Docket No.: CA 161356
Date: 20001026

NOVA SCOTIA COURT OF APPEAL

[Cite as: Metropolitan Entertainment Group v. Durnford, 2000 NSCA 122]

Freeman, Roscoe and Cromwell, JJ.A.

BETWEEN:

METROPOLITAN ENTERTAINMENT GROUP, (Workers' Compensation Board Claim No. 1656602)

Appellant

- and -

ANGELA DURNFORD, THE NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL and **THE WORKERS' COMPENSATION BOARD OF NOVA SCOTIA**

Respondents

REASONS FOR JUDGMENT

Counsel:	John Graham and Paul McLean for the appellant Linda Zambolin and Bill MacDonald for the respondent, Angela Durnford Madeleine Hearns for the respondent, Workers' Compensation Board of Nova Scotia Sarah Bradfield for the respondent, Workers' Compensation Appeals Tribunal of Nova Scotia
Appeal Heard:	September 25, 2000
Judgment Delivered:	October 26, 2000
THE COURT:	The appeal is dismissed without costs per reasons for judgment of Freeman, J.A.; Roscoe and Cromwell, JJ.A., concurring.

FREEMAN, J.A.:

[1] The respondent Angela Durnford was employed by the appellant in the dual capacity of supervisor and dealer of blackjack and other games in its Halifax casino from 1995 until 1997 when she developed right lateral epicondylitis, or tennis elbow, which resulted in lost time and modified duties until she left this employment in 1999.

[2] This appeal is from a decision of the Workers' Compensation Appeals Tribunal that the condition arose out of and in the course of her employment in that it was aggravated by her duties. She was found to be entitled to temporary earnings replacement benefits. This decision reversed the determination by the Workers' Compensation Board that her condition was not a compensable injury under the **Workers' Compensation Act**, S.N.S. 1994-5, c. 10.

[3] The appellant asserts the Tribunal erred in law in interpreting and applying ss. 10 and 187 of the **Act**, and in concluding it was not bound by findings of the hearing officer respecting expert evidence. It says the decision was patently unreasonable, raising a question of jurisdiction. Section 10 requires compensation to be paid when personal injury by accident arising out of and in the course of employment is caused to a worker. Section 187 relates to the burden of proof and gives the worker the benefit of the doubt. The appellant's position is that dealing blackjack, while repetitive, does not involve sufficient force to cause a repetitive strain injury such as epicondylitis. Expert medical opinion is divided on this point.

[4] To deal blackjack the dealer withdraws a card from a “shoe” containing several decks of cards with her left hand and reaches across her body to retrieve it with her right. She then places it before one of several players, sometimes turning it face-up. A study by an ergonomics expert showed Ms. Durnford, considered a dealer of average speed, would deal between 984 and 1476 cards an hour, depending on varying conditions of play. She would deal for an hour, and take a break for twenty minutes. Between January and August 1997 she worked two eight-hour shifts a week as dealer.

[5] Ms. Durnford had no symptoms of epicondylitis prior to beginning work as a blackjack dealer in early 1997 but developed symptoms within roughly six months of taking up blackjack dealing. She began to experience problems, including pain in her right elbow, during the summer of 1997. She said this pain radiated up and down her right arm, in which she noted discoloration and swelling. She saw a doctor August 20, 1997 and reported her symptoms to her shift manager the next day. She was permitted to stop dealing and concentrate on supervisory duties. Discomfort forced her to stop work in October 1997. She returned to work December 30 doing lesser duties for lower pay until March 1998, when she returned to her dual role dealing and supervising. By August 1998, her problems increased and she had to stop dealing, working only as supervisor until she was laid off in September. She underwent tennis elbow surgery performed by Dr. Gerald Reardon on February 2, 1999. She returned to work April 29, 1999 but her symptoms quickly resumed and she was forced to resign.

[6] An epicondyle is a bony protuberance in the elbow to which ligaments, tendons

and muscles attach. Epicondylitis is irritation or inflamation at that site. Medical reports from Drs. Reardon and Wieder, who treated Ms. Durnford, expressed the view that in her case dealing blackjack likely caused the epicondlylitis. The appellant employer's occupational health consultant, Dr. Matthew Burnstein, was of the opposite view. Dr. Reginald Yabsley, an orthopaedic surgeon, who had not examined Ms. Durnford, tended to agree with Dr. Burnstein but opined that dealing blackjack could have a temporary aggravating effect on epicondylitis. This divergent medical opinion had to be weighed by the hearing officer at the Board level then, together with some additional evidence, by the appeals commissioner on the Tribunal appeal.

[7] After a thorough review of the evidence, both testimonial and documentary, the Workers' Compensation Board hearing officer concluded that "insufficient evidence has been presented to prove that the worker sustained personal injury by accident arising out of and in the course of her employment."

