CITATION: OHIP v. Clarke & Williams 2014 ONSC 2009
DIVISIONAL COURT FILE NO.: 495/13
DATE: 20140331

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MARROCCO A.C.J., NORDHEIMER & WHITAKER JJ.

BETWEEN:	)	
	)	
GENERAL MANAGER, THE ONTARIO HEALTH INSURANCE PLAN	)	*S. Nishikawa*, for the appellant
	)	
Appellant	)	
	)	
– and –	)	
	)	
DENVILLE CLARKE and KENROY WILLIAMS	)	*J. Schwartz, M. Yachnin & J. Tellez*, for the respondents
	)	
Respondents	)	
	)	
	)	
	)	**HEARD at Toronto:** March 25, 2014

NORDHEIMER J.:

[1] The General Manager of the Ontario Health Insurance Plan appeals from the decision of the Health Services Appeal and Review Board dated August 14, 2013 as confirmed by the Reconsideration decision of the Board dated October 4, 2013. The appellant had ruled that the respondents were not eligible for continued coverage under the Ontario Health Insurance Plan. In contrast, the Board concluded that the respondents were eligible for coverage under OHIP.

[2] On August 2, 2013, the respondents arrived in Ontario as participants in the Seasonal Agricultural Worker Program, a program operated by the Federal Government. The respondents held work permits issued under the SAWP that were valid from August 2, 2012 to December 15,

2012. The respondents were to be employed as seasonal workers by a company in Ontario. The respondents signed the standard form of employment agreement prescribed by the SAWP. Under that agreement, the employer is required to obtain insurance that will provide compensation to the worker for personal injuries received or diseases contracted as a result of the employment unless prevailing law provides for such compensation. Similarly, the employer is required to take the worker to obtain health coverage according to provincial regulations. In this case, the respondents received the insurance from the Workplace Safety and Insurance Board and the health coverage from OHIP.

[3] A few days after their arrival, both respondents were injured in a serious motor vehicle accident while being transported to work in their employer's van with other co-workers. Both respondents received workers' compensation benefits from the WSIB, as well as medical care for their work-related injuries funded by the WSIB. The respondents' medical treatment, however, extended beyond December 15, 2012. As a consequence, the respondents (i) applied to the Federal Government to be granted visitor status until February 2014 and (ii) applied for an extension of the OHIP coverage. The respondents were granted visitor status. However, the appellant denied their request for extended OHIP coverage.

[4] As a result of the Board's decision, which determined that the respondents were residents of Ontario and eligible for health insurance coverage, the respondents have continued to be covered by OHIP. It was not suggested that the respondents had failed to receive any necessary medical treatment as a result of this dispute.

[5] The issue raised before the Board, and in this appeal, is whether the respondents continued to qualify for OHIP coverage after December 15, 2012. The Board concluded that they did. The appellant contends that they did not.

[6] Central to the resolution of this issue is the proper interpretation of s. 1.3(2) of Regulation 552 under the *Health Insurance Act*, R.S.O. 1990, c. H.6.

[7] Before turning to that issue, however, I will address the standard of review applicable to the Board's decisions. The parties agree that the standard of review is one of reasonableness. I

agree that reasonableness is the appropriate standard of review since the Board was interpreting a statute that is directly related to its core function. However, as noted by the appellant, in considering the reasonableness of a decision, the range of reasonable outcomes is much narrower when one is considering matters of a legal nature, such as the proper interpretation of a statute. As Rouleau J.A. noted in *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)* 2008 ONCA 436 at para. 22:

> In contrast, where there is no real dispute on the facts and the tribunal need only determine whether an individual breached a provision of its constituent statute, the range of reasonable outcomes is, perforce, much narrower.

[8] Returning to the central issue, s. 1.3(2) of Regulation reads, in part:

> The following persons are residents, even if they do not meet the other requirements in this Regulation, and they are not affected by any of the other rules in this Regulation regarding recognition as a resident, other than the requirements under sections 3 and 4:
>
> …
>
> 4. People who are present in Ontario because they have a work permit issued under the program of the Government of Canada known as the "Seasonal Agricultural Worker Program"

[9] The appellant submits that the respondents did not qualify as residents of Ontario after December 15, 2012 because, by that point, their work permits had expired. This issue was not directly addressed by the Board in its decision. Instead, the Board, after finding that the other sections of the Regulation had no application to persons covered by s. 1.3(2), said simply, at para. 36:

> This begs the question as to how and when do SAWP participants cease to be residents in Ontario.

