NOVA SCOTIA COURT OF APPEAL
Citation: ***Enterprise Cape Breton Corporation v. Hogan***,
2013 NSCA 33

Date: 20130307
Docket: CA 385259
Registry: Halifax

Between:

Enterprise Cape Breton Corporation (formerly
Cape Breton Development Corporation)

Appellant

v.

Peter Hogan, The Nova Scotia Workers' Compensation
Appeals Tribunal, Workers' Compensation Board, and the Attorney General of
Nova Scotia

Respondents

Judges:	Saunders, Hamilton and Farrar, JJ.A.
Appeal Heard:	November 26, 2012, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Hamilton and Farrar, JJ.A. concurring.
Counsel:	Nancy F. Barteaux and Krista Smith, for the appellant Kenneth H. LeBlanc and Rick MacCuish, for the respondent Peter Hogan Alison Hickey for the respondent Nova Scotia Workers' Compensation Appeals Tribunal Rory Rogers, Q.C. and Paula Arab, for the respondent Workers' Compensation Board Edward A. Gores, Q.C., for the respondent Attorney General of Nova Scotia not participating

Reasons for Judgment:

[1] Mr. Hogan is an electrician by trade. He started work in the mines of Cape Breton in 1977 as an employee of Cape Breton Development Corporation (DEVCO). When mining operations shut down in 2001 Mr. Hogan was eligible to apply for benefits under an Early Retirement Incentive Program (ERIP). He opted to take the benefits and began receiving an ERIP in April, 2002.

[2] The question that arises in this appeal is whether the worker's ERIP benefits should be included in the calculation of his post-injury earnings for the purposes of determining his Temporary Earnings-Replacement Benefit (TERB) payment.

[3] The Tribunal decided that it should not be included in the calculation. The Employer (formerly DEVCO, now ECBC) appeals that decision. The appellant says that in arriving at such a conclusion the Tribunal ignored relevant and reliable evidence of legislative intent, which resulted in a decision that is unreasonable and has led to absurd results.

[4] For the reasons that follow I would dismiss the appeal. In doing so I should not be taken as endorsing all aspects of the Tribunal's reasoning which led to its conclusion.

[5] Before addressing the issues on appeal, I will review the background to provide sufficient context for the analysis that follows.

Background

[6] The WCAT decision (WCAT # 2011-209-AD) provides a complete history of the worker's claim and the appeal proceedings related to it. I will summarize the salient points. Mr. Hogan suffered a compensable right knee injury in 1995. After arthroscopic surgery and a period of therapy he was able to resume his employment as an electrician. Until his return to work he was paid temporary benefits but no permanent medical impairment was identified at that time. His knee continued to bother him. After an assessment he received a 5% rating for residual knee impairment under the Workers' Compensation Board's PMI

Guidelines, effective six months after the date of injury. He was awarded a lump sum permanent impairment benefit by a Board Case Manager in March, 2007.

[7] After the mines closed Mr. Hogan was able to find alternate employment as far away as Fort McMurray, Alberta, largely on account of his relatively young age and specialized trade.

[8] From 2007 until 2009 he worked at a power plant in Ontario, returning home to Nova Scotia during temporary lay-offs.

[9] In 2008 he required further surgery on his right knee followed by a total knee replacement in December, 2009. He was unable to return to his employment as an electrician after his surgery. At the time of the hearing before the Tribunal in October, 2011, Mr. Hogan was still off work and receiving TERB.

[10] The worker's periodic lay-offs and re-opening of his claim led to a number of decisions by Board personnel culminating in the current proceedings before the WCAT which are now the subject of this appeal.

[11] To better understand ECBC's complaint, as well as the context and time period in which it arose, it will be necessary to outline the chronology of decisions relating to Mr. Hogan's claim. The WCAT decision contains a useful summary:

> 1. In a **May 17, 2010 decision**, a Board Case Manager found that the Worker's time loss commencing February 8, 2010 (the date the Worker was due to resume employment) was related to his February 1995 right knee injury.
>
> The Worker's weekly income from his power plant employment, expressed as an annual amount, exceeded the maximum insurable earnings for 2010. Therefore, the Case Manager determined the amount of the weekly TERB payment based on s. 48 of the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended (the "Act"), which provides that for the first 26 weeks, the total amount of compensation payable is limited to 75% of the Board's maximum insurable earnings. The initial rate was based on the maximum insurable earnings for 2010 as the Worker was earning in excess of this amount at the time of his loss of earnings. She added that, after 26 weeks, a long-term rate would be determined.

2. On **August 26, 2010**, the same Case Manager issued a decision amending the May 17, 2010 decision to include references to payments made on May 17, 2010 and specifying the amount of gross annual maximum earnings used to calculate the TERB payment which, as mentioned, was less than the Worker's actual gross earnings at that time.

3. On **August 26, 2010**, the Case Manager also issued a decision setting the long-term rate for the calculation of the Worker's weekly TERB. She considered the Worker's earnings for a three year period prior to his loss of earnings and chose 2009 as the appropriate earnings to use but, again, found that the Worker's rate should be based on the maximum annual insurable earnings for 2010 as the Worker's earnings far exceeded this sum.

The Case Manager also considered, for the first time, the amount of the Worker's ERIP benefits in the pre-injury earnings and post-injury earnings profile. This amount had no impact on his pre-injury earnings as the Board's maximum insurable earnings for 2010 was used as pre-injury earnings; however, it had a considerable impact on post-injury earnings and, therefore, on the resulting amount of weekly TERB benefit.

4. On **October 18, 2010**, the Case Manager reversed her earlier decision and stated that ERIP income would not be considered post-injury earnings and would no longer be deducted from the Worker's weekly TERB payment.

5. On **January 31, 2011**, a Hearing Officer issued a decision denying the Employer's appeal from the October 18, 2010 Case Manager decision. The Hearing Officer found that ERIP benefits were appropriately excluded from post-injury earnings when calculating the TERB rate.

6. On **February 4, 2011**, the Hearing Officer's Manager rescinded the January 31, 2011 decision as it was issued without considering the Employer's submissions (which were delivered to the Board by the end of the business day on January 31, 2011, the submission deadline).

7. On **April 7, 2011**, the Hearing Officer issued a decision varying the October 18, 2010 Case Manager decision. The Hearing Officer confirmed that the Worker's ERIP benefits were properly excluded from post-injury earnings when calculating the TERB rate. She also found that ERIP benefits were improperly included in pre-injury earnings when calculating his TERB rate. The Case Manager was directed to recalculate the Worker's pre-injury earnings excluding his ERIP benefits. [This

> finding had no impact on the TERB payment because maximum insurable earnings continued to be used as pre-injury earnings.]
>
> The Employer appealed the April 7, 2011 Hearing Officer decision to this Tribunal seeking a finding that the Worker's ERIP benefits were improperly excluded from the calculation of post-injury earnings when determining the Worker's TERB rate.

