NOVA SCOTIA COURT OF APPEAL

Citation: Gillis-Andrea v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2010 NSCA 29

Date: 20100408
Docket: CA 308309
Registry: Halifax

Between:

Ann Gillis-Andrea

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 Victorian Order of Nurses

Respondents

Judges:	Saunders, Hamilton and Farrar, JJ.A.
Appeal Heard:	March 29, 2010, in Halifax, Nova Scotia
Held:	Appeal is dismissed, per reasons for judgment of Farrar, J.A.; Saunders and Hamilton, JJ.A. concurring.
Counsel:	Kenny LeBlanc and Michelle Margolian, for the appellant Paula Arab and Madeleine Hearns, for the respondent, the Workers' Compensation Board of Nova Scotia Andrew MacNeil, for the respondent, the Nova Scotia Workers' Compensation Appeals Tribunal Ed Gores, Q.C., for the respondent, the Attorney General for the Province of Nova Scotia (not appearing) Monique Arnfast for the respondent, the Victorian Order of Nurses (not participating)

Reasons for judgment:

I. INTRODUCTION:

[1] Ms. Gillis-Andrea is a registered nurse employed as a district nurse with the Victorian Order of Nurses (VON). While at home on the evening of March 18, 2008, she went out to her vehicle to retrieve a work-related form. She slipped and fell fracturing her left ankle. She considered her injury to be related to work and claimed Workers' Compensation benefits. To be eligible, her injury by accident had to be one that arose "out of and in the course of" her employment, as provided for in s. 10 of the **Workers' Compensation Act**, S.N.S. 1994-95, c. 10 (**WCA**). The Workers' Compensation Board (the Board) benefits administrator, a hearing officer, and a Workers' Compensation Appeals Tribunal (WCAT) all decided that it was not. The worker now contends on appeal that they all were wrong and that this court should reverse the decision.

[2] In my view, WCAT stated and applied the correct legal principles and its application of the legal principles to the particular facts of this case was reasonable. We cannot interfere and the appeal should be dismissed.

II. OVERVIEW OF FACTS AND PROCEEDINGS:

[3] As a registered nurse employed with the VON, Ms. Gillis-Andrea's duties are to conduct visits at patients' homes and provide nursing services as required. She is an hourly paid employee who is paid for an eight-hour shift, generally 8:00 a.m. to 4:00 p.m. daily but the exact hours depend upon patients' needs, the assigned work scheduled and duties for a particular workday.

[4] When Ms. Gillis-Andrea leaves home at the beginning of her shift, she travels directly to the location of her first client of the day. Thereafter, she travels from one client location to the next.

[5] On March 18, 2008 she worked her normal shift and followed her usual after work routine. That evening, while at home, she decided to complete paperwork outstanding from her client visits that day, including a progress note relating to an elderly woman who had recently returned home after being in a nursing home.

[6] Ms. Gillis-Andrea did not have the appropriate form in her house. However, she did have one in the trunk of her car. She decided, clad in housecoat and sneakers, to retrieve the form from the car.

[7] Unfortunately, after retrieving the form, she slipped and fell in her driveway fracturing her ankle. She viewed the accident as work-related and claimed Workers' Compensation benefits. The Board had to decide whether her injuries arose "out of and in the course of" her employment, as it must, to be compensable under the **WCA**.

[8] Ms. Gillis-Andrea's claim was first denied by a Board's benefits administrator. She determined that the injury did not arise out of or in the course of Ms. Gillis-Andrea's employment essentially because Ms. Gillis-Andrea was not being paid at the time of the injury and, further, that she was not required to do work outside of her normal shift.

