C.A. No. 106591

NOVA SCOTIA COURT OF APPEAL

Cite as: Cape Breton Development Corporation v. Nova Scotia (Workers' Compensation Board), 1995 NSCA 19

Hallett, Matthews and Chipman, JJ.A.

BETWEEN:

CAPE BRETON DEVELOPMENT CORPORATION Appellant	)	Brian G. Johnston and Bernard F. Millier for the Appellant
- and -	)	
WORKERS COMPENSATION BOARD OF NOVA SCOTIA and the WORKERS COUNSELLOR PROGRAM Respondents	)	David Farrar for the Respondent Workers Compensation Board of Nova Scotia
	)	Anne S. Clark and Annette M. Boucher for the Respondent Workers Counsellor Program
	)	Appeal Heard: January 11, 1995
	)	Judgment Delivered: February 6th, 1995

THE COURT: Appeal allowed per reasons for judgment of Hallett, J.A.; Matthews and Chipman, JJ.A. concurring.

HALLETT, J.A.:

This is an appeal from a decision of a Supreme Court Judge who dismissed the appellant's application: (i) to quash a decision of the Workers' Compensation Board; (ii) for an order prohibiting the Board from applying the decision in question; and (iii) for a declaration regarding the proper interpretation of the **Workers' Compensation Act**, R.S.N.S. 1989, c. 508.

The learned chambers judge decided that the motion was premature.

The appellant asserts the application was not premature and asks this Court to grant the relief sought.

The respondents, the Board and the Workers' Counsellor Program assert that the matter decided and put in issue on this appeal related to preliminary questions and is not a decision that affects the rights of the appellant. They assert that the learned trial judge did not err in ruling the motion was premature.

Facts

As of June 4th, 1993, the Board had received over 1500 claims for entitlement to compensation due to alleged industrial hearing loss; it is an industrial disease that is compensable under **s. 84** of the **Workers' Compensation Act**.

Section 84(1) is relevant to the appeal. It provides:

> " 84 (1) Where a worker suffers from an industrial disease, or his death is caused by an industrial disease and the disease is due to the nature of any employment in which he was engaged at any time within twelve months previous to the date of his disablement, whether under one or more employments, the worker or his dependants shall be entitled to compensation as if the disease were a personal injury by accident and the disablement were the happening of the accident, subject to the modifications hereinafter mentioned unless at the time of entering into the employment he had wilfully and falsely represented himself as not having previously suffered from the disease."

Over 700 of these claims were made by present or former employees of the appellant and a company known as Dominion Coal Company whose assets had been acquired at some point by the appellant. In the majority of these cases the appellant had filed a notice of objection to the individual claims for industrial hearing loss as it is entitled to do pursuant to s. 25. That section is also relevant to this appeal and provides as follows:

> " 25 (1) Any person who objects to a claim that has been filed with the Board shall do so by notifying the Board in writing within ten days of the date such claim has first been reported to the person objecting.
>
> (2) Such notice shall state fully the nature of the objection and the reasons therefor, and a copy of same shall be handed to the worker or mailed to his last known address.
>
> (3) An inquiry shall be held by the Board into any such claim at the earliest convenient date, and in any case within forty-five days after the lodging of such objection."

With respect to these claims no formal inquiries had been convened.

The Board was concerned as to how to deal with this large number of cases and on May 7, 1993, proposed to the appellant and the Workers Counsellor Program a procedure to be followed in processing the claims which involved the appellant. The stated intention was to adjudicate five key issues which were essentially questions of law common to many of the claims. Both the appellant and the Program were invited to make written submissions to two of the Board's Hearing Officers who had been designated to adjudicate five questions:

> (1) **Section 25**: Has the Board met the requirement to hold an "inquiry" within forty-five days, and if not, what is the legal consequence?
>
> (2) **Section 84**: When does the twelve month period begin to run and what kind of "disablement" is being referred to?
>
> (3) **Section 69(4)**: On whom does the burden of proof lie on the issue of prejudice to the employer?

Section 69(4) provides:

> 69. (4) Failure to give the prescribed notice or to make such claim or any defect or inaccuracy in a notice shall not bar the right to compensation where, in the opinion of the Board, the employer was not prejudiced thereby and the Board is of opinion that the claim for compensation is a just one and ought to be allowed.

