NOVA SCOTIA COURT OF APPEAL

Citation: Cohen v. Nova Scotia (Workers' Compensation Board), 2007 NSCA 118

Date: 20071207
Docket: CA 280926
Registry: Halifax

In the matter of: A stated case pursuant to s. 206 of the *Workers' Compensation Act* by the Workers' Compensation Appeals Tribunal to the Nova Scotia Court of Appeal in relation to WCAT Appeal 2007-22

- and -

In the matter of: WCAT Appeal # 2007-22

Between:

Philip Cohen

Appellant

v.

Workers' Compensation Board of Nova Scotia and Attorney General of Nova Scotia and Sydney Steel Corporation and Alliance of Manufacturers & Exporters, Canada, c.o.b. as Canadian Manufacturers Association, Nova Scotia Division and Pictou County Injured Workers' Association

Respondents

Judge(s): Saunders, Oland, Fichaud, JJ.A.

Appeal Heard: November 22, 2007 in Halifax, Nova Scotia

Held: The court answered both questions in the stated case "no". The Policy was inconsistent with Regulation 4. The Regulation governs and Mr. Cohen was not barred from entitlement to an assessment per reasons for judgment of Fichaud, J.A.; Saunders and Oland, JJ.A. concurring.

Counsel: Kenneth H. LeBlanc, for the appellant
David Farrar, Q.C. and Daniela Bassan for the respondent WCB
Bernadine MacCaulay for the respondent Canadian Manufacturers Association, NS Division
Larry Maloney, In Person for the Pictou County Injured Workers' Association
Edward Gores, Q.C. for the AGNS (not present)
Louanne Labelle for WCAT

Reasons for judgment:

[1] This is a stated case under the *Workers' Compensation Act*. The court is asked to interpret statutory instruments concerning a worker's entitlement to an assessment for chronic pain benefits.

[2] On March 10, 1982 Mr. Cohen strained his stomach and back while closing a safety valve on a heater. He was awarded temporary total disability and permanent medical impairment benefits under the predecessor to the current *Workers' Compensation Act*, S.N.S. 1994-95 c. 10 ("*Act*").

[3] More recently, Mr. Cohen has sought an assessment to determine if he is eligible for benefits and services related to chronic pain.

[4] In *Martin v. Nova Scotia (Workers' Compensation Board)*; *Laseur v. Nova Scotia (Workers' Compensation Board)*, [2003] 2 S.C.R. 504, the Supreme Court of Canada held that the *Act's* denial of entitlement to an assessment of eligibility for chronic pain benefits violated s. 15(1) of the *Charter of Rights and Freedoms*. The Court's decision was on December 9, 2003. The Court (¶ 119) postponed its declaration of invalidity for six months so that "an appropriate legislative response to chronic pain can be implemented." The Lieutenant Governor in Council, under ss. 184 and 184A of the *Act*, then enacted the *Chronic Pain Regulations*, NS Reg. 187/2004, OIC 2004-299 (dated July 22, 2004, effective April 2, 2004). Regulation 4 says:

> **Eligibility under these Regulations**
>
> 4 A worker is entitled to an assessment to determine eligibility for benefits and services under these regulations if the medical evidence establishes that on or after April 17, 1985, the worker ***had*** chronic pain that was causally connected to an original compensable injury. [emphasis added]

[5] Section 183(2) of the *Act* says that the WCB's Board of Directors "may adopt policies consistent with this Part and the regulations to be followed in the application of this Part or the regulations". Section 183(5A) says that the policy "is only binding on the Appeals Tribunal where the policy is consistent with this Part or the regulations".

[6] Under s. 183, the WCB's Board of Directors, on September 13, 2004, issued policy #3.3.5 entitled "Eligibility Criteria and Compensation related to Chronic Pain" ("Policy"). Section 12 of the Policy said:

> A worker is entitled to an assessment to determine eligibility for benefits and services outlined in the *Chronic Pain Regulations* where the medical evidence establishes that on or after April 17, 1985, the worker ***developed*** chronic pain that is causally connected to an original compensable injury. [emphasis added]

[7] On November 16, 2004, a Case Manager for the WCB dismissed Mr. Cohen's request for a chronic pain assessment. The Case Manager's decision said:

> . . . The worker went on to develop chronic pain that is causally connected to an original compensable injury, however the worker developed chronic pain prior to April 17, 1985.

