

Date: 19980204

Docket: C.A. 134042

NOVA SCOTIA COURT OF APPEAL

Cite as: Clattenburg v. Nova Scotia (Workers' Compensation Appeals Tribunal), 1998 NSCA 24

Clarke, C.J.N.S.; Hallett and Chipman, JJ.A.

BETWEEN:

WAYNE CLATTENBURG, Workers'	)	K. H. LeBlanc
Compensation Claimant (Claim No. 1472264)	)	Christina M. Lazier
	)	for the Appellant
Appellant)	
- and -)	
	)	Jonathan Davies
THE WORKERS' COMPENSATION	)	for the Respondent
APPEALS TRIBUNAL OF NOVA SCOTIA	)	Appeals Tribunal
and THE WORKERS' COMPENSATION)	
BOARD OF NOVA SCOTIA)	
	)	John R. Ratchford
Respondents	)	for the Respondent Board
)	
	)	Appeal Heard:
	)	February 4, 1998
)	
	)	Judgment Delivered:
	)	February 4, 1998
)	
)	
)	

THE COURT: Appeal allowed from the decision of the Workers' Compensation Appeals Tribunal and the matter remitted to the Tribunal, per reasons for judgment of Clarke, C.J.N.S.; Hallett and Chipman, JJ.A, concurring.

CLARKE, C.J.N.S.:

This appeal, for which leave was granted, is from the decision of the Workers' Compensation Appeals Tribunal (the Tribunal) dated November 20, 1996. It refused the appellant's application for an award of permanent partial disability and vocational rehabilitation benefits.

The appellant, a truck driver, was injured on March 4, 1991. Pursuant to the **Workers' Compensation Act**, R.S.N.S. 1989, c. 508 (the former **Act**), the Workers' Compensation Board (the Board) awarded him temporary total disability benefits from March 18, 1991 to August 16, 1991, at which time his claim was terminated.

The appellant appealed the decision to close his claim. He sought additional benefits, including a permanent partial disability award pursuant to s. 45 of the former **Act**. In the intervening period the current **Act**, S.N.S. 1994-95, c. 10, was proclaimed and the Workers' Compensation Transitional Appeal Regulations (the Regulations) were approved and filed.

The Hearing Officer, in a decision dated September 19, 1995, denied the claim of the appellant for any further benefits. An appeal was taken to the Tribunal.

In its decision on November 20, 1996, the Tribunal decided the Hearing Officer had erred in his decision. It granted the appellant additional temporary total benefits from August 5, 1992 to October 28, 1992. It refused to consider his application for a permanent partial disability award.

The Appeal Commissioner wrote:

With respect to the Appellant's request for a permanent partial disability award, I have found that I am bound by the Board's Policy No. 3.3.2 and consequently, I am unable to award a permanent medical impairment award to the Appellant as it relates to his work-related injury of March 4, 1991, in the absence of objective physical findings of permanent disability.

The Tribunal also decided the appellant was ineligible for vocational rehabilitation benefits because pursuant to the guidelines, it must first be determined that Mr. Clattenburg has a permanent medical impairment. The Policies to which reference is made came into place under the current **Act**.

The circumstances underlying this appeal relate to s. 228 of the current **Act**. They fall within what Chipman, J.A. described in **Doward v. Workers' Compensation Board (N.S.)** (1997), 160 N.S.R. (2d) 22, as being the 'window period' between March 23, 1990 and February 1, 1996.

He wrote at p. 43, para. 118:

[118] The question of permanent impairment should be determined on the basis of the law which was applicable during the window period of March 23, 1990 to February 1, 1996. This is dealt with in s. 228. The only modification is the recalculation process referred to in s. 228(2).

He continued at p. 44, para. 124:

[124] ... Section 228 is a transitional provision which provides a code for dealing with cases of workers who were injured between March 23, 1990 and February 1, 1996. Simply because the Tribunal is, generally, governed by the entire **Act** does not entitle it to apply sections therein which are contradictory to the legislative intention respecting transitional cases. The PMI Guidelines are only applicable if they are authorized by the transitional provisions of the current **Act**.

In **Doward**, Justice Chipman pointed out that the " 'decision' " which the Tribunal was called upon to review on appeal was, as here, the decision of the Hearing Officer "made before the effective date of policy 3.3.2." He continued at p. 46, paras. 132, 133.

[132] ... In my opinion the Tribunal erred in a patently unreasonable manner in concluding that that policy applied to its decision because, in so doing, it was changing the rules in the middle of the game. For this reason as well, Policy 3.3.2 and the PMI Guidelines are inapplicable to the appellant's case.

[133] The PMI Guidelines are substantive in nature and by the Tribunal's own decision, operated to eliminate the appellant's condition from consideration for permanent disability by a table with zero percentage. Subject only to recalculation, any rating schedule made pursuant to s. 34 which is not consistent with awarding compensation "in accordance with the former **Act**" is ultra vires. The presumptions against retroactivity and interference with vested rights operate.

In our opinion, the decision of this Court in **Doward** applies to this appeal and determines its result. The circumstances here fall within the window period. The interpretation placed upon s. 228 of the current **Act** in **Doward** applies. The result is that the Tribunal made a jurisdictional error.

The appeal is allowed. The matter is remitted to the Tribunal to decide whether as a result of the injury the appellant is entitled to permanent partial disability benefits under the provisions of s. 228 of the current **Act** by applying the law as stated by this Court in **Doward**.

Concurred in:

Hallett, J.A.

Chipman, J.A.

