NOVA SCOTIA COURT OF APPEAL

Citation: *Messom v. Nova Scotia (Workers' Compensation Board)*, 2017 NSCA 14

Date: 20170208
Docket: CA 443898
Registry: Halifax

Between:

Calvin Messom

Appellant

v.

Nova Scotia Workers' Compensation Appeals Tribunal, the Workers' Compensation Board of Nova Scotia, the Attorney General for the Province of Nova Scotia, and O.H. Armstrong Limited

Respondents

- AND -

CA 443993

Between:

Workers' Compensation Board of Nova Scotia

Appellant

v.

Calvin Messom, the Workers' Compensation Appeals Tribunal, and the Attorney General for the Province of Nova Scotia

Respondents

Judges: MacDonald, C.J.N.S.; Farrar and Scanlan, JJ.A.

Appeal Heard:	December 5, 2016, in Halifax, Nova Scotia
Held:	Appeal of Calvin Messom dismissed; appeal of the Workers' Compensation Board allowed per reasons for judgment of Farrar, J.A.; MacDonald, C.J.N.S. and Scanlan, J.A. concurring.
Counsel:	Kenneth H. LeBlanc, for appellant/respondent Calvin Messom Alison Hickey, for the appellant/respondent Nova Scotia Workers' Appeal Tribunal Scott R. Campbell, for the appellant Workers' Compensation Board of Nova Scotia (CA 443898) Roderick (Rory) Rogers, for the appellant Workers Compensation Board of Nova Scotia (CA 443993) Edward A. Gores, Q.C., for the respondent Attorney General for the Province of Nova Scotia (not participating)

Reasons for judgment:

Overview

[1] This matter came before the Court as two separate appeals. They were argued sequentially on the same day. I will address the issues raised on both appeals in one decision as they are inter-related.

[2] Mr. Messom was injured in a workplace accident on April 11, 1988, for which he was awarded a 10% permanent impairment rating.

[3] In February, 2010, Mr. Messom had an increase in symptoms relating to the 1988 injury and went off work. He received temporary earnings-replacement benefits (TERB) until September 13, 2011, when the Workers' Compensation Board determined he was no longer entitled to TERB.

[4] The Board also determined that Mr. Messom was not entitled to be assessed for an extended earnings-replacement benefit (EERB) because of the date of his injury.

[5] Mr. Messom appealed the Board's decision to the Workers' Compensation Appeals Tribunal (WCAT). In its decision dated August 28, 2015 (WCAT #2013-54-AD & 2014-696-AD), WCAT confirmed that Mr. Messom was not entitled to further TERB beyond September 13, 2011 but found he was entitled to be assessed by the Board for an EERB.

[6] Mr. Messom appeals the refusal of the continuation of his TERB. The Board appeals WCAT's determination that Mr. Messom is entitled to be assessed for an EERB.

[7] For the reasons that follow, I would dismiss Mr. Messom's appeal and allow the Board's appeal without costs to any party.

Background

[8] As noted, Mr. Messom suffered a workplace injury on April 11, 1988. On October 20, 1995 he had a permanent medical impairment (PMI) assessment examination which resulted in him receiving a 10% PMI which was made retroactive to June 29, 1995.

[9] He returned to work after his 1988 accident and continued to work until February 2, 2010. He ceased working at that time as a result of an increase in symptoms related to the 1988 injury.

[10] On July 19, 2011, following the results of the re-assessment examination, Mr. Messom's permanent impairment rating was increased to 15%. From July 19, 2011 to September 13, 2011, Mr. Messom was provided with vocational rehabilitation (VR) services to assist in his returning to work. He was paid a TERB until the September 13, 2011 date.

The Board Decisions

[11] On August 10, 2011 a Board case manager determined that Mr. Messom was not entitled to additional TERB/VR beyond September 13, 2011. This was confirmed in the decision dated August 12, 2012, in which an adjudicator found that Mr. Messom was no longer entitled to TERB because his condition was no longer temporary. She said:

> Based on the medical opinion on file from the WCB Medical Advisor I find the worker's condition as previously documented was considered no longer "temporary" and therefore not entitled to receive Temporary Benefits (TERB) beyond September 13, 2011.

[12] On January 11, 2013, a Hearing Officer upheld this finding. In particular, the Hearing Officer confirmed that Mr. Messom had reached maximum medical recovery and that his ongoing compensation would be based upon his permanent medical impairment. In other words, he was no longer eligible for temporary benefits.

[13] The Hearing Officer wrote:

> In July 2012, the Adjudicator requested an opinion from a Board Medical Advisor prior to rendering her August 2012 decision. In this opinion, dated July 30, 2012, the Medical Advisor noted the Worker has been thoroughly investigated and treated with respect to his compensable injury. She noted that at the completion of the Tier 3 program, he was deemed capable of working at his pre-injury employment with a restriction in standing. The Medical Advisor was of the opinion that there was nothing in the medical evidence that would suggest that this is not correct. <u>The Adjudicator determined that based upon the evidence on file and the Medical Advisor's opinion, the Worker's condition was no longer considered "temporary" and, as such, he was not entitled to further TERB beyond September 13, 2011</u>.

