NOVA SCOTIA COURT OF APPEAL

Citation: *Dipersio v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2004 NSCA 139

Date: 20041119
Docket: CA 209460
Registry: Halifax

Between:

Hector G. Dipersio

Appellant

v.

Workers' Compensation Appeals Tribunal
and Workers' Compensation Board
and Rowan Companies Inc.

Respondent

Judge(s): Cromwell, Saunders & Fichaud, JJ.A.

Appeal Heard: October 5, 2004

Held: Appeal allowed as per reasons for judgment of Fichaud, J.A.; Cromwell and Saunders, JJ.A. concurring

Counsel: William Burchell, for the appellant
Alexander MacIntosh, for the respondent WCAT
David P. S. Farrar, for the respondent WCB
Peter McLellan, Q.C., for the respondent Rowan Companies Inc.

Reasons for judgment:

[1] Mr. Dipersio appeals the decision of the Nova Scotia Workers' Compensation Appeals Tribunal ("WCAT"). The WCAT decided that the Workers' Compensation Board ("WCB") could withhold, against workers' compensation payable to Mr. Dipersio, the amount which in 1991 Mr. Dipersio recovered from a Texas law suit against his employer. Mr. Dipersio argues that the WCB may not withhold this amount.

1. Background

[2] Rowan Companies Inc. ("Rowan") employed Mr. Dipersio as an oil rig roustabout. Mr. Dipersio was a Nova Scotia resident temporarily working outside Nova Scotia when, on May 22, 1986, he was injured in the Gulf of Mexico. The injury occurred on Rowan's vessel in American territorial waters. Mr. Dipersio suffered a crush injury resulting in a fracture of his wrist which caused permanent impairment. He lost much of the use of his right forearm and wrist and could not return to his pre-injury occupation.

[3] In July 1988 Mr. Dipersio sued Rowan in a Texas court for damages under the *Merchant Marine Act* 46A U.S.C., s. 688 (the "*Jones Act"*).

[4] Mr. Dipersio claimed workers' compensation benefits under the *Workers' Compensation Act*, R.S.N.S. 1967, c. 343 as amended, and as revised by R.S.N.S. 1989, c. 508 (the "former Act"). There is no dispute that, subject to whether the payments could be withheld as considered below, Mr. Dipersio was entitled to benefits under Nova Scotia's workers' compensation legislation. On December 1, 1989 the WCB awarded Mr. Dipersio a 14 percent permanent medical impairment ("PMI") rating for his injury. The Board paid Mr. Dipersio benefits according to this rating until March 1995, when those benefits were suspended as will be discussed.

[5] Rowan applied to the Nova Scotia Supreme Court to enjoin Mr. Dipersio from proceeding with the Texas action. Rowan's application was dismissed: *Rowan Co. v. Dipersio* (1989), 92 N.S.R. (2d) 83 (T.D.) per Nathanson, J.; affirmed (1990), 96 N.S.R. (2d) 181 (A.D.) per Jones, J.A., for the Court; leave to appeal denied (1990), 98 N.S.R. (2d) 360 (S.C.C.) The Appeal Division affirmed the dismissal of Rowan's application because: (1) under s. 92(13) of the

Constitution Act 1867, the Nova Scotia legislature has no power to restrict civil rights outside Nova Scotia, by preventing Mr. Dipersio from suing in a Texas court; and (2) the Nova Scotia *Workers' Compensation Act*, interpreted consistently with s. 92(13), did not intend to restrict a worker's right to sue outside Nova Scotia.

[6] In March, 1991 Mr. Dipersio settled his Texas claim with Rowan. Under the settlement Rowan paid Mr. Dipersio $170,000 US which the WCB has calculated to be the equivalent of $196,673 Canadian. (the "Rowan settlement")

[7] In April, 1995 the WCB sued Mr. Dipersio in the Nova Scotia Supreme Court. The WCB claimed that the WCB was entitled by subrogation to the proceeds of the Rowan settlement received by Mr. Dipersio.

[8] On May 1, 1995 Paul Pelrine, a third party claims adjuster for the WCB, wrote to Mr. Dipersio stating that the WCB would "suspend any further benefits to you from the Board until such time as this matter [the WCB's lawsuit] has been resolved."

[9] The former *Act* was replaced by the *Workers' Compensation Act*, S.N.S. 1994-5, c. 10 (the "current *Act*") which substantially came into force on February 1, 1996. The current *Act* introduced a statutory power to withhold in s. 32 which is central to this appeal. This will be discussed under the Second Issue.

[10] On January 20, 1998 the Nova Scotia Supreme Court issued an order which dismissed the WCB's 1995 law suit against Mr. Dipersio. The order was consented to under the signature of counsel for the WCB and for Mr. Dipersio. The order recited that "the parties have reached settlement of this matter upon terms satisfactory to themselves." Details of those terms are not in the record for this appeal.

