NOVA SCOTIA COURT OF APPEAL

Citation: *Five Star Roofing and Masonry v. Nova Scotia (Workers' Compensation Board)*, 2017 NSCA 59

Date: 20170622
Docket: CA 447078
Registry: Halifax

Between:

Five Star Roofing and Masonry

Appellant

v.

Workers' Compensation Board of Nova Scotia, Workers' Compensation Appeals Tribunal, The Attorney General of Nova Scotia, Curtis Marr, and McCarthy's Roofing

Respondents

Judge:	The Honourable Justice David P.S. Farrar
Appeal Heard:	May 24, 2017, in Halifax, Nova Scotia
Subject:	**Workers' Compensation. Interpretation of Workers' Compensation Act,** S.N.S. 1994-95, c. 10. **Interpretation of WCB Policy 1.3.8 (Recurrence of Compensable Injury).**
Summary:	Mr. Marr was injured in a workplace accident while working for McCarthy's Roofing in October 2012. On March 14, 2014, while working for Five Star Roofing, Mr. Marr experienced low back pain. The Board determined that Mr. Marr suffered a new injury while working for Five Star in 2014. Five Star appealed the Board's decision to a Hearing Officer. That appeal was dismissed. Five Star then appealed the Hearing Officer's decision to the Workers' Compensation Board. Again, that appeal was dismissed. In dismissing the appeal, WCAT found that the return of the workers' symptoms in March of 2014 constituted

a recurrence of his compensable injury in October of 2012. It also found that the recurrence was caused by his employment with Five Star.
Five Star appealed WCAT's determination that the injury was as a result of his employment with it.

Issues: Did WCAT err in its interpretation of Board Policy 1.3.8 – Recurrence of Compensable Injury - in finding that Mr. Marr's 2014 symptoms were as a result of his employment with Five Star?

Result: Appeal allowed. WCAT's decision that the injury was a "recurrence" as that term is defined in Policy 1.3.8 and that the "recurrence" was as a result of his employment with Five Star are inconsistent. His interpretation of Policy 1.3.8 was unreasonable. The matter was remitted to WCAT for rehearing before a different Appeal Commissioner.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 10 pages.

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Respondents

Judges:	Beveridge, Farrar and Bryson, JJ.A.
Appeal Heard:	May 24, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed without costs per reasons for judgment of Farrar, J.A.; Beveridge and Bryson, JJ.A. concurring.
Counsel:	Kelly E. McMillan, for the appellant Paula Arab, Q.C., for the respondent Workers' Compensation Board of Nova Scotia Alison Hickey, for the respondent, Workers' Compensation Appeals Tribunal (Watching Brief only) Stephen Lawlor, for the respondent, Curtis Marr Bradley D.J. Proctor and Caroline Spindler, for the respondent, McCarthy's Roofing Edward A. Gores, Q.C., for the respondent, Attorney General of Nova Scotia (not participating)

Reasons for judgment:

Overview

[1] On March 14, 2014, while working for the appellant, Five Star Roofing and Masonry, Curtis Marr experienced low back pain.

[2] Mr. Marr had sustained a similar injury back in October of 2012 while employed with McCarthy's Roofing.

[3] The Workers' Compensation Board originally determined that the March 2014 injury was a recurrence of his October 2012 injury. However, the Board revisited its determination and in a decision dated August 12, 2014, concluded that Mr. Marr had suffered a new injury while working for Five Star.

[4] Five Star appealed this decision to a Hearing Officer. In a decision dated November 26, 2014, the finding was upheld.

[5] Five Star appealed the Hearing Officer's decision to the Workers' Compensation Appeals Tribunal.

[6] McCarthy's Roofing elected to participate in the appeal before WCAT. Mr. Marr retained counsel who planned to participate in that appeal.

[7] WCAT determined that the appeal would proceed via written submissions. However, despite the parties' indication they would be participating in the appeal, no submissions were received by WCAT from any party, including Five Star.

[8] WCAT was left to proceed with the appeal on the record as it existed without submissions from the parties.

[9] By decision dated November 23, 2015 (WCAT #2015-158-AD), WCAT dismissed Five Star's appeal.

[10] By order dated January 23, 2017, Five Star was granted leave to appeal the Tribunal's decision to this Court.

