NOVA SCOTIA COURT OF APPEAL

Citation: ***Bishop v. Nova Scotia (Workers' Compensation Appeals Tribunal)***, 2012 NSCA 95

Date: 20120907
Docket: CA 338678
Registry: Halifax

Between:

Frederick J. Bishop

Appellant

v.

Nova Scotia Workers' Compensation Appeals Tribunal and the Workers' Compensation Board of Nova Scotia and Enterprise Cape Breton Corporation

Respondents

Revised Decision: The text of the original decision has been corrected according to the attached erratum dated September 10, 2012. This decision replaces the previously released decision.

Judges: Hamilton, Fichaud and Farrar, JJ.A.

Appeal Heard: June 14, 2012, in Halifax, Nova Scotia

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

Counsel: Vincent A. Gillis, Q.C., for the appellant
Alison Hickey, for the respondent, Workers' Compensation Appeals Tribunal
Madeleine Hearns for the respondent, Workers' Compensation Board of Nova Scotia
Jane O'Neill and Bradley Proctor for the respondent, Enterprise Cape Breton Corporation
Edward A. Gores, Q.C., for the Attorney General of Nova Scotia (not present)

Reasons for judgment:

[1] Frederick J. Bishop, the appellant, is appealing the September 30, 2010 decision of the Nova Scotia Workers' Compensation Appeals Tribunal ("WCAT") (WCAT # 2006-129-AD-CA) dismissing his claim for compensation for psychological or psychiatric injuries resulting from gradual onset stress under the **Government Employees Compensation Act**, R.S.C., 1985, c. G-5 ("**GECA**").

[2] For the reasons that follow I would dismiss the appeal.

Facts

[3] The appellant is a former underground coalminer who performed a number of trades, primarily at the coal face. He worked for the respondent, Enterprise Cape Breton Corporation ("Employer"), in the Sydney coalfield, including at the Phalen Colliery from 1991 to 1999. He seeks compensation for gradual onset stress which he says was brought on over the course of time by his work in the Phalen Colliery in particular.

[4] In order to qualify for compensation from gradual onset stress, the appellant has the onus of proving he meets the criteria set out in Policy 1.3.6 of the Workers' Compensation Board of Nova Scotia ("Policy"). The relevant portions of that Policy provide:

> **Gradual Onset Stress**
>
> Claims for psychological or psychiatric injuries resulting from gradual onset stress may be compensable if all of the following four criteria are satisfied:
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> i. The work-related events or stressors experienced by the worker are unusual and excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation; ...

[5] Mr. Bishop's claim was rejected by the case manager, a hearing officer and by a WCAT panel in a decision rendered January 12, 2007. Mr. Bishop appealed that decision to this Court where his appeal was allowed (**Bishop v. WCAT**, 2008

NSCA 29). The Court held that the WCAT panel erred in stating and applying the first requirement under the Policy set out ¶ 4 above:

> [15] The appellant submits that WCAT misstated the first requirement under the Policy. I agree. Rather than determining, as the Policy contemplates, whether the stressors experienced by the worker were "unusual and excessive" compared to those experienced by "an average worker in the same or similar occupation", WCAT instead compared the worker's experiences to those of others in the same workplace.

The Court remitted the matter back to the WCAT for a new hearing. It is the WCAT's decision from that second hearing that is before us in this appeal.

[6] During the second hearing before the WCAT, the parties presented substantially more documentary and oral evidence than was before the WCAT panel at the first hearing. The evidence introduced by the appellant at the second hearing, including the testimony of four former coalminers who had been employed by the Employer in the four collieries in the Sydney coalfield and the testimony of Mr. Bishop, focussed on the difference between the conditions at the Phalen Colliery as compared with the Employer's other collieries in the Sydney coalfield. This evidence suggested the working conditions at the Phalen Colliery were more stressful than at the Employer's other collieries mainly because of the number and size of roof falls, the rock-gas outbursts, the presence of mine water and the fact Phalen was under a flooded colliery.

[7] The evidence introduced on behalf of the Employer dealt with the conditions at its four collieries and also with the conditions at underground coal mines in other parts of Canada, the United States, the United Kingdom, Europe and elsewhere in the world. The Employer's evidence included the testimony of one of its long term employees, who had acted as general manager of the Phalen Colliery for some years, and a professor in the department of mining engineering at West Virginia University, Dr. Syd S. Peng, who was qualified as an expert in underground coal mining with a specialization in longwall mining and ground control.

