NOVA SCOTIA COURT OF APPEAL

Citation: *McLellan v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2003 NSCA 106

Date: 20031014
Docket: CA 162163
Registry: Halifax

Between:

Lorne V. McLellan

Appellant

v.

Nova Scotia Workers' Compensation Appeals Tribunal
and Workers Compensation Board of Nova Scotia

Respondent

Judges:	Glube, C.J.N.S., Freeman and Saunders, JJ.A
Appeal Heard:	September 18, 2003, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Freeman, J.A.; Glube, C.J.N.S. and Saunders, J.A. concurring.
Counsel:	Charles Broderick, for the appellant Alexander C.W. MacIntosh, for the respondent WCAT Madeleine Hearns and Paula Arab, for the respondent WCB Scott E. McCrossin, for the Attorney General of Canada

Reasons for judgment:

[1] This is an appeal by leave of this Court from a decision of the Workers' Compensation Appeals Tribunal dismissing the appellants' two appeals from decisions of hearing officers of the Workers' Compensation Board who rejected his claims for compensation, one based on coal worker's pneumoconiosis and loss of lung function, the other based on occupational disease .

[2] The appellant, Lorne V. McLellan worked as a coal miner for the Cape Breton Development Corporation (Devco), a federal Crown corporation, for more than 20 years. He began experiencing breathing difficulties in 1992, and by 1994 was complaining of coughing, increasing shortness of breath, chest tightness and tiring easily. For purposes of his workers' compensation claim he showed February 8, 1995, as the "date of accident."

The Legislation

[3] Provincial workers' compensation legislation applies to employees of federal employers such as Devco who would otherwise be beyond its scope, by virtue of the **Government Employees Compensation Act**, R.S.C. 1985, c. G-8, referred to as **GECA**, which provides:

> 4 (1) Subject to this Act, compensation shall be paid to
>
> (a) an employee who
>
> (i) is caused personal injury by an accident arising out of and in the course of his employment, or
>
> (ii) is disabled by reason of an industrial disease due to the nature of the employment; and
>
> ...
>
> (b) the dependents of an employee whose death results from such an accident or industrial disease.
>
> (2) The employee or the dependents referred to in subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive

> compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed respecting compensation for workmen and the dependents of deceased workmen, employed by persons other than Her Majesty, who
>
> > (a) are caused personal injuries in that province by accidents arising out of and in the course of their employment, or
> >
> > (b) are disabled in that province by reason of industrial diseases due to the nature of their employment.

[4] The Nova Scotia workers' compensation legislation was extensively revised by the **Workers' Compensation Act** 1994-95 c. 10, amended 1995-96, c.1, s 152; 1999, c. 1, ss. 1-28, 30-36, 39-41. Pursuant to s. 228 of this **Act**, sometimes referred to as the new or present Act, permanent partial disability claims falling within the period between March 23, 1990 and February 1, 1996, are to be dealt with under the **Workers' Compensation Act** R.S.N.S. 1989 c. 508, referred to as the "old **Act**" or the "former **Act**".

[5] Basic entitlement is created by s. 9(1) of the old **Act**:

> 9 (1) Where, in any industry to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, compensation as hereinafter provided shall be paid to such worker, or his dependents, as the case may be . . . .

[6] "Accident" is defined by s. 2 (a) to include " . . . disablement arising out of and in the course of employment."

[7] The equivalent provision to s. 9(1) in the new **Act** is s. 10(1), which states:

> 10. (1) Where, in an industry to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the Board shall pay compensation to the worker as provided by this Part.

[8] Section 10(1) of the old **Act** and s. 10(4) of the new **Act** provide:

> 10. (4) Where an accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment, and where the accident occurred in the course of employment,

> unless the contrary is shown, it shall be presumed that it arose out of the employment.

[9] Section 12 (old **Act**), referred to as the "automatic assumption" provision, is particularly relevant to Mr. McLellan's claim. It provides:

> 12. Any coal miner who has worked at the face of a mine or in similar conditions for twenty years or more and who suffers from a loss of lung function will be compensated according to his disability.

[10] Thus causation in such circumstances is presumed, but the worker still has the burden of proving disablement. Under the new **Act** the automatic assumption provision, s. 35, is similar to s. 12 of the old **Act** except that it provides that the worker shall be "compensated according to the permanent impairment as calculated pursuant to Section 34." Section 34 provides for the establishment of Permanent Medical Impairment Guidelines, approved in 1995 and revised in 1996, which create a specific standard.

