C.A. No. 02793

NOVA SCOTIA COURT OF APPEAL

Cite as: Cape Breton Development Corporation v. Nova Scotia (Workers' Compensation Board), 1993 NSCA 144

Clarke, C.J.N.S.; Hallett and Pugsley, JJ.A.

BETWEEN:

CAPE BRETON DEVELOPMENT CORPORATION Appellant - and - WORKERS' COMPENSATION APPEAL BOARD (NOVA SCOTIA) and ERNEST R. BUTTS Respondent	Harvey L. Morrison for the Appellant E.A. Nelson Blackburn, Q.C. for the Respondent Ernest R. Butts Jonathan F.L. Davies for the Respondent W.C.A.B. Appeal Heard: June 16, 1993 Judgment Delivered: July 20, 1993

THE COURT: Appeal allowed and decision of the Workers' Compensation Appeal Board awarding compensation to Mr. Butts is dismissed and Mr. Butts' appeal dismissed per reasons for judgment of Hallett, J.A.; Clarke, C.J.N.S. and Pugsley, J.A. concurring.

HALLETT, J.A.

There are three appeals before us arising out of a decision of the Workers' Compensation Appeal Board finding that an injury suffered by the respondent Butts arose out of and was in the course of his employment with Cape Breton Development Corporation (Devco). He was awarded benefits under the **Workers' Compensation Act**, R.S.N.S., 1989, c. 508 for the period June 20, 1991 to February 26, 1992. Mr. Butts was a long time employee of Devco with a history of back trouble. On June 19, 1991, he injured his back when getting into his truck in the Devco parking lot following the completion of a shift. His report of the accident constituted an election by him to claim compensation from the Workers' Compensation Board (the Board). In his claim he described how the accident occurred as follows:

> " While getting into truck, outside of Prince Colliery Office Building, I reached to catch my glasses as they were slipping off my head and twisted my back."

Devco objected to the claim under **s. 25(1)** of the **Act** on the grounds that the injury did not arise out of and in the course of his employment. As a result the Board convened a hearing to inquire into the circumstances. The Board's short decision is relevant and states as follows:

> " A hearing was held December 11, 1991 at the Holiday Inn, Sydney. The worker was present and represented by Mr. Rick MacCuish while the employer, Devco, was represented by Pauline Hillier.
>
> The employer based their objection solely on the fact that his condition did not arise out of and was in the course of his employment. They admit that he has had previous back surgery for which he is receiving a pension and is currently having back problems.
>
> The worker states that "While getting into the truck outside of Prince Colliery Office Building, I reached to catch my glasses

> as they were slipping off my head and twisted my back".
>
> Testimony on behalf of the employer and by the client himself state that this event occurred in the employer's parking lot and that there was no hazard to the premises. The employer and the worker testified that there were no holes, not stones or rocks or uneven surface that could have contributed to any event.
>
> The medical evidence from Dr. Huestis, Dr. Watt and Dr. McKeough all confirm that this worker has a back problem but this does not answer the question as to whether or not it arose out of his employment.
>
> After considering all evidence given at the hearing as well as considering the provisions of Section 24, the Board finds that this worker's condition did not arise out of and was in the course of his employment and, therefore, the claim is disallowed."

A Board's findings are somewhat immunized from review by reason of the provisions of **s. 150**:

> " 150. Except as stated in Sections 169, 182 and 183, the decisions and findings of the Board upon all questions of law and fact shall be final and conclusive, and in particular, but not so as to restrict the generality of the powers of the Board hereunder, the following shall be deemed to be questions of fact:
>
> > (a) the question whether an injury has arisen out of or in the course of an employment within the scope of this Part;
> >
> > (b) the existence and degree of disability by reason of any injury;
> >
> > (c) the permanence of disability by reason of any injury;
> >
> > (d) the degree of diminution of earning capacity by reason of any injury;
> >
> > (e) the amount of average earning;
> >
> > (f) the existence of the relationship of a member of the family;

> (g) the existence of dependency;
>
> (h) the character, for the purpose of this Part, of any industry, employment, establishment or department and the class to which such industry, employment, establishment or department should be assigned;
>
> (i) whether or not any employee in any industry within the scope of this Part is himself within the scope of this Part and entitled to compensation thereunder;
>
> (j) the question whether a disease other than a disease mentioned in Schedule A to this Act is an industrial disease under this Act;
>
> (k) whether or not any person is a worker, a subcontractor, a contractor or an employer within the meaning of this Part."

