NOVA SCOTIA COURT OF APPEAL

Citation: ***Ellsworth v. Nova Scotia (Workers' Compensation Appeals Tribunal)***, 2013 NSCA 131

Date: 20131119
Docket: CA 395440
Registry: Halifax

Between:

Michael Ellsworth

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 Surrette Battery Co. Ltd.

Respondents

Judges:	Beveridge, Farrar and Bryson, JJ.A.
Appeal Heard:	June 18, 2013, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Farrar, J.A.; Beveridge and Bryson, JJ.A. concurring.
Counsel:	Kenneth H. LeBlanc, for the appellant Alexander MacIntosh, for the respondent Nova Scotia Workers' Compensation Appeals Tribunal Paula Arab and Madeleine F. Hearns, for the respondent Workers' Compensation Board of Nova Scotia Edward A. Gores, Q.C., for the respondent Attorney General of Nova Scotia, not participating

Reasons for judgment:

[1] Mr. Ellsworth was a shipper with Surrette Battery Co. Ltd. He sustained several compensable injuries over the years. Relevant to this appeal are his injuries on December 23, 1987; February 2, 1995; and September 11, 2006. Since his 2006 injury Mr. Ellsworth has been unable to return to work.

[2] The Nova Scotia Workers' Compensation Appeals Tribunal ("WCAT"), in a decision dated February 24, 2011 (WCAT #2010-632-AD), found that Mr. Ellsworth's injury of September 11, 2006, was a recurrence of his December 23, 1987, injury.

[3] Mr. Ellsworth sought an extended earnings-replacement benefit ("EERB") for his lost income resulting from his September 11, 2006 injury. In a decision dated May 4, 2012 (WCAT #2011-731-AD), WCAT found that because the injury was a recurrence of his December 23, 1987 injury, Mr. Ellsworth was not entitled to an EERB. WCAT interpreted s. 227 of the **Workers' Compensation Act**, S.N.S. 1994-95, c. 10 (the "**Act**") as limiting his compensation to a permanent impairment benefit with the amount of his compensation calculated in accordance with the law as it existed at the time of his 1987 injury.

[4] The timing of the injuries and the interpretation of s. 227 of the **Act** are central to this appeal.

[5] Mr. Ellsworth appeals to this Court arguing WCAT was unreasonable in its interpretation of s. 227 of the **Act**.

[6] For the reasons that follow I would allow the appeal, set aside the decision of WCAT and remit the matter to the Workers' Compensation Board for the proper calculation of Mr. Ellsworth's benefits.

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

Background

[8] The WCAT decision under appeal provides a complete history of the worker's claim and the proceedings relating to it. I will summarize the salient points.

[9] On December 23, 1987, Mr. Ellsworth injured his back while pushing batteries along a conveyor line . (WCAT decision refers to this injury as occurring on December 22, 1987, however, it is apparent from the record that the injury occurred on December 23, 1987. For the purposes of this decision I will be referring to the date as December 23, 1987.) He was off work between December 23, 1987, and February 1, 1988, when he returned to work. The Board closed Mr. Ellsworth's claim on February 23, 1988 stating:

> The claim may now be closed February 1st, 1988. That is the date the employer advises the client did return to the job.

[10] With no permanent disability award, the Board's responsibility for the 1987 accident ceased as of February 1, 1988.

[11] A Review Officer, as a result of another injury suffered by Mr. Ellsworth, reviewed all of his claims in 1995. On August 8, 1995, the Review Officer commented on Mr. Ellsworth's 1987 injury as follows:

> 7. This claim was paid temporary total disability benefits from December 24th, 1987 to February 1st, 1988. At claim closure, the medical on file was reviewed by the Board's Medical Advisor who indicated that there was no evidence of any permanent partial disability arising out of and in the course of the worker's employment on December 23, 1987. (My emphasis)

[12] On February 2, 1995, Mr. Ellsworth again injured his back, this time while lifting a battery off of a skid. He was off work for approximately 10 months.

[13] The last communication on that claim was a letter from Mr. Ellsworth's claim manager dated November 23, 1995, to his then solicitor, advising him that no further temporary disability benefits would be approved at that time.