Relying on s. 12 of the Policy, the Case Manager determined that, as Mr. Cohen's chronic pain did not "develop" on or after April 17, 1985, Mr. Cohen was not entitled to an assessment for benefits and services related to chronic pain.

[8] Mr. Cohen appealed. In a decision of December 28, 2006, the WCB's Chief Hearing Officer dismissed Mr. Cohen's appeal. The reason again was that Mr. Cohen's chronic pain had not "developed" on or after April 17, 1985 under s. 12 of the Policy.

[9] Mr. Cohen appealed further to the Workers' Compensation Appeals Tribunal ("WCAT").

[10] Section 206 of the *Act* entitles the WCAT to state a case for an opinion by the Court of Appeal:

> 206 (1) The Board or the Appeals Tribunal may state a case in writing for the Nova Scotia Court of Appeal on any question of law.
>
> (2) The Nova Scotia Court of Appeal shall
>
> (a) hear and determine the question or questions referred pursuant to subsection (1); and

> (b) provide its opinion on the question to the Board or the Appeals Tribunal, as the case may be.

[11] By an originating notice on May 14, 2007, the WCAT stated a case for the opinion of this court. The following are the substantive provisions of the originating notice, stating the facts, and the two questions posed to the court:

> **TAKE NOTICE THAT** the following facts are not in dispute:
>
> 1. That Philip Cohen was an employee of Sydney Steel Corporation.
>
> 2. That Philip Cohen had several workplace injuries before April 17, 1985 that were accepted by the Workers' Compensation Board as being just claims.
>
> 3. That following the workplace injuries and before April 17, 1985, Philip Cohen developed "chronic pain" as defined in the *Chronic Pain Regulations.*
>
> 4. That section 4 of the *Chronic Pain Regulations* reads as follows:
>
> > A worker is entitled to an assessment to determine eligibility for benefits and services under these regulations if the medical evidence establishes that on or after April 17, 1985, the worker **had** chronic pain that was causally connected to an original compensable injury. [Emphasis in Originating Notice]
>
> 5. That section 12 of Board Policy 3.3.5 reads as follows:
>
> > A worker is entitled to an assessment to determine eligibility for benefits and services outlined in the *Chronic Pain Regulations* where the medical evidence establishes that on or after April 17, 1985, the worker **developed** chronic pain that is causally connected to an original compensable injury. [Emphasis in Originating Notice]
>
> 6. That on November 16, 2004, a Board Case Manager issued a decision finding that Philip Cohen had "chronic pain" as defined in the *Chronic Pain Regulations*. The decision found that Philip Cohen was not entitled to be assessed for benefits and services under the *Chronic Pain Regulations* due to the fact that he had developed chronic pain before April 17, 1985.
>
> 7. That, on appeal, a Board Hearing Officer granted participant status to the Alliance of Manufacturers & Exporters, Canada.

8. That on December 28, 2006, a Board Hearing Officer issued a decision confirming the decision of the Case Manager. The Hearing Officer found that, irrespective of any possible inconsistency between the *Chronic Pain Regulations* and Board Policy 3.3.5, Board staff members are required by sections 183(5) and 183(7) of the *Workers' Compensation Act* to apply the Board Policy.

9. That, on further appeal, the Workers' Compensation Appeals Tribunal granted participant status to the Attorney General of Nova Scotia and the Pictou County Injured Workers' Association.

10. That the sole issue before the Workers' Compensation Appeals Tribunal is whether section 12 of Board Policy 3.3.5 is inconsistent with s. 4 of the *Chronic Pain Regulations.*

11. That, after receiving merit submissions from the participants, a Panel of three Appeal Commissioners formed the view that it was appropriate to state this case to the Nova Scotia Court of Appeal.

