

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S.; Matthews and Chipman, J.J.A.

Cite as: Dockrill v. Nova Scotia (Workers' Compensation Appeal Board), 1992 NSCA 61

BETWEEN:

ROBERT ALDON DOCKRILL)	Ronald E. Pizzo
Worker's Compensation Claimant)	for the Appellant
(Claim No. 717322))	
)	Jonathan Davies
Appellant)	for the Respondent
)	
- and -)	
)	Appeal Heard:
WORKERS' COMPENSATION)	September 14, 1992
APPEAL BOARD)	
)	Judgment Delivered:
Respondent)	September 14, 1992
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THE COURT: The appeal is allowed without costs and the matter is remitted to the Workers' Compensation Appeal Board for its review and consideration as per oral reasons for judgment of Matthews, J.A.; Clarke, C.J.N.S. and Chipman, J.A. concurring.

The reasons for judgment of the Court were delivered orally by:

MATTHEWS, J.A.

The issue here is whether the respondent erred in law in awarding the appellant 15%

temporary partial disability benefits from September 17, 1990 to "the date of his latest surgery", which was on or about July 10, 1991.

On May 2, 1969, the appellant first applied, and then received, Workers' Compensation benefits due to an injury to his left knee. He has continued to experience difficulties with that knee resulting in appearances before and decisions from the Workers' Compensation Board. The circumstances giving rise to this appeal centre upon an acute attack of pain to the appellant's knee on August 20, 1990. The Workers' Compensation Board paid to the appellant 100% temporary total disability benefits for the period August 20, 1990, to September 17, 1990, but refused to pay any further benefits. His appeal to the Appeal Board was heard on December 3, 1991. Its decision dated January 16, 1992 is here set out in full:

" The Dockrill appeal was heard in Halifax on December 3, 1991.

Mr. Dockrill was represented by Ronald E. Pizzo, Workers' Counsellor.

The Appeal Board reviewed Mr. Dockrill's file, heard his oral evidence and a submission on his behalf by Mr. Pizzo which included medical reports from Drs. G.P. Reardon, W.D. Canham and C.M. Hradecky (copies attached).

Mr. Pizzo, in his presentation to the Appeal Board, requested temporary total disability benefits from September 17, 1990 for six months from the date of his latest surgery.

Mr. Dockrill received a compensable injury to his knee in 1969 which resulted in numerous surgeries, the majority being paid for by the Workers' Compensation Board.

Dr. Reardon, in a July 2, 1991 report, explains Mr. Dockrill's disability and also the confusion after an examination by an orthopaedic surgeon in Ottawa who felt the additional surgery was not required. Therefore, the Workers' Compensation Board withdrew the original agreement to cover the surgery which had been suggested by a specialist in Nova Scotia.

However, Drs. Canham and Reardon were of different opinions, thus resulting in Mr. Dockrill receiving another operation to his knee.

Dr. Reardon's opinion is as follows:

'On physical exam he appears his stated age. He walks with a severe limp. The left knee is solidly fused in about 20 degrees of flexion.

There is marked thigh atrophy. His leg obviously is significantly shortened. Multiple surgical scars are evident. Interestingly enough, his patella is quite mobile. There is obvious crepitus beneath the patella.

There are a number of factors and issues in this case which are interesting. I think the most important one is whether or not his current disability can be related to his previous work injuries. My opinion is that, yes, indeed it can. Obviously this man has a very severe problem with his knee. The knee is biomechanically unsound. I feel that it is in too much flexion, and this has resulted in marked difficulty with his ambulation. It is quite obvious that the patellofemoral problem that he is now experiencing is directly related to his injuries and his subsequent knee fusion. The joint surface of the patella has completely degenerated over the years. This is because of the malfunction of the knee joint following a fusion. This is a very common finding following a fusion where the patella is left in place. I gather the Compensation Board has had difficulty with this concept since there was no documentation of a direct injury to the patella, but I can assure you that the patellofemoral problems following a knee fusion are extremely common, and there is absolutely no question that the degenerative change that has occurred is directly related to his initial problem.

