WORKMEN'S COMPENSATION BOARD ..... APPELLANT;

1961

*Oct. 13, 16
Dec. 15

AND

VERA FAY RAMMELL ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Labour—Administrative law—Workmen's compensation—Claim rejected—Whether Board failed to disclose evidence upon which decision based—Whether breach of fundamental requirement of procedure depriving decision of its authority as one made within jurisdiction.

The respondent's husband, an employee on a logging operation at Homfray Creek, British Columbia, was drowned while crossing by boat from the job site to Campbell River. The Workmen's Compensation Board decided that he did not die as a result of an accident arising out of and in the course of his employment and rejected the widow's claim to compensation. The respondent continued to ask for further consideration of the case, and following an oral hearing the Board reaffirmed its previous decision. The respondent had submitted that the deceased's reason for the trip was to pick up certain equipment for his employer; that he also intended to visit his family was said to be incidental. An appeal to the Court of Appeal from dismissal of a motion for *certiorari* to quash the decision of the Board was allowed. The Board then appealed to this Court; the issue being whether there was a breach of a fundamental requirement of procedure which deprived the decision of the Board of its authority as one made within the jurisdiction. The fundamental breach was said to be the Board's failure to disclose to the applicant evidential facts upon which it based its decision.

Held (Cartwright J. dissenting): The appeal should be allowed.

On the facts of the case there was no refusal of disclosure and no non-disclosure amounting to refusal. This made it unnecessary to determine the duty of the Board, if any, to disclose information on its files. On the hearing the issues to be determined were plain to the applicant. There was no indication that counsel intended to question the statement which he knew the Board had that the employee was making the trip to see his family. With knowledge of this statement but not of its source, his argument was directed not to showing that it had never been made or that it was otherwise unreliable but that it was outweighed by the other evidence indicating that the workman was in the course of his employment. No issue going to jurisdiction was raised in this case.

Per Cartwright J., *dissenting*: The respondent had made a strong *prima facie* case in her attempt to establish that the deceased's death was caused by an accident arising out of and in the course of his employment. It could not lightly be assumed that the Board made a ruling contrary to the evidence and the law, and the most reasonable explanation of

*PRESENT: Kerwin C.J. and Taschereau, Cartwright, Abbott, Martland, Judson and Ritchie JJ.

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its decision appeared to be that it had in its possession some evidence other than that disclosed in the record which in its view outweighed the strong *prima facie* case made out by the respondent. In the circumstances, it was the duty of the Board to make full disclosure to the respondent of every item of evidence on which it proposed to base its decision including the contents of all statements made to its inspector and the names of the persons from whom those statements had been obtained, and, having done so, to give the respondent a fair opportunity to correct or contradict that evidence. The material indicated that it failed to perform this duty.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of Whittaker J. dismissing an application for *certiorari*. Appeal allowed, Cartwright J. dissenting.

C. C. Locke, Q.C., for the appellant.

Miss M. F. Southin, for the respondent.

The judgment of the Chief Justice and of Taschereau, Abbott, Martland, Judson and Ritchie JJ. was delivered by

JUDSON J.:—Eric Rammell, the husband of the respondent, was drowned on October 9, 1954, while crossing by boat from Homfray Creek to Campbell River in British Columbia. At the time of his death he was employed by Power Saw Sales & Service Limited as superintendent of a logging operation at Homfray Creek. The Workmen's Compensation Board decided that he did not die as a result of an accident arising out of and in the course of his employment and rejected the respondent's claim to compensation. A motion to quash the decision of the Board was dismissed by Whittaker J. but the Court of Appeal[1] did quash the decision and directed the issue of a writ of *mandamus* requiring the Board to hear and determine according to law the respondent's claim to compensation. The Board now appeals. The issue is whether there was a breach of a fundamental requirement of procedure which deprived the decision of the Board of its authority as one made within the jurisdiction. The fundamental breach is said to be the Board's failure to disclose to the applicant for compensation evidential facts upon which it based its decision.