[8] Ms. Durnford appealed to the Appeals Tribunal pursuant to s. 246 of the **Act**, and the appeals commissioner, Karen Crombie, found in her favour, holding that her condition had been aggravated by her employment. The appellant appealed to this court under s. 256 of the **Act**.

Deference to the Hearing Officer

[9] The first major ground argued by the appellant was that the appeals

commissioner should have shown greater deference to the conclusions of the hearing officer arising from the hearing before the Board, because of advantages the hearing officer enjoyed over the appeals commissioner with respect to the evidence. The hearing at the Board level took five days and involved extensive examination and cross-examination of witnesses including experts. There was opportunity for credibility to be challenged.

[10] However, not all medical experts testified. Key evidence was received from reports, some of which were challenged by written critiques. The doctors' opinions differed as to whether dealing blackjack could "cause" epicondylitis, but there was little disagreement as to most other important facts. The hearing officer did not make specific findings as to credibility or weight of evidence. While it appears that the hearing officer gave less weight to Dr. Reardon's report than to those of the other experts, no reason for doing so is given. There was no transcript of the evidence but the hearing officer kept notes and set forth summaries of the evidence of each witness in considerable detail. The appeals commissioner appears to have accepted the hearing officer's account of the evidence; the difference between the appeals commissioner and the hearing officer related to the legal consequences that should flow from those findings. The appeals commissioner was in as good a position as the hearing officer to draw such conclusions from the facts and evidence. For reasons stated below, she was not bound by the hearing officer's finding that the evidence before her was insufficient to establish to a balance of probabilities that the workplace was the source of the worker's symptoms.

[11] Neither the scheme of the **Act,** which provides generous access to fact finding and review processes before both the Board and the Tribunal, nor s. 246 under which the worker has appealed, support the paralyzing degree of deference the appellant argues is owed by the Tribunal to the Board. The section provides:

> 246. The Appeals Tribunal shall decide an appeal according to the provisions of this Act, the regulations and the policies of the Board, and
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> (a) documentary evidence previously submitted to or collected by the Board;
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> (b) subject to s. 251, any additional evidence the participants present;
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> (c) the decision under appeal;
>
> (d) the submissions of the participants; and
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> (e) any other evidence the Appeals Tribunal may request or obtain.

[12] It is clear from the variety of factors to be considered by the Tribunal pursuant to s. 246, in addition to the record of the hearing at the Board level, that the legislature could not have intended for the Tribunal to pay a high degree of deference to conclusions reached by the Board. Consideration of the additional factors requires an independent adjudicative assessment by the Tribunal and sharply curtails any deference that can be paid to the conclusions, as opposed to findings of credibility or particular facts, by the hearing officer. I would agree with the appeals commissioner that appeals under this section are of a hybrid nature combining features of appeals *de novo* with reviews of the record. She stated:

> The Tribunal is not required to review the Hearing Officer decision for errors, but rather is required to consider, pursuant to section 246, documents in the Board file, any additional evidence, the decision under appeal, the submissions of the participants, and any other evidence that the Tribunal may obtain. Reference is made to the Hearing Officer decision for two reasons: 1) to identify the issues on appeal;

> and 2) to determine whether there was an oral hearing, and if so, to review the Hearing Officer's summary of the oral testimony.
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> . . . I accept findings of fact made by the Hearing Officer where those findings were based on an assessment of credibility. However, I am not bound to accept any findings made by the Hearing Officer with respect to the opinion evidence presented to her.

[13] The limited deference to which hearing officers are entitled was recognized by Chipman, J.A. in **Doward v. Workers' Compensation Board (N.S.)** (1997),160 N.S.R. 22 (C.A.) in which he stated:

> . . . the deference that the Tribunal must show is only with respect to the advantages the hearing officer may have in the fact finding process in any particular case.

[14] Deference to findings by the Board is therefore limited by circumstance, and becomes one of the factors considered by the Tribunal in weighing all of the evidence to arrive at its own decision. In any event, the Board's conclusions, in its decision, of April 22, 1999, as to the effect of the expert medical evidence could not have been binding on the Tribunal, because, in addition to the expert evidence before the hearing officer, the Tribunal had before it a significant report from Ms. Durnford's orthopaedic surgeon, Dr. Reardon, dated May 20, 1999, after the Board hearing.