[8] The Employer's evidence suggested that Canada is a small producer of coal in terms of the worldwide underground coal mining industry, having only three such mines out of 900 worldwide. It indicated that the two other Canadian

underground coal mines are much smaller than the Phalen Colliery and use the room-and-pillar method of mining as opposed to the longwall retreat method that was used at Phalen. It indicated that the Employer's mine managers were required to travel to the United States, the United Kingdom and Europe on an ongoing basis to develop best practices to implement at Phalen because the operators of the geologically similar underground coal mines in those countries faced similar types of issues the Employer faced at Phalen. It also suggested that working below a flooded mine did not necessarily create a hazard, that the most common method of underground coal mining was the longwall method used at Phalen as it is more productive than other methods, that weighings (a significant increase in pressure on the coal seam face as a result of the removal of material) are common events in underground coal mines, that roof falls are very common (averaging two to three roof falls per panel mined per year), that participation in recovery operations was not voluntary in the United States, that the Employer had excellent safety practices, that water in a mine is very common and that there was nothing unusual about Mr. Bishop's experiences in the Phalen Colliery.

[9] In its decision, the WCAT reviewed in significant detail (eleven single spaced pages) all of the evidence before it. It determined that the "same or similar occupation", for the purpose of the first requirement of the Policy, were the various trades at which one might work at the face of a coal mine. Neither party takes issue with this finding. The WCAT then rejected the appellant's argument that the correct comparator group for the purpose of determining whether the work-related stressors experienced by Mr. Bishop were unusual or excessive in comparison to the work-related stressors experienced by an average worker at the face of a coal mine was the underground miners who worked in the Sydney coal fields other than at the Phalen Colliery. It found this was too narrow a comparator group as it did not represent the average worker. Rather the WCAT found that the appropriate comparator group was comprised of American and other worldwide underground coal mines, excluding those in developing countries:

> The Canadian underground coal mining industry is very small. The other two mines in Canada are too small to be proper comparators. In these circumstances it is appropriate to consider the experiences [of] the average American underground coal miner in considering what is an unusual and excessive stressor. Some consideration of worldwide experiences is also appropriate given that similar geographical conditions may be found in other countries. However, I do not

> believe that comparisons to developing countries is appropriate given that far different occupational health and safety standards may exist in such countries.

[10] Having chosen the comparator group, the WCAT analysed the evidence and compared the work-related stressors experienced by Mr. Bishop to those experienced by an average worker in the comparator group. It found the stressors experienced by him were not unusual and excessive and denied his claim:

> Not unusual and excessive
>
> The Worker has established that the conditions under which he worked in Phalen were comparatively more dangerous than conditions in the No. 26 Colliery, Lingan Colliery, or Prince Colliery. In terms of amount of time the miners had to spend in the gob, and time above the shields, the Worker experienced stressors which were unusual and excessive compared to the stressors experienced in the other recently active mines in the Sydney Coal field.
>
> However, that it***[sic]*** not the proper comparator group. I now examine in greater detail the dangers to which the Worker was exposed to determine whether they were unusual and excessive compared to an average coal miner who works at the face of the mine.
>
> The uncontradicted testimony of R.M. is that three rock-gas outbursts took place in Phalen. The Worker's testimony did not discuss any personal exposure to rock-gas outbursts. Irrespective of whether or not such a condition might be an unusual danger, the Worker cannot be said to have had excessive exposure to this type of danger. The remainder of my analysis will concentrate on roof falls and water.
>
> Broadly speaking, water and roof falls (and rock falls) were related stressors in Phalen. Water problems and the coal seam being surrounded by sandstone combined to make Phalen more challenging in terms of ground control than No. 26 Colliery, Lingan Colliery, or Prince Colliery.
>
> Sandstone created a strong roof, which is not a good geological feature for longwall mining. It was prone to weighing events and larger roof falls than occur with a weaker roof. It also tends to result in a larger cavity above the shield and the need for cribs to be built exposing miners to the risk of rock falls.
>
> Phalen had water from aquifers disturbed by the mining operation (as do most mines). It was also under a flooded mine from which water percolated into Phalen,

particularly during weighing events and roof falls. The water added to the risks of mining in Phalen in three ways: it slowed down mining operations which increased the risk of a weighing resulting in a roof fall (including increasing the incidence of mechanical breakdown); it increased the amount of time needed for recovery operations (the miners had to spend more time in the gob exposed to potential rock falls or additional roof falls); and it made it difficult for miners to hear a bump (one of several ways they can learn a weighing is occurring).