TAKE NOTICE THAT the Workers' Compensation Appeals Tribunal submits the following questions of law to the Nova Scotia Court of Appeal for an opinion:

1. Is section 12 of Board Policy 3.3.5 consistent with section 4 of the *Chronic Pain Regulations*?

2. Is Philip Cohen barred from an assessment for benefits and services under the *Chronic Pain Regulations* due to the fact that he had developed chronic pain before April 17, 1985?

[12] I will address these two questions in turn.

1. First Question

[13] Is s. 12 of the Policy consistent with Regulation 4?

[14] Section 12 of the Policy states that only a worker who "developed" chronic pain on or after April 17, 1985 is entitled to an assessment. There is no dispute what Section 12 means. Clearly the Policy's intent is that a worker, whose chronic pain began before April 17, 1985, would not be entitled despite that his chronic pain continued on or after April 17, 1985.

[15] Whether Regulation 4 expresses a different intent depends on the interpretation of Regulation 4.

[16] The material difference between the two instruments is that Regulation 4 substitutes the word "had" for "developed" in the Policy. Is "had" different than "developed"? Mr. Cohen says yes. He says that Regulation 4 extends the assessment entitlement to workers who suffer (employment connected) chronic pain on or after April 17, 1985, whether or not that chronic pain began before April 17, 1985. Significantly, he claims no benefits for chronic pain he suffered before April 17, 1985. Rather, it is an assessment he seeks. The WCB, on the other hand, says that Regulation 4 means the same as s. 12 of the Policy. So a worker who first developed chronic pain before April 17, 1985 could not be said to have "had" chronic pain on or after April 17, 1985. He would not be entitled to an assessment under Regulation 4 even for the chronic pain he suffers on or after April 17, 1985.

[17] The stated case poses no question respecting other prerequisites for entitlement to an assessment. These reasons express no view on any other terms, such as the "original compensable injury" or its timing or its causal connection to chronic pain. My comments are limited to the interpretive difference, if any, between "had" and "developed" in Regulation 4 and Policy section 12, respectively.

[18] In *R. v. Sharpe*, [2001] 1 S.C.R. 45, Chief Justice McLachlin reiterated Driedger's often cited "one principle of statutory interpretation":

> [33] . . . However, E. A. Driedger in *Construction of Statutes* (2nd ed. 1983) best captures the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87, Driedger states: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." Recent cases which have cited the above passage with approval include: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 144; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, at para. 30; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550, at para. 22; *Friesen v. Canada*, [1995] 3 S.C.R. 103, at para. 10. ...

See also *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U.*, Local 324, [2003] 2 S.C.R. 157, at ¶ 41-54. This court has applied

Driedger's formulation to the interpretation of the *Workers' Compensation Act*: *Thomson v. Nova Scotia (Workers' Compensation Appeals Tribunal*) (2003), 212 N.S.R. (2d) 81 (C.A.) at ¶ 16; *Cape Breton Development Corporation v. Estate of James Morrison*, 2003 NSCA 103, at ¶ 35-36; *Boyle v. Workers' Compensation Board (N.S.)*, 2004 NSCA 88, at ¶ 34-36.

[19] I will consider: (1) the plain and ordinary meaning of Regulation 4; (2) its context in the statutory scheme; then (3) the legislative objective for its enactment.

Plain and Ordinary Meaning

[20] Can it be said that a worker who began to suffer chronic pain before April 17, 1985, and continued to suffer from it afterward "had" chronic pain after April 17, 1985?

[21] "Had" is the past tense of "to have." According to the *Oxford English Reference Dictionary*, Second Edition, Revised, "have" includes:

> undergo, experience, enjoy, suffer . . . be subjected to a specified state . . . let (a feeling etc.) be present . . . be burdened with

These definitions, in the context of pain, refer to the state of suffering through the duration of pain.

[22] There is a difference between the onset of pain, and the ongoing state of suffering pain. The onset is a discrete momentary event. The state of suffering endures over time. In the word's plain and ordinary sense, one "has" pain through the duration of the suffering, not just at the moment of onset.