[14] Again referring back to the same Review Officer's decision of August 8, 1995, he had this to say about the 1995 injury and its relationship to the 1987 injury:

> ... I cannot reasonably associate these symptoms as being related to the 1987 claim when there was no nerve damage, no structural damage, no muscle damage and no lumbar disc damage at the time of the injury in 1987. As a result, I am unable to draw a causal relationship between the Worker's low back symptoms in 1995 with the low back strain of 1987 as per s. 9(1) of the *Workers' Compensation Act*. (My emphasis)

[15] As of August 8, 1995, Mr. Ellsworth's injury of December 23, 1987 was reviewed by the Board on two occasions and it was determined there was no entitlement to a permanent disability award.

[16] Mr. Ellsworth did not miss any time from work between 1997 and 2006 for which he sought workers' compensation benefits.

[17] That brings us to the injury which occurred on September 11, 2006. Mr. Ellsworth injured his back while rolling batteries and putting them on a wooden pallet. Mr. Ellsworth was put off work as a result of that injury. He has not returned to work since.

[18] Mr. Ellsworth received temporary earnings-replacement benefits ("TERB") for the 2006 injury from September, 2006 to April 18, 2008.

[19] A WCB Case Manager originally found the September 11, 2006, injury was a new injury and not a recurrence of any of Mr. Ellsworth's previous back injuries. In light of finding the 2006 incident to be a "new injury" Mr. Ellsworth received a full EERB effective April 18, 2008, the date his temporary benefits ended.

[20] Surrette Battery appealed this decision to a Hearing Officer, arguing that the incident on September 6, 2006, was not a new injury, but rather a recurrence of the appellant's December 1987 injury. The Hearing Officer agreed.

[21] I pause here to comment that much has been made about whether the September, 2006, injury was a recurrence of Mr. Ellsworth's injury of 1987 or whether it was a "new injury". In my view, whether it is a recurrence or a new

injury is of no consequence. It only became an issue as a result of the Board, and WCAT's erroneous approach to the interpretation of s. 227 of the **Act**. I will have more to say about this later.

[22] Mr. Ellsworth appealed the Hearing Officer's decision to WCAT. That appeal was denied on February 24, 2011. Leave to appeal from that decision was denied by Order of this Court dated January 19, 2012.

[23] Once it was determined that the 2006 injury was a recurrence and not a new injury, the 2006 claim was "merged" (using the Board's terminology) with the December, 1987 claim. As a result, the Board concluded Mr. Ellsworth was not entitled to an EERB, as that benefit was not available on December 23, 1987 and only became available with amendments to the **Act** on February 1, 1996.

[24] The Board went on to award Mr. Ellsworth a permanent medical impairment ("PMI") of 10% effective February 1, 1988, the date his temporary benefits due to the 1987 injury ended and a 3% pain-related impairment ("PRI") effective that same date.

[25] Mr. Ellsworth appealed that decision to WCAT. His appeal was dismissed by decision dated May 4, 2012.

[26] Leave to appeal to this Court was granted on January 24, 2013.

Issues

[27] Leave to appeal was granted on the following issues:

1. Did WCAT err in law in concluding that s. 227 of the **Act** precluded an EERB because the injury suffered by the Worker on September 11, 2006 was a recurrence of a pre-March 23, 1990 injury?
2. Did WCAT err in law in determining that the Worker sustained a PMI effective February 1, 1988?

Standard of Review

[28] The parties agree that the grounds of appeal involve WCAT interpreting its home statute and applying it to the facts before it. It does not involve questions of

law that are of central importance to the legal system outside its expertise (**Halifax (Regional Municipality) v. Hoelke**, 2011 NSCA 96, ¶11-18. Therefore, the standard of review is reasonableness.

[29] The reasonableness standard of review requires a court to read a tribunal's reasons together with the outcome to determine whether the result falls within a range of possible outcomes (**Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)**, 2011 SCC 62. The questions become, viewed through the lens of deference, do WCAT's reasons allow this Court to understand why it made its decision and do the reasons permit us to determine whether the conclusion is within the range of acceptable outcomes?

