NOVA SCOTIA COURT OF APPEAL

Citation: *Titus v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2024 NSCA 39

Date: 20240327
Docket: CA 515947
Registry: Halifax

Between:

Luke Titus

Appellant

v.

Nova Scotia Workers' Compensation Appeals Tribunal, Workers' Compensation Board of Nova Scotia,
Attorney General for the Province of Nova Scotia, Halifax Port Authority, and Atlantic Pilotage Authority

Respondents

Judge:	The Honourable Justice David P. S. Farrar
Appeal Heard:	January 24, 2024, in Halifax, Nova Scotia
Subject:	Sections 73 and 84 of the *Workers' Compensation Act* – Extended earnings replacement benefit review – Interpretation of the *Act*
Summary:	The Workers' Compensation Appeals Tribunal reduced the appellant's Extended Earnings Replacement Benefit (EERB) as a result of his failure to mitigate his damages pursuant to s. 84 of the *Workers' Compensation Act* by not accepting a job offered by the Halifax Port Authority. Mr. Titus argued that the 36-month review and the subsequent 24-month review mandated by s. 73 had already taken place and therefore the Board could not reduce his EERB. He sought leave to appeal and leave was granted.
Issues:	Did the Tribunal err in law by finding s. 73 of the *Workers' Compensation Act* did not prevent the reduction of the

appellant's extended earnings replacement benefit by application of s. 84 of the *Act*?

Result: The final determination of the appellant's EERB was still under appeal at the time the 36-month review and subsequent 24-month review took place. WCAT committed no error in finding that while the appeals were outstanding the EERB was a live issue and could be reduced as a result of the appellant's failure to accept employment which was found to have been suitable and reasonably available to him.
Appeal dismissed without costs to any party.

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Nova Scotia Workers' Compensation Appeals Tribunal, Workers' Compensation Board of Nova Scotia,
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Respondents

Judges:	Farrar, Bryson and Van den Eynden JJ.A.
Appeal Heard:	January 24, 2024, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Farrar J.A.; Bryson and Van den Eynden JJ.A. concurring
Counsel:	Danielle Morrison and Starla Sheppard, for the appellant Kyle MacIsaac and Julian Dickinson, for the respondent Halifax Port Authority Amy Bradbury and André Goguen, for the respondent Atlantic Pilotage Authority Paula Arab, K.C. and Liesl Newman, for the respondent Workers' Compensation Board (watching brief only) Alison Hickey, for the respondent Workers' Compensation Board Appeals Tribunal (watching brief only) Edward Gores, K.C. for the respondent Attorney General for the Province of Nova Scotia (not participating)

Reasons for judgment:

Introduction

[1] On June 27, 2022, the appellant, Luke Titus, filed a Notice of Application for Leave to Appeal a May 20, 2022 Workers' Compensation Appeals Tribunal decision.[1]

[2] In the WCAT decision, Appeal Commissioner Richard Dipo P. Ola found Mr. Titus breached s. 84 of the *Workers' Compensation Act* by failing to mitigate his loss of earnings resulting from two work-related accidents. WCAT found his benefits should be reduced as a result of the failure to mitigate. On June 13, 2023, this Court granted leave to appeal on the following ground:

> Did the Tribunal err in law by finding s. 73 of the *Workers' Compensation Act* did not prevent the reduction of the appellant's extended earnings replacement benefit (EERB) by application of s. 84 of the *Act*?

[3] Section 73 of the *Act* and WCB policy provides for a review of an award of an EERB at 36 months and at 24 months following the 36-month review. The issue on appeal is whether the EERB can be reduced as a result of the failure to mitigate after the 36-month and subsequent 24-month review have taken place.

[4] For the reasons that follow, I would dismiss the appeal without costs to any party.

Background

[5] This claim has a long history. In order to address the issue on appeal it is necessary to review the background in some detail.

[6] On June 16, 1998, Mr. Titus slipped and fell while working as a summer student with the Halifax Port Authority (HPA). On August 31, 1998, Mr. Titus filed an accident report with the Workers' Compensation Board. He continued working for the remainder of the summer.

