NOVA SCOTIA COURT OF APPEAL

Citation: *Michelin North America (Canada) Inc. v. Ross*, 2002 NSCA 166

Date: 20021230
Docket: CA 177445
Registry: Halifax

Between:

Michelin North America (Canada) Inc.

Appellant

v.

Richard Ross, The Nova Scotia Workers' Compensation Appeals Tribunal, and The Workers' Compensation Board of Nova Scotia

Respondents

and

Alliance of Manufacturers & Exporters Canada, carrying on business as Canadian Manufacturers & Exporters

Intervenor

Judges:	Cromwell, Freeman and Hamilton, JJ.A.
Appeal Heard:	December 3, 2002, in Halifax, Nova Scotia
Held:	Appeal allowed as per reasons for judgment of Freeman, J.A.; Cromwell and Hamilton, JJ.A. concurring.
Counsel:	C. Peter McLellan, Q.C., for the appellant Jane A. Spurr, Linda Zambolin and Terrance Brown, for the respondent Richard Ross Louanne Labelle for the respondent, Workers' Compensation Appeals Tribunal Madeleine F. Hearns for the respondent, Workers' Compensation Board Noella M. Martin and Robert Patzelt for the intervenor

Reasons for judgment:

[1] This is an employer's appeal from a decision of the Workers' Compensation Appeals Tribunal awarding a worker compensation for time lost because of symptoms resulting from severe insomnia associated with his inability to adapt to shift-work.

[2] The issue addressed by the Tribunal was whether the worker suffered "a personal injury by accident arising out of and in the course of employment so as to be eligible for compensation." Specifically, the concern was whether disablement from a "cognitive deficit" which was a symptom of shift-work maladaptation syndrome arose out of and in the course of employment.

[3] The appellant submits that the Tribunal committed an error of law in its interpretation and application of this court's decision in *Metropolitan Entertainment Group v. Durnford et al.* (2000), 188 N.S.R. (2d) 318 (C.A.) dealing with a similar issue. A second ground of appeal was put forward relating to the Tribunal's interpretation of s. 187 of the *Act* and the effect on its findings of fact.

The Background

[4] Richard Ross, the respondent, began working rotating shifts on a full time basis with the Bridgewater, Nova Scotia tire plant of Michelin North America (Canada) Limited in June of 1987. Continuous operation is necessary, and Michelin has four crews that work an eight-hour per day shift schedule over a 28 day backward rotating cycle. In 1994-1995 the workers examined other shift options and voted to maintain the present one because it provided them with more desirable time off than a forward-rotating shift schedule. In a backward cycle a worker moves from days to the night or midnight to 8:00 a.m. shift to the evening shift from 4:00 p.m. to midnight. A day off occurs after every three or four shifts and a break of four days once per cycle. Medical evidence suggested that a backward rotating shift schedule is more difficult for a person with shift-work maladaptation syndrome than a forward rotating schedule.

[5] Mr. Ross worked this schedule for seven years before experiencing sleep difficulties. He tried over-the-counter remedies and beginning in 1996 consulted, in turn, his family physician, Dr. Kydd; Dr. Brian Duggan, a psychologist; and Dr. Morehouse, a psychiatrist at the Queen Elizabeth II Sleep Disorder Clinic in Halifax, who treated him from April, 1998 to November, 2000. He continued to work the same rotating shift schedule until Michelin temporarily modified his schedule in April, 2000.

History of the Claim

[6] After missing work on several occasions because of severe sleeplessness that caused him to consider himself disabled by a "cognitive deficit" which diminished his alertness on the job, he filed a workers' compensation accident report dated November 24, 1999, claiming he had an "injury" called "shift work maladaption (sic) syndrome." (Where "maladaption" appears below in quoted contexts the spelling will be changed to "maladaptation" without further comment to conform with dictionary usage.)

[7] His case manager considered whether Mr. Ross's shift-work maladaptation syndrome arose out of and in the course of his employment. In a decision dated March 8, 2000 she disallowed his claim, finding that it only manifested itself because of shift-work.

[8] Mr. Ross successfully appealed to a hearing officer who found, in a decision dated May 24, 2000, that based on a review of the totality of the medical evidence "the Worker's shiftwork maladaptation syndrome is a result of his work as an operator with the Employer."