[12] As is apparent from this record, the position taken by various decision-makers with respect to whether Mr. Hogan's ERIP income ought to be treated as post-injury earnings and deducted from his TERB payment, changed from time to time.

[13] Initially the Case Manager accounted for Mr. Hogan's ERIP in the calculation of his post-injury earnings. That approach was said to have had "a considerable impact on post-injury earnings and, therefore, on the resulting amount of weekly TERB benefit".

[14] The Case Manager later reversed herself, concluding that ERIP income would no longer be considered post-injury earnings and would be excluded when computing Mr. Hogan's weekly TERB payment.

[15] In January, 2011, a Hearing Officer denied ECBC's appeal after finding that Mr. Hogan's ERIP benefits had been appropriately excluded from his post-injury earnings when calculating his TERB rate.

[16] A week later the Hearing Officer's Manager rescinded that decision as it had been issued without first considering ECBC's supplementary submissions.

[17] On April 7, 2011 the Hearing Officer issued a decision varying the October 18, 2010 Case Manager's decision for reasons that are not material here, but confirming the main point that Mr. Hogan's ERIP benefits were properly excluded from his post-injury earnings when calculating the TERB rate.

[18] That was the procedural record which prompted ECBC's appeal to WCAT.

[19] The appeal proceeded as an oral hearing before a panel of three Appeal Commissioners. Before calling evidence or considering submissions, several pre-

hearing conferences were arranged to address preliminary issues raised by ECBC, and in particular its demands for production concerning the Board's decision to change its position regarding the treatment of ERIP benefits. WCAT's reasons set out the manner in which the Tribunal handled ECBC's demands for disclosure:

> ... Prior to the hearing, there were several prehearing conference calls to deal with requests by Counsel for the Employer for disclosure by the Board of documentation relating to the Board's change of practice and policy on the treatment of ERIP benefits. As a result, the Board made the following disclosures:
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> 1. Letter dated July 14, 2011 from Board Counsel with attachments totaling 32 pages including an Executive Committee Issue Brief dated Nov 4, 2009 and a Benefit Comparison Chart dated September 17, 2010 prepared by Board policy analyst, N.S., who would testify to these documents at the hearing.
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> 2. Letter dated July 21, 2011 from Board Counsel with attachments totaling 8 pages and comprised of emails and speaking notes pertaining to the change in practice and policy on the treatment of ERIP benefits.
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> 3. Letter dated September 12, 2011 from Board Counsel with attachments totaling 75 pages and including communications and meeting notes between November 11, 2009 and September 7, 2010 relating to the treatment of ERIPs.
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> 4. Letter dated September 30, 2011 from Board Counsel providing N.S's curriculum vitae as well as copies of Board operating procedures 3.1.6 and 6.4.2 approved on September 28, 2010 relating to the treatment of severance payments including ERIPs.
>
> Prehearing submissions, authorities and book of documents were filed by the Employer's counsel on August 22 and 23, 2011.
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> Prehearing submissions and authorities were filed by the Worker's counsel on September 29, 2011.
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> The Board participated in the proceedings in a limited way and took no position regarding the merits of the appeal. Board counsel was present for the first day of the hearing for the testimony of Board policy analyst N.S..
>
> The Employer called four witnesses, B.C., G.S., G.L. and R.M.. The Worker provided brief testimony.

> Counsel for the Employer and the Worker made oral submissions at the conclusion of the oral testimony. The Panel gave counsel an opportunity to file post-hearing submissions to address issues relating to the effect of Regulation 2000614. Submissions were filed by counsel for the Employer on October 28, 2011; by counsel for the Worker on November 14, 2011 and by counsel for the Board on November 25, 2011.
>
> The Panel has also considered, under s. 246 of the Act, the relevant material in the Worker's Board claim file; while we have considered all of the testimony, documentation and submissions, we will only refer to the more relevant material and argument in our decision.

[20] After a 3-day hearing in Sydney the Tribunal filed a written decision dated February 10, 2012 denying ECBC's appeal saying:

> ... ERIP payments received from the Employer cannot be included in the Worker's pre- and post-injury earnings profile for the purpose of calculating his TERB.

[21] The employer now appeals to this Court. Essentially ECBC says the Tribunal ignored important evidence and rendered an unreasonable decision that has produced absurd results.

[22] Having provided a necessarily detailed outline of the background to the claim and the proceedings surrounding it I will now turn to a consideration of the issues on appeal.

Issues

[23] By Consent Order issued April 24, 2012, this Court granted ECBC leave to appeal the following grounds:

> (1) that the Tribunal erred in determining that Board Policy 3.1.1R2 was inconsistent with the *Act*.
>
> (2) that the Tribunal erred by disregarding the accepted legislative intent of "earnings" when it decided that ERIP benefits should not be considered post-injury earnings under s. 38 of the *Act*;

(3) that the Tribunal erred when interpreting the phrase "regular salary or wages" under s. 42 of the *Act*, s. 20 of the *General Regulations* and Policy 3.1.1R2; and

(4) in the alternative, if the ERIP benefits are not to be included in the determination of the Respondent Worker's temporary earnings-replacement benefits, that the Tribunal erred in failing to address the issue of the effective date for the exclusion of ERIP benefits in the Worker's case.

[24] In its factum, ECBC reduced the grounds of appeal to two discrete questions. The first attacks the reasonableness of the WCAT decision on two fronts:

(1) Was the Tribunal unreasonable to accord no weight to the legislative history?

(a) Did the Tribunal's failure to accord weight to the legislative history create absurd results?

The second raises an alternative basis to intervene.

(2) In the alternative, did the Tribunal err when it failed to address the issue of the effective date of the change in practice?

Standard of Review

[25] It is trite law but often bears repeating that choosing the proper standard of appellate review depends on the context, the issue and the forum. Appeals of WCAT decisions to this Court engage different standards of review than would be the case in an appeal from a court of first instance. Where we are faced with an appeal from a lower court a standard of correctness is applied to questions of law whereas questions of fact or inferences drawn from facts are reviewed for palpable and overriding error. See for example, **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235; **McPhee v. Gwynne-Timothy**, 2005 NSCA 80.

[26] In this case, judicial review arises in the context of administrative law. We are not dealing with an alleged error said to have been made by a judge. Instead, the failing concerns the work of an administrative tribunal. The appellant

challenges the Tribunal's decision and the way it treated certain evidence in reaching its conclusions.

[27] Selecting the appropriate standard will depend upon how one characterizes the question or the issue in dispute. Different aspects of a decision may invite different standards of review. See for example, **Dunsmuir v. New Brunswick**, 2008 SCC 9; **C.R. Falkenham Backhoe Services Ltd. v. Nova Scotia (Human Rights Board of Inquiry)**, 2008 NSCA 38; and **Osif v. College of Physicians and Surgeons of Nova Scotia**, 2009 NSCA 28.

