

Court File No.: 81/18

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

PAUL TAYLOR

Applicant
(Moving Party)

- and -

**THE WORKPLACE SAFETY & INSURANCE BOARD and THE WORKPLACE
SAFETY & INSURANCE APPEALS TRIBUNAL**

Respondents
(Responding Party)

**FACTUM OF THE RESPONDENT, THE WORKPLACE SAFETY &
INSURANCE BOARD**

Date: March 14, 2018

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PART I NATURE OF THE APPLICATION

1. The Applicant asks this court to intervene in an ongoing administrative proceeding to micro-manage the internal appeals process of the Workplace Safety and Insurance Board (the "WSIB" or the "Board"), and the yet-to-be-engaged process of the Workplace Safety and Insurance Appeals Tribunal ("WSIAT"). The Applicant also seeks leave to bring this judicial review application before a single judge as an urgent matter under s. 6(2) of the *Judicial Review Procedure Act* (the "JRPA"). The application should be dismissed because it is premature.
2. This proceeding relates to the Applicant requesting that the WSIB pay for over the counter medications. The WSIB decided on October 11, 2017 to deny

that request. The Applicant is in the midst of the WSIB administrative appeal process with respect to that decision. He now asks this Court to compel the WSIB to hold an oral hearing of his administrative appeal and to deliver electronic reasons for the decision within five days of that oral hearing. He seeks a similar remedy from WSIAT.

3. The *Workplace Safety and Insurance Act* ("WSIA") gives the WSIB discretion in regards of the type of hearing to be held (oral, in writing or electronic). The WSIB has the right to establish its own practice and procedure and the WSIA is silent in terms of when a decision should be rendered following a hearing.

4. The application should be dismissed because it is premature. Moreover there is no urgency to justify invoking s. 6(2), and this is not an appropriate case for mandamus.

PART II FACTS

A. Litigation History

5. The Applicant was injured in a workplace accident on February 6, 1997. The Applicant disagreed with a number of WSIB decisions regarding the amount and duration of his entitlement to benefits under the insurance plan. He appealed a number of those decisions internally before the Appeals Services Division of the WSIB and to WSIAT.

6. Mr. Taylor filed an Application for Judicial Review in the Superior Court of Justice seeking to set aside the WSIAT Decisions. That Application was abandoned.

7. The Appellant then commenced an action against the WSIB and WSIAT seeking damages of more than \$1.7 million.

8. His lawsuit against the WSIB was dismissed by Justice Price on February 22, 2017 with costs¹. The Applicant's appeal was also dismissed with costs by the Ontario Court of Appeal on February 6, 2018². To date the costs awards are still outstanding.

B. Mr. Taylor's Current Request Regarding Over the Counter Medications

9. Mr. Taylor first wrote to the Board seeking compensation for "over the counter pain medications and topical pain cremes" on September 20, 2017.³

10. Shortly after, he wrote again to the Board indicating that he was working "to prepare my file to be published on the internet. The purpose of which is to publicly show the cruelty, inconsistency, and above all bad faith with the decisions of the WSIB over the past twenty-year life time of my claim".⁴

11. The Board wrote to Mr. Taylor on October 4, indicating that it would need information from his doctor if he required non-narcotic prescribed medications beyond January 3, 2018, and if he required the brand name over the counter pain medications that he had inquired about.⁵ The Board also wrote to Mr. Taylor on October 5 regarding his complaints about level of service and health care expenses

¹ *Taylor v. WSIB*, 2017 ONSC 1223; 2017 ONSC 7511 (Costs) WSIB'S Book of Authorities ("BOA"), Tab 1

² *Taylor v. WSIB*, 2018 ONCA 108, BOA, Tab 2

³ Application Record, Tab Y

⁴ Application Record, Tab AA

⁵ Application Record, Tab BB

(ie. the over the counter medication), indicating that the latter request was being expedited.⁶