[7] In October 1998, he was diagnosed with a lumbar sprain.

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[1] WCAT # 2020-501-AD, 2021-01-AD, and 2021-05-AD.

[8] On December 3, 1998, a claims adjudicator approved Temporary Earnings Replacement Benefits (TERB) to December 18, 1998.

[9] In a February 22, 1999 reconsideration decision, the claims adjudicator declined to award additional TERB to Mr. Titus nor was medical aid payable.

[10] Mr. Titus appealed the reconsideration decision. On March 31, 1999, a Hearing Officer denied his appeal. Mr. Titus then appealed the Hearing Officer's decision to WCAT.

[11] On October 5, 1999, WCAT issued a decision denying Mr. Titus TERB beyond December 18, 1999 but awarding medical aid.[2]

[12] On September 20, 2000, Mr. Titus slipped and fell while working with the Atlantic Pilotage Authority (APA). On October 18, 2000, the APA filed an accident report with the WCB.

[13] In June 2004, Mr. Titus requested a review of his 1998 HPA claim. As a result of the review, effective June 28, 2006, Mr. Titus began to receive TERB.

[14] On June 14, 2011, Mr. Titus was awarded a Permanent Medical Impairment (PMI) rating of 7.5 percent.

[15] On June 20, 2011, a case manager found that Mr. Titus was entitled to an EERB in the amount of $1,289.41 per month effective June 10, 2011.

[16] The decisions awarding Mr. Titus a PMI, TERB, and EERB were appealed to a Hearing Officer by HPA and APA. Mr. Titus appealed the wage rate used to calculate the EERB.

[17] On October 23, 2013, a Hearing Officer issued a decision which considered three issues:

1. Mr. Titus' entitlement to TERB and EERB;
2. Which claim/employer the EERB and TERB should be assigned to; and
3. What the appropriate long-term rate should be in calculating the appellant's EERB.

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[2] 99-1176-AD.

[18] In the decision, the Hearing Officer found Mr. Titus was entitled to TERB and EERB and his EERB benefits were only associated with his first injury while employed with HPA. The Hearing Officer referred the issue of the rate to be used in calculating EERB back to the Case Manager. The Hearing Officer was not prepared to finally determine the amount of the EERB finding:

> […] given the outstanding issue with respect to the Worker's rate used to calculate his benefits, I am not prepared to lock in the Worker's EERB as this issue must be considered prior to that determination.

[19] On November 21, 2013, HPA appealed the October 23, 2013 Hearing Officer's decision to WCAT. It questioned Mr. Titus' entitlement to TERB and EERB, as well as its responsibility for the claim.

[20] On February 11, 2015, the Case Manager determined the appropriate EERB rate for Mr. Titus. This decision was appealed by Mr. Titus to a Hearing Officer. In an October 30, 2015 decision, the Hearing Officer determined the EERB rate for Mr. Titus was appropriately calculated. Mr. Titus appealed the Hearing Officer's decision to WCAT.

[21] On April 11, 2016, HPA wrote to Mr. Titus and made an offer of accommodated employment in the position of Visitor Services for the upcoming cruise season from June 1, 2016 to November 1, 2016. HPA stated in the letter it was "prepared to work with [Mr. Titus] to devise any accommodation necessary for [him] to be able to work in this role". Mr. Titus did not respond to this offer.

[22] On May 24, 2016, HPA sent a second letter to Mr. Titus by registered mail following up on the April 11, 2016 letter. On May 27, 2016, Mr. Titus spoke with his Case Manager, and they discussed the offer of employment. The Case Manager advised Mr. Titus that he should discuss the job offer with his doctor and his lawyer, and the job offer "deserved a response" from him. Once again, Mr. Titus did not respond to HPA about the job offer.

[23] On June 6, 2016, the WCB conducted the 36-month review of Mr. Titus' EERB under s. 73 of the *Act*. There was no change to the EERB. At the time of this review, Mr. Titus' appeal and HPA's appeal of the award relating to the EERB had not been heard.