[11] Mr. McLellan brought two appeals from decisions of hearing officers to the Tribunal. Both were dealt with in the Tribunal decision which is the subject of the present appeal to this court. One, identified as WCAT 98-441, Appeal A, was brought under s. 12, the automatic assumption provision. The other, WCAT 98-737, Appeal B, was brought pursuant to ss. 84 and 45 of the old **Act**. Section 84 puts industrial disease on an equivalent footing with accidents:

> 84 (1) Where a worker suffers from an industrial disease, or his death is caused by an industrial disease and the disease is due to the nature of an employment in which he was engaged at any time within twelve months previous to the date of his disablement, whether under one or more employments, the worker or his dependents shall be entitled to compensation as if the disease were a personal injury by accident and the disablement were the happening of the accident . . . .

[12] Sections 85 and 86 are relevant in the same context:

> 85. In this Act, "pneumonoconiosis" means permanent alteration of lung structure due to the inhalation of dust and the tissue reactions of the lung to its presence.

> 86 (1) Subject to Sections 87 to 91 (referring to exposure outside or partly outside this province), a worker resident in the Province who is disabled by silicosis or coal miners' pneumonoconiosis and the dependents of such a worker whose death is caused by silicosis or coal miners' pneumonoconiosis are entitled to benefits under this Act as if the disease were a personal injury by accident and the disablement or death were the happening of the accident.

[13] Section 45 provides for compensation for income lost because of a permanent partial disability, and also for compensation for a permanent medical impairment when there is no loss of income.

[14] Workers seeking to discharge a burden of proof under the old **Act** were assisted by s. 24:

> 24. Notwithstanding anything in this Act, on any application for compensation an applicant shall be entitled to the benefit of the doubt, which shall mean that it shall not be necessary for the applicant to adduce conclusive proof of his right to the compensation applied for, but that the Board shall be entitled to draw and shall draw from all the circumstances of the case, the evidence and the medical opinions, all reasonable inferences in favour of the applicant.

[15] In the new **Act** the similar provision is s. 187:

> 187. Notwithstanding anything contained in this Act, on any application for compensation an applicant is entitled to the benefit of the doubt which means that where there is doubt on an issue respecting the application and the disputed possibilities are evenly balanced, the issue shall be resolved in the worker's favour.

The Tribunal Appeals

[16] The Tribunal characterized the hearing officer's decision in Appeal A as follows:

> The hearing officer denied the Appellant compensation on the basis that she was unable to find that he suffered from "Coal Worker's Pneumonoconiosis", thus he was not entitled to compensation under s. 12 of the **Workers Compensation Act.**

In Appeal B:

> The Hearing Officer denied the Appellant compensation pursuant to Sections 84 and 45 of the **Workers' Compensation Act** . . . for coal worker's pneumonoconiosis because of 'insufficient objective medical evidence and physical findings supporting any medical evidence to show that [he] had a loss of lung function".

[17] Applications for leave to appeal to the Tribunal were filed July 17, 1998 with respect to Appeal A and November 25, 1996 with respect to Appeal B. The Tribunal conducted a paper review and filed its decision January 27, 2000.

[18] The Tribunal reviewed the medical evidence, noting that no consensus had been reached on Mr. McLellan's diagnosis. There were problems with the medical evidence: the evidence of a respirologist which had been treated dismissively by a Board medical advisor and two other doctors because the respirologist was not a designated Board x-ray reader, had actually been based on more recent x-rays than those on which they had based their own negative findings. The x-rays considered in the medical reports were from early 1995 and a more recent CT scan, dated January 12, 1998, which suggested silicosis rather than pneumonoconiosis, had been taken under "suboptimal" conditions and could not be considered reliable.

[19] The Tribunal concluded:

> Applying the balance of probabilities standard to the evidence before me, I find that the Appellant suffers from coal worker's pneumonoconiosis. . . .
>
> While I have concluded that the Appellant has coal worker's pneumonoconiosis due to dust inhalation in the workplace, I must also determine whether the Appellant has been disabled by his condition. In considering disablement, I must refer to the "Regular" subsection of the "Respiratory System" section of the PMI Guidelines.

[20] The Tribunal cited **Nova Scotia (Workers' Compensation Board v. William Richard,** [1998] N.S.J., No. 144006 C.A., as authority for applying the PMI Guidelines pursuant to s. 228, the transitional provision, to an appeal otherwise governed by the former **Act**.

