NOVA SCOTIA COURT OF APPEAL

Citation: Canada Post Corp. v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2007 NSCA 129

Date: 20071228
Docket: CA 275250
Registry: Halifax

Between:

Canada Post Corporation

Appellant

v.

Nova Scotia Workers' Compensation Appeals Tribunal and
The Workers' Compensation Board of Nova Scotia and
Heather Murphy (WCAT #2006-389-AD)

Respondents

Judges:	Bateman, Cromwell and Saunders, JJ.A.
Appeal Heard:	November 15, 2007, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Cromwell, J.A.; Bateman and Saunders, JJ.A. concurring.
Counsel:	Daniel W. Ingersoll and Andrew Taillon, for the appellant Alexander MacIntosh, for the respondent Nova Scotia Workers' Compensation Appeals Tribunal Paula Arab, for the respondent The Workers' Compensation Board of Nova Scotia Kenneth LeBlanc, for the respondent Heather Murphy

Reasons for judgment:

I. INTRODUCTION:

[1] Two main questions are at issue in this appeal. The first is whether the worker suffered a personal injury by accident arising out of and in the course of her employment as a letter carrier when her back "snapped" and seized up while she was at work sorting mail. The second is whether the Workers' Compensation Board (WCB) wrongly cut off her benefits even though she continued to suffer earnings loss attributable to her workplace injuries. The Workers' Compensation Appeals Tribunal (WCAT) answered both questions in the affirmative and Canada Post appeals by leave to this Court.

[2] I would uphold WCAT's decision and dismiss the appeal.

II. OVERVIEW OF FACTS AND ISSUES:

[3] The worker was employed by Canada Post as a letter carrier. Two work-place incidents in 2002, one in September and the other in November, led to her workers' compensation claims.

[4] According to her testimony accepted by the WCB's hearing officer, she was sorting mail into boxes on September 17th, 2002. When she went to move to the right, she felt a snap in her lower back. She was unable to move her legs or to walk for 20 or 30 minutes. Once able to walk, she proceeded to a trailer park and called a cab to take her back to the depot. The WCB rejected her claim for temporary earnings replacement benefits on the basis that she had not sustained a personal injury by accident arising out of and in the course of her employment.

[5] The second incident occurred on November 26 of the same year. While at work, the worker was struck by a mail cart. She was unable to work and received benefits until January 6, 2003. The Board refused to extend her benefits beyond that date.

[6] The worker appealed to WCAT both the WCB's refusal to recognize her September injury and to extend benefits beyond January of 2003. WCAT allowed

the appeals, found that the September injury was compensable and that benefits in relation to either or both injuries should be extended beyond January 6, 2003.

[7] The Court granted Canada Post leave to appeal. The issues are whether WCAT erred in finding that:

1. there had been an "injury by accident" on September 17, 2002;

2. the accident "arose out of and in the course of employment"; and

3. the worker was entitled to benefits beyond January 6, 2003.

III. ANALYSIS:

[8] To be compensable under workers' compensation legislation, a worker must suffer an injury by accident arising out of and in the course of employment. The issues raised by the appellant focus on two elements of this requirement: what is meant by the term "accident" and when may an accident be said to arise "out of and in the course of employment." The appellant contends that the worker did not have an "accident" and, even if she did, that it did not arise "out of and in the course of" her employment.

[9] The case is unusual because both its legal and factual aspects have been transformed as it has proceeded through the system.

[10] In the beginning, and even at the hearing before WCAT, the main issue was whether the worker's back problems had arisen out of and in the course of employment. In short, the main question was whether her back problems resulted from her work or from pre-existing, personal conditions. However, in this Court, the appellant has directed much of its argument to whether there was an "accident" within the meaning of the applicable legislation, a point considered only inferentially by WCAT.

[11] The factual picture has also evolved. Much of the medical evidence originally attributed the worker's back problems to Crohn's disease and sacroiliitis. The appellant's position was these were not work-related conditions. However, by the time the case reached the review and appeal stages, there was definitive

medical opinion that the worker did not suffer from Crohn's disease and a CT scan had revealed no evidence of sacroiliitis. Thus, by the time the case was before WCAT, much of the medical evidence underpinning the appellant's position had either been overcome by later testing and revised opinions or, at the least, been put into serious question.