(4) Can a claim be made by a retired person?

(5) Is the Corporation financially responsible for hearing loss claims attributable to its predecessor, the Dominion Coal Company?

Both the appellant and the Program made submissions to the two Hearing Officers addressing the five issues. Likewise, the Board itself made a submission.

On July 6th, 1993, the Hearing Officers released their decision stating that it was "the decision of the Workers' Compensation Board of Nova Scotia". I would summarize the answers to the five questions as follows:

1. An inquiry contemplated by Section 25 of the *Act* merely requires a seeking and gathering of information and not necessarily an oral hearing;

   There are no consequences to either the worker or the employer if the Board fails to inquire within 45 days;

2. The word "disablement" in Section 84 means "physical disablement";

   That for the purposes of Section 84 of the *Act* the 12 month period is measured from the date when the worker first experienced industrial hearing loss;

3. Under Section 69(4) of the *Act* the burden of proving employer prejudice by the failure to give prescribed notice or to make a claim lies with the employer;

4. That a retired person may make a claim for compensation benefits pursuant to Section 84 of the *Act* so long as he or she is able to satisfy all pre-conditions in sections 84, 69 and 45.

> 5. That the appellant is not financially responsible for hearing loss claims caused while a worker was employed by Dominion Coal Company."

The appellant asked the Board to reconsider the decision. However, by letter dated August 5th, 1993, the Chairman of the Board replied to the appellant as follows:

> " The Board of Directors has delegated its authority to decide questions of law and fact to the Hearing Officers and their decision is accordingly the final decision of the Board."

By reason of the provisions of s. 150 of the **Act** decisions of the Board "upon all questions of law and fact shall be final and conclusive". The appeal procedures in ss. 173, 182 and 183 are not applicable to the decision of the Hearing Officers. The only available remedy to the appellant was by way of application for judicial review.

I would assume the Hearing Officers were acting pursuant to s. 165 of the **Act** which provides:

> " 165 (1) The Board may act upon the report of any of its officers, and any inquiry which it shall be deemed necessary to make may be made by any one of its members or by an officer of the Board or some other person appointed to make the inquiry, and the Board may act upon his report as to the result of the inquiry.
>
> (1A) Notwithstanding subsection (1), the Board may provide that a report of a person authorized to make an inquiry pursuant to subsection (1) is final and binding and does not require the approval of the Board.
>
> (1B) The Board may provide that the report of a person authorized, pursuant to subsection (1), to make an inquiry is subject to such limitations as the Board may provide.
>
> (2) The person appointed to make the inquiry shall for the purposes of the inquiry have all the powers conferred upon the Board or a member by Section 147."

On September 9th, 1993, the General Counsel of the Board wrote to the appellant as follows:

> " As you know, on July 6, 1993, the Board's Hearing Officers released their decision on five questions of law relating to hearing loss claims of DEVCO employees. The decision settled, for purposes of adjudication, many of the contentious legal issues that had brought the processing of these claims to a virtual standstill.
>
> The Board now wishes to proceed with the processing of the claims on the basis of the findings of the Hearing Officers. In this letter, I will outline the method by which the Board proposes to proceed."

Following receipt of this letter the appellant requested that claims not be processed until a judicial review application with respect to the decision was heard and decided. However, on September 17th, 1993, the General Counsel to the Board wrote to the appellant as follows:

> " I can now confirm that it is the Board's intention to proceed with the processing of the hearing loss claims on the basis of the Hearing Officers' decision, notwithstanding that the Corporation's judicial review application has not yet been heard and decided."

On September 21st, 1993, the appellant commenced the judicial review proceedings referred to in the opening paragraph of this decision.