> Upon reviewing all the evidence on file, I find the Worker was provided with a reasonable period of VR services and TERB up to September 13, 2011.
>
> ...
>
> Due to the Worker's flare-up of symptoms in February 2010, he was provided with TERB and his PMI was reassessed in October 2010. As a result of this reassessment, a further 5% was awarded, bringing his total to 15%. This indicates the Worker experienced a permanent worsening, or deterioration, in his back condition. Therefore, although the Worker is not a complete job-match for his pre-injury work, I find his condition has stabilized and his ongoing entitlement to compensation is based upon his permanent impairment and the formula outlined in Sections 226 and 227 of the Act.
>
> ...
>
> In conclusion, based upon a review of the evidence on file, the relevant Sections of the Act and Board Policy, I cannot find the Worker is entitled to further TERB or VR services beyond September 13, 2011. I find the Worker's medical condition has plateaued and his ongoing benefits are payable in accordance with Sections 226 and 227 of the *Act*.

[Emphasis added]

[14] The significance of the finding that Mr. Messom had reached maximum medical recovery will become apparent later in these reasons.

[15] On July 28, 2014, WCAT referred Mr. Messom's file to the Board to reconsider whether he might be entitled to an EERB as a result of this Court's decision in *Ellsworth v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2013 NSCA 131. By decision dated November 13, 2014, the Hearing Officer found that Mr. Messom was not entitled to be assessed for an EERB.

[16] The Hearing Officers' decisions of January 11, 2013 and November 13, 2014 were appealed to WCAT and were the subject-matter of a hearing at WCAT on July 16, 2015 and which resulted in the decision which is before us.

[17] In its decision dated August 28, 2015, WCAT agreed with the Adjudicator and the Hearing Officer that Mr. Messom was not entitled to TERB or VR beyond September 13, 2011.

[18] WCAT then concluded that Mr. Messom was entitled to be assessed for an EERB.

Leave to Appeal

[19] By Order dated June 1, 2016, this Court granted leave to Mr. Messom to appeal WCAT's refusal to award TERB beyond September 13, 2011.

[20] In the Notice of Appeal, filed on June 10, 2016, Mr. Messom expresses the grounds of appeal as follows:

> Pursuant to an Order of the Court of Appeal dated June 1, 2016, the grounds of appeal are:
>
> 1. That the Tribunal erred on a question of law in failing to identify and apply section 38 of the *Workers' Compensation Act* and Workers' Compensation Board Policies 3.5.1, 3.5.2, and 3.5.3;
>
> 2. That the Tribunal erred on a question of law with respect to the legal test applicable to the determination of whether the Appellant (Calvin Messom) could return to work in suitable and reasonably available employment and had a loss of earnings, pursuant to section 38 of the *Workers' Compensation Act* and Workers' Compensation Board Policies 3.5.1, 3.5.2, and 3.5.3; and
>
> 3. That the Tribunal erred on a question of law because its finding that the Appellant (Calvin Messom) had no loss of earnings as a result of his compensable injury beyond September 13, 2011, which meant that he was not entitled to receive an additional temporary earnings-replacement benefit, was based on no evidence.

[21] Also, by Order dated June 1, 2016, leave was granted to the Board to appeal WCAT's decision that Mr. Messom was entitled to be assessed for an EERB. Its sole ground of appeal is as follows:

> THAT WCAT erred on a question of law in its interpretation and application of s. 227 of the *Workers' Compensation Act* and the decision in *Ellsworth v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2013 NSCA 131 in finding that the respondent was entitled to be assessed for an extended earnings-replacement benefit.

[22] I would restate the issues for determination on this appeal:

1. Did WCAT err in failing to award Mr. Messom TERB beyond September 13, 2011?
2. Did WCAT err in finding that Mr. Messom was entitled to be assessed for an EERB?

Standard of Review

[23] It is well-settled that this Court reviews the decisions of WCAT on a standard of reasonableness (*Halifax (Regional Municipality) v. Hoelke*, 2011 NSCA 96, ¶11-18).

Issue #1 Did WCAT err in failing to award Mr. Messom TERB beyond September 13, 2011?

[24] WCAT's decision on the TERB and vocational rehabilitation issues is confusing, to say the least. I say this because it appears WCAT decided that Mr. Messom was not entitled to any further TERB because his earnings loss between September 2011 and April 2013 was not due to an inability to work but was rather due to the unavailability of suitable employment. The Appeal Commissioner concluded:

> I therefore conclude that the Worker's earnings loss between September 2011 and April 2012 (sic) was not due to an inability to work for reasons related to his compensable injury. His injury was not physically preventing him from working. Rather, his earnings loss was due to the unavailability of suitable employment. He is therefore not entitled to additional TERB or VR after September 13, 2011.

[25] The Hearing Officer's decision, which was the decision under appeal to WCAT, determined that Mr. Messom was not entitled to any further TERB because he had reached maximum medical recovery. Nowhere in her decision relating to TERB does the Appeal Commissioner reference the finding that Mr. Messom had attained maximum medical recovery. Rather, she states the issue as follows:

> … The question in this appeal is whether his earnings losses after September 13, 2011 are due to his compensable injury. Key to this determination is whether the Worker had the capacity to earn income, either in his pre-accident job, or any other job, after September 13, 2011.