[11] The dismissal of the WCB's subrogation claim, initiated under that former *Act*, closed one chapter of the litigation. Section 17(1) of the former *Act*, R.S.N.S. 1989, c. 508 stated that the WCB would be subrogated to any recovery by a worker from "an action against some person other than his employer"; see discussion in *Gagnon v. Richmond District School Board* (1986), 75 N.S.R. (2d) 313 (C.A.) at paras. 5 - 6. The former *Act* did not contain a provision which stated that the WCB was subrogated to damages resulting from a claim by the

worker against the employer. So the Rowan settlement, which resulted from Mr. Dipersio's Texas claim against his employer, escaped the statutory subrogation of the former *Act*. The consent dismissal order of January 20, 1998 confirmed this result. Neither the WCAT decision nor Rowan's submission on this appeal suggests that the former *Act* entitles the WCB to withhold Mr. Dipersio's compensation. Since the dismissal order of January, 1998, the dispute has focused on the current *Act*.

[12] On February 3, 1998 Mr. Dipersio wrote to the WCB requesting that his benefits be reinstated. Having received no reply, Mr. Dipersio wrote again on March 5, 1999 directly to the chairman of the WCB. On March 31, 2000 the WCB's chairman, Mr. Innis Christie, replied to Mr. Dipersio. Chairman Christie's letter concluded:

> ... the WCB could only reinstate your benefits if you were to successfully appeal their discontinuance in 1995. I am not in a position to advise you of your legal rights in that respect. I can only say that from the WCB's point of view you[r] file is closed.

[13] On January 23, 2002 Mr. Dipersio wrote to the WCB stating:

> This correspondence represents my formal request for reinstatement of my benefits pursuant to my application of February 3, 1998 - to which I have never had a decision on the merits - and my requirement that I be given a written decision thereon.

[14] On April 23, 2002 the WCB responded to Mr. Dipersio with a written decision which stated:

> Mr. Dipersio's monthly pension will be reinstated and the monthly pension will be credited his settlement monies of $196,673. Mr. Dipersio would have been eligible for a monthly pension of $293.75 from April 1, 1995 to January 1, 2000. This would represent a period of 57 months @ $293.75 for a total of $16,743.75. This shall be applied against the settlement monies of $196, 673.

The decision stated that Mr. Dipersio's benefits payable for 2000 were $3,556.68, for 2001 were $3,618.96 and for January 1 - April 1, 2002 were $912.87. The WCB decision continued:

> ... The total pension benefit from April 1, 1995 to April 1, 2002 of $24,831.94 will be applied against the settlement monies of $196,673 received from Mr. Dipersio's employer in relation to the same injury to leave an outstanding balance as of April 1, 2002 of $171,841.06.
>
> . . .
>
> We confirm that the monthly pension from April 1, 2002 onward will not be paid to Mr. Dipersio and will be credited against the $171,841.06 balance.
>
> . . .
>
> ... Once settlement monies of $196,673 are exhausted by Workers' Compensation benefits Mr. Dipersio would have received on this claim, all future benefits will be paid directly to him.

[15] The WCB's letter of April 23, 2002 to Mr. Dipersio which enclosed this decision stated:

> You may request an appeal of this decision if you feel an error has been made. I have enclosed a *Notice of Appeal to Hearing Officer* form. The WCB must receive this form and the supporting information within 30 days of the date you received this decision.

[16] On May 2, 2002 Mr. Dipersio filed a Notice of Appeal to the Hearing Officer. On August 7, 2002 the hearing officer issued a decision which dismissed Mr. Dipersio's appeal. The WCB's letter of August 7, 2002 to Mr. Dipersio which enclosed the hearing officer's decision states:

> **There is a <u>30-day</u> limitation period to appeal to the Workers' Compensation Appeals Tribunal, if you are not satisfied with this decision. Should you wish to appeal this decision, you should contact the Appeals Tribunal without delay to obtain the necessary forms.** [Bolding and underlining in original letter]

[17] On August 22, 2002 Mr. Dipersio filed a notice of appeal to the WCAT.

[18] On October 2, 2003 the WCAT issued its decision dismissing Mr. Dipersio's appeal. This is the decision under appeal to this Court. I will discuss the WCAT's reasons later under the Second Issue. The WCAT's letter of October 2, 2003 to Mr. Dipersio which enclosed its decision stated:

> You are entitled to appeal this decision to the Nova Scotia Court of Appeal within 30 days from the date of this decision.

[19] On October 20, 2003 Mr. Dipersio filed a notice of application for leave to the Court of Appeal. Leave to appeal was granted on consent of the parties by a consent order of this Court dated April 4, 2004.

[20] There was no application for leave to cross-appeal. No leave has been granted to cross-appeal.

[21] On April 19, 2004 Rowan filed a notice of contention raising two additional issues respecting timeliness and s. 84 of the current *Act*.

[22] On the hearing of this appeal the WCB and the WCAT made no submissions.