[24] On August 3, 2016, HPA wrote to Mr. Titus' Case Manager regarding the offer of employment made in April 2016 and again in May 2016. HPA advised

they received no response from Mr. Titus and indicated Mr. Titus' failure to accept or consider the offer of accommodated employment was contrary to his obligations to mitigate under s. 84 of the *Act*. HPA asked that Mr. Titus' benefits be terminated or his compensation be suspended or reduced pursuant to s. 84(2) of the *Act*.

[25] On February 27, 2018, a hearing was held with respect to HPA's appeal of the award of EERB, the division of responsibility between HPA and APA, and Mr. Titus' appeal with respect to the EERB rate. It is unclear why it took approximately 4.5 years to hear the appeals relating to Mr. Titus' entitlement to EERB. During the course of that hearing, HPA argued Mr. Titus failed to adhere to the obligations to mitigate his earnings loss under s. 84 of the *Act* as a result of his failure to accept the offer of employment made to him by HPA in April 2016.

[26] On June 20, 2018, the WCB completed the 24-month review under s. 73 of the *Act*. Once again, Mr. Titus' EERB remained unchanged. HPA's and Mr. Titus' appeals had been heard by this time, but no decision had been rendered.

[27] On August 10, 2018, WCAT issued its decision with respect to HPA's appeal.[3] In that decision, the Appeal Commissioner found she could not address whether Mr. Titus had breached his obligation under s. 84 of the *Act* because it had not been dealt with by the Hearing Officer in the October 2013 decision. She directed the matter back to the Hearing Officer to respond to the argument of HPA:

> The Hearing Officer did not address whether the Worker had breached his obligations under s. 84 of the *Act* in the October 2013 decision. This was likely because these arguments were not made at that time and the job offer was made subsequent to the decision. None of the decisions which formed the basis for the appeal to the Hearing Officer considered this issue and it was not raised in the Notice of Appeal. Consequently, I do not have jurisdiction to address this issue in my decision.
>
> HPA's Director of Human Resources and Administration wrote to the case manager on August 3, 2016 about the Worker's failure to accept their offer of employment and asked the Board to terminate the Worker's compensation under s. 84 of the *Act*. There does not appear to have been any response to this letter and no decision has been made regarding HPA's request that the Board consider the Worker's obligations under s. 84 of the *Act*. The Board is directed to respond to HPA's request.

[3] 2013-690-AD (Re), 2018 CanLII 78294 (NS WCAT).

[28] The Appeal Commissioner's decision to remit the matter to the Board to consider the HPA's argument Mr. Titus had failed to mitigate his damages was not appealed.

[29] A second WCAT decision dated August 21, 2018,[4] considered Mr. Titus' appeal of the October 30, 2015 Hearing Officer's decision in relation to the rate used to calculate his EERB. The appeal was allowed and a higher rate was found to be appropriate.

[30] Mr. Titus filed an Application for Leave to Appeal to this Court with respect to the August 21, 2018 WCAT decision. On August 31, 2019, the leave application was dismissed on a motion of the Registrar of the Court of Appeal for failure to perfect it.

[31] On April 7, 2020, a Case Manager issued a decision finding Mr. Titus did not meet his obligations to mitigate his wage loss pursuant to the provisions of the *Act*. She concluded the annual income associated with the job was $12,923.00 which would be used in the calculation of Mr. Titus' EERB. She also based the EERB on the higher rate as a result of WCAT's August 21, 2018 decision.

[32] On April 22, 2020, Mr. Titus appealed the Case Manager's decision to a Hearing Officer. On December 10, 2020, a Hearing Officer issued a decision finding Mr. Titus had violated both ss. 84 and 113 (duty to cooperate in rehabilitation efforts), but that it did not justify terminating or suspending his benefits. The Hearing Officer also found the issue of Mr. Titus' EERB was still "live" and his post-accident employment wages needed to be considered in calculating his EERB:

> While the offer came well after the timing of the initial EERB decision, that original decision was still "live" as it had been appealed to WCAT and therefore was not a final decision respecting the original wage loss determination and an EERB needs to consider post-accident employment wages which this offer would have provided.