[26] With respect, that was not the issue.

[27] To see what the live issue was before WCAT, it is instructive to look at the submissions which were made to it by Mr. Messom's counsel at the July 16, 2015 hearing.

[28] Mr. Messom's submissions, at that time, were primarily focused on whether he was entitled to an EERB. There was little to no argument on the question of temporary benefits.

[29] This is not surprising considering that in order to be entitled to be assessed for an EERB, Mr. Messom would have to have reached maximum medical recovery. I will come back to this point.

[30] It is useful, at this point, to explain the scheme of the *Act* insofar as it relates to TERB and EERB.

[31] TERB is defined in s. 2(ad) of the *Act* to mean:

> …any earning-replacement benefit payable to a worker prior to the date on which an extended earnings-replacement benefit, if any, becomes payable.

[32] In other words, TERB is payable until such time as an EERB, would be payable to a worker.

[33] Section 2(o) of the *Act* defines EERB as follows:

> …an earnings-replacement benefit payable to a worker from the later of:
>
> (i) the date on which the Board determines the Worker has a permanent impairment pursuant to Section 34, and
>
> (ii) the date on which the worker completes the rehabilitation program pursuant to Section 112, where the worker is engaged in a rehabilitation program on or after the date the Board determines the worker has a permanent impairment pursuant to Section 34;.

[34] The date of a "permanent impairment" is addressed by WCB Policy 3.4.1 to be the date on which the worker has obtained maximum medical recovery. Policy 3.4.1R1 provides:

> 2. An EERB is payable from the later of:
>
> a) the date on which the Board determines the worker has a permanent impairment (i.e. The worker has attained maximum medical recovery and a permanent impairment assessment has been completed); or
>
> b) the date on which the worker completes a rehabilitation program (this includes the date vocational rehabilitation services have been determined to be inappropriate or discontinued).

[35] Finally, Policy 3.3.4R provides guidance with respect to when maximum medical recovery is reached. It is when the worker's condition has stabilized and no further major medical interventions are planned:

> 6. The existence and degree of a permanent impairment will be assessed by the Board. In general, the assessment will not be performed until the worker's condition has stabilized and no further major medical interventions are planned (i.e., the worker has reached maximum medical recovery). …

[36] Applying the provisions of the *Act* and policies to the circumstances of this case, Mr. Messom was only entitled to TERB until the later of:

1. the date on which his condition had stabilized – he had obtained maximum medical recovery on July 19, 2011; and
2. the date on which vocational rehabilitation came to an end – September 13, 2011.

Therefore, Mr. Messom was only entitled to a TERB until September 13, 2011. Returning now to Mr. Messom's submissions to WCAT, the real issue was not whether he was entitled to further TERB, but whether he was entitled to be assessed for an EERB as he had reached maximum medical recovery. Mr. Messom's counsel did not take issue with the finding that he had reached maximum medical recovery.

[37] This is apparent from the July 22, 2014 written submissions to WCAT which reads as follows:

> The Hearing Officer Decision of January 11, 2013 deals only with the issues of whether the Worker is entitled to further TERB and/or VR benefits beyond September 13, 2011.
>
> The WCB had determined that the Worker had attained MMR prior to the September 13, 2011 ending of TERB. The Worker had been found entitled to a PMI increase of 5% to be effective July 19, 2011.
>
> A review of Dr. Christie's opinions of 2013 and 2014 indicates no other treatment confirming the finding that the Worker had attained MMR.
>
> [Emphasis Added]

[38] The point being made by Mr. Messom's counsel, quite appropriately, is that the Board had determined that he had reached maximum medical recovery by

February 2, 2010, when his PMI was increased by 5% to 15% and that vocational rehabilitation benefits ended on September 13, 2011. It follows, from the provisions that I have reviewed previously, that Mr. Messom's counsel was arguing that, having reached maximum medical recovery, he was entitled to be assessed for an EERB.

[39] Mr. LeBlanc, counsel for Mr. Messom, is very familiar with the scheme. But his problem, as he explained (and it is a well-placed concern), is the Appeal Commissioner made a finding that the worker was not entitled to TERB because he had the capacity to earn income.

[40] Mr. LeBlanc then points out that if the Board is not successful on its appeal – i.e., Mr. Messom is entitled to be assessed for an EERB – he is stuck with a finding that his loss of earnings after September 12, 2011 is not as a result of his workplace injury. With this finding any assessment for an EERB would be rendered meaningless because it has already been determined any loss of income did not arise from the workplace injury.

[41] I agree with Mr. LeBlanc – to a certain extent – that the conclusions by the Appeal Commissioner were not ones which she was required, or should have made. Further, her conclusion that his earnings loss was due to the unavailability of suitable employment may simply be wrong based on the wording of the *Act*, WCB Policies and the evidence (or lack thereof) before her. However, it becomes somewhat of a moot point as I am of the view that Mr. Messom is not entitled to be assessed for an EERB. The Appeal Commissioner's conclusions on these issues, therefore, are of no importance.