Section 150(a) is relevant to the issues before us. Counsel for Devco has suggested to us that the reference in **Section 150** to **s. 169** appears to him to be an error; he suggests that the Legislature intended to make reference to **s. 173** rather than **s. 169** as **s. 173** deals with appeals to the Appeal Board whereas **s. 169** simply provides for the establishment of the Appeal Board, its composition, remuneration, etcetera. Chapter 43 of the **Acts** of 1975 created the Appeal Board. By that **Act s. 139** of Chapter 65 of the **Acts** of 1968 was amended by striking out the reference in **s. 139** to **ss. 140-141** and substituting a reference to **ss. 159(A)**, **159(N)** and **159(O)**. **Sections 140** and **141** which dealt with appeals from the Board to this court were repealed and an appeal from the Board to the Appeal Board was established. **Section 159(A)** provided for the establishment of the Appeal Board. **Section 159(A)** was the predecessor section to what is now **s. 169** of the present act; however there are some differences in the two sections. I agree that the reference in **s. 150** to **s. 169** does not appear to make much sense; if it is a mistake it was one made in 1975 which has been continued to this day. The argument of counsel for Devco that the reference in **s. 150(a)** to

s. 169 should be a reference to **s. 173** of the present **Act** seems logical. However, nothing turns on this question in this appeal.

The apparent predecessor section to **s. 173** of the **Act** presently in force was **s. 159E** which was enacted by Chapter 43 of the **Acts** of 1975. The wording of **s. 159E** was substantially the same as **s. 59** of Chapter 65 of the Acts of 1968 although the regime for review of a worker's claim under Chapter 65 of the **Acts** of 1968 was significantly different than that created by Chapter 43 of the **Acts** of 1975.

Mr. Butts appealed the decision of the Board to the Appeal Board pursuant to **s. 173** of the **Act**; that section provides:

> " A person aggrieved by a decision of the Workers' Compensation Board may appeal to the Appeal Board on the grounds that
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> (a) the medical opinion upon which compensation was given or refused was erroneous or incomplete;
>
> (b) a greater functional disability exists than that found by the Board; or
>
> (c) a continuance of compensation beyond the period allowed by the Board is required."

A hearing was convened by the Appeal Board. In accordance with the decision of this court in **Cape Breton Development Corp. et al. v. Penny et al** (1977), 19 N.S.R. (2d) 474 notice of appeal was not given to Devco despite the provisions of **s. 174(1)** of the **Act** which states:

> " 174 (1) Where a party wishes to appeal a decision of the Workers' Compensation Board to the Appeal Board, he shall serve a written notice of appeal upon the Workers' Compensation Board, the Appeal Board and any other parties interested in the decision."

In **Devco v. Penny** this court held that the employer was not a party interested in the decision

of the Board and that **s. 159(E)** (now **s. 173**) did not entitle an employer to appeal a decision of the Board to the Appeal Board. However, an employer could appeal a decision of the Appeal Board to this court pursuant to **s. 159(N)** (now **s. 182** and **183** of the present Act) even though the employer had no right to participate in the appeal to the Appeal Board.

Mr. Butts testified before the Appeal Board that he slipped while entering his truck. The transcript of the proceedings shows his testimony was as follows:

> " Mr. Evans: You were leaving work, you had just come off of a,
>
> Mr. Butts: I was just coming off of work and I was getting in, I don't know if there was something under that foot or if there was, if I tramped in an oil slick or what, but, you know, after putting in a full day, you're not, I hopped in my truck, it was a large truck I had, as I stepped up with my foot, you know, to get up in my truck, the other foot slipped underneath me.
>
> Mr. Evans: So you were stepping up into your truck when you slipped.
>
> Mr. Butts: I couldn't say what it was on the parking lot, but, and you know, all sorts of vehicles get parked and I always had to wear leather sole shoes because of my foot condition."