[15] The appellant argues that Dr. Reardon's report contained nothing new, no opinion that had not already been considered by the hearing officer, and, therefore, the Tribunal should have deferred to the Board's result. In fact, Dr. Reardon's report was a confirmation of his medical opinion with its probative value enhanced by his having viewed video recordings of activities in her workplace. At the least, this required a new assessment by the Tribunal. With respect, even if Dr. Reardon's report had been

a mere update, the Tribunal was bound to consider it as evidence submitted by a party. Section 246 directs that the Tribunal **shall decide** the case before it after considering evidence that was before the Board as well as additional evidence referred to in the section. That is, the Tribunal is to exercise an independent adjudicative function, and courts should be wary of curtailing that by imposing a rule of deference not contemplated by the legislature. See **Doward** (supra) and **Rijntjes v. WCAT and WCB**, CA 142871, July 9, 1998.

[16] I find no error in the principles of Tribunal review of Board decisions stated and applied by the appeals commissioner.

Causation

[17] She then summarized the background and turned to the central issue, is there a causal connection between the respondent's lateral epicondylitis and her employment? She stated:

> Contrary to the submissions made by the Employer, it is not necessary to show that the Appellant's condition was caused *solely* by her employment; the Appellant need only show that her condition was caused *in part* by her employment. To find otherwise is to render section 10(5) of the *Act* nugatory. Section 10(5) of the *Act* states that earnings loss compensation is payable only for the portion of the earnings loss that is reasonably attributable to the compensable injury. The *Act* expressly contemplates compensating workers for conditions that are due in part to a workplace accident, and in part to other causes.
>
> Furthermore, it is not necessary to prove causation to a scientific certainty; it is appropriate to use common sense to infer causation, where circumstances are appropriate: *Farrell v. Snell*, [1990] 2 S.C.R. 311 (S.C.C.)

[18] The appellant submits the appeals commissioner equated or confused the

presence of symptoms with causation. It is noteworthy that the legislative draughtsmen avoided both of these terms and sought instead a simpler description for an injured worker's right to be compensated. The ordinary definition of accident is "a chance event occasioned by a physical or natural cause" in s. 2(a)(ii) of the **Act** but the definition is broadened in s. 2(a)(iii) to mean "disablement, including occupational disease, arising out of and in the course of employment."

[19] It is clear from this definition that when symptoms severe enough to cause "disablement" arise out of and in the course of employment, causation is established for purposes of the **Act**. It is not necessary to probe deeper and find the underlying medical reasons that one worker could develop disabling symptoms under the same workplace conditions that left other workers symptom free. The cause, in that sense, may be hereditary, the result of an old trauma, or even spontaneous. It is irrelevant to determining eligibility for compensation under the **Act**.

[20] "Eligibility" is established in Section 10:

> 10(1) Where, in an industry to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the Board shall pay compensation to the worker as provided by this Part.

[21] "Accident," as noted above, is defined in s. 2(a) to include disablement arising out of or in the course of employment. A "presumption" subsection appears intended to fend off too technical an interpretation of the words "out of and in the course of

employment":

> 10(4) Where the accident arose out of employment, unless the contrary is shown, it shall be presumed that it occurred in the course of employment, and where the accident occurred in the course of employment, unless the contrary is shown, it shall be presumed that it arose out of the employment.

[22] The word "cause" occurs in ss. 10(5) but only in connection with a secondary cause for loss from an accident:

> 10(5) Where a personal injury by accident referred to in subsection (1) results in loss of earnings or permanent impairment
>
> (a) due in part to the injury and in part to causes other than the injury; or
>
> (b) **due to an aggravation, activation or acceleration of a disease or disability existing prior to the injury**,
>
> compensation is payable for the proportion of the loss of earnings or permanent impairment that may reasonably be attributed to the injury. (Emphasis added.)

[23] The hearing officer referred to a report by Dr. Jana Wieder, the worker's family physician, who stated that Ms. Durnford had been seen by a medical massage therapist, a physiotherapist and Dr. Reardon as well as herself. "All of us felt that the diagnosis is epicondylitis and her condition is caused due to her work."

[24] Counsel for the appellant in this court accepted as an accurate statement of the relevant law that a ". . . pre-existing disease or infirmity of the employee does not disqualify a claim under the 'arising out of employment' requirement if the employment aggravated, accelerated or combined with the disease or infirmity to produce the . . . disability for which compensation is sought. (See **Workers' Compensation Appeals Board v. Penney** (1980), 38 N.S.R. (2d) 623 (S.C.A.D.) at § 8, citing **Workers' Compensation Board v. Theed**, [1940] S.C.R.553, per Kerwin, J. at 574.)

[25] This approach may be contrasted with that apparently adopted by the hearing officer. She referred to a report by Dr. Matthew Burnstein, occupational health consultant for the appellant employer, who attacked the causal relationship suggested by the other professionals.

