NOVA SCOTIA COURT OF APPEAL

Citation: *Young v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2009 NSCA 35

Date: 20090415
Docket: CA 288140; CA 302838
Registry: Halifax

Between:

Greg Young

Appellant

v.

Nova Scotia Workers' Compensation Appeals Tribunal and the Workers' Compensation Board of Nova Scotia

Respondent

Judges:	Saunders, Hamilton, Fichaud, JJ.A.
Appeal Heard:	April 6, 2009, in Halifax, Nova Scotia
Held:	Appeal is dismissed without costs per reasons for judgment of Fichaud, J.A.; Saunders and Hamilton, JJ.A. concurring.
Counsel:	Kenneth LeBlanc, for the appellant Alexander MacIntosh, for the respondent Workers' Compensation Appeals Tribunal Madeleine Hearns and Paula Arab, for the respondent Workers' Compensation Board of Nova Scotia

Reasons for judgment:

[1] Mr. Young was injured on the job in 1996. He seeks extended earnings replacement benefits under the *Workers' Compensation Act* from the date of injury. He has been awarded these benefits beginning January 2003. The main issue in the proceedings under appeal was whether these benefits should extend back to 1996. The other issue on this appeal is whether an alleged error in fact finding may be an appealable question of law under s. 256(1) of the *Workers' Compensation Act*.

Background

[2] On June 13, 1996 Mr. Young injured his back on the job. He then entered what became a labyrinthine claims process for workers' compensation.

[3] He received temporary earnings replacement benefits (TERB) under the *Workers' Compensation Act* S.N.S. 1994-95 c. 10 (*Act*) from June 24, 1996 to February 11, 1997. The Workers' Compensation Board (Board) provided him with vocational rehabilitation (VR) services and benefits beginning February 11, 1997. On October 3, 1997 the Board's VR counsellor discontinued the VR services and benefits.

[4] Mr. Young requested reconsideration of the VR discontinuance. On February 10, 1998 the Board's VR counsellor denied the request for reconsideration. Mr. Young appealed to a hearing officer, who denied the appeal in a decision of June 19, 1998. Mr. Young appealed the hearing officer's decision to the Workers' Compensation Appeals Tribunal (WCAT) who, in a decision dated August 30, 1999, denied the appeal. The WCAT found:

> The Tribunal is not satisfied on the basis of the evidence before it that the Appellant does not have the transferable skills to work in the field of electrical sales. He has the diploma, field experience and even if not direct sales experience, he has experience working in an environment of electrical products and equipment. The evidence, aside from the Appellant's direct inquiries, indicates that employment in this field may be a possibility. Although the Appellant would appreciate assistance with further education in the field of environmental technology, it is not the only option in this case. The Appellant has transferrable skills to alternate suitable employment and the physical capability to perform the tasks required in the sales industry given the right opportunity.

[5] On October 16, 1997 a Board medical examiner examined Mr. Young. The medical examiner recommended a 10.5 % permanent medical impairment (PMI). Mr. Young requested a reconsideration of the PMI decision and sought a higher PMI. On February 10, 1998, the Board's case manager denied that request for reconsideration.

[6] Mr. Young sought Extended Earnings Replacement Benefits (EERB). In a decision of January 6, 1999, the Board's case manager decided that Mr. Young was not entitled to EERB. Mr. Young sought reconsideration and, by a decision of April 8, 1999, a case manager denied that request. Mr. Young appealed the April 8,1999 decision to a hearing officer who, in a decision of October 6, 1999, denied Mr. Young's appeal. Mr. Young appealed further to the WCAT who, in a decision of February 28, 2001, dismissed the appeal. The WCAT found:

> The occupation of Technical Sales Specialist, Wholesale Trade, is suitable and reasonably available employment for the Appellant. Since the Appellant's estimated weekly earnings as a Technical Sales Specialist, Wholesale Trade, exceeds his pre-accident weekly earnings, he is not entitled to an extended earnings replacement benefit.

