

Docket No.: CA 164485
Date: 20010105

NOVA SCOTIA COURT OF APPEAL

Cite as: MacNeil v. Nova Scotia (Workers' Compensation Board), 2001 NSCA 3

Bateman, Hallett and Flinn, JJ.A.

BETWEEN:

CRAIG J. MacNEIL

Appellant

- and -

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL,
the WORKERS' COMPENSATION BOARD OF NOVA SCOTIA and
CAPE BRETON DEVELOPMENT CORPORATION

Respondents

REASONS FOR JUDGMENT

Counsel: Anne Clark and Kenneth LeBlanc, for the appellant
Sarah Bradfield, for the respondent, Workers' Compensation
Appeals Tribunal of Nova Scotia
Janet E. Curry, for the respondent, Workers' Compensation
Board of Nova Scotia
Paul McLean for the employer, Cape Breton Development
Corporation

Appeal Heard: December 8, 2000

Judgment Delivered: January 5, 2001

THE COURT: Appeal allowed per reasons for judgment of Flinn, J.A.; Hallett
and Bateman, JJ.A. concurring.

FLINN , J.A.:

[1] Following the hearing of an appeal with respect to the appellant's claim for workers' compensation benefits, the Hearing Officer allowed the appellant's appeal. The appellant was granted temporary earnings replacement benefits, and medical aid, for post-traumatic stress disorder. The Hearing Officer found that the appellant's current condition was supported by medical evidence as being a result of his participation as a draegerman, in the search for missing men in the Westray mine in May, 1992. The Hearing Officer found that the appellant was an employee of the respondent (Devco) while participating in the Westray mine search in 1992.

[2] The appellant was in the employ of Devco from 1977 until he voluntarily left in June 1996. Devco takes the position that the 5 days which the appellant spent at the Westray mine were on a volunteer basis, and, therefore, while at the Westray mine the appellant was not an employee of Devco.

[3] The appellant filed his claim for workers compensation benefits on August 15, 1997, over 1 year after his departure from Devco, and over 5 years

after his involvement with the Westray mine operation.

[4] Devco appealed the decision of the Hearing Officer to the Workers' Compensation Appeals Tribunal. (WCAT)

[5] On September 8, 1999 the Acting Chief Appeals Commissioner wrote a letter to counsel for Devco, counsel for the appellant and counsel for the Board following a pre-hearing conference regarding this appeal. The letter confirmed an agreement:

1. that the appeal would proceed by paper review and not by oral hearing.
2. that there were three issues to be dealt with on the appeal, namely:
 - a.) whether Devco was the employer at the time the accident occurred,
 - b.) whether the worker was out of time in filing his workers compensation claim, and
 - c.) whether the worker was in the course of his employment with Devco while assisting in the Westray rescue attempt.
3. that written submissions were to be filed by the parties within time limits set out in the letter.

[6] The Acting Appeal Commissioner went on in the letter to state:

Should WCAT's decision be that Devco is not the employer, that will end the appeal.

[7] The Acting Appeal Commissioner was correct in making that statement because if Devco was not the employer then there is nothing further for Devco to appeal. Since there is no other appeal from the decision of the Hearing Officer, the decision of the Hearing Officer would stand.

[8] Counsel for Devco and counsel for the appellant then made their written submissions to WCAT. Counsel for the Board did not participate in the appeal, and made no submissions. It is apparent from the record that both counsel for Devco and counsel for the appellant decided to address, initially, only the issue as to whether Devco was the employer.

[9] On October 6, 1999 counsel for Devco sent his submission to WCAT with a covering letter which stated:

Please find attached our submission on the issue of **who is the employer** in the above noted matter...

[10] The attached submission dealt only with the issue as to whether Devco was the employer.

[11] On October 20, 1999 counsel for the appellant sent his submission to WCAT, and, as was the case with Devco, restricted his submission to the issue as to whether Devco was the employer. The submission was “in response to the submissions” of counsel for Devco on the issue addressed by counsel for Devco, “whether his client, the Cape Breton Development Corporation should be categorized as the employer in Mr. MacNeil’s claim.”

[12] Counsel for the appellant concluded her submission as follows:

I look forward to your decision **on this preliminary matter** in due course.

[13] Since a decision, that Devco was not the employer, would end the appeal, it is apparent that counsel decided to address that issue, firstly, and that issue alone. No submissions were made by either party on the issue of whether the claim was out of time.

[14] On May 24th 2000 WCAT rendered its decision, in which it concluded

that the appellant was not entitled to the benefits determined by the Hearing Officer because, it concluded, that the appellant's claim was statute barred. WCAT did not address in its decision the issue which had been put to it by counsel in their written submissions.

[15] Counsel for the appellant, on the appeal to this court, claims that the appellant was denied natural justice, and treated unfairly by WCAT, because WCAT did not answer the only question that was put to it by counsel, and that it decided the case on a different question without giving counsel an opportunity to be heard on that question.

[16] Counsel for WCAT was present during the hearing of this appeal in a watching capacity. In the course of the hearing she advised the panel that, under the circumstances of this case, WCAT had no objection to the matter being remitted to consider the threshold issue as to whether Devco is the employer. She advised further that the parties have been made aware of this position.

[17] In my opinion WCAT lost jurisdiction with respect to this matter. It not

only failed to address the only question that was put to it by counsel for both parties, it rendered a decision on a different question (which had not been put to it by either party) without giving the parties, particularly the appellant, an opportunity to make submissions and be heard on that question.

[18] In the result I would allow this appeal, and I would order that the decision of WCAT dated May 24, 2000 be set aside. Further, I would remit the matter to a differently constituted WCAT to render a decision firstly, on the issue submitted to it by counsel for both parties; namely, whether Devco is the employer for the purpose of the appellant's claim. If WCAT decides that Devco is the employer for the purpose of the appellant's claim it will then decide the remaining issues. However, WCAT will not decide those remaining issues before giving both parties an opportunity to make submissions on those issues.

[19] Since WCAT did not make a determination as to whether the appellant was an employee of Devco, and, therefore, an employee under the **Government Employees Compensation Act**, R.S.C. 1985, c. G-5, the recent decision of this court in **Salloum v. The Nova Scotia Workers'**

Compensation Appeals Tribunal and the Workers' Compensation Board of Nova Scotia, 2000 NSCA 148, does not constrain this court from making the order which I propose.

Flinn, J.A.

Concurred in:

Hallett, J.A.

Bateman, J.A.