2. Issues

[23] The issues are:

1. Is Mr. Dipersio's appeal out of time?
2. Did the WCAT err in law or jurisdiction by ruling that the current *Act* permits the WCB to withhold compensation benefits because of the Rowan settlement?

3. Standard of Review

[24] Section 256(1) of the current *Act* permits an appeal to the Court of Appeal, after leave, on questions of law or jurisdiction.

[25] Under the "pragmatic and functional" approach, the Court's standard of review derives from consideration of (i) the presence, absence and wording of any privative clause, (ii) the expertise of the decision maker, (iii) the purpose of the legislation, and (iv) the nature of the issue. From the cumulative analysis of these factors the court chooses correctness, reasonableness or patent unreasonableness as the standard of review: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 55-62.

[26] Not every issue of law invokes the correctness standard. But an appeal which turns on the interpretation of the workers' compensation legislation and application of principles from the judicial case law usually attracts appellate review based on correctness. *MacDonald v. Workers' Compensation Board (N.S.)*, 2000 NSCA 134, at para. 20; *Ferneyhough v. Workers' Compensation Board (N.S.)*, 2000 NSCA 121 at paras. 9-10; *Boyle v. Workers' Compensation Board (N.S.)*, 2004 NSCA 88 at paras. 11-14. This Court has applied correctness to issues of retroactivity of workers' compensation legislation and to the interpretation of the transitional provisions of the current *Act* respecting claims arising under the former *Act*: *Bauman v. Nova Scotia (Attorney General)*, 2001 NSCA 51 at para. 21; *Richard v. Nova Scotia (Workers' Compensation Board)***,** [1998] N.S.J. No. 320 at paras. 22-25.

[27] Counsel for Mr. Dipersio and for Rowan agree that correctness is the appropriate standard in this case.

[28] I will apply the correctness standard.

4. First Issue - Timeliness of Appeal

[29] Rowan contends that Mr. Dipersio's appeal to the WCB was out of time. Rowan says that the decision to end benefits was communicated in the WCB's letter of May 1, 1995 or, at the latest, by Chairman Christie's letter of March 31, 2000 stating that the WCB would not reinstate the benefits and that "from, the WCB's point of view you[r] file is closed." As Mr. Dipersio did not file a notice of appeal within the statutory period from either letter, Rowan says that his appeal to the WCB was barred. Mr. Dipersio's letter of January 23, 2002, which stated "my formal request for reinstatement of my benefits" was, according to Mr. MacLellan's forceful argument, an untimely notice of appeal. Therefore the WCB's decision of April 23, 2002, the decision of August 7, 2002 by the hearing officer and the WCAT's decision now on appeal are, in Rowan's counsel's word, "nullities."

[30] I cannot accept Rowan's argument.

[31] The WCB's decision of April 23, 2002 changed Mr. Dipersio's status. Formerly, according to Mr. Pelrine's letter of May 1, 1995, his benefits were "suspended" until resolution of the WCB's lawsuit, which settled in 1998. The

WCB's decision of April 23, 2002 "reinstated" Mr. Dipersio's benefits but stated those benefits would be applied against the proceeds received by Mr. Dipersio from the Rowan settlement in 1991. The WCB's letter of April 23, 2002 addressed to Mr. Dipersio enclosed a copy of this decision which notified Mr. Dipersio of that changed status. The WCB's letter of April 23 told Mr. Dipersio that he had 30 days to appeal from that decision. Clearly the WCB treated Mr. Dipersio's newly changed status as an appealable decision. Mr. Dipersio filed a notice of appeal to the hearing officer within that time period and has appealed within the statutory time limits from the subsequent decisions of the hearing officer and WCAT.

[32] The appeal clock started, or restarted, when the WCB, rightly or wrongly, decided to change Mr. Dipersio's status on April 23, 2002. Mr. Dipersio has filed timely notices of appeal since then.

5. Second Issue -

Did WCAT err by ruling that the current Act entitles the WCB to withhold compensation?

(i) the WCAT's Decision

[33] The WCAT chairman wrote a separate decision from the concurring plurality decision of the two other appeal commissioners. The chairman's decision referred to the decisions of this Court in *MacEachern v. Workers' Compensation Board* (N.S.) 2003 NSCA 45, at para. 15 and *Nova Scotia (Workers' Compensation Board v. Muise)* (1998), 170 N.S.R. (2d) 253 at para. 41. The chairman stated:

> In light of the above authorities, I start with the principle that retroactivity is the general rule under the current *Act*.

The chairman then referred to s. 32 of the current *Act* which states:

> 32. Where a worker or worker's dependant entitled to compensation pursuant to this Part has a right of action in a jurisdiction other than the Province in connection with the loss of earnings or permanent impairment for which compensation is payable,

> (a) the Board may request the worker or worker's dependant to take an action in that other jurisdiction; and
>
> (b) the worker or worker's dependant shall assign the right to damages recoverable, and all damages that the worker or worker's dependant recovers, under that action to the Board,
>
> and the Board may withhold payment of compensation to the worker or worker's dependant until the worker or worker's dependant takes the action or makes the assignment.