[10] The Board then proceeded to its conclusion that the respondents were still residents of Ontario because the agreement signed by the respondents under the SAWP contemplated that, in certain circumstances, persons in Canada under the SAWP might not leave the country by the date stipulated in the work permit. Specifically, the standard form of agreement signed by the respondents provided:

> The EMPLOYER shall respect the duration of the employment agreement signed with the WORKER(S) and their return to the country of origin by no later than December 15th with the exception of extraordinary circumstances (e.g. medical emergencies) [emphasis added]

[11] The Board held that this language in the SAWP agreement had the effect of continuing the status of the respondents as residents of Ontario. As a result, the Board concluded:

> …there is nothing in the relevant Regulation to support a finding that the Appellants [the respondents in this appeal] do not continue to be residents of Ontario under the Act.

[12] The very brief reasons of the Board dismissing the reconsideration do not add anything to the necessary analysis.

[13] In my view, the conclusion reached by the Board is an unreasonable one in light of the plain wording of the Regulation. The plain and ordinary meaning of the words used in s. 1.3(2) of the Regulation accords the status of residents to the respondents "because they have a work permit" under the SAWP. There is no dispute that the respondents' work permits expired on December 15, 2012.

[14] Notwithstanding the expiration of the work permits, the respondents contend that they were still eligible for OHIP under s. 1.3(2) after December 15, 2012. The respondents advance this contention on the basis that the work permit, referred to in the Regulation, does not have to be a valid one in order to comply with s. 1.3(2). In support of their position, the respondents point to other sections of the Regulation where the word "valid" is used in conjunction with the words "work permit" to justify a distinction between this section and those others.

[15] I do not agree with the respondents' contention. In my view, it is neither reasonable nor sensible to interpret the Regulation in that fashion. I reach that conclusion for two main reasons.

[16] First, there is the application of the basic rule of statutory interpretation. That rule is set out in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General),* [1999] 1 S.C.R. 743 where Major J. said, at para. 14:

> Statutory provisions should be read to give the words their most obvious ordinary meaning which accords with the context and purpose of the enactment in which they occur; *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at paras. 21-22. It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids.

[17] It seems to be agreed between the parties that the scheme of the Regulation, in this particular context, was to provide health insurance coverage to seasonal workers while they were in the Province of Ontario under the federal government's program. There is nothing in the plain and ordinary meaning of the words used in s. 1.3(2) that contemplates its application beyond the situation where a worker is present in Ontario under the terms of the SAWP. It is also clear on the plain and ordinary meaning of the words used in s. 1.3(2) that coverage is provided for people who are present in Ontario because they "have" a work permit under that program. The Regulation expressly uses the present tense, not the past tense. The simple fact is that there is no other plausible meaning that can be given to the Regulation that would give rise to an ambiguity.

[18] Second, it is well recognized that legislative drafting is often not a measure of perfection. If the triggering event for residency, under the Regulation, is the possession of a work permit, it is implicit that the work permit is a valid one. The suggestion that the provincial government would have passed a regulation that contemplated its application based on an invalid work permit is irrational. Indeed, if that had been the intention of the government, there would have been no need to include reference to the work permit at all. The Regulation could simply have said that it applied to "People who are present in Ontario under the program …". However, the reference to the work permit is in the Regulation and those words must, consequently, be given meaning.

[19] The respondents argue that OHIP coverage only ceases when there is no longer a causal connection between the respondents' physical presence in Ontario and the SAWP. In my view, when the work permit issued pursuant to the SAWP expires, it can no longer be reasonably said that there remains a causal connection between the person's physical presence in Ontario and the SAWP. When the work permit expires, the person's employment is legally at an end. If the person then remains in Ontario, their presence in Ontario is no longer an outcome connected to the SAWP. To say that such a person remains, in the words of s. 1.3(2):

> … present in Ontario because they have a work permit issued under the program of the Government of Canada known as the 'Seasonal Agricultural Worker Program'

is simply factually incorrect. It is a conclusion that is also unreasonable.