12. One week later, the Board wrote to Mr. Taylor to advise that it was unable to reimburse him for the over the counter medications because the WSIB Drug Benefit Program does not include them for coverage. The letter advised Mr. Taylor of other medication options that are covered in the WSIB's drug formulary. The letter noted that the last medical report that the WSIB has on file pertaining to his medications is dated May 25, 2007. The letter also advised Mr. Taylor that he could appeal this decision.⁷

13. The Board has attempted to call Mr. Taylor. He replied by email "I will not communicate by telephone with the WSIB staff". He also indicated by email on October 14, 2017 that if he did not received a response within 3 days he would "file a motion with the courts for a 'writ of mandamus'".⁸

14. Mr. Taylor emailed his appeal form relating to the over the counter medications on October 17. Mr. Taylor wrote in his reasons for objecting to the Board's decision that "My argument is that it is a work-related expenditure it is less aggressive than the prescribed generic crap and I have a right to choose the products that I consume in my body!.... I caution the WSIB that failure to make a

⁶ Application Record, Tab CC

⁷ Application Record, Tab DD

⁸ Application Record, Tab EE

speedy decision may result in an application being filed with the Superior Court of Justice for a Writ of Mandamus".⁹

15. The Board wrote to Mr. Taylor on October 24 indicating, among other things, that it would facilitate his appeal being expedited.¹⁰ The Board followed up on November 9 sending Mr. Taylor a copy of the claim file documents and an Appeal Readiness Form.¹¹

16. Mr. Taylor wrote to the Board on December 15: requesting an appeal readiness form; accusing the Board of "bias and inherent conflict of interest" with respect to methods of communication; accusing Board staff, his employer and the WSIAT of "knowingly, intentionally and deceptively misleading me about information". This letter also again states "I will be seeking a 'Writ of Mandamus' of the court", and lists the relief sought in this application.¹²

C. Mr. Taylor's allegation of retaliation is unfounded

17. Mr. Taylor's Notice of Motion alleges in paragraphs 17 and 18 that the Board has "retaliated" against him for appealing the Board decision relating to over the counter medications. That allegation is not true.

18. The Board provides a Drug Benefit Program for injured workers, under which a specific list of covered prescribed medications are contained in a

⁹ Application Record, Tab FF

¹⁰ Application Record, Tab GG

¹¹ Application Record, Tab II

¹² Application Record, Tab JJ

“formulary”, which is determined by a worker’s diagnosis. Generally and in practice a formulary remains in effect for two years after which it expires and is reviewed.¹³

19. Mr. Taylor’s formulary was set to expire on January 3, 2018. As set out above, the Board wrote to Mr. Taylor on October 4, 2017 to advise him that it would need information from his doctor if he required non-narcotic prescribed medications beyond January 3, 2018.¹⁴ He was invited to submit a medical report should he continue to require the prescribed medication in his formulary beyond January 3, 2018. To date, Mr. Taylor has not submitted any medical reports as requested.

20. Should an updated medical report be provided, it will be reviewed to determine continued entitlement to the prescribed medications. A worker has the right to appeal the decision following such review.¹⁵

PART III ISSUES AND LAW

21. The preliminary issue is whether this application should be dismissed because it is premature. Only if the court finds that there are exceptional circumstances and exercises its discretion to hear this application, the remaining issues are: (2) whether this application meets the test for urgency under s. 6(2) of the *JRPA*; and, on the merits of the application for judicial review, (3) whether this is an appropriate case for *Mandamus*.

¹³ *Labuntog Affidavit*, WSIB’s Record

¹⁴ Application Record, Tab BB

¹⁵ *Labuntog Affidavit*, WSIB’s Record

A. The Application is Premature

22. Judicial review is a discretionary remedy. The court will not exercise its discretion to hear a judicial review application that is premature. This principle has been expressed by many courts, and the leading statement is the following from Justice Stratas: “*absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted*”.¹⁶

23. This principle has been enforced “vigorously”, as demonstrated by the narrowness of the “exceptional circumstances” exception. As the court explained in *CB Powell*: “the authorities show that very few circumstances qualify as ‘exceptional’ and the threshold for exceptionality is high”.¹⁷

24. The Divisional Court has applied this principle to conclude that it is not the court’s function to “micro-manage” an administrative proceeding through procedural and interlocutory intervention¹⁸.