> . . . treating physicians and physiotherapists simply do not have the information on which to base a determination of a causal relationship. Any discussion of causation requires a detailed knowledge of the activity to which the condition is being attributed, and these health providers simply do not have this information. While the notion that activity "A" caused condition "B" simply based on the chronologic relationship between "A" and "B" or that pain associated with condition "B" occurs while performing activity "A", seems logical, but this thinking is simplistic and has been rejected by medical epidemiologists as fallacious.

In his report dated September 21, 1999, Dr. Burnstein stated:

> The fact that [Ms. Durnford's] symptoms increased while performing this activity has no bearing in determining causation. (Emphasis added)

[26] This opinion introduces a scientific standard of causation at variance with the requirements in the **Act** for establishing eligibility for compensation for workplace accidents, which is referred to above. Dr. Burnstein's standard was vigorously urged by the appellant, and apparently was the one adopted by the hearing officer. The appeals commissioner avoided this error.

[27] Dr. Reginald Yabsley, an orthopedic surgeon, who did not see Ms. Durnford, took a similar approach and said Dr. Reardon was attempting to prove a negative. He said there is not a lot of proven information regarding causation and repetitive strain. However he acknowledged that dealing could have a temporary aggravating effect on what was in essence a pain syndrome.

[28] I am not persuaded that the appeals commissioner was in error with respect to the legal principles she adopted and applied. She considered and weighed the expert evidence and concluded:

> Applying section 187 of the *Act*, I find that it is as likely as not that the Appellant's lateral epicondylitis was caused *at least in part* by her employment and, in particular, that her condition was aggravated by the activities which comprise Blackjack dealing, which formed part of her employment responsibilities. While it is not necessary for causation to be proved to a scientific certainty, it makes sense that a determination of causation should not be based on something that is scientifically unsupportable. A finding that the Appellant's lateral epicondylitis was aggravated by her job functions is consistent with all experts. The Appellant became symptomatic when performing dealer related functions. She was asymptomatic before she commenced dealing Blackjack. Dr. Reardon attributes a causal connection. Drs. Yabsley and Burnstein state that causation is not scientifically supportable, but they do not rule out the possibility that the Appellant's condition could be aggravated by her employment.
>
> Thus, I find that the Appellant's condition did "arise out of" her employment, in that her employment aggravated her lateral epicondylitis. I also find that her condition occurred "in the course" of her employment. She became symptomatic while working. There is no suggestion that the Appellant's symptoms were brought on by activities outside of work. . . .
>
> As a result, I find that the Appellant did suffer a personal injury by accident arising out of and in the course of employment. She suffered a compensable injury.

Patent Unreasonableness

[29] In appealing to this court the appellant employer must rely on s. 256 of the **Act**, which provides:

> 256(1) Any participant in a final order, ruling or decision of the Appeals Tribunal may appeal to the Nova Scotia Court of Appeal on any question as to the jurisdiction of the Appeals Tribunal or on any question of law but on no question of fact.

[30] This court concluded in **Workers' Compensation Board (N.S.) v. Johnstone et al.,** 1999 NSCA 164 that when error of law is not involved, the question of causation is a matter of fact to be determined by the Tribunal and over which this court has no

jurisdiction to interfere in the absence of a patently unreasonable finding. This view was recently confirmed by Roscoe J.A. in **Brown v. Workers' Compensation Board (N.S.) et al.,** 2000 NSCA 101.

[31] In a decision released concurrently with this one, **Ferneyhough v. Workers' Compensation Board (N.S.) et al.**, 2000 NSCA 121 Cromwell, J.A. had occasion to examine in depth an error of law that led the Tribunal to an erroneous conclusion as to causation.

[32] He first considered the correct standard of review to be applied to questions of law decided by the Tribunal and stated:

> Of course, not every question of law the Tribunal must decide necessarily attracts the correctness standard of review on appeal to this Court. The nature of the particular question and its relationship to the purpose of the legislative scheme and the expertise of the Tribunal must be assessed in each case: see generally **Halifax Employers Association v. Workers Compensation Board**, 2000 NSCA 86.

[33] The **Ferneyhough** case turned on the interpretation of a 1980 decision of this court, **Workers' Compensation Board v. Penney** (supra). Cromwell, J.A. found that in interpreting decisions of this court, the Tribunal is not "acting as experts in a sensitive area with which this court is not familiar." Because the Tribunal had misinterpreted **Penney**, it had reached an erroneous conclusion as to causation in **Ferneyhough**.

[34] In the present case the Tribunal was applying its own statute to facts on which the worker's entitlement to compensation depended, a matter within its core jurisdiction and expertise. It did not err in law or jurisdiction. Its factual findings are not patently

unreasonable. There is, therefore, no basis to interfere with its decision.

[35] I would dismiss the appeal without costs.

Freeman, J.A.

Concurred in:

Roscoe, J.A.

Cromwell, J.A.