Date: 20020204
Docket: CA170723

NOVA SCOTIA COURT OF APPEAL

Cite as: *Lloyd v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2002 NSCA 18

Glube, C.J.N.S., Chipman and Freeman, JJ.A.

BETWEEN:

MARY LLOYD

Appellant

- and -

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL, the WORKERS' COMPENSATION BOARD OF NOVA SCOTIA

Respondents

REASONS FOR JUDGMENT

Counsel:	The appellant in person Janet E. Curry for the respondent WCB Louanne Labelle for the respondent WCAT W. Dean Smith for the Attorney General of Nova Scotia
Appeal Heard:	January 17, 2002
Judgment Delivered:	February 4, 2002
THE COURT:	The appeal is allowed per reasons for judgment of Chipman, J.A.; Glube, C.J.N.S. and Freeman, J.A. concurring.

Chipman, J.A.:

[1] This is an appeal with leave of the court (s. 256(2) **Workers' Compensation Act**, 1994-5, C10 as amended - (the Act)) by a worker from a decision of the Workers' Compensation Appeals Tribunal (WCAT). WCAT decided that the effect of a finding that the appellant had chronic pain resulting from a series of workplace injuries rendered all issues raised by her on an appeal to it null and void.

[2] The appellant was employed in 1987 at Riverview Adult Residential Home near New Glasgow as a certified nursing assistant. On October 3, 1987, she sustained the first of five workplace accidents, suffering injuries to the left arm and shoulder. Her claim for compensation was accepted by the Workers' Compensation Board (WCB) and she received total disability benefits until November 18, 1987.

[3] The second work related injury was sustained on October 29, 1989 at Riverview, consisting of a lumbar and cervical spine injury with a possible acute disc. WCB accepted the claim and paid total disability benefits until February, 1990.

[4] The third work related injury was sustained on May 6, 1990, when the appellant suffered a second neck and back injury while assisting an unco-operative patient. WCB paid temporary total disability benefits until October 1, 1990 when the claim was closed. The appellant was unable to return to work and she commenced rehabilitative training with WCB on November 8, 1990 and her benefits were reinstated.

[5] During her training the appellant sustained her fourth injury on February 24, 1992, a re-injury of the back and neck.

[6] The appellant next commenced a computer upgrading program through WCB, beginning on April 6, 1992. On August 21, 1992 she sustained her fifth injury, to her neck, while working in her training program. She was placed on a rehabilitation allowance by WCB which was terminated in July of 1993.

[7] Between January 13, 1994, and March 27, 2000, the appellant made a number of applications for compensation and advanced appeals before hearing officers of WCB.

[8] On May 28, 1996, Dr. Valerie Boswell, a WCB medical advisor, filed a Summary Report Decision, concluding that the appellant had a very severe chronic pain syndrome and recommending a permanent medical impairment rating of zero per cent as chronic pain was not at that time compensable under the Act. Decisions of a hearing officer were rendered on March 29, 1996 and June 13, 1996 resulting in a denial of a permanent medical impairment benefit to the appellant. The appellant applied for leave to appeal to WCAT, and received notice and an amended notice of leave to appeal from WCAT.

[9] By the amended notice of leave, dated September 4, 1998, WCAT granted leave on grounds that:

> (a) the hearing officer erred by favouring the medical assessment report of Dr. Boswell over that of the appellant's treating physician - s. 243(7)(c) of the Act; and
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> (b) a greater functional disability existed than was found by the hearing officer because of the hearing officer's error in favouring the medical assessment of Dr. Boswell over that of the appellant's treating physician - s. 243(7)(e)(ii) of the Act.

[10] After further steps in the appeal process which need not be detailed, a preliminary decision on June 22, 2000 was filed by Appeal Commissioner, Alexander C. W. MacIntosh, in which he concluded that the appellant suffered from chronic pain. He did not address her claim for injuries to her arm and shoulder, but postponed the final decision until WCB had lifted a postponement of appeals it had imposed.

[11] Following this, the appellant's solicitor directed a specific inquiry to WCAT about the delay of the decision on claim 1335838, arising out of the October 3, 1987 injury.

