NOVA SCOTIA COURT OF APPEAL

Citation: *Legere v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2016 NSCA 5

Date: 20160204
Docket: CA 439252
Registry: Halifax

Between:

Alfred Legere

Appellant

v.

Nova Scotia Workers' Compensation Appeals Tribunal, the Workers' Compensation Board of Nova Scotia, the Attorney General for the Province of Nova Scotia and the Attorney General of Canada

Respondents

Judges:	Beveridge, Oland, Van den Eynden, JJ.A.
Application Heard:	December 9, 2015, in Halifax, Nova Scotia
Held:	Application dismissed, per reasons for judgment of Beveridge, J.A.; Oland and Van den Eynden, JJ.A. concurring
Counsel:	Kenneth LeBlanc and Vanessa Nicholson, for the appellant Alison Hickey, for the respondent, Workers' Compensation Appeals Tribunal Paula Arab, Q.C., for the respondent, Workers' Compensation Board of Nova Scotia Sarah Drodge, for the respondent, Attorney General of Canada Edward Gores, Q.C., for the respondent, Attorney General of Nova Scotia

Reasons for judgment:

INTRODUCTION

[1] Mr. Legere applies for leave to appeal from a preliminary decision by the Workers' Compensation Appeals Tribunal (WCAT). The practice has developed that reasons are not usually provided by this Court on applications for leave to appeal. This is not a typical case.

[2] What takes it out of the ordinary is the respondent's argument that the leave application must fail because the *Workers' Compensation Act* only authorizes appeals from "final orders, rulings or decisions" of WCAT - and the decision Mr. Legere seeks leave to appeal is not "final". The respondent also asserts that the appellant fails to articulate a fairly arguable case of error.

[3] For reasons set out below, I agree that whatever the arguability of the appellant's claim that WCAT erred in law (on which I express no view), its decision of April 30, 2015 is not a final ruling or decision within the meaning of the *Workers' Compensation Act*. As a consequence, I would dismiss the application for leave to appeal.

BACKGROUND

[4] Mr. Legere worked for Correctional Services Canada as a "Manager Assistant Warden". He was laid off work on June 4, 2012. On June 22, 2012, he filed an Accident Report claiming he could not work due to stress. In sum, he claimed that he suffered an "accident" by being subject to one or more traumatic events at work.

[5] The Board rejected the claim. Mr. Legere appealed. Submissions and evidence were filed by the Worker and the Employer. The Hearing Officer, in a written decision of February 13, 2013, denied the appeal.

[6] The Hearing Officer defined the issue to be: "Does the evidence support a finding that the Worker sustained a personal injury by accident arising out of and in the course of his employment?" She found it did not. Before further describing her reasons, and the basis of the further appeal to WCAT and its Preliminary Appeal Decision, it is necessary to set out the legal framework that may or may not determine the ultimate viability of Mr. Legere's claim.

Legal framework

[7] Generally, Nova Scotian workers and employers in defined industries are governed by the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 (as amended) (*WCA*). If a worker suffers personal injury by accident arising out of and in the course of employment, he or she shall be paid compensation by the Workers' Compensation Board (s. 10).

[8] *WCA* does not exhaustively define "accident". Section 2(a) of *WCA* directs that accident "includes" a wilful and intentional act (not that of the worker advancing a claim), a chance event, disablement, including occupational disease arising out of employment, but it excludes stress, other than an acute reaction to a traumatic event. The official words of *WCA* are:

> 2. In this Act,
>
> (a) "accident" includes
>
> (i) a wilful and intentional act, not being the act of the worker claiming compensation,
>
> (ii) a chance event occasioned by a physical or natural cause, or
>
> (iii) disablement, including occupational disease, arising out of and in the course of employment,
>
> but does not include stress other than an acute reaction to a traumatic event;

[9] The Board is authorized by *WCA* to promulgate policies (s. 183). All such policies must be consistent with the *Act* and the regulations. They are binding on the Board, and on the Appeals Tribunal itself, so long as the policy is consistent with the *Act* or regulations (s. 183(5A)).

[10] The Board adopted policy 1.3.9 establishing criteria for the adjudication of claims for psychological injury under the *WCA*. It governs all decisions made on or after March 25, 2014. The policy defines a traumatic event as a direct personal experience, or directly witnessing an event, that is sudden, frightening or shocking, and involving actual or threatened death or serious injury to oneself or others. An objective standard applies. Examples are given. The policy makes it clear that the Board will consider claims that result from stress that is a reaction to one or more traumatic events if the enumerated criteria are satisfied.