25. Mr. Taylor’s application is manifestly premature. He is awaiting an internal WSIB appeal, which could potentially be followed (according to his materials) by a WSIAT appeal. Both the Board and the WSIAT are, like other tribunals, masters of their own procedure and process. Mr. Taylor is asking this

¹⁶ *C.B. Powell v. Canada (Border Services Agency)*, 2010 FCA 61 at paras. 31-33 (BOA Tab 3); *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541 at paras. 68-69 (BOA Tab 4); *Halifax Regional Municipality v. Nova Scotia Human Rights Commission et al.*, 2012 SCC 10 at paras. 35-36 (BOA Tab 5).

¹⁷ *C.B. Powell*, *supra*, at para. 33 (BOA Tab 3).

¹⁸ *Cooney Bulk Sales Limited v. Teamsters Local Union No. 91*, 2017 ONSC 3651 at paras. 2-3 (BOA, Tab 6)

court to do precisely what this court has said that it will not do – intervene to micro-manage an ongoing tribunal proceeding.

26. Mr. Taylor's allegations of "retaliation" in relation to prescription medications is unfounded (as explained above), and he has not demonstrated any exceptional circumstances to justify interference with an ongoing administrative process.

27. This application should therefore be dismissed on this ground alone.

B. The Application is not Urgent

28. Section 6(2) of the *JRPA* provides that "An application for judicial review may be made to the Superior Court of Justice with leave of a judge thereof, which may be granted at the hearing of the application, where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice."

29. Mr. Taylor does not meet the test under s.6(2) of the *JRPA*.

30. An applicant's apprehension of a negative result that may follow from an administrative body does not support a claim of urgency or of failure of justice, and it will not be accepted by a court as a basis to interfere with an ongoing administrative proceeding.¹⁹

31. The assessment of urgency and failure of justice is a fact-driven exercise that requires a consideration of the individual circumstances of the

¹⁹ *Jafine v. College of Veterinarians of Ontario*, 1991 CanLII17126

applicant, the nature of the proceedings, the issues raised and the merits of the case. Economic hardship alone, even if proven, is not sufficient.²⁰

32. The lack of urgency here is evident on the record. Mr. Taylor has been threatening to bring this proceeding for mandamus for five months, and he has failed to provide the WSIB the necessary information relating to his prescription drugs. In addition to the lack of urgency, there is no issue here that would approach the necessary standard of a "failure of justice".

33. Moreover, as explained below, Mr. Taylor's application for a writ of mandamus is contrary to the governing principles of law and would fail.

C. The Applicant's Request for Mandamus Would Fail on the Law

34. An agency's decision as to how and when its statutory powers to enforce its legislation are to be exercised is purely a matter of policy.²¹

35. In order to succeed, the Applicant must establish that the WSIB has a public duty owed to him and that he has a clear right to performance of that duty.²² Based on the legislative framework and the WSIB's statutory powers outlined below, Mr. Taylor cannot establish a clear right to a performance of a statutory duty.

36. The WSIB has broad statutory powers and discretion to set its processes and procedures.

²⁰ *Michall v OECTA et al*, 2017 ONSC 3986 at paras. 26-27, 36 (BOA, Tab 8)

²¹ *Northern Lights Fitness Products Inc. vs. Canada*, [1994] F.C.J. No. 319 at paras. 13-16 (BOA, Tab 9).