A. Standard of Review:

[12] Many judgments of the Court have set out how the pragmatic and functional approach to determining the standard of review applies to statutory appeals from WCAT: see, e.g., **Logan v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, 2006 NSCA 88, [2006] N.S.J. No. 297 (Q.L.) at paras. 16-31; **Nova Scotia (Department of Transportation and Public Works) v. Nova Scotia (Workers' Compensation Appeals Tribunal)("Puddicombe")**, 2005 NSCA 62, [2005] N.S.J. No. 137 (Q.L.) at paras. 15 - 20. The factors concerning the mechanism of review, the absence of a privative clause in relation to questions of law and jurisdiction, the purpose of the legislative scheme and the expertise of the tribunal have all been thoroughly discussed in many judgments. I will not repeat that analysis here. I will concentrate on the factors which are specific to this case, namely, the nature of the issues, the legislative purposes of the provisions in issue and the relative expertise of the tribunal in relation to these issues.

1. Nature of the Issues:

[13] The issues raised on appeal concern the interpretation and application to the facts of some provisions of the **Government Employees Compensation Act**, R.S.C. 1985, c. G-5 **(GECA**). Specifically, the case concerns the definition of the term "accident", as set out in s. 2 and 4(1)(a)(i), of the term "... arising out of and in the course of ... employment", as set out in s. 4(1)(a)(i) and how they apply to the facts. These are components of the eligibility requirement for compensation: to be eligible the worker must have suffered " ... personal injury by an accident arising out of and in the course of his employment ..." (s. 4(1)(a)(i)). As noted in **Puddicombe**, these are broad and general terms which are at the root of the entire statutory scheme. They must, within that scheme, be applied to a great variety of different situations: paras. 24 - 29.

[14] The interpretation of these statutory provisions is a question of law. This supports less, rather than more, deference. The application of the provisions to the particular facts of specific cases is a question of mixed law and fact and is central to the operation of the whole specialized workers' compensation scheme. This supports a measure of deference.

[15] Applying these provisions to the facts also requires interpretation and assessment of the evidence. There is no appeal on questions of fact and the highest level of deference is generally accorded to WCAT's findings of fact.

2. Purpose of the provisions:

[16] The requirement that the worker suffer injury by accident arising out of and in the course of employment is, as mentioned, fundamental to the whole legislative scheme for workers' compensation. This requirement not only defines eligibility for benefits, but is also key to the bar of civil proceedings and the right of election of remedies as set out in ss. 12 and 9 of **GECA**. The provisions therefore relate intimately to the purposes and structure of the workers' compensation system. This supports accordingly more, rather than, less deference.

3. Relative Expertise of WCAT and the Court:

[17] WCAT is a highly specialized tribunal, dealing on an ongoing and day-to-day basis with the interpretation and application of the legislative scheme. Courts, too, have considerable expertise in deciding questions of law and in interpreting statutes. While I do not think that, in general, WCAT has markedly greater relative expertise with respect to interpreting **GECA**, the tribunal's specialized functions, in my view, support a measure of deference with respect to certain types of legal questions falling squarely within those functions.

4. Conclusion concerning standard of review:

[18] On standard of review, I conclude that in determining the broad, legal principles to be deduced from the statutory provisions, WCAT must be correct. However, when it applies those broad, legal principles to the facts of a particular case, WCAT's decisions should be reviewed on the reasonableness standard.

There being no appeal on questions of fact, purely factual conclusions should be reviewed for patent unreasonableness.

B. Was there an accident?

[19] The appellant says that WCAT erred by finding that the worker had suffered an injury by accident. Three main submissions are advanced: that WCAT failed to consider the term "accident" as defined in **GECA**, that it wrongly omitted from consideration the "causative elements" of the term "accident", and that it improperly applied the statutory presumption provided for in s. 10(4) of the **WCA**. I will discuss these points in turn.

1. Did WCAT fail to consider the term "accident" as defined in GECA?

[20] This case is governed by **GECA**. In brief, the appellant's submission is that WCAT erred by failing to apply the **GECA** definition of "accident."

