IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *O'Rourke v. Workplace Health, Safety and Compensation Commission*, 2022 NLCA 14
Date: February 25, 2022
Docket Number: 201901H0048

BETWEEN:

DANIEL O'ROURKE — APPELLANT

AND:

WORKPLACE HEALTH, SAFETY AND COMPENSATION COMMISSION

FIRST RESPONDENT

AND:

WORKPLACE HEALTH, SAFETY AND COMPENSATION REVIEW DIVISION

SECOND RESPONDENT

Coram: Welsh, Hoegg and Butler JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador General Division 201101G4264 (2019 NLSC 86)

Appeal Heard: December 6, 2021
Judgment Rendered: February 25, 2022

Reasons for Judgment by: Welsh J.A.
Concurred in by: Hoegg and Butler JJ.A.

Counsel for the Appellant: Donald K. Powell
Counsel for the First Respondent: Stephanie M. Sheppard
Counsel for the Second Respondent: Stephen J. Willar

Authorities Cited:

CASES CITED: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Reid v. Workplace Health, Safety and Compensation Commission*, 2015 NLCA 40, 371 Nfld. & P.E.I.R. 7; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Workers' Compensation Commission v. Jesso*, 2001 NFCA 49, 206 Nfld. & P.E.I.R. 276.

STATUTES CONSIDERED: *Workplace Health, Safety and Compensation Act*, RSNL 1990, c. W-11, sections 21, 23, 26, 26.1, 28, 28.1, 60(1).

Welsh J.A.:

[1] Daniel O'Rourke injured his back in the course of his employment on September 1, 2006. He received workers' compensation benefits until May 26, 2010 when the Workplace Health, Safety and Compensation Commission determined that he was capable of working six hours per day with accommodation. His benefits were, accordingly, reduced.

[2] As authorized by the legislation, Mr. O'Rourke applied for a review of that decision, which was conducted by the Chief Review Commissioner, with a reconsideration conducted by another Review Commissioner. Both of those decisions confirmed the original decision of the Commission.

[3] Mr. O'Rourke's application for judicial review of those decisions was dismissed. He now appeals.

BACKGROUND

[4] On September 1, 2006, Mr. O'Rourke injured his back while lifting furniture in the course of his employment as head housekeeper at a motel. His claim for benefits under the *Workplace Health, Safety and Compensation Act*, RSNL 1990, c. W-11, was accepted on September 27, 2006. Following medical and occupational assessments, an internal review decision of the Workplace Health, Safety and Compensation Commission (the "Commission"), dated May 26, 2010, confirmed that "Mr. O'Rourke was capable of working "Other Sales and Related Occupations" for six hours per day with accommodations" (decision of the applications judge, 2019 NLSC 86, at paragraph 2).

[5] Because Mr. O'Rourke's pre-injury employer was unable to accommodate him, other options in line with his skills and abilities were identified, but these were declined by Mr. O'Rourke. While Mr. O'Rourke's refusal regarding the proffered options resulted in a reduction in benefits, he was entitled to continuing extended earnings loss benefits because the alternate options would not fully replace his pre-injury income.

[6] On application by Mr. O'Rourke, the Commission's decision, set out in an internal review decision, was first reviewed and upheld by Mr. Peckford, the Chief Review Commissioner (the "Peckford Decision"). On reconsideration, as authorized by the *Act,* Mr. Barry, another Review Commissioner, also upheld the decision of the Commission (the "Barry Decision"). On judicial review, Mr. O'Rourke submitted that the Commission "did not properly weigh the medical and other evidence relating to his injury", and that the decisions of the Review Commissioners should be set aside (decision of the applications judge, at paragraph 4).

[7] In his decision dismissing Mr. O'Rourke's application for judicial review, the judge concluded that the decisions of the Review Commissioners, which were read together, were reasonable:

> [72] Whether or not the Barry Decision redresses any aspect of the Peckford Decision, it does supplement it. I am satisfied that the two, when read together, are reasonable. In the final analysis, Mr. O'Rourke has not established that the Peckford Decision was unreasonable, notwithstanding that some of the choices of phrase in it are not ideal. As supplemented by the Barry Decision, it meets the requirements of justification, transparency and intelligibility. Importantly, the outcome falls within the range of those that are possible and acceptable and are defensible in respect of the facts and the law.