[42] The Appeal Commissioner was correct to conclude that Mr. Messom was only entitled to TERB until September 13, 2011. But that conclusion, on this appeal record, is warranted because he had reached maximum medical recovery and vocational rehabilitation had come to an end. It had nothing to do with his capacity to earn income.

[43] In conclusion on this aspect of the appeal, although WCAT's reasoning is flawed in respect of the issues that were live before it, its determination that TERB should be ended as of September 13, 2011 is the only proper and possible outcome based on the record before it.

[44] For these reasons I would dismiss Mr. Messom's appeal.

Issue #2 Is Mr. Messom entitled to be assessed for an EERB?

[45] The Appeal Commissioner specifically found as a fact that Mr. Messom did not suffer any injury after March 23, 1990. She found the injury which forms the factual foundation for this appeal and for which compensation is being paid occurred on April 11, 1988. That is the only workplace injury that is relevant for the purposes of this appeal.

[46] In concluding that the worker was entitled to be assessed for an EERB, WCAT relied on this Court's decision in *Ellsworth*, finding:

> The Worker here did experience an increase in his disability or symptoms from his compensable injury, which led him to leave his employment in February 2010. The parts of his body, and the body functions, which were affected were the same, or related to, those initially affected, to a degree similar to the effect of the compensable injury. The Worker has certainly demonstrated ongoing symptoms and had some ongoing treatment for the compensable injury.
>
> I am satisfied, considering the criteria of medical compatibility and continuity, that the Worker did experience a recurrence of his July 1988 compensable injury at some time before February 2, 2010. This being the case, the Worker's situation does fall within the parameters by the Court of Appeal in *Ellsworth*, so as to entitle him to an assessment for EERB.
>
> (Emphasis added)

[47] With respect, for the reasons I will develop, *Ellsworth* does not entitle Mr. Messom to be assessed for an EERB.

[48] I will start with s. 227 of the *Act*:

> **Compensation for permanent partial disability**
>
> 227 (1) Subject to subsection (3), where a worker (a) was injured before March 23, 1990; and (b) at the date this Part comes into force, is receiving or is entitled to receive compensation for permanent partial disability or permanent total disability as a result of the injury, the Board shall pay the compensation for the lifetime of the worker.
>
> (2) The amount of compensation payable to a worker referred to in subsection (1) is deemed always to have been seventy-five per cent of the gross average weekly earnings of the worker before the accident multiplied by the permanent-impairment rating determined by the Board.
>
> (3) Section 71 applies to an award made or continued pursuant to subsection (1).

[49] Section 71, referred to in s. 227(3) provides for the review and adjustment of the permanent impairment rating in order to account for any changes or deterioration in the worker's condition. That review and adjustment of Mr. Messom's permanent impairment rating took place in 2011 (from 10% to 15%).

[50] A review of the Board and WCAT decisions leading up to the appeal before WCAT is useful to frame the issue. On January 11, 2013, a hearing officer denied Mr. Messom's claim for an EERB. She did so because the workplace injury occurred before March 23, 1990. Therefore, she reasoned Mr. Messom was bound by the transitional provisions in the *Act*:

> As the Worker's injury occurred prior to March 23, 1990, he is not entitled to permanent Earnings Replacement Benefits … In the *Lowe* decision the Court of Appeal accepted the respondent's submission that Sections 226 and 227 are "a complete code that applies to workers injured before March 23, 1990" and that, by enacting these sections, the Legislature intended to legalize retroactively the compensation formula applied by the Board before the *Hayden vs. Workers' Compensation Appeal Board* … decision dated March 23, 1990. That is, such awards are deemed to have been made in accordance with the former Act and deemed to have always been 75% of the pre-accident earnings multiplied by the PMI rating determined by the Board.
>
> Due to the Worker's flare-up of symptoms in February 2010, he was provided with TERB and his PMI was reassessed in October 2010. As a result of this reassessment, a further 5% was awarded, bringing his total to 15%. This indicates the Worker experienced a permanent worsening, or deterioration, in his back condition. Therefore, although the Worker is not a complete job-match for his pre-injury work, I find his condition has stabilized and his ongoing entitlement to compensation is based upon his permanent impairment and the formula outlined in Sections 226 and 227 of the *Act*.

(Emphasis added)

[51] Mr. Messom appealed the January 11, 2013 decision to WCAT. The decision of this Court in *Ellsworth* was issued on November 19, 2013. Given the potential applicability of the *Ellsworth* decision (which was issued after the hearing officer's decision), WCAT directed the hearing officer to reconsider whether – in light of *Ellsworth* – Mr. Messom was entitled to an EERB. On the reconsideration the hearing officer concluded that her original decision was correct and that Mr. Messom was not entitled to any EERB:

> The *Ellsworth* decision does not direct that any pre-*Hayden* injury that deteriorates over time is entitled to an assessment for an EERB. The Worker fits

> squarely within Section 227 of the Act; he had an injury pre-*Hayden* and received a Permanent Partial Disability (a 10% rating) pre-February 1, 1996. The Worker did not sustain a further personal injury by accident arising out of and in the course of his employment … rather his permanent impairment gradually worsened. Therefore, the Worker is not entitled to an assessment for an EERB.
>
> (Emphasis added)

[52] In my view, the hearing officer correctly interpreted *Ellsworth* and its treatment of the transitional provisions.