[28] Before undertaking the required standard of review analysis, one must first examine the statutory regime giving rise to the decision-maker's jurisdiction to see if any opportunities for appeal have been limited or foreclosed by lawmakers. In other words, before super-imposing the appropriate standard of review upon the impugned decision of the administrative tribunal, one asks whether the avenues to appeal have been prescribed by the Tribunal's home, or close-to-home statute. See for example, **Canada (Citizenship and Immigration) v. Khosa**, 2009 SCC 12; **Royal Environmental Inc. v. Halifax (Regional Municipality)**, 2012 NSCA 62.

[29] Section 256(1) of the **Worker's Compensation Act**, S.N.S. 1994-95, c. 10 provides:

> **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.

[30] From this we know that unless ECBC can persuade us that the WCAT erred with respect to a question of law, or jurisdiction, we cannot intervene.

[31] Having established this legislated deterrent to certain types of appeals from this Tribunal, we turn back to the question: by what standard are we to assess the merits of the Tribunal's decision? Again, in the administrative law context, it is now settled law that there are only two possible standards for review: reasonableness and correctness. See **Dunsmuir**, **supra**. Are we to assess the merits of the WCAT's decision in this case through the strict lens of correctness such that if we were to decide the reasons and result were incorrect the decision

would be set aside; or will our evaluation be tempered by a more relaxed approach paying deference to the recognized expertise of the Tribunal and extending to it a measure of tolerance as long as the result can be seen to fall within a range of "possible, acceptable outcomes which are defensible in respect of the facts and law"? (**Dunsmuir** at ¶47)

[32] In this case the appellant ECBC and the respondent Mr. Hogan share the view that the employer's principal challenge to the WCAT's decision ought to be reviewed on a standard of reasonableness. The appellant makes the point succinctly in its factum:

> In light of recent jurisprudence from this Court and the Supreme Court of Canada, the Appellant (grudgingly) accepts that the first ground of appeal will be reviewed for reasonableness, as it involves the Tribunal's interpretation of its home statute and regulations made pursuant thereto.

[33] I agree. The decision under appeal in this case is "well within the expertise of the Tribunal, interpreting its home statute and applying it to the facts before it". It did not "involve questions of law that are of central importance to the legal system outside its expertise." Therefore, the "standard of review must be reasonableness". **Saskatchewan (Human Rights Commission) v. Whatcott**, 2013 SCC 11, ¶168.

[34] Should ECBC fail in its attempt to show that the WCAT decision is unreasonable and ought to be set aside on that basis, the appellant argues in the alternative that the Tribunal erred in failing to answer a question remitted to it. ECBC says the WCAT neglected to declare the effective date of the Board's decision to change the way it treated ERIPs in the calculation of a worker's benefits. This "failure" constitutes a procedural error, which the appellant characterizes as a form of "adjudicative unfairness" (citing Brown and Evans, *Judicial Review of Administrative Actions in Canada*, looseleaf (Toronto, ON: Canvasback Publishing, 2010) at ¶14-4-211, p. 14-61. ECBC says this serious error invites our review on a standard of correctness (citing **Michelin North America (Canada) Inc. v. Nova Scotia (Labour Standards Tribunal)**, 2003 NSCA 40).

[35] On this point counsel for Mr. Hogan agrees that a correctness standard applies.

[36] Counsel for the respondent Workers' Compensation Board does not dispute the standard of review advocated by ECBC and Mr. Hogan. In keeping with its stance before the Tribunal, the Board takes no position on the merits underlying the first ground of appeal. The Board limits its submissions to the second ground: that is, whether the Tribunal erred in failing to decide a question remitted to it, and if it did, how that error ought to be rectified, and by whom.

[37] In this case it is not necessary for me to resolve whether the standard of review to be applied to the discrete issue here, that is whether the Tribunal erred in neglecting to decide a matter placed before it, is one of correctness or reasonableness. For reasons that will become apparent, I am not persuaded such a question was ever properly put to the Tribunal for resolution.

Analysis

[38] In this case, the central question turned on Mr. Hogan's entitlement to ERIP benefits and how they were to be treated in the calculation of his earnings-replacement benefits (TERB). In other words, should (as the appellant urged) the ERIP benefits be included in the calculation of the worker's post-injury earnings for the purposes of determining his TERB, or (as found by the Tribunal), should the ERIP benefits be excluded from that calculation?

[39] No reference to ERIPs can be found in the **Act**, the Regulations or Board policy. Neither are the words "regular salary and wages" defined in the legislation. So the answer to the question whether they ought to be accounted for in the calculation of the worker's claim for TERB depended upon the Tribunal's assessment of the evidence and its interpretation of its home or close-to-home statutory authority. I will judge the results of that effort on a standard of reasonableness. In so doing I am required to undertake an "organic exercise" where the reasons and the outcome are read together to see "whether the result falls within a range of possible outcomes" in a way that reflects "a respectful appreciation" for the expertise, mandate, concepts and language of specialized decision-makers. (**Newfoundland and Labrador Nurses' Union, supra**, ¶13-14).

[40] The first ground of appeal attacks the reasonableness of the Tribunal's decision. As noted earlier, the appellant casts the first ground in the form of two questions:

> (1) Was the Tribunal unreasonable to accord no weight to the legislative history?
>
> (a) Did the Tribunal's failure to accord weight to the legislative history create absurd results?

[41] While I expect to address these questions during the course of my analysis, it seems to me that the more accurate characterization of the principal issue on appeal is whether the Tribunal erred in deciding that Mr. Hogan's ERIP benefits should not be included in the calculation of his post-injury earnings for the purposes of determining his TERB payment. In assessing that issue – through the lens of reasonableness – I will address the way in which the Tribunal dealt with legislative history, and the impact that had upon the ultimate result. But a consideration of those aspects should not deflect the focus from the principal issue on appeal.

(1) Was the Tribunal unreasonable to accord no weight to the legislative history?

[42] I will start by referring to the way in which WCAT viewed the issue before it. It said:

> The issue on appeal is essentially a question of law, that is, a question of interpretation of the relevant legislative provisions dealing with the calculation of the Worker's loss of earnings.

[43] Because Mr. Hogan was a federal employee, s. 4(2) of the **Government Employees Compensation Act**, R.S.C. 1985, c. G-8 (**GECA**) was engaged which mandates that compensation for federal employees in Nova Scotia is to be determined "at the same rate and under the same conditions" as is provided under the **Workers' Compensation Act** ("**Act**"). WCAT determined that the legislative provisions relevant to Mr. Hogan's appeal included ss. 37, 38, 39 and 42 of the **Act**; s. 20 of the Workers' Compensation General Regulations, N.S. Reg. 22/96, as amended; and Board Policy 3.1.1R2.

