

CANADA / JUDGMENT

Gonzalez v. British Columbia (Workers' Compensation Board)

2016 BCCA 394

COURT

British Columbia Court of Appeal

DECIDED

28 September 2016

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2016 BCCA 394 Gonzalez v. British Columbia (Workers' Compensation Board) COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Gonzalez v. British Columbia (Workers' Compensation Board), 2016 BCCA 394 Date: 20160928 Docket: CA38059 Between: Roberto Orellana Gonzalez Appellant (Petitioner) And Workers' Compensation Board (Worksafe) of British Columbia, Workers' Compensation Appeal Tribunal, and Her Majesty The Queen in Right of the Province of British Columbia (Attorney General

- Ministry of Attorney General in the City of Victoria) Respondents (Respondents) Before: The Honourable Madam Justice Saunders The Honourable Mr. Justice Groberman The Honourable Mr. Justice Willcock On appeal from: An order of the Supreme Court of British Columbia, dated April 9, 2010 (Gonzalez v. British Columbia (Workers' Compensation Board, 2010 BCSC 476, Vancouver Registry S093068). Oral Reasons for Judgment The Appellant appeared in person: R. Gonzalez Counsel for the Respondent Workers' Compensation Board (Worksafe) of British Columbia: L. Courtenay Counsel for the Respondent Workers' Compensation Appeal Tribunal: J.T. Lovell Place and Date of Hearing: Vancouver, British Columbia September 28, 2016 Place and Date of Judgment: Vancouver, British Columbia September 28, 2016 Summary: Application to vary a May 25, 2016 chambers order denying the appellant's application to reinstate his appeal after a 4 ½ year delay. Held: application dismissed. The appellant does not identify any error made when the application to reinstate the appeal was dismissed. Rather, he simply reiterates his claim for the substantive relief he sought over six years ago.

[1] WILLCOCK J.A.: The appellant, Mr. Roberto Orellana Gonzalez, applies pursuant to s. 9(6) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, for an order discharging or varying an order made by Mr. Justice Tysoe in chambers on May 25, 2016.

[2] On that date, the appellant sought to reinstate an appeal from the April 9, 2010 order of Madam Justice Kloegman dismissing his petition for judicial review of decisions of the Workers' Compensation Board ("WCB") Appeal Division dated February 17, 1999 and April 8, 2003. Those decisions related to aspects of a claim the appellant advanced in relation to a

September 1995 workplace injury. This claim was founded upon the view that the assessment of his pension and his Worker's Compensation had not restored him to his pre-injury condition. The reasons for judgment of Kloegman J. are indexed at 2010 BCSC 476.

- [3] Madam Justice Kloegman held, at paras. 26-31 of the reasons for judgment, that applying the standard of reasonableness, the petition should be dismissed:
- [26] Applying the standard of reasonableness in the manner set out in *Dunsmuir*, I find that the Appeal Division decisions of February 17, 1999 and April 8, 2003, cannot be set aside. If it were open to me to reconsider Mr. Gonzalez's plight afresh, I might have come to a more sympathetic conclusion. However, as I explained to Mr. Gonzalez, that is not the role of the court on judicial review. The respective Appeal Division panels reached their conclusions based on the evidence before them, and their conclusions certainly fell within the range of possible acceptable outcomes.
- [27] In the February 17, 1999 decision the Appeal Division thoroughly reviewed the evidence before it. On the wage rate issue it considered Mr. Gonzalez's submissions which were essentially the same as he made before me. It considered his experience as a roofer and the evidence of his employer, Mr. Watson and Mr. Watson's wife, who did his bookkeeping. It considered the role of inclement weather, which by definition prevents roofers such as Mr. Gonzalez from working 40 hours a week all year long. It considered Mr. Gonzalez's lack of supporting documentation such as income tax returns and receipts. It looked at Mr. Gonzalez's past earnings, as reported by him, and his statement to Dr. Parades, that he works 50% of the time and the other time he is laid off because of the weather. It took into account that he worked in El Salvador as a social sciences teacher for 14 years. It concluded that it was fairest to calculate the pension wage rate on confirmed earnings in the month prior to injury.
- [28] With respect to reimbursement of legal fees and costs, the Appeal Division considered the fact that Mr. Gonzalez had received assistance under the Act from a Worker's Advisor, as well as the Legal Services Society, and therefore he was not entitled to reimbursement of legal expenses.
- [29] In the April 8, 2003 decision, the Appeal Division considered an amendment to the policy on payment of interest and found it did not apply to retroactive income continuity benefits, or retroactive rehabilitation allowances, or retroactive independence and home maintenance allowances, or retroactive wage loss equivalency payments. The Appeal Division considered whether the delay in awarding Mr. Gonzalez wage loss equivalency benefits constituted extraordinary circumstances and decided it did not.
- [30] With respect to the personal care allowance, the Appeal Division concluded, after reviewing the poor hygienic conditions and state of disorder of Mr. Gonzalez's apartment, that he would benefit more from direct home maintenance assistance instead of an allowance.

