Date: 20010406
Docket No.: CA 158398

NOVA SCOTIA COURT OF APPEAL

Cite as: Stulac v. Nova Scotia (Workers' Compensation Appeals Tribunal) , 2001 NSCA 58

Freeman, Bateman and Flinn, JJ.A.

BETWEEN:

ANN STULAC

Appellant

- and -

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

Respondents

REASONS FOR JUDGMENT

Counsel: B.A. "Rocky" Jones, for the appellant
Sarah Bradfield, for the respondent Workers Compensation Appeals Tribunal
Janet E. Curry and Paul Arab O'Leary, for the respondent Workers' Compensation Board of Nova Scotia

Appeal Heard: March 27, 2001

Judgment Delivered: April 6, 2001

THE COURT: The appeal is dismissed as per reasons for judgment of Flinn, J.A.; Freeman and Bateman, JJ.A., concurring.

FLINN, J.A.:

[1] There are two issues which arise out of this appeal, and they may be stated as follows:

> Did the Workers' Compensation Appeals Tribunal (WCAT) err in law or jurisdiction in its decision of July 29, 1999, wherein WCAT:
>
> > 1. rejected the appellant's claim that the Workers' Compensation Board has never implemented a decision of the Workers' Compensation Appeal Board (as it was then known) dated September 7, 1989, which decision, required the Board, inter alia, to have the appellant assessed for a permanent partial disability; and
> >
> > 2. rejected the appellant's claim for compensation for chronic pain arising out of the same work related injury?

[2] In my opinion WCAT made no error in law or jurisdiction in its decision with respect to the appellant's claims. As a result, this appeal must be dismissed. I will set out my reasons for coming to this conclusion.

[3] On May 18, 1986 the appellant, a registered nurse, injured her back while working in the forensic psychiatric ward of the Nova Scotia Hospital. She was bathing a patient who became uncooperative; and, in attempting to restrain the patient, she was knocked about and pushed into a sink, striking it with her back. She suffered lumbar paraspinal spasm in her mid-dorsal spine. As a result of this injury, the appellant was laid off work on May 19, 1986 but returned to work on May 21, 1986. She continued to work until June 19, 1986 when she was laid off again as a result of these injuries. The appellant received temporary total disability benefits between June 19 and October 14, 1986. She returned to work for a period of time and subsequently she was laid off again and received temporary total disability benefits from September 1, 1987 until June 1, 1988.

[4] On September 7, 1989 the appellant's claim for compensation benefits came before the Workers' Compensation Appeal Board (as it was then known). As a result of medical evidence that the appellant was unable to continue in her profession as a registered nurse, the Appeal Board issued the following order:

> Based on Dr. Loane's above opinion, the Appeal Board orders the rehabilitation assessment be carried out, if the assessment proves positive she be awarded full compensation during retraining; provided all factors are reasonable. However, if the assessment proves negative, she then be assessed for a permanent partial disability by the Workers' Compensation Board.

[5] The appellant moved to the Province of Ontario. Pursuant to the order of the Appeal Board dated September 7, 1989, a Functional Abilities Evaluation of the appellant was carried out. That evaluation proved to be positive and the appellant commenced a Vocational Rehabilitation Program, during which she received vocational rehabilitation benefits.

[6] On November 19, 1991 the appellant discontinued her Vocational Rehabilitation Program in the Province of Ontario. As a result, the Vocational Rehabilitation Counsellor for the Workers' Compensation Board of Nova Scotia advised the appellant that since she was not able to participate in a Vocational Rehabilitation Program her benefits would not be extended beyond December 16, 1991.

[7] Dr. T. E. Dobson, the director of medical services for the Board, then requested an assessment of the appellant for permanent partial disability.

[8] I note, here, that counsel for the appellant during the hearing of this appeal referred to the action of the Vocational Rehabilitation Counsellor - in terminating the appellant's benefits as of December 16, 1991 - as having "overturned the decision of the Appeal Board dated September 7, 1989", without lawful authority. That characterization of the action of the Vocational Rehabilitation Counsellor by counsel for the appellant is erroneous. The terms of the Appeal Board's order of September 7, 1989 are clear. The appellant was to receive benefits only during retraining. Since the appellant discontinued her Vocational Rehabilitation Program, for whatever reason, those particular benefits could not be continued. In such an event, the order directed that the appellant be assessed for a permanent partial disability, which was the course of action undertaken by Dr. Dobson.

[9] Further, counsel for the appellant submits that, since the appellant had to abandon her Vocational Rehabilitation Program because of her disability, the Board had an obligation, under the Appeal Board order of September 7, 1989, to pay the appellant a permanent partial disability award. The only issue left to be

determined at that time, counsel submits, was the quantum of that award. That interpretation of the order of the Appeal Board dated September 7, 1989 is also erroneous. The appellant had never been assessed for permanent partial disability, which assessment is required before the appellant's disability could be rated. As noted above, Dr. Dobson requested that assessment.

[10] In response to his request, Dr. Dobson received two medical reports. Dr. A. Hadjiski, a unit medical advisor for the Ontario Workers' Compensation Board, prepared a report dated February 12, 1992 for the purpose of the permanent impairment assessment of the appellant. Further, Dr. M. Devlin, a physiatrist at the Department of Physical Medicine, Mount Sinai Hospital in Toronto, had prepared a report dated February 3, 1992 for the appellant's doctor.

[11] The reports disclose no objective medical findings which would support the inference that the appellant's present disability resulted from the injury to her back which occurred on May l8, 1986. Rather, the appellant's present disability related to the development of chronic pain syndrome.