Analysis

[30] I will address both grounds of appeal together as they are inter-related.

[31] March 23, 1990 is a critical date in the history of workers' compensation in Nova Scotia. On that date, this Court in **Hayden v. Nova Scotia (Workers' Compensation Appeal Board)** (1990), 96 N.S.R. (2d) 108 determined that the Board should have provided compensation to a worker who suffered a permanent disability on the basis of loss of earning capacity rather than on the basis of a percentage of physical impairment.

[32] Up to that point in time, workers were compensated in a clinical rating system based on a percentage of their physical impairment. For example, if a worker had a 20% physical impairment but was unable to return to work and thus suffered a 100% loss of earning capacity, the compensation awarded would be based on a formula which calculated compensation based on 20% of 75% of the worker's pre-injury gross earnings. Conversely, a worker could have a 20% physical impairment with no loss of income and still receive compensation. The amount awarded had little to do with the actual income lost as a result of the injury.

[33] In **Hayden**, this Court, in very strong language, concluded that this was an error and that compensation ought to be calculated on the loss of earning capacity and not on the level of physical impairment. This would become known in workers' compensation parlance as a wage loss system:

> [15] A study of the **Act** leads to the conclusion that a worker is to be compensated when he or she has lost in whole or in part capacity to earn by reason of personal injury caused by an accident arising out of and in the course of employment in an industry to which the **Act** applies. ...
>
> [26] The **Act** does not refer to the level of physical impairment as the means of determining the amount of compensation to be awarded. The **Act** relates disability to wage loss or impairment of earning capacity not only where there is permanent disability, but also where the disability is temporary. ...

[34] Following this decision, the workers' compensation regime was in a state of transition for six years until new legislation was passed, effective February 1, 1996, to comply with this Court's direction.

[35] In order to transition from the clinical rating system to a new wage loss system, the Board enacted transitional provisions which appear in the **Act** at ss. 226-237. For the purposes of this appeal, s. 227 is most relevant. I will set the provision out later when addressing it directly.

[36] I will start my analysis by reviewing the very basic provisions of the **Act**. Section 10(1) of the **Act** provides:

> **Payment of compensation**
>
> 10 (1) Where, in an 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. (My emphasis)
>
> (2) The compensation payable pursuant to subsection (1) shall be paid out of the Accident Fund.
>
> (3) Where a personal injury is attributable wholly or primarily to the serious and wilful misconduct of the worker, the Board shall not pay compensation to the worker unless the personal injury
>
> (a) results in death or serious and permanent impairment; or
>
> (b) is likely, in the opinion of the Board, to result in serious and permanent impairment.

(4) Where the accident arose out of employment, unless the contrary is shown, it shall be presumed that it occurred in the course of employment, and where the accident occurred in the course of employment, unless the contrary is shown, it shall be presumed that it arose out of the employment.

(5) Where a personal injury by accident referred to in subsection (1) results in loss of earnings or permanent impairment

(a) due in part to the injury and in part to causes other than the injury; or

(b) due to an aggravation, activation or acceleration of a disease or disability existing prior to the injury,

compensation is payable for the proportion of the loss of earnings or permanent impairment that may reasonably be attributed to the injury.

(6) The Board may, by regulation, exclude any type or class of personal injury or occupational disease from the operation of this Part.

(7) The Board may, by regulation, include any type or class of personal injury or occupational disease on terms or conditions, including rates, types and durations of compensation other than those specified in this Part, that the Board may prescribe.

[37] Section 2(a) of the **Act** defines "accident" as follows:

2 In this Act

(a) "accident" includes

(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) disablement, including occupational disease, arising out of and in the course of employment,

but does not include stress other than an acute reaction to a traumatic event;

[38] The fact that Mr. Ellsworth suffered a personal injury by accident in September, 2006, is not in dispute in this proceeding. Indeed, had he not suffered a personal injury by accident, he would not have received a TERB and the income to which he is entitled as a result of that injury would not be in issue in this proceeding.

[39] Why, then, is compensation not being paid to Mr. Ellsworth as directed by s. 10(1)? The answer to that question lies in the Board's and, subsequently, WCAT's characterization of the injury as a "recurrence".

