In the Court of Appeal of the Northwest Territories

Citation: Gélinas v. Workers' Compensation Board et al., 2004 NWTCA 02

Date: 20041124
Docket: A-0001-AP-2002000021
Registry: Yellowknife, NWT

Between:

Daniel Gélinas

Appellant

- and -

The Workers' Compensation Board of the Northwest Territories and Nunavut and The Workers' Compensation Board of the Northwest Territories and Nunavut Appeals Tribunal

Respondents

The Court:

The Honourable Madam Justice Elizabeth McFadyen
The Honourable Mr. Justice Ronald Veale
The Honourable Mr. Justice Neil Wittmann

Memorandum of Judgment

Appeal from the Judgment of
The Honourable Madam Justice V.A. Schuler
Dated the 17th day of December, 2002
Filed on the 17th day of December, 2002
(2002 NWTSC 79, Docket: S0001-CV2001000412)

Memorandum of Judgment

INTRODUCTION

[1] Daniel Gélinas (the "worker") suffered an incarcerated hernia while lifting cases of beer at work on September 4, 1985. He underwent numerous surgeries to try to correct the problem and subsequent related problems. Ultimately, he suffered chronic pain, depression and substance abuse. The Workers' Compensation Board ("WCB") assessed the worker's permanent partial disability ("PPD") at 15% and awarded him a monthly pension. Over the years, the worker has been assessed by numerous physicians and health care professionals. His case has been reviewed and compensation decisions have been appealed on a number of occasions. Each time, the 15% PPD assessment was re-affirmed and temporary total disability ("TTD") benefits were denied.

[2] In November 2000, the worker appealed a decision of the WCB Review Committee to the Appeals Tribunal of the WCB (the "Tribunal"), where he had requested and was denied TTD benefits. The Tribunal reviewed the worker's case and rendered a decision in July 2001 denying the worker TTD benefits but increasing his PPD assessment to 22.5%. The worker appealed to the Supreme Court of the Northwest Territories for judicial review of the Tribunal's decision. The chambers judge substantially upheld the Tribunal's decision and referred one matter back to the Tribunal for reconsideration. (See *Gélinas v. Northwest Territories and Nunavut (Workers' Compensation Board)*, 2002 NWTSC 79 (the "chambers judgment").) The worker appealed the chambers judgment and the WCB cross-appealed.

[3] For reasons set out below, the appeal and cross-appeal are dismissed.

GROUNDS OF APPEAL

[4] The worker appealed the decision of the chambers judge on five grounds:

(1) The chambers judge erred in finding that the Tribunal did not deny the worker procedural fairness when it denied him the opportunity to continue his "oral hearing".

(2) The chambers judge erred in finding that the circumstances surrounding the obtaining of a medical opinion from the WCB Medical Advisor did not create a reasonable apprehension of bias.

(3) The chambers judge erred in finding that the Tribunal did not fetter its discretion by relying on a WCB policy to decide the degree of the worker's impairment rather than deciding the degree of impairment independently under the *Workers' Compensation Act* (the "*Act*").

(4) The chambers judge erred in finding the Tribunal considered the worker's submissions under s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Charter*").

(5) The chambers judge erred in finding that the decision to deny the worker entitlement to TTD benefits and to increase his PPD assessment retroactively resolved the issue regarding the worker's entitlement to TTD benefits.

[5] The WCB cross-appealed on a different aspect of the chambers judge's decision regarding the Tribunal's reliance on a WCB policy. The Tribunal relied on the WCB policy for two purposes: to calculate the degree of the worker's impairment, and to determine the effective date of the worker's entitlement to increased compensation benefits for chronic pain and a psychological condition.The chambers judge found that the Tribunal had fettered its discretion by relying on the policy to determine the effective date rather than considering the date on which the worker first suffered from chronic pain and a psychological condition. The WCB cross-appealed on the ground that this finding is a palpable and overriding error.