[33] Mr. Titus, HPA, and APA all appealed the Hearing Officer's decision to WCAT. HPA and APA appealed from the conclusion Mr. Titus' violation of s. 84 should not result in a suspension or termination of benefits otherwise payable. Mr. Titus appealed the decision that he violated s. 84 of the *Act*. He argued the information pertaining to the job offer made to him was irrelevant and should not

[4] WCAT #2015-655-AD.

be considered in a new EERB review. In the alternative, he submitted that the offer of employment was not suitable nor reasonably available to him.

[34] In its May 20, 2022 decision, WCAT allowed the appeal of HPA and APA and dismissed Mr. Titus' appeal. It is from that decision Mr. Titus appeals.

[35] Leave was not granted on the issue of whether the employment offer was not suitable nor reasonably available for Mr. Titus. Therefore, that issue is not before us.

[36] The only issue is whether WCAT erred in its interpretation of ss. 73 and 84 of the *Act*.

Standard of Review

[37] The standard of review is now well-settled. This appeal involves the interpretation of the *Act*. The standard of review is correctness.[5]

Analysis

Did the Tribunal err in law by finding s. 73 of the *Workers' Compensation Act* did not prevent the reduction of the appellant's extended earnings replacement benefit by application of s. 84 of the *Act*?

[38] Section 73 of the *Act* provides for the review of an EERB once at 36 months and a subsequent review 24 months later:

> **Review of extended earnings-replacement benefit**
>
> 73 (1) Subject to subsection (2), the Board may review and adjust its determination of the amount of compensation payable to a worker as an extended earnings-replacement benefit
>
> (a) once, commencing in the thirty-sixth month after the date of the initial award of the benefit;
>
> (b) once, commencing in the twenty-fourth month after a review pursuant to clause (a) is completed, if at the time the review pursuant to clause (a) is completed the Board is of the opinion that a further review is necessary;

[5] *Tufts v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2023 NSCA 50.

(c) after a review of the permanent-impairment rating of the worker pursuant to subsection 71(1) results in an adjustment of the permanent-impairment rating of at least ten percentage points according to the schedule established pursuant to Section 34; and

(d) at any time, where the extended earnings-replacement benefit was based on a misrepresentation of fact.

(2) The Board shall not vary the amount of compensation payable as an extended earnings-replacement benefit unless the amount of the variation would be equal to at least ten per cent of the amount of compensation being paid at the time of review.

[…]

(3) An award of an extended earnings-replacement benefit is final, subject to subsection (1), and shall not be further reviewed or adjusted.

[39] Section 84 of the *Act* allows the WCB to suspend, reduce or terminate any compensation payable to a worker if the worker fails to mitigate their damages. It provides:

Duty to mitigate and co-operate

84 (1) Every worker shall

(a) take all reasonable steps to reduce or eliminate any permanent impairment and loss of earnings resulting from an injury;

(b) seek out and co-operate in any medical aid or treatment that, in the opinion of the Board, promotes the worker's recovery;

(c) take all reasonable steps to provide to the Board full and accurate information on any matter relevant to a claim for compensation; and

(d) notify the Board immediately of any change in circumstances that affects or may affect the worker's initial or continuing entitlement to compensation.

(2) The Board may suspend, reduce or terminate any compensation otherwise payable to a worker pursuant to this Part where the worker fails to comply with subsection (1).

[40] Mr. Titus' position on this appeal is relatively straightforward. He says that WCAT erred in failing to apply this Court's decision in *Nova Scotia (Workers' Compensation Board) v. Rhodenizer*[6]. In *Rhodenizer*, this Court considered s. 73 of the *Act* in conjunction with s. 185.