On February 8th, 1994, the Supreme Court dismissed the application as being premature and it is that decision that has been appealed. The learned chambers judge stated:

> " The decision on the five issues is at best an interim decision of the Board that has no effect or impact upon any party, including Devco, until it is applied by the Board to an individual case or a series of cases. If these five decisions had been made by the "Hearing Officers" without inviting submissions from anyone and no cases were commenced to be processed could any party say they were affected and expect the Court to interfere by way of judicial review. I find not. This decision is not a judgment, order, warrant or inquiry as contemplated under Rule 56.06 C.P.R. Also Devco may never be adversely affected if the Board decides to hold oral hearings on each case, all claimants have suffered an economic loss, no claims are filed late and no retired person

> make a claim. If and when they are affected, its right to judicial review will be available.
>
> Once the Board moves on the first claim, or series of claims, subjects will be affected. Then Devco and all other similar employers and the claimants will be affected. At that time, then the procedure re: notice as contemplated by Rule 56.03 C.P.R. will come into play and all persons who appear to be interested or likely to be affected will be given notice.
>
> I find this application to be premature. I therefore dismiss this application with costs to the Board to be taxed."

The appellant is a federal Crown corporation and, as such, workers' compensation claims are governed by the **Government Employees Compensation Act**, R.S.C. 1985, c. G-5. However, under the **Act** workers' compensation benefits are provided on the same terms as are available to other workers in the Province of Nova Scotia. There is one essential difference; the appellant pays any claims directly. The claims are not paid from funds of the Board.

I am of the opinion (i) that the Board rendered a decision that is subject to judicial review; and (ii) that the appellant's application to the Supreme Court was not premature. This must be so as the Board 's stated intention is to process the appellant's employee claims for hearing loss and in so doing apply the decision on the five questions submitted to the Hearing Officers. The chairman advised the respondent that the decision is "the final decision of the Board". The appellant is clearly an interested party as it has to pay the compensation as determined by the Board with respect to the hearing loss claims. I reject the view that the court is usurping the Board's power to interpret its own legislation as the Board has adopted the interpretation by the Hearing Officers of the sections in question as is clear from the Board chairman's letter of August 5, 1993. To suggest that this was not a decision is to fly in the face of the Board's stated intention to treat it as a decision of the Board and apply it in the adjudication of the hearing loss claims by the appellant's

employees. Therefore the application to have the court review the decision of the Board was not premature.

The learned chambers judge, having determined that the application was premature, did not consider the issues before him on the merits. It seems more practical that we deal with the issues, as we have the power to do, rather than send the matter back for a further hearing in the Supreme Court which would result in further delays in an already long delayed process.

The Law of Judicial Review

The Hearing Officers were deciding questions of law, in particular the interpretation of the Statute which created the Board and which the Board administers in performing its function. It is necessary to consider what is the scope of judicial review of this decision. In my opinion one of the clearest statements on this question is that made by Mr. Justice Beetz of the Supreme Court of Canada in **U.E.S., Local 298 v. Bibeault**, [1988] 2 S.C.R. 1048 at pp. 1086 to 1090. The key parts of his statements are the following:

> " In its decision a tribunal may have to decide various questions of law. Certain of these questions fall within the jurisdiction conferred on the tribunal; other questions however may concern the limits of its jurisdiction.
>
> It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:
>
> 1. if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
>
> 2. if however the question at issue concerns a legislative

> provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review."

Justice Beetz explained that only a patently unreasonable interpretation results in an excess of jurisdiction when the question in issue is within the tribunal's jurisdiction whereas in the case of a legislative provision limiting the tribunal's jurisdiction a simple error will result in a loss of jurisdiction. In determining the jurisdiction of a tribunal a court must examine:

> " ... not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal."

Mr. Justice Beetz concluded his remarks on this subject with the following important statement at p. 1090:

> " When an administrative tribunal exceeds its jurisdiction, the illegality of its act is as serious as if it had acted in bad faith or ignored the rules of natural justice. The role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection: *Crevier v. Attorney General of Quebec,* [1981] 2 S.C.R. 220. Yet, the importance of judicial review implies that it should not be exercised unnecessarily, lest this extraordinary remedy lose its meaning."

This approach to judicial review was most recently affirmed by the Supreme Court of Canada in **Canadian Broadcasting Corp. v. Canada (Labour Relations Board)**, 1995 S.C.J. No. 4, January 27th, 1995 where Iacobucci J., writing for the majority, stated what he described as the general principles relating to the standard of review were as follows:

> " The first step in the judicial review of an administrative tribunal's decision is to determine the appropriate standard of review. As was noted in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at pp. 589-90:

> There exist various standards of review with respect to the myriad of administrative agencies that exist in our country. The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this question, the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved.

