1977, such that whatever complaints he suffered thereafter could in no way be consistent with or related to his simply having been standing on a ladder, turning and having his back go out.

[47] A further difficulty in relation to Mr. Meechan's request for a PMI rating relates to commentaries made concerning his X-rays taken on January 5, 1977 and Dr. Malik's reporting letter to Dr. MacDonald dated March 31, 1977.

[48] By not understanding the sequence of the appellant's injuries, Board officials over the years may have misconstrued the X-rays and Dr. Malik's impression of them. For example, in 1991 the appellant consulted with Dr. Gerald Reardon. Following his examination of the appellant and his assessment of the patient's history, Dr. Reardon identified a permanent medical impairment of 15% and went on to note that his symptoms would likely worsen in future. Counsel engaged by the appellant referred Dr. Reardon's report and findings to the Board and asked the Board to award the appellant a permanent partial disability. In a terse nine-line memorandum dated July 26, 1993, the Board rejected the appellant's request for a PMI assessment stating:

> His injury was in 1977 and was felt by Dr. Malik to be a lumbar sprain superimposed upon some early degenerative changes, as noted by x-ray. This is not an injury that should entitle anyone to a permanent medical impairment, and I do not comprehend Dr. Reardon's support for same in light of the information on file and the length of time between the injury and now.

[49] There is not a report or an X-ray in Mr. Meechan's file that says any such thing. Nowhere do the words or diagnosis "lumber sprain superimposed upon some early degenerative changes" appear. In a subsequent letter to the appellant's counsel dated August 16, 1993, the claims adjudicator rejects his request and once again, states on behalf of the Board:

> I note that this injury was in 1977, and diagnosed as lumbar strain superimposed upon some early degenerative changes as noted in the x-ray. Based on this information, no entitlement for Permanent Medical Impairment Assessment is warranted.

[50] With respect, I believe such a conclusion was itself unwarranted without an accurate and thorough understanding of the mechanics and trauma involved in *both* the December, 1976 and January, 1977, incidents or the injuries suffered as a consequence.

DISPOSITION

[51] The WCAT erred in law in failing to properly interpret and apply s. 82 and s. 83 of the **Act**. Mr. Meechan's claim was made within twelve months of the happening of the accident on December 24, 1976. Thus s. 83(5) and (6) are not engaged.

[52] Neither the WCAT, nor the Hearing Officer, nor the case manager, ever determined if Mr. Meechan was entitled to a PMI assessment because each concluded that his claim was out of time, or, failed to understand or inquire into the full effects of whatever trauma was sustained in both incidents.

[53] Accordingly I would order that the WCAT decision be set aside. I would remit the matter to the WCAT for a decision on his entitlement to a PMI rating assessment.

[54] I would order that Mr. Meechan be awarded $2,000.00 inclusive of his costs and disbursements on appeal.

Saunders. J.A.

BATEMAN, J.A.:

[55] With respect, although I agree with my colleague that the appeal should be allowed, I would not adopt his reasons for doing so.

[56] While the facts are extensively canvassed in Justice Saunders decision, I will highlight some additional points to give context to this opinion. Mr. Meechan fell off a ladder on December 24, 1976. On January 2, 1977 he experienced pain in his back while twisting, also while working on a ladder. As Justice Saunders notes at §40 of his decision, ". . . each episode occurred within days and both concerned injury and pain to the appellant's back. . . . the medical reports on file, for example, reports from Drs. Malick, Chaturvedi, Tompkins, Orrell and Reardon all clearly indicate that the appellant was injured after falling off a ladder." From the outset the doctors were aware that Mr. Meechan's back injury arose when he fell from a ladder and, shortly thereafter, experienced pain when twisting. In assessing his injuries, both events were taken into account. The January 2, 1977 date was clearly used by all participants as representing both injuries.