[9] Ms. Gillis-Andrea appealed unsuccessfully to a hearing officer. The hearing officer dismissed the appeal for the same reasons as the benefits administrator. Ms. Gillis-Andrea appealed, again unsuccessfully, to WCAT. The appeal commissioner found that Ms. Gillis-Andrea's injuries did not arise out of or in the course of her employment. The appeal commissioner relied on the factors, set out in Terence D. Ison's text **Workers' Compensation in Canada** (2nd edition), Butterworths, 1989, p. 26 as a guideline to determining whether the accident had arisen out of and in the course of her employment. After considering these factors, the appeal commissioner summed up her conclusions this way:

> My intention is not to penalize the Worker for completing work-related documents on her own time at home, nor for leaving a document in her vehicle. Both of these circumstances are well within the normal course for a professional person, and particularly so given the nature of the Worker's job. However, the Worker was not paid or required to be working at the time of her injury. The Progress Note was not required by her Employer. She slipped and fell in her own driveway, a circumstance which posed a normal risk, not specifically related to her employment. Her Employer cannot be held responsible for the risk assumed by the Worker in leaving her home to fetch a document inadvertently left in her vehicle, parked outside her own home, even a work-related document.

> CONCLUSION:
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> The appeal is denied. The Worker did sustain a personal injury by accident, but that injury did not arise out of and in the course of her employment, as required by s. 10 of the *Act*.

[10] Ms. Gillis-Andrea was granted leave to appeal to this court.

III. ISSUES:

[11] The appeal raises a single question: whether, judged by the standard of reasonableness, WCAT made a reviewable error.

IV. ANALYSIS:

1. Standard of review:

[12] The parties agree that the standard of appellate review that we should apply to WCAT's decision is reasonableness. The appellant correctly summarizes the reasonableness standard of review at para. 27 of her factum:

> 27. Under the reasonableness standard, the Court will respect that certain questions coming before WCAT do not lead to one specific, particular result; such questions may give rise to a number of possible, reasonable conclusions and WCAT will enjoy a margin of appreciation within the range of acceptable and rational solutions. When reviewing under the standard of reasonableness, the Court will inquire into qualities that make the decision reasonable, referring both to the process of articulating the reasons and to the outcome. Rather than being concerned with the particular result, reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process. A reasonable decision is one that falls within a range of possible, acceptable outcomes that are defensible in the context of the facts and the law. **Dunsmuir v. New Brunswick**, 2008 SCC 9 at paras. 47-49. (citation added)

[13] Cromwell J.A., speaking for this court in **Puddicombe v. Workers' Compensation Board (N.S.)**, 2005 NSCA 62, succinctly summarized the applicable standard of review in deciding whether a particular injury by accident arose out of and in the course of a worker's employment. At para. 13 he held:

> **[13]** Both of these submissions are partially correct. In deciding whether a particular injury by accident arose out of and in the course of a worker's employment, WCAT must do two things. First, it must determine the legal principles to be derived from the statutory requirement; and second, it must apply those principles to the particular facts and circumstances of the worker's employment and injury. In my view, for reasons I will develop, WCAT must be correct when it determines the applicable legal principles, but when it applies them to the facts, its decision is one of mixed fact and law which, in my view, should be reviewed on the reasonableness standard. I will explain.

[14] The appellant also raised as an issue the failure of WCAT to refer to s. 187 of the **Act** in rendering its decision. The appellant did not characterize the failure to reference s. 187 as an error of law but rather suggested the failure to refer to s. 187 "adds a great deal of doubt in the consideration of the reasonableness of her reasoning process – the application of the law to the facts – and the result she reached."

[15] Therefore, I will apply the reasonableness standard when reviewing WCAT's decision.

2. The Applicable Legal Principles:

[16] The question is, whether, judged by the standard of reasonableness, WCAT made a reviewable error. The appellant submits that WCAT's decision was unreasonable. The unreasonableness, it is submitted, consists of finding that the worker sustained an injury by accident and that completing paperwork at home, after hours would fall within the course of her employment, but then going on to find that the worker's accident did not occur in the course of her employment. The appellant also submits the failure to refer to s. 187 of the **Act** calls into doubt the reasonableness of the decision.