[53] It is difficult to understand how WCAT reached the opposite conclusion. It rejected Mr. Messom's argument that he was entitled to an EERB based on the date of his receipt of permanent disability benefits. To explain this point further, the decision to award Mr. Messom a permanent-impairment benefit was not rendered until April 2, 1996. Mr. Messom argued that since this was after February 1, 1996 (the cut-off date in s. 227), the provision had no application to him. In rejecting this argument, the Appeal Commissioner correctly relied on *Ellsworth* finding he was "entitled" to receive a permanent disability benefit on February 1, 1996 and, therefore, fell within s. 227 of the *Act*:

> The Worker's Adviser has argued that, while the Worker had been assessed with a 10% PMI as early as October 20, 1995, an award which was made retroactively effective as of June 29, 1995, because the decision awarding the PMI was not rendered until April 2, 1996, the Worker fell outside of the parameters of s. 227. Paragraph 71 on page 16 of the Court of Appeal's decision in *Ellsworth* makes clear that this is not the case:
>
> > Section 227 addresses those individuals who are receiving compensation, and those who are "entitled" to receive compensation for a permanent disability as of February 1, 1996. What this means is that a person may have an appeal, or their claim simply has not been adjudicated for an injury that occurred prior to March 23, 1990, yet they are entitled to a permanent disability benefit as of February 1, 1996. It is the timing of the adjudication of their claim that is the issue. The Legislature was simply putting people who had their claims adjudicated and were receiving benefits on the same level as those who were entitled but had not yet been adjudicated.
>
> This clearly applies to the Worker here. He became entitled to compensation in the form of a PMI award upon the recommendation being made by the Board Medical Advisor in October 1995. The adjudication of his claim was delayed, and the formal written decision confirming that award was not issued until April 1996. Nevertheless, the date of the PMI recommendation by the Board Medical

> Advisor, together with the retroactive effective date of that award, makes clear that, as of February 1, 1996, he was entitled to receive a permanent disability benefit. The Worker's situation therefore falls squarely within s. 227 of the *Act*.

(Emphasis added)

[54] The Appeal Commissioner also rejected Mr. Messom's assertion that he had suffered a new workplace injury after March 23, 1990. In other words, the Appeal Commissioner affirmed, that the April 11, 1988 accident is the only workplace injury in play. Having made these findings, the Appeal Commissioner goes on to determine that Mr. Messom is entitled to be assessed for an EERB based on a reoccurrence of his 1988 workplace injury. She says:

> [2] Is the Worker entitled to be assessed for an EERB?
>
> Yes, The Worker experienced the recurrence of his 1988 injury in approximately February 2010, which, in accordance with the Court of Appeal's decision in *Ellsworth* - … entitles him to be assessed for an EERB.

[55] Having made these findings which places Mr. Messom squarely within s. 227 of the *Act*, the Appeal Commissioner's decision does not explain how the decision in *Ellsworth* would entitle him to be assessed for an EERB. In my view, her conclusion is inconsistent with the proper interpretation of s. 227 of the *Act* and *Ellsworth*.

[56] Some historical context is needed to understand the purpose of the transitional provisions. The calculation of compensation based on a permanent impairment rating (as opposed to actual wage loss) was the measure of compensation prior to this Court's decision in *Hayden v. Nova Scotia (Workers' Compensation Appeal Board)*, [1990] N.S.J. No. 93. In that case, the majority concluded that compensation should be calculated on the loss of earning capacity and not the level of physical impairment.

[57] After *Hayden*, the Nova Scotia Legislature passed a new *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 and (among other things) implemented a wage loss system in accordance with *Hayden*. In doing so, and as a necessary measure of transition to the new regime, the Legislature identified a category of individuals whose compensation would continue to be governed by the permanent

impairment/clinical rating regime. The Legislature, in effect, established a "pre-*Hayden*" and a "post-*Hayden*" regime.

[58] This is set out in section 227. It identifies those individuals whose compensation for permanent disability (partial or total) will be assessed on the basis of their impairment rating for life.

[59] In *Lowe .v Nova Scotia (Workers' Compensation Appeals Tribunal)*, [1998] N.S.J. 99, this Court explained the role of s. of 227:

> [25] Section 227 ... applies to workers injured before March 23, 1990 who, on February 1, 1996, are receiving or who are entitled to receive either partial or total disability benefits. Section 227 does not deem compensation to be in accordance with the former *Act*. The whole section is subject to s. 71 which allows the Board to review and adjust the amount of compensation payable as a permanent impairment benefit if there is a change in the worker's condition, subject to the requirements that the change is one that was not already taken into account, that it represents at least a ten percent change and that sixteen months have elapsed since the last rating. Section 227(2) is very similar to s. 226(b). It deems that the compensation payable under the section "always to have been" 75% of the lost earnings multiplied by the permanent impairment rating determined by the Board. Once again, in my opinion, this clearly ratifies the use of the permanent impairment rating, and consequently rescinds the effect of the *Hayden* decision for people injured before March 23, 1990, and who fall within s. 227.
>
> (Emphasis added)

[60] In other words, and material to this appeal, a section 227 worker is not entitled to an EERB. This is because an EERB is a wage loss entitlement. It is not available to workers injured before March 23, 1990 who were receiving or entitled to receive compensation for a permanent disability on February 1, 1996. Mr. Messom fits both criteria.