[12] The final decision of Commissioner MacIntosh, the subject of appeal to this court, was rendered on March 8, 2001. This decision recited the finding in the decision of June 22, 2000 that the appellant suffered from chronic pain as defined

in the Act. The postponement of appeals previously imposed by WCB had since been lifted, and WCAT was then able to render a final decision, based on a paper review of the claims. The Commissioner recited the evidence and the submissions. The Commissioner then addressed the question whether the chronic pain followed an injury in the so-called window period - March 23, 1990 to February 1, 1996 - referred to in s. 10E of the Act, to which I will refer. He found that it was at least as likely as not that the chronic pain found in his earlier decision commenced following one of the three window period injuries. His conclusion was that since the appellant, as of November 25, 1998, had claims under appeal with WCAT, and had chronic pain following a window period injury, she was entitled to the benefits specifically provided in s. 10E of the Act, but that pursuant to that section, the appeal with respect to any other injury was void, precluding any other award of compensation.

[13] An appeal to this court from a decision of WCAT lies on a question of law or jurisdiction by reason of s. 256(1) of the Act. An exception to this general rule is found in s. 10F of the Act, to which I will refer.

[14] The issue before us is whether in the circumstances here detailed s.10E of the Act operates, by reason of chronic pain following window period accidents, to render all or any part of the appellant's appeal void.

[15] The relevant sections of the Act are 10A, 10B, 10E, 10F and 10G being legislation, we are told, designed to resolve a large number of appeals backlogged in the system. These sections were enacted by 1999, c-1.

> **10A** In this Act, "chronic pain" means pain
>
> (a) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise predated the pain; or
>
> (b) disproportionate to the type of personal injury that precipitated, triggered or otherwise predated the pain,
>
> and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed. 1999, c. 1, s. 1.

10B Notwithstanding this Act, Chapter 508 of the Revised Statutes, 1989, or any of its predecessors, the Interpretation Act or any other enactment,

(a) except for the purpose of Section 28, a personal injury by accident that occurred on or after March 23, 1990, and before February 1, 1996, is deemed never to have included chronic pain;

(b) a personal injury by accident that occurred before February 1, 1996, is deemed never to have created a vested right to receive compensation for chronic pain;

(c) no compensation is payable to a worker in connection with chronic pain, except as provided in this Section or in Section 10E or 10G or, in the case of a worker injured on or after February 1, 1996, as provided in the Functional Restoration (Multi-Faceted Pain Services) Program Regulations contained in Order in Council 96-207 made on March 26, 1996, as amended from time to time and, for greater certainty, those regulations are deemed to have been validly made pursuant to this Act and to have been in full force and effect on and after February 1, 1996. 1999, c. 1, s. 1.

. . .

10E Where a worker

(a) was injured on or after March 23, 1990, and before February 1, 1996;

(b) has chronic pain that commenced following the injury referred to in clause (a); and

(c) as of November 25,1998, was in receipt of temporary earnings-replacement benefits; or

(d) as of November 25, 1998, had a claim under appeal

(I) for reconsideration,

(ii) to a hearing officer,

(iii) to the Appeals Tribunal; or

(iv) to the Nova Scotia Court of Appeal,

or whose appeal period with respect to an appeal referred to in subclauses (i) to (iv) had not expired

the Board shall pay to the worker a permanent-impairment benefit based on a permanent medical impairment award of twenty-five per cent multiplied by fifty per cent, and an extended earnings replacement benefit, if payable pursuant to Sections 37 to 49, multiplied by fifty per cent and any appeal referred to in clause (d) is null and void regardless of the issue or issues on appeal.

10F A decision of the Appeals Tribunal on a matter referred to in Section 10E is not subject to appeal, review or challenge in any court.

10G A worker who is entitled to receive a benefit pursuant to Section 10E may also be entitled to receive medical aid and Sections 102 to 111 apply *mutatis mutandis*. 1999, c. 1, s. 1.

[16] I repeat the dates of the appellant's workplace injuries:

October 3, 1987
October 29, 1989
May 6, 1990
February 24, 1992
August 21, 1992.

