S.C.A. No. 02499

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S., Matthews and Freeman, JJ.A.

B E T W E E N:

TERRY HUBLEY appellant - and - THE WORKERS' COMPENSATION BOARD OF NOVA SCOTIA respondent	Linda L. Zambolin for appellant David Farrar for respondent Appeal Heard: January 14, 1992 Judgment Delivered: January 29, 1992

THE COURT: Appeal allowed from dismissal of application for **certiorari** to quash decision of Workers' Compensation Board refusing claim, per reasons for judgment of Freeman, J.A.; Clarke, C.J.N.S., and Matthews, J.A., concurring.

FREEMAN, J.A.:

A steeplejack who fell from scaffolding has appealed from the dismissal of his certiorari application to quash a ruling denying him Workers' Compensation for his injured back, apparently because he waited too long to see a doctor.

After a hearing January 22, 1990, J.H. Vaughan, Commissioner, advised Mr. Hubley on behalf of the Workers' Compensation Board as follows:

> "With respect to claim No. 1391539, the Board finds the worker had made a claim on May 30, 1989 for an injury that allegedly occurred on December 15, 1987. The Board finds that the worker had not sought medical treatment following this alleged incident until May 26, 1989, some seventeen months after the alleged incident.
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> After considering all evidence given at the hearing and in particular Dr. Reardon's objective medical evidence as well as considering the provision of Section 20 (now s. 24) of the Act, the Board finds that the worker's condition cannot be associated to an accident at work and that his condition did not arise out of his employment. This claim, therefore, is dismissed."

After correspondence with the appellant's counsel, Linda Zambolin, and further medical evidence Mr. Vaughan sent

Ms. Zambolin a further Summary Report and Decision in which he stated:

> "The worker alleges that on December 15, 1987, he injured his back during a fall but did not seek medical treatment until May 26, 1989. At that time he complained mostly of right hip conditions. This means that the worker went some seventeen months following the alleged accident without medical treatment.
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> Dr. Reardon reports on December 20, 1989 that 'his present condition could in all likelihood be as a direct result of a significant injury that occurred in December, 1987.' What significant injury took place? Any alleged accident in 1987 did not result in any lay off nor did he seek treatment for seventeen months. This can hardly be considered as a 'significant injury.' Dr. Reardon goes on to say that his symptoms settled down but have been reaggravated. He does not say how they were reaggravated, where or why.
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> Dr. G. MacDonald reported on May 29, 1990 that he first examined Mr. Hubley in May, 1989. He speculated upon reviewing the xrays that there may be an old traumatic fracture to the right hip. He did not say how old the fracture was nor what might have been the cause. Again, how could he go for seventeen months with a fractured hip without treatment?"

It should be noted, with respect to the emphasis placed upon the delay in seeking medical attention, that under s. 69 of the Act failure to report a claim to the Board within six months can result in loss of the right to compensation, but the claim is not barred when in the opinion of the Board the employer has suffered no prejudice. In the present case the

Board did not invoke s. 69 but attempted to deal with the claim on its merits.

Chief Justice Constance Glube of the Trial Division found that:

> "The decision is within the jurisdiction of the Commission and alternately, not patently unreasonable.
>
> After reviewing the material and the submissions of counsel, the fact that there is no alternate explanation for the applicant's condition is in my opinion, not sufficient to quash the decision of the Commissioner. The decision which he reached is one which could be reached based on the evidence before him and his interpretation of the legislation, even though it might not be the decision which this court would reach based on the same evidence. As stated very early in this decision, it is not the function of the court to substitute its own opinion on a certiorari application. I cannot agree with the submission that the only inference to be drawn is that the applicant's condition in May of 1989 resulted from the accident on December 15, 1987."

With respect, under s. 24 of the Workers' Compensation Act the test is not whether the only inference to be drawn is that the worker's condition resulted from an accident, but whether that is a reasonable inference favorable to the applicant. If such an inference is reasonable, the benefit must be given to the worker.

Section 24 is as follows:

> 24. Notwithstanding anything in this Act, on any application for compensation an applicant shall be entitled to the benefit of the doubt, which shall mean that it shall not be necessary for the applicant to adduce conclusive proof of his right to the compensation applied for but that the Board shall be entitled to draw and shall draw from all the circumstances of the case, the evidence and the medical opinions, all reasonable inferences in favour of the applicant.

