NOVA SCOTIA COURT OF APPEAL
Citation: ***Halifax (Regional Municipality) v. Hoelke***, 2011 NSCA 96

Date: 20111021
Docket: CA 326354
Registry: Halifax

Between:

Halifax Regional Municipality (Workers' Compensation Board Claim No. 1997130)

Appellant

v.

Herbert Hoelke, The Nova Scotia Workers' Compensation Appeals Tribunal, The Workers' Compensation Board of Nova Scotia, Attorney General of Nova Scotia

Respondents

Judges: Beveridge, Farrar and Bryson, JJ.A.

Appeal Heard: June 14, 2011, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Farrar, J.A.; Beveridge and Bryson, JJ.A. concurring.

Counsel: Randolph Kinghorne and Katherine Salsman, for the appellant
Kenneth H. LeBlanc and Vanessa Nicholson, Articled Clerk, for the respondent Herbert Hoelke
Alexander MacIntosh for the respondent Nova Scotia Workers' Compensation Appeals Tribunal
Paula Arab and Madeleine F. Hearns for the respondent Nova Scotia Workers' Compensation Board
respondent Attorney General of Nova Scotia not participating

Reasons for judgment:

[1] Halifax Regional Municipality (HRM) appeals from the finding of Commissioner Brent W. Levy of the Nova Scotia Workers' Compensation Appeals Tribunal (WCAT) that the respondent, Herbert Hoelke's actinic keratosis (a condition where pre-cancerous lesions form on the skin) was a personal injury by accident.

[2] For the reasons which I will develop, I would dismiss the appeal.

Facts

[3] Mr. Hoelke commenced work with Metro Transit, as a bus driver, in 1988 when he was approximately 39 years of age. At the time of this hearing in February of 2010 he had retired from Metro Transit for medical reasons unrelated to the matters in issue on this appeal.

[4] In August, 2008, Mr. Hoelke filed an accident report with the Workers' Compensation Board claiming that he had developed pre-cancerous spots on the left side of his face resulting from prolonged exposure to the sun while operating a bus. In support of his claim, Mr. Hoelke relied upon two reports of Dr. C.J. Gallant dated July 7, 2004, and May 8, 2008, diagnosing him with actinic keratosis.

[5] On May 1st, 2009, an occupational disease adjudicator for the WCB issued her decision and found that the condition was not a personal injury by accident as that term is defined in the **Workers' Compensation Act**, S.N.S. 1994-95, c. 10. In making her decision the adjudicator only considered whether Mr. Hoelke's condition was an "occupational disease" as defined in s. 12 of the **Act**.

[6] Mr. Hoelke appealed that decision and by decision dated June 30, 2009, a hearing officer denied his appeal. Again, the hearing officer only considered whether his condition was an occupational disease.

[7] By notice of appeal dated July 3rd, 2009, the worker appealed to WCAT asking for "recognition of actinic keratosis as [sic] work accident".

[8] In its decision dated February 25th, 2010, WCAT found that Mr. Hoelke's "occupational exposure to sunlight" was a personal injury by accident arising out of and in the course of his employment. HRM argues it is unclear from the decision whether the appeals commissioner considered Mr. Hoelke's condition to be an occupational disease under s. 12 of the **Act** or an accident under s. 2 of the **Act**. I will address this distinction in more detail later in these reasons.

[9] Leave to appeal to this Court was granted on December 10th, 2010.

Issues

[10] Although leave to appeal was granted on a number of grounds, the issues on this appeal can be succinctly summarized as follows:

1. Did WCAT err in its interpretation of "accident" as it is defined in the **Act**?;

2. Did WCAT err in finding that the worker suffered a personal injury by accident arising out of or in the course of his employment?

Standard of Review

[11] Section 256(1) of the **Act** provides 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.