[23] Assume that someone began to suffer chronic pain on April 16, 1985 and continued to suffer chronic pain every day since. If today the individual was asked how he felt yesterday, he could truthfully answer "I had pain." It is hard to conceive how, in plain language, he could truthfully say anything else. The interpretation of "had chronic pain" in Regulation 4 proposed by the WCB, on the other hand, would involve a counterintuitive answer:

> I definitely suffered pain yesterday, as I have continuously for over 22 years. But, because my pain began back on April 16, 1985, I didn't "have" pain yesterday.

Scheme and Context

[24] I move to the scheme and context of Regulation 4.

[25] A critical contextual provision is the definition of "chronic pain" in s. 10A of the *Act*, repeated in Regulation 2(c) of the *Chronic Pain Regulations*. "Chronic pain" is defined to include "pain . . . continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise predated the pain." The *Act* and the *Chronic Pain Regulations* contemplate, not surprisingly for a "chronic" condition, that chronic pain is "continuing." In my view, this supports the interpretation that "having chronic pain" under the Regulations means the enduring state of suffering, not just the moment of onset. The very word "chronic" connotes the notion of a continued state, rather than an acute event.

[26] The WCB makes three points respecting the scheme and context of the Regulation.

[27] First, the WCB's factum refers to the following passages from this court's decision in *Boyle v. Workers' Compensation Board (Nova Scotia)*, 2004 NSCA 88, ¶ 51 and 54:

> [51] ***The Act contemplates that the WCB, through the regulation or policy-making process, maintains some control over the expansion or refinement of specified benefits.*** There is a reason for this.
>
> . . .
>
> [54] Because the WCB has a duty to maintain the [Accident] Fund's ability to satisfy benefits, ***the Act gives the WCB leverage over the expansion and refinement of benefits formulae beyond those specified in the Act.*** . . . Because the *Act* directs that the Fund be solvent, the *Act* controls the benefits payable from the Fund. [emphasis in WCB factum]

Based on *Boyle*, the WCB submits that Regulation 4 should be interpreted restrictively and that only chronic pain that first developed on or after April 17, 1985 should qualify.

[28] I disagree that the passages from *Boyle* have any material bearing on the interpretation of Regulation 4. In *Boyle*, the court held that the WCAT did not have

authority under the *Act* to order the WCB to pay interest to a worker for delayed payment of benefits. The court said that the WCAT could order only those benefits that were contemplated by the *Act* or by statutory instruments, including Board Policies, under the *Act*. Neither the *Act* nor its statutory instruments contemplated the common law principle of interest as damages. *Boyle* does not assist the WCB's submission in this stated case. The *Chronic Pain Regulations* expressly contemplate the payment of compensation for chronic pain, and the issue is the interpretation of words in Regulation 4. *Boyle* does not affect the interpretation of the word "had" in Regulation 4.

[29] Next, the WCB's factum says:

> 38. . . . More specifically, April 17, 1985 is ***one of many "trigger" or "effective" dates*** found in the Act, regulations, and policies for the purpose of delineating eligibility for benefits and services. [emphasis in WCB factum]

[30] I agree that "on or after April 17, 1985" is a trigger date. The question is - a trigger date for what? Does it refer to the moment of onset? Or does it refer to the state of suffering, whenever the chronic pain first developed? That the legislation contains other trigger dates, unrelated to chronic pain, does not help to answer the key question.

[31] Third, and still under the category "scheme and context of the *Act*," the WCB refers to a letter written by the Deputy Minister of Environment and Labour to the Chairman of the Workers' Compensation Board. The letter is undated, but marked "received" by the WCB in December 2005. The letter says:

> This will confirm that it was the intention of the provincial government in adopting the *Chronic Pain Regulations*, that injured workers eligible to be assessed for entitlement to benefits for chronic pain would be those workers who developed chronic pain, in relation to a compensable injury, on or after April 17, 1985.