[17] Although, respectfully, the appeal commissioner's reasoning is, at times, difficult to follow, the decision read in its entirety reveals that WCAT recognized that there are two main aspects to determining whether an accident arose out of and in the course of employment. They are the nature of the work and the link between the activity of the employee giving rise to the injury and the risk of the work. (**Puddicombe, supra**, para. 37)

[18] Reference to the variables identified in the text **Workers' Compensation in Canada, supra**, shows that the WCAT commissioner considered these two aspects of the inquiry. The variables identified by WCAT are:

> **3.3.6 Relevant variables.** While no single criterion is conclusive in classifying an injury as one arising out of and in the course of the employment, various factors are used for guidance. These include:
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> - whether the injury occurred on the premises of the employer;
> - whether it occurred in the process of doing something for the benefit of the employer;
> - whether it occurred in the course of action taken in response to instructions from the employer;
> - whether it occurred in the course of using equipment or materials supplied by the employer;
> - whether it occurred in the course of receiving payment or other consideration from the employer;
> - whether the risk to which the worker was exposed was the same as the risk to which he is exposed in the normal course of production;
> - whether the injury occurred during a time for which the worker was being paid;
> - whether the injury was caused by some activity of the employer or fellow worker

These variables take into account the two main aspects of the "arising out of and in the course of" employment inquiry. After considering each of these questions, WCAT concluded that the injury did not arise out of and in the course of Ms. Gillis-Andrea's employment.

[19] The confusion in the decision relates to the proximity in the decision of two findings made by WCAT. WCAT found that the completion of the progress note would be a work-related activity, even if completed after hours. Immediately

following that determination, the appeal commissioner found that the worker's accident did not occur in the course of her employment.

[20] The appellant suggests that these two findings are inconsistent; that the accident must have logically occurred in the course of her employment; and that the appeal commissioner erred when she, essentially, "took back" what she had previously found.

[21] With respect, I do not accept the appellant's argument as fairly characterizing the WCAT decision.

[22] In my view, the decision comes down to this: WCAT found that for a VON nurse, like the appellant, completion of work-related paperwork after hours would fall within the course of that worker's employment. In such circumstances, WCAT stated, the employer would expect that its employees finish the paperwork if it was not completed at the client's home.

[23] However, the crux of the decision relates to whether falling after going to the car to retrieve the paperwork was a compensable injury.

[24] On this issue, WCAT found that in the circumstances of the appellant's case, the retrieval of the paperwork from the car was not "arising out of and in the course of" employment, after reviewing the variables previously identified. In particular, it found the appellant was not being paid or required to be working at the time of the injury and, therefore, concluded the injury did not occur "in the course of" her employment.

[25] Further, WCAT found the risk of being in the driveway at that time was not a risk she was exposed to by reason of her employment. Therefore, it concluded the injury did not "arise out of" her employment.

[26] WCAT viewed it as being analogous to a worker walking to and from their car to attend work, which absent exceptional circumstances, is not considered to be "arising out of and in the course of employment".

[27] WCAT's decision is not expressly worded in this manner, but that is what I take from its conclusions after reading the decision in its entirety.

[28] As a result, I do not accept that the appeals commissioner's application of the facts to the law was flawed in the manner suggested by the appellant.

[29] The appellant also argues that the failure to refer to s. 187 "adds a great deal of doubt in consideration of the reasonableness of her reasoning process."

[30] Section 187 of the **Act** provides:

> 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.

[31] WCAT weighed the evidence provided by the parties at the hearing. If it found that the disputed possibilities were evenly balanced, after weighing all of the evidence, it would have been incumbent upon it to apply s. 187 and resolve the appeal in the appellant's favour. However, WCAT did not find that the possibilities were evenly balanced. It found that the accident did not "arise out of or in the course of employment" and, therefore, s. 187 was inapplicable. The failure to refer to s. 187 does not call into question the reasonableness of the decision.

[32] In my view, WCAT's application of the appropriate legal principles to the facts of this case passes the reasonableness test. WCAT reasoned that the accident did not "arise out of or in the course of employment" because Ms. Gillis-Andrea was not required to be working at that time, was not being paid at the time, the accident occurred on her own property, and the slip and fall in the driveway was not a risk associated with her employment.

[33] I am satisfied there is a rational basis for WCAT's conclusion that her injury by accident did not arise out of and in the course of her employment. While not everyone might find its reasoning the most persuasive, the decision is one that falls within a range of possible, acceptable outcomes that are defensible in terms of the facts and the law.

[34] I would, therefore, dismiss the appeal without costs.

Farrar, J.A.

Concurring:

Saunders, J.A.

Hamilton, J.A.