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NOVA SCOTIA COURT OF APPEAL

[Cite as: Fraser v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2000 NSCA28]

Roscoe, Flinn and Cromwell, JJ.A.

BETWEEN:

ALBERT FRASER, Worker's Compensation Claimant (Claim No. 1529258) Appellant	)	Linda L. Zambolin and D. William MacDonald for the appellant
- and -	)	Tribunal not appearing
THE WORKERS' COMPENSATION APPEALS TRIBUNAL OF NOVA SCOTIA, and WORKERS' COMPENSATION BOARD OF NOVA SCOTIA Respondents	)	Janet E. Curry and David P.S. Farrar for the respondent Board
	)	Appeal heard: January 12, 2000
	)	Judgment delivered: February 9, 2000

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

CROMWELL, J.A.:

I. Introduction:

[1] Mr. Fraser was injured in March of 1993 while working at the Trenton Works Lavalin Inc. This appeal is his second to this Court in the course of his nearly seven year odyssey to have his claim for workers' compensation dealt with according to law.

II. Facts and Proceedings:

[2] Mr. Fraser received temporary total disability benefits (as they were known under the former **Workers' Compensation Act,** R.S.N.S. 1989, c. 508) from May 25th, 1993, to October 12, 1993. His request for further temporary total disability benefits and a work hardening program was denied by the Board. That denial was upheld by a Hearing Officer in a decision made in July of 1995. Mr. Fraser appealed to the Workers' Compensation Appeals Tribunal. In March of 1997, the Tribunal dismissed his appeal from the denial of temporary total disability payments beyond October 12th, 1993, but allowed the appeal to the extent of ordering that Mr. Fraser be provided with a work hardening program. (The work hardening program was unsuccessfully attempted in July of 1997.)

[3] Mr. Fraser appealed the WCAT decision of March 25, 1997, to this Court. The appeal was allowed. The Tribunal, the Court found, made a jurisdictional error by reviewing the Hearing Officer's decision for patent unreasonableness rather than correctness. In allowing the appeal and remitting the matter to WCAT, the Court said:

> Inasmuch as the Tribunal has already found that there was a reasonable inference, based on the evidence, that the appellant continued to suffer from a

> temporary total disability as a result of the work place injury beyond October 12, 1993, it is only necessary to direct the Tribunal to determine the amount of the temporary total disability benefits to which the appellant is entitled in accordance with the Tribunal's finding. (emphasis added)

[4] Pursuant to the Court's Order, the matter once again went before WCAT. However, another significant event intervened. Between the hearing of Mr. Fraser's first appeal in this Court and it being heard by WCAT pursuant to the Court's order remitting the case, this Court gave judgment in **Workers' Compensation Board of Nova Scotia v. Workers' Compensation Appeals Tribunal of Nova Scotia and Philip Muise** (1999), 170 N.S.R. (2d) 253 (C.A.). **Muise** made it clear that the current **Act** , (S.N.S. 1994 - 95, c. 10 as amended) ought to be applied to claims like Mr. Fraser's for temporary benefits falling within s. 229 of the current **Act**. It had been assumed prior to **Muise** that the former **Act** applied and Mr. Fraser's claim had proceeded on that assumption.

[5] When the matter came back before WCAT, therefore, the Tribunal was faced with a direction of this Court to determine the amount of the "temporary total disability benefits" to which Mr. Fraser was entitled. But, as a result of **Muise**, the Tribunal was also bound to apply the current **Act** to the extent the claim fell within the terms of s. 229.

[6] WCAT, in its decision of May 12th, 1999, relied on new medical evidence and determined that Mr. Fraser had suffered a loss of earnings due, at least in part, to his injury beyond October 12th, 1993. His appeal was nonetheless dismissed because, in

the Tribunal's opinion, his condition as of that date had "plateaued" and become permanent, thereby disentitling him to the continuation of temporary benefits.

[7] Mr. Fraser now appeals the May 12th decision of WCAT. The appeal to this Court, as a result of the 1999 amendments to the **Workers' Compensation Act**, (S.N.S. 1999, c. 10), now extends, not only to questions of jurisdiction, but also to questions of law: see . 256(1):

> 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.