STANDARD OF REVIEW

[6] This is an appeal from the judgment of a superior court that exercised a power of judicial review. Accordingly, this is a second-level review. Kerans J.A. states that in error-correcting cases like this one, as long as the first-level reviewer applied the correct standard of review, the second-level reviewer only interferes with the judgment if a clear error or unreasonableness is established in the first-level reviewer's judgment. (R.P. Kerans, *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994) ("Kerans J.A.") at 210-212. Also see *Gordon (Next friend of) v. Trottier*, [1974] S.C.R. 158; *Maryland Casualty Company v. Roland Roy Fourrures Inc.*, [1974] S.C.R. 52; and *Demers v. Montreal Steam Laundry Co.* (1897), 27 S.C.R. 537.)

[7] The parties have not expressed any concerns with the standard the chambers judge applied in her review. It is apparent from her judgment that the chambers judge carefully considered relevant factors to determine whether the Tribunal committed a substantial breach of the requirements of procedural fairness and natural justice. Accordingly, the task for this Court is to judge whether there is any clear error in the chambers judge's application of the standard of review to the facts. That is to say, this Court must determine whether the chambers judge acted reasonably.

ANALYSIS

Ground I The chambers judge erred in finding that the Tribunal did not deny the worker procedural fairness when it denied him the opportunity to continue his "oral hearing".

[8] The Tribunal decision appealed was held in two sessions. At the first session in November 2000, the worker attended by video-conference and asked the Tribunal that he be examined by specialists so the Tribunal would have recent medical reports to assist in making its decision. The Tribunal agreed and adjourned the hearing. The worker flew to Vancouver and was examined by a urologist, a neurologist and a psychiatrist. The Tribunal reconvened for the second session of the hearing upon receiving the three specialist reports, comments from the WCB Medical Advisor and a written submission from the worker. The Tribunal denied the worker's earlier request to attend this second session in person or by video-conference.

[9] The worker appealed the Tribunal's decision on the ground that he was denied procedural fairness when he was denied the opportunity to attend the second session of his hearing. The chambers judge applied factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 ("*Baker*") to conclude that the worker was not denied procedural fairness when he was denied the opportunity to appear in person or by video-conference when the Tribunal reconvened.

[10] The worker submits that the chambers judge committed a palpable and overriding error in her application of the factors set out in *Baker, supra*, when she failed to adequately consider (a) the importance of the decision to the worker, and (b) the legitimate expectations of the worker regarding the (non-)involvement of the WCB Medical Advisor in the rehearing.

[11] In support of point (a), the worker cites *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54. In that case, at paras. 104-5, the Supreme Court emphasizes the importance of recognizing the reality of the pain and impairment of injured workers suffering from chronic pain, as well as providing such people with the "chance to establish their eligibility for benefits on an equal footing with others."

[12] The chambers judge noted that the worker attended the first session of his hearing by video-conference. Regarding the second session, the chambers judge clearly recognized the great importance of the Tribunal's decision to the worker "because it affects his income and welfare." (chambers judgment, *supra*, at para. 28.) At paras. 26 and 29, she recognized the importance to the worker of appearing before the Tribunal at the second session. At paras. 28-29, the chambers judge explicitly balanced these factors against other factors set out in *Baker*. That she did not assign the same weight to each factor, as the worker suggests should have been assigned, does not make her balancing unreasonable. The chambers judge clearly did consider the importance of the decision to the worker before reaching her conclusion that the Tribunal's duty of procedural fairness had been discharged.

[13] In support of his point (b), the worker submits that the chambers judge committed a palpable and overriding error when she found the Tribunal's procedure fair without adequately considering the worker's legitimate expectations regarding the (non-)involvement of the WCB Medical Advisor in the hearing. The

worker contends that the chambers judge did not consider enough history of the worker's dealings with the WCB, its Medical Advisor and the Tribunal.

