IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20170227
Docket: S09037
Registry: Courtenay

Between:

William Pomponio

Petitioner

And:

Workers' Compensation Appeal Tribunal of British Columbia, Work Safe British Columbia, and Great Northern Marine Towing Ltd.

Respondents

Before: The Honourable Mr. Justice Bracken
(via teleconference)

On judicial review from: Workers' Compensation Appeal Tribunal, July 7, 2015, (WCAT-2015-02119)

Oral Reasons for Judgment

(In Chambers)

Appearing on his own behalf:	W. Pomponio
Counsel for the Respondent Workers' Compensation Appeal Tribunal of British Columbia appearing via teleconference:	J. T. Lovell
No other appearances	
Place and Date of Trial/Hearing:	Courtenay, B.C. December 12, 2016
Place and Date of Judgment:	Courtenay, B.C. February 27, 2017

[1] **THE COURT:** The petitioner seeks judicial review of the decision of the Workers' Compensation Appeal Tribunal, dated July 7, 2015. In that decision, the WCAT declined to reconsider a decision that determined the petitioner would have retired when he was 70 years old were it not for a compensable injury that he had suffered. That decision -- the original decision -- was dated December 11, 2006.

[2] In that decision, WCAT stated at p. 14:

> I find the worker has provided clear and objective evidence of his plans to work beyond age 65. Although he was unable to provide a date as to when he may consider retirement, I find it reasonable to assume that the worker would continue to work for at least five years, until the age of 70, when his mortgage would be virtually repaid, and direct the Board to pay pension benefits to the worker's 70th birthday, March 13, 2012. However, I wish the worker well in his desire to work past that date.

[3] With respect to a review of the July 7th decision, the applicable section is s. 256 of the *Workers Compensation Act*, which provides:

> (1) This section applies to a decision in
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> (a) a completed appeal by the appeal tribunal under this Part or under Part 2 of the *Workers Compensation Amendment Act (No. 2)*, 2002, and
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> (b) a completed appeal by the appeal division under a former enactment or under Part 2 of the *Workers Compensation Amendment Act (No. 2)*, 2002.
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> (2) A party to a completed appeal may apply to the chair for reconsideration of the decision in that appeal if new evidence has become available or been discovered.
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> (3) On receipt of an application under subsection (2), the chair may refer the decision to the appeal tribunal for reconsideration if the chair is satisfied that the evidence referred to in the application
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> (a) is substantial and material to the decision, and
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> (b) did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.
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> (4) Each party to a completed appeal may apply for reconsideration of a decision under this section on one occasion only.

[4] The petitioner suffered a compensable injury on July 24, 2002, as a result of his employment. He was awarded a permanent disability pension that was payable until he turned 65 years old. The petitioner appealed to the WCAT.

[5] The petitioner was employed as a log barge loader when he injured his left ankle. His ankle was caught in a line being pulled on board a barge by a winch. He experienced three surgeries on his ankle. As a result, he experienced a "residual permanent functional impairment". At the time of the injury in July 2002 the petitioner was 60 years old.

[6] He sought reviews of the initial decision setting compensation until he reached age 65, which occurred on March 13, 2007. It was noted in the December 2006 decision that the petitioner gave evidence that he intended to work past age 65, that he was expected to be healthy enough to do so, that he was a skilled and reliable employee, and that he had employment as an equipment operator available to him. The payment of the award was then extended until age 70.

[7] There was some correspondence between the petitioner and the Board manager in which the petitioner requested that his permanent disability award be extended beyond March 13, 2012. The manager advised the petitioner that the award stating that it was payable to age 70 was binding upon the Board. The petitioner requested a review of that letter, but was unsuccessful. He then appealed the decision to the WCAT.

[8] In a decision dated December 19, 2012, the WCAT declined to make the order sought by the petitioner as the letter appealed from was not a "reviewable decision". The WCAT went on to say:

> I understand from the worker's submissions that he is now over 70 and continues to work. Pursuant to section 256 of the Act, a party to a completed appeal may apply to the chair of WCAT for reconsideration of a WCAT decision if new evidence has become available or been discovered. Section 256(3) provides that a WCAT decision may be referred for a reconsideration where the chair is satisfied that the new evidence meets certain criteria. I make no finding as to whether the worker's circumstances would constitute new evidence as set out in section 256(3) of the Act. As noted by the review

> officer, it remains open to the worker to apply for a reconsideration of WCAT-2006-04555 [that is referring to a decision number].