An issue of this kind makes necessary a review of the Board's procedure in this case. The employer reported the death by letter dated October 29, 1954, and stated that the

[1] (1961), 35 W.W.R 145, 28 D.L.R. (2d) 138.

employee had been drowned in the course of his employment. The Board asked the employer to complete its regular form for the report of an accident. It obtained a death certificate and a copy of the report of the Coroner's inquest. On November 23, 1954, it sent a form of application for compensation to the widow, which was returned completed on November 29, 1954. In November it also received from its own inspector a report covering his investigation of the death made at Homfray Creek on October 23, 1954.

On December 1, 1954, the Board wrote to the employer to question its statement that the employee had been drowned during and in the course of his employment. The Board stated that other information on its file indicated that the deceased left the camp to see his family at Campbell River and was warned not to go and that in spite of this, the employee stated that he was going as he wanted to see his family. On December 8, the Board received a reply to this letter. The reply is not in the material filed on the motion but it appears from the printed case that it was this letter from the employer which was read to the Board by counsel for the applicant on the oral hearing in 1958.

On December 21, 1954, the Board asked the employer to call at its office to discuss the case. On January 10, 1955, Robert A. Challenger, the secretary of the employer, called on the Board and gave it information about the duties of the deceased and also about a piece of paper which had been found on the body. A few days later, on January 13, Challenger telephoned the Board to add to the information given at the interview on January 10. The Board gave its decision on March 7, 1955, rejecting the claim.

On March 10, 1955, the Board, in answer to a letter from the father of the deceased workman, stated that the evidence did not establish that the purpose of Mr. Rammell's trip was for the employer's business. The letter informs the father that the reason given by his son for making the trip was to see his family. The letter also refers to the piece of paper that was found on the body. The suggestion was evidently being made that this was an order form. The Board stated that the evidence from the employer indicated

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that Mr. Rammell had some packing slips in his pocket at the time of his death but they referred to previous trips which had been made.

On March 23, 1955, the Board wrote to Messrs. Anderson and Anderson, solicitors of Vancouver, who had written on behalf of the widow. The solicitors evidently had the Board's letter to Mr. Rammell Sr. and had questioned its accuracy. The Board informed the solicitors that Mr. Robert A. Challenger, secretary of the employer, had given it part of the information contained in its letter when he came in to see the Board on January 10. The letter also referred to the list of parts for equipment found on the body and stated that no such list had been received by the Board.

Mr. Rammell Sr. then made inquiries from the Royal Canadian Mounted Police at Campbell River concerning the slip of paper. The officer in charge reported on April 19, 1955, that two constables had seen the slip of paper on which the writing was badly faded and blurred because of water, that it had been difficult to establish whether it was a receipt or an order form but that the opinion of the constables was that it was an order form. He also reported that the paper had been lost and that it was assumed at the time that it had no importance except as a means of identification. On May 26, 1955, the two constables swore affidavits to the same effect. On June 3, 1955, P. E. Hornby, branch manager of the employer at Campbell River, also swore an affidavit that he had examined what appeared to be an order form which Constable McPherson had handed to him on October 9, 1954, and that this order form itemized parts for a power saw and nothing else.

Mr. Rammell Sr. had sent to the Board the letter of April 19, 1955, from the officer in charge at Campbell River. This letter contained a summary of the information which was shortly afterwards sworn to by the two officers and Hornby. The Board, however, in its reply dated April 26, 1955, stated that as the letter from the father and the enclosure with it contained no new information, its decision would not be changed.

In November 1955, Mr. A. E. Branca, Q.C., of Vancouver, asked for further discussion of the claim. The secretary wrote agreeing to this but Mr. Branca did not pursue

the matter. He had, however, on July 11, 1955, obtained a letter from both P. E. Hornby and A. J. Hornby containing information to the same effect as that contained in the affidavit of A. J. Hornby sworn on June 3, 1955, and referred to above.

On April 9, 1956, Mrs. Rammell asked for further consideration of the case. On May 16, 1956, she sent in three affidavits which I take to be those of the two constables and A. J. Hornby. On May 31, 1956, the Board asked whether she had any additional evidence. She notified the Board on September 26, 1956, that she had nothing further to submit and on October 12, 1956, the Board confirmed its previous decision and notified her of its confirmation.