[11] This is an unusual appeal. The issues before WCAT typically involve the determination of benefits for injured workers. In this case, Mr. Marr's benefits are not in issue. Whether the onset of his symptoms in 2014 is determined to be a

recurrence of his 2012 injury while employed with McCarthy's Roofing or a new injury arising in 2014 while employed with Five Star; it will have no impact on the benefits Mr. Marr is entitled to receive. This really comes down to a contest between the two employers about who is responsible for the claims costs associated with the compensation payable to Mr. Marr as a result of the return of his symptoms in 2014.

[12] For the reasons that follow, I would allow the appeal.

Background

[13] In October of 2012, Mr. Marr injured his back while working as a roofer with McCarthy's. He submitted a claim for workers' compensation benefits and received temporary earnings-replacement benefits.

[14] He returned to his pre-injury employment with McCarthy's on December 24, 2012.

[15] Shortly after that Mr. Marr was laid off by McCarthy's and remained unemployed until November, 2013, when he was hired as a roofer with Five Star.

[16] On March 14, 2014, Mr. Marr experienced back pain while working for Five Star but continued to work until April, 2014, at which time he submitted a claim for workers' compensation benefits and sought medical attention for his back.

[17] Mr. Marr saw his family physician, Dr. Jacqueline Cloney, on April 14, 2014. She noted that he had "pain in his left buttock and radiated down the back of his left leg since a lift at work on 14/3/14".

[18] Dr. Cloney referred Mr. Marr to a neurologist, Dr. Alexander MacDougall.

[19] In a report dated November 24, 2014, Dr. MacDougall says the following:

> …He then injured the left leg stretching and reaching two years ago, and had similar pain. His symptoms resolved with a course of therapy and time but recurred in the spring of this year when he was carrying a load on a roof. He works as a roofer. His symptoms have been unremitting since then. …

[20] Mr. Marr was also referred to a pain specialist, Dr. Edvin Koski who noted the following:

> Mr. Curtis (sic) reported a *work injury* to the left leg on March 14, 2014. He said that he was carrying a roof matt and garbage. As he picked up the garbage and was walking with it, he felt pain in the left side of the back, spreading down to the big toe and then to all the toes.
>
> [Emphasis in original]

[21] The WCB Case Manager, in a decision of August 12, 2014, concluded that Mr. Marr's symptoms arose as a result of his employment with Five Star:

> **Decision**
>
> After reviewing the evidence on file I have decided that your current back symptoms are related to your employment with 5-Star.

[22] Five Star appealed the August 12, 2014, Case Manager's decision to a Hearing Officer. By decision dated November 26, 2014, the Hearing Officer denied that appeal finding as follows:

> The Worker was diagnosed with a soft tissue injury with no neurological defects following his workplace accident of October 18, 2012. …The Worker returned to work and following his return, there lacks ongoing medical reports or treatment reports, or requests for further benefits or services, to support that the compensable soft tissue injuries had not healed. This supports a resolution of the compensable injuries of October 18, 2012. Then, well over a year later, there was a new accident and new diagnosis described. A physician chart note entry of April 14, 2014 states that the Worker was lifting at work on March 14, 2014 and developed left buttock pain radiating down into the back of his leg and he was subsequently diagnosed with left-sided sciatica. The Worker confirmed to the Board Representative during a telephone conversation on April 22, 2014 that he had been stripping off a roof on March 14, 2014 when he experienced back pain. He also said that he had not sought any medical attention for his back for well over a year during the period from January 2013 to April 2014. The Worker's family physician has also confirmed, in his July 29, 2014 letter, that there was a 15 month period between the two incidents where the Worker was not having any pain. This supports a resolution of the 2012 injury with a new injury occurring in March 2014.
>
> [Emphasis added]

[23] The Hearing Officer went on to deny Five Star's appeal concluding Mr. Marr had sustained a new compensable back injury while working for Five Star in March, 2014.

[24] Five Star appealed the decision of the Hearing Officer to WCAT and, as noted earlier, that appeal was dismissed in a decision dated November 23, 2015.