[44] At the hearing before the WCAT, ECBC challenged the Board's decision on a number of fronts. First, it appeared that the decision was based on a change in approach taken by the Board in light of this Court's ruling in **Canada Post Corporation v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, 2009 NSCA 41(**Almon**) as well as subsequent WCAT decisions identified as the "severance decisions". ECBC said the result in **Almon** should not be applied routinely in all cases across the board when the issue is whether employer-sponsored benefits will, or will not, be considered deductible in the calculation of post-injury earnings. ECBC said that deductibility must depend upon the nature of the benefit in issue – how it is funded, paid and reported – matters which will always be case and fact-specific.

[45] Further, in ECBC's submission, s. 38 of the **Act** and s. 20 of the General Regulations could only mean that ERIPs are a form of employment income, virtually indistinguishable from earnings, and should be treated as post-accident earnings when calculating the worker's benefits. To support its arguments, ECBC referred to communications from the Board's legal counsel and senior executives of the day that explained the position initially taken by the WCB in handling claims involving ERIPs which was to treat them as income in the calculation of any worker's earnings-replacement benefits. In ECBC's view, the current statutory and regulatory regime ought to require a return to the Board's original position.

[46] I need not particularize the many occasions when this subject came up for debate at various levels within the Board and which ultimately led the Board to change its practice. Those are all carefully described in WCAT's decision at pp. 5-12 *ff*. Suffice it to say that this Court's decision in **Almon** which held that disability payments payable to Ms. Almon under her employer's pension and disability plan were not "earnings" and that the phrase "regular salary and wages" in Regulation 20(1)(a) could not be read as including a disability benefit paid out after the employee ceased employment due to disability, prompted the Board to re-consider the approach it ought to take when dealing with ERIPs.

[47] We were advised by counsel that our decision in **Almon** has led to subsequent WCAT decisions where the same principles have come to be applied in claims involving severance payments. This in turn led to a review within the Board as to whether ERIPs ought to be treated in the same way as severance payments, and taken into account as part of the worker's "regular salary or

wages" to be included in the calculation of "gross earnings". Rather than seek leave to appeal the WCAT severance cases, management opted to review its practice, in-house.

[48] Against that backdrop the Tribunal looked to the statute as well as the Regulations and policies for guidance. Under the **Act**, ss. 37, 38 and 39 explain how a worker's loss of earnings and earnings-replacement benefits are to be calculated. The calculation, in part, depends upon the worker's net average earnings which are based on gross average earnings, less certain stipulated deductions. Under s. 42 of the **Act**, determining a worker's gross average earnings will be based on the worker's regular salary or wages combined with any other types or amounts of income as the Board may prescribe by Regulation.

[49] This led the Tribunal to a consideration of s. 20 of the Regulations. Here, the dispute centered on the contrast between the present wording in s. 20(1) of the General Regulations, as compared to its predecessor legislation.

[50] Section 20 was amended by O.I.C. 2000-614, N.S. Reg. 195/2000, effective December 1, 2000. This current version of s. 20(1) as amended, is much shorter and provides:

> 20(1) A worker's gross average earnings are the total of
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> (a) the worker's regular salary or wages; and
>
> (b) after the first 26 weeks of earnings-replacement benefits or for purposes other than earnings-replacement benefits and extended earnings-replacement benefits, income from
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> i. overtime that is not regular salary or wages, and
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> ii. federal employment insurance benefits other than those payable as maternity or parental leave benefits.
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> (2) For the purpose of calculating net average earnings under subsection 39(1) of the Act, earnings-related expenses shall be deducted from gross average earnings.

[51] Previously, s. 20 of the Regulations included the following:

> 20. A worker's gross average earnings are the total of
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> (a) the worker's regular salary or wages, less earnings-related expenses;
>
> (b) for the first 12 weeks of temporary earnings-replacement benefits, income from overtime; and
>
> (c) after the first 12 weeks of temporary earnings-replacement benefits, and for purposes of benefits other than temporary earnings-replacement benefits, income from
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> (i) overtime,
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> (ii) commissions,
>
> (iii) bonuses,
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> (iv) vacation pay,
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> (v) federal unemployment insurance or employment insurance benefits, excluding benefits payable for maternity or paternity leave,
>
> (vi) a profit-sharing arrangement with the worker's employer,
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> (vii) tips and gratuities, if reported on a worker's T4 income tax slip,
>
> (viii) other types of employment income allowable on the "Employment Income" and "Other Employment Income" lines of an individual tax return.

[52] Obviously the effect of the amendment was to remove the list of other types of income described in ss. (c) of the Regulations.

[53] Also relevant to the Tribunal's analysis is Board Policy 3.1.1R2 which was brought into effect on the same day (December 1, 2000) as was the amendment to Regulation 20(1). This Policy explains that a worker's pre-accident earnings will

include all regular salary or wages as well as federal insurance benefits and overtime. As noted by WCAT in its decision, while Policy 3.1.1R2 applied to the calculation of pre-injury weekly earnings, it became the Board's practice to consider such payments when calculating the worker's post-accident earnings. Further, in the words of the Tribunal:

> ... the effect of the amendment to the *Regulations* in December 2000 was to move a list of specific income items included in the calculation of a worker's "gross average earnings" from the *General Regulations* to a list of income items included in "regular salary or wages" under the Policy.

[54] On appeal to this Court, ECBC's principal argument is that the Tribunal ignored a Report and Recommendation from the then Minister of Labour, and prepared by the Board's Acting General Counsel dated October 12, 2000 to the Executive Council (the provincial cabinet) which – so the appellant says – supports their argument that s. 20 of the Regulations was only amended to "eliminate redundancy and ambiguity in this clause" and that therefore the Tribunal ought to have given the phrase "regular salary or wages" its "original meaning" at the times it was enacted and subsequently amended. This, the appellant says was the "best" and most direct evidence of the meaning to be given to the Regulations. It says the WCAT erred by ignoring the documentary record and applying a dictionary definition to the words "regular salary or wages" which was entirely unnecessary and cannot be reconciled with the legislative history.

[55] I respectfully disagree with the appellant's submissions.

