

Date: 19980619

Docket: C.A. 144519

NOVA SCOTIA COURT OF APPEAL

Cite as: Cuddihy v. Nova Scotia (Workers' Compensation Tribunal), 1998 NSCA 130

Bateman, Flinn and Cromwell, J.J.A.

BETWEEN:

THOMAS JOSEPH CUDDIHY
Workers' Compensation Claimant
(Claim No. 5042579)

Appellant

- and -

THE WORKERS' COMPENSATION APPEALS
for the respondent
TRIBUNAL OF NOVA SCOTIA and THE
WORKERS' COMPENSATION BOARD OF
NOVA SCOTIA

Respondents

) Kenneth H. LeBlanc and
) Anne S. Clark
) for the Appellant

) David P.S. Farrar and
) John R. Ratchford
) for the respondent
) Board

) Alexander M. Cameron
)

) Tribunal not appearing

) Appeal Heard:
) May 29, 1998

) Judgment Delivered:
) June 19, 1998

THE COURT: Appeal allowed per reasons for judgment of Cromwell, J.A.;
Bateman and Flinn, J.J.A. concurring.

CROMWELL, J.A.:

I. Introduction:

The Workers' Compensation Appeal Tribunal has decided that Thomas Joseph Cuddihy is not entitled to temporary total disability benefits for the period January 31, 1994 to May 3, 1996. The main question before the Court on this appeal is whether the Tribunal made any jurisdictional error in making this decision.

II Overview of the Facts:

Mr. Cuddihy worked as an "operator repair" and stevedore for the Sydney Steel Corporation. This involved maintenance work and heavy lifting. On June 7, 1993, he was picking up wood on a pier for stacking. As he did, he developed pain in the back of his right leg and the right side of his groin area. Through the Board and its internal appeals processes, he was awarded temporary total disability benefits from June 8, 1993 until September 30, 1993. But a Hearing Officer of the Board refused to extend these benefits beyond that date. This initial decision not to extend the benefits was based on what the Hearing Officer concluded to be the absence of a reasonable inference that Mr. Cuddihy's ongoing back problems were attributable to his work-related injury.

Mr. Cuddihy applied for leave to appeal this ruling to the Tribunal, asking for temporary total disability benefits from February 1, 1994 and a permanent partial disability assessment. Leave to appeal was granted, but only with respect to the

claim for temporary total disability, because that was the only issue considered by the Hearing Officer from whose decision he appealed. On the appeal, the Tribunal referred the matter back to a hearing officer because it concluded that there was new evidence which ought to be considered.

To understand what this new evidence was, and its significance, it is necessary to review, briefly, the medical evidence relating to Mr. Cuddihy's condition. After his injury in June of 1993, he was diagnosed as having low-back strain. His initial period of temporary disability benefits, from June until September, 1993, was extended until January of 1994 on the basis of ongoing investigations of his condition. It appears that the treating physicians were puzzled about the cause of his ongoing pain. As one doctor put it, "this is a puzzling situation for someone to have such marked pain with little physical findings." WCAT described the medical situation between January of 1994 and May of 1996 as "...of a lasting or indefinite duration, and the cause of his medical difficulties ... uncertain."

This situation changed in May of 1996, when, as a result of an exploratory procedure, a cyst and disc protrusion were discovered and removed. In light of this development, the Tribunal found that it was reasonable to infer that the workplace injury caused the disc protrusion. Having reached this conclusion, the Tribunal awarded temporary total disability for the recovery period following this surgery, that is for three months following May 3, 1996. The Tribunal said:

On the basis of the proven facts, I find it possible to reasonably

infer (s. 24 of the *former Act*) that the discovery of the disc protrusion corroborates Dr. Malik's November 19, 1993 diagnosis. Thus, the disc protrusion would have been present in November, 1993, several months after the workplace incident. I therefore find it possible to reasonably infer that the workplace injury of June 1993 caused the disc protrusion. The May 3, 1996 removal of the disc protrusion can be considered treatment undertaken with a view to return the Appellant to work from a workplace injury within a reasonably normal and definite period of time - to wit, the 3 month recovery period. Thus, the 3 months period following May 3, 1996 can be considered "temporary" within the meaning of s. 37 of the *former Act*.

