

Date: 20011129
Docket No.: CA 171783

NOVA SCOTIA COURT OF APPEAL

Cite as: Julien v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2001 NSCA 176

Flinn, Saunders and Oland; J.J.A.

BETWEEN:

CHRISTINA JULIEN

Appellant

- and -

WORKERS' COMPENSATION APPEAL TRIBUNAL OF
NOVA SCOTIA (WCAT), WORKERS' COMPENSATION
BOARD OF NOVA SCOTIA, (WCB), DARMOS ENTERPRISES
INTERNATIONAL

Respondents

REASONS FOR JUDGMENT

Counsel: Michael K. Power for the appellant
Louanne Labelle for the respondent Workers'
Compensation Appeal Tribunal of Nova Scotia
Paula Arab O'Leary and Madeleine Hearn for the
respondent Workers' Compensation Board of Nova
Scotia

Appeal Heard: November 29, 2001

Judgment Delivered: November 29, 2001

THE COURT: Appeal dismissed per oral reasons for judgment of Oland,
J.A.; Flinn and Saunders, J.J.A. concurring.

OLAND, J.A. (Orally):

[1] This appeal is from a decision of the Workers' Compensation Appeals Tribunal (WCAT) denying the appellant's appeal of a decision of a Hearing Officer which held that the appellant was not entitled to a reconsideration of a 1997 final decision denying her compensation.

[2] In 1996, the appellant was working at Darnos Enterprises International Ltd. (the employer). She filed a Report of Accident dated June 12, 1996 with the Workers' Compensation Board (the Board) indicating that she had slipped on water while at work and had fallen on her back. Following the Board's recognition of her injury and its award of medical aid, the employer appealed on the basis that the appellant's back injury was not work-related.

[3] In a decision dated January 23, 1997, the Board Review Officer did not accept that there had been an accident arising out of and in the course of her employment as the appellant had claimed (see s. 10(1) of the **Workers' Compensation Act**, S.N.S. 1994-1995, c. 10 (the **Act**)). He allowed the appeal and refused her compensation. The appellant did not appeal this decision which became a final decision of the Board (Policy 8.1.7R1).

[4] In several proceedings since, the appellant has unsuccessfully sought reconsideration of the 1997 final decision. In 1999, she provided the Board with two medical reports, each prepared that year. The Board decided that this material did not constitute "new evidence" under Board Policy 8.1.7R1 and s. 185(2) of the **Act** warranting a reconsideration. The appellant appealed to a Hearing Officer and in doing so filed a second report from one of the doctors. The Hearing Officer found that none of the reports contained information warranting a reconsideration of the 1997 final decision and denied her appeal. He also noted that they did not provide evidence of a causal relationship between her back pain and any compensable injury dating back to June 1996.

[5] The appellant appealed to WCAT. She and a witness for the employer testified and the appellant filed additional material consisting of a further medical report, an operation record, ambulatory care chart notes, and a diagram she had prepared of the workplace. The employer also filed a sketch of the workplace.

[6] WCAT allowed the appeal in part. It upheld the Hearing Officer's decision that the three medical reports which had been before her did not constitute new

evidence warranting a reconsideration of the 1997 final Board decision. It then referred the additional material filed directly with WCAT back to the Hearing Officer to consider whether it entitled the appellant to a reconsideration. It also took the position that the transcript was not a full representation of the oral evidence it had heard, and suggested that the Hearing Officer consider WCAT's summaries in its decision of the testimony of the appellant and the employer's witness, which summaries included its own findings as to credibility.

[7] The appellant submits that WCAT erred in law in finding that there was no new evidence warranting a reconsideration of the 1997 final decision and that the only redress was a referral to a Hearing Officer, and in failing to provide a full transcript of the evidence. With respect, I am of the view that the 1997 final decision which ruled that the accident did not occur is fatal to this appeal. The appellant never appealed that decision. There has never been a finding that an accident actually happened. Compensation is not payable unless the appellant was injured in an accident that arose out of and in the course of employment. As a result, the later medical reports of chronic back pain, even if accepted, could not impact on the final decision. They do not, and cannot, establish that an accident took place. Without that critical finding, neither the appellant's claim for compensation nor her appeal could succeed. Somehow, this was lost in the course of the several proceedings these past few years.

[8] I would only add that, assuming without deciding that WCAT had been able to refer any matter back to the Hearing Officer, its provision of summations of the testimony given at the oral hearing before it and its assessment of the credibility of those witnesses when it redirected the matter for reconsideration was improper. Oral evidence given before WCAT is recorded and every participant to an appeal is entitled, at their own expense, to a transcript of the record (s. 253 of the **Act**). Should, pursuant to s. 251(1) of the **Act**, WCAT refer any matter connected with an appeal to the Hearing Officer who decided the matter on appeal before it, that Hearing Officer should receive a transcript of the evidence and not any summaries or findings of credibility made by WCAT.

[9] The appeal is dismissed.

Oland, J.A.

Concurred in:

Flinn, J.A.

Saunders, J.A.