[7] Mr. Young applied for a PMI reassessment, denied by an extended benefits adjudicator in a decision of January 7, 2002. Mr. Young appealed to a hearing officer who, in a decision of March 26, 2002, denied the appeal. Mr. Young appealed to the WCAT which, in a decision of August 28, 2002, partially allowed Mr. Young's appeal. The WCAT found (1) the PMI rating should be reconsidered as a result of Mr. Young's disc surgery in June 2002, but (2) Mr. Young had not established that his knee problems were caused by his compensable accident of July 13, 1996.

[8] As a result of the WCAT's decision of August 28, 2002, directing a PMI reconsideration, a Board medical examiner examined Mr. Young on January 24, 2003. The medical examiner recommended a 20% PMI, a 9.5% increase from Mr. Young's rating of October 1997. Mr. Young sought reassessment of the PMI. By a decision of May 9, 2005, the Board's extended benefits case manager denied the request and found that the 20% PMI reflected Mr. Young's disability.

[9] By a decision of August 15, 2006, a Board adjudicator determined that Mr. Young did not have chronic pain as defined in the *Chronic Pain Regulations* under

the *Act*, and he was not entitled to chronic pain benefits. Mr. Young appealed to a hearing officer who, in a decision of November 6, 2006, dismissed the appeal. Mr. Young appealed this decision to the WCAT.

[10] By a decision of March 28, 2007, the Board's case manager decided that Mr. Young was entitled to EERB as of January 24, 2003, the date of Mr. Young's 20% PMI reassessment. Mr. Young sought an earlier entitlement. He appealed to a hearing officer who, by a decision of August 20, 2007, denied Mr. Young's request for an effective EERB date before January 24, 2003. Mr. Young appealed the August 20, 2007 decision to the WCAT.

[11] The WCAT consolidated the hearing of Mr. Young's two appeals of the November 6, 2006 and August 20, 2007 decisions of the hearing officers. The WCAT issued a decision of October 16, 2007 (WCAT # 2007-179 AD and 2007-638 AD), partially allowing his appeal. The WCAT found that Mr. Young had an element of chronic pain and was entitled to a pain related impairment (PRI) rating effective January 8, 1997. The WCAT rejected Mr. Young's request for an earlier effective date for his EERB. Respecting the EERB date, the WCAT said:

> The Worker underwent significant diagnostic testing in the early stages of his claim. The Worker was investigated extensively by orthopaedic surgeons, a neurosurgeon, and the Board Medical Advisor. The diagnostic investigations undergone by the Worker did reveal a pathology at the L4-5 level but it was felt at that time to be best treated conservatively. Dr. Malik, for instance, in his September 24, 1996 report diagnosed the Worker with a possible disc protrusion, at the L5-S1 level. Dr. Collicutt noted that there may be a small disc bulge at the L4-5. Despite these findings, those physicians advised that the Worker, be treated conservatively. Even after the MRI results were available, Dr. Brien, recommended against surgery.
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> Even though Dr. Reardon diagnosed a disc injury, he stated there was a reasonable chance that the Worker could get back to the workforce. Dr. Collicutt, recommended that the Worker be active. Dr. Cameron in her Form 8/10 of January 1, 2002, after the Worker's surgery, indicated an ability to do "light" work. Throughout the course of the Worker's treatment he was found able to at least perform sedentary work. Evidence that the Worker would be unable to return to any gainful employment came after the Worker's surgery, firstly from Dr. Alexander.

> The fact that the Worker was eventually found to have a disc herniation does not, in itself allow me to conclude that he could not have worked, at anything, since 1996. Although I accept Dr. Ryan's testimony that the Worker had a disc problem from the time of his injury, this evidence does not allow me, in the face of opinions to the contrary from the Worker's actual treating specialists and family doctor, to conclude that he could not have worked at anything since 1996.