[21] To be compensable, a work place injury must occur by means of an "accident." Both **GECA** and **WCA** do not define the term "accident" exhaustively, but list certain things that are included within that term. The inclusions in each statute are not identical. **GECA** provides that the term accident "includes ... a fortuitous event occasioned by a physical or natural cause": **GECA** s. 2. **WCA** provides that an accident includes "a chance event occasioned by a physical or natural cause" and also "disablement ... arising out of and in the course of employment": **WCA** s. 2(a)(ii) and (iii). (For ease of reference, I will refer to these as the **GECA** and the **WCA** definitions of "accident".) The appellant submits that WCAT did not take note of this difference and that it must have wrongly applied the "disablement" definition of "accident" from **WCA**.

[22] The appellant says that WCAT's failure to note the differences between **GECA** and **WCA** is, in itself, a reviewable error. I do not agree. As the Court reasoned in **Cape Breton Development Corp. v. Burrell**, 2003 NSCA 15, 212 N.S.R. (2d) 278 (C.A.), such a failure will only be a reviewable error when it is apparent from the facts that the difference between the two statutes is material to the outcome: paras. 7 - 9. Here it was not. The result reached by WCAT is, as I will explain in a moment, readily explained on the basis that there had been an

accident in the sense specified in **GECA** of "a fortuitous event occasioned by a physical ... cause."

[23] The appellant further submits that WCAT's reasoning reveals that it must have relied on the "disablement" definition from **WCA** in reaching the result it did. The appellant says that WCAT's reasons are consistent only with it having found that disabling symptoms arising at work constitute an accident. This, the appellant submits, is not the case under **GECA**.

[24] WCAT did not expressly refer to the statutory inclusions within the term "accident." Indeed, it dealt with whether there had been an accident only inferentially, probably because this issue was not the focus of the arguments made to it. The issue, therefore, is essentially one of interpreting WCAT's decision to see if it must have relied on the wrong statutory definition of accident.

[25] I do not think that it did. WCAT's reasons should be read in light of the issues it was addressing. The focus of argument before WCAT was on whether the workplace had caused or contributed to the worker's condition. This is clear from the way WCAT set out the parties' positions. It noted that the appellant's position was that "... the worker's problem of September 17, 2002 is the consequence of a long-standing personal condition and not the consequence of the worker's employment duties." The worker's position was that "... even if the worker had pre-disposing personal condition(s), an aggravation or acceleration of the condition, through employment duties, is compensable." WCAT's reasons should be understood as being responsive to these issues. Read in that way, it is clear to me that WCAT was not relying on the "disablement" inclusion in the term "accident" from **WCA**, but rather addressing the issue of whether the injury arose "out of and in the course of employment." That is the main focus of WCAT's reasons.

[26] In the worker's submissions to WCAT, there was no reliance on, or even reference to, the "disablement" definition of "accident" under the **WCA**. Those submissions cited and relied on only the matters which **GECA** specifies are included in the term "accident". We should not assume that WCAT ignored the worker's position.

[27] Moreover, WCAT acted on the worker's testimony before the hearing officer that she had been sorting mail, her back "seized up", she felt a "snap" in her lower back and soon was in a great deal of pain. The onset of the pain was sudden, dramatic and accompanied by a "snap" in her back as she moved to the right. Thus WCAT's decision is supported by there having been an accident in the sense of a "fortuitous event occasioned by a physical or natural cause." While, as the appellant points out, the descriptions of the incident are not always consistent in the various reports of accident and medical reports in the record, WCAT was entitled to rely on the facts set out by the hearing officer before whom the worker had testified. Those facts are consistent with there having been "a fortuitous event occasioned by a physical or natural cause."

[28] WCAT, in my view, accepted the worker's submission that her "... back was fine and she was fully able to work prior to her back injury on September 17, 2002. [She] stated that as she was working, sorting mail into mail boxes, she went to move to the right and she felt a snap in her back and the difficulties with her back and her related disability commenced from that point in time." To find that this constituted an 'accident' was consistent with the leading case from the Supreme Court of Canada, **New Brunswick (Workers' Compensation Board) v. Theed**, [1940] S.C.R. 553. Kerwin, J., at p. 570, approved the following interpretation of the word "accident" in the workers' compensation context:

> ... if a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in, I consider that this is accidental injury in the sense of the Statute.

[29] The appellant has not convinced me that WCAT erred by relying on the wrong statutory provisions relating to the term "accident" even assuming, without deciding, that those statutory differences would be material here.

