
ROBERT C. KINNAIRD (*Prosecutor*) APPELLANT;

1963

*Mar. 7, 8
April 1

AND

THE WORKMEN'S COMPENSATION }
BOARD (*Respondent*) } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

Workmen's compensation—Discontinuance of pension by Board—Examination of workman under medical appeal provision—Notification rejecting appeal—Matters contained in specialist's certificate not included in notification—Application for writ of mandamus with certiorari in aid to quash Board's decision—Workmen's Compensation Act, R.S.B.C. 1960, c. 413.

The appellant contracted dermatitis as a result of his employment as a painter and was granted compensation therefor by the Workmen's Compensation Board from February 1945 until February 1947, when his pension was discontinued and he was advised by the Board that he should obtain employment of a clerical type. At that time there was no medical appeal provision in the *Workmen's Compensation Act*, R.S.B.C. 1936, c. 312, but such a provision was added as s. 54A of the Act by 1955 (B.C.), c. 98, s. 15. In 1956 the appellant applied to the Board, under the provisions of s. 54A, to be examined by a specialist and his application was granted. Some time after the examination the appellant was informed by a letter from the Board that the latter had received the certificate of the specialist. He was further informed that his claim had been reviewed, that the matters contained in the certificate had been fully considered, and that no change had been made in the status or disposition of his claim. An application for a writ of *mandamus* with *certiorari* in aid to quash the decision of the Board was dismissed by Brown J. and his judgment was affirmed by the Court of Appeal, one member dissenting. By leave of the Court of Appeal, an appeal was brought to this Court.

Held: The appeal should be dismissed.

*PRESENT: Cartwright, Fauteux, Martland, Ritchie and Hall JJ.

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Per Curiam: The contention that the Board had "declined jurisdiction" by failing to notify the appellant of its decision regarding the matters contained in the specialist's certificate failed. The provisions of s. 54A(9) did not give the workman a right to anything more from the Board than a notification in writing of its decision. The Board had complied with this section, albeit in a most niggardly fashion.

The contention that as s. 54A(5) makes the specialist's certificate "conclusive as to the matters certified" and as the certificate in the present case certified that his disability was "a result of his occupation", the Board had no jurisdiction to do otherwise than to reinstate the appellant's pension in accordance with this finding also failed. This contention overlooked the fact that the specialist's report is initiated on the strength of a physician's certificate "certifying that in the opinion of such physician there is a bona fide medical dispute to be resolved". It is for the purpose of resolving this dispute that the specialist makes his examination and furnishes his certificate to the Board, and it is his opinion as to how this dispute is to be resolved which is embodied in the certificate and made conclusive and binding on the Board by s. 54A(5). The effect of this certificate upon the Board's decision with respect to whether compensation was to be awarded or not was another matter and the fact that the specialist's certificate was not intended to be conclusive in this regard was demonstrated by the provisions of s. 54A(9) which clearly contemplate a review of the whole claim and the making of an independent decision by the Board after the certificate has been received.

Under the provisions of the present s. 77(d) (formerly s. 76) of the Act, the Board is given "... exclusive jurisdiction to inquire into, hear and determine . . . (d) the degree of diminution of earning capacity by reason of any injury;" and s. 22(1) of the Act provides that when the Board is awarding compensation "regard shall be had to the workman's fitness to continue in the occupation in which he was injured or to adapt himself to some other suitable employment or business". Accordingly, the Board had jurisdiction to review the appellant's claim in light of the specialist's certificate and to determine that no change should be made in the disposition of his case because of the degree of his fitness to adapt himself to employment at clerical work if he chose to do so. Whether or not this formed the basis of the Board's decision was not for the Court to say. In assessing the effect of the specialist's certificate on the appellant's right to compensation it was within the jurisdiction of the Board to examine all other data available to it for the purpose of determining whether or not the appellant's earning capacity had been diminished as a result of his disability and the fact that the Court was unable, on the material before it, to understand how the Board reached the decision which it did was beside the point. *Farrell v. Workmen's Compensation Board* [1962] S.C.R. 48, followed; *Battaglia v. Workmen's Compensation Board* (1960), 32 W.W.R. 1, distinguished.

Per Hall J.: The appellant did not appear to have received the substantial justice which s. 79 of the Act contemplates. However, the courts are without power to review the merits of the case on *certiorari*. The legislature has given the Board unlimited discretion not subject to appeal or judicial review as long as the Board acts within its jurisdiction.

APPEAL from a judgment of the Court of Appeal for British Columbia¹, affirming a judgment of Brown J. Appeal dismissed.

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T. R. Berger, for the appellant.

C. C. Locke, Q.C., for the respondent.

The judgment of Cartwright, Fauteux, Martland and Ritchie JJ. was delivered by

ITCHIE J.:—This is an appeal brought by leave of the Court of Appeal of British Columbia from a judgment of that Court¹ (O'Halloran J.A. dissenting) affirming the judgment of Brown J. whereby he dismissed the appellant's application for a writ of *mandamus* with *certiorari* in aid to quash a decision of the Workmen's Compensation Board of British Columbia, dated March 28, 1957.