[11] The policy sets out four criteria; all must be satisfied. There must be one or more traumatic events; the traumatic events must arise out of and in the course of employment; the response to the traumatic events caused the worker to suffer from a mental or physical condition described in the DSM; the DSM condition is diagnosed by a psychiatrist or qualified clinical psychologist.

[12] The policy clarifies that there can be a cumulative effect to exposure to traumatic events:

> More specifically, the WCB will consider claims for compensation in respect of:
>
> > An acute response to one or more Traumatic Event(s) which involves witnessing or experiencing an event(s) that is objectively traumatic. Due to the nature of some occupations, some workers, over a period of time may be exposed to multiple traumatic events. If the worker has an acute reaction to the most recent traumatic event, entitlement may be considered even if the worker may experience these traumatic events as part of the employment and was able to tolerate the past traumatic events. Possible examples would include a paramedic who develops Post Traumatic Stress Disorder after responding to a number of fatal traffic collisions, or a drugstore pharmacist after multiple robberies.

[13] Policy 1.3.9 appears consistent with earlier decisions by WCAT that stress claims are to be assessed objectively, and excluded from compensation is stress caused by labour relation issues (see: *Logan v. Nova Scotia (Workers' Compensation Appeals Tribunal*), 2006 NSCA 88).

[14] But Mr. Legere was employed by the Federal Government. His entitlement to compensation is not directly governed by *WCA*, but by the *Government Employees Compensation Act*, R.S.C. 1985, c. G-5 (*GECA*). Under that *Act*, compensation is payable to an employee who is injured by an accident arising out of and in the course of his employment (s. 4(1)).

[15] Like *WCA*, "accident" is not specifically defined in *GECA*, but simply stipulates what is included. There is no exclusion for injury caused by stress, whether tied to one or more traumatic events, or by reason of gradual onset stress. The precise wording of *GECA* is:

> 2. In this Act,
>
> "accident" includes a wilful and an intentional act, not being the act of the employee, and a fortuitous event occasioned by a physical or natural cause;

[16] Historically, the Board has long considered that gradual onset stress was compensable under *GECA*. In 2005, it adopted Policy 1.3.6 that established criteria for adjudication of stress claims by employees governed by *GECA*. This Court, in *Embanks v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2008 NSCA 28, agreed that the relevant parts of Policy 1.3.6 were a codification of the law with respect to employee's entitlement to compensation for gradual onset stress under *GECA*.

[17] Policy 1.3.6 addresses stress claims, whether caused by a response to a traumatic event or by gradual onset stress that is a reaction to unusual and excessive work-related stressors over time.

[18] The criteria for assessing a claim for traumatic onset stress in Policy 1.3.6 is, for all intents and purposes, identical to those now found in Policy 1.3.9. for adjudicating claims under the *WCA*.

[19] Policy 1.3.6 provides that gradual onset stress may be compensable if the work-related events or stressors are unusual and excessive in comparison to those experienced by an average worker in the same or similar occupation; a diagnosis is made of a mental or physical condition described in DSM IV. Excluded are mental or physical conditions caused by labour relation issues.

[20] With this background, I return to the reasons of the Hearing Officer and the consequent appeal to the Appeals Tribunal.

Decision by the Hearing Officer

[21] Before the Hearing Officer, the appellant identified three events which he said lead to his diagnosed mental disorder, coupled with his long career in a stressful occupation. The first event was information learned in July 2006 that two violent inmates were planning on taking the appellant hostage. The employer did not consider the threat to be credible. The inmates were not placed in segregation, nor transferred to another institution. In short, nothing was done. The appellant did not take time off work. He sought no medical attention nor received counselling. The Hearing Officer did not consider this to be a traumatic event within the meaning of Policy 1.3.6.

[22] The second event involved the appellant managing a staff hostage taking in August 2007. The appellant claimed that there was only one other documented case of a Warden doing so. The employer disputed this claim - asserting that

Wardens must deal with similar situations on a regular basis. The Hearing Officer noted that the appellant did not seek any medical attention nor lose any time from work.

[23] The third event causing his mental disorder was his reaction to the death of an inmate in October 2007. The death did not occur at his institution, but one in Alberta. No time off was taken by the worker until after he was given a warning by his employer in 2008. Other employee/employer difficulties were noted.