[12] As a result of the WCAT's ruling of October 16, 2007, a claims adjudicator, in a decision dated December 21, 2007, awarded Mr. Young a 3 % PRI for chronic pain. Mr. Young appealed this decision to a hearing officer who, in a decision of March 11, 2008, found that Mr. Young was not entitled to PRI over 3 % and that there was insufficient evidence that Mr. Young's compensable injury and chronic pain entitled him to EERB before January 24, 2003. Mr. Young appealed the hearing officer's decision of March 11, 2008 to the WCAT. In a decision dated September 22, 2008 (WCAT # 2008-185 AD), the WCAT (1) raised Mr. Young's PRI for chronic pain from 3% to (the maximum available) 6% and (2) denied Mr. Young's request for EERB before January 24, 2003. Respecting the EERB, the WCAT said:

> I find that the Appeal Commissioner in Tribunal *Decision 2007-179-AD and 2007-638-AD* dealt with the Worker's entitlement to extended benefits prior to January 24, 2003 on the basis of both his permanent medical impairment rating and the finding made in that decision that the Worker suffered from chronic pain as of January 8, 1997. Her ultimate conclusion was that there was insufficient evidence that the Worker was unable to return to any type of employment prior to his back surgery in 2002. In reaching this conclusion, the Appeal Commissioner was well aware that the Worker was suffering from chronic pain as of January 24, 2003 because she allowed the Worker's appeal on this issue.
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> Tribunal *Decision 99-513-AD-CA* (May 21, 2002, NSWCAT) dealt with the impact of previous Tribunal decisions dealing with an issue again before the Tribunal. The Appeal Commissioner found that the Tribunal is bound by the prior findings unless new evidence is presented which would allow a reconsideration for the same issue. I find that I am bound by the prior findings of the Tribunal on October 16, 2007.

[13] Mr. Young appeals to the Court of Appeal from the WCAT's decisions of October 16, 2007 and September 22, 2008. By a consent order of November 19, 2008, this court granted leave to appeal and directed that Mr. Young's two appeals

be heard together. I will refer to the two decisions under appeal as the "2007 WCAT decision" and "2008 WCAT decision".

Issues

[14] Mr. Young submits that (1) the 2007 WCAT wrongly found that Mr. Young was capable of some employment before January 24, 2003, disentitling him to EERB before that date and (2) the 2008 WCAT decision wrongly concluded that the WCAT was bound by the 2007 WCAT decision on this point. The Board, as respondent, says that Mr. Young's first submission is not an issue of law or jurisdiction and is not appealable to this court under s. 256(1) of the *Act* – the issue I will address first.

Entitlement to Appeal

[15] This appeal is brought under s. 256(1) of the *Act*:

> 256 (1) Any participant in a final order, ruling or decision of the Appeals Tribunal may appeal to the Nova Scotia Court of Appeal on any question as to the jurisdiction of the Appeals Tribunal or on any question of law but on no question of fact.

[16] The Board says that whether Mr. Young is entitled to EERB before January 24, 2003 fastens on a question of fact, whether he could have performed other employment before that date, and questions of fact are not appealable to this court.

[17] In *Nova Scotia (Workers' Compensation Board) v. Johnstone*, [1999] N.S.J. No. 454, 1999 NSCA 164, at ¶ 37, Justice Freeman for the court said:

> Conclusions of fact made by the Tribunal are beyond the jurisdiction of this court on appeal unless they are transformed into errors of law or jurisdiction by reason of patent unreasonableness.

This court has followed that principle in later appeals under s. 256(1): e.g. *Martell v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2007 NSCA 107 at ¶ 26.

[18] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court abolished patent unreasonableness as a standard of review. From this, the Board's factum here submits:

> 48. As articulated in *Dunsmuir*, the standard of 'patent unreasonableness' has been eliminated and, consistent with s. 256 of the *Act*, questions of fact are therefore not reviewable by this Court.

