

Date: 20070921

Docket: A-32-07

Citation: 2007 FCA 301

**CORAM: DESJARDINS J.A.
DÉCARY J.A.
RYER J.A.**

BETWEEN:

RAYMOND PATRY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on September 19, 2007.

Judgment delivered at Vancouver, British Columbia, on September 21, 2007.

REASONS FOR JUDGMENT OF THE COURT BY:

RYER J.A.

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REASONS FOR JUDGMENT OF THE COURT

RYER J.A.

[1] This is an application for judicial review of a decision of Umpire Haddad (CUB 65132A) dated November 21, 2006, under the *Employment Insurance Act* S.C. 1996 c. 23 (the Act) dismissing the Applicant's appeal from a decision of the Board of Referees, dated December 7, 2004, which upheld a decision of the Canada Employment Insurance Commission (the Commission) dated May 3, 2004.

[2] The Applicant applied for benefits following his suspension, in October 2001, from his employment with the Canada Customs and Revenue Agency (as it was then known).

Approximately six weeks after his suspension the Applicant was reinstated and returned to work until near the end of July of 2002. While working he also collected benefits.

[3] During the period in which the Applicant was collecting benefits, he filed 18 reports with the Commission in which he specified that he was not working and had no earnings. As a result of these reports and having determined that the Applicant had actually earned \$27,971.61 during this period, the Commission, by letter dated May 3, 2004, notified the Applicant that he was required to repay benefits in the amount of \$14,145 that had been overpaid. In addition, he was assessed a penalty under subsection 38(1) of the Act, in the amount of \$7,434, for having knowingly made false representations. Finally, the Commission issued a notice of violation pursuant to subsection 7.1(4) of the Act.

[4] The Applicant appealed the decision of the Commission to the Board of Referees. While the Applicant did not appear at the hearing of his appeal, after having requested and received an adjournment of the initial hearing date, he provided the Board of Referees with some 63 pages of materials, including medical reports and photographs, which related to a motor vehicle accident that had occurred in late 1996, and submissions to the effect that the injuries that he has sustained in the accident affected his ability to correctly record his earnings in the reports that were filed with the Commission. In addition, the Applicant requested that the hearing be tape recorded and that a copy of the tape be provided to him.

[5] The Board of Referees upheld the determinations of the Commission that the Applicant had earnings in his benefit period, those earnings led to an overpayment of benefits and a repayment of the overpayment of benefits was required. They also held that the imposition of the penalty under subsection 38(1) of the Act was appropriate, as was the issuance by the Commission of a notice of violation, pursuant to subsection 7.1(4) of the Act, that classified the violation as a “very serious violation”, in accordance with subparagraph 7.1(5)(a)(iii) of the Act. With respect to the penalty, the Board of Referees gave consideration to the medical evidence that had been submitted to them by the Applicant and stated in their reasons:

The Board reviewed in detail this most lengthy file and found no compelling evidence that post traumatic syndrome from his accident caused Mr. Patry to create 18 false statements.

[6] The Applicant appealed the decision of the Board of Referees to the Umpire and once again having requested and received an adjournment of the initial hearing date, did not appear at the scheduled hearing of that appeal.

[7] The Umpire confirmed the decision of the Board of Referees, holding that the Board of Referees correctly determined that the Applicant had derived earnings in the benefit period that mandated the repayment of the overpayment of benefits in the amount of \$14,145.

[8] With respect to the penalty under subsection 38(1) of the Act, the Umpire concluded that the Board of Referees had made no specific findings that would have established that the Applicant had knowingly made false statements. The Umpire then went on to make these findings and to give the

decision on that point that the Board of Referees should have given, citing subsection 117(b) of the Act as his authority for so doing. In that respect, the Umpire concluded that the Applicant had made 18 incorrect reports with respect to his earnings in the benefit period and that having received a request from the Commission for clarification of these errors, he failed to clarify or explain them. The Umpire decided that the failure of the Applicant to explain away the errors enabled him to draw the inference that the representations or statements with respect to earnings in the benefit period were false statements that were knowingly made. The Umpire then concluded that the penalty of \$7,434 that was imposed by the Commission, while substantial, was justified.

[9] With respect to the notice of violation, the Umpire concluded that its issuance pursuant to subsection 7.1(4) of the Act was a mandatory consequence of the imposition of the penalty under subsection 38(1) of the Act.

[10] Finally, the Umpire concluded that since there was no statutory requirement that a tape recording of the proceedings at the hearing of the Board of Referees must be provided to the Applicant, the failure of the Board or Referees to provide a tape recording did not invalidate the proceedings before, or the decisions of, the Board of Referees.

[11] Having reviewed the submissions made by the Applicant, I am not persuaded that the Umpire made any error in reaching his conclusions that would warrant intervention by the Court. However, the conclusion of the Umpire with respect to the imposition of the penalty under subsection 38(1) of the Act appeared to be of particular concern to the Applicant and requires

specific consideration. Contrary to the Applicant's contention, in my view the portion of the reasons of the Board of Referees that is reproduced above, in paragraph 5, establishes that they did consider the medical evidence that was provided to them by the Applicant and that such evidence did not persuade them that the false statements were attributable to the medical condition of the Applicant that was described in that evidence.

[12] For the foregoing reasons, I would dismiss this application for judicial review, without costs in the circumstances.

"C. Michael Ryer"

J.A.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-32-07

STYLE OF CAUSE: Raymond Patry v. AGC

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: September 19, 2007

REASONS FOR JUDGMENT BY: RYER J.A.

CONCURRED IN BY: DESJARDINS J.A.
DÉCARY J.A.

DATED: September 21, 2007

APPEARANCES:

Raymond Patry

FOR THE APPLICANT

Cindy W. Mah

FOR THE RESPONDENT

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FOR THE RESPONDENT