[32] This letter from a senior government employee was one and one half years after Regulation 4 and over a year after the Policy. I accept that it is admissible. But it is not legislation, nor a regulation, nor a statutory instrument of any sort. It is not even part of the legislative history that led to Regulation 4 or the Policy. It does not attain the status of "context" or "scheme of the *Act*" within the *Driedger* test. *Sullivan and Driedger on the Construction of Statutes* (Fourth Edition), pp. 487-8 says:

> If Ministers and Members of Parliament cannot speak for the legislature as a whole, still less can government officers and employees. At the trial in *R. v. S.(G.)* [(1988), 67 O.R. (2d) 198 (C.A.), affirmed [1990] 2 S.C.R. 294], a bureaucrat from the Department of Justice, responsible for managing programs under the *Young Offenders Act*, gave evidence of the government's intention respecting the introduction of alternative measures programs under the Act. In the Court of Appeal Lacourcière J.A. wrote:
>
> > Courts are not to be guided in the interpretation of statutes by the opinion of persons such as the witness in this case, although he was described as a knowledgeable senior civil servant in the federal Department of Justice. The opinion of any policy-maker or law enforcement officer cannot be qualified as expert evidence when the court in considering the interpretation of or the purpose of a statute.
>
> In the view of the court, it was not possible for the opinion of a government servant to be equated with, or even linked to, the intention of the legislature.

[33] I give little weight to the Deputy Minister's letter. It does not change my view derived from the plain and ordinary meaning of Regulation 4 and the contextual provisions in the *Act* and *Chronic Pain Regulations*.

Objective of the Legislation

[34] The third step is to consider the policy objective of Regulation 4. Section 9(5) of the *Interpretation Act* R.S.N.S. 1989, c. 235 reiterates this step:

> Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and

> (g) the history of legislation on the subject.

Section 7(1)(e) of the *Interpretation Act* says that "enactment" includes a regulation.

[35] The "occasion and necessity for the enactment" of Regulation 4 and the "mischief to be remedied" refer to the constitutional deficiency noted by the Supreme Court in *Martin*. At the hearing in this Court, counsel for the WCB acknowledged this. The object of the Regulation was to address this constitutional deficiency.

[36] The stated case does not ask this court to rule on the constitutional validity or invalidity of any statutory instrument. Nothing in my reasons should be taken as expressing a view on the constitutional validity or invalidity of Regulation 4 or s. 12 of the Policy or any other instrument. The stated case asks the court to interpret Regulation 4, and section 206(2)(b) of the *Act* says that the court "shall" provide its opinion on the stated question. An analysis of Regulation 4's objective, and the mischief that Regulation 4 intends to address, is essential to the interpretative exercise that the court is directed to undertake. I cannot shirk this responsibility just because it involves a reference to the former constitutional deficiency as the mischief that the Regulation intended to remedy. But I wish to be clear that my comments are made solely from the perspective of interpretation.

[37] At the hearing in this court, counsel for the WCB emphasized the words in Regulation 4 "on or after April 17, 1985." WCB counsel forcefully urged that, unless the entitlement to an assessment was conditioned on the *development* of chronic pain on or after April 17, 1985, the Regulation's reference to "on or after April 18, 1985" would be meaningless and without any apparent purpose.

[38] I respectfully disagree with this submission. In my view, the WCB's submission is premised on a misunderstanding of Regulation 4's objective and the mischief it intended to address.

[39] In *Martin*, the Supreme Court of Canada ruled that the exclusion of chronic pain sufferers from the *Act's* assessment entitlement discriminated based on disability contrary to s. 15(1) of the *Charter*. The Court said (¶ 80): "Distinguishing injured workers with chronic pain from those without is still a disability-based distinction." By s. 32(2) of the Charter, s. 15(1) came into force

on April 17, 1985. Regulation 4's reference to April 17, 1985 recognizes that the new regime, eliminating the disability-based distinction, was triggered by the coming into force of s. 15(1). Under the interpretation that “had chronic pain” refers to the state of suffering with chronic pain, Regulation 4's reference to “on or after April 17, 1985" has a clear meaning and purpose. It addresses the disability-based distinction identified by the Supreme Court.

