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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

COLLIN De RUYCK,	)	Israel A. Ludwig
	)	Alexander Krush
applicant,	)	for the applicant
- and -	)	
	)	Gordon A. McKinnon
THE WORKERS COMPENSATION BOARD OF MANITOBA AND THE APPEAL COMMISSION,	)	Eli E. Milner
	)	for the respondents
	)	
	)	JUDGMENT DELIVERED:
respondents.	)	February 16, 2024

SUCHE J.

INTRODUCTION

[1] On November 10, 2022, The Workers Compensation Board Appeal Commission denied Mr. De Ruyck's claim for benefits arising out of a 2014 incident where he was injured while working on a construction project (the Decision). On this judicial review, he asks me to quash the Decision and remit it to the hearing panel for determination of benefits owing. For the reasons that follow, I am allowing his application.

BACKGROUND

[2] The construction project involved building an arena on the Poplar River First Nation. Mr. De Ruyck was a contractor working for the project supervisor, Marpell Industries, and also one of its subtrades, Evans Plumbing. Both are employers under the ***Workers Compensation Act***, C.C.S.M. c. W200 (the ***Act***).

[3] On January 16, 2014, Mr. De Ruyck arrived at the site and saw that the outdoor portable toilet was frozen. Several other crews were working that day. Mr. De Ruyck was not there to do plumbing, but he had done the rough-in for the toilet previously and knew a toilet was on the site, so he decided to install it. To do this, he had to move a steel door out of the way and injured his back.

[4] Mr. De Ruyck filed a claim saying he was an employee of Evans. The Board accepted the claim and paid benefits. However, in the summer of 2016 the Board's Compliance Services office launched an investigation which concluded that Mr. De Ruyck had misrepresented both his self-employed earnings and for whom he was working at the time of the injury.

[5] Mr. De Ruyck went through the different levels of review and appeals available under the ***Act***. Ultimately, the Commission issued a decision in February 2019 concluding that he was performing work for Marpell, not Evans, when he was injured and was therefore not entitled to benefits.

[6] Mr. De Ruyck requested a review of the decision, which was refused. He did not seek judicial review. Instead, he filed a claim for benefits on the basis that pursuant to section 60(2.1) of the ***Act***, he was deemed an employee of Marpell

when injured. The assessment officer assigned to the claim concluded that Mr. De Ruyck was not a worker of Marpell, but rather a deemed worker of Poplar River First Nation pursuant to section 60(2.1) of the ***Act***. As First Nations are exempt employers under the ***Act***, benefits were not available to Mr. De Ruyck.

[7] Mr. De Ruyck requested a review of this decision. In April 2019, the Assessment Committee found he was an employee of Marpell, but was not at the job site that day. On further review by the Review Office, this decision was upheld. Mr. De Ruyck then appealed to the Commission. A hearing was held in September 2022. The Decision was released November 19, 2022 dismissing Mr. De Ruyck's appeal.

The Decision

[8] The Commission accepted Mr. De Ruyck's explanation of how he came to be injured, and found he was a worker of Marpell, and was on the job site that day. However, it concluded he was not working within the scope of his employment with Marpell when he was injured and denied his claim.

[9] Specifically, the Panel found that Mr. De Ruyck's work for Marpell related to two specific tasks- installing doors in the arena and supervising the foundation work. He was doing neither at the time he was injured.

[10] The Decision states:

> When it was put to worker at the hearing that the information on file with respect to his relationship with [Marpell] was very specific and very task oriented, and did not involve installing a toilet, the worker stated:
>
> > …that was a decision I made on site while I was there. I wasn't on site to do any specific plumbing. It was a decision that I made because of how cold it was and the fact that

> the porta potty was literally a block of ice…so knowing that I did all the plumbing work and finished the rough-in back in December, to me it just made sense to put a toilet in it…To me it was kind of a no-brainer, put a toilet in so people don't have to freeze…

[11] This, in the view of the Commission, demonstrated that installing the toilet did not come within the parameters of the two projects Marpell hired Mr. De Ruyck to do.

