Date: 20001123
Docket: CA 162973

NOVA SCOTIA COURT OF APPEAL

[Cite as: MacDonald v. Nova Scotia (Workers' Compensation Board), 2000 NSCA 134]

Glube, C.J.N.S.; Hallett and Oland, JJ.A.

BETWEEN:

THE WORKERS' COMPENSATION BOARD OF NOVA SCOTIA

Appellant

- and -

THE WORKERS' COMPENSATION APPEALS TRIBUNAL OF NOVA SCOTIA and DANNY MacDONALD (Workers' Compensation Claim No. 1419987)

Respondent

REASONS FOR JUDGMENT

Counsel:	David Farrar and Janet E. Curry for the appellant Kenny H. LeBlanc and Anne S. Clark for the respondent Danny MacDonald Sarah Bradfield for the respondent Tribunal
Appeal Heard:	October 13, 2000
Judgment Delivered:	November 23, 2000
THE COURT:	Appeal allowed per reasons for judgment of Hallett, J.A.: Glube, C.J.N.S. and Oland, J.A. concurring.

HALLETT, J.A.:

[1] This is an appeal from a March 6th, 2000, decision of a 3-member panel of the Nova Scotia Workers' Compensation Appeal Tribunal (the Tribunal).

[2] The Tribunal held that Board of Directors' Policy 8.1.7R1 is inconsistent with the **Workers' Compensation Act**, S.N.S. 1994 - 95, c. 10, as amended by S.NS. 1999, c. 1, and in particular, that the Policy is inconsistent with s. 185(2) of the **Act** "because it imposes the precondition of "new evidence" to a reconsideration of a previous Board decision."

[3] Section 185 states:

> **Exclusive jurisdiction of Board**
>
> **185 (1)** Subject to the rights of appeal provided in this Act, the Board has exclusive jurisdiction to inquire into, hear and determine all questions of fact and law arising pursuant to this Part, and any decision, order or ruling of the Board on the question is final and conclusive and is not subject to appeal, review or challenge in any court.
>
> **Powers of Board**

(2) Notwithstanding subsection (1) but subject to Sections 71 to 73, the Board may

(a) reconsider any decision, order or ruling made by it; and

(b) confirm, vary or reverse the decision, order or ruling.

[4] Policy 8.1.7R1 is as follows:

Reconsideration pursuant to s. 185(2) where a Final Decision of the Board Addressing an Issue Has Been Rendered

Definitions: “Final decision of the Board” means

(a) a decision of a staff member if a Notice of Appeal is not filed with the Workers” Compensation Board within the prescribed time limits; or

(b) a decision of a Hearing officer

Policy Statement:

1. 1.1 Subject to the review rules set out in Sections 71 - 73 of the *Act*, Client Services or the Assessment Services Department (as appropriate) may reconsider any final decision of the Board when a Worker or Employer provides the Workers' Compensation Board with new evidence in support of the request for a reconsideration pursuant to Section 185(2).

1.2 In order to conduct a s. 185(2) reconsideration the new evidence must satisfy the following two criteria:

i) It must truly be new evidence. It must not be a reiteration of the evidence already on file, or a new argument based on the same evidence, or evidence which is inconsequential and therefore, even if accepted, would not impact on the Workers' Compensation Board's final decision; and

ii) the evidence could not have been presented by the worker or employer at the time the final decision was made.

2. When a request is made to reconsider a matter that is already the subject of a final decision of the Workers' Compensation Board, the Workers' Compensation Board shall determine the following issue(s) only:

a) whether the evidence presented satisfies the criteria for new evidence set out in subsection 1.2 above;

and, if so,

b) whether the new evidence presented to the Workers' Compensation Board is sufficient to persuade it to alter the final decision.

3. If these two issues are satisfied in the appellant's favor, the final decision on this issue is set aside, and the Workers' Compensation Board will implement the new decision of Client Services or the Assessment Services Department.

4. An appeal of a Section 185(2) reconsideration decision shall be specifically limited to the two issues set out in paragraph 2.

5. The discretion of the Board to reconsider a decision, order or ruling made by it, pursuant to Section 185(2), is subject to the limitation on the Board's discretion to review compensation payable as a Permanent-Impairment Benefit, a Temporary Earnings-Replacement Benefit and an Extended Earnings-Replacement Benefit as set out in Sections 71 - 73 of the *Act*.

Application: This policy applies to any decision by a staff member dated on or after April 16th, 1999.