[24] Although there were identified events, the Hearing Officer concluded that the appellant's claim was for gradual onset stress.

[25] The Hearing Officer assessed whether all four criteria found in Policy 1.3.6. were satisfied. She found they were not.

[26] In particular, she found that the appellant had not experienced work-related events or stressors that were unusual or excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation.

[27] Furthermore, although the appellant had been diagnosed by qualified health care professionals with an adjustment disorder within DSM IV, that condition was not caused by work-related events, but by the appellant's perception of a lack of employer support. She found that based on the totality of the evidence, the appellant's mental condition was as a result of labour relation issues.

[28] The Hearing Officer's answer to the defined issue was: "The evidence does not support a finding that the Worker sustained personal injury arising out of and in the course of employment."

Proceedings before the appeals tribunal (WCAT)

[29] The appellant filed an appeal as of right to WCAT. He complained that his case was not assessed correctly; the Board's Policy 1.3.6 was unfair, unreasonable, caused discrimination, and violated the *Canadian Charter of Rights and Freedoms*. The Notice of Appeal indicated that the appellant expected to have medical evidence for the appeal that had not been available to the Hearing Officer.

[30] Concurrently with the Notice of Appeal, counsel for the appellant also served the relevant parties with notice under the *Constitutional Questions Act* of

the challenge to the constitutional validity of s. 2(a) of the *Workers' Compensation Act* and Board Policy 1.3.6 as violating s. 15 of the *Charter*.

[31] The record before us does not reveal all of the details, but it appears that at some point a hearing date was set before WCAT. The hearing did not proceed. The reason is tied to the Supreme Court of Canada's decision in *Martin v. Alberta (Workers' Compensation Board)*, 2014 SCC 25, released March 28, 2014. Mr. Martin, like the appellant here, was a federal government employee. He claimed compensation for chronic onset stress. All levels of the workers' compensation authorities in Alberta denied his claim because it did not meet the criteria established by the Policy in that province. In particular, the third and fourth: that the "work-related events are excessive or unusual in comparison to the normal pressures and tensions experienced by the average worker in a similar occupation"; and there is "objective confirmation of the events".

[32] The Alberta Court of Queen's Bench set aside the decision, reasoning that the provincial Policy did not apply as it was inconsistent with *GECA*. The Alberta Court of Appeal reversed and restored the decision by the Commission on the basis that eligibility for compensation under *GECA* is, absent conflict with that statute, to be determined in accordance with provincial law and policies. The Supreme Court of Canada agreed.

[33] Counsel for the respondent employer wrote to WCAT suggesting that it may be beneficial to all parties to obtain a ruling from WCAT on the applicable test in advance of the hearing. Counsel for the appellant agreed. Detailed written submissions were filed by the worker and the employer.

[34] The respondent employer suggested that there is no direct conflict between *WCA* and *GECA*, and while it was correct that the definition of "accident" in *WCA* is more restrictive than in *GECA* as it excludes "stress other than an acute reaction to a traumatic event" there is no specific entitlement in *GECA* to stress claims. Furthermore, it argued that only Policy 1.3.9 governs Mr. Legere's claim, as Policy 1.3.6 is *ultra vires* as being inconsistent with the *Act*. Submissions on how Policy 1.3.9 would apply to the facts of the case were deferred to after evidence was called.

[35] The appellant pointed out that in *Martin*, there was no exclusion in the Alberta legislation for chronic or gradual onset stress. In Nova Scotia, there is. Further, it had long been accepted in Nova Scotia that gradual onset stress was

compensable for federal workers before and after Policy 1.3.6. Hence, there was a conflict between *GECA* and the Nova Scotia legislative scheme.

Decision by WCAT

[36] The Appeals Tribunal sat with three Commissioners. It released a written "Preliminary Appeal Decision" on April 30, 2015. It concluded that there is no conflict between *GECA* and *WCA* with respect to compensation for stress injuries; Board Policy 1.3.6 was not binding on the Tribunal as it was inconsistent with s. 2 of the *WCA*; and therefore, the appellant's claim is to be assessed under Board Policy 1.3.9.

[37] With this background, I return to the issue: is the decision by WCAT of April 30, 2015, a "final" one within the meaning of s. 256 of the *Act*?