[12] In **Pelley v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, 2008 NSCA 46, this Court discussed the standard of review from a WCAT decision. The conclusions in **Pelley** were summarized by Justice Fichaud in **Young v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, 2009 NSCA 35, as follows:

> [32] As discussed in *Pelley*, ..., issues of mixed fact and law, where the legal point is not easily separated, and issues of law engaging the legislative intent that the tribunal exercise its specialized expertise to interpret its home statute and

> govern its administrative regime, may attract reasonableness. *Pelley* drew these principles from the reasons of Justices Bastarache and LeBel in *Dunsmuir*, para. 41, 53-56, 58-60. In *Khosa*, para. 25-26, 44, 59, Justice Binnie for the majority reiterated these principles from *Dunsmuir*.

[13] Where the overall issue is one of mixed fact and law from which a legal point cannot be separated, that is, where the issue involves an application of the principles to the facts, reasonableness is the appropriate standard.

[14] HRM argues that WCAT erred in interpreting the definition of "accident" and, in particular, the term "disablement" which forms part of that definition. It says that this is a question of law which can be easily separated from the question of mixed law and fact and should be reviewed on the standard of correctness.

[15] With respect, simply characterizing the issue as a question of law does not automatically attract the correctness standard.

[16] Recently, in **Smith v. Alliance Pipeline Ltd.**, 2011 SCC 7, the Supreme Court of Canada held:

> [37] Characterizing the issue before the reviewing judge as a question of law is of no greater assistance to Alliance, since a tribunal's interpretation of its home statute, the issue here, normally attracts the standard of reasonableness (*Dunsmuir*, at para. 54), except where the question raised is constitutional, of central importance to the legal system, or where it demarcates the tribunal's authority from that of another specialized tribunal – which in this instance was clearly not the case.

[17] The interpretation of the term "disablement" is not of central importance to the legal system as a whole nor is it outside the adjudicator's specialized area of expertise. (**Dunsmuir v. New Brunswick**, 2008 SCC 9, ¶ 60 citing **Toronto (City) v. CUPE, Local 79**, 2003 SCC 63). I am satisfied that the appropriate standard of review for WCAT's interpretation of "accident" is reasonableness.

[18] The ultimate issue, whether Mr. Hoelke suffered a personal injury by accident, was resolved by the application of the broad legal principles to the facts of this case and as such will be reviewed on the standard of reasonableness.

Analysis

1. Did WCAT err in its interpretation of "accident" as it is defined in the Act?

[19] A worker's right to be compensated under the **Act** for workplace injuries must be found within the **Act** itself. The starting point for consideration of Mr. Hoelke's claim is s. 10(1)which 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.
> (My emphasis)

[20] Essential to the consideration of whether a worker is entitled to compensation is whether his personal injury arose by "accident". Accident is inclusively defined in s. 2(a) as follows:

> **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;

[21] There was no issue on this appeal that Mr. Hoelke's condition does not fall within s. 2(a)(i) or (ii). Therefore, the argument focused on whether Mr. Hoelke suffered a "disablement", which includes an occupational disease, arising out of or in the course of his employment.

[22] HRM makes two arguments on the issue:

1. the appeal commissioner erred in law in finding that there could be a "disablement" without a loss of earnings or loss of earning capacity; and

2. if the appeal commissioner determined that the worker's condition was an occupational disease he was in error.

[23] I will address the second argument first.

[24] Unfortunately, the appeal commissioner did not explicitly state whether he considered Mr. Hoelke's condition to be a "disablement" or an "occupational disease". However, it is implicit in his decision that he considered Mr. Hoelke's injury to be a "disablement". It is not disputed that Mr. Hoelke has never suffered a loss of earnings or loss of earning capacity as a result of his skin condition nor has it resulted in any physical impairment to Mr. Hoelke in the sense that it has prevented him from work.

[25] An occupational disease may be treated as if it were an accident if it falls within s. 12(1) of the **Act** which is as follows:

> **12 (1)** Where an occupational disease is due to the nature of any employment to which this Part applies in which a worker was engaged, whether under one or more employments, and
>
> (a) the occupational disease results in loss of earnings or permanent impairment; or
>
> (b) the worker's death is caused by the occupational disease,
>
> the worker is entitled to compensation as if the occupational disease was a personal injury by accident.
> (My emphasis)

[26] "Occupational disease" is also defined in s. 2(v) as follows:

> "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
>
> and includes silicosis and pneumoconiosis.