The notice of motion by which these proceedings were initiated sought relief upon the following grounds:

1. Workmen's Compensation Board did not notify the Prosecutor in writing of its decision regarding the matters contained in the certificate made in 1957 by Dr. K. Greenwood pursuant to the provisions of section 54A of the Workmen's Compensation Act, and thereby declined jurisdiction.
2. Workmen's Compensation Board neglected or refused to consider the certificate of the specialist appointed pursuant to the provisions of section 54A in 1957 as conclusive as to the matters certified therein, and thereby declined jurisdiction.
3. That the said Board, following receipt of the specialist's certificate, neglected or refused to pay compensation to the Prosecutor, and thereby declined jurisdiction.

The circumstances giving rise to this application are that Robert C. Kinnaird, the prosecutor, contracted dermatitis in December 1944, as a result of his employment as a painter and was granted compensation therefor by the Workmen's Compensation Board from February 1945 until February 1947, when his pension was discontinued and he was advised by the Board that:

From the medical information now on file it is considered that as far as any disability arising out of your employment with the Newcastle Ship-building Co. Ltd. is concerned, it cannot obviously be now considered to be produced by occupational contact, and your claim is therefore terminated this date and a cheque accordingly for time-loss to February 5th inclusive, together with subsistence allowance for January 8th, and transportation, is herewith enclosed.

¹ (1962), 39 W.W.R. 177, 34 D.L.R. (2d) 110.

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Ritchie J.

It is the belief of this Board that you should immediately apply yourself to the suggestion given you by Dr. Williams and obtain employment, light in nature, clean and of a clerical type.

At this time, there was no medical appeal provision in the *Workmen's Compensation Act*, but by s. 15 of c. 91 of the Statutes of British Columbia, 1955, s. 54A was added to the statute whereby provision was made entitling any workman who disputed a finding of the Board to be examined by a specialist to be nominated by him from a list of specialists provided by the Board. The request initiating such an examination was required to be

... accompanied by a certificate from a physician certifying that in the opinion of such physician there is a bona fide medical dispute to be resolved, with sufficient particulars thereof to define the question in issue.

Under the provisions of s. 54A(5) the specialist so selected was required to report to the Board within 18 days after his appointment, certifying as to:

- (a) The condition of the workman;
- (b) His fitness for employment;
- (c) If unfit, the cause of such unfitness;
- (d) The extent of his temporary or permanent disability by reason of the injury in respect of which he has claimed compensation; and
- (e) Such other matters as may, in his opinion, or in the opinion of the Board, be pertinent to the claim;

and such certificate, which shall be in the form provided by regulation, shall be conclusive as to the matters certified. (The italics are mine.)

On September 15, 1956, the appellant decided to take advantage of the provisions of this section and applied to the Board in writing to be examined by a specialist, enclosing a certificate of a physician certifying that in his opinion there was a *bona fide* medical dispute to be resolved. Upon this application being granted, the appellant nominated Dr. Greenwood as the specialist to conduct the examination and the examination was conducted on January 29, 1957. Dr. Greenwood furnished the Board with his certificate in accordance with s. 54A(5) on February 1, 1957, in which he reported as follows:

- (a) Examination of the skin revealed a mild non-specific eczematous process involving the fingers, with some active vesiculation. Occasional similar lesions are present also on the feet. The skin appears otherwise clear.

- (b) This patient is temporarily unfit for work, on account of his recent coronary attacks. The exceptionally sensitive condition of his skin precludes him from any occupation except for dry, clean work such as clerical work. He is unfit to continue in his two trades, namely, painting and baking.
- (c) This unfitness is due to the skin having been previously severely sensitized as a result of his occupation.
- (d) The skin in itself would constitute very little disability to an individual employed in clerical work. This man, however, is permanently unfit for either of his two trades. He also states that his educational attainments do not fit him for any other more suitable job.
- (e) I would estimate that there is an element of resentment in this case, and that this psychological factor may well be responsible for the recalcitrance of the disease process. It is not possible to say whether or not the patient could have employed himself in a non-irritating occupation, had this "negative" attitude been absent.

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Under the provisions of s. 54A(9) the Board is required "within eighteen days of the receipt of the certificate from the specialist" to "review the claim and notify the workman in writing of its decision regarding the matters contained in such certificate".

The notification which the appellant received from the Board pursuant to this section is contained in a letter dated March 28, 1957, which reads as follows:

The certificate of the specialist nominated by you for examination under Section 54A of the Workmen's Compensation Act has been received.

Your claim has been reviewed by the Board and the matters contained in the certificate fully considered and this is to inform you that no change has been made in the status or disposition of your claim.

It is contended on behalf of the appellant that the Board "declined jurisdiction" by failing to notify him of its decision regarding the matters contained in the specialist's certificate, and although I am bound to say that, in my opinion, it would have been more humane and more businesslike for the Board to have furnished the appellant with a copy of the certificate and an explanation of its decision, I am nevertheless unable to find that the provisions of s. 54A(9) give the workman a right to anything more from the Board than a notification in writing of its decision, and it seems to me that the Board complied with this section, albeit in a most niggardly fashion, when it advised the appellant in its letter of March 28, 1957, that after reviewing his claim and having given full consideration to the certificate it had decided that there was no change in the disposition of his claim.