[9] On August 7, 2013, the petitioner applied to the WCAT for reconsideration of the original decision on the basis of new evidence. The evidence that the petitioner wished to put forward included a letter dated October 1, 2012 from his doctor, Dr. Harris, that stated the petitioner was in good medical condition, and "there was no expected reason why he would not be able to work for another two years".

[10] The petitioner also provided a letter stating that he wanted to continue working until he was perhaps 74 or 75. In the letter, the petitioner said that he had developed a love of operating all types of machines when he was very young. He said it was likely he would work as long as he was in good health, and that he could use the money.

[11] In the decision issued July 7, 2015, it was decided that the new evidence the petitioner submitted did not meet the criteria of being "substantial and material to the decision". The application was refused. The WCAT stated, at paras. 24 to 26 inclusive:

> [24] The worker has indeed provided new evidence in support of his request for consideration. However that information is neither material nor substantial with regard to the issue before me when writing the original decision. I was tasked with determining whether the worker before the time of the compensable injury had planned to work beyond the age of 65. I accepted that he had done so, and estimated that he would work until at least the age of 70 based on the information provided to me.
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> [25] The worker has now worked past that age, and plans to work at least two years from that date and perhaps longer. However, his continuing to work, his physical ability to do so, and the availability of employment are not relevant to the decision before me, which was whether the worker had the intention to work past the age of 65 prior to the compensable injury, and, if so, for how long he would work.
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> [26] I find that the worker's new evidence is neither substantial nor material. There is no basis on which the worker's new evidence reconsideration application can succeed. The worker's application for reconsideration on the basis of new evidence was dismissed.

[12] The petitioner initially alleged that the policy of the Board and the determination of when a worker would retire must be based on facts as they existed at the time of the injury and that the policy was beyond the jurisdiction of the Board. He abandoned that position at the outset of the hearing, thus the Board's counsel, Mr. Parkin was allowed to withdraw from the hearing.

[13] The petitioner had also alleged that s. 23.1 of the *Workers Compensation Act*, was void for uncertainty. He abandoned that position as well at the outset of the hearing. As a result, Ms. Drake, counsel for the Attorney General took no part in the hearing.

[14] The WCAT has exclusive jurisdiction over a matter of fact or law or an exercise in discretion and therefore the test for judicial review of the decision is whether the WCAT rendered a decision that is patently unreasonable or that the procedure was unfair. See s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

[15] In *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25, the majority of the court said, at para. 30:

> The Tribunal's conclusion that the workers' breast cancers were occupational diseases caused by the nature of their employment was a finding on a question of fact (*Ediger v. Johnston*, 2013 SCC 18, [2013] 2 S.C.R. 98, at para. 29). That finding is therefore entitled to deference unless Fraser Health demonstrates that it is patently unreasonable -- that is, that "the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact" (*Toronto (City) Board of Education*, at para. 45). Because a court must defer where there is evidence capable of supporting (as opposed to conclusively demonstrating) a finding of fact, patent unreasonableness is not established where the reviewing court considers the evidence merely to be insufficient (*Speckling v. Workers' Compensation Board (B.C.)*, 2005 BCCA 80, 209 B.C.A.C. 86, at para. 37). Simply put, this standard precludes curial re-weighing of evidence, or rejecting the inferences drawn by the fact-finder from that evidence, or substituting the reviewing court's preferred inferences for those drawn by the fact-finder.

[16] In *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, the court said that a decision will be found to be unreasonable only if there is no line of reasoning that could, on the evidence presented, support the decision of the Tribunal. Provided the

reasons for decision can withstand a "somewhat probing examination", the court should not interfere.