[14] The history the worker refers to is as follows. The hearing now appealed was actually a rehearing held to cure a procedural defect in a previous hearing before the Tribunal. That defect occurred when a WCB Pensions Specialist simply adopted the views of the WCB Medical Advisor and decided that the worker's 15% PPD assessment should not be varied. The Tribunal should have made the decision. It was not appropriate for it to delegate its authority to the WCB Pensions Specialist. Because of the WCB Medical Advisor's role in relation to the procedural defect at the first hearing, the worker expected that the WCB Medical Advisor would not participate at the rehearing. However, he did participate in the rehearing. He received the new, independent specialist reports that were prepared for the second session of the rehearing and he sent comments to the Tribunal prior to that session. The worker was not aware that the WCB Medical Advisor would be participating in this manner. The worker's only opportunity to question or cross-examine the WCB Medical Advisor on his comments was through a written submission that the worker was asked to prepare and submit within a short period of time.

[15] The worker's submission is not accepted because the chambers judge expressly considered the worker's reasonable expectations when she ruled on the fairness of the rehearing. At paras. 15 and 16 of the chambers judgement she considered the parties' expectations of how the rehearing would proceed after the specialist assessments had been obtained. She acknowledged that the worker did not contemplate that the Tribunal would obtain a new report from the WCB Medical Advisor, but found the parties had no agreement that the Tribunal would not do so. She found nothing unfair in the Tribunal obtaining the report. Further, when the chambers judge analyzed the worker's argument regarding bias later in the chambers judgment, she specifically noted the WCB Medical Advisor's involvement in the worker's file in 1999 when he provided the report that led to the procedural defect at the first hearing.

[16] Accordingly, the chambers judge was cognizant of the WCB Medical Advisor's prior involvement with the worker's file when she considered the worker's legitimate expectation that he would attend the second session of the rehearing. She found nothing unfair in the worker being excluded from attending this second session. We find nothing unreasonable in her analysis. The fact that she did not review at great length the worker's history with the WCB and, in particular, with its Medical Advisor when she considered the fairness of the rehearing does not amount to a palpable and overriding error.

Ground II The chambers judge erred in finding that the circumstances surrounding the obtaining of a medical opinion from the WCB Medical Advisor did not create a reasonable apprehension of bias.

[17] The worker submits that an issue of bias arises from the relationship between the Tribunal and the WCB Medical Advisor. He submits that the chambers judge committed a palpable and overriding error in three respects:

(a) She failed to consider the WCB Medical Advisor's involvement with the worker's file over the years when she considered whether his involvement in the rehearing resulted in a reasonable apprehension of bias;

(b) She concluded that the Tribunal is not, or is not intended to be, independent of the WCB;

(c) She determined that the WCB was entitled to adduce evidence on an issue under appeal.

[18] In support of his point (a), the worker states that the chambers judge "did not accord any or adequate weight to the evidence of the role of the Medical Advisor throughout the [worker's] WCB history nor (sic) the impact that such evidence might have on the [worker] or an informed person...". The independent specialist reports were sought at the rehearing so that the Tribunal would not have to rely on the advice of the WCB Medical Advisor.

[19] In considering the bias issue in her judgment, the chambers judge did not review the worker's long history with the WCB Medical Advisor in great detail. In fact, the only aspect of that history she mentioned was the fact that the WCB Medical Advisor had provided a report in 1999 commenting on the worker's file. We are of the opinion that this does not amount to a palpable and overriding error, or any error at all, on the part of the chambers judge. First, the prior history that the worker complains the chambers judge did not consider includes three occasions when the WCB Medical Advisor decided that the worker deserved compensation for his injury and condition and one instance when the WCB Medical Advisor determined that the worker should resume normal recreational activities and work. That history does not suggest that a further opinion from the WCB Medical Advisor would introduce a reasonable apprehension of bias. It is the 1999 report that is the most important in judging bias, and the chambers judge expressly considered the 1999 report in her judgment.