[17] It will be seen that the last three injuries occurred during the window period provided in s. 10E - March 23, 1990 to February 1, 1996. There is a finding of WCAT, not in dispute before us, that chronic pain commenced following one or more of these three injuries and that as of November 25, 1998, the appellant had claims under appeal to WCAT with respect to all five injuries. The first two of these related to injuries which occurred before the window period and the last three to injuries which occurred within it. The position taken by the Board on the appeal before us is that the result is clear. All that was needed to kill any appeal under way on November 25, 1998, is a finding that chronic pain commenced following any injury in the window period.

[18] The appellant's position is that before a claim under appeal is void by virtue of s. 10E it must be shown that it relates to injury occurring in the window period. Further, only claims respecting chronic pain are void, so that even if the injury at issue occurred in the window period, the appeal remains alive respecting claims for non-chronic pain. In support of this position we were referred to a decision of WCAT, No. 2001-349-AD rendered on December 21, 2001, and the decision of this court in **Huphman v. Workers' Compensation Board, NS** et al 2001, N.S.J. No. 77.

[19] The appellant says that her claims relate to two injuries outside the window period and also involve non-chronic pain, and that these matters must be heard and dealt with by WCAT. She asks us to so order.

[20] In **Hunter v. WCAT** (1999) 177 N.S.R. (2d) 390 (NSCA) this court was presented with an appeal by a worker respecting an injury sustained by him during the window period. Following argument of the appeal, s.10E of the Act was passed and the court called for submissions from the parties concerning the effect, if any, of this amendment on the appeal. Cromwell, J.A. speaking for the court said, commencing at §5:

> 5 In their submissions to the Court, counsel . . . are in agreement that Mr. Hunter's case falls under section 10E of the amended Act because he was injured on or after March 23, 1990 and before February 1, 1996, had chronic pain that commenced following the injury and, as of November 25, 1998, had a claim under appeal. Counsel for Mr. Hunter submits that we should, therefore, make an

> order requiring the Board to pay the benefits as set out in section 10E. Counsel for the Board takes the position that we should not do so, because section 10E specifically provides that this appeal is "...null and void regardless of the issue or issues on appeal" and that it is the Board, not this Court, which is to address in the first instance what benefits, if any, are payable to Mr. Hunter under the amended legislation.
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> 6 In my view, the position of the Board is the correct one. Section 10E provides that this appeal is null and void and counsel for Mr. Hunter acknowledges that this section is applicable to this appeal. That being the case, there is no basis upon which the Court may make any order other than one dismissing the appeal.

[21] **Hunter**, supra deals only with the case where chronic pain alone was found following an injury occurring in the window period. The decision does not answer the question what happens in such a case when an appeal is under way on November 25, 1998 respecting a claim also involving non-chronic pain, or involving injuries occurring outside the window period.

[22] In its decision WCAT No. 2001-349-AD, released December 21, 2001, WCAT was of the view that the law has evolved since a decision it had rendered in 1999 (98-305-AD) holding that any non-chronic pain aspect of an appeal falling in s.10E(d) was void. The Board referred to the decision of this court in **Huphman**, supra. WCAT concluded that the court in **Huphman** interpreted s. 10E to mean that an appeal remains alive in terms of issues therein relevant to non-chronic pain aspects of the worker's injury, even if that injury occurred during the window period.

[23] In **Huphman,** supra the appellant injured his knee in a workplace accident on December 15, 1995, within the window period. Following extensive treatment, pain in the knee did not subside but became chronic and did not respond to treatment. The appellant became despondent, depressed and suicidal. He was subsequently hospitalized with respect to his depression. He was seen by a psychiatrist and treated with antidepressants and anxiolythics. By decision dated November 1, 1999, WCB found the appellant had chronic pain, met the other criteria of s. 10E and was thus entitled to the limited compensation benefits thereunder. The appellant fell within s. 10E because he was, as of November 25, 1998, in receipt of temporary earnings replacement benefits (S.10E(c)). An appeal

to a hearing officer was denied. A further appeal to WCAT was dismissed. An appeal was then taken to this court.

