Date: 20010307
Docket: S.C. No. 00-A0179
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

IN THE MATTER OF THE WORKERS' COMPENSATION ACT
S. Y. 1992, C. 23, AS AMENDED

AND

IN THE MATTER OF AN APPLICATION BY MARIO MURPHY AND THE WORKERS' ADVOCATE ON BEHALF OF MARIO MURPHY

PETITIONERS

RICHARD BUCHAN — For the Petitioner

BRUCE WILLIS, Q.C. — For the Respondent

**MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH**

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[1] McINTYRE J. (Oral): These are my oral reasons for decision in *Workers' Compensation Act* and Mario Murphy.

I. INTRODUCTION

[2] This petition seeks a declaration concerning the meaning of s. 19.1 of the *Workers' Compensation Act*. A request for a mandamus was not pursued. The *Workers' Compensation Act*, R.S.Y. 1992, c. 16, was significantly amended in 1999 by R.S.Y. 1999, c. 23, to provide for a workers' advocate and an independent tribunal to hear workers' appeals. This is the first case interpreting these amendments. At issue is the ability of the workers' advocate to seek judicial relief, whether other remedies should be used before coming to court, and the interpretation of the 30-day requirement of s. 19.1 of the *Act*.

II. LEGISLATION

A. General

[3] The *Act* is intended to benefit Yukon workers. The preamble speaks of the existence of the Workers' Compensation System since 1917 and the desire to "...enable a wholistic approach to the rehabilitation of disabled workers...".

[4] The objects of the *Act* are set out in s. 1, and include, in subsection (e), providing an appeal procedure that is simple, fair, and accessible, with minimal delays.

[5] Section 3 provides that a worker who suffers a work-related disability is entitled to compensation unless the worker did something deliberately to receive compensation.

[6] Section 5 presumes a disability is work-related where a disability arises in the course of a worker's employment.

[7] Section 19 gives the worker access to all documents in the possession of the board re that worker's claim.

[8] Section 19.6 gives the benefit of the doubt to the worker in a claim for compensation.

B. Claim for Compensation

[9] The worker gives notice to the employer of a work-related disability under s. 8. The employer must give notice to the board within three days of receiving notice of the worker's disability (s. 10). Three separate entities may then deal with the claim. As well, the board has an oversight power.

[10] The claim for compensation is first determined by a board adjudicator (s. 11). On request of the worker or employer, a decision made under s. 11 is reviewed by a hearing officer (s. 17).

[11] The worker or employer may appeal a s. 17 decision of a hearing officer to the appeal tribunal (s. 18). The appeal tribunal strikes an appeal committee comprising a non-voting chair, a member representative of employers, and a member representative of workers (ss. 18.3(1)).

[12] The appeal committee's decision must be in writing (ss. 18.3(7)).

[13] Section 19.1 requires the board to, subject to exceptions, either implement a decision of a hearing officer or appeal tribunal, or provide an implementation plan within 30 days after the date of the decision of the hearing officer or appeal tribunal. The section reads:

> **19.1** Subject to an appeal under subsection 18(1) and subject to subsections 18.3(8), (10) and (13), the board shall
>
> > (a) implement any decision of a hearing officer or appeal tribunal, or
> >
> > (b) provide the hearing officer or the appeal tribunal, the worker, the dependants of a deceased worker, and the worker's employer with an implementation plan for the decision of the hearing officer or appeal committee
>
> within 30 days after the date of the decision of the hearing officer or appeal tribunal.

[14] I refer to the exceptions. An appeal under ss. 18(1) refers to a worker's or employer's appeal of the decision of a hearing officer. Thus, a hearing officer's decision is not to be implemented if there is an appeal.

[15] Subsection 18.3(13) refers to a court application under ss. 18.5(1). This will be discussed below.

[16] Subsections 18.3(8) and (10) refer to the board's ability to request the appeal tribunal to rehear its decision and to stay the implementation. Pursuant to ss. 18.3(8), if the board considers the appeal committee has not properly applied board policies, or failed to comply with the provisions of the *Act* or the regulations, by written reasons, the board can direct the appeal committee to rehear the appeal, giving fair and reasonable consideration to the policies and provisions. Pursuant to ss. (10), the board may stay a decision of the appeal committee pending rehearing. In my view, these subsections work together.

C. The Court's Role

[17] The appeal tribunal's decisions are said to be final and conclusive on any matter within jurisdiction (ss. 18.4(3) and (4)). However, ss. 18.4(3) is subject to board oversight, found in subsection 18.3(8), and court oversight, in 18.3(13), and both ss. 18.4(3) and (4) are subject to ss. 18.4(11), that provides a worker or employer may seek judicial review of an appeal tribunal decision where there has been an error of law or jurisdiction.

[18] Subsection 96(4) is a privative clause for decisions made within the board's jurisdiction, which, according to ss. 96(1), is an exclusive jurisdiction to examine, inquire into, hear, determine and interpret all matters and questions under the *Act*.

[19] The court is given a specific statutory role in ss. 18.5(1) whereby either the appeal tribunal or the board may apply for a determination whether policy established by the board is consistent with the *Act*. A rehearing of an appeal following a direction by the board is final unless the court decides the policy in question is consistent with the *Act*, in which case the board may, again, direct a rehearing of the appeal (ss. 18.3(12) and (13)).

[20] Of course, even without specific statutory authority, pursuant to administrative law principles courts have traditionally had the right to review actions of administrative bodies.