[56] The Tribunal referred to this Court's decision in **Mime'j Seafoods Ltd. v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, 2007 NSCA 115 as well as Elmer Driedger's, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) when correctly identifying the principles of construction it employed while applying the modern approach to statutory interpretation. Rather than adopt a "dictionary definition", the Tribunal, citing Professor Sullivan's *Treatise on Statutory Interpretation*, 2nd ed. (Toronto: Irwin Law Ltd., 2007) said the proper interpretation had to be gleaned from the context and scheme of the legislation as a whole. The Tribunal reasoned:

> There has been much discussion and argument about the use of a dictionary definition of the word "earnings" in the *Almon* decision. It is not uncommon for the Courts, or this Tribunal, to look at a dictionary meaning when words are not defined in the *Act*. In this case, the words "earnings", "regular salary or wages" or "income" are not specifically defined.
>
> Although a dictionary definition is useful, Professor Sullivan cautions that the ordinary meaning of a word or a group of words is not their dictionary meaning but the meaning that would be understood by a competent language user upon reading the words in their immediate context [Ruth Sullivan, *Statutory Interpretation*, 2nd ed. (Toronto, Ont.: Irwin Law, 2007) at p. 50].
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> ...
>
> As demonstrated by the above decisions, the determinative factor is the meaning of the words within the context and scheme of the *Act*.
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> ..
>
> "Earnings" include "regular salary or wages", which terms more closely relate to remuneration in some form from active employment.
>
> ERIPs are monthly income replacement benefits payable by the Employer until age 65.
>
> Simply looking at the ordinary sense of all these terms, ERIPs are a type of income that could be included in "earnings" but they would not be considered as "regular salary or wages" in common parlance.

[57] In construing the meaning of the words in the context and scheme of the **Act**, the Tribunal also addressed the intent and purpose of the provisions. After doing so, the WCAT concluded that "income" has a more expansive meaning than either "earnings" or "regular salary or wages". It reasoned that whereas "earnings" and "income" are not confined to active employment, the phrase "regular salary or wages" is intended to reflect actual remuneration, in whatever form, from active employment. I see nothing unreasonable in the way the Tribunal chose to analyze the problem.

[58] I do not think it can be seriously suggested that the Tribunal ignored or failed to give any weight to the legislative history surrounding the impugned statutory and regulatory provisions. The fact is that the WCAT sought detailed written and oral submissions on these issues both for the hearing and in post-hearing submissions. A fair reading of the Tribunal's lengthy and comprehensive decision satisfies me that the WCAT understood and addressed all of the arguments put forward by the appellant. The Tribunal's reasons reflect the expertise it brings to the interpretation and application of its legislation and policies, as well as its familiarity with the intricacy of such claims for compensation. I will refer to one example to illustrate my point.

[59] ECBC argued that the Minister of Labour's Report and Recommendation to the Executive Council had stipulated that the purpose of the amendments to the Regulations was to eliminate redundancy, in that the types of income previously listed in s. 20(c) would normally be included in regular wages, or salary, anyway. Thus, ECBC argued that the Report and Recommendation reflected a legislative intention not to limit the types of income that could be considered as earnings under the **Act**. In their view, the terms "income" and "earnings" were used interchangeably in the **Act** and that in the context of generally accepted accounting and tax principles, it only made sense that ERIPs would be treated as income and included in the calculation of the worker's earnings, and post-accident earnings-replacement benefits.

[60] The Tribunal acknowledged that it could take into account the Minister's Report and Recommendation as part of its overall consideration of the criteria enumerated under the **Interpretation Act**, R.S.N.S. 1989, c. 235, and which of course included a review of the history, intent and purpose of the impugned legislation. Having done so, the WCAT rejected the characterization urged by the appellant. The Tribunal dismissed the suggestion that ERIPs ought to be seen as "earnings" because they had been treated as "regular salary or wages" and identified as such on T4 slips and line item entries on income tax returns. Rather, after thoroughly reviewing the entire record, the Tribunal concluded that ERIPs, properly construed were:

> ... monthly income replacement benefits payable by the Employer until age 65. They are not pension, disability or retirement benefits payable under a defined or contributory plan, but they are payable after the employment relationship ceases in

relation to the loss of employment. They also differ from severance payments as they are a bridge benefit designed to provide the older worker with a revenue stream until they reach 65. ... Atlhough the reasons for offering the early retirement incentive payments and the conditions for eligibility may have changed over the years, it has always been a form of partial salary continuation or a bridging benefit payable until the worker reaches the age of 65. It was not a pension nor was it a severance payment. ..

[61] Having defined ERIPs in this way, the Tribunal reasoned:

Therefore, to find that ERIPs should be included in the calculation of loss of earnings, we must find that they are "regular salary or wages" as determined by the Policy. ....

Atlhough the Panel may refer to the Report and Recommendation for guidance and we may accept that the intention was to continue to include other types of income in the meaning of "earnings", we cannot ignore the express wording and effect of the amendment. The wording of s. 20 of the *Regulations* is not ambiguous. The stated intention in the Report and Recommendation does not take away from the effect of the amendment. ...

However, it is evident that these types of earnings are not "regular wages or salary". Under s.42 of the *Act*, the Board must prescribe by regulation other types or amounts of income in addition to "regular salary or wages" to be included in "gross average earnings". Section 20 of the *Regulations* adds overtime that is not regular salary or wages and federal employment insurance benefits, but does not add the other types of income mentioned in section 3 of Policy 3.1.1R2.

Therefore, we need to consider whether or not the Board can expand the meaning of "regular salary or wages" under its policymaking power. The Board has included by policy in "regular salary or wages" what was formerly included in "gross average earnings" by regulation.

...

Applying the above principles of statutory interpretation to this matter, it is apparent that the words "earnings" and "income" may be given expanded meanings pursuant to the *Act*. They are not just in relation to active employment. However, "regular salary or wages" reflect actual remuneration in whatever form (salary, tips, commissions etc...) from active employment.

> The Panel finds that the Board's policy that includes "other income" and "other employment income" as regular salary or wages is not consistent with the Act. Subordinate legislation must be authorized by the legislation. In this case, the Policy expanded the terms "regular salary or wages" to a point not authorized by the legislation when considering the text, context and purpose of the legislation. It could only include these types and amounts of income in "earnings" by regulation.
>
> In short, we find clause 3 (viii) of Policy 3.1.1R2 to be inconsistent with the *Act*.
>
> Therefore, the Panel finds that the Board is not authorized to include ERIPs as "earnings" under the *Act*. They cannot be included in pre-injury and post-injury earnings for the purposes of calculating the Worker's TERB.
>
> **CONCLUSION:**
>
> The Employer's appeal is denied. ERIP payments received from the Employer cannot be included in the Worker's pre- and post-injury earnings profile for the purpose of calculating his TERB.

[62] After carefully considering the record and ECBC's submissions, I am not persuaded the WCAT's decision falls outside the range of possible, acceptable outcomes which are defensible having regard to the facts and the law.

[63] Before leaving this first ground of appeal I wish to deal with a few collateral matters that arise in this case. The first will be to add a brief but important *caveat* to one aspect of the Tribunal's reasons.