[9] Michelin appealed to the Workers' Compensation Appeals Tribunal which stated the issue before it as:

> Did the Worker suffer a personal injury by accident arising out of and in the course of employment so as to be eligible for compensation?

[10] The Tribunal dismissed the appeal in a decision dated January 25, 2002. The employer appealed to this court under s. 256 of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 which provides a right of appeal on questions of law or jurisdiction. An application by the Canadian Association of Manufacturers and Exporters to be added as an intervenor was granted.

[11] The Tribunal summarized its reasons as follows:

> The Employer submits that in order for the Worker to be eligible for compensation he would need to prove that his shift-work maladaptation syndrome was caused by work. The Employer submits that there is no evidence to support such a conclusion. The Panel disagrees with the submission that the Worker need prove that his shift-work maladaptation syndrome was caused by work. Durnford states that a Worker need only prove that she or he had symptoms severe enough to cause disablement which arose out of and in the course of employment. The Worker's inability to adapt to the disruption to his endogenous circadian sleep-wake cycle (his shift-work maladaptation syndrome) resulted in symptoms (the cognitive deficit) when the Worker was required by his Employer to work

> rotating shifts, most particularly the night shift. The Worker becomes asymptomatic when no longer working rotating shift-work. The experts stated that the mismatch between natural sleep-wake cycle and exongenous demands, such as working rotating shift-work, can result in insomnia, reduced alertness and excessive sleepiness. The degree of the Worker's cognitive deficit rendered him disabled at times. We find that the scheduling of rotating shifts provides a proper foundation to conclude that the cognitive deficit had its origins in the Worker's period of employment. It is not necessary for this Panel to probe deeper and find the underlying medical reasons why the Worker developed disabling symptoms under the same conditions that may not have rendered other workers disabled. The cause of the Worker's shift-work maladaptation syndrome is not relevant to the determination of eligibility for compensation under the *Act*. Finally, there is insufficient evidence to support a conclusion that the Worker's symptoms were brought on by activities outside of work.

[12] It is to be noted that the only basis asserted by the worker for his claim is the work schedule, and his inability to adapt his sleeping pattern to accommodate it. The medical evidence confirms that some individuals, Mr. Ross among them, suffer from shift-work maladaptation syndrome, which results from their inability to adjust their personal sleeping-waking, or "circadian", rhythms to the hours when they must work. This inability to adjust may lie latent and manifest itself only after a period of years, and difficulty with adjusting can increase as an individual ages. This can cause a variety of symptoms including the cognitive deficit of which Mr. Ross principally complains. The evidence is clear that periods of disability for which Mr. Ross is claiming compensation result from this cause and no other.

[13] Mr. Ross has no complaints with the work he is required to do, nor with conditions in the workplace in which he does it. The sole cause of his difficulties is inability to sleep, which is most acute when he is working the night shift. The question is whether Mr. Ross's cognitive deficit is an injury caused by an accident arising out of and in the course of his employment.

The Law

[14] A worker's right to be compensated under the *Workers' Compensation Act* for workplace injuries must be found within the *Act* itself, as interpreted in the jurisprudence. The right arose with what is known as the "historic tradeoff": workers lost the right to bring individual actions against their employers in return for access to a legislated scheme providing accessible compensation for a range of broadly-defined workplace accidents without the necessity of proving the employer at fault. Employers contribute financially to the scheme, which brings stability to the workplace and spares

them the risk of ruinous damage awards. They retain an interest in the operation of the scheme because the more generous the benefits it provides for workers, the more employers are assessed to pay for it. This underlying tension is kept in balance by the legislation, including regulations and policies, as interpreted by the courts. While the concept of fault generally has no place in workers' compensation law, the scheme's adversarial origins should not be forgotten in attempting to understand its modern context. The economy of the language in which many of the principles are expressed should not be allowed to obscure basic concepts.

[15] The present decision of the Appeals Tribunal is unique because it represents the first time in Nova Scotia that the Tribunal has awarded compensation to a worker whose "injury", the lack of sleep leading to disabling symptoms, occurred when he was off duty, on his own time, and away from the worksite. But shift-work, a commonplace and necessary requirement of the workplace, must be included, as the appellant conceded, in the whole bundle of circumstances that may be described as working conditions.