The chairman said:

> The facts here fall squarely within the circumstances addressed by s. 32.

The chairman concluded that the WCB could withhold the amount of the Rowan settlement from the compensation payable by the WCB to Mr. Dipersio under Mr. Dipersio's PMI award of December 1, 1989.

[34] The plurality decision of the other two appeal commissioners stated:

> We agree that the reasoning in *MacEachern* is applicable to this appeal, which leads to the conclusion that the *Act* applies to the outstanding claim of the Worker, whose injury occurred prior to its enactment. ...
>
> We find that the effect of holding that the *Act* applies to the worker's situation is to change the law that was applicable to events which occurred prior to its enactment. Section 32 becomes applicable to events which occurred prior [to] February 1, 1996. The worker had an injury, started an action, and recovered damages prior to February 1, 1996. Section 32 applies retroactively to those events. In other words, s. 32 does not just apply from February 1, 1996 onward. The duty to assign damages contained in s. 32 applies to the damages recovered by the Worker regardless of whether he still had any damages in his possession as of February 1, 1996. ...

The two concurring commissioners agreed with the chairman that, under s. 32 of the current *Act*, the WCB could withhold payments of the amount of the Rowan settlement from the WCB's compensation obligation.

[35] The WCAT proceeded on the basis that the only statutory authorities supporting the WCB's withholding of benefits were sections 32, 84 and 232 of the current *Act*, supported by the "historic tradeoff" which was the wellspring of workers' compensation legislation. It was not suggested to this Court that the former *Act* permitted the WBC to withhold the benefits. The WCB did not file a factum or actively participate in this appeal. The only issues before us, therefore, are whether these three sections of the current *Act*, in their statutory context, authorize the WCB to withhold benefits from Mr. Dipersio.

[36] Rowan concedes that s. 32 does not permit the WCB to set off benefits due to Mr. Dipersio before s. 32 came into force on February 1, 1996. In my view, and for reasons which I will set out shortly, Rowan's concession is well founded. I am also of the view that the WCAT erred in law by holding that ss. 32, 84 or 232 permit the Board to withhold any benefits payable to Mr. Dipersio against the 1991 Rowan settlement. I will address s. 32, its statutory context, and the case law which the WCAT reviewed to support its conclusion respecting s. 32. I will then turn to the WCAT's reasoning and Rowan's arguments respecting s. 232, s. 84 and the historic tradeoff.

(ii) Section 32

[37] Missing from the reasoning of both the WCAT's chairman and the concurring commissioners is any analysis of the triggering words in s. 32.

[38] Section 32 opens with the words:

> Where a worker or worker's dependant entitled to compensation pursuant to this Part ***has a right of action*** in a jurisdiction other than the Province in connection with the loss of earnings or permanent impairment for which compensation is payable ... [emphasis added]

These quoted words are the necessary pre-condition for the consequences stated in paragraphs (a) and (b) and for the Board's entitlement to "withhold payment of compensation" in the concluding words of s. 32. The WCB could only "withhold payment of compensation" from a worker who "has a right of action" within the opening words of s. 32.

[39] Neither the chairman nor the concurring commissioners considered the words "has a right of action" or decided whether those words applied to Mr. Dipersio.

[40] In my view Mr. Dipersio clearly was not a worker who "has a right of action" within s. 32. Mr. Dipersio released his right of action against Rowan in 1991 when he settled with Rowan. He had no right of action in February 1996.

[41] Section 32 came into force on the date of the current *Act's* proclamation, February 1, 1996 (current *Act* s. 277).

[42] Section 32 speaks in the present tense:

> Where a worker ... has a right of action ...

The WCAT's interpretation treats these words as if they read:

> Where a worker has, *or had but no longer has*, a right of action ...

[43] Nothing in s. 32 supports the WCAT's notional insertion of the italicized words. It is unnecessary to consider the statutory presumption against retroactive interpretation of statutes, or the difference between a "retrospective" and "retroactive" statute. As a matter of plain statutory interpretation, the triggering words of s. 32 cannot support the WCAT's conclusion.

[44] Counsel for Rowan candidly acknowledged on the hearing of this appeal that the words "has a right of action" in s. 32 refer to February 1, 1996, the day s. 32 came into force. Rowan did not suggest that "has a right of action" could somehow be interpreted retroactively to mean "had but no longer has a right of action". Neither the WCB nor WCAT made any submission on this appeal.

[45] Rowan's submission is that Mr. Dipersio had a right of action against Rowan on February 1, 1996. Rowan says that, after a plaintiff settles and releases his claim, the plaintiff's right of action continues, subject to the new defence that the plaintiff's claim has been released. So Mr. Dipersio continued to have a "right of action" against Rowan in February 1996 to which s. 32 attached.

[46] Rowan's submission departs from the WCAT's path of reasoning. The WCAT said that s. 32 applies retroactively to the 1991 right of action.