(emphasis added)

[5] The Policy was made by the Board of Directors pursuant to s. 183 of the **Act**. The Directors may "adopt policies consistent with the **Act**". The policies are binding on the Workers' Compensation Board, case managers, hearing officers and on the Tribunal. However, a policy that is inconsistent with Part I of the **Act** or the Regulations is not binding on the Tribunal (s. 183(5A)). Part I of the **Act** deals with all compensation matters. Part II establishes the Tribunal.

[6] Reconsideration of Board decisions is provided for in s. 185(2) of the **Act**. Section 185(1) gives the Board exclusive jurisdiction to inquire into and determine all questions of fact and law arising pursuant to Part I and any decision of the Board is final and conclusive but subject to the rights of appeal as provided in the **Act**. Under s. 185(2) the Board may reconsider any decision and confirm, vary or reverse the decision, order or ruling of the Board.

[7] On this appeal, the appellant Board asserts that the Tribunal erred in law in concluding that the Policy is inconsistent with the **Act**.

THE TRIBUNAL'S DECISION OF MARCH 6, 2000

[8] The respondent MacDonald's claim for compensation had been dismissed by the Board on June 24th, 1998. He applied for reconsideration of that decision. The case manager affirmed the June 24th decision. MacDonald filed further medical evidence. On April 27th, 1999, the case manager ruled that the evidence was not new evidence within the meaning of the Policy. On May 4th, 1999, MacDonald appealed that decision to a

hearing officer. On June 10th, 1999, the hearing officer applied the Policy and dismissed the appeal. Mr. MacDonald appealed to the Tribunal. The Tribunal invited the parties to address whether the Policy is consistent with the **Act**.

[9] In concluding that the Policy is not consistent with the **Act**, and in particular is inconsistent with s. 185(2), the Tribunal reasoned that s. 185(2) "would appear to constitute a broad reconsideration provision" and that :

> ... Section 185(2) does not include any of the limitations often found in workers' compensation reconsideration provisions. Consequently, the Panel finds that s. 185(2) represents an express policy choice by the Legislature to provide for a broad and expansive jurisdiction to reconsider previous final workers' compensation decisions .... (p. 8 - Tribunal Decision)

[10] The Tribunal found it useful in reaching its conclusions to compare the relevant provisions of the **Workers' Compensation Act**, c. 10 of the **Acts of 1994 - 1995** as amended by c. 1 of the **Acts** of 1999 with the former **Act** (the **Workers' Compensation Act**, R.S.N.S. 1989, c. 508, as amended).

[11] Section 180 of the former **Act** provided for appeals from Board decisions to an Appeal Board pursuant to subsection (1) and a power to the Board to amend or rescind a Board decision on "new facts". The exact text of s. 180 is as follows:

> 180 (1) The Appeal Board has authority to determine any question of law or fact as to whether any benefit is payable to a person and the amount of any such benefit and the decision of the Appeal Board, except as provided in this Act, is final and binding for all purposes of this Act.
>
> (2) The Board or the Appeal Board may, notwithstanding subsection (1), on new facts amend or rescind a decision made under this Act by the Board or the Appeal Board, as the case may be.

[12] The Tribunal went on to state:

> Given that s. 185(2) of the *Act* reflects the Legislature's choice to create a broad reopening provision emphasizing accuracy over finality, the Panel concludes that Policy 8.1.7R1 is inconsistent with the *Act*. In particular, Policy 8.1.7R1 purports to impose the precondition that there be "new evidence" as defined in the Policy, prior to a reconsideration of a previous final decision. However, no such requirement is found in the *Act*. The absence of a "new evidence" requirement in the *Act* is particularly telling, given the presence of such a limitation in s. 70 of the former *Act*, and the wording of s. 180(2) of the former *Act* in which "new facts" was the sole basis upon which a decision could be amended or rescinded. If the Legislature had intended to create a precondition that there be "new evidence" prior to a s. 185(2) reconsideration taking place, the Legislature simply could have included such a precondition, as it did in s. 70 of the former *Act* or in s. 180(2) of the former *Act*.

> Given that there is no "new evidence" precondition to a reconsideration pursuant to s. 185(2), it is necessary to determine what is at issue in a s. 185(2) reconsideration. Applying s. 186 of the *Act*, the Panel finds that a s. 185(2) reconsideration involves a reconsideration on the merits. ..... (Tribunal Decision, page 10)

[13] Section 186 of the **Act** provides as follows:

> The decisions, orders and rulings of the Board shall always be based upon the real merits and justice of the case and in accordance with this Act, the regulations and the policies of the Board.

[14] The only relevant provision for review of a Board decision in the former **Act** was provided for in s. 180(2) plus an appeal to this Court on limited grounds from a decision of the Appeal Board.