In April 1957 the Board received an inquiry from the Department of Veterans Affairs and explained to the department why the claim had been disallowed. Its letter is not in the material filed.

On February 19, 1958, Graham B. Ladner, the present solicitor for the applicant, telephoned the Board to say that he was acting for the widow, and on the following day the Board received a letter from him asking for the recognition of the claim. He referred to the lost slip of paper found on the body and made the submission that if the slip was an order, it would be conclusive evidence. He also enclosed a copy of the letter from A. J. Hornby and P. E. Hornby addressed to Mr. Branca, dated July 11, 1955.

In his reply to Mr. Ladner dated February 25, 1958, the secretary of the Board said that he did not know whether the slip would have any effect on the Board's decision. Mr. Ladner had been inquiring whether he should make an effort to locate the slip. The police had stated three years before that it had been lost. The secretary told Mr. Ladner by letter, as he had told him by telephone, that the workman himself made the statement that although it was a rough day he could make it as he wanted to see his family. Mr. Ladner then asked for an oral hearing and this was held on March 25, 1958. Mr. Ladner appeared on that date but no one appeared to represent the employer although notified of the hearing.

At the hearing, counsel for the applicant did not call any witnesses. He did, however, file the two Hornby letters, the first to Branca, dated July 11, 1955, and referred to

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above, and the second to himself, dated February 23, 1958. These letters are, of course, some evidence from which an inference could be drawn that in going to Campbell River, Rammell was in the course of his employment. Counsel made this submission that the reason for the trip was to pick up this equipment from the Hornbys and that a visit to the family was incidental. The order form was also referred to. Then counsel read a letter, dated December 7, 1954, from D. M. Challenger to the Board. D. M. Challenger was the manager of the employer. It was this letter which the Board received on December 8 and which asserted that the accident happened in the course of the employment. It was this letter that caused the Board to ask Challenger why he made this assertion and this reply, together with the subsequent invitation, led to the visit of Mr. R. M. Challenger to the Board on January 10, 1955, and Challenger's subsequent telephone conversation. In discussing Challenger, the chairman of the Board said:

> Mr. Eades: Not much new. Mr. Challenger was in here and gave a statement and said it was Rammell's own boat.
>
> Mr. Ladner: I believe that was correct. I have interviewed Challenger—there are two of them and I have spoken to them both and no question in their minds that he was going over there primarily in the course of his duties.

It is quite evident from this that counsel knew that Challenger had given information about the boat and that counsel, after his interview with them, knew that they were still asserting that the employee was in the course of his employment.

We have therefore in this case both the manager and secretary of the employer, the Hornbys, who ran the repair shop, and the Royal Canadian Mounted Police, through their finding of what they referred to as order slips, all giving evidence tending to show that the employee was in the course of his employment. The Board, however, was emphasizing the employee's own statement that he was going to see his family in spite of the rough weather and the fact that he was using his own boat on a Saturday morning. The issues were fully apparent and disclosed at the hearing. Counsel knew that the question was the employee's own statement about his intentions and the fact that he was using his own boat. What other issues

could there be apart from the assertions that I have mentioned tending to show that the man was in the course of his employment?

If counsel had thought that Challenger could give material evidence, he could have called him as a witness or presented evidence from him in some other form. He had interviewed both the Challengers. He knew what they would say, and he read a letter from one of them to the Board which was presumably favourable to his position. At no time either before or during the oral hearing did he state that he was working in the dark, that he wanted further information that the Board might have and which he lacked, or that anything was being held back from him. Specifically, he did not say that he questioned the report made by someone that the employee had said that he was making the trip to see his family. If he had had any doubt on this point, he had every opportunity to raise it and to demand any information which he lacked and which he thought he needed and should have.

The judgment of the Court of Appeal has no common ratio. The learned Chief Justice held that there had been no finding or determination that the death did not arise out of and in the course of the employment and that consequently the right to compensation still remained to be determined. Counsel for the respondent declined to argue this ground in support of the judgment. O'Halloran J.A. held that the inquiry and decision of the Board had not met the requirement of substantial justice because of failure to give the applicant for compensation a fair opportunity to know what was alleged against her and to contradict any relevant statement which might be prejudicial to her claim and that this principle was not affected by the prohibition in the Act against the divulging of information.