- [31] Both the subject decisions of the Appeal Division appeared to have been the product of due consideration and the logic of their reasoning appears justifiable, transparent and intelligible. It was open to these Appeal Division panels to reach the conclusions that they did, and I cannot find grounds to interfere with their decision making process.
- [4] The appellant filed a notice of appeal from that decision on April 21, 2010. He applied for indigent status in this Court on April 27, 2010. That application was dismissed by Mr. Justice Groberman who was of the view there was no prospect that the appeal would succeed. He noted, when he addressed the appellant's argument that the chambers judge had applied the wrong standard of judicial review, as follows:
- [5] With all due respect to the arguments that Mr. Gonzalez has put forward, which I can assure him I do understand, there is no prospect, in my view, of success in this court on the argument that he wishes to put forward. There is an extensive body of law providing that in the face of a privative clause, as there is here, and in the face of expertise on the part of the administrative tribunal, the appropriate standard for the Court to apply is a standard of reasonableness.
- [5] Mr. Roberto Gonzalez took no steps to prosecute the appeal and it was dismissed as abandoned on October 11, 2011.
- [6] His application to reinstate the appeal was considered by Tysoe J.A. in light of the criteria set out in *Hannigan v. Hannigan*, 2006 BCCA 167 (CanLII), 33 C.P.C. (6th) 205 at paras. 12-13; and *Booty v. Hutton*, 2009 BCCA 375:
- (a) the length of the delay and, in particular, whether the delay has been inordinate;
 - (b) the reason for the delay and, in particular, whether the delay is excusable;
 - (c) whether the respondent has suffered prejudice as a result of the delay; and
 - (d) the extent of the merits of the appeal.
- [7] Mr. Justice Tysoe found the 4½ year delay to be inordinate. It was inadequately explained and presumptively prejudicial to the respondent. He noted that Groberman J.A. had considered the appeal to be lacking in merit on the application for indigency status and shared that view, noting that no new argument had been advanced by the appellant on his motion to reinstate the appeal. He concluded that it was not in the interests of justice to reinstate the appeal.
- [8] Our role on an application to vary a decision of a justice in chambers was described by Lambert J.A. in *Haldorson v. Coquitlam (City)*, 2000 BCCA 672, in the following terms:

- [7] It comes to this: that the review hearing is not a hearing of the original application as if it were a new application brought to a division of the court rather than to a chambers judge, but is instead a review of what the chambers judge did against the test encompassed by asking: was the chambers judge wrong in law, or wrong in principle, or did the chambers judge misconceive the facts. If the chambers judge did not commit any of those errors, then the division of the court in review should not change the order of the chambers judge.
- [9] The appellant's written submission of June 14, 2016, to which he referred us today, reiterates his claim for the substantive relief he sought before Kloegman J. over six years ago. It does not address the issues that Tysoe J.A. was required to consider, nor does it identify any error made when the application to reinstate the appeal was dismissed. In my view, Tysoe J.A. did not commit any error of the nature described in the Haldorson case and the division should not change the order he made. I would dismiss the application.
- [10] SAUNDERS J.A.: I agree.
- [11] GROBERMAN J.A.: I agree.
- [12] SAUNDERS J.A.: The application is dismissed "The Honourable Mr. Justice Willcock"

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Prepared on 29 October 2026 · Esheria