NOVA SCOTIA COURT OF APPEAL

Citation: Workers' Compensation Board of Nova Scotia v. Kaye, 2009 NSCA 123

Date: 20091204
Docket: CA 309638
Registry: Halifax

Between:

The Workers' Compensation Board of Nova Scotia

Appellant

v.

Workers' Compensation Appeals Tribunal, Attorney General of Nova Scotia and Martin Kaye

Respondents

Judges:	Oland, Hamilton, Fichaud, JJ.A.
Appeal Heard:	November 25, 2009, in Halifax, Nova Scotia
Held:	Appeal is dismissed per reasons for judgment of Oland, J.A.; Hamilton and Fichaud, JJ.A. concurring.
Counsel:	Roderick H. Rogers and Paula Arab, for the appellant Workers' Compensation Board of Nova Scotia Alexander MacIntosh, for the respondent Workers' Compensation Appeals Tribunal Jane A. Spurr and D. William MacDonald, for the respondent Martin Kaye

Reasons for judgment:

[1] On June 19, 1990, while at work, the worker injured his lower back. On February 26, 2008 a Board Adjudicator determined that he had chronic pain related to that injury. The worker was awarded a three percent pain-related impairment, effective November 26, 1992.

[2] In determining that effective date, the Board Adjudicator relied upon s. 228 of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 (the "*Act*") which reads in part:

> 228 (1) Subject to subsection (2), where a worker
>
> > (a) was injured on or after March 23, 1990, and before the date this Part comes into force;
> >
> > (b) suffered a permanent impairment as a result of the injury; and
> >
> > (c) at the date this Part comes into force, is receiving or is entitled to receive compensation for permanent partial disability or permanent total disability as a result of the injury,
>
> the compensation awarded between March 23, 1990, and the date this Part comes into force is deemed to be and always to have been awarded in accordance with the former Act.
>
> (2) The Board shall recalculate the amount of compensation payable to the worker in accordance with Sections 34 to 58.
>
> (3) Where a recalculation made pursuant to subsection (2) entitles the worker to a greater award than the award the worker was receiving when this Part comes into force, the Board shall commence payment of the recalculated amount of compensation as of the latest of
>
> > (a) the date on which the Board determines the worker has a permanent impairment, whether pursuant to Section 34 or the former Act;
> >
> > (b) the date on which the worker completes a rehabilitation program pursuant to Sections 112 and 113, where the worker is engaged in a

> rehabilitation program on or after the date the Board determines the worker has a permanent impairment pursuant to Section 34; or
>
> (c) November 26, 1992.
>
> . . .
>
> (5) For greater certainty, nothing in this Section entitles any person to compensation for a period prior to November 26, 1992.
>
> [Emphasis added.]

[3] The worker's appeal of the Board Adjudicator's decision to a Hearing Officer was denied. The worker then appealed to the Workers' Compensation Appeals Tribunal ("WCAT").

[4] In a decision dated March 9, 2009 and reported as WCAT #2008-424-AD, WCAT increased the pain-related impairment to six percent. It also determined that s. 228 did not restrict the worker's entitlement to chronic pain benefits to an effective date of November 26, 1992, and found that the evidence warranted an effective date of October 1, 1990. The Workers' Compensation Board (the "Board") appeals.

[5] The issue on appeal is narrow: does s. 228 of the *Act* limit the retroactive payment of chronic pain benefits stemming from injury between March 23, 1990 and February 1, 1996 to November 26, 1992?

[6] The issue on appeal involves a question of law and the interpretation of a statutory provision with no specialized technical meaning, for which the standard of review is correctness.

[7] In its decision, WCAT summarized the history of the jurisprudence and legislation which gave rise to the transitional provisions in the Act. These include s. 228 which pertains to injuries which occurred in the so-called window period between March 23, 1990, when this court's decision in *Hayden v. Workers' Compensation Appeal Board (N.S.)* (1990), 96, N.S.R. (2d) 108 was released, and February 1, 1996, when the current Act came into force. Payment of any

permanent compensation was suspended after the decision until the Board started compensating workers through an interim loss policy effective November 26, 1992 which was later amended. The policy was temporary with compensation to be recalculated when the final earnings loss policies were adopted.

[8] The *Chronic Pain Regulations* did not come into effect until 2004. Section 9 pertains to chronic pain for injuries during the window period:

> **Original compensable injury on or after March 23, 1990**
>
> **9** If a worker's original compensable injury occurred on or after March 23, 1990, and the worker is found to have a pain-related impairment,
>
> **(a)** the worker's permanent benefit will be calculated in accordance with Sections 34 to 48 of the Act; and
>
> **(b)** the worker may be eligible to receive an extended earnings-replacement benefit.

[9] After reviewing these provisions and submissions on behalf of the worker and the Board, WCAT concluded:

> I agree with the Worker's Advisor that his benefits should be determined by the *Chronic Pain Regulations*, and that s. 228 has no bearing on his entitlement to chronic pain compensation. There is no issue of recalculation here, which is the stated purpose of this section. The November 26, 1992 date, chosen by the Board as the effective date of the Worker's pain-related impairment, is one choices (*sic*) under that section for when the recalculated award is to take effect. As there is no recalculation in this case, s. 228 does not apply.

[10] Having carefully considered the written and oral submissions presented by counsel for the Board and the worker, I am of the view that WCAT's reasoning and determination satisfy the standard of review of correctness.

[11] Section 228 as worded sets out a recalculation mechanism for addressing how and when payments to workers injured within the window period would be calculated under the new *Act*. Counsel for the Board acknowledges that in order for its appeal to succeed, it must show that entitlement to chronic pain benefits involves a recalculation within the meaning of s. 228. I am not persuaded that it

does. When the new *Act* came into effect in February 1996, chronic pain was not compensable. There was no entitlement whatsoever for benefits for chronic pain prior to the *Chronic Pain Regulations* in 2004. Hence, there could be no benefit which would be recalculated. Section 228 has no application to payment of chronic pain benefits for injuries during the window period. Nor is entitlement under s. 9 of the *Chronic Pain Regulations* restricted to an effective date of November 26, 1992. There is no authority which prevents the payment of benefits for chronic pain for a period prior to that date.

[12] I would dismiss the appeal.

Oland, J.A.

Concurring:

Hamilton, J.A.

Fichaud, J.A.