NOVA SCOTIA COURT OF APPEAL

Citation: *Surette v. Nova Scotia (Workers' Compensation Board)*, 2017 NSCA 81

Date: 20171103
Docket: CA 460849
Registry: Halifax

In the matter of:
A stated case pursuant to s. 206 of the *Workers' Compensation Act* by the Workers' Compensation Appeals Tribunal to the Nova Scotia Court of Appeal in relation to WCAT Appeal 2016-299;

And, in the matter of:

WCAT Appeal #2016-299 **Between:**

Lloyd Surette

Appellant

v.

Workers' Compensation Board of Nova Scotia and Attorney General of Nova Scotia

Respondents

Judges:	Fichaud, Farrar and Bourgeois, JJ.A.
Appeal Heard:	October 4, 2017, in Halifax, Nova Scotia
Held:	**Workers' Compensation Appeals Tribunal's Question to the Court of Appeal Answered in the Affirmative**
Counsel:	Stephen R. Lawlor and David McCluskey, for the appellant Roderick (Rory) Rogers, Q.C. and Paula Arab, Q.C., for the respondent, Workers' Compensation Board of Nova Scotia Alexander C.W. MacIntosh, for Workers' Compensation Appeals Tribunal Edward A. Gores, Q.C., for the respondent Attorney General of Nova Scotia (not participating)

Reasons for judgment:

Overview

[1] This matter came before this Court as a stated case from the Workers' Compensation Appeals Tribunal (WCAT) pursuant to s. 206 of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 ("the *Act*") . Section 206 allows WCAT to state a case to this Court on any question of law. It provides:

> Stated case to Court of Appeal
>
> 206 (1) The Board or the Appeals Tribunal may state a case in writing for the Nova Scotia Court of Appeal on any question of law.
>
> (2) The Nova Scotia Court of Appeal shall
>
> (a) hear and determine the question or questions referred pursuant to subsection (1); and
>
> (b) provide its opinion on the question to the Board or the Appeals Tribunal, as the case may be.
>
> (3) The Nova Scotia Court of Appeal shall not award costs in a case stated pursuant to this Section.

[2] WCAT asks for our opinion on the following question of law:

> Is Paragraph 2 of Step 2 of Board Policy 1.2.5AR1, the "five-year audiogram rule", inconsistent with Part 1 of the *Act*, specifically sections 10, 12 and 83?

[3] For the reasons that follow, I would find that the Policy is inconsistent with Part 1 of the *Act*.[1]

Background

[4] The facts have been provided to us by WCAT in its Notice of Application to State a Case. I will restate them here although not necessarily in the same order or wording as in the Notice of Application.

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[1] The *Act* is divided into four parts. Part 1 of the *Act* referred to in WCAT's question contains the provisions relating to a worker's entitlement to benefits. Part II establishes the Workers' Compensation Appeals Tribunal; Part III establishes the Workers' Advisors Program and Part IV contains General Provisions. The only Part that we are concerned with on this Stated Case is Part 1. When I refer to the *Act* I am referring to Part 1.

[5] Mr. Surette was employed as a shipwright for 50-55 years. He retired in December of 2007.

[6] The first time he had his hearing tested after he ceased working was on November 26, 2015, at the Nova Scotia Hearing and Speech Centre. According to the audiogram taken that day, Mr. Surette had sensorineural hearing loss bilaterally for which binaural amplification was recommended.

[7] Mr. Surette filed a claim for occupational noise-induced hearing loss (sometimes referred to by the acronym NIHL) with the Workers' Compensation Board (WCB) in February 2016.

[8] In a decision dated March 1, 2016, a Hearing Loss Adjudicator denied Mr. Surette's claim because he did not meet the criteria of Board Policy 1.2.5AR1 which addresses entitlement to benefits for occupational hearing loss (the Policy). To be considered for entitlement to compensation, the Policy requires a worker to have an audiogram within five years of leaving the workplace where it was alleged exposure to excessive noise occurred (this is sometimes referred to as the five-year audiogram rule).

[9] The Policy provides:

> To consider entitlement of NIHL, once a worker is no longer exposed to workplace noise in excess of permissible levels, the worker must have an audiogram performed within 5 years of leaving the workplace location with the excessive noise. The date of the audiogram indicating NIHL will be considered the date of accident for adjudication purposes.
>
> [Emphasis added]

[10] Mr. Surette appealed the adjudicator's decision to a hearing officer. In a decision dated June 17, 2016, the Hearing Officer upheld the Adjudicator's decision, confirming the finding that Mr. Surette's claim was barred by the operation of the five-year audiogram rule in the Policy.