Having regard to these and other factors, the courts have developed a spectrum that ranges from the standard of patent unreasonableness at one extreme to that of correctness at the other. In this regard see generally: H. Wade MacLauchlan, "Reconciling Curial Deference with a Functional Approach in Substantive and Procedural Judicial Review" (1993), 7 C.J.A.L.P. 1.

Generally speaking, where the tribunal whose decision is under review is protected by a broad privative clause, its decision is subject to review on a standard of patent unreasonableness. However, this is only true so long as the tribunal has not committed a jurisdictional error. Jurisdictional questions addressed by the tribunal are independently reviewed on a correctness standard. An error on such a jurisdictional question will result in the entire decision of the tribunal being set aside.

In distringuishing jurisdictional questions from questions of law within a tribunal's jurisdiction, this Court has eschewed a formalistic approach. Rather, it has endorsed a "pragmatic and functional analysis", to use the words of Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048. In that decision Beetz J. noted, at p. 1088, that it was relevant for the reviewing court to examine:

> . . .not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its memebrs and the nature of the problem before the tribunal.

The goal is to determine whether the legislature intended that the question in issue be ultimately decided by the tribunal, or rather by the courts."

Section 84 is an empowering provision but it also limits the Board's jurisdiction to making awards for compensation as provided in the Act. Section 84 has the earmarks of a jurisdictional provision as a fundamental purpose of the Act is to provide a compensation

scheme for workers whose earnings or earning capacity has been impaired by work related injury, coal miners' disease or industrial disease. Section 84 states the bounds of the Board's power to make compensation awards for industrial disease. The reason for the Board's existence is to determine within the terms of the legislation to whom and to what extent a worker who has suffered a personal injury or industrial disease is to be compensated. The nature of the main problem before the two Hearing Officers in dealing with the questions relating to s. 84 was to interpret a section which is fundamental in determining the scope of the Board's power to award compensation under the **Act**.

The appellant contends that the Hearing Officers' interpretation of "disablement" means compensation may be payable to a worker who has an industrial hearing loss even if it does not result in a loss of earning capacity. With respect, that is not what the Hearing Officers decided. The Hearing Officers merely decided that "disablement" in s. 84 means "physical disablement".

In my opinion the Hearing Officers correctly interpreted the word "disablement" as it appears in s. 84. In the context of s. 84 the word does not mean a disability that reduces earnings or earning capacity. The Hearing Officers' interpretation of the word "disablement" does not offend the interpretation of s. 45 by this Court in **Hayden v. Workers' Compensation Appeal Board** (No. 2) (1990), 96 N.S.R. (2d) 108 (C.A.) or s. 84 by this Court in **Workers' Compensation Board of Nova Scotia v. Cape Breton Development Corporation** (1984), 62 N.S.R. (2d) 127 as argued by the appellant's counsel. Those decisions did not deal with the interpretation of the word "disablement" in s. 84. Nor does that interpretation of "disablement" contradict the purpose of the **Act** to provide a scheme to compensate workers for earnings lost or earning capacity apt to have been impaired as a result of the employment related injuries or diseases.

The **Act**, like a patchwork quilt that has been worked on off and on since 1915,

is difficult to interpret. In view of the positions taken by the respective counsel appearing before us it might be prudent to make a few additional comments rather than run the risk that this decision be misinterpreted.

The usual claim for compensation for hearing loss is in the nature of a claim for compensation for a permanent partial disability. Therefore, the Board must adapt and apply the provisions of s. 45. This is so because s. 84 provides that the worker "shall be entitled to compensation as if the disease were a personal injury by accident". Section 45 provides:

> " 45 (1) Where permanent partial disability results from the injury the compensation shall be a weekly payment of seventy-five per cent of the difference between the average weekly earnings of the worker before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident, and such compensation shall be payable during the lifetime of the worker.
>
> (2) Notwithstanding the provisions of subsection (1), where the amount which the worker was earning before the accident has not been diminished, the Board may pay compensation in any case where such worker has suffered a permanent injury which, in the opinion of the Board, is capable of impairing his earning capacity.
>
> (3) In estimating such impairment of earning capacity the Board shall give due regard to the nature and degree of the injury and the worker's fitness to continue the employment in which he was injured or to adapt himself to some other suitable occupation.
>
> (4) . . .
>
> (5) . . .
>
> (6) . . ."