D. Workers' Advocate

[21] Section 11.1 provides for the Minister of Justice to appoint a workers' advocate, who shall:

> 11.1(2)(a) advise workers and the dependants of deceased workers on the intent, process and procedures of the compensation system, including the administration of the Act, the regulations and the policies of the board,
>
> (b) advise workers and the dependants of deceased workers on the effect and meaning of decisions made under the Act with respect to their claims for compensation, and
>
> (c) assist, or at their request, represent a worker or a dependant of a deceased worker in respect of any claim for compensation, including communicating with or appearing before an adjudicator, hearing officer or appeal committee.

III. ANALYSIS

Issue 1: Role of the Workers' Advocate

[22] In my view, the important words of ss. 11.1(2), paragraph (c), are: "...represent a worker...in respect of any claim for compensation...". I am told other jurisdictions also have a workers' advocate, but there is no case law on the role.

[23] Board counsel suggests that, by implication, the advocate is restricted to appearances before adjudicators, hearing officers or appeal committees, and that it is anomalous for one party in the system to take another to court.

[24] In my view, it is not anomalous. The words of the enactment are broad. The legislation, and the role, should be given a fair, large and liberal construction (see s. 10 of the *Interpretation Act*, R.S.Y. 1986, c. 93). Should a worker request representation in respect of a claim for compensation, I see no reason why the workers' advocate could not seek judicial review in court, in respect of the actions, or lack of action, of the board.

[25] However, this right is only for, and at the specific request of workers who have claims for compensation. I reject the contention of counsel for the workers' advocate that the advocate can take matters "at large" to court. The very words in the *Act* that grant the advocate the power to go to court do so only in respect of an individual, not a possible or potential claimant. This representation can only

occur at the request of a worker. This means that there must be a specific complaint by a specific worker in respect of a claim for compensation.

Issue 2: Jurisdiction

[26] Counsel for the board suggests that, although the meaning of s. 19.1 must be resolved, it should not be resolved in this forum, that is to say, in court. Rather, the meaning should be decided by an adjudicator, whose decision could then be reviewed by the appeal tribunal.

[27] Further, counsel points out that Mario Murphy, on whose behalf this matter was commenced, has received the benefit of the appeal tribunal's decision. Thus, any decision would be moot.

[28] As for the internal appeal process, counsel argues that the implementation plan contained, in Mario Murphy's case, as step 1, a preliminary step, "await decision of the Board pursuant to section 18.3."

[29] This was said to be a decision of an adjudicator which could then be appealed to a hearing officer and then to the appeal tribunal. The board could then, of course, call for a rehearing if it did not agree with the decision.

[30] For me, this would not be appropriate. This would not be an effective appeal on what is a legal question: the interpretation of a time requirement in the

statute relating to the implementation of the decision of the appeal tribunal. In other words, an appeal on this point is not an adequate alternative remedy. Further, this issue will inevitably return to court, as the workers' advocate and the board are diametrically opposed on the meaning of the section.

[31] In assessing the level of deference to be given a tribunal such as the board, four factors are to be taken into account:

1. Privative clauses
2. Expertise
3. Purpose of the *Act* as a whole and the provisions in particular
4. The nature of the problem, a question of law or fact.

[32] This pragmatic and functional approach is found in *Pushpanthan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

[33] In my view, this is a question of law, on which the board has no special expertise. Further, it occurs to me that the purpose of the *Act* and the board are to decide questions relating to compensation of disabled workers, not to decide questions of law.

[34] The standard to be applied to the board's interpretation of s. 19.1 is correctness.

[35] This is a legal question, as to the interpretation of the *Act*, that is best handled by this court, rather than by an adjudicator, hearing officer or the appeal tribunal.

[36] As for mootness, it is common ground that it is not just Mario Murphy who complains, through the workers' advocate, as to timing; other workers make a similar complaint. In my view, this court should interpret s. 19.1, having had the benefit of full argument. See: *B.C. Transit v. B.C. Human Rights Council* (1991), 1 Admin. L. R. (2d) 88 (B.C.C.A.) at 95.

Issue 3: Time Limit

[37] Counsel for the board forcefully argued that the "subject to" provisions of s. 19.1 mean that it is appropriate that step 1 in the implementation plan be to await the decision of the board, in its role as overseer of the appeal tribunal, pursuant to subsection 18.3(8). This may, it was argued, take more than 30 days. Indeed, in this case, it took 39 days, at which time the board said it would not call for a rehearing.

[38] The mischief, it was argued, is that if it were not this way, a worker might be paid pursuant to an appeal tribunal's decision, and then have to repay the board should there be a rehearing by the tribunal, at the direction of the board, and a decision contrary to the first. As well, often the decisions of the appeal tribunal are complex, and it takes time to analyze them.

[39] Although I was at first attracted to this argument, I find four faults with it:

1. It is inconsistent with the object of a simple, fair, accessible appeal procedure with minimal delays.
2. The delay is indeterminate, arbitrary and solely dependent on the time the board decides to take deciding the question of rehearing.
3. The mischief of potential repayment is easily avoided by requiring a rehearing decision by the board within 30 days. Failing a stay, an immediate implementation by the board of the decision of the hearing officer or appeal tribunal, or the provision of an implementation plan, would follow.
4. If there are internal problems meeting the 30-day requirement, these will have to be overcome through the use of more resources or a change in the legislation. In this matter, internal constraints cannot amend the meaning of the legislation.

IV. CONCLUSION

[40] In summary, I conclude:

1. The workers' advocate may seek judicial relief, but only in respect of individual workers who have requested representation;
2. Although other avenues of appeal may be available, the questions at issue are of statutory interpretation, which questions should be decided now.

3. Section 19.1 requires that the board decide within 30 days after the decision of the appeal tribunal whether it intends to direct a rehearing and to stay the decision of the appeal tribunal.

[41] The parties will bear their own costs.

[42] Those conclude my reasons in this matter.

McINTYRE J.