[15] The Tribunal went on to state at p. 11:

> Policy 8.1.7R1 affects the <u>substantive right of participants to apply for reconsideration of a final decision on the merits</u> without meeting any pre-conditions, by creating a mandatory condition that there must be "new evidence" which would change the original decision. Policy 8.1.7R1 is inconsistent with the broad statutory power of reconsideration created by s. 185(2). Policy 8.1.7R1 thus does not represent a legitimate attempt by the Board to structure the discretion of its decision makers, but in effect constitutes an attempt by the Board to amend the legislation. Of course, the prerogative of amending the *Act* rests with the Legislature, not with the Board. .....
>
> The fact that the Board decision makers are limited to a reconsideration of whether there existed "new evidence" per Policy 8.1.7R1 is a function of a Policy which is inconsistent with the *Act*. Under s. 185(2) of the Act, the Board possesses a very broad jurisdiction to review previous decisions.

> Policy 8.1.7R1 improperly attempts to create a precondition to the exercise of the Board's jurisdiction, and also impacts on the participants' right to apply for reconsideration without meeting any preconditions. (emphasis added)

[16] At p. 13 the Tribunal stated:

> Regardless of the theoretical policy arguments which could be advanced whether to emphasize accuracy or finality, the Tribunal is first and foremost under a duty to give effect to the Legislature's intention. In s. 185(2), the Legislature expressly determined that the Board was to possess a very broad jurisdiction to reconsider its own previous final decisions, which gives rise to the related substantive right of participants to have their applications for reconsideration considered on the merits, without the requirement of meeting preconditions such as adducing "new evidence". Nowhere did the Legislature include a precondition that there be "new evidence", or any other limitation, to performing a section 185(2) reconsideration, even though it very easily could have included such a limitation. It is the clearly expressed intent of the Legislature which governs. The policy arguments advanced by the Board are best directed to the Legislature, not the Tribunal. (emphasis added)

[17] The Tribunal summarized its conclusions at p. 17 as follows:

> The Appellant's application for reconsideration is to be assessed in the light of s. 185(2) of the *Act*, not s. 72 of the *Act*, given that eligibility to, and not the quantum of, benefits is sought to be reconsidered. Thus, it is necessary to consider Policy 8.1.7R1, which is stated to apply to s. 185(2) reconsiderations.

> Policy 8.1.7R1 is inconsistent with the *Act*, particularly s. 185(2) of the *Act*, because it imposes the precondition of "new evidence" to a reconsideration of a previous Board decision. The imposition of such a requirement is contrary to the Legislature's intent, given the absence of such a precondition in the *Act*. Moreover, it interferes with the substantive right of participants to have previous decisions reconsidered on the merits, without the requirement of meeting any preconditions. Alternatively, the wording of Policy 8.1.7R1 on its face indicates that it does not apply to the Tribunal, but only to Board staff members.
>
> The Panel believes the issue of the consistency of Policy 8.1.7R1 with the *Act* has been argued fully, and hence this aspect of the Panel's decision is final. However, it appears that the previous decision makers directed themselves to the wrong issue: whether the Appellant's symptoms from March 1998 onwards were due to a January 8, 1990 compensable incident. Instead, the correct issue is: whether his symptoms were due to or aggravated by his employment activities generally. As a result, Employer B may be a relevant participant. However, Employer B has not been treated as a participant up to this time. Therefore, an opportunity will be provided to all participants, including Employer B, to file further evidence and submissions concerning the issue whether the symptoms and period of lay-off were related to the Appellant's employment activities generally. However, the Panel reiterates that its findings concerning whether Policy 8.1.7R1 is consistent with [the] *Act*, or whether the Policy is applicable to the Tribunal, are final.
> (emphasis added)

ISSUE ON APPEAL:

[18] The Board asserts that the Tribunal erred in law in concluding that Policy 8.1.7R1 is inconsistent with the **Act**.

STANDARD OF REVIEW:

[19] Section 256 of the **Act** provides for an appeal to this Court on a question of the Tribunal's jurisdiction or on any question of law but on no question of fact.

[20] I am satisfied that a question of law is raised on this appeal. The question the Tribunal considered was whether Policy 8.1.7R1 is inconsistent with the **Act** and, in particular, s. 185(2). This involved the interpretation of the Policy but also the interpretation and application of the **Act** including the scope of the Directors' power to make policy. To answer the question raised by the Tribunal, general principles of statutory interpretation were engaged. The Tribunal is not entitled to any degree of deference on this question as, in dealing with the question, the Tribunal was not acting as an expert in a sensitive area unfamiliar to the Court. Correctness is the standard of review to be applied by this Court to the Tribunal's decision, particularly those that relate to the Board's jurisdiction.