[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."

[41] To paraphrase, using the definition of recur, the Board and WCAT have found that Mr. Ellsworth's injury occurred again after an interval. It is also reasonable to conclude since the Board found it was a personal injury by accident, that the incident on February 11, 2006, triggered the recurrence.

[42] However, for some reason which I cannot discern from a review of the Case Manager's decision and two WCAT decisions in this matter is why the decision-makers felt that the characterization of the injury precluded Mr. Ellsworth from compensation pursuant to Part I of the **Act**.

[43] WCAT, in the decision under review in this appeal, makes the following finding:

> I find it reasonable to infer that this 1987 disc injury, after the acute symptoms subsided, left the disc in a permanently weakened state, rendering it permanently susceptible to re-injury. This inference appears to be consistent with Dr. Alexander's statement and my colleague's analysis as she wrote:
>
> > The evidence of Dr. Alexander satisfies me that what the Worker suffered on September 11, 2006 was a recurrence of the injury he suffered in 1987 ...

> I accept my colleague's conclusion. The injuries suffered by the Worker in 2006 was a recurrence of his injury of 1987: that finding is no longer open to debate.

[44] The Appeal Commissioner continues with, what I consider to be, the problematic part of his decision:

> ...The earlier injury permanently changed the Worker's L4-5 disc; this change constituted a permanent impairment, a permanent weakening of the disc, entitling the Worker to receive a permanent impairment benefit, based on a permanent impairment rating. The Worker's actual history is consistent with Dr. Alexander's general experience. That the Worker suffered many recurrences between 1987 and 2006 which did not result in extended earnings-loss is evidence of good fortune, not evidence that he had not suffered a permanent impairment.
>
> Under the foregoing analysis, the Board was correct to find that the Worker was entitled to a permanent benefit effective as of February 1st, 1988, the date on which his temporary benefits ended. (My emphasis)

The Appeal Commissioner, when referring to the Board, is referring to the Case Worker's decision dated August 2, 2010. In order to understand this portion of the Appeal Commissioner's decision it is necessary to refer back to that decision which shows the fatal flaw in the analysis. The Case Manager in her decision says:

> ...Because the injury in September 11, 2006, is now found to be a recurrence of a December 22nd, 1987, injury a different set of rules apply for the PMI. Therefore, the effective date of the PMI/PRI needed to be determined and what benefits were payable given the accident date is December, 1987 (in accordance with Policy 7.1.1 which states:
>
> Where a worker
>
> a) suffered an injury prior to February 1, 1996; and
>
> b) on February 1, 1996 was receiving, or was entitled to receive, compensation for temporary disability pursuant to Chapter 508 of the Revised Statutes, 1989 as amended (i.e. the "former Act" – the Workers' Compensation Act in force prior to February 1, 1996) the worker will continue, on and after February 1, 1996, to receive compensation calculated in accordance with the former Act.

> 2. The Board shall recalculate the amount of compensation payable to such a worker in accordance with the Worker's Compensation Act, Chapter 10, Acts of 1994-95.

[45] There are a number of problems with the Case Manager's statement:

1. No explanation is given for why, since the accident is described as a recurrence, a different set of rules apply;
2. The accident date has been changed to December, 1987, from September 11, 2006, no explanation is given for why it is changed to that date nor is any statutory authority or other authority cited by the Case Manager for saying the accident date is changed as a result of the categorization of the injury as a recurrence;
3. Although she cites Policy 7.1.1 she does not explain why it is applicable in these circumstances.

[46] The Case Manager then goes on to determine that the worker's PMI would be effective on the last day that temporary earnings-replacement benefits were payable as a result of the December 23, 1987 injury, that being February 1, 1988.

[47] Again, it is difficult to understand the Case Manager's reasoning for reaching this conclusion. Although she references medical reports which were on file, it had previously been conclusively determined in 1988 and, again, referenced in 1995 that there was no evidence of any permanent disability arising out of and in the course of the worker's employment on December 23, 1987. See ¶9-15.