[47] I cannot agree with Rowan's ingenious submission.

[48] A settlement relinquishes the right of action. That is the point of a settlement. Rowan would not have paid $170,000 US if Mr. Dipersio was to retain his right of action.

[49] After the 1991 settlement, Mr. Dipersio might have been able to file at a court registry another originating notice against Rowan. But he could not have taken this originating notice to trial on the merits. Upon seeing the release, or being satisfied that there was a settlement, the court would strike or summarily dismiss that claim, or order that the parties comply with the terms of the settlement: *Begg v. East Hants (Municipal District) and Nova Scotia (Director of Assessment)* (1986), 75 N.S.R. (2d) 421 (C.A.) at paras. 26 - 29; *Sinanan v. Woodyer* (1999), 177 N.S.R. (2d) 200 (C.A.) at paras. 49 - 50; *Canasia Industries Ltd. v. May* (2000), 204 N.S.R. (2d) 88 (C.A.) at paras. 30 - 31; *CIBC Mortgage Corp. v. Ofume* (2002), 208 N.S.R. (2d) 185 (C.A.), affirming 206 N.S.R. (2d) 234 (S.C.); *Nowe v. All State Insurance Co. of Canada* (1996), 157 N.S.R. (2d) 148 (S.C.) at para. 11; *McQuaid v. Lapierre* (1993), 128 N.S.R. (2d) 327 (S.C.) at paras. 9 - 14.

[50] Such an aborted proceeding is not a "right of action".

[51] The closest cases of which I am aware are two old decisions of the Supreme Court of Canada: *Conrod v. Canada* (1914), 49 S.C.R. 577; *British Columbia Electric Railway Co. v. Turner* (1914), 49 S.C.R. 470. Both involved the release by injured persons of injury claims before their death and subsequent attempts by survivors to sue under fatal injuries legislation after the injured persons died. The fatal injuries legislation granted a right of action to survivors if (among other things) the deceased would have been entitled to maintain an action if he had not died. In both decisions, it was stated that a valid release granted by the injured person before his death would bar the survivors' right of action. The reasoning, as expressed by Anglin, J. in *Conrod* is that it was a condition precedent of the right of recovery under the fatal injuries legislation that the deceased had a right of action against the defendant for the injuries which caused his death, but that where the deceased had released such claims before his death, the condition precedent was not met. Both cases, which are binding on us, stand for the proposition that a

valid release by the deceased put an end to the survivors' right of action because, by virtue of the release, the deceased did not have a right of action at the time of his death. So I conclude that Mr. Dipersio's release in 1991 put an end to his right of action some five years before s. 32 came into effect.

[52] Section 32(a) states that the WCB may request the worker who has a "right of action" to "take an action in the other jurisdiction". Section 32(b) states that the worker who "has a right of action" must "assign the right of damages" to the WCB. These are barren directions for a right of action which was released and extinguished five years before s. 32 came into force.

[53] Section 32 applies to a worker who had a right of action either on February 1, 1996 when s. 32 came into force, or arising after that date. Contrary to the view expressed by the WCAT chairman, this does not entitle the worker to avoid the consequences prescribed by s. 32 merely by suing and settling before the WCB learns of it. Once the section applies to the right of action, nothing in the section says that the WCB's powers expire merely because the worker surreptitiously settles. I mention this because the reasons of the WCAT chairman cited the point in support of the WCAT's conclusion. The point has no relevance to Mr. Dipersio because, as discussed, he had no right of action against Rowan on February 1, 1996, when s. 32 came into force.

[54] In summary, s. 32 applies to a worker who "has a right of action" on or after February 1, 1996. Mr. Dipersio's right of action ceased to exist in 1991. Section 32 does not apply to the right of action which generated the Rowan settlement funds received by Mr. Dipersio in 1991. The WCB has no right to "withhold payment of compensation" to Mr. Dipersio under s. 32 of the current *Act*. By ruling otherwise, the WCAT erred in law.

(iii) Statutory Context

[55] This interpretation is supported by contextual provisions of the current *Act*. Section 32 appears under the heading "Third Party Claims and Subrogation" comprising ss. 28-33. Sections 30 and 31 were enacted by S.N.S. 1999, c. 1, s. 3(1). Section 3(2) of S.N.S. 1999, c. 1 states that ss. 30 and 31 apply to causes of action arising since October 1, 1998. When the legislature wished to give to the WCB a right with respect to "third party claims and subrogation", the legislature expressly prescribed any retroactive effect.

[56] Sections 10(B), 10(D), 10(E), 48(1) and 60(A) of the current *Act* were either enacted by S.N.S. 1994-95, c. 10 or added by subsequent amendment. These provisions expressly state the extent to which they apply to claims which have been determined under the former *Act*.

[57] These contextual provisions confirm that, if the legislature had intended s. 32 to cover a worker who "had but no longer has a right of action", the legislature would have said so.

