

CANADA / JUDGMENT

Jirasek v. Zhao

2020 BCCA 308

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 308 Jirasek v. Zhao COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Jirasek v. Zhao, 2020 BCCA 308 Date: 20201102 Docket: CA46155 Between: Vaclav Jirasek Appellant (Plaintiff) And Catherine Zhao (property owner/employer), Kevin Hughes (excavator operator), "Mana" Excavation Company Owner Respondents (Defendants) Before: The Honourable Chief Justice Bauman The Honourable Madam Justice Fenlon The Honourable Mr. Justice Fitch On appeal from: An order of the Supreme Court of British Columbia, dated May 15, 2019 (Jirasek v. Zhao, 2019 BCSC 828, Vancouver Docket S1611909). Oral Reasons for Judgment The Appellant, appearing in person: V. Jirasek Counsel for the Respondent, Catherine Zhao: A. Soliman Place and Date of Hearing: Vancouver, British Columbia November 2, 2020 Place and Date of Judgment: Vancouver, British Columbia November 2, 2020 Summary: Appellant was injured in a workplace accident. He applied to the Workers' Compensation Board, which, in a series of decisions, awarded the appellant some compensation. Appellant filed a petition for judicial review of the Board's decisions, seeking additional compensation, but did not further pursue the petition. Appellant instead filed and pursued a civil claim against the respondents for frustrating his efforts to obtain proper compensation from the Board. The chambers judge struck the claim on the basis that the appellant was barred from pursuing damages for work place injuries subject to the process in the Workers Compensation Act. The appellant seeks reinstatement of the claim. Held: Appeal dismissed. The judge did not err in striking the claim, which attempted to circumvent the WCB process and obtain damages directly from his employer. It remained open to the appellant to pursue judicial review of the Board's decisions.

- [1] FENLON J.A.: Vaclav Jirasek asks this Court to reinstate his claim against Catherine Zhao. It was struck out by a judge because she found it involved workplace injuries that can only be dealt with by the Workers' Compensation Board, not the court. Mr. Jirasek also asks this Court to consider new affidavit evidence he has gathered since the judge made her decision.
- [2] I will begin with the accident and the steps Mr. Jirasek took to try to get compensation for his injuries.
- [3] The accident happened on December 23, 2014. Mr. Jirasek was working on a property owned by Ms. Zhao. It was a multi-level, challenging worksite. He was struck on the head by the hydraulic bucket of an excavator as he worked spreading gravel on a lower level. He kept

working that day and returned to work the next day because he needed the money, but he says that what started as a sore neck gradually developed into a significant chronic pain and debilitating spinal injuries, which have reduced his height by approximately four centimeters and now require him to use a motorized cart and a cane.

- [4] Ms. Zhao did not report the accident initially. Mr. Jirasek filed an application with the Board on July 16, 2015, seeking compensation for neck strain. His claim was originally denied by the Board in August 2015 on the basis that there was insufficient evidence to show that his neck injury was caused by the accident. Eventually, the Workers' Compensation Appeal Tribunal overturned that decision in March 2017. The Appeal Tribunal found Mr. Jirasek had sustained what it described as a "minor neck strain" due to the December 23, 2014 accident. They sent his case back to the Board to determine the nature and extent of the benefits he was entitled to for that neck injury.
- [5] The Board found that the neck strain had resolved by June 2015 and that no benefits would be paid after that date. Because Mr. Jirasek had continued to work after the accident, the Board decided there was no compensation due for loss of wages.
- [6] In a later decision in July 2017, the Board also ruled that Mr. Jirasek's injury did not aggravate his pre-existing degenerative disc disease and found no evidence of a psychological condition caused by the accident. In September 2018, the Board considered Mr. Jirasek's request to have his chronic pain accepted as part of his claim so that he could be referred to a pain management clinic. The Board denied that request as well. All of the Board's decisions were confirmed by the review division of the Board.
- [7] On April 21, 2017, Mr. Jirasek filed a petition for judicial review of the Board's decisions. He amended that petition on May 5, 2017. The Appeal Tribunal filed a response on May 18, 2018, but it appears that the petition has not been set for hearing.
- [8] Instead of following through with the judicial review, Mr. Jirasek filed the notice of civil claim that he is asking us on appeal to reinstate. He did that on December 23, 2016, two years exactly after his accident, but did not serve it on Ms. Zhao until August 2018. Under Part 3, "Legal Basis," Mr. Jirasek simply lists 11 statutes, provincial and federal; international treaties; and conventions. But, read as a whole, it is apparent that Mr. Jirasek wants to sue Ms. Zhao for not reporting his claim right away and for not cooperating with the Board's investigation of his claim--conduct he says frustrated his efforts to prove his injuries before the Board and obtain proper compensation.
- [9] The judge applied Supreme Court Rule 9-5(1)(a) and (d). She found that Mr. Jirasek did not have a valid claim because the Workers Compensation Act, R.S.B.C. 1996, c. 492 at s. 10, says that a worker who files a claim with the Board is barred from suing his employer. The judge also found that the claim could not go ahead because it was trying to overturn final decisions of the Board and Appeal Tribunal outside of the proper review process.