[48] Turning back to the Appeal Commissioner's decision, he accepts the findings of the Case Manager as to the effective date of the PMI without any analysis as to why that should be considered the date of the injury. He then uses that date as the springboard for his interpretation of s. 227 of the **Act** which provides:

> 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.

[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.

[51] The Appeal Commissioner then concludes:

> By their terms ss. 226 and 227 define the compensation payable to a worker who suffered an injury prior to March 23, 1990 and who was receiving, or was entitled to receive compensation in relation to that injury prior to February 1st, 1996. An extended earnings-replacement benefit is not included in the compensation payable. One cannot read into the provision the authorization to pay an EERB simply because it has not been specifically excluded.

[52] In doing so the Appeal Commissioner relies upon this Court's decision in **Lowe v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, [1998] N.S.J. No. 99 (Q.L.). After referring to Mr. Ellsworth's counsel's argument he says:

> ... This reading requires one to accept counsel's argument that the Nova Scotia Court of Appeal in **Lowe v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, [citation omitted] addressed itself exclusively to the facts in **Lowe**, rather than considering more broadly the meaning to give the statutory provisions. This is not borne out by the reading of the very excerpts from that decision which counsel included in his submission at ¶33.

[53] With all due respect to the Appeal Commissioner, the decision in **Lowe** is very much related to the facts of that case. Ms. Lowe suffered three work-related

injuries prior to March 23, 1990. She sought and was refused a permanent disability benefit.

[54] The case was remitted by the Court of Appeal to WCAT as a result of WCAT's failure to apply the proper standard of review. **Lowe** simply confirms that ss. 226 and 227 are a complete code for compensating injuries which occurred prior to March 23, 1990. **Lowe** says absolutely nothing that is applicable to the facts of this case. Ms. Lowe did not suffer an injury after March 23, 1990. It is not a recurrence case. All of her injuries occurred prior to March 23, 1990. It is not clear to me why the Appeal Commissioner draws a parallel between Ms. Lowe and the appellant here. There is none.

[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.

[57] Secondly, even if you get over that hurdle by somehow saying that the injury in September, 2006, was a recurrence of the injury in 1987, the second condition is that on the date Part I of the **Act** came into force, the worker had to be receiving or be entitled to receive a permanent disability award. In my respectful submission, there is no explanation given as to why the Appeal Commissioner concluded that Mr. Ellsworth was entitled to a permanent disability benefit as of February 1, 1996. To the contrary, the evidence on file indicates conclusively that he was not so entitled. Mr. Ellsworth didn't even have an open claim on February 1, 1996 (the date Part I came into force). There simply was no entitlement on that date.

[58] Section 227 of the Act is not complex. In **Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)**, 2009 NSCA 44, MacDonald, C.J.N.S. does an in depth analysis of the rules of statutory interpretation (¶36-42).

I will not repeat his analysis here other than to paraphrase and set out the questions we are to answer under the modern principle of statutory interpretation. They are:

1. What is the meaning of the legislative text?
2. What did the legislature intend? What did it hope to achieve? What intentions did it have with respect to the facts of this case?
3. What are the consequences of adopting a proposed interpretation?

(**Cape Breton (Regional Municipality)**, ¶40)

[59] I will now address these three questions as it relates to s. 227 of the **Act**.

What is the meaning of the legislative text?

[60] Here, once again, is the text of s. 227:

> 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.

[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.

[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. Other provisions in the **Act** mitigate against such an interpretation. For example, the word "recurrence" is only used once in the **Act** in s. 75 which provides:

> **Computation and payment of benefit**
>
> 75 (1) Subject to subsection (2), where a temporary earnings-replacement benefit is payable, it shall be computed in accordance with Section 37.
>
> (2) Where a temporary earnings-replacement benefit is payable as the result of a recurrence of an injury, compensation shall be computed and be payable from the day on which the loss of earnings resulting from the recurrence commences unless one year has elapsed since the worker's temporary earnings-replacement benefit for the injury ended, in which case, subsection (1) applies.

