

Date: 20010420
Docket: 162579

NOVA SCOTIA COURT OF APPEAL

**Cite as: MacKay v. Nova Scotia (Workers' Compensation Appeals Tribunal),
2001 NSCA 67**

Roscoe, Bateman and Cromwell, J.J.A.

BETWEEN:

ELI MACKAY

Appellant

- and -

WORKERS' COMPENSATION APPEALS TRIBUNAL OF
NOVA SCOTIA, WORKERS' COMPENSATION BOARD OF
NOVA SCOTIA, and JIM MORRISON CONTRACTING LIMITED

Respondent

REASONS FOR JUDGMENT

Counsel: Michael K. Power for the appellant
Louanne Labelle for the respondent Tribunal
Paula Arab O'Leary and Madeleine F. Hearn for the respondent Board

Appeal Heard: April 11, 2001

Judgment Delivered: April 20, 2001

THE COURT: Appeal allowed per reasons for judgment of Cromwell, J.A.; Roscoe and Bateman, J.J.A. concurring.

CROMWELL, J.A.:

- [1] Eli MacKay suffered an injury on September 20, 1986, while employed as a bulldozer operator. He claimed workers' compensation benefits in March of 1989 and his claim was ultimately recognized by the Board as a result of a hearing officer's decision in August of 1995. In October of 1995, Mr. MacKay was assessed for a permanent medical impairment (PMI). The Board's medical advisor, Dr. M.A. Smith, determined that the PMI should be assessed at 10.5%. Mr. MacKay sought review of the PMI rating and the review process led to an appeal to the Workers' Compensation Appeals Tribunal (WCAT).
- [2] Prior to WCAT's decision, the Tribunal had advised the parties that it had determined that chronic pain might be at issue in the appeal and invited submissions. Submissions were made to the Tribunal on behalf of the worker on the applicability of the chronic pain provisions of the **Act** as well as on the other issues raised in the appeal. The Board took no position on the chronic pain issue.
- [3] In its October 27, 1999 decision, the Tribunal found that Mr. MacKay is suffering from chronic pain and that under s. 10B of the **Workers' Compensation Act** no compensation benefits are payable in connection with such chronic pain. His PMI rating remained at 10.5%.
- [4] Pursuant to leave granted on consent of the parties, Mr. MacKay now appeals that decision to this Court pursuant to s. 256(1) of the **Workers' Compensation Act**.
- [5] Counsel for Mr. MacKay raises six issues in his factum, but in my view there are two main questions before the Court:
 1. Did the Tribunal err in law or jurisdiction in addressing the issue of whether Mr. MacKay was precluded from obtaining further benefits by virtue of the chronic pain provisions of the **Act**?
 2. Did the Tribunal err in law or jurisdiction by failing to address the questions upon which leave had been granted to Mr. MacKay to appeal to the Tribunal?
- [6] Turning to the first issue, in my view the Tribunal did not err in law or jurisdiction in raising and considering the chronic pain issue. WCAT is bound to decide appeals according to the provisions of the **Act**: see s. 246(1). If a provision of the **Act** which has not been addressed by the parties arguably precludes the benefits sought on the appeal, WCAT acts

properly in raising the matter with the parties. Here, the Tribunal afforded the parties a full opportunity to address this issue in written submissions prior to the hearing and relevant submissions were advanced on behalf of Mr. MacKay. In my view, the Tribunal acted properly by raising the matter which arguably went to its jurisdiction to award further benefits, by raising the chronic pain issue in advance and by providing a full opportunity to the parties to make submissions on the point.

- [7] Turning to the second issue, in my view WCAT did commit reversible error in the circumstances of this case by failing to address the main issue raised by Mr. MacKay on the appeal.
- [8] The main issue raised by Mr. MacKay on his appeal to WCAT was that his 10.5% PMI rating did not fully reflect the degree of his permanent medical impairment. The Board assessed the 10.5% PMI rating on the basis that Mr. MacKay's impairment fell within Category 3 under the Lumbar Disc section of the Board's Permanent Medical Impairment Guidelines. That finding requires that Mr. MacKay have significant symptoms and objective abnormalities on physical examination. When the issue of chronic pain was raised, the issue before WCAT, simply stated, was whether the 10.5% rating adequately reflected the extent of Mr. MacKay's compensable permanent medical impairment.
- [9] The Tribunal concluded that Mr. MacKay fell within the chronic pain definition of the **Act**, that is:

... pain (a) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise pre-dated the pain; or

(b) disproportionate the type of personal injury that precipitated, triggered or otherwise pre-dated the pain ... but does not include pain supported by significant objective physical findings at the site of the injury which indicate that the injury has not healed."

- [10] The earlier finding of the Board that Mr. MacKay was entitled to a permanent medical impairment rating based on Category 3 of the Lumbar Disc Section of the Guidelines means that he had an impairment supported by significant symptoms and objective abnormalities on physical examination. This finding, by definition, cannot include chronic pain. The PMI rating, coupled with the subsequent finding of WCAT that Mr. MacKay has chronic pain, if correct, means that his condition has two aspects: the compensable impairment reflected by his PMI rating and pain which falls

within the definition of chronic pain and is, therefore, not compensable under the **Act**.

- [11] WCAT's conclusion that Mr. MacKay suffers from chronic pain, however, does not address the issue raised by Mr. MacKay on appeal of whether the 10.5% rating adequately reflects the compensable aspect of his permanent medical impairment. Even accepting that some portion of his physical impairment is caused by non-compensable chronic pain, there was a live issue before the Tribunal, which it failed to consider, as to whether the 10.5% rating adequately addressed the compensable aspect of his impairment.
- [12] Counsel for the Board in her helpful and candid submissions argued that we should interpret WCAT's reasons as making a finding that any impairment beyond 10.5% is attributable to non-compensable chronic pain. With great respect, I do not think we should do so. That interpretation considerably strains the language used by the Tribunal and reaches a result to the disadvantage of the worker. In my view, Mr. MacKay was entitled to a clear decision on the issue which he placed before the Tribunal. With great respect to the Tribunal, he did not get it. WCAT's decision should be set aside and the case remitted to WCAT for decision.
- [13] Other matters were raised by Mr. MacKay's counsel which, in my view, we do not need to address.
- [14] Submissions were made in relation to the applicability of the Board's interim earnings loss and amended interim earnings loss policies. This point was not raised at any stage in the appeal process prior to the appeal to this Court. In my view, this aspect of the matter is not properly before the Court.
- [15] Counsel for Mr. MacKay also submits that the Tribunal erred in finding that Mr. MacKay has chronic pain within the meaning of the **Act**. I do not think it appropriate or necessary to address this issue at this time. The matter is being remitted to WCAT for decision. WCAT will have to consider afresh both Mr. MacKay's submission that his 10.5% PMI rating should be increased and the question of whether an increase is precluded by the chronic pain provisions of the **Act**. There may be new medical evidence before WCAT. It is, therefore, not necessary or desirable to deal with the chronic pain issue for the purposes of this appeal.
- [16] In the result, I would allow the appeal and remit the matter to WCAT for determination of the issue of whether the Board's 10.5% permanent medical

impairment rating adequately reflects the compensable aspects of Mr. MacKay's permanent impairment.

Cromwell, J.A.

Concurred in:

Roscoe, J.A.

Bateman, J.A.