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It is contended, however, that as s. 54A(5) makes the specialist's certificate "conclusive as to the matters certified" and as the certificate in the present case certifies that his disability is "a result of his occupation", the Board had no jurisdiction to do otherwise than to reinstate the appellant's pension in accordance with this finding.

This contention appears to me to overlook the fact that the specialist's report is initiated on the strength of a physician's certificate "certifying that in the opinion of such physician there is a bona fide medical dispute to be resolved . . .". It is for the purpose of resolving this dispute that the specialist makes his examination and furnishes his certificate to the Board, and it is his opinion as to how this dispute is to be resolved which is embodied in the certificate and made conclusive and binding on the Board by s. 54A(5). The effect of this certificate upon the Board's decision with respect to whether compensation is to be awarded or not is quite another matter and, in my view, the fact that the specialist's certificate is not intended to be conclusive in this regard is demonstrated by the provisions of s. 54A(9) which clearly contemplate a review of the whole claim and the making of an independent decision by the Board after the certificate has been received. If the specialist's certificate were intended to be conclusive of the workman's right to compensation, there would be no room for the jurisdiction to review and decide which the Board is required to exercise under s. 54A(9).

In the course of the reasons for judgment which he delivered on behalf of the majority of the Court of Appeal, Davey J.A. expressed the following opinion:

In my opinion it is possible that the Board may have accepted Dr. Greenwood's certificate but still have concluded, rightly or wrongly, on law or facts falling within the Board's exclusive jurisdiction that the opinion certified did not entitle the appellant to restoration of his compensation.

Counsel for the appellant treated this passage as meaning that the Court of Appeal required the appellant to prove his case to the exclusion of all possibilities instead of in accordance with the preponderance of evidence. I do not, however, think that any problem concerning burden of proof is raised by the above-quoted passage or that Davey J.A. was doing more than saying that it was open to the Board and within its jurisdiction to reach the conclusion which it did.

Under the provisions of the present s. 77(d) (formerly s. 76) of the Act, the Board is given

... exclusive jurisdiction to inquire into, hear and determine ...

(d) the degree of diminution of earning capacity by reason of any injury;

and s. 22(1) of the Act provides that when the Board is awarding compensation "regard shall be had to the workman's fitness to continue in the occupation in which he was injured or to adapt himself to some other suitable employment or business".

In my opinion, the Board has jurisdiction to review the appellant's claim in light of the specialist's certificate and to determine that no change should be made in the disposition of his case because of the degree of his fitness to adapt himself to employment at clerical work if he chose to do so. Whether or not this formed the basis of the Board's decision is not for me to say. In assessing the effect of the specialist's certificate on the appellant's right to compensation, it was, in my opinion, within the jurisdiction of the Board to examine all other data available to it for the purpose of determining whether or not the appellant's earning capacity had been diminished as a result of his disability and the fact that I am unable, on the material before us, to understand how the Board reached the decision which it did is quite beside the point.

As was said by Judson J. in *Farrell v. Workmen's Compensation Board*¹:

... even if there was error, whether in law or fact, it was made within the exercise of the jurisdiction and is not open to any judicial review including *certiorari*.

The case of *Battaglia v. Workmen's Compensation Board*² stands on entirely different ground, because in that case it was clear that the medical opinion embodied in the certificate of a specialist had been ignored by the Board which had reached its decision on the basis of a contrary opinion obtained from other doctors. In so doing, the Board disregarded the medical conclusions contained in the certificate and thus trespassed on a field over which the specialist had been given exclusive jurisdiction by s. 54A(5).

¹[1962] S.C.R. 48 at 51, 31 D.L.R. (2d) 177.

²(1960), 32 W.W.R. 1, 24 D.L.R. (2d) 21.

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In view of all the above, I would dismiss this appeal.

I would, however, make no order as to costs as I am of opinion that these proceedings might well have been avoided had the Board seen fit to inform the appellant of the reasons for its decision regarding the matters contained in Dr. Greenwood's certificate of February 1, 1957.

HALL J.:—I concur in the judgment of Ritchie J. I am impelled, however, to say, that this workman does not appear to have received the substantial justice which s. 79 of the *Workmen's Compensation Act* of British Columbia contemplates. Section 79 reads:

79. The decision of the Board shall be upon the real merits and justice of the case, and it is not bound to follow strict legal precedent.

The courts are without power to review the merits of the case on *certiorari*. The legislature has given the Board unlimited discretion not subject to appeal or judicial review as long as the Board acts within its jurisdiction.

Appeal dismissed.

Solicitors for the appellant: Shulman, Tupper, Worrall & Berger, Vancouver.

Solicitors for the respondent: Ladner, Downs, Ladner, Locke, Clark & Lenox, Vancouver.