[24] Flinn, J.A., writing for the court, referred to ss. 10A, 10B, 10E, 10F and 10G of the Act, and the findings of WCAT that the appellant's psychiatric condition was connected with the chronic pain and that the appellant was thus confined to the compensation as provided in ss. 10E and 10G of the Act. Flinn, J.A. then continued:

> 12 An appeal to this court is confined to questions of law or jurisdiction. As well, the respondent submits that by virtue of s.10F of the Act the decision of the Tribunal on a matter referred to in s. 10E is not subject to appeal in any event. I will address this latter argument at the outset. In my opinion this provision does not bar an appeal with respect to claims for compensation that do not fall within s. 10E, that is to say, claims for other than chronic pain. The real question is whether the Tribunal erred in law or jurisdiction in finding that the appellant's claim fell within s. 10E. If it did, then this court has jurisdiction to intervene.
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> 13. There is, in my mind, a live issue whether the appellant's psychiatric condition falls within the description of chronic pain as defined in the Act.
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> 14. I accept, as does counsel for the Board, the appellant's submission that s. 10E does not operate to bar a worker from asserting a claim for injuries other than chronic pain in addition to a claim for the chronic pain itself.

[25] The court concluded, however, that WCAT's finding that the appellant's psychiatric condition was connected to his chronic pain, being a finding of fact or of mixed law and fact, was beyond attack on appeal to this court. The psychiatric condition came within the definition of chronic pain in s. 10A of the Act. WCAT had made no error in law or patently unreasonable finding of fact and the appeal was dismissed.

[26] In WCAT No. 2001-349-AD the Tribunal relied on §14 quoted above in support of its conclusion that even where the worker falls within s. 10E of the Act,

the appeal remains alive in terms of any issue therein that is relevant to the non-chronic pain aspects of the injury.

[27] **Huphman**, supra deals with a case which, on facts found by WCAT, was one of chronic pain only. As of November 25, 1998, the worker was in receipt of temporary earnings replacement benefits. The case falls within s-s. 10E(c) and not s-s. 10E(d). Because there was chronic pain only, WCAT therefore did not err in making an award only under s. 10E of the Act and the appeal was dismissed. The court was not called upon to determine whether, or to what extent, an appeal was void by reason of s-s. 10E(d), and the decision, including the three paragraphs quoted thereupon, must be read in that light. It is not determinative of the issue before us. We must decide what kind of appeal is "referred to in clause (d)" and hence null and void.

[28] WCB says that the sole parameter for inclusion in s-s. 10E(d) is that a given appeal be at any time within the system, irrespective of its subject matter. This appears to me to be a harsh and illogical result. There is no apparent reason why, in providing benefits for chronic pain in the window period, the Legislature would take away every other possible claim a worker had, whenever it arose, even if not related to chronic pain, or however serious, just because the worker had an appeal respecting it under way on November 25, 1998 and happened to have chronic pain following a window period injury. I believe s-ss. 10E(a) and (b) qualify the appeals referred to in s-s. 10E(d). The "claim under appeal" therein referred to must be one for chronic pain in the window period. It follows that the "appeal referred to in clause (d)" is one relating to such a claim. The words "regardless of the issue or issues on appeal" are thus restricted to appeals that relate to chronic pain only following a window period injury and make clear that all aspects of such an appeal are null and void.

[29] Further, the severe privative clause found in s.10F could only be explained on the basis that it restricts access to the court in the cases where the Legislature has conferred a special benefit, that is for chronic pain. Again, it would be difficult to think that the Legislature would remove a worker's right of appeal in other claims, however arising, just because the worker was eligible for the new benefit for chronic pain following an injury in the window period.

[30] Thus, in the context of s-s. 10E(d) as well as in that of s-s. 10E(c) (**Huphman,** supra) s. 10E does not operate to bar a worker from asserting a claim for injuries other than chronic pain in addition to claims for chronic pain itself.

[31] I conclude, therefore, that the appellant's claims are barred only with respect to the chronic pain component. I would allow the appeal and remit the claims to WCAT to determine to what extent, if any, the appellant is entitled to compensation in these claims for other than for chronic pain and to make a disposition accordingly.

Chipman, J.A.

Concurred in:

Glube, C.J.N.S.

Freeman, J.A.