[57] Mr. Meechan received temporary benefits. His quest for a permanent medical impairment rating has been unsuccessful. There is no doubt that Mr. Meechan is firmly of the view that his back troubles emanate from the 1976/77 injury. As a result he has relentlessly pursued further compensation. The principal issue is whether Mr. Meechan's ongoing back problems can be attributed to these 1976/77 workplace accidents?

[58] The January 5, 1977 X-ray, taken as a result of the accident, reported "interspace narrowing between L5 and S1" as the only significant finding in relation to the lumbar spine. The radiologist noted some small osteophytes in relation to the end plates of the vertebral bodies of the mid and lower thoracic spine.

[59] In his March 31, 1977 report to the Workmen's Compensation Board Dr. Malik said:

> I reviewed the x-rays of the lumbar spine which you had so kindly sent with him. There are 5 lumbar vertebrae. L5 sits low on the sacrum and seems to be partly sacralized. The L5-S1 disc space is narrow. The L4-5 disc space also appears to be slightly narrow. The facet joints appear to be within normal limits.
>
> I feel that this gentleman's problem is due to a degenerated L4-5 disc and he may have had a lumbar sprain. There are no radicular findings and I feel that he will probably get better quite well on his own. . . . I would think that would be in about a month.

[60] By May 31, 1977 when Mr. Meechan was again seen by Dr. Malik, he was cleared to return to work.

[61] A lingering issue has been the question of Mr. Meechan's condition pre-existing the 1976/77 accidents. In the March 31, 1977 report referred to above Dr. Malick wrote:

> . . . In 1974 [Mr. Meechan] bent over to pick up a plastic tray at a store and seemed to have pain in his back and was advised by his doctor to take rest for two weeks following which he was able to go back to work.. ...

[62] Mr. Meechan says that he did not experience a back problem in 1974 and did not tell Dr. Malick that he had. The record reveals, however, that for some reason Mr. Meechan had a spinal X-ray in 1974 on the request of his family physician, Dr. Brennan. That X-ray report said:

> Routine projections of the lumbo-sacral spine and pelvis reveal no recent fracture or malalignment. The intervertebral disc spaces are within normal limits and there is no bone destruction.

[63] While we do not have a copy of the letter referring Mr. Meechan for the X-ray in 1974, I think it is reasonable to conclude that there was some event or complaint at that time which precipitated the referral for an X-ray. The file does not contain Dr. Brennan's records from that time period. The fact that the X-ray was taken, however, does seem to confirm, to an extent, the possible accuracy of the information contained in Dr. Malik's report.

[64] There is also the concern that Mr. Meechan may have suffered injury subsequent to the 1976/77 accident. On August 10, 1979 Mr. Meechan was putting a bag of groceries behind the seat of his pickup truck, turned and twisted his back and was unable to straighten up. He made another claim for benefits. An X-ray of the dorsal spine on August 13, 1979 reported no abnormalities save for “a minimal levo (sic) [level of] scoliosis of the upper dorsal spine . . .”. This was consistent with the dorsal spine findings in 1977. Accordingly, the Board denied that claim on the basis that the further back injury was not work related and specifically not related to the 1977 workplace accident.

[65] In 1985 Mr. Meechan was injured in a motor vehicle accident. His family physician referred him to Dr. Alexander for assessment, at the time mentioning that there had been a resulting lumbar spine injury. Dr. Alexander reported that the 1985 accident caused a flare up of back pain. This information is referenced in a 1991 report of Dr. Reardon which I will

address in more detail below. Mr. Meechan told Dr. Reardon in 1991, however, that Dr. Alexander was mistaken and that the automobile accident did not cause back pain. An explanatory letter written in 1992 by Dr. Brennan to Mr. Meechan's counsel indicates that when he mentioned Mr. Meechan's “lumbar spine” injury to Dr. Alexander in his referral letter of 1985, Dr. Brennan feels that he must have been mistaken and meant to refer to an injury of the cervical spine.

[66] There is, therefore, a question as to what events or conditions preceded or followed the 1976/77 accident and to what extent they are relevant to his current back problems.

