IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Douglas* v. *WCH & SB,* 2004 YKSC 05

Date: 20040116
Docket No.: 03-A0106
Registry: Whitehorse

Between:

**IN THE MATTER OF THE WORKER'S COMPENSATION ACT
R.S.Y. 2002, CH. 231**

and

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

by

**JUDY DOUGLAS and the WORKERS' ADVOCATE
ON BEHALF OF JUDY DOUGLAS**

Petitioners

Appearances:
Mr. Richard Buchan — For the Petitioners
Mr. Bruce Willis — For WCH & SB

Before: Mr. Justice J.E. Richard

REASONS FOR JUDGMENT

[1] The petitioner, Judy Douglas, is a claimant for compensation under the *Workers' Compensation Act,* R.S.Y. 2002, c. 231. She was unsuccessful in her claim at the initial stages of the claim process, i.e., before the adjudicator and the hearing officer. However, with the assistance of the Workers' Advocate, she eventually prevailed before an appeal committee of the Appeals Tribunal. In particular, the appeal committee, in its

decision of September 22, 2003, made a determination that her disability was work-related, i.e., arose out of and in the course of her employment. Both the hearing officer and the appeal committee, in making their respective decisions, considered and applied, *inter alia,* a Board policy entitled Cumulative Trauma Disorders.

[2] The appeal committee's decision of September 22, 2003, was reviewed by the Board pursuant to s. 24 of the Act. After consideration, the Board on October 14, 2003, sent the matter back to the appeal committee for a re-hearing. This was done by the Board pursuant to s. 24(8) of the Act which reads:

> **24**(8) If the members of the board consider that an appeal committee has not properly applied the policies established by the board, or has failed to comply with the provisions of the Act or the regulations, the members of the board may, in writing and with reasons, direct the appeal committee to rehear the appeal and give fair and reasonable consideration to those policies and provisions.

[3] The Board was of the view that the appeal committee had not properly applied the Cumulative Trauma Disorders policy.

[4] The petitioners have initiated these proceedings in this court alleging that the Board in sending the matter back for a re-hearing under s. 24(8) acted outside its jurisdiction. The petitioners seek declaratory relief to that effect and also an order in the nature of *certiorari* quashing the Board's decision of October 14, 2003.

[5] For the reasons which follow, I find that the Board did not act improperly or outside its jurisdiction.

[6] The principal ground on which the petitioners attack the Board's decision of October 14, 2003 is that the policy relied on by the Board, i.e. the Cumulative Trauma Disorders policy, has not been formally approved by the Board. Petitioners' counsel

submits that the present proceedings constitute a test case for other “unapproved” policies of the Board. I disagree. At best, this case is about sloppy paperwork by a public body.

[7] The “policy” referred to in s. 24(8) of the Act, in the context of this case, is the Board’s policy entitled Cumulative Trauma Disorders. The “policy” considered and applied by the hearing officer and the appeal committee, and considered by the Board on October 14, 2003, was the Cumulative Trauma Disorders policy. Prior to 1993, this policy was set forth in a Board policy document numbered 52 and dated May 10, 1990. It had been approved by the Board in accordance with the then procedures in that regard. These is no evidence that the policy has ever been revoked. Since a date in 1993, the *policy* has also been set forth in a Board document numbered CL-31. The substance, or contents, of the policy, as set forth in each of the two Board documents, is identical. There is undisputed evidence that since 1993, individuals and officials (including the present litigants) have had regard to the Board’s Cumulative Trauma Disorders policy by referring to Board document CL-31. Unfortunately, on the top of document CL-31, within what I would term an administrative or identification block, there are some confusing entries and blanks with regard to the document’s approval and its effective date. However, the substance of the Cumulative Trauma Disorders policy has not changed. The substance of the policy is identical in Board document 52 and Board document CL-31.

[8] The Board’s counsel submits that document CL-31 is merely document 52 re-typed with a different numbering system – yet there is a paucity of actual evidence of

how Board document CL-31 came into existence, and why the top of that document reads as it does.

[9] On this principle ground of attack on the Board's decision of October 14, 2003, the petitioners say that the Board acted without jurisdiction in referring to Board document CL-31 because Board document CL-31 has never been formally approved. With respect, this is a red herring. The Cumulative Trauma Disorders policy has been approved by the Board. It is the *policy* which requires Board approval, not a specific Board document.

[10] I therefore find there is no merit in this ground of attack. In any event, I also find that the petitioners, having participated in the earlier stages of the claim process (including a successful appearance before the appeal committee) where full regard was had to the Cumulative Trauma Disorders policy as set forth in Board document CL-31 without objection to the status of the document, is now estopped from denying its proper promulgation.

[11] The petitioners' second ground of attack is that the Board has no jurisdiction to act under s. 24(8) where it has been established that the appeal committee properly applied a Board policy. Inherent in this argument is that it is for this court to determine whether or not the appeal committee has properly applied the Cumulative Trauma Disorders policy. With respect, this is an erroneous reading of the subsection. If *the members of the Board* (i.e., not this court) are of the view that the policy has not been properly applied by the appeal committee, the subsection authorizes the Board to direct a re-hearing by the appeal committee. It is clear from a reading of the Board's decision of October 14, 2003, that the members of the Board held that view. Absent any allegation of bad faith, the court must allow the Board to make that determination under s. 24(8).

[12] For these reasons, the Petition is dismissed

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Richard J.