(iv) Caselaw on Transitional Provisions

[58] The WCAT ruled that s. 32 permitted the WCB to withhold benefits which accrued to Mr. Dipersio both before and after the enactment of s. 32. The WCAT supported this conclusion with principles which it drew from the decisions of this Court in *Nova Scotia (Workers' Compensation Board v. Muise* (1998), N.S.J. 182, 170 N.S.R. (2d) 253 (C.A.), leave to appeal denied [1999] 1 S.C.R. xi and *MacEachern v. Nova Scotia (Workers' Compensation Board)*, 2003 NSCA 45. The WCAT relied on the principle approved by *MacEachern* and *Muise* that, unless a contrary intention appears in the current *Act*, outstanding claims at the date the current *Act* came into force should be decided in accordance with the current *Act*. With respect, this principle has no application here.

[59] *Muise* and *MacEachern* were in a series of this Court's decisions which considered how to address claims for benefits which were pending on the date the current *Act* came into force. In each of these cases, the question involved the statutory interpretation of the transitional provisions of the current *Act*, in light of the presumptions against retroactive operation of statutes and interference with vested rights. In the leading decision of *Doward v. Workers' Compensation Board (N.S.)* (1997), 160 N.S.R. (2d) 22 (C.A.), the court ruled essentially that these presumptions had not been rebutted for cases covered by s. 228 of the current *Act*. *Muise* and the cases following it held that other transitional provisions of the current *Act* showed the legislature's intention that outstanding claims were to be addressed under the current *Act*.

[60] In *Muise* the court considered the application of the current *Act* to a claim for additional temporary total disability benefits. The worker had been injured in 1993, was awarded initial benefits in March 1994, and filed a claim for additional

benefits which was still under appeal when the current *Act* came into force on February 1, 1996. Justice Bateman for the court stated:

> [38] It is appropriate to look at the structure and wording of the current *Act* in the context of this background information, to determine the legislative intent. Section 229, which is the subject of this appeal, is contained in Part 1 of the *Act*, in a group of sections titled Transitional Provisions (ss. 226 to 274).
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> [39] **Certain of these Transitional Provisions expressly address the circumstances of workers injured prior to the implementation of the current *Act* ...**
>
> [40] **In my view, unless a contrary intention appears (as in s. 228), these sections are directed at workers who are already receiving compensation, or whose entitlement to compensation has been determined, yet not in pay.** The purpose is to set out a scheme for recalculation of the quantum of that compensation, in some cases in accordance with the current *Act* (s. 229), and otherwise, in accordance with the former *Act* (s. 230). The wording of these sections is awkward. Absent from s. 229 is the wording "the compensation awarded . . . is deemed to be and always to have been awarded in accordance with the former *Act*" which creates the ambiguity in s. 228 and therefore gives rise to the presumptions against retroactivity and the interference with vested rights. **The question arises, then, what of the workers who were injured prior to the coming into force of the current Act, and whose claims have not been finally determined?** These claims may be at any stage of the process. Additional sections contained in the Transitional Provisions provided some guidance ...
>
> [41] **Clearly, the current *Act*, save where a contrary intention appears (as in s. 228), is intended to apply to parties who had suffered injuries prior to its enactment. This is exemplified by the inclusion of the Transitional Provisions, ss. 226 to 237. These sections specifically refer to workers who were injured either before March 23, 1990** (the date *Hayden* was released and the date after which no compensation has been provided pursuant to the provisions of the former *Act*), or before the current *Act* came into force. Sections 226 to 230 are primarily directed at the recalculation of compensation paid pursuant to the former *Act*. **What is not specifically addressed in the wording of those sections is the resolution of the outstanding claims of workers, injured before the effective date of the new legislation. I conclude that the legislators intended that those claims be decided in accordance with the new legislation, unless a contrary intention appears.** ...
>
> 42 Section 229 applies to workers who are "receiving" or "entitled to receive" compensation for a temporary disability, total or partial. It provides that "the

> amount of compensation payable to the worker shall continue to be calculated in accordance with" s. 37 (temporary total disability) or s. 38 (temporary partial disability) of the former *Act*, as amended by this *Act*. Sections 37 and 38 of the former *Act* simply set out the rate of compensation for the injured worker. The amendment to those sections is contained in s. 275 of the current *Act* which section adjusts the rate of compensation. The entire focus of s. 229 is the recalculation of compensation. Reading the section in this context there is no ambiguity. **At the date the current Act came into force, Mr. Muise's entitlement to compensation had not been determined, recalculation was therefore not an issue.** Section 229 lacks the ambiguous wording of s. 228. The issue of interference with vested rights, therefore, does not arise. In my view, nothing in the wording of s. 229 incorporates, for the purposes of determining entitlement to temporary compensation, the provisions of the former *Act*. The question of Mr. Muise's entitlement to further temporary disability benefits is to be determined in accordance with the current *Act*. [Emphasis added.]