[64] When considering the effect of the Minister's Report and Recommendation (R and R), the Tribunal said this during the course of its decision:

> There is no doubt that we can refer to the Report and Recommendation that was put to Executive Council by the Acting Minister of Environment and Labour as this is specifically referred to in the Order-in-Council. Therefore it is incorporated by reference and is part of this regulatory enactment. Furthermore, as stipulated by the *Interpretation Act*, the former law and the history of the enactment should be considered to ensure that the enactment attains is objects. (Underlining mine)

While it was certainly open to the Tribunal – based on the record and disclosure in this case – to take the R and R into account during the course of its deliberations,

my reasons should not be seen as endorsing that portion of the Tribunal's analysis which I have underlined in the extract quoted above. In another claim there may well be privacy, privilege or confidentiality concerns associated with requests for disclosure that might trigger freedom of information and protection of privacy issues (**Freedom of Information and Protection of Privacy Act**, S. N.S. 1993, c. 5, as amended) which in my opinion could only be resolved on a case by case basis.

[65] Let me also address what the appellant said was an important inconsistency in the Tribunal's analysis.

[66] On appeal to this Court counsel for ECBC said there was a clear contradiction in WCAT's reasons that points to error in how the Tribunal came to its conclusion that ERIPs should not be included as "earnings" under the **Act**. Counsel selected parts of the decision which, in her submission, reflected a serious inconsistency, leading to a flawed result. In fact, counsel for ECBC said that when she first read the portion of the judgment set out below she thought she had persuaded the Tribunal as to the merits of her appeal, only to realize, as she went further, that WCAT had rejected her position. I will reproduce those paragraphs here:

> In the context of the legislative provisions and the scheme of the *Act*, and taking into consideration the legislative history of the provisions, we find an intention to include ERIPs as "earnings' or "gross earnings" when calculating a worker's loss of earnings. This is consistent with the underlying purpose of the legislation, which is to calculate as accurately as possible the actual loss a worker suffers as a result of an injury. These benefits are earnings because of the worker's office or employment, albeit his former office or employment.
>
> However, it is evident that these types of earnings are not "regular wages or salary". Under s.42 of the *Act*, the Board must prescribe by regulation other types or amounts of income in addition to "regular salary or wages" to be included in "gross average earnings". Section 20 of the *Regulations* adds overtime that is not regular salary or wages and federal employment insurance benefits, but does not add the other types of income mentioned in section 3 of Policy 3.1.1R2.
>
> ...

> Applying the above principles of statutory interpretation to this matter, it is apparent that the words "earnings" and "income" may be given expanded meanings pursuant to the *Act*. They are not just in relation to active employment. However, "regular salary or wages" reflect actual remuneration in whatever form (salary, tips, commissions etc...) from active employment.
>
> The Panel finds that the Board's policy that includes "other income" and "other employment income" as regular salary or wages is not consistent with the *Act*. Subordinate legislation must be authorized by the legislation. In this case, the Policy expanded the terms "regular salary or wages" to a point not authorized by the legislation when considering the text, context and purpose of the legislation. It could only include these types and amounts of income in "earnings" by regulation.
>
> In short, we find clause 3 (viii) of Policy 3.1.1R2 to be inconsistent with the *Act*.
>
> Therefore, the Panel finds that the Board is not authorized to include ERIPs as "earnings" under the *Act*. They cannot be included in pre-injury and post-injury earnings for the purposes of calculating the Worker's TERB. **(Underlining mine)**

While I agree that on a first reading there would appear to be an inconsistency in whether the Tribunal was prepared to interpret the legislation in a way that ERIPs would be included as "earnings" or not, it seems to me the point the Tribunal was making is that while one could find an intention to include ERIPs as earnings, the real question was whether ERIPs were "regular wages or salary" (based on "actual remuneration ... from active employment") and could properly be dealt with by Board policy rather than its General Regulations (subordinate legislation).

[67] In doing so the Tribunal accepted the worker's argument that ECBC's attempt to have his ERIPs deducted from his TERB benefits could not be supported by the Board Policy, in that the Policy was inconsistent with the **Act** and did not have the authority of subordinate legislation by regulation.

[68] Seen in that light and read in the context of the Tribunal's reasons as a whole I am not persuaded there is any inconsistency in WCAT's analysis such as would render its decision unreasonable.

[69] The next collateral issue concerns ECBC's attack on what it said was a failure on the part of the Tribunal to attach proper weight to the evidence relating

to what the appellant characterized as the history of the legislation and its intent. I have already dismissed that argument but I wish to add a further observation because it pertains to the role of the decision-maker when evaluating evidence.

[70] It is settled law that reaching a conclusion on a material point that affects the outcome, when there is no evidence to support it, is a flaw in reasoning amounting to an error in law which requires us to intervene. We do so, as a matter of law, because the reasoning is incorrect.

[71] That is a very different thing than complaining – as ECBC does here – that the Tribunal failed to give "adequate", "proper", or "sufficient" weight to certain evidence. We leave the decision as to the degree of importance (if any) to be accorded the evidence, to the decision-maker in the court or tribunal of first instance. They are the finders of fact and it is fundamental to the fact-finding process that the decision-maker be entitled to hear and weigh the evidence in order to decide what importance ought to be attached to it. That is the function of the decision-maker, and is not to be confused with our role on appeal. When we use expressions such as "owing deference" or allowing "a margin of appreciation", or recognizing a "tolerance" for results "which fall along a spectrum of acceptable outcomes", we do not employ such terms in the abstract. Rather, they are intended to reflect, and respect, the well-recognized advantage held by frontline decision-makers in hearing and evaluating the evidence, first hand.

[72] I do not accept ECBC's submission that WCAT erred by according "no weight" or failing to accord "significant weight" to what the appellant described in its factum as "relevant and reliable history of legislative intent". On the contrary, the Tribunal pressed all parties to provide thorough submissions on the point. Further, the Tribunal's decision is replete with references to the evidence surrounding that history, that legislative intent, and the tools of statutory interpretation it employed in completing its analysis.

[73] Respectfully, it seems to me that ECBC is disappointed with the Tribunal's conclusions and asks us to repeat the same inquiry. Disappointment in the outcome is never a proper ground for appeal; nor is it our role to retry the case.

[74] The next collateral issue concerns the Board's apparent extrapolation of certain aspects of this Court's reasoning in **Almon**, to later cases where the deductibility of severance payments was in dispute. I need not express any opinion concerning the approach taken by WCAT in any of the so-called "severance cases". That issue is not before us in this appeal. Here, we are only concerned with the Tribunal's treatment of Mr. Hogan's ERIPs in the calculation of his loss of earnings benefits. The issue in **Almon** was disability, not severance. I would also note that in **Almon** this Court specifically declined to consider the validity of Board Policy 3.1.1R2, or its application to the worker's disability benefits plan in that case.

(a) Did the Tribunal's failure to accord weight to the legislative history create absurd results?

[75] I will turn now to the second main thrust to the appellant's primary ground of appeal that the WCAT's decision should be set aside as being unreasonable. Here, the appellant focuses on what it says is an unintended and absurd result.