Devco did not participate at the hearing in accordance with the directive of this court in the **Devco v. Penny** case. In that case Chief Justice MacKeigan summed up his reasons for coming to the conclusion that the employer was not entitled to participate in the hearing; he stated at para. 47:

> " Having regard to the narrow scope of matters appealable to the Appeal Board, to the procedures followed by the Compensation Board and by the medical review board, which the Appeal Board has replaced, and to the strong policy inconsistent with adversary investigations shown by the Act and by the practice of the Compensation Board, I am satisfied that it was not intended that the employer should be permitted to participate in Appeal Board hearings. Such participation would be foreign to the spirit of the workmen's compensation history in this and other provinces and to the spirit of the extensive commission reports on "Workmens Compensation"

> issued by the Honourable Alexander H. McKinnon, later Chief Justice of Nova Scotia, on December 19, 1959, and by Mr. Lorne O. Clarke, Q.C., on February 1, 1968."

Cooper J.A. agreed with Chief Justice MacKeigan and wrote a useful judgment tracing the history of the legislation. Macdonald J.A. dissented on the issue of whether or not the employer had standing before Appeal Board.

On November 18, 1992, the Appeal Board decided that Mr. Butts was injured in the course of his employment despite the finding to the contrary by the Board. When Devco received notice of the Appeal Board's award, as it was entitled to, Devco decided to appeal to this court but due to several factors the notice of appeal was not filed with the court until December 18, 1992, thirty (30) days after the date of the decision. The notice stated that the required application for leave to appeal would be applied for on December 31, 1992.

Section 182 of the **Act** deals with appeals to this court; **subsections (1)** and **(2)** are relevant to this appeal:

> " 182 (1) An appeal shall lie to the Appeal Division of the Supreme Court from any final decision of the Appeal Board upon any question as to its jurisdiction or upon any question of law, but such appeal can be taken only by leave of a judge of the Appeal Division, given upon application for leave to appeal which must be made to said judge within thirty days after the rendering of the decision, and upon such terms and conditions as the judge may determine.
>
> (2) Notice of the hearing on an application for leave to appeal pursuant to subsection (1) shall be given to the Appeal Board at least two clear days before the application is heard.

The application for leave was heard by the chambers judge on December 31, 1992, and was dismissed as being out of time not having been presented to the court within thirty (30) days of the rendering of the decision of the Appeal Board. A subsequent application for an extension of time and for leave to appeal was granted pursuant to the

power conferred on the chambers judge of this court by the combined effect of **s. 50** of the **Judicature Act**, R.S.N.S. 1989, c. 240 [amended 1989, c. 20] , **Civil Procedure Rule 62.34** and **s. 182(6)** of the **Act**. These respective provisions are as follows:

> " 50 Where an enactment authorizes an appeal to the Trial Division or the Appeal Division of the Court and prescribes a time period during which
>
> (a) the appeal is to be commenced;
> (b) an application for leave to appeal is to be made;
> (c) a notice is to be given; or
> (d) any other procedural step preliminary to the appeal is to be taken,
>
> the judges of the Court may make rules respecting extension of the time period notwithstanding that the time period has expired."

Section 50 of the **Judicature Act** was initially enacted as **s. 45A**. Pursuant to the power conferred on the court by that section the court made **Civil Procedure Rule 62.34**; it provides:

> " 62.34 (1) For the purposes of Section 45 A of the Judicature Act a judge of the division of the court having power to hear an appeal may extend or abridge the time periods pursuant to that section either before or after the expiration of the period.
>
> (2) The application shall be made upon two clear days notice to the parties to the proceedings and be supported by an affidavit.
>
> (3) The judge may extend or abridge the time on such terms as he thinks just.

Section 182(6) of the **Act** provides:

> " 182 (6) Any appeal to the Appeal Division of the Supreme Court pursuant to this Act shall be subject to the *Civil Procedure Rules."*

As noted by MacKeigan C.J. in **Devco v. Penny s. 182(6)** of the **Act** need not have been enacted as appeals to this court are governed by the **Civil Procedure Rules** in any

event.

It is clear that the dismissal of the first application for leave to appeal did not estop the chambers judge from granting leave on the second application as the first application had not been dealt with on the merits. (**Scotia Chevrolet Oldsmobile Ltd. v. Whynot** (1970), 1 N.S.R. (2d) 1041 at 1049).