The Worker was in the Phalen Colliery from 1991 until he was laid off in January of 1999. This means that he was not working in Phalen when the final two roof falls occurred in 1999 (a fall which stopped production for five months and the final fall after which Phalen was closed).

P.P., a witness for the Worker, testified that over 100 weighing events occurred at Phalen over the years. He testified that there were about 8 roof falls over the years. His evidence is very similar to that by R.M. on behalf of the Employer. He testified that there had been 113 weighing events at Phalen. He testified that there had been 8 roof falls.

The Employer's Annual Reports document 6 specific roof falls, plus the 1997 report states that a "number" of roof falls occurred during its reporting period.

The chronological history (from unknown sources) from the Cape Breton Post documents 13 roof falls, plus it cites unknown source from the Employer as stating that up to 30 roof falls had occurred at Phalen by 1997.

I cannot give any weight to the suggestion that 30 roof falls occurred. The information (of unknown source) is too unreliable and does not accord with the rest of the evidence.

Given that both P.P. and R.M. testified to 8 (or about 8), this appears to be in the right ball park. However, R.M's thesis states that weighings resulted in 8 roof falls. I infer that R.M. used his thesis in recalling the number of roof falls. Given that not all roof falls result from weighings, it is reasonable to infer that the total number was slightly higher than 8. In all these circumstances, I accept that about 13 roof falls occurred as suggested by the Cape Breton Post article. The Worker would have been employed at Phalen for about 11 of those.

The Employer's evidence is that 14 longwall panels were mined between 1988 and 2000.

In his thesis, R.M. wrote that the weighing events and roof falls occurring on five panels which were mined in the last six years of Phalen.

Taking into account the number of longwall panels mined while the Worker was at Phalen, and Dr. Peng's evidence that on average there are 2 to 3 roof falls per year per panel mined, it appears that, by industry standards, Phalen's number of roof falls fell within the average range. The number of roof falls was not unusual.

Roof falls lead to recovery operations. The Employer did not require its employees to take part in recovery operations. However, I accept the evidence of Dr. Peng that, by industry standards, it is a usual part of a[n] underground miner's job to take part in recovery operations. This is not an unusual danger given the occupation.

Phalen was closed many years before its reserves of coal were extracted. I accept that the Employer was concerned that the risk of fatalities was too great to continue mining Phalen. There is uncontradicted evidence before me that the Employer had a greater focus on safety than many in the industry. There is also evidence before me that mine operators perform cost analysis after roof falls to determine whether to continue with a mine. There is a strong correlation between safety and profitability. I do not find it unusual that a mine operator would close a mine due to cost and safety concerns. That in itself does not make the Worker's stress exposures unusual and excessive.

Witnesses on behalf of the Worker suggested that it is unusual to work under a flooded mine or to mine under sandstone. I accept that these features made Phalen more dangerous than the other mines in the Sydney coal field.

However, the Worker has not led evidence that working under a flooded mine or mining coal under sandstone is unusual in the industry outside of the Sydney coal field. Dr. Peng testified that it is common to have multiple seam mining with the abandoned mines having been flooded. He testified in the industry the need for cribs and foam above the shields is common. He testified that the thickness of the sandstone at Phalen was about average for a coal mine. Dr. Peng was also of the view that there was nothing unusual about the Worker's experiences in the context of underground coal mining. I accept the foundation for Dr. Peng's opinion and come to the same conclusion on the evidence as a whole.

Overall, I find that the Worker has failed to prove, on an as likely as not basis, that the stressors to which he was exposed were unusual and excessive compared to the average underground coal miner who works at the face of a mine. There is no need for me to consider the other criteria under policy 1.3.6.

Issue

[11] There is only one issue in this appeal. Did the WCAT err in law by choosing the wrong comparator group, causing it to wrongly deny compensation to Mr. Bishop?

Standard of Review

[12] The parties do not agree on the standard of review to be applied by this Court. The appellant argues the standard is correctness. The respondent argues it is reasonableness.

[13] To determine the appropriate comparator group, the WCAT had to interpret the Policy in light of the evidence. This is an issue of mixed law and fact; see **Canada (Human Rights Commission) v. Canadian Airlines International Ltd.**, 2006 SCC 1, ¶ 42; **Canada (Attorney General) v. Walden**, 2010 FC 490, ¶ 71 -76; **Public Service Alliance of Canada v. Canada Post Corp.**, 2011 SCC 57.