Davey J.A. (dissenting) held on the facts of the case there was no refusal of disclosure and no non-disclosure amounting to refusal. This, in my respectful opinion, is the correct and obvious finding to be made on the facts of the case and made it unnecessary for him to determine the duty of the Board, if any, to disclose information on its files. On the hearing held in this case, the issues were plain to the applicant. There was no indication that counsel

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intended to question the statement which he knew the Board had that the employee was making the trip to see his family. With knowledge of this statement but not of its source, his argument was directed not to showing that it had never been made or that it was otherwise unreliable but that it was outweighed by the other evidence indicating that the workman was in the course of his employment. I agree with Davey J.A. and also with Whittaker J. that no issue going to jurisdiction is raised here. Consequently, the Court of Appeal should not have quashed the decision of the Board and issued the mandatory order.

I would allow the appeal and set aside the judgment of the Court of Appeal and restore the judgment of Whittaker J. dismissing the application. The Board does not ask for costs and there will consequently be no order for costs in any court.

CARTWRIGHT J. (*dissenting*):—The relevant facts are stated in the reasons of my brother Judson and in those of O'Halloran J.A. in the Court of Appeal.

I do not understand that there is any disagreement in this Court or in the courts below as to the principle of law under which this case falls to be decided.

The appellant Board was under a duty to hear and determine the respondent's application for compensation. It was not bound to conduct its hearings in accordance with the procedure followed in the trial of an action but it was under a duty to give a fair opportunity to the respondent to correct or contradict any relevant statement prejudicial to her claim. If it failed in this duty its order would be the subject of *certiorari* and the Board itself would be the subject of *mandamus*. If authority is required for this fundamental proposition it is to be found in the words of Lord Loreburn L.C. in *Board of Education v. Rice*[1], which were adopted by Viscount Haldane L.C. in *Local Government Board v. Arlidge*[2].

It appears that the Board had received a report from one of its inspectors and founded its decision, in part at least, upon a statement or statements said to have been

[1] [1911] A.C. 179 at 182, 80 L.J.K.B. 796.
[2] [1915] A.C. 120 at 133, 84 L.J.K.B. 72.

made to him. I do not think it can be determined with any certainty from the material before us who made these statements or what they contained.

The material indicates that the respondent had made a strong *prima facie* case to show that when her late husband met his death he was crossing by boat from Homfray Creek to Campbell River to obtain parts, listed in an order slip which he had with him, which were required in his employer's business. As is pointed out in the reasons of my brother Judson, the evidence of the manager and secretary of the deceased's employer, of the Hornbys who ran the repair shop at Campbell River, and of the officers of the Royal Canadian Mounted Police who investigated the fatality all tended to support this view. If these were the facts, it would follow that the death of the deceased was caused by an accident arising out of and in the course of his employment, and the circumstances that he was using his own boat and that he wanted to see his family at Campbell River would not alter this result.

We cannot lightly assume that the Board has made a ruling contrary to the evidence and the law and the most reasonable explanation of its decision would appear to be that it had in its possession some evidence other than that disclosed in the record which in its view outweighed the strong *prima facie* case made out by the respondent. The material, as pointed out above, does establish that the Board had before it some evidence which was not fully disclosed.

No doubt, as my brother Judson points out, the issue to be determined was plain to the applicant; admittedly her husband met his death by accident and the sole question was whether that accident arose out of and in the course of his employment. What the applicant complains of is that the Board did not fully and fairly inform her as to what was the evidence which moved it to find against her on that issue.

In the particular circumstances of this case it was, in my opinion, the duty of the Board to make full disclosure to the respondent of every item of evidence on which it proposed to base its decision including the contents of all statements made to its inspector and the names of the persons from whom those statements had been obtained,

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and, having done so, to give the respondent a fair opportunity to correct or contradict that evidence. The material indicates that it failed to perform this duty.

I would dismiss the appeal.

Appeal allowed, Cartwright J. dissenting.

Solicitors for the appellant: Ladner, Downs, Ladner, Locke, Clark & Lenox, Vancouver.

Solicitors for the respondent: Ladner & Southin, Vancouver.