[16] The employer and the intervenor are concerned because they consider the precedent is capable of giving rise to an array of compensation claims for health conditions only tenuously related to the workplace, including a wide range of common diseases and disabling physical characteristics never previously considered compensable. The legislation therefore must be carefully examined to determine whether it supports the Tribunal's award of compensation to Mr. Ross.

[17] Section 10 (1) of the *Act* contains the basic statement of eligibility, and provides:

> 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.

[18] Section 10 (4) creates a rebuttable presumption that "arising out of employment" is an equivalent term to "arising . . . in the course of employment."

[19] Section 10 (5) provides:

> 10 (5) Where a personal injury by accident referred to in subsection (1) results in loss of earnings or permanent impairment
>
> > (a) due in part to the injury and in part to causes other than the injury; or

> (b) due to an aggravation, activation or acceleration of a disease or disability existing prior to the injury,
>
> compensation is payable for the proportion of the loss of earnings or permanent impairment that may reasonably be attributed to the injury.

[20] Section 2 defines many of the terms used in the *Act*:

> 2(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; . . .
>
> (p) "injury" means personal injury, but does not include any type or class of personal injury excluded by regulation pursuant to Section 10; . . .
>
> (v) "occupational disease" means a disease arising out of and in the course of employment and resulting from causes or conditions
>
> > (i) peculiar to or characteristic of a particular trade or occupation, or
> >
> > (ii) peculiar to the particular employment,
>
> and includes silicosis and pneumoconiosis; . . .
>
> (n) "employer" means an employer within the scope of Part 1 and includes
>
> > (i) every person having in the person's service under a contract of hiring or apprenticeship, written or oral, express or implied, any person engaged in any work in or about an industry within the scope of Part 1, . . .
>
> (ae) "worker" means a worker within the scope of Part 1, and includes

> (i) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, . . .

[21] Section 187 provides that:

> 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.

[22] The industry, the employer and the worker all fall under Part 1 of the *Act*. Subsections (6) and (7) of s. 10 provide the Board with authority to make regulations excluding or including "any type or class of personal injury or occupational disease". There are no regulations referring to shift-work maladaptation syndrome or any other type of insomnia.

[23] Subject to the reduced burden of proof provided under s. 187 and the apportionment provisions in s. 10(5), principles of causation similar to those in tort law apply: a worker's injury is compensable only when it is caused by accident arising out of and in the course of employment. This principle has been confirmed in such recent cases as *Ferneyhough v. Nova Scotia (Workers' Compensation Board)*, [2000] N.S.J. No 342 (N.S.C.A.) and *Nova Scotia (Workers' Compensation Board) v. Johnstone*, [1999] N.S.J. No. 454 (N.S.C.A.).

[24] The Tribunal found as a matter of fact that the worker had been disabled by his cognitive deficit. His diminished alertness made it unsafe for him to work with industrial equipment. But to be compensable, disablement must arise out of and in the course of employment. "Accident" arising out of and in the course of employment, the basis for eligibility under s. 10, is defined by s. 2(a)(iii) to include "disablement", but only disablement that arises out of and in the course of employment.

[25] Findings of fact by the Tribunal are deferred to by this court, but the appellant contests the Tribunal's factual findings on the basis that it reached them as a result of misinterpreting s. 187 of the *Act* respecting the burden of proof. That is addressed in the appellant's second ground of appeal. Subject to any necessary consideration of that ground, the question remains whether the disablement arose out of and in the course of employment.

[26] The various terms of the *Act* were considered in the *Durnford* case, which was central to the Tribunal's decision. That case will be examined below.

The Appellant's Position

[27] The relationship between Michelin and Mr. Ross is the employment contract referred to in ss. 2(n)(i) and 2(ae)(i). This would have been entered into with full knowledge that shift-work was involved, and under the mutual assumption that the worker was fit to perform the work assigned to him. For nine years that was not an issue. It appears from the evidence that Mr. Ross was a valued employee, and that Michelin has sought ways to accommodate the development of his inability to adapt to shift-work, although nearly all production jobs involve shift-work. The employer submits that Mr. Ross's shift-work maladaptation is a personal condition which may make shift-work an inappropriate option for him. It cited hypothetical examples of window-washers with a fear of heights or miners with claustrophobia who simply should be in another line of work. The appellant suggested that apart from a job change, a remedy for a mismatch between the ordinary requirements of the workplace and a worker disabled from meeting them by a personal condition might be found under human rights legislation or long-term disability insurance, but not in the workers' compensation scheme.