[19] To address this submission, I distinguish the statutory entitlement to appeal from the standard of review on the appeal. In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 Justice Binnie for the majority said (¶ 18) "where the legislature has enacted judicial review legislation, an analysis of that legislation is the first order of business". He continued:

> 36. In my view, the language of s 18.1 [of the Federal Courts Act, RSC 1985, c F-7] generally sets out **threshold grounds which permit but do not require** the court to grant relief. Whether or not the court should exercise its discretion in favour of the application will depend on the court's appreciation of the respective roles of the courts and the administration as well as the 'circumstances of each case'.... Of course, the discretion must be exercised judicially, but the general principles of judicial review dealt with in *Dunsmuir* provide elements of the appropriate judicial basis for its exercise. [emphasis added]

Justice Binnie summarized:

> 51 As stated at the outset, a legislature has the power to specify a standard of review, as held in *Owen*, if it manifests a clear intention to do so. However, where the legislative language permits, the courts (a) will *not* interpret grounds of review as standards of review, (b) will apply *Dunsmuir* principles to determine the appropriate approach to judicial review in a particular situation, and (c) will presume the existence of a discretion to grant or withhold relief based on the *Dunsmuir* teaching of restraint in judicial intervention in administrative matters (as well as other factors such as an applicant's delay, failure to exhaust adequate alternate remedies, mootness, prematurity, bad faith and so forth).

[20] The threshold question is whether there is an issue of law or jurisdiction under s. 256(1). If not, this court is not permitted to inquire further. If so, we move to standard of review analysis as discussed in *Khosa* and *Dunsmuir*. Of course the case law dealing with the standards of review may assist the interpretation of the statutory wording stating the grounds of appeal on the threshold issue. This is how

Johnstone came by "patent unreasonableness" to interpret "jurisdiction" and "law" in s. 256(1).

[21] Whether this court is permitted to entertain an appeal depends on s 256(1) of the *Act*. *Dunsmuir*'s elimination of patent unreasonableness did not amend s. 256(1). An appeal that could be entertained before *Dunsmuir* should be no less available now. This is apparent from a dissection of the pre-*Dunsmuir* treatment of patently unreasonable errors of fact finding.

[22] In *Toronto Board of Education v. OSSTF, District 15*, [1997] 1 SCR 487, at ¶ 44-45, 48, Justice Cory for the majority explained when fact finding may involve patent unreasonableness:

> 44 It has been held that a finding based on "no evidence" is patently unreasonable. However, it is clear that a court should not intervene where the evidence is simply insufficient. As Estey J., dissenting in part, noted in *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245, at p. 277:
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> > . . . a decision without any evidence whatever in support is reviewable as being arbitrary; but on the other hand, insufficiency of evidence in the sense of appellate review is not jurisdictional, and while it may at one time have amounted to an error reviewable on the face of the record, in present day law and practice such error falls within the operational area of the statutory board, is included in the cryptic statement that the board has the right to be wrong within its jurisdiction, and hence is free from judicial review.
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> 45 When a court is reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence, it can only intervene "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact": *Lester (W. W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, at p. 669 per McLachlin J.
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> . . .
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> 48 Therefore, in those circumstances where the arbitral findings in issue are based upon inferences made from the evidence, it is necessary for a reviewing court to examine the evidence that formed the basis for the inference. I would stress that this is not to say that a court should weigh the evidence as if the matter were before it for the first time. It must be remembered that even if a court

> disagrees with the way in which the tribunal has weighed the evidence and reached its conclusions, it can only substitute its opinion for that of the tribunal where the evidence viewed reasonably is incapable of supporting the tribunal's findings.

[23] This court, before *Dunsmuir*, applied Justice Cory's formulation to determine when a suggested error in fact finding would be patently unreasonable: *Granite Environmental Inc. v. Nova Scotia (Labour Relations Board)*, 2005 NSCA 141, at ¶ 39-40, 84-85. Since *Dunsmuir*, this court has continued to apply Justice Cory's formulation to whether a tribunal has committed an unreasonable error in fact finding: *Casino Nova Scotia v. Nova Scotia (Labour Relations Board)*, 2009 NSCA 4, at ¶ 44.