[21] It concluded:

> I conclude that the evidence before me does not yet establish, to a balance of probabilities, that the Appellant has been disabled by his employment-related condition, and he is therefore not entitled to compensation in its regard.
>
> . . .
>
> The Appeals are denied.
>
> The evidence does not show that the Appellant has suffered sufficient loss of lung function to be entitled to a PMI by virtue of Automatic Assumption under s. 12 of the *former Act*.
>
> The Appellant has coal workers' pneumonoconiosis, as a result of inhaling dust in the workplace. However, as established by the PMI Guidelines, he has not been disabled by his pneumonoconiosis, and he is not entitled to a PMI under s. 86 of the *former Act*.

Application of GECA

[22] The Tribunal clearly held Mr. McLellan to the civil standard of proof, a preponderance of probabilities, without the benefit of the doubt available to him under s. 24 of the former **Act**, because he was the employee of Devco, a federal Crown corporation. I would consider this to be a misinterpretation of **GECA** and an error of law going to the Tribunal's jurisdiction because of the conclusions reached in three appeals decided by this Court since the Tribunal's decision in the present case. The latest of these is very recent, **Nova Scotia (Workers' Compensation Board) v. Morrison Estate**, 2003 NSCA 103, C.A. No. 192454, which was decided in the context of **Salloum v. Nova Scotia (Workers Compensation Appeals Tribunal),** [2000] N.S.J. No. 415, 2000 NSCA 148 and **Thomson v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, [2003] N.S.J. No. 39, 2003 NSCA 14.

[23] In deciding Mr. McLellan's appeals before the decisions in **Salloum, Thomson**, and **Morrison**, the Tribunal stated:

> ... The Tribunal has taken the position that federal workers must initially establish entitlement to compensation under s. 4(1) (of GECA). Once that threshold has been satisfied, pursuant to s. 4(2) of G.E.C.A., the **Act** is to be applied to determine the compensation to be provided [see **Decision No. 98-380-AD**,

January 26, 1999, (N.S., WCAT) and **Decision No. 96-121-PAD**, January 15, 1998, (N.S., WCAT)].

Prior to the issuance of **Decision No. 99-1275-AD**, December 22, 1999, (N.S., WCAT), the Tribunal's position had been that the standard of proof to be applied in considering issues under G.E.C.A. is the civil standard. In **WCAT No. 99-1275**, the Appeal Commissioner took the position that the standard of proof contained in s. 187 of the Act should be imported into G.E.C.A. In this appeal, since eligibility is being determined pursuant to the former Act, the s. 24 "reasonable inference" standard of proof would be imported into G.E.C.A. according to WCAT No. 99-1275.

I have considered **WCAT No. 99-1275** and concluded that I cannot agree with its conclusion with respect to burden of proof under G.E.C.A.

. . . [I]t is my opinion that Parliament should be inferred to have intended that issues under G.E.C.A. would be judged according to the civil standard. There are varying standards amongst the provincial statutes resulting from the varying inclusion of "burden" and "benefit of the doubt" provisions. It is my opinion that, if Parliament had intended for federal workers to deal with varying standards from province to province, G.E.C.A. would contain a provision (similar to the definition of "industrial disease" contained in s. 2) that expressly adopts the varying provincial standards. There is no such provision. I therefore conclude that Parliament did not intend for issues under G.E.C.A. to be decided in different ways in different provinces, and the single standard Parliament intended to be applied is the civil standard.

. . . Having inferred that the civil standard is incorporated within G.E.C.A., I find that I do not have jurisdiction to import the standard of proof contained in the provincial legislation into the federal statute.

Analysis

[24] In **Morrison**, another WCAT panel was also confronted with a claim that arose under **GECA** in considering a claim for survivor benefits by the widow of a miner who had died while in receipt of a worker's compensation award for 70 % diminished lung function after more than twenty years working at the coal face of a Devco mine. In that case, like this one, the medical evidence was also of poor quality and the standard of proof was in issue. The miner's own claim had been established under s. 12 of the old **Act**, the automatic assumption provision, which presumes that loss of lung function in a coal miner who has worked twenty years

underground is the result of an occupational disease. The widow nevertheless had the onus of proving that her husband's death was the result of his occupational disease, and not some other cause.

[25] The **Morrison** Tribunal panel found on the evidence that the probabilities were evenly balanced, and did not meet the civil standard of a preponderance of probability. The panel therefore applied s. 187 to give the widow the benefit of the doubt and decided the claim in her favour. Devco appealed, arguing that the Tribunal had no jurisdiction to apply s. 187 in the case of a miner whose claim to compensation arose under **GECA**. The appeal was dismissed.