IS THE DECISION "FINAL"

[38] Appeals are strictly creatures of statute. They have no existence apart from legislative mandate. *WCA* permits any participant in a final order, ruling or decision of WCAT to appeal to this Court on any question of jurisdiction of WCAT or any question of law, but leave must first be obtained. The operative portions of the *WCA* are as follows:

> 256 (1) Any participant in a final order, ruling or decision of the Appeals Tribunal may appeal to the Nova Scotia Court of Appeal on any question as to the jurisdiction of the Appeals Tribunal or on any question of law but on no question of fact.
>
> (2) No appeal shall be made pursuant to subsection (1) without leave of the Nova Scotia Court of Appeal.
>
> (3) The Nova Scotia Court of Appeal shall not grant leave to appeal pursuant to this Section unless
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> (a) leave is applied for in accordance with the *Civil Procedure Rules* within thirty days of the receipt of written communication of the decision of the Appeals Tribunal; and
>
> (b) all other avenues of appeal provided for in this *Act* have been exhausted.

[39] Accepting, for the sake of argument, that the issue raised by the appellant raises a fairly arguable case, leave must be denied because, in my respectful view,

the decision by WCAT of April 30, 2015 is not a "final order, ruling or decision" within the meaning of s. 256 of the *Act*.

[40] Neither that phrase, nor any of the words in it, are defined in the *Act*. The respondent cited no cases that addressed this phrase specific to the *Act* or in general. Counsel submitted that its position was consistent with what occurred in *Ryan v. Nova Scotia (Workers' Compensation Appeals Tribunal) (Ryan No. 1)*, [1998] N.S.J. No. 169 (C.A.) and *Lloyd v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2002 NSCA 18. In each of those cases, a "final" Tribunal decision was appealed to this Court, but the Tribunal's "preliminary" decision in the same matter was heavily referenced during the appeal. The Attorney General acknowledges that the question of whether the workers could have successfully obtained leave to appeal from the preliminary decisions was not considered.

[41] The Attorney General of Canada suggests that *Trusz*[1], a decision of this Court, appears to be at odds with the Attorney General's position respecting preliminary Tribunal decisions. In that case, this Court granted leave and subsequently allowed an appeal of a preliminary decision. With respect, I see no indirect, let alone direct clash, with what occurred in *Trusz*. Before explaining why, it is important to keep in mind that the answer to this issue is found by the application of well-established principles of statutory interpretation.

[42] The Supreme Court of Canada directs that the starting point for statutory interpretation is the "modern rule" espoused by Professor Driedger. Iacobucci J., for the Court in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 wrote:

> [21] Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates 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 he states:

[1] Reported as *Nova Scotia (Workers' Compensation Board) v. Trusz*, [1998] N.S.J. No. 429, and *Nova Scotia (Workers' Compensation Board) v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, [1999] N.S.J. No. 39.

> 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.

[43] The appellant concedes that the adjective "final" applies to the words "order", "ruling" and "decision". The grammatical and ordinary sense of only permitting an appeal (with leave) from "final" orders, rulings or decisions of the Appeals Tribunal can only mean that there is nothing left for the Tribunal to decide. It has disposed of the issues it needed to resolve.

[44] Furthermore, the overall scheme of the *Act* and its evolution suggests the legislature intended that participants could only seek leave to appeal once the tribunal had adjudicated, as completely as it could, the rights of the participants.

[45] Legislatures do not enact laws in a vacuum. They do it in light of the legal landscape, and the need to create or change laws to remedy perceived or actual mischief. The law has long debated the difference between rulings or orders that are "final" and those that are preliminary or interlocutory (see Sopinka and Gelowitz, *The Conduct of An Appeal*, 3d ed (Markham: LexisNexis Canada, 2012) at pp. 8-9.

[46] The difference is important. If interlocutory, there may be no right of appeal, or only one with leave; whereas parties can usually pursue appeals from orders or decisions that are final. A well-accepted test to distinguish between the two was formulated by Middleton J.A. in *Hendrickson v. Kallio*, [1932] O.R. 675, as follows:

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties -- the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the application, but it is interlocutory if the merits of the case remain to be determined.
>
> p. 678

[47] This is the general test that governs this issue in Nova Scotia. Cromwell J.A., as he then was, in *Van de Wiel v. Blaikie*, 2005 NSCA 14 (in Chambers) wrote:

> [12] In general, an order is interlocutory which does not dispose of the rights of the parties in the litigation but relates to matters taken for the purpose of

