IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Doyle* v. *Workers' Compensation Health & Safety Board,* 2006 YKSC 22

Date: 20060316
Docket No.: S.C. No. 05-A0078
Registry: Whitehorse

IN THE MATTER OF THE WORKERS' COMPENSATION ACT
R.S.Y. 2002, c. 231

and

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
IN RESPECT OF CERTAIN ERRORS OF THE
WORKERS' COMPENSATION HEALTH & SAFETY BOARD

by

MICHAEL DOYLE AND THE WORKERS' ADVOCATE
ON BEHALF OF MICHAEL DOYLE

Petitioners

Before: Mr. Justice R.S. Veale

Appearances:

Susan Roothman	Counsel for Michael Doyle and the Workers' Advocate
Bruce Willis, Q.C.	Counsel for Workers' Compensation Health and Safety Board

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Workers' Advocate, on behalf of Michael Doyle, applies for a declaration by way of judicial review that the Hearing Officer erred in granting the adjournment of a hearing without providing the Workers' Advocate an opportunity to make representations on behalf of the worker. The Workers' Compensation Heath & Safety Board (the board),

on behalf of the Hearing Officer, submits that the application is moot and unnecessary to decide.

FACTS

[2] This case begins with the worker claiming a work-related disability in May 2004. An adjudicator employed by the board denied the claim in a decision dated March 9, 2005.

[3] The worker requested a review of the decision of the adjudicator on March 11, 2005.

[4] The employer made a request for disclosure of the worker's file on March 22, 2005.

[5] On April 14, 2005, a Notice of Hearing was issued to the worker and the employer for a hearing date of July 13, 2005, before a Hearing Officer.

[6] The determination of relevant documents for disclosure was made on June 13, 2005, and the documents were made available on June 15, 2005. The employer picked up the disclosure documents on June 21, 2005.

[7] Counsel for the employer advised the appeals assistant on June 10, 2005, that they wished to reschedule the hearing date. The appeals assistant advised that November 2005 was the next available date for that Hearing Officer.

[8] On June 14, 2005, counsel for the employer filed an Application to Reschedule a Hearing requesting a date in October 2005 based on the fact that counsel did not have disclosure of the worker's file.

[9] The appeals assistant, on June 14, 2005, confirmed with counsel for the employer that November 2, 9 or 16, 2005, was available and counsel indicated a

preference for November 9, 2005. Counsel for the employer apparently concluded that a new hearing date was set for November 9, 2005.

[10] The appeals assistant never consulted the Hearing Officer or the Workers' Advocate about rescheduling the hearing until July 12, 2005, when the Hearing Officer was informed. A Notice of Hearing – Rescheduled letter was never issued. The Hearing Officer directed the appeals assistant to contact the parties to come to an agreement as to a new hearing date.

[11] Prior to July 12, 2005, the Workers' Advocate had not been advised that an Application to Reschedule a Hearing had been filed. He learned that the hearing date was postponed when he was asked to reach agreement on a new date.

[12] The Workers' Advocate, by e-mail, submitted that a hearing date should be set within 10 working days of the July 13, 2005 hearing date.

[13] No agreement was reached on the new date and no hearing was held to hear submissions of counsel and fix a new date.

[14] The Workers' Advocate filed a Petition on August 8, 2005 claiming that the Hearing Officer had committed a jurisdictional error and seeking an order for a timely hearing.

[15] The appeals assistant continued to seek agreement of counsel. She obtained agreement from the employer's counsel to a hearing date of October 13, 2005, before another Hearing Officer. The Workers' Advocate did not agree.

[16] The matter came before this Court on September 21, 2005. At this point a pre-hearing meeting had been held before a second Hearing Officer on September 15, 2005. The second Hearing Officer ordered the matter be heard on October 13, 2005.

[17] The second Hearing Officer, in her written reasons dated September 27, 2005, noted that "… Errors have occurred that the board has attempted to mitigate since July 12, 2005."

[18] I indicated to the parties that the matter should proceed before the Hearing Officer without prejudice to this application of the Workers' Advocate.