Standard of Review

[12] The parties agree that the standard of review is reasonableness. In ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65, [2019] 4 S.C.R. 653, the Supreme Court established that this was the correct approach to this area of law. The standard applies to both facts and law. This provides a robust form of review, but requires judicial restraint and respects administrative decision makers. (***Vavilov*** at para. 14).

[13] The reasonable standard focusses on the outcome of the administrative decision and its underlying rationale to ensure the decision is transparent, intelligible, and justified. Thus, the court does not attempt to ascertain the range of possible conclusions that was available, conduct a *de novo* analysis, or seek to determine the correct solution. The only question is whether the decision, including both the underlying rationale and the outcome, is reasonable. Statutory interpretation, like other questions of law, is evaluated on the reasonable standard considering the decision, including the reasons.

When is a decision unreasonable?

[14] ***Vavilov*** identifies two types of fundamental flaws that will result in the decision being unreasonable:

- a failure of rationality internal to the reasoning process; and
- a decision that is in some respect untenable in light of the relevant factual and legal constraints.

[15] Under this approach then, review is not a line-by-line or formalistic analysis of the decision, but consideration of whether the reasoning "adds up". (***Vavilov*** at paras. 102-104)

[16] With respect to the requirement the decision must be justified in light of the legal and factual constraints, ***Vavilov*** explains that this includes consideration of (at para. 106):

> …the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

[17] A decision can also be unreasonable where a decision maker fails to consider a relevant aspect of the governing legislation (at para. 22):

> It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Where such an omission is a minor aspect of the interpretive context, it is not likely to undermine the decision as a whole. It is well established that decision makers are not required "to explicitly address all possible shades of meaning" of a given provision: *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405, at

> para. 3. Just like judges, administrative decision makers may find it unnecessary to dwell on each and every signal of statutory intent in their reasons. In many cases, it may be necessary to touch upon only the most salient aspects of the text, context or purpose. If, however, it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker.

ANALYSIS

[18] Only the November 2022 decision is before me for review. However, the record includes the 2019 decision, as well as the history of the Board's consideration of Mr. De Ruyck's claim.

[19] The key findings in the Decision are that Mr. De Ruyck was a worker of Marpell and was working on the day in question, as such. Installing the toilet was outside the scope of his employment because Mr. De Ruyck was hired for two specific projects: supervising the foundation work, and installation of some doors. Installing the toilet was not part of either.

[20] The Board argues that while Mr. De Ruyck, who was a contractor, was deemed to be a worker of Marpell to be entitled to benefits under the ***Act***, the work had to be within the scope of his contract, which wasn't the case. It suggests Mr. De Ruyck is in the same situation as a contractor hired by a municipality to clear snow from roads. While the individual would be deemed a worker of the municipality, if they decided to help a homeowner and cleared a private driveway, and were injured in doing so, they would not be entitled to benefits. The question,

says the Board, is "whose work" was being performed when the worker was injured? In the example, it was not the municipality's work, and here it was not Marpell's.

[21] I disagree, for several reasons. The first is that the work- installation of a toilet- very clearly was Evans' work. Evans was the plumbing subtrade. The toilet was on site and was scheduled to be installed by Evans once other work was completed. However, the 2019 decision found that Mr. De Ruyck was not Evans' worker when he was injured. The Board maintains that since the 2019 decision is not before me, the finding cannot be challenged.

[22] More importantly perhaps, the issue of "whose work was performed" is not the point of section 60(2.1) of the ***Act***, which creates the notion of deemed workers. Rather, it is "for whose benefit was the work performed"?

[23] Section 60(2.1) states:

> Notwithstanding the other provisions of this Act, where a person who is not a worker under this Part performs *work for the benefit* of another person, the board may deem the first person to be a worker, and the second person to be the employer of the first person, within the meaning of this Act; and the board may determine an amount that shall be deemed to be the earnings of the first person, for the purpose of this Part.
>
> [emphasis added]

[24] The evidence shows that there were several other crews working on site that day. The temperature was between -30 and -35. The porta potty was frozen and could not be used. The toilet was on site and had been roughed in by Mr. De Ruyck on an earlier trip. On his own initiative, without direction or instruction from either employer, Mr. De Ruyck decided to install the toilet because

he thought the workers on site should have a functioning toilet. While preparing to do this, he moved a door and injured his back.