[24] In my view, Justice Cory's comments from *Toronto Board of Education* establish the underlying test. Before *Dunsmuir*, an error in fact finding that offended this test was patently unreasonable, and an error of law under s. 256(1) of the *Workers' Compensation Act*. Now the error is unreasonable under *Dunsmuir*'s standard of review analysis and remains an error of law under s. 256(1).

[25] I note that other courts of appeal have determined that errors in fact finding may constitute errors of law: *PSS Professional Salon Services Inc. v. Saskatchewan (Human Rights Commission)*, 2007 SKCA 149 (CA), at ¶ 60-70, leave to appeal denied [2008] S.C.C.A. No. 69; *Osmond v. Newfoundland (Workers' Compensation Commission)*, 2001 NFCA 21 at ¶ 83-85.

[26] Returning to this case, there was evidence which, viewed reasonably, was capable of supporting the WCAT's finding about Mr. Young's ability to work. The 2007 WCAT decision cites that evidence in the passage I have quoted earlier (¶ 11). Mr Young asks this court to conclude that, based on other evidence, the WCAT should have made a different finding. This would stray beyond the constraint of s. 256(1) by assessing whether the WCAT erred in fact.

[27] I would dismiss the appeal from the 2007 WCAT decision because the ground of appeal does not involve an error of law or jurisdiction, but involves a suggested error of fact that is unappealable under s. 256(1).

[28] The 2008 WCAT decision dismissed Mr. Young's appeal because the Tribunal held it was bound by the 2007 WCAT decision. Whether the 2008 WCAT

erred involves an issue of law that is appealable under s. 256(1). So I will move to the standard of review analysis respecting the 2008 WCAT decision.

Standard of Review

[29] In *Pelley v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2008 NSCA 46, the dissenting reasons, with which the majority agreed on the standard of review (¶ 8), summarized the *Dunsmuir* principles in the context of the *Workers' Compensation Act*:

> [57] Correctness and reasonableness are now the only standards of review. (¶ 34) The ultimate question on the selection of a standard remains whether deference from the court is required to respect the legislative choice to leave the matter in the hands of the administrative decision maker (¶ 49). The court engages in "standard of review analysis", without the "pragmatic and functional" label (¶ 63).
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> [58] The first step is to determine whether the existing jurisprudence has satisfactorily determined the degree of deference on the issue (¶ 62, 54, 57).
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> [59] If the existing jurisprudence is unfruitful, then the court should review the following factors to choose between correctness and reasonableness (¶ 55):
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> 1. Does a privative clause give statutory direction indicating deference?
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> 2. Is there a discrete and special administrative regime for which the decision maker has special expertise? This involves an analysis of the tribunal's purpose disclosed by the enabling legislation and the tribunal's institutional expertise in the field (¶ 64).
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> 3. What is the nature of the question? Issues of fact, discretion or policy, or mixed questions of fact and law where the legal issue cannot readily be separated, generally attract reasonableness (¶ 53). Constitutional issues, legal issues of central importance, and legal issues outside the tribunal's specialized expertise attract correctness. Correctness also governs "true questions of jurisdiction or vires", ie. "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter". Legal issues that do not rise to these levels may attract a reasonableness standard if this deference is consistent with both (1) any statutory privative provision and (2) any legislative intent that the tribunal exercise its special expertise to interpret its home statute and

> to govern its administrative regime. Reasonableness may also be warranted if the tribunal has developed an expertise respecting the application of general legal principles within the specific statutory context of the tribunal's statutory regime. (¶ 55-56, 58-60).

[30] Section 252(2) of the *Act* says:

> 252 (2) The Appeals Tribunal shall not
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> (a) reconsider;
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> (b) rescind, alter or amend; or
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> (c) make any further or supplementary order in regard to,
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> any decision already made by the Appeals Tribunal.