[67] It is difficult from the material on file to discern precisely what course Mr. Meechan's continuing claims have taken. The file is relatively quiet after his denial of benefits arising from the August 1979 claim. It became active again around 1990 as a result of Mr. Meechan's continuing back troubles which he felt arose from the 1976/77 accident.

[68] In 1991 Mr. Meechan was referred by his then solicitor to Dr. Gerald Reardon for assessment of his back condition. According to the background provided by Mr. Meechan to Dr. Reardon he had no history of back trouble prior to 1977, nor were there any events since that time which would have contributed to his ongoing problems. Dr. Reardon concluded that there was, therefore, a high probability that Mr. Meechan's lumbar instability was related to the 1977 injury and he recommended a PMI assessment at 15%.

[69] A report from the Board's Administrator of Medical Services dated July 26, 1993 stated:

> I have reviewed this file, as per the letter submitted by the worker's counsellor, including the copy of a report from Dr. Reardon dated July 2, 1991.
>
> His injury was in 1977 and was felt by Dr. Malik to be a lumbar sprain superimposed upon some early degenerative changes, as noted by x-ray. This is not an injury that should entitle anyone to a permanent medical impairment, and I do not comprehend Dr. Reardon's support for same in light of the information on file and the length of time between the injury and now.

[70] On August 16, 1993 his claim was rejected by the Claims Adjudicator.

[71] Mr. Meechan was off work again on November 3, 1993 when he reported that while sitting at his desk he turned to get up and his back went out. He experienced pain in his leg. It is unclear from the material on file whether he instituted a new claim as a result of this event or continued the existing one. In either case he was again seeking a permanent medical impairment rating.

In a report dated October 12, 1994 Dr. Reardon reported that a mylogram had revealed an L5-S1 disc herniation. On January 26, 1995, a case manager denied his claim for a PMI, finding no justification to warrant a change to the July 26, 1993 decision. Mr. Meechan appealed the January 26, 1995 decision and, at the same time, purported to appeal decisions of August 16, 1993 and October 17, 1990. In the written submission from Mr. Meechan's counsel in support of that appeal he requests a PMI including retroactive benefits in relation to the December 24, 1976 accident.

[72] The Hearing Officer's decision on the appeal is dated August 26, 1996. While the Hearing Officer refers to the injury as reportedly arising from a twisting while on a ladder, the Officer completely reviewed the medical reports and considered that the injury could have arisen from a fall at work. Significant, in my view, to the denial of benefits is the Hearing Officer's observation that:

> The medical evidence on file does not substantiate or explain the process whereby a disc herniation could go undiscovered between January 2, 1977 and the spring of 1994. . . .

And:

> The medical reports on file do not suggest that the disc herniation resulted from the Worker's January 2, 1977 work place injury which was soft tissue in nature. I note in particular that Dr. Malik's report of March 31, 1977 does not provide a reasonable basis from which it may be inferred that a disc herniation which came to light 17 years subsequent to a work place injury, may be reasonably attributed to that work place injury. I note that Dr. Malik's report refers to the Worker's injury as a lumbar sprain in 1977. He reported that there were no radicular findings and that the Worker did not require surgical intervention and would become well on his own. No evidence of an injured disc is recorded in Dr. Malik's report. Reference to the fact that the Worker's L5-S1 disc space was narrow, as well as the fact that the L4-5 disc space appeared to be slightly narrow, was mentioned. However, as noted previously in this decision, this degenerative disc disease clearly per-existed the January 2, 1977 work place injury. Dr. Malik attributed the Worker's problem to a degenerated L4-5 disc and lumbar sprain. No suggestion is contained in Dr. Malik's report after the Worker's compensable injury, that the Worker's condition involved a disc herniation.
> (Emphasis added)

[73] In denying further benefits the Hearing Officer concluded on the evidence that the Worker's degenerative disc condition must have pre-dated the workplace injury. She was

not satisfied on the evidence that the workplace injury resulted in the Worker's herniated disc condition which was the cause of his ongoing back problems.