In short, s. 45 directs the Board how to calculate compensation for claims for permanent partial disability from injury by accident; by reason of the provisions of s. 84 it must also be applied in determining compensation for permanent partial disability where a worker suffers from an industrial disease. Section 45 requires the Board to consider the

actual or potential economic effect on the worker arising from the hearing loss not simply "the nature and degree" of his hearing loss in determining the amount of compensation payable for a claim made under s. 84.

A reading of ss. 84 and 45 and the jurisprudence respecting s. 9 (**Hayden** case) lead to the conclusion that compensation for hearing loss that results in a permanent partial disability is determined, not only by the extent of the physical disablement but by the extent to which the disablement affects earnings or is capable of impairing earning capacity.

In reaching this conclusion I have not overlooked the fact that s. 84 was amended in 1992 by a deletion from the section of the words which I have underlined:

> " (1) Where a worker suffers from an industrial disease and is thereby disabled from earning full wages at the work at which he was employed, or his death is caused by industrial disease and the disease is due to the nature of any employment in which he was engaged at any time within twelve months previous to the date of his disablement, whether under one or more employments, the worker or his dependants shall be entitled to compensation as if the disease were a personal injury by accident and the disablement were the happening of the accident, subject to the modifications hereinafter mentioned unless at the time of entering into the employment he had wilfully and falsely represented himself as not having previously suffered the disease."

This amendment was clearly a response to the decision of this Court in **Cape Breton Development Corp. v. Workers' Compensation Board** (1990), 99 N.S.R. (2d) 254 which is commonly referred to as the MacKay decision. Mr. Justice Chipman, writing for the Court, concluded:

> " The provisions of s. 45 of the **Act** are but a part of the many provisions therein that govern personal injury by accident. Before any of the sections come into play in cases of industrial disease within s. 84(1), the essential condition that the worker be disabled from earning full wages must be met. Where no such disability has occurred, the legislature has shown a clear intention to differentiate between cases of industrial disease within s. 84 and cases of personal injury by

> accident within s. 45. The former will fall without the compensation scheme, the latter within it.
>
> By ignoring this fundamental distinction as it applied here, the Board attempted to vary the **Act**. In so doing, it exceeded its jurisdiction. Such patently unreasonable error is subject to the reach of judicial intervention."

The only effect of the 1992 amendment to s. 84 is that a worker suffering from an industrial disease does not now have to be disabled from earning full wages at the work at which he was employed in order to claim compensation. The amendment does not take it any further than that. It does not alter the law as found by this Court in **Hayden**.

In summary, considering (i) the wording of s. 84; (ii) that a fundamental purpose of the **Act** is to provide a compensation scheme for loss of earnings or potential earning capacity; (iii) the reason for creating the Board - to deal with claims for compensation; and, (iv) the nature of the problems the Board has to deal with in interpreting and applying s. 84 so as to determine how much, if any, compensation is payable for disablement resulting from an industrial disease I am of the opinion that s. 84 is a legislative provision which limits the Board's power to grant compensation to only those workers who can bring themselves within the provisions of ss. 84 and 45 of the **Act.** Being a section that limits the Board's jurisdiction the Board's interpretation of s. 84 must, therefore, be correct. The Board was correct in its interpretation of the word "disablement" in s. 84 when it determined that the word means physical disablement but that does not mean that compensation is payable to a worker without the Board being satisfied there was a loss of earnings due to the industrial disease or that the disease is capable of impairing the worker's earning capacity. To the extent that the Hearing Officers expressed views to the contrary they were wrong. Such an interpretation is inconsistent with the **Hayden** decision. Compensation is not payable simply because a worker suffers from an industrial disease. Such an interpretation is not only

incorrect it is patently unreasonable given the intention of the legislature as expressed in s. 84 and s. 45.

I will now turn to the Board's interpretation of s. 25(3) of the **Act**.