- [10] On appeal, Mr. Jirasek says the judge erred in striking his claim because she did not realize that he is not suing Ms. Zhao for his injuries; he is suing her instead for the way she dealt with the Board and frustrated his efforts to get fair compensation. He says he was denied proper recognition of how serious his injuries were because Ms. Zhao did not report the accident or provide documents or proof that the accident happened on her property.
- [11] I do not see that the judge made a mistake when she struck out the claim under Rule 9-5(1), because the claim against Ms. Zhao does not disclose a valid cause of action and because it deals with the same matters the Board dealt with.
- [12] First, even if Ms. Zhao did not have insurance and did not report the accident right away, Mr. Jirasek reported the claim, so the Board had it. Although the Board denied his claim initially, after an appeal it was sent back and addressed by the Board. As for Ms. Zhao not providing timely information about what happened, the issue before the Board was not whether the accident had occurred or how it had occurred. The issue before the Board was whether the accident caused the symptoms Mr. Jirasek was experiencing. That required the Board to look at medical evidence, and nothing Ms. Zhao did or did not do could affect that analysis.
- [13] Second, if Ms. Zhao was not cooperating in any way to provide evidence Mr. Jirasek needed to prove his injury, that had to be dealt with by the Board as part of its process. The Board could have made Ms. Zhao provide information Mr. Jirasek needed. If the Board made a mistake and did not get the information it needed to assess Mr. Jirasek's claim, that could be pursued in a review of the Board's decision, but it does not provide grounds to sue Ms. Zhao.
- [14] Third, the action Mr. Jirasek wants to pursue against Ms. Zhao seeks compensation from her for the very injuries and pain and suffering and loss of ability to work that the Board addressed in its process.
- [15] Mr. Jirasek feels strongly that the Board has got it terribly wrong and has not accepted how seriously he was injured when the excavator bucket struck his head. He says his situation reflects a problem with smaller employers not following the rules that are there to keep all workers safe. Much of the new evidence Mr. Jirasek has put before us on this appeal goes to the issue of the nature of his injuries. It consists of letters from friends and acquaintances describing his deteriorating medical and psychological condition since the accident. It contains medical reports and photographs of Mr. Jirasek pre- and post-accident, which he says demonstrate his injuries and how much his life has changed since his accident. Some of that evidence, in particular, a medical opinion from Mr. Jirasek's family doctor, Dr. Sundeep Singh Grewal, dated September 11, 2020, which notes multi-level spinal pathology, and a report from a pain specialist at St. Paul's Hospital, support his position that he suffered significant, not minor, injuries in the accident.

- [16] I have reviewed all the material Mr. Jirasek has filed. I note that most of it would not meet the test for accepting more evidence on appeal because it existed and could have been given to the judge at the hearing below. Even the updates and material that was not available before does not meet the test because it is not relevant to the issue of whether Mr. Jirasek has a valid claim against Ms. Zhao. It relates to the scope of Mr. Jirasek's injuries: *Palmer v. The Queen*, [1980] 1 S.C.R. 759.
- [17] Although Mr. Jirasek cannot pursue a claim against Ms. Zhao, that does not mean that his disagreement with the Board's assessment of his injuries and the award he received cannot be challenged. That decision can be reviewed by the court on judicial review after it has gone through the process mandated by the Workers Compensation Act. Mr. Jirasek was on the right track when he filed a petition to do just that in May 2017. He can, in that petition proceeding, ask the Supreme Court of British Columbia to look at what the Board did--how it handled his claim and the information it got or did not get from Ms. Zhao--to see if the Board should be required to reconsider Mr. Jirasek's claim. But what Mr. Jirasek cannot do is to go completely outside the process in the Act and start a claim against Ms. Zhao for compensation for injuries that only the Board has the authority to decide.
- [18] I encourage Mr. Jirasek to seek help from Access Pro Bono, as he has in the past, and to do so in relation to the judicial review claim that is already filed in the Supreme Court of British Columbia. These reasons will be transcribed and provided to Mr. Jirasek and should be given to any lawyer who helps him with that judicial review.
- [19] To sum up, in my view, the judge was correct to strike out Mr. Jirasek's notice of civil claim. I would therefore dismiss the appeal and the application to file new evidence.
- [20] BAUMAN C.J.B.C.: I agree.
- [21] FITCH J.A.: I agree.
- [22] BAUMAN C.J.B.C.: The appeal is dismissed. [Submissions from counsel and appellant re: costs]
- [23] BAUMAN C.J.B.C.: The appeal is dismissed. Each party will bear their own costs of this proceeding. "The Honourable Madam Justice Fenlon"

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