[11] Mr. Surette appealed the Hearing Officer's decision to WCAT.

[12] In her decision dated February 2, 2017, the Appeal Commissioner found that, in all other respects, Mr. Surette was entitled to be adjudicated for occupational hearing loss. However, the five-year audiogram rule would preclude such an adjudication.

[13] WCAT stated a case to this Court asking us to answer the question as previously set out.

Issue

[14] The only issue for determination is whether the five-year audiogram rule is inconsistent with the *Act*.

Standard of Review

[15] The *Act* entitles the WCB to adopt policies "consistent with" the *Act* and regulations:

> **183 (2)** The Board of Directors may adopt policies consistent with this Part and the regulations to be followed in the application of this Part or the regulations.

[16] Section 183 also provides that policies adopted by the Board are expressly binding on the WCB and on WCAT, although in the case of WCAT only to the extent that they are consistent with the *Act* and the regulations:

> **183 (5)** Until a different policy is adopted, every policy adopted by the Board of Directors pursuant to subsection (2) is binding on the Board itself, the Chair, every officer and employee of the Board and on the Appeals Tribunal.
>
> **(5A)** Notwithstanding subsection (5), a policy adopted by the Board is only binding on the Appeals Tribunal where the policy is consistent with this Part or the regulations.

[17] In *Guy v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2008 NSCA 1, this Court discussed the nature of policies made pursuant to s. 183 and determined they were more akin to subordinate legislation than to administrative policies. To the extent that they are consistent with the *Act* they have the force of law:

> [14] … Because the WCB's policies are specifically authorized and made binding by statute, they have more in common with subordinate legislation than with administrative policies and guidelines which are not specifically authorized or binding. In short, within the workers' compensation system, these policies, by express statutory provision, have the force of law. The legislature could not more clearly have evidenced its intent that the WCB has the authority to make policies

> which are binding to the extent that they are not inconsistent with the **WCA** or the regulations under it.
>
> [Emphasis added]

[18] Board policies are, therefore in substance, subordinate legislation. The standard of review of subordinate legislation is set out in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64. The *Katz* standard was recently summarized by this Court in *The Nova Scotia Barristers' Society v. Trinity Western University*, 2016 NSCA 59 as follows:

> [48] *Katz* directs the Court to consider the scheme of the *Legal Profession Act* – i.e. its wording, context and objective and the Society's statutory mandate, interpreted purposively and broadly. *Katz* instructs that the impugned regulation benefits from a presumption of validity, and its purpose is interpreted liberally. It is *ultra vires* only if it is "irrelevant", "extraneous" or "completely unrelated" to its statutory authority. Neither the policy merits of the regulation nor the underlying "political, economic, social or partisan considerations" pertain to the inquiry.

[19] The question is: does the scheme of the *Act* allow the WCB to pass a policy which precludes it from adjudicating a worker's claim on the expiration of a time limit.

Analysis

[20] Broadly speaking, the overall scheme and purpose of the *Act* is to provide compensation to workers injured in the course of their employment without regard to fault. In doing so, the Board is given broad powers to manage the Accident Fund out of which benefits are to be paid. It has the ability to shape, by regulation and by policy, many of the benefits contemplated by the *Act* (*Guy, supra*, ¶18).

[21] I now turn to the specific wording of the *Act*.

[22] A worker's eligibility for compensation is set out in s. 10 of the *Act*:

> **10 (1)** Where, in an industry to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the Board shall pay compensation to the worker as provided by this Part.
>
> [Emphasis added]

[23] "Accident" is defined in s. 2 of the *Act* and includes:

> … (iii) disablement, including occupational disease, arising out of and in the course of employment, …
>
> [Emphasis added]

[24] Occupationally-induced hearing loss is an occupational disease (Policy 1.2.5AR1 ¶1).