DISPOSITION OF THE APPEAL:

[21] In my opinion, it was not useful, as the Tribunal stated, for it to have founded its decision on a comparison of the **Act** with the former **Act**. The enactment of c. 10 of the **Acts** of 1994 - 95 constituted a massive revision of the review regime of Board decisions from that which existed under the former **Act** which had been enacted in 1989, as amended.

[22] Other than the provisions of s. 70(1) and s. 180(2) of the former **Act** referred to earlier, there was absolutely nothing in the former **Act** that provided for reconsideration by the Board of a decision it had made. There were no express provisions for a formal right to have a decision reconsidered by the Board as provided for in s. 196 of c. 10 of the **Acts** of 1994 - 95. Section 196 provided:

> APPEALS
>
> **Reconsideration of decision**
>
> **196 (1)** The Board shall reconsider a decision made pursuant to Section 185 where

> (a) in the case of a decision respecting compensation, the worker or the worker's employer; or
>
> (b) in the case of a decision respecting an assessment, the employer,
>
> makes a written request to the Board, if the request is made within thirty days of being notified of the Board's decision.
>
> **Procedure**
>
> **(2)** The Board shall determine the procedure for reconsidering a decision pursuant to subsection (1). 1994-95, c. 10, s. 196.
>
> (emphasis added)

[23] The review regime created by chapter 10 of the **Acts** of 1994 - 95 provided for a mandatory reconsideration of a decision respecting compensation. It also provided for an appeal from such reconsideration decision to a hearing officer (s. 197).

[24] The text of s. 197 of Chapter 10 of the **Acts** of 1994 - 95 was as follows:

> 197 (1) Any worker or the worker's employer may request that an appeal from a decision made pursuant to s. 196 be heard by a hearing officer.
>
> (emphasis added)

[25] A decision of a hearing officer was and is appealable to the Tribunal (s. 243). Pursuant to s. 246 of the **Act** the Tribunal is required to decide an appeal according to the **Act**, the Regulations, the policies of the Board and "subject to Section 251 any additional evidence the participants present" (s. 246(b)).

[26] The Tribunal may confirm, vary or reverse the decision of a hearing officer (s. 252(1)).

[27] There is then the appeal to this Court (s. 256).

[28] On April 16th, 1999, the Legislature repealed s. 196 of chapter 10 of the **Acts** of 1994 - 95; s. 196 had provided for the Board's mandatory

reconsideration of a decision respecting compensation (s. 25, c. 1, **Acts** of 1999). At the same time the Legislature amended s. 197 so as to provide for an appeal to a hearing officer of decisions made under s. 185.

[29] In my opinion, the Tribunal made a fundamental error of law in failing to consider the fact that s. 196 was repealed by chapter 1 of the **Acts** of 1999, effective April 16th, 1999. The amendment to s. 197 was made to reflect the repeal of s. 196 so that s. 197, as worded since April 16th, 1999, allows an appeal from either a final decision of the Board made under s. 185(1) or a reconsideration decision made under s. 185(2).

[30] The Tribunal erred in concluding there is a substantive right of a worker to have previous decisions of the Board reconsidered on their merits. A worker never had a right to have the Board reconsider a decision under the former **Act**. Pursuant to s. 180 of the former **Act**, although the Board had a discretion to amend or rescind a decision “on new facts”, the former **Act** did not give a worker a statutory right to reconsideration.

[31] Under the **Act**, the Board may reconsider a decision of the Board under s. 185(2). With the repeal of s. 196, the Legislature eliminated the right of a worker to have a Board decision reconsidered.

[32] The fact that s. 196 was repealed by chapter 1 of the **Acts** of 1999 is the best evidence of the Legislature's intention with respect to the review process available to a worker who is dissatisfied with a Board decision rendered under s. 185(1). Under s. 185(2) the Board may exercise its discretion and reconsider a decision. In my opinion, Policy 8.1.7R1 is not inconsistent with the discretionary power given to the Board to reconsider a decision. The Board may reconsider a decision but the worker has no right to demand a reconsideration. The Tribunal failed to apply fundamental rules of statutory interpretation by apparently overlooking the fact that as of April 16th, 1999, there was no longer a right to have a Board decision made under s. 185 reconsidered.