III. Issues:

[8] The issues, as stated by Mr. Fraser's counsel, are these:

> The Workers' Compensation Appeals Tribunal has erred in law and jurisdiction:
> (a) In the interpretation and application of sections 2 (ad) and 37(1) regarding the payment of an earnings loss benefit where loss of earnings results from an injury;
> (b) In failing to consider the provisions of section 2 (o) together with sections 2 (ad) and 37(1) as they relate to the payment of an earnings loss benefit where a loss of earnings results from an injury; and
> (c) In failing to apply the proper test in the assessment of entitlement to TERB as set forth in WCAT Decision 98-349-AD, dated May 10, 1999; and
> (d) In finding that the Appellant was not entitled to further TERB beyond October 12, 1993 contrary to the Order for Judgement dated February 6, 1998, which remitted the matter back to the Workers' Compensation Appeals Tribunal for the sole purpose of determining the amount of the TTD benefits to which the Appellant was entitled in light of the Workers' Compensation Appeals Tribunal finding that the Appellant continued to suffer from a TTD as a result of a work place injury.

[9] Mr. Fraser's position, in essence, is that the Tribunal erred in finding that he was not entitled to temporary benefits. It is submitted that Mr. Fraser is entitled to the continuation of temporary benefits so long as he is unable to return to work due to the

compensable injury and has not been found to have a permanent impairment by the Board. As expressed in the appellant's factum, whether or not a condition has plateaued or stabilized in the medical sense is immaterial; permanency is only material when it has been evaluated pursuant to section 34 and benefit entitlement established. (emphasis added) It is also argued that the Tribunal erred in considering Mr. Fraser's entitlement to benefits rather than restricting itself to the question of quantum as directed by the Court.

IV. Analysis:

[10] The former **Act** dealt explicitly with compensation for temporary disability and permanent disability: see, for example, ss. 37 and 43. The current **Act** speaks generally of earnings-replacement benefits (s. 37) and permanent impairment benefits (s. 34). Section 37(1) provides:

> 37 (1) Where a loss of earnings results from an injury, an earnings-replacement benefit is payable to the worker in accordance with this Section.

[11] The current **Act** defines two types of earnings-replacement benefits, extended and temporary:

> 2 (o) "extended earnings-replacement benefit" means an earnings-replacement benefit payable to a worker from the later of
>
> (i) the date on which the Board determines the worker has a permanent impairment pursuant to Section 34, and
>
> (ii) the date on which the worker completes a rehabilitation programs pursuant to Section 112, where the workers is engaged in a rehabilitation program on or after the date the Board determines the worker has a permanent impairment pursuant to Section 34;
>
> 2. (ad) "temporary earnings-replacement benefit" means any earnings-replacement benefit payable to a worker prior to the date on which an extended

earnings-replacement benefit, if any, becomes payable; (emphasis added)

[12] The distinction between “extended” and “temporary” benefits is significant for, among other things, the purposes of the Board’s review of the compensation payable. The amount of a temporary earnings-replacement benefit is reviewable at any time (s. 72) whereas the review of the amount of an extended earnings-replacement benefit is considerably more restricted (s. 73).

[13] The order of the Court remitting the case to WCAT, coupled with the requirement (resulting from **Muise**) to apply the current **Act** to cases falling within s. 229, presented WCAT with a dilemma. The Court’s order remitting the matter directed the Tribunal to determine the amount of the temporary disability benefits to which Mr. Fraser was entitled; the requirement to apply the current **Act** made it impossible to comply literally with that direction because the current **Act** provides for earnings-replacement benefits rather than temporary disability benefits. The challenge facing WCAT was to apply the Court’s direction in light of the current **Act**.

[14] In my view, the key to the problem lies in the history of the matter prior to its first appearance in this Court. A significant issue relating to Mr. Fraser’s claim was whether his disability resulted from his workplace injury. WCAT, in its March 25, 1997, decision had found in Mr. Fraser’s favour on this issue. In my opinion, the intent of the Court’s order remitting the matter to WCAT was to preserve that finding in his favour and to secure for him the benefits to which that finding entitled him.