[26] The court in **Thomson** considered **Salloum**, which had held that no right of appeal to the Nova Scotia Court of Appeal pursuant to s. 256 of the Nova Scotia **Workers' Compensation Act** existed for workers whose entitlement to compensation originated under **GECA** because **GECA** did not provide for such appeals. In **Thomson** the court considered a volume of Hansard reports and the legislative history not available to the panel in **Salloum** and reached the conclusion that properly interpreted **GECA** did provide for the right of appeal. Accordingly, **Salloum** was not to be followed.

[27] In **Thomson**, in considering rights of appeal under s. 256 of the new **Act**, this Court carefully reviewed the manner in which Parliament intended its own **Compensation Act** for injured workers of federal employers to interrelate with the workers compensation legislation of the various provinces. The court's reasoning in **Thomson** was extended in **Morrison** with respect to the s. 187 benefit of the doubt provision in the present **Act,** which would apply equally to s. 24, the benefit of the doubt provision in the former **Act.**

[28] In **Morrison** the parliamentary debates and legislative history were again considered as an aid to the interpretation of **GECA**, this time with the focus on s. 187. The court concluded that the so-called **GECA** "gateway," the "threshold" identified by the Tribunal panel in the present case, did not exist in Nova Scotia because there was no basis relevant to that case for distinguishing the language creating entitlement in federal employees under s. 4(1) of **GECA** from the language creating entitlement in their provincial counterparts in the entitlement provisions of the **Nova Scotia Workers' Compensation Act**.

[29] The court also concluded in **Morrison**, as it had in **Thomson**, that the Parliamentary intention had been to create in federal workers the same access to provincial workers' compensation legislation enjoyed by their provincial counterparts in the province in which the federal worker was usually employed. Section 4(2) of **GECA** provides that they are entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province. In provinces where the legislation gives workers and their dependents the benefit of the doubt, as in the case of s. 187 (new **Act**), that evidentiary presumption is a "condition" from which federal employees are able to benefit.

[30] The court found in **Morrison** that all provisions of the **Workers' Compensation Act** which are related to the terms and conditions of compensation and which do not conflict with **GECA** apply to federal workers as defined in **GECA** who are employed in Nova Scotia, as it does to their Nova Scotia counterparts, from the time of filing the claim for compensation, which must be reviewed by the Workers Compensation Board applying the law of the province. It is the provincial law, including s. 187, which **GECA** requires to be applied to the Board's evaluation of the claim pursuant to s. 4(1). Therefore, s. 4 of **GECA** must be considered as a whole, and no "gateway" is created whereby federal workers must prove entitlement to the civil standard before the provisions of the Act can be engaged in the consideration of their claim. The Nova Scotia statute governs the claim provided that the provision in issue is reasonably incidental to a rate or condition governing compensation under the laws of the province and the provision is not otherwise in conflict with **GECA**.

[31] Therefore the tribunal panel in the present appeal erred in concluding that:

> . . . Parliament did not intend for issues under GECA to be decided in different ways in different provinces, and the single standard Parliament intended to be applied is the civil standard.

[32] The reverse is true. It is clear in **Morrison** that Parliament intended for federal workers under **GECA** to be governed by the same conditions as provided by the law of the province where they are usually employed, even when those conditions vary from one province to another. **GECA** is silent as to the civil standard.

[33] In light of **Thomson** and **Morrison**, the Tribunal committed an error of law going to its jurisdiction by holding the appellant to a rigid civil standard of proof and in failing, contrary to s. 24 or s. 187, to give him the benefit of the doubt.

[34] I would allow the appeal and remit the matter to the Tribunal for a review of all relevant evidence in light of all the provisions of the **Nova Scotia Workers' Compensation Act,** including s. 24 or s. 187. I am concerned that the most recent medical evidence referred to in this appeal dates from 1998, and much of it from 1995. The occupational diseases complained of by the worker are progressive. Evidence of the worker's present condition and any variations in his condition since 1995 is relevant. In particular all evidence relating to disablement by loss of lung function, both subjective and objective, is relevant. At the hearing of the appeal it was submitted on behalf of the Board that the issue of compensation for Mr. McLellan had become somewhat moot because he had been granted a permanent medical impairment award for a bronchial condition. He is nevertheless entitled to have the issues of this appeal determined on their merits in accordance with the appropriate principles.

Freeman, J.A.

Concurred in:

Glube, C.J.N.S.

Saunders, J.A.