[61] In *MacEachern v. Nova Scotia (Workers' Compensation Board)*, 2003 NSCA 45, the court referred to *Muise* and concluded:

> [16] Although Mr. MacEachern was "injured" while the former *Act* was in force, **his claim was first made under the current *Act* (subsequent to February 1, 1996).** It is our view that the above comments from *Muise* are equally applicable to Mr. MacEachern's claim. There is no "contrary intention" leading to the conclusion that unclaimed events, such as this, are to be governed by the former *Act*. ... [Emphasis added.]

Mr. MacEachern's claim had not been adjudicated and was "outstanding" as described in *Muise*, when the current *Act* came into force on February 1, 1996.

[62] The WCAT's analysis in Mr. Dipersio's case, with respect, ignored two fundamental points from these decisions.

[63] First, these decisions considered claims which were outstanding at the date the current *Act* came into force. Mr. Dipersio's claim was determined by a 1989 decision of the WCB, long before the current *Act* came into force. The only issue here is whether the current *Act* gave the WCB a statutory power to withhold payment of this continuing award.

[64] Second, as appears from this Court's decisions which discuss the transitional issues, the application of the current *Act* to events which preceded its enactment involves the interpretation of the applicable transitional provision. Under the "one principle" of statutory interpretation approved repeatedly by the Supreme Court of Canada, the plain and ordinary meaning of the applicable statutory provision, in this case s. 32, should be read harmoniously with the entire context, scheme and object of the *Act*: *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 33; *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees' Union Local 324*, [2003] 2 S.C.R. 157, at paras. 41-54. This Court has applied this approach to the interpretation to the *Workers' Compensation Act*: *Thomson v. Nova Scotia (Workers' Compensation Appeals Tribunal)* 2003, 212 N.S.R. (2d) 81 (C.A.) at para. 16; *Cape Breton Development Corp. v. Estate of James Morrison*, 2003 NSCA 103 at paras. 35-36; *Boyle v. Workers' Compensation Board (N.S.)*, 2004 NSCA 88 at paras. 34-36. *Muise* and the other decisions which followed it considered the interpretation of the relevant transitional provision to determine whether the current *Act* applied to the outstanding claim. Under the Supreme Court's "one principle", the relevant transitional provision of the current *Act* is part of the context and scheme of the *Act*, which should be analyzed to determine whether s. 32 permits the WCB to withhold payment of Mr. Dipersio's 1989 award.

[65] Mr. Dipersio suffered permanent partial disability in 1986. The applicable transitional provisions in the current *Act* are ss. 226 and 227. These sections expressly apply to workers who suffered permanent partial disability before March 23, 1990. In *Lowe v. Nova Scotia (Workers' Compensation Appeals Tribunal)* (1998), 166 N.S.R. (2d) 321 (C.A.), at paras. 22 - 25, this Court accepted the WCB's argument that ss. 226 and 227 were a "complete code" respecting workers injured before March 23, 1990, to whom the WCB had issued a compensation award under the former *Act*. To the same effect: *Richard v. Nova Scotia (Workers' Compensation Board)* (1998), N.S.J. 320, at para. 27.

[66] Section 226 deems the compensation award to be in accordance with the former *Act*. Section 226 addresses the decision in *Hayden v. Workers' Compensation Appeal Board(N.S.)(No. 2)* (1990), 96 N.S.R. (2d) 108 as discussed in *Lowe* at paras. 16-24. Section 226 is not relevant to the issues in this appeal.

[67] Section 227(1) states:

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.

[68] Under s. 227(1), where a worker was injured before March 23, 1990 and was entitled to receive compensation for permanent partial disability immediately before February 1, 1996, "the Board shall pay the compensation for the lifetime of the worker." Neither the WCAT chairman nor the plurality, before approving the WCB's cessation of payments to Mr. Dipersio, considered the direction in s. 227(1), that "the Board shall pay the compensation for the lifetime of the worker."

[69] Counsel for Rowan acknowledged on this appeal that s. 227(1) applies to Mr. Dipersio, but noted that s. 227(1) does not state to whom the compensation shall be paid. Rowan submitted that the compensation was "paid" under s. 227(1), but was paid to the WCB instead of to Mr. Dipersio.

[70] I do not agree that the payment contemplated by s. 227(1) includes a withheld payment under 32 of the current *Act.* My reasons are these:

(a) Section 32 permits the WCB to "withhold payment of compensation". Section 32 does not prescribe that the WCB "pays" itself. The fictional "payment" in s. 227(1), which is necessary for Rowan's argument, is not acknowledged by s. 32.

(b) The fictional "payment" to the WCB is not supported by the context in s. 227. Section 227(1) begins with the words " ... where a worker ... is entitled to receive compensation." Section 227(2) opens with the words:

> The amount of compensation payable to a worker referred to in subsection (1) is deemed ...

> Section 227 contemplates that the payment be to the “worker”, not from the WCB to itself.