With respect to the period in issue in this appeal, that is from January 1994 until May of 1996, the Tribunal concluded that it should not assess the claim for that period with the benefit of hindsight, particularly the new understanding of the cause of Mr. Cuddihy's suffering derived from the May, 1996 surgery. The Tribunal said:

It is necessary to remember that claims for workers' compensation ought not be assessed with the benefit of hindsight. For example, in the previous *WCAT Decision No. 96-565-TAD*, the following fact situation was set out. A Worker suffered an injury on date A. His physician set out date B as the estimated date of return to work. However, the Worker's situation did not improve and he never returned to his former employment. With the benefit of hindsight, it could be argued that date A represented the point of maximum medical improvement, or the date on which the Worker's situation plateaued. However, at the time, the Worker's physician presumably believed the Worker would return to work on date B, and date B therefore should be the date of maximum medical improvement because it is the first date on which the failure of treatment, or of normal recovery time, would become apparent.

So too, in the present case, with hindsight it appears that Dr. Malik's diagnosis was correct, and the appropriate course of

treatment would have been to operate to remove the disc protrusion. However, this does not render the entire period from June 7, 1993 to August 3, 1996 “temporary” as *per* the *former Act*. I reiterate there is no indication that any course of treatment was being followed in the period from January 30, 1994 to May 3, 1996. The preponderance of specialists’ medical opinion advised against surgery. There was disagreement and/or confusion as to the cause of the Appellant’s difficulties. The medical reports convey the sense the Appellant had concerns about [a] more “aggressive” approach advocated by Dr. Malik, and that this was the reason for his referral to other specialists for further opinions. Moreover and perhaps most significant, in his February 12, 1996 letter, Dr. Malik indicates that the proposed surgery is primarily exploratory. He indicates that if a disc protrusion is found, it would be excised but that if no protrusion were found, the wound would be closed and the Appellant would be no better than he had been before the surgery. Thus, the February 12, 1996 letter makes it clear that the May 3, 1996 surgery would not necessarily have resulted in treatment, and there was the contemplation and possibility that the surgery would not result in any treatment. It was only when the disc protrusion was discovered that treatment of the workplace injury - to wit, the removal of the disc protrusion - was undertaken.

Mr. Cuddihy appeals this decision to this Court on a question of jurisdiction.

III. Grounds of Appeal:

(a) Application by the Tribunal of the Wrong Statutory Provisions:

It is common ground that this case is governed by the transitional provisions set out in s. 229 of the **Workers' Compensation Act**, R.S.N.S. 1994-95, c. 10. The Tribunal decided that this case should be considered under the provisions of the former **Workers' Compensation Act**, R.S.N.S. 1989, c. 508. It did so before this Court released its reasons for judgment in **Workers' Compensation Board of Nova Scotia v. Workers' Compensation Appeals Tribunal of Nova Scotia and Philip Muise** (May 12, 1998). **Muise** has now held that the current **Act** applies to cases like this one that fall within the transitional provisions of s.229 of the **Act**. The Tribunal's failure to apply the correct legislation is, as noted in **Muise**, a jurisdictional error. It is not clear to me that the result would inevitably be the same under the current **Act**, although I do not offer any firm opinion on this question. That being so, the question of Mr. Cuddihy's entitlement to temporary disability benefits from January 31, 1994 to May 3, 1996 must be remitted to the Tribunal for consideration under the applicable legislation.