[41] Section 185 sets out the jurisdiction and powers of the WCB to reconsider any decision. It is specifically made subject to s. 73 of the *Act*:

> **Jurisdiction and powers of Board**
>
> **185** **(1)** Subject to the rights of appeal provided in this Act, the Board has exclusive jurisdiction to inquire into, hear and determine all questions of fact and law arising pursuant to this Part, and any decision, order or ruling of the Board on the question is final and conclusive and is not subject to appeal, review or challenge in any court.
>
> **(2)** ***Notwithstanding subsection (1) but subject to Sections 71 to 73, the Board may***
>
> (a) ***reconsider any decision, order or ruling made by it***; and
>
> (b) confirm, vary or reverse the decision, order or ruling.
>
> [Emphasis added.]

[42] Section 183 of the *Act* allows the Board to adopt policies to guide it in its application of the *Act* or the *Regulations*. It has done so with respect to s. 73 in Policy 3.4.2R2. The applicable provisions provide:

> 1. Extended Earnings-Replacement Benefits (EERBs) will be reviewed 36 months after the date the EERB was determined.
>
> […]
>
> 3. An EERB may be reviewed 24 months after the 36-month review, if it is determined to be necessary by the Board at the time of the 36 month review. As a general guideline, an EERB will be reviewed a second time if the worker has not established a consistent earnings pattern during the first 36 months the worker was in receipt of the EERB or the worker has shown significant deterioration in their compensable condition. The Board may choose not to set another review date if the information on the file

[6] 2015 NSCA 15.

> indicates the worker's employment pattern, although casual or seasonal, is still an established pattern.[7]

[43] Mr. Titus argues *Rhodenizer* decided s. 73 was a complete code for reviewing EERB and, because the 36 month and subsequent 24-month review occurred before WCAT's decision, s. 73 would prevent a review of Mr. Titus' EERB. After referring to s. 73, he puts it this way in his factum:

> 79. These Sections were considered by this Court in *Rhodenizer*, *supra*. This Court found that Sections 71 to 73 were a complete code, and the intention of Section 73 was to support finality and limit the review of EERB. Review was permitted at 36 months, a further 24 months, in cases of misrepresentation, or as a result of a change of more than 10% in impairment rating. New evidence did not trigger a review of EERB.
>
> […]
>
> 81. The Appeal Commissioner's decision in this case was a decision on "new evidence." The PORT job offer, and Mr. Titus's lack of response, was new evidence which was used to reassess whether Mr. Titus could earn an income. It was not presented that way in the Decision, but the evidence which supported the Section 84 determination related to a time five years after the award of EERB.

[44] Although I do not disagree with Mr. Titus' characterization of this Court's decision in *Rhodenizer*, I disagree with the characterization of the HPA job offer as "new evidence" as that term was being considered in *Rhodenizer*. *Rhodenizer* is distinguishable from Mr. Titus' situation. In *Rhodenizer*, Mr. Rhodenizer was seeking to introduce new evidence under s. 185 to change the original amount awarded for his EERB. To highlight the differences between *Rhodenizer* and this case, I will review the facts in *Rhodenizer*.

[45] On February 18, 2009, Mr. Rhodenizer was awarded an EERB. He appealed the determination of the amount of his EERB to a Hearing Officer. On June 23, 2009, the Hearing Officer dismissed his appeal.

[46] Mr. Rhodenizer then appealed the Hearing Officer's decision to WCAT. On October 15, 2009, WCAT dismissed Mr. Rhodenizer's appeal. As a result, the amount of Mr. Rhodenizer's EERB became a final decision on February 9, 2009.

[47] At the 36-month review, Mr. Rhodenizer's EERB was reduced as a result of him having received disability benefits under the Canada Pension Plan.

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[7] Policy 3.4.2R1 which was under consideration in *Rhodenizer* was replaced by Policy 3.4.2R2 effective December 16, 2021. However, the provisions cited herein are identical in both policies.

[48] Mr. Rhodenizer appealed that decision to WCAT and presented evidence at the hearing that he was not capable of working as a customer service representative as found by the WCB. WCAT agreed and ordered the WCB to recalculate his EERB without any deemed earnings. It also directed the WCB to consider whether the evidence presented at the hearing might be considered new evidence so as to permit a review of consideration of the original award of EERB on February 18, 2009.