[61] This Court in *Ellsworth* considered the interpretation and operation of section 227 beginning with a review of the language of s. 10 of the *Act*. It provides the trigger for compensation requiring "personal injury by accident arising out of and in the course of employment".

[62] Section 10 reads, in part:

> (1) Where, in any industry to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a

> worker, the Board shall pay compensation to the worker as provided by this Part.

[63] In subsection 2(a), "accident" is defined as including:

> (i) a wilful and intentional act, not being the act of the worker claiming compensation;
>
> (ii) a chance event occasioned by a physical or natural cause; or
>
> (iii) a disablement, including occupational disease, arising out of and in the course of employment.

[64] Tracking the language of subsection 10(1) of the *Act*, Mr. Ellsworth suffered three separate workplace injuries "by accident arising out of and in the course of employment":

1. December 23, 1987, he injured his back while pushing batteries along a conveyor line;
2. on February 2, 1995, he injured his back while lifting a battery off of a skid; and
3. on September 11, 2006, he injured his back while rolling batteries and putting them on a wooden pallet.

[65] Mr. Ellsworth's first injury occurred prior to March 23, 1990, but there was no evidence of entitlement to a permanent disability award in relation to this injury. Indeed, the medical records confirmed that there was no permanent disability arising from the December 1987 injury.

[66] Nevertheless, in *Ellsworth*, WCAT characterized the September 11, 2006 injury as a "recurrence" of the first injury and concluded that Mr. Ellsworth was not entitled to an EERB on the basis of section 227. WCAT concluded that Mr. Ellsworth sought compensation for a pre-March 23, 1990 injury for which he was receiving or was entitled to receive a permanent disability benefit as of February 1, 1996.

[67] On appeal, this Court concluded that WCAT erred by placing any emphasis on the characterization of the 2006 workplace injury as a "recurrence" of the 1987 injury.

[68] This was because it was undisputed that Mr. Ellsworth had suffered a subsection 10(1) injury on September 11, 2006. As a result, the existence of an earlier, pre-*Hayden* injury, was immaterial.

[69] Putting it another way, Mr. Ellsworth sought compensation for a subsection 10(1) workplace injury that occurred after March 23, 1990. As noted by this Court: "Mr. Ellsworth did suffer an injury prior to March 23, 1990 but that is not the injury for which compensation is being sought." (¶56)

[70] With this in mind, and looking to the transition language selected by the Legislature in section 227, this Court concluded that there is nothing in the *Act* to suggest that a post-March 23, 1990 injury should be treated differently where it can be classified as a "recurrence" of a pre-March 23, 1990 injury:

> [40] I had earlier said that, in my view, the characterization of the injury as a recurrence or as a new injury is of no significance in determining the amount of compensation payable to Mr. Ellsworth. I will now explain why. Section 10(1) of the *Act* does not make a distinction between new injuries and injuries which are recurrences. Although the *Act* does not define recurrence or recur, *Webster's 9th New Collegiate Dictionary* defines recur to include: "To occur after an interval."
>
> ...
>
> [55] The Appeal Commissioner does not explain why he is applying s. 227 to an injury that occurred in September, 2006. I appreciate that much has been made of the recurrence aspect of this claim but nowhere does he explain, nor does the Case Manager, why a recurrence is to be treated differently than any other injury arising out of or in the course of employment.
>
> [56] As I indicated earlier, there are two conditions to s. 227; one is that the injury must have occurred prior to March 23, 1990; Mr. Ellsworth did suffer an injury prior to March 23, 1990 but that is not the injury for which compensation is being sought.
>
> ...
>
> [62] Injury, as referred to in s. 227, is a defined term in the *Act* and means "personal injury".
>
> [63] "Personal injury" is the cornerstone of s. 10(1) of the *Act* for it is only personal injuries by accident that give rise to eligibility for compensation.
>
> [64] Section 2 of the *Act* defines "accident" and for the purposes of Mr. Ellsworth, would be a "chance event occasioned by a physical or natural cause."
>
> [65] Is there anything in the text of s. 227 which would cause someone to conclude that when an injury is classified as a recurrence it is the date of the