[25] To return to the Board's example, when the question of "who benefited" is asked, the answer remains the same because a third party- the homeowner- was the only party who benefited from the work. But in the present situation, all workers on the site, and by extension, their employers, including Marpell, would have benefited from the existence of a functioning toilet. This becomes even clearer given the nature of the project, Marpell's role as project manager, and the fact that installing the toilet was part of the project, albeit scheduled to be done at a later date.

[26] The crux of the legal issue is that although specifically raised, the hearing panel failed to consider the wording of section 60(2.1). This was not a minor aspect of the text, and I can say that had it been considered, the Commission would most likely have reached a different conclusion.

[27] Finally, and in addition, I add a point that was not argued. In finding that the injury did not arise in the course of Mr. De Ruyck's employment, the Commission failed to consider the definition of "accident" in the ***Act***.

> **1(1)** **"**accident" … includes,
>
> c) an event or condition, or a combination of events or conditions, related to the worker's work or workplace,

[28] Clearly this is intended to include situations where a worker is required to respond to something. Had a fire occurred and Mr. De Ruyck was injured while extinguishing it, it would be unreasonable to conclude that he was not injured by

an event related to his workplace. The same is true remedying the problem of not having a functioning toilet. This is not a minor aspect of the ***Act*** and the Commission would have likely reached a different conclusion had it considered it.

[29] In the end then, the Commission's failure to consider these sections of the ***Act*** resulted in a decision, both in underlying rationale and outcome, that is not reasonable.

REMEDY

[30] In ***Vavilov***, the Supreme Court decided that under the reasonable standard, the choice of remedy must be guided by the rationale for applying that standard. This includes recognition that the Legislature has entrusted the matter to the administrative decision maker and not to the court. At the same time, a reviewing court must be guided by concern related to the proper administration of justice, and the need to ensure access to justice and the goal of expedient and cost-efficient decision making. There will be some scenarios where applying the rationale would stymie the timely and effective resolution of matters in a manner that no Legislature could have intended. The court says (at para. 142):

> …. An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose. [citations omitted] Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence

> the exercise of its discretion to quash a decision that is flawed. [citations omitted]

[31] Here, Mr. De Ruyck was injured over ten years ago. He has not received benefits since 2016. His injury was significant. Although the record does not reveal how long he was unable to work, it was certainly beyond 2016.

[32] He has also been on something of an odyssey to have his claim recognized. The number of reviews and appeals is approaching double digits. Albeit that this is the first judicial review, no doubt Mr. De Ruyck feels he has been on an endless merry-go-round of contradictory decisions and appeals: he was a Marpell worker; he wasn't a Marpell worker, but a deemed worker of Poplar River First Nation; he wasn't even at the worksite on the day in question; he was at the worksite and was a Marpell worker, but he wasn't working within the scope of his employment. This does not instill confidence in the Board's ability to make a reasonable decision in this case. But above all, basic fairness demands that it come to an end.

[33] The other considerations identified in ***Vavilov*** are also present: concern for delay, the nature of the regulatory regime, the Commission had a genuine opportunity to weigh in on the issue in question, and costs to the parties.

[34] It is also evident to me that the Commission would come to the same conclusion with respect to Mr. De Ruyck's entitlement to benefits. I conclude, then, that declining to remit the matter to the decision maker is appropriate.

[35] In the result, I am quashing the Decision and remitting the matter to the Commission for a determination of benefits, on the basis that Mr. De Ruyck was a

deemed employee of Marpell under s 60(2.1) of the ***Act***, and entitled to benefits when he was injured.

[36] Costs may be spoken to if the parties are unable to agree on same.

_____ J.