Issues

[25] Leave to appeal was granted on the following three issues:

(a) the Tribunal erred in law when it ruled that Five Star Roofing and Masonry was responsible for the claim, notwithstanding its finding that Mr. Marr had suffered a recurrence of a previous employment injury incurred during his previous employment with McCarthy's;

(b) the Tribunal erred in law by adopting or applying an unreasonable interpretation of WCB Policy 1.3.8 (Recurrence of Compensable Injury), contrary to s. 183 of the *Workers' Compensation Act*; and

(c) the Tribunal erred in its interpretation and application of section 10 of the *Act* when it ruled that the recurrence was caused by Mr. Marr's employment with Five Star Roofing and Masonry.

[26] Despite leave being granted on three issues; there is really only one issue:

Did WCAT err in its interpretation of Board Policy 1.3.8 - Recurrence of Compensable Injury - in finding that Mr. Marr's 2014 symptoms were as a result of his employment with Five Star?

Standard of Review

[27] It is well-settled that this Court reviews decisions of WCAT on a standard of reasonableness (*Halifax (Regional Municipality) v. Hoelke*, 2011 NSCA 96, ¶11-18).

[28] In *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, Justice Moldaver explained reasonableness:

> [20] … However, the analysis that follows is based on this Court's existing jurisprudence – and it is designed to bring a measure of predictability and clarity to that framework.
>
> …
>
> [32] In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer,

> legislative provisions will on occasion be susceptible to multiple *reasonable* interpretations. … The question that arises, then, is *who gets to decide among these competing reasonable interpretations*?
>
> [33] The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in the administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired the *administrative decision maker* – not the courts – to make….
>
> [38] … Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable – no degree of deference can justify its acceptance. [citations omitted]
>
> [Justice Moldaver's italics]

Analysis

Issue: Did WCAT err in its interpretation of Board Policy 1.3.8 – Recurrence of Compensable Injury in finding that Mr. Marr's 2014 symptoms were as a result of his employment with Five Star?

[29] The Appeal Commissioner found there was a "recurrence" of Mr. Marr's 2012 injury in 2014. He concluded the "recurrence" was as a result of the work Mr. Marr was performing for Five Star:

> **Conclusion:**
>
> [Five Star's] appeal is denied. The evidence supports that the Worker suffered a recurrence of his 2012 compensable injury, but [Five Star] is responsible because the recurrence was caused by duties the Worker was performing for its benefit.

[30] The issue on this appeal centers on the Appeal Commissioner's use of the word "recurrence" in his conclusions.

[31] Recurrence is a defined term in Policy 1.3.8:

> "recurrence of compensable injury" is the return of, or increase in, clinically demonstrated disability or symptoms that are caused by the compensable injury after the worker has reached maximum medical recovery; the worker has returned to work; and/or the worker suffers a further injury, condition, or disablement caused by, and considered part of, the compensable injury.

[Emphasis added]

[32] Simply put, a recurrence is a return of symptoms caused by the original compensable injury. In this case, that would have been the October 2012 injury Mr. Marr suffered while in the employ of McCarthy's.

[33] The Policy provides guidance to decision-makers as to determining whether a worker has suffered a recurrence of the compensable injury:

> Generally, in determining whether a worker has suffered a recurrence of the compensable injury, the WCB considers whether there is medical compatibility between the compensable injury and the current return of, or increase in, disability or symptoms.
>
> Where medical compatibility, by itself, is not a reliable indicator of the causal relationship between the compensable injury and the current return of, or increase in, disability or symptoms, the WCB may consider a combination of medical compatibility and continuity. If medical compatibility has been established, it is not required that continuity be considered.

[Emphasis added]

[34] Decision-makers are, therefore, instructed to consider whether there is medical compatibility between the original injury and the return of or increase in, symptoms.

[35] The Policy goes further and provides direction on when medical compatibility may be established by the decision-maker considering a number of questions:

> **Medical compatibility**
>
> To establish medical compatibility, the current return of, or increase in, disability or symptoms must result from the compensable injury. In determining medical compatibility, the WCB compares the worker's current medical diagnosis to the diagnosis of the compensable injury (using, but not limited to, medical opinions, the worker's medical history, information collected about the circumstances of the recurrence claim, and medical/scientific literature). In particular, in gathering and weighing evidence of medical compatibility to determine if a worker has suffered a recurrence of their compensable injury, the WCB considers a series of questions that may include, but is not limited to, the following:
>
> a) has the worker experienced an intervening event or exposure that may have caused the current disability or symptoms?