[33] Pursuant to s. 183 of the **Act** authorizing the Directors to adopt policies consistent with the **Act**, the Board of Directors, in my opinion, has the power to impose limits on the scope of a reconsideration hearing before

a case manager given: (i) the s. 197 right of a worker to appeal a decision of the Board, including a reconsideration decision, to a hearing officer and to present evidence to the hearing officer; and, (ii) the fact that limiting a reconsideration of a previous decision to “new evidence” is accepted in law as an appropriate mechanism to control a reconsideration of issues that had been previously decided. In my opinion, the Tribunal also erred in failing to consider the broad mandate given to the Board of Directors to make policy. The Tribunal erred in inferring a legislative intent that the Directors were not empowered to adopt the “new evidence” policy for reconsideration of a Board decision simply because the **Act** did not contain any provision in s. 185(2) limiting the evidence that could be adduced on such reconsideration.

[34] Although s. 197 is worded as if a worker could only request an appeal rather than worded in affirmative terms that a worker has a right to appeal, as far as I know, the Board has never taken the position that a worker does not have a right of appeal pursuant to s. 197. In my opinion, the Board is correct to have taken such a position. The wording of s. 197, when read in conjunction with sections 198, 185(1) and 243(1) of the **Act**, shows a

legislative intent that a worker has a right of appeal to a hearing officer from a decision of the Board. Section 185(1) states that a decision of the Board is final and conclusive but such decision is expressly subject to "the rights of appeal provided in this **Act**". Section 243(1) provides:

> **243 (1)** Any person entitled to be a participant before a hearing officer may, within thirty days of the participant being notified of the decision of the hearing officer, appeal to the Appeals Tribunal.
>
> (Emphasis added)

[35] To interpret s. 197 as not conferring a right to appeal a s. 185 Board decision to a hearing officer would mean that the Board could refuse a request for an appeal and, thus, render the right of appeal created by s. 243(1) meaningless as there would not be a hearing officer decision to appeal. The Legislature could not have intended that a worker could only request that an appeal be heard by a hearing officer.

[36] I am satisfied that the Legislature intended that the worker has an appeal as of right from a decision rendered under s. 185 even though s. 197 is worded as if the worker could only request an appeal.

[37] In summary, the Tribunal erred in its interpretation of the **Act** by failing to give any consideration to the fact that the **Act** provides for a completely new review regime from that which existed under the former **Act** and by failing to recognize that while the Board has the discretionary power to reconsider a decision, the worker does not have a right to a reconsideration as a result of the repeal of s. 196 of chapter 10 of the **Acts** of 1994 - 95.

[38] The Policy seems to contemplate that: (i) if a notice of appeal is not filed, a Board decision rendered by a case manager either on the original application for compensation or following a reconsideration; and (ii) a decision of a hearing officer on an appeal of a s. 185 decision may be reconsidered by the Board (see definition of “final decision” in the Policy). This is consistent with s. 185(2) of the **Act**. Therefore, in addition to the worker’s right to appeal a hearing officer’s decision to the Tribunal, it would seem that a worker can seek a reconsideration by the Board of a hearing officer’s decision. However, such a reconsideration is solely at the

discretion of the Board and the new evidence policy would apply. The worker does not have a right to such a reconsideration.

[39] Given that there is an appeal to a hearing officer under s. 197 from a decision made pursuant to either s. 185(1) or (2), Paragraph 4 of Policy 8.1.7R1 (which limits the issues that may be dealt with by a hearing officer on an appeal from a reconsideration decision made pursuant to s. 185(2) to those set out in Paragraph 2 of the Policy) raises a very real question whether paragraph 4 is consistent with a worker's right to adduce evidence on an appeal to a hearing officer from a reconsideration decision (s. 197(6)). That issue was not dealt with by the Tribunal as the Tribunal focussed only on reconsideration decisions by the Board and not on appeals from reconsideration decisions to hearing officers. The issue was not raised on the appeal. For the sake of clarity I emphasize that I am not deciding if Paragraph 4 of the Policy is inconsistent with the statutory rights of a worker to adduce evidence on an appeal of a reconsideration decision to a hearing officer pursuant to s. 197 of the **Act**. However, I invite the Board and the Directors to consider this matter.

[40] Ground 4 of the notice of appeal which stated that the Tribunal ought not to have considered the merits of Mr. MacDonald's claim was not dealt with in the appellant's factum filed on August 16th, 2000, nor argued on the hearing of this appeal on October 13th, 2000. Therefore, I do not propose to comment on that ground of appeal.

[41] I would allow the appeal and issue a declaratory order that Policy 8.1.7R1 is not inconsistent with the discretionary power, conferred on the Board pursuant to s. 185(2) of the **Act**, to reconsider a s. 185(1) decision.

Hallett, J.A.

Concurred in:

Glube, C.J.N.S.

Oland, J.A.