[76] In its submissions ECBC says that as of 2010 Mr. Hogan's gross annual ERIP benefit was $28,205.28. The effect of the exclusion of ERIPs in the calculation has resulted in Mr. Hogan's weekly benefits increasing from $226.97 to $596.43. Accordingly, Mr. Hogan will receive an annual net income of $52,067.76 commencing October 24, 2010, from combined ERIP and workers' compensation benefits. ECBC says this has led to an absurd and unintended result giving Mr. Hogan a "windfall" where he is receiving more today than he ever earned as an active employee. ECBC says this has created serious prejudice in at least two respects. First, because ECBC is self-insured and therefore the full cost of both the worker's compensation benefits and the ERIP benefits are paid by the employer. Second, because this is not the only ERIP case in contention and we were advised by counsel at the appeal that there are several other cases awaiting our decision in this appeal.

[77] Respectfully, I am not persuaded by the employer's complaints. ECBC's status as a self-insured, federal employer does not entitle it to any special consideration in the workers' compensation regime, as compared to other employers in the province. As the successor to DEVCO's assets and liabilities,

ECBC is a participant in Nova Scotia's workers' compensation system, able to enjoy the advantages achieved by the historic trade-off with workers, which gives employers immunity from being sued for work-related injuries and deaths. Its obligation to cover the cost of Mr. Hogan's TERB simply fulfils its responsibilities as a willing participant in the compensation scheme. Mr. Hogan, as a former DEVCO and federal employee is subject to the same rights and obligations as other workers covered by Nova Scotia's workers' compensation system, (**GECA, supra**).

[78] ECBC's legal responsibility to cover the cost of Mr. Hogan's TERB arises because of **GECA** and the Nova Scotia workers' compensation regime and is a completely separate matter from its legal responsibility to pay Mr. Hogan his ERIP benefits.

[79] ECBC's obligation to pay ERIP benefits to former DEVCO employees who were eligible and who exercised their option to acquire such benefits until age 65 arose in the context of federal-provincial labour negotiations incidental to the closure of the mines as a way to facilitate the transition of the Cape Breton economy away from its dependency on the coal industry. There was no provision in the ERIP agreements to reduce ERIP benefits to account for workers' compensation benefits (except in situations which do not arise in Mr. Hogan's case).

[80] In my respectful view, Mr. Hogan's receipt of ERIP benefits, and his receipt of TERB are entirely distinct. They ought not to be characterized as a windfall and do not offend the rule against double recovery. ERIP benefits are paid out in accordance with the ERIP agreement. They were available to the few workers who were eligible to exercise their option. Mr. Hogan was one of them. ERIPs are - as found by WCAT – equivalent to monthly income replacement benefits payable by the employer as a form of salary continuation or a bridging benefit until the worker reaches the age of 65. They are neither a pension, nor a severance payment. TERB, on the other hand, is an earnings-replacement benefit which compensates for loss of earnings resulting from a work-related injury. ERIPs and TERBs are paid for different reasons and in the circumstances of this case, do not invoke or offend the rule against double recovery.

[81] Taking an organic approach to the Tribunal's reasons and outcome as I am obliged to do, I am satisfied that its decision falls within a range of possible, acceptable solutions. It meets the criteria for reasonableness and ought not to be disturbed.

(2) In the alternative, did the Tribunal err when it failed to address the issue of the effective date of the change in practice?

[82] I will turn now to a consideration of the appellant's alternative ground of appeal; that is, whether the Tribunal erred by failing to answer a matter placed before it for disposition.

[83] I will begin by summarizing the nature of the appellant's complaint and what the parties say ought to be done about it.

[84] ECBC says the WCAT failed to exercise its jurisdiction and rule on a question placed before it. Specifically, ECBC says the WCAT failed to decide when the Board made the decision to change its approach in handling claims where ERIPs are concerned. ECBC says the Tribunal ought to have fixed the effective date as "sometime in mid-September, 2010", which the appellant says coincides with the Board's decision to change its practice. Counsel for ECBC say in their factum that they:

> ... did not identify the effective date as a ground of appeal in its Notice of Appeal to WCAT because it was not aware that it was an issue until much later. ...

(but, after having had the benefit of oral evidence at the hearing)

> ... it truly became clear that the WCB had not made a definitive decision to exclude ERIPs from post-accident earnings until sometime in September, 2010.

[85] The appellant says that although WCAT recounted "all of the relevant facts necessary to decide the issue" it "did not acknowledge or rule on this request for relief".

[86] The appellant asks this Court to declare that the effective date of the Board's change in practice was mid-September, 2010. Alternatively, the appellant asks that we send the issue back to WCAT to decide the matter.

[87] Counsel for the respondent worker, Mr. Hogan, asks that the issue be referred back to WCAT to permit a full hearing and argument on the point. In that way the Tribunal will have "the opportunity to give a reasoned decision on this issue". The respondent also counsels against the idea of our establishing an effective date in this case which might then have adverse and unintended consequences in future cases. As the worker says in his factum:

> 144. In addition to the Workers' appeal, there are other appeals in the workers' compensation system involving former Devco employees receiving ERIP benefits and whether or not they are earnings under the *Act*. In one or more of those appeals, the former Devco employees are arguing that the effective date for the WCB's change in practice should be made effective well before December 2009. The Worker's loss of earnings only started after his surgery in 2009 and so his financial interest in this issue is not as significant as it is for some other former Devco employees.
>
> 145. Fairness, as well as WCAT's jurisdiction, means this issue should be fully argued at WCAT before it is dealt with in this Court.

[88] Counsel for the WCB acknowledged the Board's failings in informing stakeholders of the change. The Board's factum reads:

> 41. The Board acknowledged in submissions to WCAT, and through the evidence of Nancy Stacey, that there were deficiencies with respect to Board communication of the change in practice with respect to the treatment of ERIPs both internally within the Board, and also in relation to communication to ECBC. This less than perfect internal communication admittedly gave rise to inconsistent decisions in relation to ERIPs in the post-December 2009 time. However, it remains the position of the Board that this Board change in practice in relation to treatment of ERIPs was made and was effective as of December 2009.

[89] While agreeing that the December 15, 2009 date is relevant to establishing when the change in practice became effective, that fact alone, is not determinative. The Board explains the distinction this way in its factum:

> 43. The Appellant further asserts in its factum that the effective date should be the date that Board change in practice as to treatment of ERIPs was communicated to ECBC in mid-September 2010. The Board does not dispute ECBC's contention that ECBC was not advised of any change in practice by the Board in relation to treatment of ERIPs in 2009 and that it was not until fall 2010 that the Board's position on ERIPs was clarified to ECBC.
>
> 44. The Board submits, however, that the relevant date for determining entitlement to workers' compensation benefits reflecting the Board's change in practice concerning treatment of ERIPs is December 15, 2009, namely, the date when the change of practice was made by the Board. That decision in turn was based on the earlier Nova Scotia Court of Appeal *Almon* decision and the three subsequent 2009 WCAT decisions that applied *Almon*. It is the position of the Board that it is this December 15, 2009 change in practice that is relevant to establishing the effective date, not the date of communication of this decision or change in practice to the Appellant as employer.
>
> 45. In applying this approach to the circumstances of this appeal, the Board submits that the effective date here is February 8, 2010. That is the date the Worker became eligible for Temporary Earnings Replacement Benefits. Accordingly, from that February 8, 2010 date, the change in practice by the Board in relation to treatment of ERIPs would apply.