In the course of its decision the Board made reference to the new procedures put in place as of June 1st, 1993, to deal with claims by workers. The Hearing Officers stated:

> " Effective June 1, 1993, pursuant to the Board's Internal Appeal Guidelines, the Board will no longer conduct oral hearings before a claim has first been considered by an Adjudicator and also reviewed by a Review Officer. Where an objection is made pursuant to Section 25 of the Act, the Adjudicator will gather information from both the worker and the employer and after having considered the information provided by the parties, render a decision. As long as an employer files an objection, the employer continues to have the right to view the complete Workers' Compensation Board claim file. The Adjudicator's decision may be appealed by an interested party, including the worker and the employer, to a Review Officer. The Review Officer will provide parties with an opportunity to provide written submissions, and shall review the claim file, written submissions, and any other documentation prior to rendering a decision. All parties will be provided with a copy of the Review Officer's decision which may be further appealed to a Hearing Officer. An appeal to a Hearing Officer is the final level of appeal within the Board. Hearing Officers may request written submissions and may conduct oral hearings."

The appellant asserts that the Hearing Officers erred in giving the word "inquiry" in s. 25(3) an improper construction when they concluded that the inquiry required does not necessarily involve an oral hearing. In its decision the Board stated, that although in the past when an employer objected to a worker's claim the Board arranged a date, time and place for the parties to be heard and conducted an oral hearing that with respect to <u>these</u> hearing loss claims, the Board has not actually set a date and a time for an inquiry. For the convenience of the reader I will set out again what s. 25(3) provides:

> " 25 (3) An inquiry shall be held by the Board into any such claim at the earliest convenient date, and in any case within

forty-five days after the lodging of such objection."

In their decision the Hearing Officers referred to the shorter Oxford Dictionary definition of the word "inquiry":

> " The action of seeking, esp. (now always) for truth, knowledge, or information concerning something; search, research, investigation, examination. b. (with pl.) A course of inquiry, an investigation 1512. 2. The action of asking or questioning;interrogation. (Comm.=DEMAND sb.4.)"

The Hearing Officers went on to conclude:

> " We find that when the ordinary meaning of the word "inquiry" is considered in the context of the provisions of the Act, it means the gathering of information, or the asking of questions and it is not, as Counsel for Devco indicates in their submission, an oral hearing."

The Hearing Officers in an attempt to validate this interpretation of the word "inquiry" as it appears in s. 25 made reference to ss. 148, 155, 158 and 165 in which the word "inquire" or "inquiry" appears. With respect, the word "inquiry" as used in those sections is not the same sort of inquiry as is contemplated by s. 25. The Board also made reference to the **Fatal Inquiries Act**, R.S.N.S. 1989, chapter 164 in which the chief medical officer is required to make inquiry respecting the cause and manner of death in certain circumstances; he is not required to hold an oral hearing. The Hearing Officers concluded that the Legislature would have intended that the word "inquiry" as used in various sections of the **Act** and in different enactments would have a coherent meaning.

There can be no doubt that an inquiry can be a seeking and gathering of information. The Hearing Officers' decision on this point concluded with the following:

> " By way of summary, it is therefore concluded that an "inquiry" is the seeking and gathering of information and not necessarily an oral hearing."

This is an alleged error of law made within jurisdiction and as such the test to be applied on judicial review is whether the Board's interpretation is one that the language will reasonably bear or is it "patently unreasonable". In my opinion given the purpose of s. 25 to enable any person who objects to a claim (generally speaking an employer) to give notice stating the nature of the objection to the claim and providing in ss. (3) that an inquiry "shall be held" by the Board "at the earliest convenient date" clearly indicates that the Legislature intended that an oral hearing must take place. These words can mean nothing other than the convening of a conventional hearing at a particular time. The interpretation by the Hearing Officers of the word "inquiry" as it appears in s. 25(3) is patently unreasonable. I agree with their decision that the holding of an inquiry within 45 days is not mandatory and that there are no consequences for either the worker or the employer if such a hearing has not been convened due to the failure of the Board to do so.