> advancing the matter towards resolution or for the purpose of enabling the conclusion of the proceedings to be enforced: see *Cameron v. Bank of Nova Scotia et al.* (1981), 45 N.S.R. (2d) 303 (S.C.A.D.).
>
> [13] In *Irving Oil Ltd. v. Sydney Engineering Inc*. (1996), 150 N.S.R. (2d) 29 (C.A. Chambers), Bateman, J.A. considered the distinction between interlocutory and final orders. Although finding it unnecessary to conclusively determine the nature of the order in the case before her, she cited with approval the first edition of *The Conduct of an Appeal* by Sopinka and Gelowitz (1993) at p. 15 which described the distinction as follows:
>
> > Where such orders have a terminating effect on an issue or on the exposure of a party, they plainly "dispose of the rights of the parties" and are appropriately treated as final. Where such orders set the stage for determination on the merits, they do not "dispose of the rights of the parties" and are appropriately treated as interlocutory.

(See also *Raymond v. Brauer*, 2015 NSCA 37.)

[48] The current legislative scheme began with the *Workmen's Compensation Act*, S.N.S. 1915, c. 1. The legislation was based on the report by Sir William Meredith. Key features included: collective liability, under which all covered employers share financial responsibility for benefits to injured workers; no fault benefits, under which workers gain the right to benefits regardless of any negligence on their part, in return for giving up the right to sue employers; public administration, under which the province assumes responsibility for collecting employer contributions and distributing benefits to injured workers.

[49] Important to the present issue is that exclusive jurisdiction was given to the Board to adjudicate all issues, and to enquire into, re-hear, and re-adjust claims as necessary. Access to the courts to interfere was limited. A privative clause declared all decisions and findings of the Board on all questions of law and fact to be final and conclusive (s. 31), with nine matters deemed to be questions of fact.

[50] The *Act* permitted resort to the Court of Appeal by two avenues, a stated case by the Board (s. 31(5)), and an appeal, with leave, from any ***final decision*** of the Board upon any question as to its jurisdiction or upon any question of law. It provided as follows:

> s. 31 (2) An appeal shall lie to the Supreme Court *in banco* from any final decision of the Board upon any question as to its jurisdiction or upon any question of law, but such appeal can be taken only by permission of a judge of the said court, given upon a petition presented to him within fifteen days after the

> rendering of the decision, and upon such terms as said judge may determine. Notice of such petition shall be given to the Board, at least two clear days before the presentation of such petition.

[51] There have been myriad amendments to the legislative scheme over the past one hundred years, including some of the language governing a party's ability to seek leave to appeal. But one thing has remained constant - the decision sought to be appealed must be a final one.

[52] One of the major revisions to the legislative scheme was the *Workers' Compensation Act*, S.N.S. 1994-1995, c. 10. For our purposes, the relevant changes were the creation of a new Appeals Tribunal, replacing the former Appeal Board. This new tribunal heard appeals from a Hearing Officer, if the Chief Appeals Commissioner, or his delegate, granted leave to appeal (s. 243).

[53] Leave applications to the Court of Appeal could be from: a final order of a Hearing Officer on the ground that a policy utilized in making the decision is not consistent with the *Act* or the regulations, but on no other question of law or fact (s. 183(8) and see: *Geldart v. Nova Scotia (Workers' Compensation Board)*, [1996] N.S.J. No. 432); or from a final order, ruling or decision of the Appeals Tribunal on any question of jurisdiction of the Appeals Tribunal, but on no other question of law or fact (s. 256(1)).

[54] The last amendments of the appeal provisions were introduced by S.N.S. 1999, c. 1. The scope of appeals to this Court was expanded to what it had been before, to questions of law as well as those of jurisdiction, but on no question of fact. Further, prior to 1999, while the *Act* permitted functionaries of the Board and the Appeals Tribunal to interpret Board policies, it was not within their jurisdiction to refuse to apply them on the ground of inconsistency with the *Act* or regulations (ss. 183(5) and 183(7)).

[55] The 1999 amendments directed that the Appeals Tribunal was only bound by a policy that was consistent with the *Act* and the regulations. This was accomplished by the addition of s. 185(5A) and the deletion of the Appeals Tribunal from s. 183(7). Nonetheless, still left, at least on paper, is the ability of a participant to seek leave to appeal directly from a decision of a Hearing Officer to the Court of Appeal (s. 183(8)) on the ground that the decision of the Hearing Officer depended on a policy that is inconsistent with the *Act* or the regulations.