[12] Dr. Hadjiski's report contains the following:

> A 37 year old woman who was in no distress. She was sitting comfortably throughout the interview and no discomfort or complaints of pain were noted.
>
> The neck examination did not reveal any abnormalities, full range of movements were present. Range of movement of both upper extremities were full, strength was good.
>
> Thoracic spine examination did not show any abnormalities, no tenderness in the mid-line. Range of movements were full. There was some very non-specific superficial sensitivity to the pressure on the left shoulder blade and around the rib cage. There was no tenderness over anterior chest even to the pressure. Chest expansion was good. No sensory changes were present. Deep tendon reflexes in upper extremities were equal. Strength was good.
>
> Lumbar spine examination was within normal limits. Gait was normal.

[13] Dr. Devlin's report contains the following:

> On examination today she was alert and cooperative. The alignment and range of movement of the cervical, thoracic and lumbar spines was full and there was no pain.

> Her muscle bulk and tone are normal, her deep tendon reflexes are 2+ and equal bilaterally. Her strength and sensation are normal.
>
> Her gait is normal.
>
> At this time her diagnosis is that of a chronic pain syndrome.

[14] As a result of these reports, Dr. Dobson awarded no permanent medical impairment rating for the appellant, because the medical reports “record almost a normal examination.”

[15] Dr. Dobson’s decision was confirmed by the Permanent Disability Committee of the Board on March 23, 1992. The appellant appealed that decision. The appeal was heard, firstly, by a hearing officer pursuant to the Workers’ Compensation Transitional Appeal Regulations, on March 22, 1996. By that time the appellant had obtained a further medical report from Dr. Gerald P. Reardon, an orthopaedic surgeon in Halifax. The report is dated November 29, 1994, and Dr. Reardon concludes:

> I don’t think that there can be any doubt that she should be classified in the category of chronic pain syndromes, which are difficult or in many cases impossible to treat.

[16] As with the other medical reports there were no objective medical findings upon which the appellant’s present disability could be related to her back injury of May 18, 1986. The hearing officer decided, on that basis, that the appellant was not entitled to a permanent partial disability award. This decision of the hearing officer was confirmed by WCAT’s decision of July 29, 1999 which is the subject of this appeal.

[17] In the grounds of appeal, as framed, this first issue is referred to as: Has the Board assessed the appellant for a permanent partial disability?

[18] Clearly, the Board has conducted that assessment, and WCAT made no error in law or jurisdiction in coming to that conclusion. The appellant, is, obviously, not content with the assessment. There was, however, medical evidence upon which the conclusion of a zero rating for permanent partial disability could be made. That conclusion involved no error of law, nor patently unreasonable factual

determination (or other error of jurisdiction).

[19] With respect to the appellant's claim for compensation for chronic pain, WCAT concluded, on the basis of the medical evidence before it, that the appellant suffered from chronic pain as that term is defined in s. 10(a) of the **Workers' Compensation Act** , S.N.S. 1999, c. 2 (the **Act**). WCAT said:

> The evidence before the Tribunal is clear and uncontroverted that the Appellant suffers from chronic pain. This diagnosis is specifically confirmed by Dr. Gerald P. Reardon in his report dated November 29, 1994. Dr. J.J.P. Patil referred to her chronic condition as early as February 3, 1987. The numerous medical reports in between note ongoing pain and discomfort without significant objective physical findings at the site of injury.

[20] WCAT then reviewed the provisions of the **Act** dealing with chronic pain, concluding as follows:

> Having determined that the Appellant suffers from chronic pain within the meaning of s. 10A of the *Act*, s. 10B of the *Act* must be applied which provides in part:
>
> > 10B Notwithstanding this Act, Chapter 508 of the Revised Statutes, 1989, or any of its predecessors, the *Interpretation Act* or any other enactment,
> >
> > ...
> >
> > (b) a personal injury by accident that occurred before February 1, 1996 is deemed never to have created a vested right to receive compensation for chronic pain;
> >
> > (c) no compensation is payable to a worker in connection with chronic pain, except as provided in this section or in section 10E or 10G or, in the case of a worker injured on or after February 1, 1996, as provided in the Functional Restoration (Multi-Faceted Pain Services) Program Regulations contained in Order in Council 96-207 made on March 26, 1996, as amended from time to time and, for greater certainty, those regulations are deemed to have been validly made pursuant to this Act and to have been in full force and effect on and after

February 1, 1996.

> Subsection 10B(a) since it applies only to injuries occurring between March 23, 1990 and February 1, 1996, is not relevant to this appeal.
>
> In light of both s. 10B(b) and s. 10B(c), the Appellant is not entitled to compensation benefits. Section 10B(b) specifies that chronic pain is not included within the definition of "personal injury by accident" for injuries occurring prior to February 1, 1996. Section 10B(c) effectively precludes the provision of compensation in relation to chronic pain for Appellants injured prior to March 23, 1990 and who suffer from chronic pain. Accordingly, the Appellant is not entitled to receive compensation benefits pursuant to the *Act*.

[21] WCAT made no error in law or jurisdiction in coming to this conclusion.

[22] The appellant's counsel, Mr. Jones, made an impassioned plea on behalf of his client that "justice" be done in this case and that this court award something to the appellant for the disability she presently suffers as a result of her chronic pain. While I empathize with the appellant's present condition, this court's role is limited by the legislation. The legislature has spoken clearly on this matter. Since the appellant was injured prior to March 23, 1990, and since she suffers from chronic pain, she is not entitled to Workers' Compensation benefits for that chronic pain.

[23] I would, therefore, dismiss this appeal.

Flinn, J.A.

Concurred in:

Freeman, J.A.

Bateman, J.A.