Chief Justice Glube, in considering the position of the court in a certiorari application, stated:

> "The first matter to be determined is the appropriate standard of review on this application. Section 150 of the Workers' Compensation Act, R.S.N.S. 1989, c. 508 (the Act) contains a privative clause commonly called a finality clause. Section 150 reads in part as follows:
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> Decision of Board is Final
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> 150 Except as stated in Sections 169, 182 and 183, the decisions and findings of the Board upon all questions of law and fact shall be final and conclusive, and in particular, but not so as to restrict the generality of the powers of the Board hereunder, the following shall be deemed to be questions of fact:
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> (a) the question whether an injury has arisen out of or in the course of an employment within the scope of this Part;
> . . .

> Such clauses are placed in legislation to limit the courts' power to review the tribunal's decisions. In the case of Workers' Compensation Board of Nova Scotia v. Kenalty (unreported S.C.A. No. 01964 October 5, 1988), the court reviewed the opening words contained in Section 139 (now s. 150) and at page 4 stated:
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> > . . . That we of this court or indeed the trial judge might have come to some other conclusion is not the test to be applied in the circumstances that exist here."

Kenalty, however, must be distinguished from the circumstances of the present case because the Board was found to have been acting within its jurisdiction. In Kenalty Chief Justice Clarke stated:

> "In this instance a review of the record and the relevant provisions of the Act reveals that the Board did not exceed its jurisdiction. It was required to decide the necessity, character and sufficiency of dental aid and the fees or charges for the same, and did so. There is nothing in the record to indicate the Board made an error in law. It understood and accepted the obligation imposed upon it by the Act."

Determination of entitlement as a question of fact under s. 150 (a) is subject to s. 24 of the Act which imposes jurisdictional limits upon the manner in which the Board may deal with inferences arising from the facts. A simple error of

law respecting such a provision deprives the Board of jusisdiction, as will be seen below. In Kenalty the Board was acting within its jurisdiction; in the present case the Board exceeded its jurisdiction.

In Canada v. Alliance de la Fonction publique du Canada 123 N.R.161 at 174 ff., Sopinka, J. dealt with recent developments in the law relating to judicial review of the findings of administrative tribunals. He referred to the decision of Beetz, J in U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048 at 1086 as "a distillation of this complex area of law" and quoted from it as follows:

> "It is I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:
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> 1. If the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
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> 2. If however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review."

Sopinka, J. continued:

"In the recent decision of this court in Paccar of Canada Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers, Local 14, [1989] 2 S.C.R. 983, 102 N.R. 1, La Forest, J. stated:

> 'Where, as here, an administrative tribunal is protected by a privative clause, this court has indicated that it will only review the decision of the Board if that Board has either made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function; see Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227. (At p. 1003)'

"Although Wilson, J., and L'Heureux-Dubé, J., dissented, both agreed with the basis for judicial review adopted by La Forest, J. For example, L'Heureux-Dubé, J. remarked:

> 'I agree with my colleague La Forest, J., that courts must defer to the judgment of administrative tribunals in matters falling squarely within the area of their expertise. It is now well-established that an administrative tribunal exceeds its jurisdiction because of error only if (1) it errs in a patently unreasonable manner in respect of a question which is within its jurisdiction; or, (2) it commits a simple error in respect of a legislative provision limiting the tribunal's powers (see U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048 . . .). (At p. 1033)'

"To the same effect see Wilson, J., at p. 1020.

'In determining whether there has been a simple error in interpreting a provision conferring or limiting jurisdiction, as in determining whether jurisdiction has been exceeded by a patently unreasonably error, a pragmatic, functional approach must be adopted. This emerges from the following statement of Beetz, J., in Bibeault:

> "'At this stage, the court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal. At this stage a pragmatic or functional analysis is just as suited to a case in which an error is alleged in the interpretation of a provision limiting the administrative tribunal's jurisdiction: in a case where a patently unreasonable error is alleged on a question within the jurisdiction of the tribunal, as in a case where simple error is alleged regarding a provision limiting that jurisdiction, the first step involves determining the tribunal's jurisdiction.'" (Emphasis added by Sopinka, J. at pp. 1088-1089)

Section 24 is a legislative provision limiting the tribunal's powers. The Board's power to draw inferences from the circumstances, the evidence and medical opinions is circumscribed by the requirement that it "shall draw . . . all reasonable inferences in favour of the applicant."

The applicant is excused from adducing "conclusive proof" of his right to compensation. His burden is to prove to the civil standard facts from which the inference he is seeking may reasonably be drawn. Once he has discharged his burden, it becomes the duty of the Board to draw the inference.

It is not sufficient merely to refer to s. 24, as Commissioner Vaughan did in his decision. It must be applied in accordance with its expressed intent. The failure to do so will result in loss of jurisdiction and judicial review.