[74] In the September 27, 1996 Notice of Appeal from the above decision Mr. Meechan says, *inter alia*, that there was substantial evidence before the Board "indicating a significant disk [sic] injury which was initiated at the time of the work-related accident and became more severe over time." If such evidence exists it is not clear on the record.

[75] The Workers' Compensation Appeals Tribunal ("WCAT"), on further appeal, confirmed the decision of the Hearing Officer. WCAT, in a decision dated October 28, 1999, declined to award further benefits ruling that it could not consider the accident of December 24, 1976 because a claim was not filed with the Board in relation thereto. This was an unfortunate comment and from this point the matter veered off course.

[76] That decision was appealed to this Court and, on Consent Order of the parties dated February 16, 2000, it was remitted to the Board to consider, *inter alia*, whether the December 24, 1976 accident could form a separate head of claim for compensation. On remittal it was the view of the case manager that the claim was out of time. That determination was appealed to WCAT. On December 19, 2000 WCAT ruled that any claim by Mr. Meechan based upon the December 1976 incident was out of time, no report having been filed with the Board. There was, in the Tribunal's view, non-compliance with s. 83 of the **Worker's Compensation Act**, S.N.S. 1994-95, c.10. The Tribunal did accept that Mr. Meechan sustained a work place injury as a result of the December 1976 fall from the ladder.

[77] As I have indicated, throughout this matter Mr. Meechan has been treated by his doctors on the basis that he suffered a fall from a ladder and a subsequent twisting injury. The investigations and medical reports have taken into account both injuries. The reference in the reports to the January 2, 1977 injury is, in my view, simply a shorthand reference to both events, and one which was adopted by Mr. Meechan as well as the doctors. To now suggest that there should be a second and separate claim assessment for the fall cannot succeed. That accident has been considered as part of the overall event and ought not now be severed as a separate claim.

[78] In my view, the only question to be decided is whether, taking into account the nature of the accidents of both December 24, 1976 and January 2, 1977, in the context of the evidence on file, Mr. Meechan is entitled to a permanent medical impairment rating. This is the question which should have been addressed on the appeal from the Hearing Officer's August 26, 1996 decision, had the matter been properly framed. It is my view that the reporting requirements of the current **Worker's Compensation Act** are not relevant to this claim. With respect, I do not agree with my colleague on this point. Mr. Meechan should be taken to have reported the fall from the ladder with the January 2, 1977 incident, as was revealed in the follow-up medical investigations. The decision of this Court in **Walsh v. Nova Scotia (Workers' Compensation Appeals Tribunal)** (2001), 190 N.S.R. (2d) 123; N.S.J. No.11 (Q.L.) is not applicable. There the parties agreed that the worker had made no claim for compensation in relation to a May 1977 injury until March of 1999, although the appellant's employer was advised of the accident on the day that it happened. Here, Mr. Meechan made an immediate claim for compensation which he has pursued since that time. At § 35 to 41 of his decision, Justice

Saunders finds that the Board had notice of Mr. Meechan's claim within 12 months of the injury. I would agree. In that case the relevant **Act** would be the one in effect in 1977. At the latest, the 1989 **Act** would apply which is the one that was in effect at the time of Mr. Meechan's first request for a PMI (early 1990's). It is not necessary to decide, here, which **Act** would apply. In either case, Mr. Meechan's claim meets the reporting requirements in effect at the relevant time. The current **Act** is not the governing statute. The Tribunal erred at law in so holding.

[79] I would allow the appeal to the limited extent of remitting the matter to WCAT to determine if Mr. Meechan is entitled to a PMI rating on the evidence taking into account the accidents of both December 24, 1976 and January 2, 1977.

[80] As the path that this matter has taken has been complicated by the approach of both parties, I would not award costs.

Bateman, J.A.

Concurred in:

Hallett, J.A.