[67] Section 75 relates to the calculation of benefits where there is a recurrence of the injury. If the injury recurs within one year of the cessation of the worker's temporary benefits, payment of the loss of earnings is as at the date of the reoccurrence. However, if one year elapses then a new computation of loss of earnings is mandated. The original injury date ceases to have any relevance.

[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.

What did the Legislature intend?

[70] Prior to March 23, 1990, the Board paid compensation based on a clinical rating system. **Hayden, supra**, changed the workers' compensation landscape. This Court instructed the Board that it was to pay compensation based on the impairment of a worker's earning capacity not on his or her physical impairment. That is what the Legislature was faced with moving from a clinical rating system to a wage loss system. In interpreting s. 227, this must be forefront in our minds. The intention of the provision is clear on its plain reading. 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.

[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.

[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**.

[73] This is consistent with s. 228, another transitional provision, which provides that workers injured after March 23, 1990, and before February 1, 1996, would have their compensation re-calculated in accordance with ss. 34-37 of the **Act**. Section 228 provides:

Compensation for permanent partial disability

228 (1) Subject to subsection (2), where a worker

(a) was injured on or after March 23, 1990, and before the date this Part comes into force;

(b) suffered a permanent impairment as a result of the injury; and

(c) 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 compensation awarded between March 23, 1990, and the date this Part comes into force is deemed to be and always to have been awarded in accordance with the former Act.

(2) The Board shall recalculate the amount of compensation payable to the worker in accordance with Sections 34 to 58.

(3) Where a recalculation made pursuant to subsection (2) entitles the worker to a greater award than the award the worker was receiving when this Part comes into force, the Board shall commence payment of the recalculated amount of compensation as of the latest of

(a) the date on which the Board determines the worker has a permanent impairment, whether pursuant to Section 34 or the former Act;

(b) the date on which the worker completes a rehabilitation program pursuant to Sections 112 and 113, 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; or

(c) November 26, 1992.

(4) Where a recalculation made pursuant to subsection (2) entitles the worker to a smaller award than the award the worker was receiving when this Part comes into force, the Board

> (a) shall commence payment of the recalculated amount of compensation as of the date of recalculation; and
>
> (b) shall not collect any amount as an overpayment from the worker in respect of the difference between the two awards.
>
> (4A) For the purpose of clause (4)(a), the date of recalculation is deemed to be and always to have been February 1, 1996, regardless of when the recalculation is made.
>
> (5) For greater certainty, nothing in this Section entitles any person to compensation for a period prior to November 26, 1992. (My emphasis)

[74] Nothing in the wording of s. 227, nor in any other provision of the **Act**, would lead me to conclude that the Legislature intended the clinical rating schedule, except for the limited purposes in s. 228 of the **Act**, would survive an injury occurring after March 23, 1990.

What are the consequences of adopting the proposed interpretation as suggested by the Board and WCAT?

[75] The consequences of adopting the interpretation proposed by the Board and WCAT would, in my view, have absurd consequences. This is illustrated by Mr. Ellsworth's situation. Mr. Ellsworth suffered injuries in 1987 and 1995 for which he received workers' compensation benefits. He worked for another 11 years before being injured in 2006 and could not return to work. He was awarded a permanent impairment rating of 10%. As a result, his workers' compensation benefit is based on 10% of 75% of his gross earnings at the time of his entitlement to the permanent rating, being February 1, 1988, a mere fraction of his loss of earning capacity in 2006 and which loss continues today.

[76] Mr. Ellsworth's employer paid premiums based on the income that was being paid to Mr. Ellsworth. The **Act** provides for the payment of earnings-replacement benefit should a worker be injured in a workplace accident. To suggest that Mr. Ellsworth's entitlement to benefits as a result of an injury occurring in 2006 would be limited to a percentage of his gross income in 1988 flies in the face of **Hayden** and everything the changes to the **Act** were intended to remedy.

[77] For these reasons, even reviewing the decision of WCAT through the lens of deference, I cannot find that its conclusion is within a range of acceptable outcomes.

[78] Section 227 has no application factually or legally to Mr. Ellsworth's situation. I would allow the appeal and remit the matter to the Board for proper calculation of Mr. Ellsworth's compensation without regard to s. 227.

Farrar, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.