> b) are the parts of the body affected now the same as, or related to, those affected initially?
>
> c) are the body functions affected now the same as, or related to, those affected initially?
>
> d) is the degree to which body functions are affected now similar when compared to the affect of the compensable injury?
>
> e) what was the nature of, and medical prognosis for, the compensable injury?
>
> Where a worker's current return of, or increase in, disability or symptoms arise from a further injury, condition, or disablement, the questions above may not always be appropriate in guiding the determination of medical compatibility. In these instances the WCB may, where circumstances warrant, consider questions other than (or in addition to) those noted above in establishing a causal relationship between the current increase in, or return of, disability or symptoms and the compensable injury.
>
> When determining medical compatibility between the worker's current return of, or increase in, disability or symptoms and the compensable injury the WCB may, where appropriate, consider the relevance and/or impact of non work-related factors.
>
> [Emphasis added]

[36] The Policy specifically directs the decision-maker to ask the question: "Has the worker experienced an intervening event or exposure that may have caused the current disability or symptoms?" when considering medical compatibility. If there is an intervening event, it may inform the determination of whether there is medical compatibility with the original injury.

[37] The Appeal Commissioner, after considering the medical evidence, concludes there was medical compatibility:

> Given Policy 1.3.8, a finding of medical compatibility supports that the March 2014 onset of symptoms was a recurrence. The next question is: What caused the recurrence?

[38] The Appeal Commissioner found that there was medical compatibility which supported his conclusion that the March 2014 onset of symptoms was a recurrence of the October 2012 injury. Put another way, by finding it was a recurrence (as that term is defined in Policy 1.3.8) he was concluding that it was attributable to his original injury at McCarthy's. However, he went further and asked himself: "What caused the recurrence?"

[39] With respect to the Appeal Commissioner, he just answered that question. He found it was a "recurrence". Therefore, by definition, it was caused by the original injury.

[40] After asking the question, he then went on to conclude:

> …The totality of the evidence is sufficient to conclude that the recurrence developed as a result of the Worker's performance of his duties as a roofer with [Five Star].

[41] This conclusion is inconsistent with the finding it is a "recurrence". The two findings are contradictory.

[42] The Appeal Commissioner appears to have asked himself the questions in the wrong sequence. He should have asked the question: - was there an intervening event? - when considering medical compatibility. Not after determining there was medical compatibility and, therefore, a recurrence.

[43] The Appeal Commissioner lost sight of the fact that "recurrence" was a defined term in the Policy. It is almost as if he meant to refer to "symptoms" not "recurrence". For example, had he found:

> The totality of the evidence is sufficient to conclude that the symptoms developed as a result of the worker's performance of his duties as a roofer with Five Star.

It would have precluded his finding that there was a recurrence.

[44] However, that is not what he said. The findings that there was a "recurrence" and that "recurrence" was as a result of his work with Five Star are inconsistent on any reasonable interpretation of Policy 1.3.8.

[45] The Appeal Commissioner repeated his error in a concluding paragraph to the decision:

> The Worker's symptoms in March of 2014 constitute a recurrence of his compensable injury in October of 2012. The recurrence was caused by his employment with [Five Star]. Consequently, [Five Star] is not absolved of responsibility for the claim and is the responsible employer. …

[46] There is simply no way to reconcile the Appeal Commissioner's decision. The findings are mutually exclusive of each other. In other words, if he found

there is a "recurrence", he could not find that Mr. Marr's employment with Five Star was responsible for the symptoms. Alternatively, if he found that his employment with Five Star was responsible for the symptoms, it could not be a "recurrence" as that term is defined in the Policy. Both of his conclusions are unreasonable based on the wording of the Policy.

[47] In these circumstances, the appropriate remedy is to allow the appeal and to remit the matter to WCAT for a rehearing before a different Appeal Commissioner. To review the evidence and, interpret the Policy, for the first time on appeal to this Court would be inappropriate in these circumstances.

Conclusion

[48] The appeal is allowed without costs to any party.

Farrar, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.