[90] Ultimately the Board says the WCAT decided the issue and that there is no need to send it back to the Tribunal for a hearing. This, the Board says, was a finding of fact and consequently this Court has no jurisdiction to vary it. In the alternative, should we conclude that the issue had not been determined by the Tribunal, then in the Board's submission we should send it back to WCAT for a decision. We ought not to decide the matter for ourselves.

[91] After carefully considering the record and counsels' comprehensive submissions I am not persuaded the WCAT ever seriously considered, or was explicitly asked to resolve, the effective date in Mr. Hogan's case which would pinpoint the WCB's change in practice concerning its treatment of ERIPs. I say that for several reasons.

[92] The issue was not identified in the WCAT decision as a matter the Tribunal considered itself bound to decide. Neither was there anything in the transcript of counsels' opening statements which would suggest that they expected the Tribunal

to answer such a question. The point was not raised by counsel in their oral submissions at the conclusion of the hearing. It was not included in the list of three issues the Commissioners asked counsel to brief in their post-hearing written submissions. This issue was mentioned, for the first time, in ECBC's written post-hearing submission. However, the point was referred to almost obliquely, in the last few paragraphs of a more than 100 paragraph and 28-page brief. The responses from Mr. Hogan and the WCB in their post-hearing briefs were similarly curt and hardly precise in affirming an appropriate effective date, or pointing to the "evidence" which might support such a finding.

[93] Given the cursory nature of counsels' remarks I am not prepared to conclude that the issue demanded the Tribunal's attention. While the body of the Tribunal's decision contains references to the mixed messages the appellant and others received from the WCB concerning the Board's intentions in how to treat ERIPs in the calculation of benefits, as I read the Tribunal's decision, those comments were meant to place in context the employer's plea that the Board's first position was correct and should never have been reversed. There is nothing in the Tribunal's decision which suggests to me that the parties expected WCAT to decide the effective date in Mr. Hogan's case and that failing to do so would constitute grounds for appeal.

[94] That said, all parties would agree that it is important to establish an effective date in Mr. Hogan's case. Ordinarily we would refer such a question back to the WCB so as to take advantage of the incremental, tiered review established within the workers' compensation regime. However, in this case it does not seem appropriate to refer the matter of determining the effective date when the Board changed its approach in dealing with ERIPs, back to the Board. It would be tantamount to asking the Board to decide, when it had decided. At the hearing in this Court all of the parties agreed that if it had to go back, it should be remitted to the WCAT. I agree.

[95] I would therefore remit this single issue to the Tribunal for its consideration. This is a matter which ought to be addressed by the same three Commissioners who heard the appeal. They are in the best position to decide the question, as well as the manner in which they would wish to receive evidence and submissions on the point. Once that concludes, the Tribunal will be well placed to provide reasons to explain its disposition.

Conclusion

[96] The Tribunal found that while ERIPs might be seen as a type of "income" and broadly cast as "earnings", they would not be commonly understood as part of a worker's regular salary or wages which more closely relate to one's understanding of remuneration from active employment. Implicit in the WCAT's decision is the recognition that the genesis and purpose of ERIPs is completely unrelated to the worker's entitlement to compensation following injury during the course of his employment.

[97] The Tribunal found that ERIPs were in fact (and were intended to be) monthly income replacement benefits payable by the employer, to those workers who qualified and who took up the option, until age 65. The criteria were fixed. Discretion had nothing to do with it. Their receipt was in no way linked to the worker's health or any work place injury. They were not a pension, a disability, a retirement benefit, or a severance but rather a bridge benefit payable to age 65 as a way to transition Cape Breton's economy from its dependence on the coal mining industry. Mr. Hogan was offered a one-time opportunity to participate in this early retirement incentive plan based on his age and service criteria. In choosing to accept the terms and conditions of the plan, Mr. Hogan agreed that before receiving any benefit under the ERIP, he would be obliged to apply for and exhaust all employment insurance benefits to which he might be entitled. Further, if he were eligible for CPP disability benefits, those disability benefits would be deducted from his ERIPs.

[98] As such, ERIPs are entirely distinct from earnings-replacement benefits such as TERB which are designed to compensate for loss of earnings resulting from a compensable work-related injury. Mr. Hogan's receipt of ERIP benefits, and his receipt of TERB arise from completely different circumstances: ERIP by virtue of a contract between the worker and his past employer; TERB by virtue of a statutory workers' compensation scheme which prescribe the rights and responsibilities of both the worker and his employer following a workplace injury. To me, this distinction is clearly established on the record and provides a sound foundation for the Tribunal's decision.

[99] In reaching such a conclusion, the WCAT accepted Mr. Hogan's submission that if the receipt of ERIP benefits could be used to reduce his entitlement to earnings-replacement benefits, the legal authority for such a reduction must be found in the **Act** or the Regulations. It could not (as the appellant maintained) acquire legislative support or authority in Board Policy 3.1.1R2 which virtually mirrored the list of types of income included in the former s. 20 of the Regulations before it was amended in December, 2000. The Tribunal concluded that dropping s. 20(c) from the Regulations in December, 2000 and virtually replicating that list in Policy 3.1.1R2 had the effect of expanding the policy to include terms and conditions not authorized by the legislation. In the Tribunal's view, any attempt to define the types or amounts of income when calculating "earnings" could only be accomplished by regulation, in other words, by subordinate legislation, consistent with the **Act**. Since this change was said to arise under the "authority" of the Policy rather than the legislation, the Tribunal determined that clause (iii) of Policy 3.1.1R2 was inconsistent with the **Act**. I see nothing unreasonable in the Tribunal's analysis.

[100] For all of these reasons I would dismiss the appeal. WCAT's decision is reasonable with respect to both the outcome and the reasoning which led to it. The Tribunal's decision allows me to understand how the Commissioners came to their conclusions and be satisfied that their disposition falls within a range of possible, acceptable outcomes.

[101] I would remit the question of fixing the effective date of the WCB's change in practice concerning its treatment of ERIPs as applicable in Mr. Hogan's case to the Tribunal, to be decided at a time and in a manner of its choosing.

Saunders, J.A.

Concurred in

Hamilton, J.A.
Farrar, J.A.