[30] I should note that the worker does not concede that an accident under **GECA** must consist of some specific and identifiable incident. I should also note that the worker does not concede that an accident for the purposes of **GECA** does not include "disablement ... arising out of and in the course of employment." The worker's position is that we need not decide these points in this case. I agree and refrain from deciding either question here.

[31] To conclude on this point, WCAT did not err in this case by failing to advert specifically to the differences between **GECA** and **WCA** and it did not apply the wrong definition of accident.

2. Did WCAT ignore the required causative elements of the term "accident?"

[32] The appellant submits that the term "accident" must be understood as having "causative elements"; that is, the term "accident" must be understood as including some causal link between the accident and the worker's employment. This submission is based on various dictionary definitions of accident and on **Metropolitan Entertainment Group v. Durnford**, 2000 NSCA 122, 188 N.S.R. (2d) 318 (C.A.), particularly paras. 18 and 19.

[33] I cannot accept these submissions. In my view, engrafting onto the term "accident" some "causative elements" as regards the worker's employment would combine and tend to confuse the various related, but distinct, requirements for recognition of a work-place injury. As provided for in **GECA**, "... compensation shall be paid to an employee who is caused personal injury by an accident arising out of and in the course of his employment": **GECA** s. 4(1)(a). In this case, the "accident" falls within the specific inclusion of "a fortuitous event occasioned by a physical ...cause." The required causal link to the workplace is expressed by the requirement that the injury by accident must arise "out of and in the course of employment." To add some further causal element in relation to the workplace to the term "accident" itself is not consistent with the legislative text and in my view would serve only to confuse an orderly analysis of whether an injury should be recognized as compensable.

[34] Contrary to the appellant's submission, I do not understand the Court in **Durnford** to have accepted that the term "accident", in the sense relevant here of a fortuitous (or chance) event, must be understood as having some causative element in relation to the worker's employment. The appellant relies on paras. 18 and 19 of the judgment in this regard, but respectfully that is a misreading of those paragraphs.

[35] It is important to remember that **Durnford** concerned the requirement that an injury by accident "arise out of and in the course of employment." The Court stated at para. 17 that the "central issue" in the case was whether there was a causal

connection between the injury and the employment. Moreover, the accident in **Durnford** fell within the "disablement" inclusion in that term. That inclusion repeats the requirement that the "disablement" must "arise out of and in the course of employment": **WCA** s. 2(a)(iii). However, that requirement is not repeated in the **GECA** inclusions in the term "accident."

[36] I find no support in **Durnford** for the appellant's proposition that there must be some causative element in relation to the worker's employment included in the "fortuitous event" definition of accident in **GECA**.

[37] I conclude that the term "accident", used in the sense of "a fortuitous event occasioned by a physical or natural cause", does not have any "causative element" in relation to the workplace as part of its definition.

3. Did WCAT incorrectly interpret and apply s. 10(4)?

[38] It is argued that WCAT wrongly used the presumption in s. 10(4) of **WCA** to meet the required "causative elements" said to be contained in the definition of the term accident. This submission falls with the one I have just rejected. Given my conclusion that there are no causative elements in relation to the workplace within the definition of the term accident, it follows that WCAT did not err by failing to consider whether such elements had been established, with or without the presumption.

B. Did the accident arise "out of and in the course of employment?"

[39] WCAT relied on the presumption found in s. 10(4) of **WCA** that where an accident occurred "in the course of employment," it shall be presumed "that it arose out of the employment" unless the contrary is shown. The appellant submits that WCAT erred in two respects: it failed to analyse, in accordance with the principles set out in **Puddicombe**, the strength of the link between the injury and the risk created by the employment and that, contrary to the approach set out in **Michelin North America (Canada) Ltd. v. Ross**, 2002 NSCA 166, 211 N.S.R. (2d) 273 (C.A.), it found the necessary causal link based solely on the fact that symptoms manifested themselves at work.

[40] I cannot accept either argument. In my view, the analysis based on **Puddicombe** is not relevant here and the submission based on **Ross** is misplaced.

[41] Before turning to those points, I should be clear that the issue is not whether the presumption in s 10(4) of **WCA** applies to **GECA** claims. The appellant is content, without conceding the point, that we assume for the purposes of this appeal that the presumption was available to the worker. I will therefore assume, but not decide, that s. 10(4) of **WCA** applies to **GECA** claims.