[20] The real issue is whether there is a reasonable apprehension of bias on the part of the Tribunal, not on the part of its witness, the WCB Medical Advisor. The Tribunal panel that heard the worker's rehearing was different than that which presided at his first hearing. The worker has not suggested that there is a reasonable apprehension that the Tribunal's new panel members were biased. Both the worker and the WCB Medical Advisor provided their written submissions to the Tribunal for its evaluation. Ultimately, the Tribunal did not accept all of the WCB Medical Advisor's recommendations. Accordingly, the chambers judge committed no error by not expressly considering all of the WCB Medical Advisor's involvement with the worker's file in her consideration of a reasonable apprehension of bias on the part of the Tribunal.

[21] The second argument of the worker in relation to bias, point (b), asserts the chambers judge erred in her conclusion that the Tribunal is not, or is not intended to be, independent of the WCB. The worker implies that because the chambers judge erroneously characterized the Tribunal as "not completely independent", she erroneously concluded that the WCB's involvement in the Tribunal's decision-making process was appropriate. In support of his submission that the legislation establishes an administratively independent Tribunal, the worker quotes Vertes J. in *Northern Transportation Co. v. Northwest Territories (Workers' Compensation Board)*, [1998] N.W.T.R. 366 (S.C.).

[22] The chambers judge's assessment of the Tribunal as "not completely independent" of the WCB is not an unfair comment. After all, as the chambers judge noted, under s. 7.7(2) of the *Act*, the WCB can direct the Tribunal to hear an appeal and to give fair and reasonable consideration to WCB policy or the provisions of the *Act*. However, the Tribunal is substantially independent from the WCB. Its members are appointed by the Minister responsible for the WCB. It has broad jurisdiction to examine all matters arising on appeals before it. It has the power to establish its own procedures and to compel witnesses to testify.

[23] The characterization of 'not completely independent' is not crucial to the issue of whether there was a reasonable apprehension that the Tribunal was biased. The chambers judge used the characterization to justify the WCB Medical Advisor's involvement as a witness before the Tribunal, nothing more.

[24] The chambers judge considered whether a reasonable person would apprehend bias on the part of the Tribunal because it asked the WCB Medical Advisor for his comments on the specialists' assessments. The worker was given an opportunity to respond to the WCB Medical Advisor's comments. There was no evidence that the WCB Medical Advisor unfairly influenced the Tribunal. On the contrary, the Tribunal did not accept his recommendation and instead decided to increase the worker's pension. For these reasons, we conclude that the chambers judge's characterization of the Tribunal as 'not completely independent' did not result in a reversible error .

[25] In support of his final argument on this ground of appeal, point (c), the worker submits that the chambers judge erred when she determined that the WCB was entitled to adduce evidence on an issue under appeal. The worker submits that this is equivalent to allowing the decision-maker below, the WCB Review Committee, to make representations on the very issues under appeal to the Tribunal.

[26] At para. 32, the chambers judge recognized that others might perceive that the Medical Advisor would be making comments from the Board's perspective or attempting to justify the Board's position. However, the WCB Medical Advisor's role is to ensure that the policy of the WCB and the *Act* are properly applied. He is not the WCB's advocate to defend decisions of the Review Committee. Rather, he is a witness with expertise and knowledge on WCB matters, which the Tribunal may consider before rendering its independent judgment. The chambers judge properly concluded that no unfairness results from the Board seeking the Medical Advisor's views, provided that the worker was given the opportunity to respond.

[27] In the current case, the WCB Medical Advisor reviewed the specialist reports and provided comments as a witness. The Tribunal was not precluded from reviewing this or any other information about the worker's history and medical condition even if it was created prior to the three specialist reports. Rather, the Tribunal was entitled to and did consider all the relevant information available to make its independent decision. Ultimately, that decision was contrary to the WCB Medical Advisor's recommendation. The chambers judge did not err in finding that bias had not been established.

Ground III The chambers judge erred in finding that the Tribunal did not fetter its discretion by relying on a WCB policy instead of deciding the extent to which the worker's earning capacity was impaired as required by the *Act*.