We have before us an appeal by Devco of the order dismissing the first application for leave to appeal plus an appeal by Devco from the Appeal Board's decision that Mr. Butts' injury arose out of and in the course of his employment and we have an appeal from Mr. Butts of the order granting leave to appeal.

Without deciding whether or not an appeal lies to the court from a decision of a chambers judge of this court on a leave application I am of the opinion the learned chambers judge had jurisdiction and properly exercised his jurisdiction in granting to Devco an extension of time in which to have applied for leave to appeal Appeal Board's decision. I would only say that to permit the taking of appeals from a ruling on a leave application would tend to make the leave procedure meaningless. On the other hand, the inability to appeal a wrongful refusal of leave to appeal seems unfair to the appellant.

On the main issue I am of the opinion that the Appeal Board did not have jurisdiction to consider whether or not Mr. Butts' injury arose out of and in the course of his employment. Counsel for Mr. Butts argues that **s. 180(1)**, **(2)** and **(3)** of the **Act** authorize the Board to deal with this issue. The section in question provides as follows:

> " 180 (1) The Appeal Board has authority to determine any question of law or fact as to whether any benefit is payable to a person and the amount of any such benefit and the decision of the Appeal Board, except as provided in this Act, is final and binding for all purposes of this Act.
>
> (2) The Board or the Appeal Board may, notwithstanding subsection (1), on new facts amend or rescind a decision made under this Act by the Board or the Appeal Board, as the

> case may be.
>
> (3) The Appeal Board may affirm or vary a decision of the Board and may take any action in relation thereto that might have been taken by the Board under this Act."

The words of these subsections on their face would appear to support counsel's argument; however, the **Act** must be read as a whole and each provision of the **Act** given meaning and effect so as to be consistent with the whole of the **Act**. As Mr. Justice Kellock stated in **R. v. Assessor of the Town of Sunny Brae**, [1952] 2 S.C.R. 76 at 97:

> " A statute is to be construed, if at all possible, "so that there may be no repugnancy or inconsistency between its portions or members."

As stated by Côté in the **Interpretation of Legislation in Canada**, 2nd edition at p. 260:

> " Courts use the contextual and logical method to specify the meaning of vague or general terms, to clarify the meaning of ambiguous provisions, and to set aside the usual meaning of an expression when its use leads to contradictory or illogical results."

In interpreting the **Act** it is necessary to recognize that the provisions of **s. 180** are inconsistent with the provisions of **ss. 150** and **173**. In my opinion the scope of the Appeal Board's powers conferred on it by **s. 180(1)**, **(2)** and **(3)** are restricted by the provisions of **ss. 150** and **173**. The issue of whether or not the injury arises in the course of a worker's employment is determined by the Board and its finding on that issue is a finding of fact and is conclusive (**s. 150(a)**). Secondly, that issue is not within the scope of the matters described in **s. 173** that can give rise to an appeal from a Board decision to the Appeal Board. **Section 180(1)**, **(2)**, and **(3)** cannot be read in isolation from **ss. 150** and **173**; these two sections clearly restrict what matters can form the basis of an appeal to the Appeal Board. In my opinion in view of the provisions of **ss. 150** and **173** the Legislature could not have intended

that **s. 180** be given a literal interpretation.

The restrictions on appeals to the Appeal Board were recognized by MacKeigan C.J. in **Devco v. Penny**, supra. In commenting on the 1975 legislation which repealed the long standing provisions for appeals to this court from decisions of the Compensation Board Justice MacKeigan stated at para. 17:

> " This repeal had the remarkable effect of depriving both workman and employer of any right to appeal to a court from a decision of the Compensation Board. In substitution the workman only was given a greatly limited right to appeal to the Appeal Board on questions of medical fact and compensation. Then only in cases that have thus been brought before the Appeal Board is there a further right of appeal to the Appeal Division."

and at para. 37 he stated:

> " Neither employer nor workman now has any right to appeal a Compensation Board decision on jurisdictional or legal grounds, the workman's right to go to the Appeal Board being limited to medical grounds. Doubtless either may now resort to *certiorari* against the Compensation Board, as in other provinces without appeal rights, whereupon interesting questions may arise as to the effect of s. 139. A Compensation Board decision that is affirmed by the Appeal Board (s. 159L(3)) may, however, be indirectly involved in an appeal from the Appeal Board to this Court, even in respect of non-medical matters of jurisdiction or law."