[31] The 2008 WCAT decision assessed a 6 % PRI for chronic pain. Mr. Young says the 6% PRI was a new factor not before the 2007 WCAT, and the 2008 WCAT erred by declining to review the ruling of the 2007 WCAT. He says this error is reviewable for correctness.

[32] As discussed in *Pelley*, ¶ 59(3), issues of mixed fact and law, where the legal point is not easily separated, and issues of law engaging the legislative intent that the tribunal exercise its specialized expertise to interpret its home statute and govern its administrative regime, may attract reasonableness. *Pelley* drew these principles from the reasons of Justices Bastarache and LeBel in *Dunsmuir*,¶ 41, 53-56, 58-60. In *Khosa*, ¶ 25-26, 44, 59, Justice Binnie for the majority reiterated these principles from *Dunsmuir*.

[33] In *Puddicombe v. Nova Scotia (Workers Compensation Board*), 2005 NSCA 62, at ¶ 31, adopted by *Pelley*, ¶ 8, 61-65, this court said that correctness applied to "the broad legal principles to be deduced from the statutory requirement" and reasonableness to "applying those broad legal principles to the facts of a particular case".

[34] Whether or not the 2008 WCAT is bound by the 2007 WCAT decision involves both s. 252(2) and an assessment of whether the issues and evidence presented to the 2008 WCAT differed materially from the issues and evidence

resolved by the 2007 WCAT decision. There was no discernable dispute before the 2008 WCAT concerning the meaning of s. 252(2), and the contentions focussed on the evidence. The overall issue, to paraphrase *Pelley*, is one of mixed fact and law from which a legal point cannot easily be separated. This is similar to saying, paraphrasing *Puddicombe*, that the issue involves an application of the principles to the facts. In my view, reasonableness is the appropriate standard to address Mr. Young's submission that the 2008 WCAT wrongly deferred to the 2007 WCAT decision.

Was the 2008 WCAT Decision Unreasonable?

[35] Under the reasonableness standard, the reviewing court examines the tribunal's decision, first to identify an intelligible line of reasoning to a conclusion, then second to determine whether that conclusion occupies the range of acceptable outcomes. *Dunsmuir*. ¶ 47, 49; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, at ¶ 41; *Casino Nova Scotia*, ¶ 29-31.

[36] Mr. Young says that the key factor, known to the 2008 WCAT and unknown to the 2007 WCAT, was Mr. Young's 6 % PRI for chronic pain. This, according to the submission, meant the 2008 WCAT was not reconsidering the 2007 WCAT decision, which would contravene s. 252(2), but was considering a new and materially different issue. So the 2008 WCAT erred in saying it was bound by the 2007 WCAT decision.

[37] The fallacy in Mr. Young's submission is that 2007 WCAT knew that Mr. Young had suffered chronic pain. In fact it was the 2007 WCAT that directed the examination of Mr. Young's chronic pain to quantify his PRI. The 2007 WCAT decision said:

> ... The Worker is entitled to a pain-related impairment, effective October 16, 1997, the level of which is to be determined by the Board.

Despite Mr. Young's known chronic pain, the 2007 WCAT concluded on the evidence that Mr. Young had been capable of performing light work before January 2003.

[38] The 2008 WCAT's reasoning path is clear and its conclusion is within the range of acceptable outcomes based on the facts and law, including s. 252(2). The

2007 WCAT, being aware that Mr. Young suffered chronic pain before January 2003, found nonetheless that he could have worked at some employment before January 24, 2003 despite his chronic pain. The mere quantification of the PRI in the 2008 WCAT decision did not add materially to the prior body of evidence about Mr. Young's ability to work. The WCAT reasonably concluded that it could not simply reconsider the issue that had been litigated the year before. I see no basis to overturn the 2008 WCAT decision.

Conclusion

[39] I would dismiss the appeal without costs.

Fichaud J.A.

Concurred in:

Saunders, J.A.

Hamilton, J.A.