[20] Under the respondents' interpretation, a seasonal worker can always have a work permit as long as s/he hangs on to the original document. Given that possibility, under the respondents' interpretation of the Regulation, any seasonal worker, who simply keeps possession of the original work permit, could have OHIP coverage essentially in perpetuity. While the respondents insist that that is not the result of their position, they cannot point to any objective indicator, under their interpretation of the Regulation, that would lead to a cessation of coverage. Instead, they say that it will fall to the appellant to determine that issue on a case by case basis.

[21] A fair reading of the Board's decision shows that the Board did not consider the plain wording of the Regulation and whether, on its face, any ambiguity arose. The Board did not engage in any analysis of the scheme of the Act or of the Regulation. The Board did not identify any policy considerations that directed the adoption of any particular interpretation of the Regulation. Rather, having rejected that any other provision of the Regulation could assist in the proper interpretation of s. 1.3(2), and without considering whether the wording of s. 1.3(2) itself provided the answer to the question posed, the Board turned to the SAWP agreement. It used one provision in that agreement to base its conclusion that s. 1.3(2) covered the respondents' situation.

[22] In my view, the Board erred in using the terms of the SAWP agreement to assist it in interpreting the regulation. Even assuming that there was an ambiguity in the section (and the Board did not point to any) that would have permitted the use of external interpretive aids, the SAWP agreement was not an appropriate external interpretive aid for that purpose. The Province of Ontario is not a party to the SAWP agreement. It cannot have its interests affected by an agreement to which it is not a party nor should its legislative or regulatory enactments be interpreted based on such an agreement, especially ones that create fiscal responsibilities and liabilities.

[23] The respondents submit that there were reasons, other than the SAWP agreement, that could justify the Board's conclusion. They place considerable reliance on the Supreme Court of Canada's decision in *McLean v. British Columbia (Securities Commission),* [2013] S.C.J. No. 67 in support of their position that the Board's reasons do not have to address all issues that were raised or that would justify the conclusion reached. The respondents submit that, if this court can discern another basis on the record that would support the Board's conclusion, then the decision is a reasonable one and this court should defer to it.

[24] In my view, the decision in *McLean* does not assist the respondents. In *McLean*, the Securities Commission had not given any reasons for its conclusion. The courts were then required to essentially consider the matter afresh and in the process determine if the conclusion implicitly reached by the Commission was a reasonable one. However, this is not a case where no reasons were given. Here the Board gave reasons supplemented by the brief reasons on the reconsideration. The problem in this case is that the reasons given do not justify the result.

[25] Further, while the court in *McLean* found that it would have been preferable for the Securities Commission to have given reasons for its conclusion, the court held that the failure to give reasons was not fatal to the Board's conclusion. The court so found because they were of the view that a reasonable basis for the conclusion was apparent. The same cannot be said for this case. Rather, this case falls within that category of cases that was referred to in *McLean* by Moldaver J., at para. 38:

> Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable -- no degree of deference can justify its acceptance [citations omitted].

[26] In my view, the plain wording of the regulation allows for no other conclusion than the respondents ceased to be eligible for OHIP once their work permits expired on December 15, 2012. The Board's contrary conclusion is not a decision that "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 47.

[27] Before leaving this issue, I will say that, if there is a gap in the parameters of the SAWP that do not ensure health care coverage for seasonal workers who are required to remain in Ontario for legitimate medical reasons after the expiration of their work permit, then that gap should be filled, either by requiring the employers to obtain supplemental health insurance or through an agreement negotiated between the Federal and Provincial governments. It cannot be filled by a contrived interpretation of an existing regulation.

[28] The appeal is allowed, the decision and reconsideration decision of the Board are set aside, and the original decision of the appellant is restored. In accordance with the agreement of the parties, there will be no order as to costs.

NORDHEIMER J.

MARROCCO A.C.J.S.C.J.

WHITAKER J.

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Appellant

– and –

DENVILLE CLARKE and KENROY WILLIAMS

Respondents

REASONS FOR JUDGMENT

NORDHEIMER J.

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