[56] This appears to be in conflict with the direction in s. 256(3) that this Court shall not grant leave unless an application is brought within thirty days, and "all other avenues of appeal provided for in this *Act* have been exhausted". For the purposes of this appeal, this seeming incongruity need not be resolved.

[57] What this partial précis of the evolution of these provisions makes clear is that the legislature only permitted cases to be considered by the Court of Appeal where there had been a "final" determination by the adjudicative functionaries of the Workers' Compensation scheme.

[58] The appellant argues that the decision of the Appeals Tribunal of April 30, 2015 is final as the Appeals Tribunal, by virtue of s. 252, cannot change its mind, and it disposes of the appellant's ability to advance a claim of gradual onset stress. I am not persuaded by these submissions.

[59] Section 252 sets out the powers of the Appeals Tribunal and confirms the adjudicative norm that the participants cannot return to the Tribunal seeking to have it reconsider a matter that it has finally adjudicated. The formal words are:

> s. 252 (1) The Appeals Tribunal may confirm, vary or reverse the decision of a hearing officer.
>
> (2) The Appeals Tribunal shall not
>
> (a) reconsider;
>
> (b) rescind, alter or amend; or
>
> (c) make any further or supplementary order in regard to, any decision already made by the Appeals Tribunal.
>
> (3) Notwithstanding subsection (2), the Appeals Tribunal may correct a typographical or clerical error in a decision made by the Appeals Tribunal.

[60] If the appellant were correct, then logically every order, ruling and decision of the Appeals Tribunal is final, and there would be no restriction on participants seeking leave to appeal any interlocutory ruling. This would be contrary to the well-established reluctance for courts to entertain interlocutory appeals from decisions by administrative tribunals, even without the existence of an explicit statutory qualifier that decisions be "final". (See, for example, *Nova Scotia (Attorney General) v. Bishop*, 2006 NSCA 114; *Nova Scotia (Environment) v. Wakeham*, 2015 NSCA 114 at para. 87 et seq.)

[61] Whatever label the Appeals Tribunal put on its April 30, 2015 decision, WCAT appears to have removed from further consideration the appellant's compensation claim for gradual onset stress. Is it therefore a "final" decision? It is tempting to accept that it is a "final" decision given the obvious importance of the issue for consideration of the appellant's claim. But, again I am not persuaded this would be correct.

[62] The key to my proposed disposition of this issue, and the application for leave to appeal, is the position of the appellant. Mr. Legere originally advanced a claim before the Hearing Officer that appeared to be limited to compensation due to gradual onset stress, although he did identify a number of traumatic events and argued a causal connection between those events and his claim. However, before us, the appellant maintains that he still has a valid claim for compensation.

[63] Whatever evidence the appellant has or expects to have, he plans to persuade the Appeals Tribunal that he qualifies for compensation on the basis that his stress was caused by an acute reaction to a traumatic event or events.

[64] The appellant insists he still has a valid claim for stress arising out of or in the course of his employment. In other words, Policy 1.3.9 may well govern the Appeals Tribunal's consideration of his claim, but he can satisfy the criteria articulated in that Policy. If he is correct, he may succeed in his claim. Whatever the outcome of his claim for compensation, one or more of the participants may then try to obtain leave to appeal to this Court on any claimed error of law or jurisdiction committed by WCAT in the course of deciding the appellant's claim.

[65] In other words, the Preliminary Decision of the Appeals Tribunal did not dispose of his claim for compensation arising out of or in the course of his employment. That is still to be adjudicated. When it is, any of the participants would then be at liberty to seek leave to appeal to this Court in compliance with the strictures of s. 256 of the *Act*, including the contentions, if still live issues, the validity of Policy 1.3.6, and the legal test employed by WCAT to adjudicate the appellant's claim for compensation caused by stress.

[66] This is not the first time this Court has considered the sometimes difficult question of what constitutes a "final" decision within the meaning of the appeal provisions of the *Act*. None of the parties referred us to them.

[67] In 1977 there was a trilogy of cases heard by this Court. Three applications for leave to appeal were brought from what was then called the Workers'

Compensation Appeal Board (see *Cape Breton Development Corporation, Hawker Siddeley Canada Limited and Sydney Steel Corporation v. Penny, Berry and Buckingham,* [1977] N.S.J. No. 464 (C.A.)). Employers had been denied the right to fully participate in appeals to the Appeal Board. This Court ultimately determined that the legislation at that time did not authorize an employer to appeal to the Appeal Board from a decision of the Board, nor provide a right to appear or be heard before the Appeal Board; but the employer could, subject to leave, appeal to this Court. There does not appear to have been any discussion at the leave stage of employers' complaints of denial of natural justice whether the decisions of the Appeal Board were "final".

