

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

Appellant: **[*] (Worker)**

Participants entitled to
respond to this appeal:

**The Workers' Compensation Board of Nova Scotia
(Board)**

APPEAL DECISION

Representatives: **[*] for the Worker**

Form of Appeal: Oral hearing held in Sydney, NS, on October 23, 2008

WCB Claim No.: **[*]**

Date of Decision: December 12, 2008

Decision: The appeal of the May 14, 2008 Board Hearing Officer decision is denied, according to the reasons of Chief Appeal Commissioner Louanne Labelle.

CLAIM HISTORY AND APPEAL PROCEEDINGS:

The Worker had a very serious accident on December 24, 1957 when he was hit by a car as he was delivering messages for Canadian National Telegraphs. Although the accident was reported to the Employer, a claim for compensation was never filed with the Board until December 4, 2007. The Board denied the Worker's claim under s. 83(6) of the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended [the "Act"]. On appeal the Case Manager's decision was confirmed.

The Worker now appeals from the May 14, 2008 Hearing Officer decision seeking recognition that he suffered a personal injury by accident arising out of and in the course of his employment. He also seeks benefits that would flow from such recognition.

The Worker's appeal proceeded by way of oral hearing. The Worker appeared and gave oral testimony in support of his appeal. He was assisted by his brother-in-law. The Worker filed additional documentation prior to the hearing consisting of medical information and a 1957 newspaper article. At the hearing the Worker also produced further documents to be considered on the appeal: marked as Exhibit "1", was a report dated February 9, 1982 from Dr. Shears and marked as Exhibit "2", was a report dated December 12, 1958 from Dr. Thomas Gorman.

The Board did not participate in the appeal.

I have also considered under s. 246 of the *Act* the material in the Worker's Board claim file and the decision under appeal.

ISSUE AND OUTCOME:

Is the Worker's claim, as a result of a December 24, 1957 accident, statute barred?

Yes. The Worker did not file a claim in the time specified under s. 83 of the *Act*. He is therefore barred from bringing a claim at this time.

ANALYSIS:

There is no doubt that the Worker was seriously injured in the accident which took place on Christmas Eve 1957. A newspaper article from that time indicated that the Worker was a CNR messenger who was critically injured in a traffic accident when returning from delivering a message. The article also mentioned that CN Telegraph Manager in Sydney (W.J. McManus) filed a report of the accident with headquarters in Moncton, New Brunswick.

Medical reports filed by the Worker indicate that he was admitted to hospital on December 24, 1957 and discharged on July 3, 1958 having suffered multiple injuries due to trauma including a fractured pelvis and a fractured left femur. He has had numerous surgeries in recent years including hip and knee replacements due to the effects of the motor vehicle accident, his global arthritis and a rheumatoid condition.

The Worker's family physician, Dr. J.M. Archibald, in a June 23, 2008 report, indicated that after a lengthy convalescence the Worker was left with a significant leg length discrepancy such that he always required a buildup shoe on the left. He noted that the Worker was left with a fusion of his left hip since the time of his injury and that his hip has protruded into the pelvis which has contributed to his length discrepancy. He also has pain and discomfort in the right hip as a result of the abnormal gait over the years.

In 1992 the Worker was seen by Dr. Shears. Dr. Shears noted in his February 9, 1982 report that the Worker had narrowing and secondary post-traumatic degenerative changes in the left knee. He was having trouble coping with work. Dr. Shears recommended a lift for his shoe to spare his right hip. He also suggested that the Worker might be helped by the use of a cane. He noted that the Worker was married and had five children.

The Worker confirmed in his testimony that notwithstanding the serious injuries he was able to work for many years and support his family even though he was not able to do labour intensive work. He retired on CPP Benefits in 2001 due to severe arthritis.

The Worker recalled in his testimony that a lawsuit was instigated presumably against the driver of the vehicle involved in the accident. This appears to be evident from a medical report dated December 12, 1958 from Dr. Gorman who provided a medical legal report assessing the extent of the Worker's permanent disability. Dr. Gorman estimated the Worker's permanent disability for the shortness of the leg, arthritic changes in the hip, decreased range of movement and the probability of arthritis in the lumbar spine at 25%. There were also secondary problems for which he thought the Worker was entitled to a 10% disability rating.

