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A case of Disablement and Deference under the Workers' Compensation Act

By Shaun Fluker

Cases Considered:

Schneider v. Alberta (Appeals Commission for Alberta Workers' Compensation), 2008 ABQB 662.

Maurice Schneider was exposed to asbestos at work in the late 1960s and subsequently developed asbestosis, a drastic reduction in lung capacity whose primary symptom is severe shortness of breath. The disease has a long incubation period before symptoms become apparent (see http://en.wikipedia.org/wiki/Asbestosis). On March 10, 2003 Schneider underwent studies that confirmed he suffers from a mild pulmonary impairment (asbestosis), and in September 2004 the Alberta Workers' Compensation Board accepted that Schneider's asbestosis was the result of workplace exposure. Schneider was accordingly entitled to benefits under the *Workers Compensation Act*, R.S.A. 2000, c. W-15.

The Board ruled that Schneider suffered his disability (the date of accident) on March 10, 2003, being the date his condition was identified. This ruling contrasted significantly with Schneider's medical evidence that suggested his disability occurred in 1993. The result of the ruling presumably was that Schneider was entitled to significantly less compensation with the 2003 date of accident (this result is not clear from the judgment).Schneider appealed the Board's ruling and, in particular, its decision that his disability occurred on March 10, 2003.

His appeal was heard by the Appeals Commission, a statutory body established by section 10 of the Act. The Appeals Commission upheld the Board's date of accident ruling. Schneider then applied for judicial review under the *Alberta Rules of Court*, Alta. Reg. 390/1968, (the Court's inherent jurisdiction to review administrative decisions) and also engaged his statutory right of appeal on questions of law to the Court of Queen's Bench pursuant to section 13.4 of the *Act*.

Early in his judgment, Justice R. Paul Belzil notes the procedural issue of which remedy - judicial review or statutory appeal - is available to Schneider. The issue was somewhat moot in this case since the Court of Queen's Bench held jurisdiction in both instances; nevertheless, it is generally understood that an aggrieved person must exhaust all statutory avenues for a remedy before applying for judicial review. Justice Belzil concludes that Schneider could not avail himself of the section 13.4 right of appeal as the question at issue was one of mixed fact and law,

relying on *Alberta (Workers' Compensation Board) v. Appeals Commission*, 2005 ABCA 276. His judgment continues as a judicial review under the *Rules of Court*.

The legal issue here concerned an interpretation of section 24(7) of the *Act* which determines the date of an occupational accident:

> s. 24(7) If a worker suffers disablement or potential disablement caused by an occupational disease, the date of the accident for the purposes of this Act is deemed to be
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> (a) in the case of disablement, the date the disablement occurs, and
>
> (b) in the case of potential disablement, the date the potential disablement comes to the Board's attention.

The specific interpretation issue here was the meaning of "disablement" in the section, as the term was not defined in the Act. The Board and subsequently the Appeals Commission ruled that "disablement/disability" in the context of the Act means "[t]he decreased capacity or loss of ability of an individual to meet occupational demands, measured as loss of earning capacity" (cited by Belzil J. at para. 20). The Appeals Commission referred to government policy as its interpretation aid. On the absence of evidence to establish a loss of earning capacity prior to March 10, 2003, the Appeals Commission upheld the Board's initial ruling. One wonders whether Schneider was taken by surprise with this interpretation, and the extent to which this explains the absence of earnings evidence to support his claim of a 1993 date of accident.

Belzil J. denies Schneider's judicial review application, refusing to overturn the Appeal Commission ruling. His analysis demonstrates, in my respectful opinion, one of the deficiencies with current judicial review in Canada. Most of his analysis simply recites the legal framework for assessing the level of deference owed to the Appeals Commission decision, rather than justifying the deference he actually administers.

Belzil J. canvases the various factors set out in leading Supreme Court jurisprudence for assessing deference, including presence of a privative clause and/or statutory right of appeal, relative expertise of administrative decision-maker, purpose of the statute, and the type of question at issue. He moves from this survey to the conclusion that he must afford *considerable* deference, without any application of the cited factors.

Missing from his assessment are the following considerations:

- The privative clause in section 13.1(1) of the Act is strong in that it states not only does the Appeals Commission have exclusive jurisdiction to hear enumerated matters, but that also the Commission's decisions are not to be reviewed in any Court. This suggests more deference.
- The Appeals Commission performs an adjudicative function, a relatively narrow purpose with no policy development role. This suggests less deference.

- The interpretation of “disablement” has precedential value and will impact future cases. This suggests less deference.
- Pursuant to section 10 of the Act, Appeals Commission members are appointed at the pleasure of provincial Cabinet with no apparent expertise in statutory interpretation or appeal process. This suggests less deference.

It is somewhat ironic that Belzil J. cites the Supreme Court of Canada’s recent decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 as a shift in substantive judicial review, as I believe the *Dunsmuir* decision was a plea for reviewing courts to avoid the formalistic sort of reasoning employed here. For commentary on *Dunsmuir* on ABlawg see “Dunsmuir: Much Ado About Nothing”, “Dunsmuir v. New Brunswick: Standards of Review and Employment Contracts” and “The Metaphysical Court: Dunsmuir v. New Brunswick and the Standard of Review”.