[28] The worker submits that the chambers judge committed a palpable and overriding error when she decided that the Tribunal's methodology for calculating the percentage impairment of earning capacity ("impairment factor") was not patently unreasonable. In brief, the WCB was required to calculate the worker's impairment factor pursuant to s. 43 of the *Act*. It fulfilled that requirement by having a physician evaluate the worker and apply a rating following the WCB *Permanent Medical Impairment Guide*, which contains no impairment factor for chronic pain. Once the impairment factor was calculated, the Tribunal factored in the worker's chronic pain and psychological condition by applying a WCB policy to increase the worker's pension.

[29] The worker states that the chambers judge's error arose in her failure to take into account the fact that the Tribunal did not consider the worker's chronic pain when it determined his impairment factor. Chronic pain was not considered until the second step when the Tribunal made an earnings loss adjustment pursuant to the WCB policy. The worker submits that the Tribunal's approach in following this methodology "belies a slavish approach to following the WCB policy respecting the use of the 'Guidelines' to the extent that it fettered its discretion and lost jurisdiction." He submits that the chambers judge's failure to recognize this was a palpable and overriding error.

[30] We appreciate the logic in the worker's argument that his chronic pain and psychological condition should have been taken into account when his impairment factor was determined, not later when an earnings loss adjustment was made. However, neither this Court nor that below is, or was, charged with determining whether the best possible methodology was followed. Contrary to the worker's submission, para. 58 of the chambers judgment shows that the chambers judge was entirely cognizant of the fact that compensation for the worker's chronic pain was determined after his impairment factor had been calculated. Nevertheless, she found that the Tribunal's methodology and decision were a possible resolution of the law, policy and available evidence. She concluded that the policy the WCB chose to fulfill its duty under s. 43 of the *Act* is a

possible interpretation of the legislation and is not patently unreasonable. The worker has not identified any palpable and overriding error in her analysis.

Ground IV The chambers judge erred in finding the Tribunal considered the worker's submissions under s. 15 of the *Charter*.

[31] During the rehearing before the Tribunal, the worker had argued that his s. 15 *Charter* right to equal treatment would be breached if the Tribunal did not find chronic pain to be a personal injury within the meaning of s. 14 of the *Act*. The Tribunal's subsequent decision did not expressly deal with this *Charter* argument. The worker argued in the court below that this amounted to a denial of natural justice. He now submits to this Court that the chambers judge's failure to find that he was denied natural justice on the basis of a *Charter* breach amounts to a palpable and overriding error.

[32] At para. 66 of the chambers judgment, the chambers judge agreed with the worker that "[i]t would have been preferable had the Appeals Tribunal expressly dealt with the *Charter* argument." However, she concluded that this did not amount to a denial of natural justice for several reasons, which are set out in her judgment. In brief, at para. 68 the chambers judge cited several Supreme Court cases affirming the general principle that "the absence or inadequacy of reasons is not sufficient as a freestanding ground of appeal." She also noted that the Tribunal must have recognized the worker's chronic pain as compensable as it did increase his pension for that reason. She found that the worker's individual circumstances were taken into account when his pension amount was determined. Accordingly, the chambers judge concluded that the Tribunal's failure to deal with the *Charter* argument expressly in its decision did not amount to a denial of natural justice. We can see no palpable and overriding error in the chambers judge's decision.

Ground V The chambers judge erred in finding the decision to deny the worker entitlement to TTD benefits and to increase his PPD assessment retroactively resolved the issue regarding the worker's entitlement to TTD benefits.

[33] The worker submits that the chambers judge interpreted the Tribunal's decision incorrectly when she found that the worker could work. He submits that the Tribunal actually decided that he could not work due to his chronic pain and psychological condition. He states that because she made that error, the chambers judge failed to recognize that the Tribunal's decision to deny the worker TTD benefits was patently unreasonable.