There is nothing wrong with the guidelines established by the Board with respect to the preliminary investigation of claims for compensation as referred to by the Hearing Officers in their decision and quoted herein. However, when the investigation gets to the point where an inquiry is to be held by a Hearing Officer following an objection filed pursuant to s. 25, it must be a properly convened hearing. I will turn now to the appellant's point that the Board improperly interpreted s. 69(4) of the **Act** when it found that the employer is required to provide specific evidence of the prejudice in order for the Board to make a determination pursuant to s. 69(4) that an employer is prejudiced by the worker's failure to comply with s. 69(4) of the **Act**. I will repeat s. 69(4):

> " 69. (4) Failure to give the prescribed notice or to make such claim or any defect or inaccuracy in a notice shall not bar the right to compensation where, in the opinion of the Board, the employer was not prejudiced thereby and the Board is of opinion that the claim for compensation is a just one and ought to be allowed."

This is a matter that is clearly within the jurisdiction of the Board.

The appellant relies on a decision of a judge of the Supreme Court in the case **Dietienne v. Workers' Compensation Board of Nova Scotia** (1990), unreported, S.N. 05038. That decision was rendered on a review of a Board decision relating to a hearing loss claim. In the course of rendering his decision the learned judge of the Supreme Court stated:

> " It is clear that the Board considered s. 20 and s. 57 in arriving at its decision. Both are quoted and commented upon by the Board. There is nothing to suggest that the Applicant was not given the benefit of doubt and that the Board did not draw all reasonable inferences in favour of the Applicant.
>
> In considering s. 57 requiring the filing of a claim within six months after the happening of an event, the Board emphasized that it always gave a liberal interpretation of this requirement, but that in the present case of the passage of 20 years and the impossibility of assessing the hearing loss, if any, suffered by the Applicant at the time of the termination of his employment, that the delay was prejudicial to the Corporation. The claim was therefore disallowed because of the Board's finding that the Corporation was prejudiced.
>
> There is no doubt that the legislature, in drafting the Act, wished to give the benefit of the doubt to the worker in all marginal cases. S. 20 said the Board "shall draw from all the circumstances of the case the evidence of medical opinions all reasonable inferences in favour of the Applicant." The inferences must be reasonable and not merely possible.
>
> The section mentions that the Board could draw inferences from medical opinions which I would think are vital in most cases.
>
> S. 57 sets out the time frame an injured worker must file a claim. It is within six months from the happening of the accident. Again the legislature, in attempting to be most fair, provided that the Board could waive any defect in the notice in the event that "in the opinion of the Board the employer was not prejudiced thereby and the Board is of the opinion that the claim for compensation is a just one and ought to be allowed."
>
> The Corporation argued it was prejudiced by the claim which was filed nearly 20 years after the termination of employment. The onus for establishing the employer has not been

prejudiced lies with the Claimant."

While the learned trial judge in that case did state that the onus of establishing the employer had not been prejudiced lies on the claimant, that statement must be taken in the context of the fact the claim was made 20 years after the termination of the employment. That period of time in itself would indicate a presumption of prejudice sufficient to shift the onus to the claimant. In my opinion the Board's interpretation of s. 69(4), placing the onus to show prejudice on the employer, is one that the language of s. 69(4) will reasonably bear. I reject the appellant's arguments on this issue.

Conclusion

In my opinion the learned chambers judge erred in deciding that the appellant's motion was premature. I would allow the appeal and quash the decision of the learned chambers judge. I would issue a declaration that s. 25 of the **Act** requires the holding of a hearing at which the objector can present evidence and make submissions.

I would not interfere with the interpretation by the Board of ss. 84 and 69(4) nor would I make a declaration that a retired employee is never entitled to workers' compensation benefits; such a determination would turn on the facts.

It would be redundant to make an order for prohibition as one can assume the Board will apply ss. 84 and 25(3) in accordance with this decision.

There was not an appeal from the answer to Question 5.

It is not necessary to determine whether the Board has the authority under s. 165 to delegate to Hearing Officers the task of interpreting the **Act** as that issue was not raised on the appeal.

The appeal should be allowed in part without costs to any of the parties.

Hallett, J.A.

Concurred in:

Matthews, J.A.

Chipman, J.A.

C.A. No. 106591

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

CAPE BRETON DEVELOPMENT CORPORATION

Appellant

- and -

WORKERS COMPENSATION BOARD OF NOVA SCOTIA and the WORKERS COUNSELLOR PROGRAM

Respondent

R E A S O N S FOR JUDGMENT BY:

HALLETT, J.A.