[8] Accordingly, there was no basis on which to set aside the decisions of the Review Commissioners or the Commission.

ISSUES

[9] The issues raised on appeal are:

(1) Which decision was under review by the applications judge;

(2) Did the applications judge err in defining the appropriate standard of review; and

(3) Did the applications judge err in applying the relevant legal principles to the facts of this case?

ANALYSIS

The Legislation

[10] The *Workplace Health, Safety and Compensation Act* establishes an independent Review Division, composed of a panel of not more than seven persons appointed by the Lieutenant-Governor in Council, that is "responsible for the review of decisions of the commission" (section 21). The Chief Review Commissioner reviews the decision of the Commission, or assigns the review to another Review Commissioner (section 23). In reviewing a decision, the Review Commissioner is bound by the *Act*, regulations and policy of the Commission. The role of the Review Commissioner is to determine whether the Commission "acted in accordance with [the] Act, the regulations and policy established by the commission" (sections 26.1 and 26(1)).

[11] A Review Commissioner is required to "communicate" to the parties his or her decision, with reasons, within 60 days of the date of the application for review (section 28(8)). Reconsideration of that decision is authorized pursuant to section 28.1 of the *Act*:

> (1) A worker, dependent, employer or the commission may apply, in writing, to the chief review commissioner for a reconsideration of a decision of a review commissioner.
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> ...
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> (3) The chief review commissioner shall review the application and, where he or she determines that reconsideration is appropriate, shall reconsider the decision, or order

> that the decision be reconsidered by another review commissioner who did not make the decision.

A reconsideration decision must also be communicated to the parties, with reasons.

[12] Section 60(1) of the *Act* addresses the question of equally weighted evidence:

> An issue related to a worker's entitlement to compensation shall be decided on a balance of probabilities and, where the evidence on each side of an issue is equally balanced, the issue shall be decided in favour of the worker.

Decision Under Review

[13] As a result of the reconsideration procedure under the *Act*, there is some uncertainty as to which decision was subject to judicial review by the applications judge. In fact, he referred to both the review and reconsideration decisions:

> [24] Because the reconsideration by Mr. Barry upheld the decision by Mr. Peckford, ... I am prepared to focus my review on the Peckford Decision. Nevertheless, it may be necessary to comment on the Barry Decision insofar as it may supplement or "redress" something at issue in this application ... .

[14] On appeal, the parties did not challenge that approach.

Standard of Review

[15] The analytical approach to an appeal following judicial review of an administrative decision is discussed in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559. LeBel J., for the Court, explained:

> [45] ... But before I discuss the appropriate standard of review, it will be helpful to consider once more the interplay between (1) the appellate standards of correctness and palpable and overriding error and (2) the administrative law standards of correctness and reasonableness. These standards should not be confused with one another in an appeal to a court of appeal from a judgment of a superior court on an application for judicial review of an administrative decision. ...
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> ...

> [47] The issue for our consideration [on appeal] can thus be summarized as follows: Did the application judge choose the correct standard of review and apply it properly?

[16] In order to answer that question, the appellate court must view the matter from the perspective of the applications judge whose function is to determine whether the decision of the administrative tribunal is reviewable on a standard of correctness or reasonableness, and to apply that standard.

[17] In *Reid v. Workplace Health, Safety and Compensation Commission*, 2015 NLCA 40, 371 Nfld. & P.E.I.R. 7, the Court accepted reasonableness as the appropriate standard of review to be applied by a judge conducting a judicial review in the context of workers' compensation:

> [7] The parties agreed and the applications judge accepted that the Chief Review Commissioner's decision should be reviewed on a standard of reasonableness. Counsel took the same position on appeal. I agree. The appropriate standard of review has, in fact, been determined by this Court in previous decisions (*Mount Pearl (City) v. Workplace Health, Safety and Compensation Review Division*, 2008 NLCA 69, 282 Nfld. & P.E.I.R. 14, at paragraph 26). Referring to the same decision, at paragraph 15, I would add that the applications judge's decision is subject to review by this Court on a standard of correctness.