[71] The WCAT relied on *Muise* and *MacEachern* to support its conclusion that s. 32 applied to Mr. Dipersio’s 1991 settlement. *Muise* and *MacEachern*, and other decisions of this Court dealing with the transitional provisions of the current *Act*, turn on the interpretation of the applicable transitional provision. The applicable transitional provision here, s. 227, in no way supports the WCAT’s conclusion that s. 32 applies to Mr. Dipersio’s 1991 settlement from Rowan.

(v) Sections 232 and 84

[72] The WCAT chairman’s concurring decision referred to ss. 232 and 84 of the current *Act* to support the conclusion that the WCB could withhold Mr. Dipersio’s benefits. The plurality decision did not rely on these provisions.

[73] Section 232 states:

> Where an appeal from a decision of the Board is filed after the date this Part comes into force, the appeal shall be heard and decided pursuant to this Part.

The WCAT chairman stated that “s. 232 requires the application of the current *Act*” which, according to the chairman, included the WCB’s power to withhold payment under s. 32.

[74] This misinterprets s. 232. Section 232 does not change the substantive effect of ss. 32 and 227. If ss. 32 and 227 do not permit the WCB to withhold payment, then the mere words “pursuant to this Part” in s. 232 do not authorize the WCB or WCAT to withhold payment. Section 232 relates principally to the procedure by which appeals are taken from WCB decisions. Those procedures are as set out in the current *Act*. Section 232 does not change the meaning of substantive provisions such as ss. 32 and 227.

[75] The chairman also cited s. 84 of the current *Act*:

> 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 cooperate 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 acclaim 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).

[76] The chairman stated:

> Alternatively, even if there were no settlement proceeds remaining as of February 1, 1996, since the current *Act* requires that the worker make an assignment of damages recovered, the worker had a duty to disclose the extent of settlement proceeds available as of that date. The duty arose by virtue of s. 84(1)(c) of the current *Act*. Failure to satisfy this duty exposes the worker to a sanction under s. 84(2) similar to the sanction under s. 32; i.e. the Board "suspend, reduce or terminate" benefits otherwise payable to the worker.

[77] In my view this misinterprets s. 84.

[78] The WCAT chairman's premise for his disposition under s. 84 is "since the current *Act* requires that the worker make an assignment of damages recovered", a reference to s. 32. As discussed, s. 32 does not apply to Mr. Dipersio's 1991 settlement proceeds. So the premise does not exist.

[79] Section 84(1)(c) requires the worker to provide information "on any matter relevant to a claim for compensation." Mr. Dipersio's 1991 settlement proceeds were not relevant to any claim for compensation. His "claim for compensation" had been determined in 1989. It is not suggested that the former *Act* entitled the WCB to withhold benefits on the basis of the Rowan settlement proceeds. Section 32, properly construed in light of s. 227 and in the context of the whole *Act*, does

not apply to Mr. Dipersio's situation. Section 84 does not entitle the WCB to discontinue payment on a free-standing basis unconnected to a relevant compensation issue.

(vi) The Historic Tradeoff

[80] The WCAT's chairman cited the "historic tradeoff" proposed by Sir William Meredith which was the rationale for the initial workers' compensation legislation: see *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 at para. 25. Workers relinquished their cause of action against their employers and, in return, gained compensation under the statutory scheme. Employers pay assessments but not damages. The chairman stated that the avoidance of double recovery promotes a reading of the current *Act* which authorizes the WCB to withhold Mr. Dipersio's compensation.

[81] The historic tradeoff led to the enactment of workers' compensation legislation. It is the legislation itself which governs the rights and obligations of Mr. Dipersio and the WCB. Under the former *Act*, for constitutional reasons and notwithstanding the historic tradeoff, Mr. Dipersio could sue in Texas while he claimed compensation from the WCB. If the former *Act* had contained a provision similar to the current s. 32, then the WCB could have withheld payment from Mr. Dipersio. Notwithstanding the historic tradeoff, the legislature (1) did not include such a provision in the former *Act* and (2) has chosen wording in ss. 32 and 227 of the current *Act* which does not retroactively entitle the WCB to withhold payment against a 1991 settlement.

[82] The historic tradeoff does not amend the statute. The statute governs.

[83] For these reasons, in my view WCAT erred in law by ruling that the current *Act* permits the WCB to withhold compensation benefits payable to Mr. Dipersio.

6. Summary

[84] As Rowan has acknowledged, Mr. Dipersio was entitled to his benefits due under the former *Act* up to February 1, 1996. This entitlement continues under the current *Act*. The current *Act* does not entitle the WCB to withhold benefits because of Mr. Dipersio's recovery under the 1991 Rowan settlement. I would allow the

appeal and remit the matter to the WCB for proper calculation and payment of Mr. Dipersio's benefits, without withholding.

[85] Notwithstanding *Rule* 62.27, I would award to the appellant against Rowan $2,000.00 all inclusive costs for this appeal.

Fichaud, J.A.

Concurred in:

Cromwell, J.A.

Saunders, J.A.