ISSUES

[19] There are two issues to decide:

1. Is the application moot or are there special circumstances requiring the matter to be heard?
2. Did the Hearing Officer commit a jurisdictional error in permitting the hearing date to be adjourned without first hearing representations from the Workers' Advocate?

THE LEGISLATION

[20] Claims for compensation by workers are heard in the first instance by an adjudicator employed by the board pursuant to section 12 of the *Workers' Compensation Act*, R.S.Y. 2002, c. 231 (the *Act*).

[21] The *Act* also provides in section 13(1) for the appointment of a workers' advocate to advise workers on all aspects of the compensation system and represent them before adjudicators, hearing officers and the appeal committee of the appeal tribunal.

[22] The worker or an employer may request a review of any decision of an adjudicator concerning a claim for compensation. The review is conducted by a hearing officer or panel of hearing officers pursuant to section 20(3) of the *Act* which states:

> 20(3) When reviewing a decision, the hearing officer or panel of hearing officers shall
>
> (a) provide all parties with an opportunity to make representations;
> (b) provide a hearing, if requested by an party;
> (c) consider the entire record of the claim in the board's possession;
> (d) consider further evidence considered necessary to make a decision; and
> (e) confirm, vary, or reverse any decision made in respect of the claim.

[23] The Hearing Officer is required to make a decision with reasons within 30 days after the review is conducted as provided in section 42 of the Rules of Procedure.

[24] The Rules of Procedure set out certain obligations of the Hearing Officer.

> **Notification and Scheduling**
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> 9) Upon receipt of a notice of claim review, the Hearing Officer will:
>
> a) notify the party by registered mail that he or she is considering the matter for acceptance; or
> b) schedule the hearing for the next available date.
>
> 10) The Hearing Officer will notify the parties by registered mail of the date, time and location of the hearing and will provide:
>
> a) verification that the notice of claim review has been received; and
> b) to all other parties, a copy of the notice and a form for reply.
>
> 11) The Hearing Officer may reschedule a hearing at the request of a party. The request must be in the required form unless otherwise agreed by the Hearing Officer.

[25] Section 35 of the Rules of Procedure provides as follows:

> 35) The Hearing Officer may adjourn, postpone or relocate a hearing as long as this does not prejudice a party.

Issue 1: Is the application moot or are there special circumstances requiring the matter to be heard?

[26] The Workers' Advocate seeks a declaration that the board has committed a jurisdictional error when the first Hearing Officer did not proceed on the original hearing date of July 13, 2005, and did not reschedule the hearing.

[27] The Workers' Advocate relies upon section 32 of the *Judicature Act,* R.S.Y. 2002, c. 128, which states:

> No action or proceeding is open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or can be claimed or not.

[28] Counsel for the board submits that since the written decision of the second Hearing Officer dated September 27, 2005, the matter is moot, as a hearing date has been set for October 13, 2005.

[29] Counsel for the board acknowledges the administrative error in his written submission but submits there is no useful purpose to resolving the administrative error that caused a delay as it has been resolved by the second Hearing Officer setting the date of hearing.

[30] Counsel for the Workers' Advocate submits that this court should exercise its discretion to make a declaration in the nature of a supervisory remedy for future guidance of the board and the workers' advocate.

[31] The doctrine of mootness is discussed at length in *Borowski* v. *Canada (Attorney General)*, [1989] 1 S.C.R. 342. In that case, Mr. Borowski sought to strike down section 251 of the *Criminal Code* relating to abortion on the ground that it contravened

protected rights of the foetus. However, section 251 was struck down in *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, before the Supreme Court of Canada heard Mr. Borowski's appeal.

[32] In dismissing Mr. Borowski's appeal as moot, the court set out principles for considering the doctrine of mootness, which I shall attempt to summarize as follows:

1. The courts will generally decline to decide a case which raises hypothetical questions that will have no practical effect on the rights of the parties;
2. If, subsequent to the initiation of an action, events occur so that no "live controversy" exists, the matter becomes moot and the court may decline to decide the case.
3. However, the court may nonetheless exercise its discretion to address a moot issue if the circumstances warrant it after considering the following criteria:
    a) Is there an adversarial context to ensure that the issues are fully argued?
    b) Is the expenditure of judicial resources warranted?
    c) Is the court departing from its traditional role and intruding on the role of the legislative branch?