In my opinion the Appeal Board has the broad powers described in **s. 180(1)**, **(2)** and **(3)** but only when acting within the sphere of those matters described in **s. 173** as grounds for appeal and not excluded from Appeal Board review by reason of **s. 150**.

In summary, the Appeal Board did not have jurisdiction to deal with the issue as to whether or not the injury arose out of and in the course of Mr. Butts' employment. In **Penny v. Devco** MacKeigan, C.J. suggested that an employee who could not bring himself within the scope of an appeal to the Appeal Board would have a right to apply to the courts

for *certiorari* to review a decision of the Board. In **Herman v. Workers Compensation Board and Vaughn**, (1983) 58 N.S.R. (2d) 353 Hart J.A. of this court granted an order in the nature of *certiorari* from a decision of the Appeal Board relating to a non medical matter. He stated at paragraph 9:

> " Chief Justice Glube further suggested that an order in the nature of *certiorari* should not issue, since there was an avenue open to the appellant to proceed by way of appeal to the Workers' Compensation Appeal Board. Such an appeal is, however, limited by the provisions of s. 159E to the medical aspect of compensation and does not include the determination of a question of law. This anomaly arising out of the 1975 amendments to the statute was discussed by MacKeigan, C.J.N.S., in *Cape Breton Development Corporation et al. v. Penny et al.,....*"

The limitations on a worker's right to appeal to the Appeal Board and the right of appeal from the Appeal Board to this court was also recognized by Macdonald J.A. writing for the court in **Osmond v. W.C.A.B. (N.S.)** (1988), 84 N.S.R. (2d) 240.

In view of my conclusion that the Appeal Board exceeded its jurisdiction and that leave to appeal was properly granted, it is not necessary to decide whether an appeal lies to this court from a decision of a judge of the court sitting in chambers on a leave application.

However, there is one somewhat collateral issue that we should address. In **Re Chafe** (1974), 10 N.S.R. (2d) 261 this court decided that an application for leave to appeal under the **Workmens' Compensation Act** then in force had to be actually heard by the chambers judge within fifteen days of the rendering of the decision by the Board pursuant to the provisions of **s. 140(1)** of the **Act** then in force which provided as follows:

> " 140 (1) An appeal shall lie to the Appeal Division of the Supreme Court from any final decision of the Board upon any question as to its jurisdiction or upon any question of law, but such appeal can be taken only by leave of a judge of the Court, given upon a petition presented to him within fifteen days after the rendering of the decision, and upon such terms as said judge may determine. Notice of such petition shall be

> given to the Board at least two clear days before the presentation of such petition."

The decision turned on the wording of **s. 140(1)** that presentation of a petition for leave to appeal meant the actual hearing had to take place within the fifteen day period. The court held that the filing of the documents commencing the leave application within the fifteen day period did not meet the statutory requirement.

Section 182 of the **Act** now deals with appeals to this court. The wording of the section is significantly different that the provisions of **s. 140(1)** in effect at the time the decision in **Re Chafe** was rendered. **Section 182** provides that leave to appeal "must be made to the said judge within thirty (30) days after the rendering of the decision". The authorities generally agree that when words similar to those used in the present **s. 182** are employed by the legislature an appeal is made when the documents are filed. The Supreme Court Practice, 1988 states:

> " An application is treated as 'made' when the relevant document (notice of ex parte application, if it is ex parte, or summons, if it is inter partes) is lodged with the Civil Appeals Office. It is not necessary for the application to be heard before the expiration of the time limit."

In my opinion as a result of the change in the wording of the relevant section an appeal to this court from a decision of the Appeal Board is made when the documents instituting the application are filed with the court.

The decision of the Appeal Board ought to be set aside; there should not be an order for costs.

Hallett, J.A.

Concurred in:

Clarke, C.J.N.S.

Pugsley, J.A.

C.A. No. 02793

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

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Appellant	)	
- and -	)	R E A S O N S
FOR	)	JUDGMENT
BY:		
WORKERS' COMPENSATION APPEAL BOARD (NOVA SCOTIA) and ERNEST R. BUTTS	)	HALLETT, J.A.
Respondents	)	