> original injury that governs the calculation of benefits as the incident of December, 1987, rather than the recurrence on September 11, 2006?
>
> [66] In my view, there is not ...
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> ...
>
> [68] Section 10, referred to previously, requires that the Board pay compensation pursuant to "this Part". If the Legislature had intended a recurrence of an injury to be treated differently, it would have been very easy to say so, i.e., calculation of benefits for recurrence of an injury shall be determined at the date of the original injury. It did not and nothing in the text of s. 227 supports such an interpretation.
>
> [69] In my view, no measure of creative interpretation could transfer the meaning of s. 227 into a restriction on the amount of compensation to which a worker is entitled where the injury occurs after March 23, 1990, and is classified as a recurrence. It would take very clear language in the provision to effect such a result.
>
> ...
>
> [70] ... The Legislature intended that workers who were injured before March 23, 1990, would be compensated under the old clinical rating schedule. Workers injured after that date would be entitled to benefits under the *Act*, as amended.
>
> ...
>
> [72] Read in this way, everyone injured before March 23, 1990, would be treated the same and compensated under the clinical rating system and those injured after that date would fall within the provisions of the new *Act*.

(Emphasis added)

[71] The effect of *Ellsworth* is to make clear that the date of the workplace injury is the deciding factor. A worker does not fall within the parameters of section 227 if he or she seeks compensation for a post-March 23, 1990 "personal injury by accident arising out of and in the course of employment". But if the workplace injury occurs before March 23, 1990, then section 227 will prevail so long as the worker was receiving or was entitled to receive a permanent disability benefit as of February 1, 1996 in relation to that injury.

[72] *Ellsworth* provided clarity on the intended scope and operation of section 227. In particular, it was observed that section 227 "is not complex":

> [49] Section 227 has two conditions:
>
> 1. The injury must have occurred before March 23, 1990; and

> 2. As of February 1, 1996, the worker must have been receiving or was entitled to receive compensation for permanent partial disability or permanent total disability.
>
> [50] If those two conditions are met the worker would be paid in accordance with the scheme which was in force prior to the *Hayden* decision.
>
> ...
>
> [61] The text is not difficult to read. It simply requires that someone be injured prior to March 23, 1990, and be receiving or is entitled to receive compensation for a permanent disability. If these two conditions are met then the compensation is calculated by multiplying 75% of the gross average weekly earnings of the worker before the accident by the worker's permanent impairment rating.
>
> (Emphasis added)

[73] On the facts in *Ellsworth*, neither of the section 227 criteria was satisfied:

1. the s. 10(1) injury in question occurred after March 23, 1990 (on September 11, 2006); and
2. in any event, there was no evidence to support WCAT's finding of receipt of or entitlement to a permanent disability benefit as of February 1, 1996.

[74] On the second point, the Court confirmed that "entitled to receive" is meant to capture those individuals who are entitled to these benefits as of February 1, 1996, irrespective of when that entitlement is ultimately adjudicated:

> [71] Section 227 addresses those individuals who are receiving compensation, and those who are "entitled" to receive compensation for a permanent disability as of February 1, 1996. What this means is that a person may have an appeal, or their claim simply has not been adjudicated for an injury that occurred prior to March 23, 1990, yet they are entitled to a permanent disability benefit as of February 1, 1996. It is the timing of the adjudication of their claim that is the issue. The Legislature was simply putting people who had their claims adjudicated and were receiving benefits on the same level as those who were entitled but had not yet been adjudicated.
>
> (Emphasis added)

[75] Returning to the facts in this case, WCAT's decision is inconsistent with s. 227 of the *Act* and this Court's decision in *Ellsworth* because:

1. Mr. Messom suffered a workplace injury in April 1988, well before the March 23, 1990 cut-off in section 227.
2. As a result of this April 1988 injury, Mr. Messom was entitled to receive compensation for a permanent disability as of June 29, 1995 (prior to February 1, 1996).
3. Quite unlike Mr. Ellsworth, Mr. Messom is not seeking compensation for a post-March 23, 1990 workplace injury. WCAT concluded as a matter of fact that Mr. Messom did not suffer any such post-March 23, 1990 workplace injury.
4. Mr. Messom has had his permanent-impairment rating adjusted in response to a change in his condition over time (from 10% - 15%), as provided by subsection 227(3) and section 71.

[76] To repeat, WCAT found:

> …the Worker did experience a recurrence of his July 1988 compensable injury at some time before February 2, 2010. This being the case, the Worker's situation does fall within the parameters described by the Court of Appeal in *Ellsworth* so as to entitle him to be assessed for an EERB.

[77] With respect, *Ellsworth* supports the opposite conclusion and only the opposite conclusion.

[78] This Court was very clear in *Ellsworth* that nothing turns on the classification of something as a "recurrence" of an earlier injury. Calling Mr. Ellsworth's 2006 injury a "recurrence" of the 1987 injury did nothing to alter the fact that Mr. Ellsworth had nevertheless suffered a new "personal injury by accident arising out of and in the course of employment" after March 23, 1990.

[79] To be abundantly clear, a worsening of an earlier compensable injury does not and cannot equate to a new s. 10(1) injury. WCAT found as a fact that Mr. Messom did not suffer a new injury. The WCAT decision was based on the position that Mr. Messom experienced a "recurrence" of his 1988 injury and, for some reason, this removes him from the scope of section 227 and entitles him to an EERB. With respect, that determination is not supported by any reasonable interpretation of section 227 of the *Act* or *Ellsworth*.