[17] The court in *Ryan* also discussed the difference between reasonableness and patent unreasonableness. At para. 52, Iacobucci J. said:

> The standard of reasonableness simpliciter is also very different from the more deferential standard of patent unreasonableness. In *Southam*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64. A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

[18] In this case, the Tribunal heard and considered the appeal of the decision to set the termination of the petitioner's award at the time when he reached the age of 65. In that decision, the WCAT carefully considered the matter and found the petitioner to be a credible witness in that he had provided considerable evidence to support an age of retirement beyond 65. In the December 11, 2006 decision, the Tribunal extended the payment of the award until age 70. That decision was reconsidered by the WCAT at the petitioner's request. In its decision of July 7, 2015, the Tribunal found that the materials submitted in support of an extension beyond age 70 had to be "substantial and material" and the decision of WCAT found in the material did not meet that standard.

[19] At para. 23 of the decision, the Tribunal said:

> The worker's representative had said that I "had difficulty establishing a specific age of retirement". He is correct, but failed to say that the reason I had that difficulty was that the worker himself was unable to say … how long he would work. He could anticipate that work would be available, and guessed that he would work as long as he could. The issue before the Tribunal in its December 11, 2006 decision was whether the worker before the time of the compensable injury had planned to work beyond the age of 65. The Tribunal accepted that the petitioner would work beyond age 65, and

> in fact he did. I was told that he planned to work to the age of 72 or 73 before retiring.

[20] The decision was based on s. 23.1 of the *Workers Compensation Act*. That section states:

> Compensation payable under section 22(1), 23(1) or (3), 29(1) or 30(1) may be paid to a worker, only
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> (a) if the worker is less than 63 years of age on the date of the injury, until the later of the following:
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> (i) the date the worker reaches 65 years of age;
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> (ii) if the Board is satisfied the worker would retire after reaching 65 years of age, the date the worker would retire, as determined by the Board, and
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> (b) if the worker is 63 years of age or older on the date of the injury, until the later of the following:
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> (i) 2 years after the date of the injury;
>
> (ii) if the Board is satisfied that the worker would retire after the date referred to in subparagraph (i), the date the worker would retire, as determined by the Board.

[21] The policy of the Board of Directors of the Workers Compensation Board changed in 2014 to include the determination of the date of expected retirement as to be determined at the date of the injury. That policy was not formally in effect when the initial decision to set the petitioner's date of retirement was made to be age 70. However the previous policy of the Board also anticipated a retirement age of 65, and it also required independent and verifiable evidence to support a later retirement date.

[22] The fact that the Tribunal focused on determination of the date of retirement as at the date of the injury is consistent with the wording of s. 23.1, which states that the date is to be the date the worker “would retire”, as determined by the Board.

[23] The WCAT considered such evidence in its December 11, 2006 decision that set the age of retirement at 70. That decision considered all of the evidence, and concluded that 70 was a reasonable age for retirement in all the circumstances of the petitioner.

[24] While the Tribunal appears to have considered the content of the 2014 policy change in its decision of July 2015, the decision which is under review, I cannot find that the decision was reached by the simple application of a later policy report. The Tribunal considered all of the evidence and appears to have reached its decision based on the available evidence.

[25] The clear issue stated was whether the petitioner had the intention to work past the age of 65 prior to the subject injury. In my view, the Tribunal was plainly focused on the petitioner's retirement plans as at the time of the injury. The basis for that finding is a conclusion of law that cannot be challenged on an application for reconsideration.

[26] The interpretation of the 2006 decision was confirmed by the Tribunal at para. 4 of the reconsideration decision, as quoted above. In my view, the reconsideration decision considered the new evidence and made a rational decision that it did not meet the substantial and material standard as required by the *Act*. In all of the circumstances, I cannot find that the decision of the Tribunal not to alter the decision on the basis of new evidence is patently unreasonable.

[27] As to procedural fairness, my assessment of the materials, and particularly the decisions of the Tribunal, indicate that the WCAT has acted fairly throughout. In particular, I find that the procedures of the WCAT met the requirements of procedural fairness and there is no basis to interfere with the reconsideration decision of July 7, 2015. Therefore, the petition must be dismissed.

[28] I have no doubt that the petitioner is an honest and at all times hardworking and productive worker. His employer said that he was a highly efficient and gentle operator of very expensive equipment and I have no doubt that that is so. Nevertheless, the decision of the Tribunal ought to reconsider the appropriate length of retirement is, in my view, one that meets the appropriate legal standard as set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[29] In the result, I must dismiss the petition.

[30] That concludes my decision.

"J. K. Bracken, J."
The Honourable Mr. Justice Bracken