[27] There is no discussion in the adjudicator's decision about Mr. Hoelke's condition being peculiar to a particular trade or occupation or to a particular employment. Nor did Mr. Hoelke lead any evidence on this point.

[28] Further, as noted previously, the worker did not suffer a loss of earnings or earnings capacity. Therefore, in order to qualify for an occupational disease the worker would have had to suffer a "permanent impairment" to have an occupational disease considered as if it were a personal injury by accident. Workers' Compensation Board Policy 3.3.4R defines "impairment" as follows:

> "Impairment" means a loss of, loss of use of or derangement of any body part, system or function.

[29] Again, the appeal commissioner made no finding, nor was any evidence led on the point, that Mr. Hoelke suffered a permanent impairment. Reading the appeal commissioner's decision in its entirety, I cannot conclude that he determined compensation based on Mr. Hoelke having an occupational disease. To come to that conclusion, I would have to assume that the appeal commissioner did not understand what evidence Mr. Hoelke would have to lead to establish his entitlement to compensation for an occupational disease or if he understood, he chose to ignore the requirements of s. 12 of the **Act**. I am not prepared to do so.

[30] I will now turn to the consideration of whether Mr. Hoelke's skin condition could be a disablement.

[31] Disablement is not defined in the **Act**. In **Falconer v. Nova Scotia (Workers' Compensation Appeal Board)**, [1991] N.S.J. No. 13 (Q.L.) (N.S.S.C.A.D.) this Court held at p. 5 that:

> ... The definition of "accident" in the Act includes "disablement arising out of and in the course of employment." This is a very broad definition of accident far beyond the usual meaning of that word. The word disable is defined in the 1982 Concise Oxford Dictionary to mean "make unable, incapacity from doing or for work." A disablement therefore need not be caused by an accident in the ordinary

> sense. Section 9(1) of the Act entitles a worker to compensation for personal injury caused to the worker by accident arising out of and in the course of the employment. The worker need only prove his disablement arose out of and in the course of his employment. ...

[32] Similarly, in **Metropolitan Entertainment Group v. Durnford**, 2000 NSCA 122 it was held:

> 19 It is clear from this definition that when symptoms severe enough to cause "disablement" arise out of and in the course of employment, causation is established for purposes of the **Act**. ...

[33] HRM relies on these decisions for support of its argument that "disablement" requires a loss of earnings or loss of earning capacity.

[34] While in **Falconer, supra**, the worker's disablement was supported by a loss of earnings resulting from the injury, this Court did not make loss of earnings a pre-condition for finding a disablement. Similarly, in **Durnford, supra**, the worker was unable to work and suffered a loss of earnings. However, the loss of earnings was not required to support a finding of a personal injury arising from a disablement. It is noteworthy that in both decisions the injuries were occasioned by a continuous activity and not one single event.

[35] What HRM misses in its argument is that s. 2(a) of the **Act** sets out the mechanism of injury, how the injury occurred, not the result of the injury. Let me explain. In s. 2(a)(i), the cause of injury is a wilful or intentional act; in s. 2(a)(ii), the cause of injury is a chance event. Similarly, in s. 2(a)(iii), disablement is the cause of injury; that is, an injury which occurs over a period of time rather than from a specific incident. **Falconer, supra** and **Durnford, supra** were both concerned with causation. Because the injuries resulted in loss of earnings, it was not necessary to decide the issue of whether a loss of earnings or earning capacity was a precondition to finding disablement. The decisions do not stand for the broad principle that HRM argues, that is, in order for a worker to have a personal injury by "disablement" it is necessary to have a loss of earnings or earning capacity. To find otherwise, would be to treat individuals who have similar injuries occurring from different causes differently under the **Act**.