(b) The Tribunal's Refusal to Consider the Issue of Permanent Disability:

As mentioned earlier, an Appeals Commissioner of the Tribunal, at the time leave to appeal to the Tribunal was granted, ruled that the Tribunal did not have jurisdiction to deal with the issue of permanent disability because it had not been considered by the Hearing Officer. This ruling of the Tribunal is expressed in a brief letter. In the September reference by the Tribunal to the Hearing Officer, the

Appeal Commissioner stated:

In correspondence dated May 30, 1996, Appeal Commissioner Andrea Smillie indicated to the Appellant's Counsel that the sole issue before WCAT concerned whether the Appellant was entitled to temporary total disability benefits from February 1, 1993, and that this was the only issue over which WCAT had jurisdiction. Appellant's Counsel was advised that if she had any questions, or if she wished to discuss the findings of the Appeal Commissioner with respect to WCAT's jurisdiction, she should not hesitate to contact the Appeal Commissioner. There is no record of the Appeal Commissioner being contacted concerning her finding relating to the scope of WCAT's jurisdiction.

The Appellant was granted various extensions with reference to filing submissions. On July 25, 1996, WCAT received submissions from the Appellant, in addition to items #1-#5 of new evidence referred to herein above. The submissions do not address Appeal Commissioner Smillie's finding with respect to WCAT's jurisdiction on this appeal.

In the decision under appeal, which followed the report of the Hearing Officer on the reference, the Tribunal again referred to this matter as follows:

I further add that I make no finding concerning the Appellant's entitlement to permanent disability benefits. As explained in the September 10, 1997 reference to the Hearing Officer, the sole issue before the Tribunal concerned the Appellant's entitlement to temporary total disability benefits subsequent to January 30, 1994, and this was the sole issue considered in the December 18, 1997 decision on reconsideration and in this appeal.

The Tribunal's jurisdiction, to deal, on appeal, with matters not placed in issue before the Hearing Officer is an important practical question for the workers' compensation process and, as the submissions directed to us reveal, raises legal

issues that are far from straight-forward. This is not the question on which leave to appeal to this Court was granted. I have already concluded that, as a result of **Muise**, this case must be remitted to the Tribunal for reconsideration. The resolution of the issue of the Tribunal's jurisdiction to deal with the permanent disability question in this case is, therefore, not essential to the proper disposition of this appeal. I think it better not to pronounce on the issue until a case arises in which it is and, hopefully, when that occasion arises, the Court will have the benefit of full consideration of the matter in reasons of the Tribunal.

(c) **The Factual Findings Concerning the Period of January 31, 1994 to May 3, 1996**

As described earlier, the Tribunal found that the temporary total disability benefits should be awarded for the recovery period following the May, 1996, surgery to remove the disc protrusion. It did so because it was reasonable to infer that the work-related injury in June, 1993, caused the disc protrusion and the surgery removing it was treatment undertaken with a view to return the appellant to work from a workplace injury within a reasonably normal and definite period of time. The Tribunal found, however, that temporary disability benefits could not be awarded for the January, 1993 to May 1996 period. The premise of this conclusion is the Tribunal's view that it was inappropriate to assess the question with the benefit of hindsight — that is, with the benefit of the knowledge gained as a result of the May, 1996, surgery. The Tribunal thought that prior to the surgery in May, the cause or

likely duration of Mr. Cuddihy's disability was not known and he was not receiving treatment. That being so, the Tribunal found that the disability could not be considered temporary or work-related.

Mr. Cuddihy submits that the Tribunal committed jurisdictional error in reaching this decision. As indicated during the argument, the reasoning does appear to me to be difficult to follow. However, this issue raises important questions about the extent to which, if at all, the Tribunal's treatment of the evidence before it may give rise to jurisdictional errors and whether the rule against using hindsight in the assessment of claims gives rise to any jurisdictional issues. Once again, it is not necessary to resolve these issues in this appeal, given my conclusion that the matter must be remitted to the Tribunal. I think it best not to pronounce on these questions until it is necessary to do so; in particular, any future judicial consideration of the hindsight rule would be assisted by a fuller exposition of its scope and rationale by the Tribunal.

IV. Disposition:

For these reasons, I would allow the appeal and remit the issue of whether Mr. Cuddihy is entitled to compensation for temporary total disability pursuant to the **Act** from January 31, 1994 to May 3, 1996 to the Tribunal for reconsideration in accordance with the applicable law.

Cromwell J.A.

Concurred in:

Bateman, J.A.

Flinn, J.A.

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REASONS FOR
JUDGMENT BY:

CROMWELL, J.A.