[14] In **Young v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, 2009 NSCA 35, Fichaud J.A. found that issues of mixed law and fact will generally attract the reasonableness standard:

> [32] As discussed in *Pelley*, ¶ 59(3), 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*, ¶ 41, 53-56, 58-60. In *Khosa*, ¶ 25-26, 44, 59, Justice Binnie for the majority reiterated these principles from *Dunsmuir*.

[15] The applicable standard of review in this appeal is reasonableness.

[16] This Court recently outlined what is required when it reviews a tribunal's decision for reasonableness in **Royal Environmental Inc. v. Halifax (Regional Municipality)**, 2012 NSCA 62:

[47] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, Justice Abella for the Court recently elaborated on the meaning of "reasonableness":

> [11] It is worth repeating the key passages in *Dunsmuir* that frame this analysis:
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> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [Justice Abella's emphasis]
>
> ...What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in respect for governmental decisions to create administrative bodies with delegated powers" . . . . [paras. 47-48.]
>
> ...
>
> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result [citation omitted]. It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is

> what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion [citation omitted]. In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
>
> [17] The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

[48] In determining whether the tribunal's conclusion occupies the range of acceptable outcomes:

> The court then assesses the outcome's acceptability through the lens of deference to the tribunal's "expertise or field sensitivity to the imperatives or nuances of the legislative regime". This respects the legislators' decision to leave certain choices within the tribunal's ambit, constrained by the boundary of reasonableness. The reviewing court does not ask whether the tribunal's conclusion is right or preferred. Rather the court tracks the tribunal's reasoning path, and asks whether the tribunal's conclusion is one of what may be several acceptable outcomes.

Analysis

[17] The WCAT reviewed the evidence in detail before concluding that the appropriate comparator group included American and worldwide underground coal mines, except those in developing countries.

[18] Reference to work places in other countries may be appropriate in cases involving unique employers and capital intensive industries for which there may not be many, or in some cases any, "same or similar occupations" in Canada. This will ensure consideration of a group large enough to reasonably represent the occupation. This has been recognized in other cases: **Toronto Hydro-Electric System Ltd. (Re)**, 2012 LNONOEB 1, ¶ 61; **Ontario (Energy Board) (Re)**, 2009 LNONOEB 107, ¶ 49 and 50.

[19] The lack of similarity between the Phalen Colliery and the other two Canadian mines, the fact Canadian mines represent such a small part of the global underground coal mining industry and the need for the Employer's mine managers to use expertise from American, English and European mines to develop mine planning best practices for the Phalen Colliery over the years, satisfy me that the WCAT's choice of a comparator group including work places outside of Canada was reasonable.

[20] Having chosen the comparator group, the WCAT carefully analysed the evidence in light of the wording of the Policy to determine if the work-related events or stressors experienced by Mr. Bishop were "unusual or excessive in comparison to the work-related events or stressors experienced by an average worker in the" underground coal mines in the comparator group. The WCAT accepted, as it was entitled to do, the foundation of Dr. Peng's opinion that Mr. Bishop's experiences were not unusual and excessive and came to the same conclusion on the evidence as a whole. WCAT's reasons clearly indicate how it reached its decision, as can be seen from the portion of its decision set out in ¶ 10 above. Its conclusion lies within a range of possible outcomes.

[21] I would dismiss the appeal without costs. None were requested.

Hamilton, J.A.

Concurred in:

Fichaud, J.A.

Farrar, J.A.

NOVA SCOTIA COURT OF APPEAL

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Respondents

Revised decision: The text of the original decision has been corrected according to this erratum dated September 10, 2012.

Judges: Hamilton, Fichaud and Farrar, JJ.A.

Appeal Heard: June 14, 2012, in Halifax, Nova Scotia

Held:	Appeal dismissed per reasons for judgment of Hamilton, J.A.; Fichaud and Farrar, JJ.A. concurring
Counsel:	Vincent A. Gillis, Q.C., for the appellant Alison Hickey, for the respondent, Workers' Compensation Appeals Tribunal Madeleine Hearns for the respondent, Workers' Compensation Board of Nova Scotia Jane O'Neill and Bradley Proctor for the respondent, Enterprise Cape Breton Corporation Edward A. Gores, Q.C., for the Attorney General of Nova Scotia (not present)
Erratum:	The Docket Number on the first page of the Decision dated September 7, 2012 has been corrected to read CA 338678.