[18] That decision is consistent with relevant more recent authority from the Supreme Court of Canada, in which a standard of reasonableness would be presumed (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65). Reasonableness as a standard of review is discussed in *Vavilov*:

> [86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir* [2008 SCC 9, [2008] 1 S.C.R. 190], at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": [*Dunsmuir*, at para. 47]. ...

[19] While a standard of reasonableness applies to the judicial review of a Review Commissioner's decision, different considerations apply to the review of the Commission's decision by a Review Commissioner. In *Workers' Compensation Commission v. Jesso*, 2001 NFCA 49, 206 Nfld. & P.E.I.R. 276, this Court reiterated that the role of a Review Commissioner is to ensure that, in

making its decision, the Commission acted in accordance with the *Act*, regulations and policy established by the Commission:

> [22] In summary, the current scheme, established by the *Act*, makes it the role of the Review Division to ensure that the Commission properly applies the *Act*, *Regulations* and policy. There is no privative clause operative respecting the Review Division's review of the decisions of the Commission, nor are there other indices that the standard of review should be other than correctness. ... Common sense suggests that the whole raison d'être of the Review Division is to act as a watch dog over the Commission in respect of those matters listed in s. 26(1). I conclude that the standard of review to be applied by the Review Division is correctness. In other words, a review commissioner is, for matters within his or her jurisdiction, free to re-examine the evidence, interpret the *Act*, *Regulations* and policy and, if he or she finds that the Commission has not correctly interpreted the *Act*, *Regulations* or policy, substitute the decision which he or she considers to be proper or remit the matter to the Commission. ...
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> (Emphasis added.)

[20] In this case, the applications judge correctly stated the law and how it was to be applied, concluding:

> [45] Thus, in making my review, I must determine whether the Peckford Decision was reasonable when it found the decision of [the Commission] to be correct, in the sense of having been made in accordance with the *Act*, regulations, and policies. ...

Application of the Legal Principles

[21] Mr. O'Rourke's appeal focuses on the application of the Commission's Policy EN-20, which is referenced in the decision of the applications judge:

> [32] Policy EN-20: Weighing Evidence provides guidance on how evidence is to be weighed. It states in relevant part:
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> ...
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> 2. When addressing conflicting medical evidence, decision makers will not automatically prefer the medical evidence of one category of physicians or practitioners over that of another. Decision makers shall consider the following criteria in deciding what weight to give to such evidence:
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> a. the expertise of the individual providing the opinion;
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> b. the correctness of the facts relied upon by the provider of the opinion;

> c. any issues of bias or objectivity with the opinion;
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> d. subjective versus objective medical evidence; and
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> e. the findings of any relevant scientific studies referenced by a qualified medical practitioner;
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> ...
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> (Emphasis added.)

[22] The applications judge considered this issue in detail, and provided a careful analysis:

> [58] Here, [the Commission] and Mr. Peckford were faced with conflicting medical evidence. Mr. O'Rourke's family physician, Dr. Noble, concluded that Mr. O'Rourke was not capable of performing manual labour only. This is consistent with the opinion of the occupational therapists who concluded in the [functional capacity evaluation] that Mr. O'Rourke could perform certain sedentary or light-to-medium level tasks for a certain number of hours each day provided proper accommodations were provided. The neurosurgeon, Dr. Murray, on the other hand, expressed surprise at the findings of the occupational therapists and concluded that the amount of pain displayed by Mr. O'Rourke during the examination would make it very difficult for him to get back to work at anything.
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> [59] The record confirms that [the Commission] considered all of the evidence before it and gave the [functional capacity evaluation], supported by Dr. Noble, more weight than the opinion of Dr. Murray. There is nothing in the record to suggest that they did so "automatically". In fact, the depth of analysis conducted by [the Commission] demonstrates the opposite.
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> ...
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> [61] Mr. Peckford considered that the [functional capacity evaluation] provided objective evidence of Mr. O'Rourke's capacity to work and supported the conclusion reached by [the Commission] respecting Mr. O'Rourke's abilities and entitlement to benefits. He was satisfied that the weight of evidence supported the conclusion reached by [the Commission] ... .