[42] WCAT did not commit the error identified in **Ross, supra**, by inferring causation simply because symptoms manifested themselves at work. Unlike this case, **Ross** concerned an "injury" that occurred while the worker was off-duty, on his own time and away from the work site: see para. 15. Unlike **Ross**, the present case concerned the happening of an accident in the sense of "a fortuitous event occasioned by a physical or natural cause" and that occurred in the course of the worker's employment.

[43] The presumption in s. 10(4) provides that, where an accident occurred "in the course of employment", it shall be presumed "that it arose out of the employment" unless the contrary is shown. The requirement that the accident arise "in the course of employment" is concerned with the time, place and circumstances of the accident while the requirement that it arise "out of employment" is concerned with the origin of the cause of the injury: **Gellately v. Newfoundland (Workers' Compensation Appeal Tribunal)**(1995), 126 D.L.R. (4th) 530 (N.L.C.A.) at 534; **Puddicombe, supra**.

[44] I have already decided that WCAT did not err in concluding that there had been an "accident". The sudden seizing up and the snap in the worker's back while turning was a "fortuitous event occasioned by a physical ... cause." There is no doubt that this accident occurred while the worker was at work and while she was in the midst of carrying out her duties. As WCAT put it, the accident occurred "... in the course of [the worker's] job duties." It therefore arose "in the course" of her employment.

[45] There is no issue in this case, as there was, for example in **Puddicombe**, about whether the accident happened within the scope of the worker's employment. The sort of analysis undertaken in **Puddicombe** was not necessary

here because, in this case, it was clear that the accident occurred while the worker was at work and working.

[46] Because the accident in this case occurred "in the course" of employment, s. 10(4) placed an onus on the appellant to show that the accident did not "arise out of" the employment. WCAT did not commit any reviewable error in finding that this burden arose and that the appellant had not discharged it.

[47] WCAT discussed the evidence suggesting possible explanations for the worker's back pain. The appellant had argued that the injury was the result of long-standing personal conditions, particularly Crohn's disease and sacroiliitis. However, the evidence before WCAT was that these previously diagnosed conditions had been discounted, if not entirely rejected, by further medical testing and opinion by the time of WCAT's consideration of the matter:

> Sacroiliitis was diagnosed variously by Drs. Coughlan (November 27, 2002), Peters (December 5, 2002), and Deliu (December 18, 2002). However, in an examination performed on the worker recounted in an August 6, 2003 report, Dr. Mosher discounted the previous diagnosis of Crohn's disease, a specialist having found no evidence of it on examination by colonoscopy. As a consequence, and in light of the opinion of radiologists that there was no indication of sacroiliitis, Dr. Mosher discounted this diagnosis as well (noting that the diagnosis of sacroiliitis was, in large measure, dependent on the prior report of Crohn's disease).
>
> In his report of a CT examination of the worker's sacroiliac joints performed on February 25, 2003 radiologist Dr. Mitchell wrote: "No evidence of sacroiliitis. Mild osteoarthritic alterations involving the left sacroiliac joint." Note is taken of Dr. Burnstein's observation that "[s]acroiliitis is a common feature of this [spinal arthritic involvement], and may predate the onset of the inflammatory bowel disease" (see his report dated June 8, 2004).
>
> (Emphasis added)

[48] There was also evidence that the worker had never before had the sort of seizing up of her back that she experienced on September 17, 2002 although she had an earlier lower back injury in August of 2001 which the WCB had recognized as compensable.

[49] In my view, WCAT did not err in finding that the accident arose out of and in the course of the worker's employment.

C. Was the worker entitled to benefits beyond January 6, 2003?

[50] The appellant acknowledges that the outcome of this issue depends on whether we find any error in WCAT's conclusions regarding the September 17 injury. WCAT found that either or both of the September 17 and November 26, 2002 injuries continued to be responsible for earnings loss after January 6, 2003. There is no challenge to the findings relating to the November 26th injury. Given that I would uphold WCAT's conclusions in relation to the September 17 injury, there is no basis to interfere with its decision that benefits should be extended beyond January 6, 2003.

IV. DISPOSITION:

[51] I would dismiss the appeal without costs.

Cromwell, J.A.

Concurred in:

Bateman, J.A.

Saunders, J.A.