Presently, I feel that he is totally disabled from work. He is in marked pain, and I think his symptoms are quite legitimate. The question as to whether or not a patellectomy is warranted is purely a judgement call. Dr. Canham knows this patient better than anyone else. He obviously has thought long and hard about whether or not a patellectomy should be done. He has taken great pains to point out the potential pitfalls of the surgery. In the end he has elected to proceed. I really cannot fault his judgement. He feels the pain is patellofemoral, as do I. I think because all other attempts at treatment have failed that a patellectomy is reasonable. Obviously Dr. Hradecky's concerns are legitimate, but there is absolutely no contraindication to patellectomy here. I think Dr. Canham's judgement in this case is very sound, and I would certainly support it.'

Dr. Canham, in his report dated March 11, 1991, replies to questions put forth by the Workers' Compensation Board as follows:

'The first question is the condition of his fused knee. The knee is fused, and will continue to be fused.

The second question is its relationship to the original work injury. It was a secondary problem related to the original work injury that resulted in this patellofemoral arthritis.

Your third question asks if this man is totally disabled from work. In my opinion, he is disabled.

The usual period of convalescence from this procedure, unfortunately,

is about three to six months. He will not be fit for work during that period.'

Although Mr. Dockrill may have not been able to perform his regular type of work, the Appeal Board Members feels he would be capable of performing sedentary work if such were available.

Considering all evidence available, the Appeal Board awards Mr. Dockrill 15% temporary partial disability benefits effective September 17, 1990 to continue until the date of the latest surgery at which time he is to be placed on full compensation for a period of six months."

The appellant has placed three issues before us:

- "(1) Did the Workers' Compensation Appeal Board fail to consider and interpret Sections 37 and 38 of the Workers' Compensation Act;
- (2) Did the Workers' Compensation Appeal Board fail to consider, interpret and apply Section 24 of the Workers' Compensation Act; and
- (3) Did the Workers' Compensation Appeal Board:
 - (a) Fail to give reasons supporting its decision to award a 15% temporary partial disability only; and
 - (b) make the finding that Mr. Dockrill was only temporarily partially disabled upon no evidence?"

It is impossible to discern from the decision how or why the Appeal Board arrived at its decision, particularly when it quoted from Dr. Reardon: "Presently, I feel that he is totally disabled from work" and that in Dr. Canham's opinion "he is disabled". The file does contain some reference to the fact that the appellant may be able to perform sedentary work but he has no training for any such occupation. Further, the appeal Board did not indicate, nor does the file disclose, what type of sedentary work the appellant could perform, his qualifications for that work or the level of income he may be able to earn. The decision does not comment upon any evidence which would conflict with the statements of Drs. Reardon and Canham nor is there any indication that the Appeal

Board considered and provided the benefit of the doubt to the appellant pursuant to s. 24 of the **Workers' Compensation Act**, R.S.N.S. 1989, Chapter 508.

The respondent does not contest issue number 3. On enumerable occasions this court has held that the Appeal Board must supply reasons for its decisions and we have remitted matters to the Appeal Board insisting that this be done. See s. 185 of the **Act** and among others, **Stevens v. Workers' Compensation Appeal Board** (1987), 76 N.S.R. (2d) 342; **North v. Workers' Compensation Appeal Board** (1989), 93 N.S.R. (2d) 401 and the cases cited therein.

Forthrightly the respondent says that as to issues 1 and 2, "lack of adequate reasons makes it difficult to tell whether the Appeal Board considered these sections". It agrees that the Appeal Board is required to provide the worker with the benefit of the doubt under s. 24. See **Riche v. Workers' Compensation Appeal Board**, N.S.A.D. No. 02585, judgment dated June 2, 1992, not yet reported.

Workers and those who fund the workers' compensation regime would save much time, effort and expense and the workers' great agony if the Board and the Appeal Board merely followed these principles.

We allow the appeal without costs and remit the matter to the Appeal Board for a rehearing to review and reconsider the claim and to provide reasons for its determination.

J.A.

Concurred in:

Clarke, C.J.N.S.

Chipman, J.A.

S.C.A. No. 02619

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BETWEEN:

ROBERT ALDON DOCKRILL
Worker's Compensation Claimant
(Claim No. 717322)

Appellant

- and -

WORKERS' COMPENSATION
APPEAL BOARD

REASONS FOR
JUDGMENT BY:

MATTHEWS, J.A.
(orally)