[33] Although the court in Borowski was somewhat disposed to decide the case based upon the first two criteria, it declined to do so on the third criterion as there was no governmental action to bring the *Charter of Rights* into play.

[34] Counsel for the board relies on a decision of the British Columbia Court of Appeal in *Cheslatta Carrier Nation* v. *British Columbia*, 2000 BCCA 539. In that case, the Cheslatta Carrier Nation applied for a declaration of aboriginal title without pleading any infringement by government of that title. The trial judge and the Court of Appeal

declined to hear the case because "… the declaration would not serve a legal purpose in terms of resolving a real difficulty, present or threatened." The Court of Appeal also declined to make a general declaration against government which might require later refinement or clarification (paras. 16 and 17).

[35] In my view, the issue between the parties is moot as a result of the decision of the Hearing Officer on September 27, 2005 ordering that the review be held on October 13, 2005. However, in this case, there is no question of interfering with the legislative branch and the cost of judicial resources is minimal. It is also a consideration that delay issues such as this are often never addressed by courts because of the short time frame and the interest of the worker in having the merits of the claim decided with as little delay as possible. As a result, I find that it is appropriate to address this dispute in a supervisory way to ensure that the worker's claims are dealt with in an expeditious manner.

Issue 2: Did the Hearing Officer commit a jurisdictional error in permitting the hearing date to be adjourned without first hearing representations from the Workers' Advocate?

[36] There is no dispute about the fact that the Hearing Officer erred in not setting a date for the review hearing and not permitting both parties to make representations about the appropriate date. The result was a delay of three months before the hearing was heard.

[37] As with most tribunals, the board employs an appeals assistant for the purpose of assisting workers and employees to bring reviews before a Hearing Officer. This is a reasonable approach employed by most courts and tribunals to streamline and

administer the process of setting matters for hearing without engaging the judge or Hearing Officer in preparing the paperwork or contacting the parties.

[38] Despite the use of an appeals assistant, the statutory power to set hearing dates is the prerogative of the Hearing Officer, not the appeals assistant. When the Hearing Officer learned of the error, it was not appropriate to put the matter into the hands of the appeals assistant with instructions to see if the parties could agree on a date, which ultimately led to a three-month delay.

[39] At that point, it would be prejudicial both to proceed without counsel for the employer or not to proceed when the Workers' Advocate was ready to proceed. The Hearing Officer had to make a decision.

[40] In my view, the more appropriate course of action would have been for the Hearing Officer to appear on the July 13, 2005 hearing date and hear the representations of the Workers' Advocate and the explanation of the appeals assistant as to why counsel for the employer was not present. The Hearing Officer could adjourn the hearing for a short period to allow the appeals assistant to contact the office of counsel for the employer and advise that a date was set to resolve the matter as to what date the hearing should be adjourned. In this case, counsel for the employer was not resident in the jurisdiction so the appearance could be arranged by telephone.

[41] After giving both counsel for the employer and the Workers' Advocate an opportunity to make representations on an appropriate date, the Hearing Officer should have made a decision on the new date of hearing and avoided the protracted delay that occurred. I should add that it is my understanding that generally the claims of workers are dealt with in a timely manner.

[42] It is also important to state that the Hearing Officer was not seized of the review and there was no necessity to adjourn to the next date of availability for that Hearing Officer as opposed to an earlier date before another Hearing Officer. The object of the *Act* is clear:

> 1 (e) to provide an appeal procedure that is simple, fair, and accessible, with minimal delays;

[43] In this case, the error of the appeals assistant in not informing the Hearing Officer of an adjournment application was compounded by the Hearing Officer not proceeding on the established date for hearing and allowing both counsel to make representations on the appropriateness of an adjournment.

[44] It is unnecessary to provide any remedy in the circumstances of this case other than this supervisory guidance for future practice and procedure.

VEALE J.