The circumstances of the case, and the evidence, establish that the applicant, Terry Hubley, fell 10-15 feet from scaffolding on December 15, 1987, while working for D & M Morash Steeplejack. That was the last day of regular work before the winter layoff, and instead of seeking medical attention for his painful back and hip he was able to rest during the winter. When he returned to work in the spring of 1988 he complained that his back and hip bothered him, and his affidavit states he was bothered on an ongoing basis. He worked through 1988 and did not seek medical attention until after he returned to work in the spring of 1989.

When he saw his family doctor, Dr. Donald MacDonald, on May 26, 1989, he was advised to make a claim. Dr. MacDonald suggested the hip might have been fractured. In a letter to the Board dated June 22, 1989, Dr. MacDonald advised that the physiotherapists felt there had been "damage to the posterior aspect of the right hip capsule as well as damage to the correlating ligaments and tendons. . . . I feel sure that this is related to his accident back last year and this is a Workers' Compensation case."

Mr. Hubley mentioned a fractured hip in his Workers' Compensation application. That appears to have been viewed unfavorably by the Board in dealing with his claim, but it is not relevant in light of the more thorough medical investigations which followed, and which established that his injury was not a fracture but a herniated disc in his spine from which the pain radiated through his hip and right leg. By letter dated June 22, 1989, the Board refused his claim and has maintained that position.

On August 28, 1989, Mr. Hubley went to work for J.G. Hartling Limited and worked until September 6, 1989, when he

aggravated his back condition while erecting scaffolding and had to stop work. A decision by the Board that that injury was not caused by an "accident" within the meaning of the Workers' Compensation Act was quashed by Chief Justice Glube at the same time the present matter was heard. She returned that claim to the Commissioner for a determination of compensation, and it is not under appeal.

Mr. Hubley was examined by Dr. Michael Gross who reported to Dr. MacDonald on July 18, 1989, as follows:

> "My impression is that this gentleman has more of a back pain with nerve root irritation on the right side, rather than anything localized in his hip. I think this may fit with his past history of back irritation, in particular with his strenuous job. It could have been provoked by this fall, although it is impossible to be 100 % certain."

Dr. Gerald P. Reardon wrote Dr. MacDonald dated October 23, 1989 confirming symptoms in the appellant's right hip and buttock radiating down his right leg that were consistent with a radiculopathy at the level of the L5 vertebra requiring further investigation. He stated:

> "There doesn't appear to be any doubt that this most recent problem is related to his work injury. He was doing reasonably well until the injury of July (an erroneous reference to the

September 6th incident)."

Dr. Reardon recommended a CAT scan which confirmed the diagnosis of a radiculopathy at the L5 level Following the scan Dr. Reardon reported on December 20, 1989:

> "Basically, my opinion is that his present condition, that is, the pain secondary to the disc herniation and the nerve root compression, could in all likelihood be as the direct result of the significant injury that occurred in December, 1987. His symptoms initially settled down, but have been reaggravated. This is not an uncommon history. There is certainly a strong possibility that the initial injury could be the initiating cause of his present difficulties."

The accident of December 15, 1987, is clearly proven. The appellant's injured condition in the autumn of 1989 is clearly proven. There is uncontradicted evidence of consistent symptoms persisting from December, 1987, to the date of the hearing in January, 1990. There is no evidence of any other cause for the injury. There is evidence of three doctors that the injury is consistent with the accident, although their opinions stop short of one hundred per cent certainty as to causation.

The inference that the injury was caused by the accident is clearly a reasonable one. Section 24 of the

Workers' Compensation Act imposes a positive duty on the Board to draw all reasonable inferences in favour of the appellant. The Commissioner had no jurisdiction to refuse to draw it; by failing to draw that inference he committed jurisdictional error and the decision becomes open to judicial review.

It is not necessary to consider whether it was patently unreasonable for the Commissioner or the Board to refuse to draw the inference, nor to consider whether it was patently unreasonable for him to find that the appellant's condition "did not arise out of his employment." Chief Justice Glube at page 3 of her decision found that "no evidence was apparently presented which contradicted Mr. Hubley's two claims." While it might have been possible for the Board, in the absence of s. 24, to have concluded that there was insufficient evidence that the injury arose out of the employment, there was no evidence upon which it could take the further step of concluding that it did not so arise. While the test for patent unreasonableness is stringent, a finding made in the absence of supporting evidence is patently unreasonable. See Planet Development Corp. and Lester (W.W.) (1978) Ltd., v. United Assocation of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740 (1991), 123 N.R. 241, pp.

I would allow the appeal, set aside the judgment and the order of the chambers judge as they relate to Workers' Compensation claim No. 1391539 dated May 30, 1989. I would direct that an order in the nature of certiorari issue to quash the decision of the Board made by Commissioner Vaughan as it relates to that claim.

Freeman, J.A.

Concurred in: Clarke, C.J.N.S.

Matthews, J.A.