[34] After reviewing the Tribunal's decision, we find it clear that the Tribunal found that the worker is able to work, but not in the type of work he was doing at the time of his accident. The Tribunal stated: "The Appeals Tribunal has determined from the medical evidence presented that the [worker] is fit for work at a sedentary or medium intensity level"; and "the [worker] is capable of returning to sedentary employment"; and "[t]he hearing panel has determined that the [worker] is deemed unable to fully return to his usual or comparable employment, but can work in some capacity." Wording included at the end of the decision is

slightly inconsistent where it states: "For the chronic pain and psychological components related to the workplace accident that are contributing to the [worker's] inability to return to work...". Taken in context, this reference to an 'inability to return to work' is surely a misuse of words. All other words in the decision point to the conclusion that the Tribunal found the worker capable of work. At para. 76 of the chambers judgment the chambers judge interpreted the passage above to mean that "the main obstacle to [the worker's] returning to work is his psychological state...". We agree that is a reasonable interpretation. The chambers judge did not make a palpable and overriding error when she interpreted the Tribunal's decision.

Cross-appeal The chambers judge made a palpable and overriding error by finding that the Tribunal fettered its discretion when it considered itself bound by a WCB policy and decided the increased compensation benefits it awarded to the worker would commence on the effective date of the policy.

[35] The Tribunal followed a WCB policy to award the worker increased compensation for his chronic pain and psychological condition. The policy explicitly states that, for claims which occurred before the policy's effective date, any change in benefits would only be from the effective date forward without retroactive adjustment. Accordingly, the Tribunal awarded the worker's increased benefit commencing on the policy's effective date.

[36] The chambers judge found that the Tribunal could have dealt with compensation for chronic pain and psychological problems under s. 43 of the *Act*, rather than under the WCB policy, to retroactively award the compensation from the date when those factors commenced rather than from the date the policy came into effect. At para. 61 of the chambers judgment, she found that the Tribunal "seemingly considered itself bound" by the WCB policy and therefore fettered its discretion.

[37] The WCB submits that the Tribunal's careful consideration of the evidence, policy and law make it reasonable to conclude that the Tribunal considered the possibility of the earnings loss adjustment starting on some date other than the policy's effective date. A reasonable rationale for this view is that the Tribunal must have been cognizant of the fact that a retroactive increase in the amount to be paid to injured workers could jeopardize the actuarial integrity of the Accident Fund. It would have known that the WCB set the effective date of the policy so that assessments paid by employers would be sufficient to cover the cost of the increased compensation benefits it expected would be awarded under the policy. Although the Tribunal could have commenced the increased pension from an earlier date, it was not obliged to do so and chose not to do so. The WCB states that the chambers judge's finding that the Tribunal fettered its discretion because it seemingly considered itself bound by the policy was a palpable and overriding error because the Tribunal's decision was a possible interpretation of the evidence, policy and law.

[38] We agree that the Tribunal's decision was a possible interpretation of the evidence, policy and law, but so did the chambers judge. That is not the point. The point is that the Tribunal fettered its discretion when

it failed to recognize that it had discretion in the matter and did not automatically have to apply the policy. There is no evidence that the Tribunal considered applying s. 43 of the *Act* to assess the worker's condition and a fair commencement date for his increased pension. There is no evidence that the Tribunal considered the actuarial integrity issue to arrive at its decision to apply the policy. Rather, it appears that the Tribunal applied the policy without question. We see no error in the chambers judge's finding that, in so doing, the Tribunal fettered its discretion. Her decision to refer the issue back to the Tribunal for consideration is reasonable.

[39] In summary, the chambers judge acted reasonably and made no palpable and overriding error in her judicial review of the Tribunal decision. The appeal and cross-appeal are dismissed.

Appeal heard on June 22nd, 2004.

Reasons filed at Yellowknife, Northwest Territories, this day of 2004.

McFadyen J.A.

(authorized to sign for) Veale J.A.

Wittmann J.A.

Appearances:

J. R. Posynick
for the Appellant

A.C. Wright
for the Respondents