[40] The WCB submits that, if “had chronic pain” refers to the state of suffering, anyone who suffers today from chronic pain (causally connected to an original compensable injury) would be entitled to an assessment under Regulation 4. So, under the argument, all applicants would be entitled to an assessment, and “on or after April 17, 1985" in Regulation 4 would have no effect.

[41] Again, I respectfully disagree. Someone who did not suffer chronic pain “on or after April 17, 1985" would not be entitled to an assessment. That virtually all applicants in 2007 likely will claim to have had chronic pain since April 16, 1985 just reflects the reality that 22 years have passed since the trigger for the new regime, i.e., the coming into force of s. 15(1). It does not mean that the reference to the date is surplusage. Even under the WCB’s proposed interpretation, there would come a day when virtually all applicants would claim to have “developed” chronic pain on or after April 17, 1985. April 17, 1985 is the date when the mischief to which Regulation 4 was directed - the former constitutional deficiency under s. 15(1) - came into existence. Regulation 4's aim is to address that mischief. Its aim is not to include or exclude a preordained quantifiable number of applicants. The WBC’s submission that the reference to the date is meaningless, because few, if any, current applicants would be excluded, misconstrues the Regulation’s objective.

[42] The respondent, Alliance of Manufacturers & Exporters, Canada (“Alliance”) says that the key event is the worker’s assessment. Mr. Cohen had an assessment before April 17, 1985. The Alliance says that to interpret Regulation 4 to allow him another, and possibly inconsistent, assessment now would give retrospective effect to the *Charter*. The Alliance’s factum says:

> This is an absurd result because the *Charter* does not apply retrospectively.

[43] I repeat that the issue involves the interpretation of Regulation 4, not of the *Charter*. I disagree that interpreting “had” pain to mean suffering the state of pain on or after April 17, 1985 would address a “mischief” that assumes a retrospective

application of s. 15(1). As the Supreme Court said in *Martin* (¶ 80), the disability-based distinction was between "workers with chronic pain and those without." The interpretation of Regulation 4 I have adopted merely entitles a worker with (*i.e.* having) employment-connected chronic pain on or after April 17, 1985, to an assessment. Only chronic pain on or after s. 15(1) came into force on April 17, 1985 would be assessable.

Summary

[44] In summary, under the words "on or after April 17, 1985, the worker had chronic pain" in Regulation 4, it is not a prerequisite that the chronic pain developed for the first time on or after April 17, 1985. Section 12 of Board Policy 3.3.5, on the other hand, would prescribe as a prerequisite that the chronic pain developed for the first time on or after April 17, 1985. To answer question one in the stated case, s. 12 of the Policy is inconsistent with Regulation 4.

2. Second Question

[45] Is Mr. Cohen barred from an assessment because he developed chronic pain before April 17, 1985? I note again that nothing in the stated case poses a question respecting any other prerequisite to Mr. Cohen's entitlement to an assessment. The only question is whether Mr. Cohen is "barred" because he "developed" chronic pain before April 17, 1985. The answer follows from the reasons I have expressed earlier. "On or after April 17, 1985" in Regulation 4 is a trigger for suffering the state of chronic pain, not for developing the onset of chronic pain.

[46] Section 183(2) of the *Act* authorizes the WCB's Board of Directors to "adopt policies consistent with this Part and the Regulations." Section 183(5A) says that a Board Policy "is only binding on the Appeals Tribunal where the policy is consistent with this Part or the Regulations." Section 183(8) reiterates that a Policy must be consistent with the *Act* and Regulations. The word "developed" in s. 12 of the Policy is inconsistent with Regulation 4. It follows that Mr. Cohen is not barred by the word "developed" in the Policy.

3. Conclusion

[47] To repeat, I would answer the questions as follows:

1. Is s. 12 of the Board Policy 3.3.5 consistent with section 4 of the Chronic Pain Regulations?

- No

2. Is Philip Cohen barred from an assessment for benefits and services under the Chronic Pain Regulations due to the fact that he had developed chronic pain before April 17, 1985?

- No

Fichaud, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.