[23] However, the applications judge voiced concern about the use of the word "reasonable" in the concluding remarks in the Peckford Decision, at page 7:

> I note the Commission, in reaching its decision, has considered all the medical evidence and the recommendations of the occupational therapists. From this, it has concluded the weight of evidence supports an ability to work and earn within restrictions. It is apparent from this conclusion, the Commission has concluded that

> the weight of evidence resulting from the [functional capacity evaluation] outweighs the secondary work capability evidence supplied by the worker's physicians. Although not specifically noted by the Commission in its decision, there is the implication that the opinion of the medical providers on work capability, secondary to a medical diagnosis or treatment opinion, though relevant, is not accorded the same weight as that flowing from occupational therapists, whose professional expertise is to assess and report on functional capacity.
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> As noted earlier, the Commission, in its decision, has applied the evidence and considered the relevant policy and legislation. The Commission has weighed the recommendations that resulted from two different occupational therapists as having greater weight than the worker's account that he is incapable of working, augmented by the opinions of his medical providers and has accepted the greater weight favours he has the capability to work. I find, in my review of this case, the Commission has considered and weighed all the evidence and has reached a reasonable decision.
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> (Emphasis added.)

[24] In considering this comment, the applications judge concluded:

> [62] Read on its face, the conclusion by Mr. Peckford that [the Commission] did not afford the evidence provided by the medical practitioners the same weight as that of the occupational therapists could run counter to Policy EN-20. As we have seen, that policy requires [the Commission], when addressing conflicting medical evidence, not to *automatically* prefer the medical evidence of one category of physicians or practitioners over that of another. If [the Commission] did so, then its decision would not comply with the *Act*, regulations or policies and would be wrong in law and the Peckford Decision would be unreasonable in upholding it.
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> [63] But that is not what [the Commission] did and it is not what the Peckford Decision ultimately decided. In suggesting that [the Commission] preferred the opinions of the occupational therapists (and Mr. O'Rourke's family physician), over that of Dr. Murray, [the Commission] conducted a detailed examination of the evidence, the professionals providing it, and their respective interactions with Mr. O'Rourke. I am satisfied, therefore, that [the Commission] did not *automatically* prefer the evidence of one practitioner over another, but only did so after a careful weighing of appropriate criteria.
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> (Italics in original.)

[25] I agree with this analysis and conclusion. However, the judge went on to note that Mr. Peckford had concluded that the Commission had reached a "reasonable" decision. As determined in *Jesso*, the standard of review that a Review Commissioner must apply in reviewing a decision of the Commission is correctness, not reasonableness. The applications judge dismissed the

suggestion that Mr. Peckford actually applied the wrong standard of review. In fact, he was satisfied that "the use by Mr. Peckford of that one word is inconsistent with the entirety of the Peckford Decision" (decision of the applications judge, at paragraph 65).

[26] The judge buttressed this conclusion by reference to the reconsideration of the Commission's decision in the Barry Decision:

> [71] Specifically, Mr. Barry conducted an analysis and was satisfied that [the Commission] applied Policy EN-20 correctly (page 4). He found that giving greater weight to the evidence of the occupational therapists in this case was in keeping with the Policy and led to the weight of the evidence supporting a finding that Mr. O'Rourke retained some work capacity. This was not a case of equally balanced evidence and, therefore, did not invoke that aspect of section 60(1). Consequently, Mr. Barry found that [the Commission] correctly applied section 60(1) of the *Act* (page 4). He, therefore, saw no reason to interfere with the Peckford decision.

[27] The Review Commissioners gave detailed reasons for concluding that the Commission correctly applied the *Act*, regulations and policy in assessing Mr. O'Rourke's application. Reviewing those reasons, the applications judge was satisfied that the decisions of the Review Commissioners, read together, satisfied the hallmarks of reasonableness – justification, transparency and intelligibility. And further, that "the outcome [determined by the Commission and approved by the Review Commissioners] falls within the range of those that are possible and acceptable and are defensible in respect of the facts and the law" (decision of the applications judge, at paragraph 72).

SUMMARY AND DISPOSITION

[28] There is no basis on which to conclude that the applications judge erred in stating the relevant legal principles, and in applying them in determining that the decisions of the Review Commissioners met the appropriate standard of reasonableness.

[29] Accordingly, I would dismiss the appeal, with no order as to costs.

B. G. Welsh J.A.

I concur: _____

L. R. Hoegg J.A.

I concur: _____

G. D. Butler J.A.