²² *Apotex Inc. v. Canada*, [1993] F.C.J. No. 1098 at para. 45 (FCA), (BOA, Tab 10)

37. Section 119(3) of the WSIA addresses hearings before the WSIB and states that “the Board shall give an opportunity for a hearing”.²³ Section 119(4) of the WSIA provides the WSIB with discretion in conducting its hearings, in that the WSIB “may conduct hearings orally, electronically or in writing”.²⁴

38. Furthermore, section 131 of the WSIA gives the WSIB broad powers in terms of its practice and procedure, in the following terms:

The Board shall determine its own practice and procedure in relation to applications, proceedings and mediation. With the approval of the Lieutenant Governor in Council, the Board may make rules governing its practice and procedure.²⁵

39. The WSIA provides the WSIB with discretion in terms of the method of hearing and does not mandate any specific timing upon which such hearings are to take place. The WSIA does not obligate the WSIB to hold an oral hearing in every case, let alone within five days. The WSIB has the discretion to determine which method of hearing is appropriate in the circumstances.

40. Therefore the authority in relation to hearings under the WSIA is discretionary in nature and not mandatory. As such, the Applicant’s request for mandamus must fail.

²³ Section 119(3), *WSIA*, Schedule “B”.

²⁴ Section 119(4), *WSIA*, Schedule “B”.

²⁵ Section 131, *WSIA*, Schedule “B”.

PART IV ORDER REQUESTED

41. The WSIB respectfully requests an order dismissing this application,
with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.


Frank Cesario & Dianne Jozefacki
Of Counsel for the Respondent, The
Workplace Safety and Insurance Board

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Taylor v. WSIB*, 2017 ONSC 1223; 2017 ONSC 7511 (Costs)
2. *Taylor v. WSIB*, 2018 ONCA 108
3. *C.B. Powell v. Canada (Border Services Agency)*, 2010 FCA 61
4. *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541
5. *Halifax Regional Municipality v. Nova Scotia Human Rights Commission et al.*, 2012 SCC 10
6. *Cooney Bulk Sales Limited v. Teamsters Local Union No. 91*, 2017 ONSC 3651
7. *Jafine v. College of Veterinarians of Ontario*, 1991 CanLII17126
8. *Michail v OECTA et al*, 2017 ONSC 3986
9. *Northern Lights Fitness Products Inc. vs. Canada*, [1994] F.C.J. No. 319
10. *Apotex Inc. v. Canada*, [1993] F.C.J. No. 1098 (F.C.A.)

SCHEDULE "B" – STATUTES AND REGULATIONS

1. *Judicial Review Procedure Act, RSO 1990, c J.1,*

Application to Divisional Court

6 (1) Subject to subsection (2), an application for judicial review shall be made to the Divisional Court. R.S.O. 1990, c. J.1, s. 6 (1).

Application to judge of Superior Court of Justice

(2) An application for judicial review may be made to the Superior Court of Justice with leave of a judge thereof, which may be granted at the hearing of the application, where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice.

Transfer to Divisional Court

(3) Where a judge refuses leave for an application under subsection (2), he or she may order that the application be transferred to the Divisional Court.

Appeal to Court of Appeal

(4) An appeal lies to the Court of Appeal, with leave of the Court of Appeal, from a final order of the Superior Court of Justice disposing of an application for judicial review pursuant to leave granted under subsection (2).

2. *Workplace Safety and Insurance Act, 1997, SO 1997, c 16, Sch A*

Board: miscellaneous rules

Hearing

119(3) The Board shall give an opportunity for a hearing.

Hearings

(4) The Board may conduct hearings orally, electronically or in writing.

...

Practice and procedure

131 (1) The Board shall determine its own practice and procedure in relation to applications, proceedings and mediation With the approval of the Lieutenant

Governor in Council, the Board may make rules governing its practice and procedure.

Same, Appeals Tribunal

(2) Subsection (1) applies with necessary modifications with respect to the Appeals Tribunal.

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-and-

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and THE WORKPLACE SAFETY & INSURANCE
APPEALS TRIBUNAL**

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Proceeding commenced at Guelph

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WSIB**

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