[36] For example, to accept the appellant's argument would be to preclude workers whose injuries develop over time but have no lost time associated with the injuries for medical aid benefits under the **Act**, whereas workers who suffer personal injuries by an intentional act (not the act of the worker) or a chance event are entitled to medical aid even if they do not suffer a loss of wages. Again, let me explain further.

[37] Section 102(1) of the **Act** provides:

> **102** The Board may provide for any worker entitled to compensation pursuant to this Part, or any worker who would have been entitled to compensation had the worker suffered a loss of earnings equivalent to the amount determined pursuant to s. 37(4) any medical aid the Board considers necessary or expedient as a result of the injury.

[38] Section 37(4) of the **Act** requires that a worker suffer a loss of earnings for a stipulated period of time prior to being entitled to earnings-replacement benefits. The operation of the two sections is to the effect that a worker can receive medical aid benefits even though they have not suffered a loss of earnings.

[39] To accept HRM's argument would lead to anomalies. For example, if the worker in **Durnford, supra**, were able to continue in her work despite the difficulty she was having with her injuries, she would not have been entitled to receive medical aid. However, if she were unable to continue, she would be entitled to receive medical aid benefits. The result would force workers who are injured but can continue to work to go off work to receive medical aid benefits such as physiotherapy, prescription medication, etc. Such an interpretation is untenable. The appeal commissioner's determination that a loss of earnings or earning capacity is not necessary to qualify the "disablement" aspect of the definition of accident is reasonable and in keeping with the purpose and intent of the **Act**.

[40] Having determined that "disablement" under s. 2(a)(iii) refers to the cause or mechanism of the injury and not to the effects of it, I now turn to whether the appeal commissioner's decision that Mr. Hoelke's condition was a "personal injury by accident" was unreasonable.

[41] Under this standard, our role is to examine the appeal commissioner's decision, first to identify an intelligible line of reasoning to a conclusion, then second, to determine whether that conclusion occupies a range of acceptable outcomes (**Dunsmuir , supra**, ¶ 47-49). The appeal commissioner had the following evidence before him:

> the actinic keratosis developed on the left side of Mr. Hoelke's face and temple;
>
> that he was first treated for the condition on December 21st, 1999;
>
> actinic keratosis is directly related to sun exposure;
>
> the worker had an increased risk of developing actinic keratosis;
>
> that Dr. Gallant has treated the worker's left side 13 times but the right side only once;
>
> that it is uncommon to have such a lopsided distribution of actinic keratosis;
>
> Mr. Hoelke did not use tanning beds, lie in the sun and did not regularly take vacations to the southern hemisphere; and
>
> it was the left side of Mr. Hoelke's body which was exposed to the sun as a bus driver.

[42] After reviewing this evidence, the appeal commissioner found:

> Given the Worker's strikingly asymmetric distribution of actinic keratosis, and given Dr. Gallant's testimony that his occupational exposure to sunlight was a risk factor, I find it as likely as not that the Worker's occupational exposure to sunlight made a material contribution to the development of his actinic keratosis.
> ...

[43] In appealing to this Court, HRM must rely on s. 256 of the **Act** which provides:

> **256** 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.

[44] This Court concluded in **Nova Scotia (Workers' Compensation Board) v. Johnstone**, 1999 NSCA 164 that the question of causation is a matter of fact to be determined by WCAT in which this Court has no jurisdiction to interfere in the absence of a patently unreasonable finding. In **Young, supra**, Justice Fichaud concluded that with the elimination of patent unreasonableness, **Dunsmuir, supra**, the test is now whether the error is unreasonable (¶ 23).

[45] The appeal commissioner had evidence before him upon which he could make the finding of causation which he did.

[46] I can follow the appeal commissioner's line of reasoning and the finding of causation is one which is within the range of acceptable outcomes based on the facts and the law. I see no basis to overturn the WCAT decision.

[47] I would dismiss the appeal without costs.

Farrar, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.