[15] During the hearing before this Court, the position of the Board was considerably clarified in two important respects. First, the Board conceded that WCAT had found that Mr. Fraser suffered a loss of earnings due at least in part to his injury beyond October 12th, 1993. Second, the Board also conceded that WCAT had found that Mr. Fraser had suffered a permanent medical impairment as of October 12th, 1993. I agree with the Board's concession that WCAT made these findings.

[16] While I have considerable sympathy for the difficult position in which WCAT found itself as a result of being required both to apply the current **Act** and to comply with this Court's order remitting the case, I have concluded that the Tribunal erred in law in simply dismissing Mr. Fraser's appeal. WCAT found that Mr. Fraser had suffered earnings loss as a result, at least in part, of his injury beyond October 12th, 1993, and that he suffered a permanent medical impairment beyond that date. Having made these findings, it was an error of law for WCAT to fail to, at least, remit the case to the Board for determination of the benefits to which these findings entitled Mr. Fraser.

[17] That leaves the question of what order, if any, this Court should make in addition to allowing the appeal and setting aside WCAT's decision of May 12, 1999.

[18] Mr. Fraser says that we should order the Board to pay Temporary Earnings-Replacement Benefits from October 13, 1993 to July 24, 1997, the date on which vocational rehabilitation measures (in the form of work hardening) concluded and, as well, order extended earnings-replacement benefits to be paid from that date.

Underpinning this submission is the view that once entitlement to temporary earnings-replacement benefits is established, such benefits remain payable (assuming the loss of earnings resulting from the work-related injury continues) until an extended earnings-replacement benefit, if any, becomes payable: see section 2(ad). An extended earnings-replacement benefit becomes payable from the later of the date on which the Board determines the worker has a permanent impairment pursuant to section 34, and the date on which the worker completes a rehabilitation program: see section 2(o). In other words, the argument is that WCAT erred in denying the continuation of temporary benefits because it formed the view that Mr. Fraser's condition had "plateaued" or become permanent in the medical sense. No permanent medical impairment assessment having been conducted, but ongoing earnings loss attributable at least in part to the injury having been found, the temporary benefits should have been continued until the Board completed that assessment.

[19] With respect, I do not think that this argument, even if accepted, applies to the facts of this case. Accepting, without deciding, that there is indeed a "continuum" of benefits so that temporary benefits (assuming that wage loss results from the workplace injury) continue until the conditions described in section 2(o) come into existence, WCAT has found that there was a permanent impairment as of October 12, 1993. In my view, in the context of this appeal, that must be taken as a determination by the Board that "... the worker has a permanent impairment pursuant to section 34 ..." within the meaning of s. 2(o)(i). I do not think it essential that the permanent impairment have been rated so that a permanent impairment benefit has become payable. Section 2(o),

which defines extended earnings-replacement benefits, speaks in terms of " the date on which the Board determines the worker has a permanent impairment..." (emphasis added). It does not speak in terms of a permanent impairment benefit becoming payable.

[20] The appellant argues that the proper test for determining entitlement to temporary benefits is the negative test set out by the Tribunal in WCAT Decision No. 98-349-AD:

> The appellant is entitled to continual T.E.R.B. so long as she is unable to return to work due to the compensable injury and has not been found to have a permanent impairment. (emphasis added)

[21] Assuming, without deciding, that is the correct test and that it applies here, the Tribunal did not misapply it here because it is now conceded by the Board that the Tribunal found Mr. Fraser to have a permanent impairment.

V. Disposition:

[22] I would allow the appeal, set aside WCAT's decision of May 12, 1999 and remit the matter directly to the Board for determination of the quantum of all benefits to which Mr. Fraser is entitled in light of WCAT's findings.

[23] I would also add that no point was raised concerning the implications, if any, for this appeal of s. 228 of the **Act** and nothing in these reasons addresses that question.

[24] The appellant did not request costs and I would order none.

Cromwell, J.A.

Concurred in:

Roscoe, J.A.

Flinn, J.A.