[28] It must be acknowledged that compensation for the state of being "very tired", as the appellant characterized the respondent's cognitive deficit, does not appear to fit readily into the traditional pattern of workers' compensation for personal injuries caused by accident. The intervenor sought to expand on the exclusion of stress, except as an acute reaction to trauma, in s. 2(a) of the *Act*, but that, like the s. 10(5) apportionment section, had not been an issue before the Tribunal. Conditions such as chronic pain which have significant psychological overtones result in limited benefits directed toward early rehabilitation. Policy 1.3.3R, the validity of which has been questioned by the Tribunal, attempts to exclude environmental illness from compensation in the absence of a proven chemical or agent in the workplace. Compensation for environmental illness has been denied under the s. 2(a) stress exclusion.

Jurisprudence

[29] A decision of the Ontario Appeals Tribunal cited merely as *Decision No. 207/90*, [1991] O.W.C.A.T.D. No. 96, accepted shift-work as a working condition and focused on medical aspects of the worker's claim for compensation for narcolepsy. The Ontario Tribunal awarded the worker full temporary benefits during the seven specified periods claimed, but stated:

> . . . the Panel is satisfied that throughout the seven periods claimed, shift work could not be considered suitable employment in light of the compensable aggravation suffered.

[30] In *Decision No. 440/001* of the OntarioWorkplace Safety and Insurance Appeals Tribunal a worker sought compensation for a cardiac condition requiring a pacemaker which was caused by sleep apnea (cessation of breathing) which developed from a disruption of his sleep pattern caused by shift-work. In that decision the Tribunal called for further medical evidence which was considered in *Decision No. 440 00,* [2002]. In the latter decision reference was made to *Decision No. 207 90,* [1991] which was distinguished because the information the panel relied on in 1991 was by then out of date, and the worker's narcolepsy represented a " very different condition."

[31] The panel held that under the Ontario legislation "there must be some injuring process that is part of the worker's employment." It found:

> Shift work may well have contributed to the worker's sleep disturbance. Nevertheless, we cannot conclude that it was a significant contributing factor to the development of the worker's sleep apnea. . . . Similar[ly], we find that there is little persuasive evidence of a direct link between the worker's shift work and his cardiac condition.

[32] Two decisions have been brought to the attention of this court from American states: *Metropolitan Edison Company v. Workmen's Compensation Appeal Board and Stephen C. Werner* (1998), 553 Pa. 177; 718 A.2d 759; 1998 Pa. Lexis 2148 and *Virgil L. Henley v. Roadway Express* (1985), 699 S.W.2d 150; 1985 Tenn. LEXIS 561. In the *Henley* case The Supreme Court of Tennessee, interpreting a statute which confines workers' compensation recovery "to injury by accident arising out of and in the course of employment," held:

> We have repeatedly said that to satisfy the requirement "arising out of" employment it must be shown that the injury was caused by a hazard incident to the employment and that, to satisfy the requirement of "in the course of" employment, it must be shown that at the time and place of the injury the employee was performing a duty he was employed to do. . . .
>
> Clearly, it would require expansion beyond reasonable limits to find that the inability to sleep at home between the hours of eight-thirty a.m. and twelve p.m. was in the course of performing a duty [the] plaintiff was employed to do or was a hazard incident to the employment environment.

[33] The Supreme Court of Pennsylvania held in *Werner*:

> In this case, Werner argues that shift work maladaptation syndrome constitutes an injury under the Act because he suffered from physical symptoms of headaches, diarrhea and loss of sleep. Werner contends that this satisfies the broad definition of injury discussed in Pawlosky. Met-Ed argues that Werner has not sustained an injury as defined under the Act because the stimulus underlying his physical complaints was the simple scheduling of work on a rotating shift basis. Met-Ed contends that scheduling an employee to work an eight-hour shift is a normal condition of employment, not a disease or physical harm.
>
> We agree with Met-Ed that normal working conditions, such as requiring an employee to work an eight-hour shift, do not constitute an injury under the Act. Werner's argument confuses cause with effect. The cause, or stimulus, of Werner's physical complaints is the scheduling of the hours that Werner worked. Neither the condition of Met-Ed's premises nor the job functions of a system load dispatcher resulted in an injury to Werner. It would be a gross distortion of the common and approved usage of the term "injury" to include within its meaning an employer's scheduling of an employee to work during an available eight-hour shift.