This law suit might explain why a claim for workers' compensation benefits was never filed.

The accident was reported to the Employer but the Board has no record of a claim being reported. Under s. 83 of the *Act*, the Worker must provide notice of the accident to the Employer. A claim for compensation must be made within 12 months. This time limit can be extended under s. 83(5), however, it cannot be extended where five years or more have elapsed from the happening of the accident.

The facts in this matter resemble the fact situation considered by the Nova Scotia Court of Appeal in *Walsh v. Nova Scotia (Workers' Compensation Board)*, 2001 NSCA 6, where the Court noted that the Appellant in that case had given notice to her employer but she had not made a claim within 12 months of the accident, nor was a report of the accident

filed with the Board by her employer.

The Court noted that the discretion to extend the time does not apply where five years or more have elapsed since the accident. In that case, a claim had not been filed until 22 years after the accident. In this case, it has been almost 50 years since the accident.

The Court in *Walsh* found that s. 190 of the *Act* did not allow the Board the discretion to extend the time limits provided for under s. 83.

I acknowledge that the Worker was only 15 at the time of his accident. It appears that his legal guardians, presumably his parents, exercised their right to pursue an action against the driver of the motor vehicle that hit him. Whether or not they knew of their option to file for compensation is unknown.

The Worker did not file a claim with the Board until many years after he became an adult. To bar the Worker's claim may appear to be unjust due to the severity of the Worker's injuries, however, the legislation does not allow the Board to waive or extend the 5 year limitation period. The Board has no power under the *Act* to award compensation. Therefore, I find that, notwithstanding the merits of the Worker's claim, his claim for compensation is statute barred.

I acknowledge that the Worker's claim for compensation is under the *Government Employees Compensation Act*, R.S.C. 1985, c. G-8 ["*GECA*"]. Eligibility for compensation under the provisions of *GECA* is determined under s. 4(1). Under s. 4(2) of *GECA*, federal employees "receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed".

The Nova Scotia Court of Appeal in *Cape Breton Development Corporation v. Morrison Estate*, 2003 NSCA 103, referred with approval to the following proposition submitted on behalf of the federal AG:

The Attorney General submits that the interplay between *GECA* and the *WCA* ought to be interpreted as follows:

1. The provincial workers' compensation scheme governs claims submitted under *GECA* provided that
 - (a) the provision in issue is reasonably incidental to a "rate" or "condition" governing compensation under the law of the province, and
 - (b) the provision is not otherwise in conflict with *GECA*.

The Court in *Morrison* also referred to the relevant principles of statutory interpretation as summarized by the Court of Appeal in *Thomson v. Nova Scotia (Workers' Compensation*

Appeals Tribunal), [(2003) 212 N.S.R. (2d) 81 (N.S.C.A.)], which also dealt with the interplay between GECA and the *Act*:

As in any case of statutory interpretation, the Court must strive to give the statute its most appropriate interpretation. The appropriate interpretation is to be arrived at by taking account of the statute's total context having regard to its purpose, the consequences of proposed interpretations and presumptions and special rules of interpretation. The appropriate interpretation is one which is plausible in the sense that it complies with the text of the statute, which is efficacious in the sense that it promotes the legislative purpose and that is acceptable, in the sense that the outcome is reasonable and just. – *Ruth Sullivan (ed.) Driedger on the Construction of Statutes* (3rd, 1994) at 131.

The application of these principles leads me to the conclusion that GECA must be interpreted as incorporating the provisions of s.83 of the *Act*. Section 83 incorporates notice provisions applying to all claims in the province. It is an integral part of a compensation claim and sufficiently linked or connected to a “condition” of compensation to be incorporated by reference in *GECA*.

Therefore, in conclusion, I find that the Worker's claim statute barred by s. 83 of the *Act*.

CONCLUSION:

The appeal is denied. The Worker's claim is barred by s. 83 of the *Act*.

DATED AT HALIFAX, NOVA SCOTIA, THIS 12th DAY OF DECEMBER, 2008.

Louanne Labelle
Chief Appeal Commissioner