[49] The WCB recalculated the EERB effective as of the date of the 36-month review. It did not change the original February 18, 2009 decision.

[50] Mr. Rhodenizer appealed that decision all the way to WCAT seeking to have the new evidence applied to the original award of EERB. In a decision dated February 27, 2014,[8] WCAT found that the review provisions in s. 185 of the *Act* were broad enough to permit reconsideration of an EERB at any time and was not limited by the provisions of s. 73. Put another way, WCAT found the WCB could review an EERB at any time on the presentation of new evidence.

[51] The WCB appealed WCAT's decision finding a review under s. 185 was not subject to s. 73. This Court agreed with the WCB and found s. 73 was a complete code for reconsideration of EERB awards and the awards were not subject to, potentially, multiple reviews on the presentation of new evidence under s. 185 of the *Act*.

[52] *Rhodenizer* is distinguishable for the following reasons:

- On the 36-month review, Mr. Rhodenizer had a final determination of his EERB which was not under appeal. At the time of the 36-month review in this case, Mr. Titus and HPA both had appeals outstanding with respect to the award and amount of his EERB. Both of these appeals would be moot if Mr. Titus' interpretation of the interaction between ss. 84 and 73 was accepted.
- On the 24-month review after the 36-month review, the appeals had been heard but a decision had not yet been rendered. Again, if we were to accept Mr. Titus' interpretation, the 24-month review, at that time, would oust the jurisdiction of WCAT to decide the appeals and render them moot.

[8] 2013-377-AD (Re), 2014 CanLII 8053 (NS WCAT).

- The HPA job offer is not new evidence as that term was used in *Rhodenizer*. The evidence of the offer of employment to Mr. Titus existed prior to the June 6, 2016 36-month review. It was a live issue before WCAT on February 27, 2018, and there was nothing precluding WCAT from remitting the matter back to the WCB to address the mitigation issue. Nor was there any impediment to WCAT, on Mr. Titus' appeal or the APA or HPA appeals, considering that evidence.

[53] Section 246(1) allows WCAT to consider additional evidence presented by the parties on an appeal:

> **Decision on appeal**
>
> **246** **(1)** The Appeals Tribunal shall decide an appeal according to the provisions of this Act, the regulations and the policies of the Board, and
>
> (a) documentary evidence previously submitted to or collected by the Board;
>
> (b) ***subject to Section 251, any additional evidence the participants present***;
>
> (c) the decision under appeal;
>
> (d) the submissions of the participants; and
>
> (e) ***any other evidence the Appeals Tribunal may request or obtain***.
>
> [Emphasis added.]

[54] The evidence of the job offer was presented to WCAT at the February 27, 2018 hearing. There was no suggestion at that time the evidence was inadmissible, irrelevant or for any other reason could not have been considered by WCAT.

[55] As was done in this case, s. 251 of the *Act* gives WCAT the power to refer any matter connected to an appeal to the Hearing Officer who decided the matter in issue on the appeal if, in the opinion of the Appeal Commissioner, the quality or nature of new or additional evidence merits the referral:

> **Referral to hearing officer**
>
> **251** **(1)** The Appeals Tribunal may, at any point in the hearing of an appeal, refer any matter connected with the appeal to

> (a) the hearing officer who decided the matter on appeal to the Appeals Tribunal; or
>
> (b) where the hearing officer who decided the matter on appeal to the Appeals Tribunal cannot for any reason hear the appeal, another hearing officer,
>
> for reconsideration where, in the opinion of the presiding appeal commissioner, the quantity or nature of new or additional evidence or the disposition of the appeal merits the referral.

[56] As noted earlier, Mr. Titus did not appeal the decision of WCAT remitting the issue of mitigation to the Hearing Officer on August 10, 2018.