[34] While these cases are based on statutes which vary from our own, it is noteworthy that both state supreme courts recognized that the mere scheduling of a worker to work rotating shifts was to be distinguished from injuries arising from job requirements or conditions on the worksite.

Durnford

[35] As mentioned above, the Tribunal relied on this court's decision in *Durnford* and the appellant submits it erred in law by misinterpreting the decision. Durnford was employed as a blackjack dealer and supervisor in the Halifax casino when she developed lateral epicondylitis or tennis elbow. She had no symptoms of epicondylitis prior to beginning work but developed them within six months of dealing blackjack, which involves moving her arm across her body to deliver cards from a "shoe" to the board up to 1,500 times an hour. Her employer's position was that dealing blackjack does not involve sufficient force to cause a repetitive strain injury. The opinion evidence of medical experts was divided as to the cause of the epicondylitis. The Tribunal, overturning a Board decision, found a causal connection between dealing blackjack in the course of her employment and the disablement she suffered. In dismissing the appeal this court was of the view that the worker established that the requirements of her occupation as a blackjack dealer, which occurred at the worksite during working hours,

caused her "disablement . . . arising out of and in the course of employment."

[36] *Durnford* stands for the proposition, among others, that when symptoms severe enough to cause "disablement" arise out of and in the course of employment, causation is established for the purposes of the *Act*: see *Durnford* at ¶ 19. However, in the present case, the Tribunal took *Durnford* to stand for a much broader proposition and this misinterpretation of the case led the Tribunal to make an error of law.

[37] In effect, the Tribunal concluded that *Durnford* stands for the proposition that simply because symptoms manifest themselves at work, they therefore arose out of and in the course of employment. WCAT said:

> . . .[T]he cognitive deficit had it's [sic] origins in the Worker's periods of employment. His symptoms arose when he worked rotating shifts, and he was most symptomatic when he worked the night shift. But for the assignment to work outside his circadian sleep-wake cycle, it appears on the evidence that the Worker's symptoms would not have manifested themselves. We find that the cognitive deficit arose out of and in the course of the Worker's employment. (Emphasis added.)

[38] In this passage it is apparent in my respectful view that the Tribunal interpreted *Durnford* to say that the mere fact that symptoms manifested themselves while the worker was at work means that his disablement arose out of and in the course of employment. That was not what *Durnford* decided and this critical passage of the Tribunal's reasoning is, therefore, premised on an error of law.

[39] In *Durnford*, there was medical evidence supporting the view that Ms. Durnford's lateral epicondilytis, the underlying condition giving rise to her disability, was caused at least in part by her employment and there was no suggestion that her symptoms were brought on by activities outside of work: *Durnford* at ¶ 23 and 28. Viewed in the light of that record, the court rejected the appellant's argument that the Tribunal had equated or confused the presence of symptoms with causation. *Durnford* was clear, however, that to be compensable, symptoms causing disablement must arise out of and in the course of employment. The Tribunal erred in the present case by finding that *Durnford* held that the mere fact that a worker becomes symptomatic at work is sufficient to satisfy this requirement.

[40] In the present case, unlike *Durnford*, the Tribunal did confuse the manifestation of symptoms while at work with the requirement that the

disablement arise out of and in the course of employment. Mr. Ross's cognitive deficit was a result of his shift-work maladaptation syndrome arising, as the Tribunal found, from his natural and innate intolerance of the conflict between his personal circadian sleep-wake pattern and the need to work at a time when his individual sleep-wake cycle would naturally be in the sleep phase or the need to sleep at the time he would naturally be awake. This intolerance is, as the Tribunal found, a personal characteristic inherent to the person. Unlike *Durnford*, there is no evidence that this condition is either caused or aggravated by the requirements of the job. Contrary to the Tribunal's holding based on its erroneous reading of *Durnford*, it cannot be said that simply because the condition manifests itself at work that the condition or its symptoms arise out of or in the course of employment.

[41] It is not necessary to decide the ground of appeal relating to s. 187 nor to consider its effect on the Tribunal's findings of fact. The Tribunal having erred in law, I would allow the appeal and set aside the award of compensation to the respondent.

Freeman, J.A.

Concurred in:

Cromwell, J.A.

Hamilton, J.A.