[25] If a worker suffers from an occupational disease, the worker is entitled to compensation as provided in s. 12 of the *Act*:

> **12 (1)** Where an occupational disease is due to the nature of any employment to which this Part applies in which a worker was engaged, whether under one or more employments, and
>
> (a) the occupational disease results in loss of earnings or permanent impairment; or
>
> (b) the worker's death is caused by the occupational disease,
>
> the worker is entitled to compensation as if the occupational disease was a personal injury by accident.
>
> [Emphasis added]

[26] The *Act* provides a claim for compensation must be made within one year of a worker learning that the worker suffers from the occupational disease:

> **83**(2) In the case of an occupational disease, the Board shall not pay compensation except where
>
> (a) the worker has given the employer notice of the injury as soon as practicable after the worker learns that the worker suffers from an occupational disease; and
>
> (b) the worker's claim for compensation is made within twelve months after the worker learns that the worker suffers from the occupational disease for which the worker is claiming compensation.
>
> [Emphasis added]

[27] The *Act* gives the WCB discretion to extend the time limits in s. 83(2) if there is no prejudice to the WCB subrogated interests or any right of the employer:

> **83**(5) Failure to give notice pursuant to this Section bars the right to compensation unless, upon the application of the worker, the Board determines that
>
> (a) any right of the worker's employer pursuant to this Part; and
>
> (b) the subrogated interest of the Board,
>
> has not been prejudiced by the failure, in which case the Board may extend the time for filing a claim.
>
> (6) Subsection (5) does not apply where five years or more have elapsed from
>
> (a) the happening of the accident; or
>
> (b) the date when the worker learns that the worker suffers from an occupational disease,
>
> as the case may be.

[28] Finally, s. 184(1) allows the WCB by regulation, with the approval of Governor-in-Council, to prescribe any time limit not otherwise prescribed in the *Act*:

> **184**(2) Without restricting the generality of subsection (1), the Board, with the approval of the Governor in Council, may make regulations
>
> (a) prescribing any time limit not prescribed in this Part that the Board considers necessary for the efficient operation of the Board;
>
> …

[29] What then is the scheme of the *Act* when considering a claim for an occupational disease? It may be summarized as follows:

i. If a worker has an accident arising out of and in the course of employment the WCB is required to pay compensation as provided in the *Act* (s. 10);

ii. Occupational diseases are defined as an accident compensable under the *Act* (s. 2);

iii. A worker is entitled to compensation for an occupational disease as if it were a personal injury by accident (s. 12);

iv. The only time limitation on entitlement of compensation for occupational disease is contained in s. 83 of the *Act*. The failure to give notice is a bar to the right to compensation, unless the WCB determines that the worker's employer and the subrogated interest of

the WCB have not been prejudiced by the failure to give timely notice in which case the WCB may extend the time;

v. The WCB may, among other things, enact policies, but only if those policies are consistent with the *Act*; and

vi. The WCB may, with the approval of the Governor-in-Council, make regulations prescribing any time limit not already prescribed in the *Act*. It is subject to:

a. Approval of the Lieutenant-Governor-in-Council; and

b. The time limitation is not otherwise prescribed in the *Act*.

[30] I now return to the wording of the Policy which requires an audiogram within five years as a prerequisite to adjudication of a claim for noise-induced hearing loss:

> To consider entitlement of NIHL, once a worker is no longer exposed to workplace noise in excess of permissible levels, the worker must have an audiogram performed within 5 years of leaving the workplace location with the excessive noise. The date of the audiogram indicating NIHL will be considered the date of accident for adjudication purposes.

[31] The requirement, by Policy, to have an audiogram within five years of the worker leaving employment does not accord with the scheme of the *Act*. It imposes a limitation on the entitlement to compensation for a specific type of occupational disease, i.e., noise-induced hearing loss which is contrary to the express provisions of the *Act*.

[32] The 5 year audiogram rule is clearly a limitation period. The *Act* already provides a limitation period for when a claim may be made for an occupational disease. The *Act* further provides when the WCB may exercise its discretion extending the time for filing a claim even if the time limitation has been missed.

[33] The Policy not only imposes an additional limitation period not contemplated by the *Act*, it removes any discretion from the WCB to extend the time for filing a claim. It changes the limitation period in the *Act* from one which is based on when a worker learns of the occupational disease to one which is rigid and non-discretionary. Its effect is extraneous to its statutory authority under *Katz*. It is inconsistent with the *Act*.

[34] Mr. Surette has complied with the statutory requirements which would otherwise enable him to have his claim adjudicated. It is not open for the WCB to prevent that through policy.

[35] For these reasons, to the extent that the Policy requires the worker to obtain an audiogram within five years of leaving his employment in order to be eligible for compensation, it is inconsistent with the *Act*.

[36] No costs will be awarded to any party.

Farrar, J.A.

Concurred in:

Fichaud, J.A.

Bourgeois, J.A.