[68] The individual applications for leave to appeal were adjourned to hear the appellants on whether they could establish fairly arguable grounds of appeal on the alleged errors of law or jurisdiction by the Appeal Board.

[69] In *Hawker Siddeley Canada Ltd. v. Berry* (1977), 21 N.S.R. (2d) 41, MacKeigan C.J.N.S. wrote for the Court. He found only two arguable issues - whether the Appeal Board erred in law in its interpretation of the *Act*, and whether it had made a "final decision" appealable to this Court. The Chief Justice found that he did not need to decide the second issue. He wrote as follows:

> [2] The only arguable issues here are, in my view, whether the Appeal Board erred in its interpretation of s. 7(2) when it made an interim award of compensation where a compensable injury had aggravated a physical condition existing prior to the injury, and whether it made a "final decision" appealable to this Court under s. 159N, supra, when it so interpreted s. 7(2). Since I do not think the Board erred in law I need not decide the second issue.

[70] While he clearly considered it unnecessary to decide the second issue, he did express his views, in *obiter*:

> [22] It is unnecessary for us to decide whether or not the Appeal Board's implied decision as to the meaning of s. 7(2) was a "final decision" appealable under s. 159N. **I point out, however, that although an award of the Appeal Board granting temporary compensation is by its nature only interim and not a final decision in the sense of being a final disposition of the case, such an award may expressly or impliedly include a final decision upon a question of law or jurisdiction, and be a decision on that question which is final and definitive for the purposes of the case, including any future review of it. Indeed, on a question of jurisdiction, the decision, express or tacit, to assume jurisdiction is usually made at the beginning, when the Appeal Board enters upon an inquiry and begins its proceedings**. That decision is tacitly assumed

> and repeated at each stage of the case, including an interim award. That tacit decision almost always is a definitive and final decision of the question for all purposes of the particular claim or appeal.
>
> [Emphasis added]

[71] This approach was reiterated in another decision by this Court in the 'trilogy' of 1977, *Sydney Steel Corporation v. Buckingham* (1977), 21 N.S.R. (2d) 49. The respondent employee was injured at work. He applied for and received compensation for some months. The employee returned to work, but stopped and applied for further compensation. The Board refused. Fourteen months later he appealed to the Appeal Board, which ordered retroactive compensation, to be reassessed in the future. The Appeal Board held a re-hearing, which continued full compensation and a further reassessment. The employer sought leave to appeal.

[72] MacKeigan C.J.N.S. adopted the reasoning he expressed in *obiter* in *Hawker Siddeley Canada Ltd. v. Berry*, *supra.*, and found that although the decision by the Appeal Board did not make an order that finally disposed of the case, it impliedly made a final decision that it had jurisdiction to entertain the respondent's appeal to it, and hence it was a decision which could be appealed to this Court. He expressed his reasons as follows:

> [8] We must first consider whether the Appeal Board made a "final decision" upon a question of law or jurisdiction which this Court on appeal may entertain under s. 159N(1) of the *Workmen's Compensation Act*, *supra*. The appellant has applied for leave to appeal from the Appeal Board's "order" of October 29, 1976, on various grounds including an allegation that the Appeal Board in making its decision or order had acted without jurisdiction.
>
> [9] **The decision of October 29, 1976, as to temporary compensation to January 31, 1977 is obviously not a final decision of Mr. Buckingham's whole case. The Appeal Board, however, in entering upon this case, assumed it had jurisdiction to act in the whole case, and thus in my opinion, impliedly made a final decision on a question of jurisdiction which may be reviewed by this Court**. See my comments in *Hawker Siddeley Canada Limited v. Berry* (1977), 21 N.S.R.(2d) 41.
>
> [10] **Here, what is questioned is the Board's right to entertain the appeal to it at all.** Its decision on that issue is implicit in all its proceedings in this case, including the interim award of October 29, 1976. This Court therefore can, and in my opinion should, entertain this appeal.
>
> [Emphasis added]

[73] The last decision of this Court that has adverted to the question of what may qualify as a "final" decision is *Stevens v. Workers' Compensation Appeal Board* (1987), 76 N.S.R. (2d) 342. In that case, Jones J.A., writing for the Court, cited with approval the comments of MacKeigan C.J.N.S. in *Buckingham*, *supra*, and affirmed that a final order of the Appeals Board would include one that determines the rights of a worker to compensation, although it may be temporary or subject to further review. His conclusion on this issue is as follows:

> [12] Under the *Workers' Compensation Act* the Board has broad powers to make temporary orders and to review and vary orders. Under s. 159E a person aggrieved by a decision of the Workers' Compensation Board may appeal to the Appeal Board. The *Act* should be liberally interpreted. See *Workers' Compensation Appeal Board v. Penney* (1980), 38 N.S.R. (2d) 623. In my view a final decision of the Appeal Board is one that determines the rights of a worker to compensation although the order may only be temporary or subject to review. To hold otherwise would greatly restrict the right of appeal. The present appeal raises questions of law and jurisdiction.

[74] In the case at bar, the appellant does not suggest that the Appeals Tribunal did not have the jurisdiction to entertain the appeal from the Hearing Officer, or the power to decide, as a preliminary matter, the test that it would employ in hearing the appellant's claim for compensation caused by stress.

[75] The sole issue upon which he seeks leave to appeal is the suggestion that the Appeals Tribunal made an unreasonable decision on a question of law. He phrases the proposed ground of appeal as:

> That WCAT erred or made an unreasonable decision in deciding that WCB Policy 1.3.6 is *ultra vires* because it contemplates compensation for gradual onset stress and, accordingly, that it has no application to Mr. Legere's claim, which must be adjudicated under the WCB Policy 1.3.9.

[76] As earlier emphasized, the appellant firmly asserts that his claim for compensation for stress is alive and well before the Appeals Tribunal. That Tribunal may proceed to hear the appellant's claim for compensation pursuant to its mandate set out in s. 246 of the *Act* or refer the case back to a Hearing Officer for reconsideration. Whatever the merits of the appellant's complaint of legal error in the preliminary decision (on which I express no view), WCAT has not yet determined the appellant's claim for compensation.

[77] I return to this Court's decision in *Trusz* in 1999. At that time, the *Act* limited appeals to this Court on questions of jurisdiction. The parties consented to

an order of the Court to grant leave. Of course, consent cannot bestow jurisdiction where it does not lie. Chipman J.A., in giving short reasons granting leave, observed that the panel had reviewed the file, and were satisfied that the grounds raised significant issues as to the jurisdiction of the Appeals Tribunal about the role and status of the Board on appeals before WCAT ([1998] N.S.J. No. 429).

[78] Further details of the case were revealed when the Court heard the appeal ([1999] N.S.J. No. 39). Despite the clear wording of the *Act* that the Board was a participant in appeals before WCAT, the Tribunal had ruled that the Board had a limited role. It could not make motions about evidence, procedural fairness, address individual issues about facts or medical issues, or raise issues of credibility. At best, it had a role comparable to *amicus curiae* (friend of the Tribunal).

[79] Justice Hallett delivered brief oral reasons for judgment, allowing the appeal. His conclusion was as follows:

> [8] The Board has a broad function under the *Act*. It receives claims, it investigates claims and it allows or disallows claims. It is not a pure disinterested independent adjudicative body. On the other hand, the Tribunal established under the *Act* to hear appeals, is an independent adjudicator.
>
> [9] The Tribunal, in rendering decision 98-146-PAD, had a duty to interpret the *Act* according to the clear and expressed intent of the Legislature. The Tribunal, in limiting the role of the Board on an appeal to something less than that of other participants, and less than clearly expressed in the Statute, exceeded its jurisdiction. Therefore, I would allow the appeal and quash Preliminary Appeal Decision No. 98-146-PAD without costs.

[80] In *Trusz*, it does not appear that any of the parties raised the issue whether the preliminary decision by WCAT was, for the purposes of s. 256(1), a "final" decision. But it can easily be seen that the decision under appeal in *Trusz* neutered the Board's ability to participate in a fundamental step in the administrative process. Obviously the Board had no claim for compensation to be determined, although it can resist a worker's claim. The WCAT ruling finally determined the Board's statutory right to be a full participant in the process. I see no incongruity between that decision and the position advanced here by the Attorney General, and with which I agree.

[81] The preliminary decision by WCAT of April 30, 2015 is not a "final" decision or ruling. In these circumstances, leave to appeal cannot be granted, and I would dismiss the application for leave to appeal.

Beveridge, J.A.

Concurred in:

Oland, J.A.

Van den Eynden, J.A.