[57] I agree with WCAT's decision that found Mr. Titus' entitlement to EERB was a live issue since it was first awarded and when the matter was remitted to the WCB it was deciding the matter for the first time:

> On page 2 of his rebuttal submissions dated May 6, 2022, Employer no 1 Counsel submits that from the June 20, 2011 decision, which first awarded the Worker an entitlement to EERB until the February 27, 2018 WCAT decision, ***the Worker's EERB entitlement was under appeal and was thus a live issue, not a final decision***.
>
> Employer no 2 Counsel asserts, in page 2 of her rebuttal submissions, that the Hearing Officer decision under appeal pre-dated the offer of accommodated employment that was made by the Employer no 1 in April/May 2016. ***Thus, the issue under consideration by the Case Manager at the time was not a reconsideration based on new evidence under section 185 (2), but rather was a consideration for the first time whether section 84 had been violated. I agree***.
>
> [Emphasis added.]

[58] I also agree with WCAT's finding that if Mr. Titus disagreed with WCAT remitting the matter to the Board, the proper time to raise the issue was after the August 2018 decision. Mr. Titus did not appeal the decision, and he cannot now argue that remitting the matter to the Board for reconsideration was impermissible:

> Employer no 2 Counsel further asserts that if the Worker's position is that the Tribunal in *Decision 2013-690-AD* (August 10, 2018 NS WCAT) was directing reconsideration of the EERB benefit in the 2018 WCAT decision, and this was inappropriate because of the restrictions by section 73, then the proper time to raise the issue was when the WCAT decision was issued in August 2018. However, the Worker did not appeal that decision and cannot now argue that sending this issue to the Board for determination is impermissible. I agree.

[59] To suggest, as Mr. Titus does, that the 36-month review and the subsequent 24-month review foreclosed WCAT's jurisdiction to decide the matter which remained under appeal would lead to an absurdity. It would render the appeal provisions in the *Act* and WCAT's ability to adjudicate an appeal subordinate to the 36 and 24-month reviews. There is nothing in the *Act* which would support that interpretation.

[60] Professor Ruth Sullivan in *Sullivan on the Construction of Statutes*,[9] refers to the presumption against absurdity when considering statutory interpretation:

> Interpretation involves the application of legislation to facts in ways that affects the well-being of individuals and communities for better or worse. Not surprisingly the courts are interested in knowing what the consequences will be in judging whether they are acceptable. Consequences judged to be good are presumed to be intended and generally are regarded as part of the legislative purposes. Consequences judged to be contrary to accepted norms of justice or reasonableness are labelled absurd and are presumed to have been unintended.[10]
>
> […]
>
> The court's jurisdiction to avoid absurd results parallels and complements its jurisdiction to promote legislative purpose. Whereas purposive analysis justifies the preference for interpretations that lead to good consequences, which are presumed to be intended, avoiding absurdity justifies the rejection of interpretations that lead to bad consequences which are presumed not to be intended.[11]

[61] The only logical interpretation is the s. 73 reviews must occur after a final determination of the EERB. Any other interpretation would lead to the anomalies I have discussed above.

[62] I also refer to Policy 3.4.2R2 (¶41 above) which provides an EERB will be reviewed "36 months after the date the EERB was determined". A purposeful interpretation requires the reviews take place after the EERB has been finally determined and is not the subject of an appeal.

[63] A s. 73 review would be meaningless if it were to take place while there were outstanding appeals relating to the original EERB determination. To hold otherwise would be potentially prejudicial to workers. In this case, Mr. Titus was successful on his appeal to have the rate increased for the calculation of his EERB.

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[9] 5th ed (Markham: LexisNexis, 2008).
[10] Sullivan at p. 299.
[11] Sullivan at p. 317.

The decision to increase the rate was made after the 36-month and subsequent 24-month reviews were completed. If his interpretation was accepted his EERB rate could not have been increased.

[64] For these reasons, I would dismiss Mr. Titus' appeal and find the reviews in s. 73 should only occur once the EERB has been finally determined.

[65] The parties also made submissions to us on whether s. 84 would apply, even after the final determination of the EERB and the 36-month and 24-month reviews have been completed. I decline to address that issue as it does not arise on the facts of this particular case.

Farrar J.A.

Concurred in:

Bryson J.A.

Van den Eynden J.A.