[80] WCAT's decision is also inconsistent with at least three other WCAT decisions (and two subsequent decisions on Leave of this Court) on this very point.

[81] In *Hines* (WCAT #2014-332-AD), the Chief Appeal Commissioner (Louanne Labelle) refused to award an EERB on the basis of section 227 and this Court's decision in *Ellsworth*, noting that the worker:

> (a) suffered a workplace injury before March 23, 1990;
>
> (b) was receiving compensation for a permanent partial disability as of February 1, 1996;
>
> (c) did not suffer a workplace injury after March 23, 1990; and
>
> (d) had his permanent-impairment rating adjusted in response to a change in his condition over time, as provided by subsection 227(3) and section 71 of the *Workers' Compensation Act*.

[82] In addition, the Chief Appeal Commissioner expressly rejected the worker's argument on "recurrence", noting that the key focus is on the date of the injury in question. On this point, WCAT wrote:

> The Worker's representative refers to the broad definition of recurrence as found in Board Policy 1.3.8. Although the definition includes an "increase in symptoms" resulting from a compensable injury, it does not trigger new *Act* benefits. The fact remains that the Worker did not suffer a new injury to bring him into the new *Act*, nor a new permanent disability for which he was not receiving an award at February 1, 1996. His injury did not re-occur but continued to deteriorate.
>
> …
>
> The Ellsworth matter did not turn on the finding of a recurrence but on the finding of an injury under s. 10(1) triggering new *Act* benefits, which is not the case here. Similarly, this matter would not turn on a finding of recurrence as the only injury is the 1978 injury for which the Worker was receiving a permanent partial disability award as of February 1, 1996.
>
> [Emphasis added]

[83] Likewise in *MacKinnon* (WCAT #2013-488-AD), a different Appeal Commissioner (Sandy MacIntosh) also refused to award an EERB where the only workplace injury occurred before March 23, 1990.

[84] In both cases, the worker advanced the argument on their leave applications to this Court that a "recurrence" is sufficient to remove a worker from the parameters of section 227, even in the absence of a post-March 23, 1990 "personal

injury by accident arising out of and in the course of employment." (The same argument which was accepted by WCAT in this case).

[85] In *Hines*, the worker specifically argued before this Court that a mere "recurrence" of a pre-*Hayden* injury is an "injury" and is therefore enough to escape section 227. In his factum on leave, the worker argued:

> The Chief Appeal Commissioner should have found that Mr. Hines suffered a recurrence no earlier than 2006. With this finding in hand, the conclusion to draw would have been that Mr. Hines' request for compensation, including an EERB starting in February 2012 when his TERB ended, was in connection with the recurrence, not the November 1978 injury, thus taking his request outside s. 227.
> …

[86] In *MacKinnon*, the worker advanced the same argument about the effect of a "recurrence" in the absence of a post-*Hayden* injury. In his factum, the worker summarized his argument as follows:

> Mr. MacKinnon suffered a recurrence – a return of or increase in symptoms – of the 1987 injury which forced him to leave work in September 2012. The WCB accepted that Mr. MacKinnon's loss of earnings at that time was related to the 1987 injury. For similar reasons as in *Ellsworth*, s. 227 does not apply to Mr. MacKinnon and he is eligible for an EERB to compensate him for his loss of earnings related to the recurrence of his injury.

(Note: The excerpts from the leave application facta are taken from the Board's factum on this appeal).

[87] On December 1, 2015, this Court (per Fichaud, Hamilton and Bryson JJ.A.) dismissed the Applications for Leave to Appeal in both *Hines* and *MacKinnon*. Although reasons were not provided for the refusal to grant leave to appeal, this Court would have had to conclude that there is no arguable issue on this point.

[88] Finally, in WCAT #2015-522-AD, the Appeal Commissioner, Alison Hickey, expressly disagreed with the approach taken by WCAT in this case. She wrote:

> With respect, I do not accept the Tribunal's reasoning in *Decision 2013-54-AD & 2014-696* (August 28, 2015, NSWCAT), 2015 CanLII 57056, the decision on appeal in *Messom*. In that decision a worker with a pre-March 23, 1990 injury was awarded an EERB. The decision is inconsistent with the weight of Tribunal jurisprudence on this issue. I note that leave to appeal was granted to the Board in

> relation to the Tribunal's finding. Further, leave to appeal was denied on *Decision 2014-332-AD* (January 9, 2015, NSWCAT), 2015 CanLII 423, *infra*, a case with facts similar to those before me. I am not prepared to hold the issue of EERB entitlement in abeyance waiting for a decision in *Messom*. It is appropriate for me to decide all issues before me on the basis of the law as it presently exists. No bifurcation of the appeal will be granted.

[89] She went on to find the worker was not entitled to an EERB.

Conclusion

[90] For all of these reasons, I find WCAT's decision does not follow an intelligible line of reasoning, and its conclusion falls beyond the range of possible, acceptable outcomes. I would allow the Board's appeal.

Farrar, J.A.

Concurred in:

MacDonald, C.J.N.S.

Scanlan, J.A.