Docket: CA 160031
Date:20001026

NOVA SCOTIA COURT OF APPEAL

[Cite as: Ferneyhough v. Nova Scotia (Workers' Compensation Board), 2000 NSCA 121]

Bateman, Hallett and Cromwell, JJ.A.

BETWEEN:

AGNES FERNEYHOUGH, spouse of
ARTHUR FERNEYHOUGH (deceased)
Workers' Compensation Claimant (Claim No. 931757)

Appellant

- and -

THE NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL, THE WORKERS' COMPENSATION BOARD OF NOVA SCOTIA and CAPE BRETON DEVELOPMENT CORPORATION

Respondents

REASONS FOR JUDGMENT

Counsel:	Anne S. Clark and Kenneth H. LeBlanc for the appellant Sarah Bradfield for the respondent Tribunal Paula Arab O'Leary and Madeleine F. Hearns for the respondent Board Paul D. McLean for the respondent Cape Breton Development Corporation
Appeal Heard:	September 15, 2000
Judgment Delivered:	October 26, 2000
THE COURT:	Appeal allowed and matter remitted to Tribunal per reasons for judgment of Cromwell, J.A.; Hallett and Bateman, JJ.A. concurring.

CROMWELL, J.A.:

I. Introduction:

[1] The late Arthur Ferneyhough worked as a coal miner from 1941 until June of 1973. He was granted permanent impairment benefits under the "automatic assumption" provisions of the applicable workers' compensation legislation for the industrial disease, pneumoconiosis. He died on June 1, 1998; a 70% permanent impairment benefit was in place at the time of his death. His widow claimed workers' compensation survivor benefits, but these were denied by the Board. The denial was upheld by WCAT on the ground that it had not been shown that pneumoconiosis caused Mr. Ferneyhough's death. Hence, this appeal by leave previously granted.

[2] The case is governed by the **Government Employees Compensation Act**, R.S. C. 1985, c. G-5, as amended, but, by virtue of ss. 4(1), (2) and (3) of that **Act**, compensation is to be determined according to the Nova Scotia workers' compensation legislation.

II. Facts and Issue

[3] The fundamental issue in this case is whether WCAT erred in law in its interpretation or application of the decision of this Court in **Workers' Compensation Appeal Board v. Penney** (1980), 38 N.S.R. (2d) 623 (S.C.A.D.). That case sets out the principles relating to causation in the context of claims for survivor benefits under the workers' compensation system.

[4] It will be helpful to review the sections of the Nova Scotia **Workers' Compensation Act**, R.S.N.S. 1994 - 95, c. 10, as amended, most relevant to the issue before WCAT and this Court. Under s. 60, survivors benefits are payable "... where a worker dies as the result of an injury ...". (s. 60(1)). Under s. 12, where "...the worker's death is caused by the occupational disease [a category which includes pneumoconiosis], the worker is entitled to compensation as if the occupational disease was a personal injury by accident." (s.12(1)(b)).

[5] There was no issue before WCAT, and it apparently accepted, that Mr. Ferneyhough suffered from the occupational disease pneumoconiosis due to the nature of his employment. It would not be appropriate for us to revisit that aspect of the case on this appeal. The only issue considered by WCAT was whether Mr. Ferneyhough's death had been caused by the occupational disease; the only issue before the Court on appeal is whether the Tribunal erred in law in resolving that issue against Mrs. Ferneyhough.

[6] The Tribunal accepted the evidence contained in a report by Dr. Acres, a specialist in Respirology and General Internal Medicine. The report provides, in relevant part, as follows:

> This letter is in response to your request for my opinion whether silicosis/pneumoconiosis contributed to the death of this individual.
>
> First I will review documents pertinent to the case. Lung function studies, for example 31-01-1994 showed a combined obstructive/restrictive picture with marked airflow obstruction. Chest x-rays were reported over many years as showing marked elevation of the left diaphragm and in 1994 Dr. LeMoine reported findings on x-ray consistent with pneumoconiosis. On the 18th of February 1994

> he stated that Mr. Ferneyhough had very significant lung disease which was multi factorial including:
> chronic obstructive pulmonary disease
> coal workers pneumoconiosis
> left phrenic nerve paralysis
>
> .....
>
> The death certificate signed 1 June 1998 by Dr. Michel McKeough indicated that the patient died of acute cardiopulmonary arrest due to acute exacerbation of chronic obstructive lung disease.
>
> .....
>
> Conclusion: The death certificate was incomplete. In fact this man had three conditions which reduced his lung function as detailed by Dr. LeMoine above and all three contributed to reducing the overall lung function to a point that an exacerbation of his obstructive aurways (sic) disease led to his death at the time it occurred. Put another way, if he did not have a paralyzed left hemidiaphragm and pneumoconiosis would he have died of this exacerbation of chronic obstructive pulmonary disease at this time? I do not think so.
>
> Recommendation: From the evidence one cannot be precise in attributing percentage blame for death to the three conditions but in my estimation the greatest contributor was chronic obstructive pulmonary disease with the next most important component being the paralyzed hemidiaphram. As the radiographic evidence of pneumoconiosis was not marked I would attribute the least percentage of responsibility for his death to this disease. My estimate is that 20% of his overall lung condition leading to his death was due to pneumoconiosis. (emphasis added)

[7] Although accepting this report, WCAT decided that the necessary causal link had not been established between the pneumoconiosis and Mr. Ferneyhough's death. The Tribunal found that the applicable test was whether the compensable disease was a "substantial contributing factor" in the death, basing its conclusion on this Court's decision in **Penney**. The Tribunal stated at pp. 4 and 5 of its decision:

> The Court of Appeal's decision in *Workers' Compensation Appeal Board v. Penney* (1980), 38 N.S.R. (2d) 623, held that on a claim for survivor's benefits the survivor was not required to show that the workers' compensable disease was the sole cause of death, but only a **substantial contributing factor**. .....
>
> The Court of Appeal showed in *Penney*, on a claim for survivor benefits the survivor was not required to show that the Appellant's compensable disease was the sole cause of death, but only a substantial contributing factor. Clearly the

> Appellant's pneumonoconiosis was a factor in his death, but I find that 20% in comparison to 80% for the COPD and paralyzed hemidiaphragm, is not a substantial contributing factor.
> (emphasis added)

[8] In my view, it is helpful to approach this appeal by asking two questions. First, what is the proper legal test for determining whether the required causal link exists between an occupational disease and death for the purposes of eligibility for survivor's benefits under the **Workers' Compensation Act**? Second, did WCAT apply the correct test? Before turning to these questions, I must address the appropriate standard of appellate review.

III. Standard of Review:

[9] The interpretation of **Penney** is a question of law. The Tribunal's interpretation of **Penney** may appear in its statements describing the holding of the case or may be apparent, although not expressly stated, from the Tribunal's application of those principles. In either situation, the question of law is whether the Tribunal properly interpreted **Penney**.

[10] Of course, not every question of law which 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. Here, the question of law is whether the Tribunal has erred in interpreting a decision of this Court. In interpreting decisions of this Court, the Tribunal is not ".. acting as experts in a sensitive area with which this court is not familiar..." :see Chipman, J.A. in **Doward v. Workers' Compensation Board** (1997), 160 N.S.R. (2d) 22 (C.A.) at § 89. Consideration of the various factors relevant to ascertaining the appropriate standard of review as outlined in such authorities as **Canada (Director of Immigration & Research) v. Southam Inc.** [1997] 1 S.C.R. 748 and **Baker v. Canada**, [1999] 2 S.C.R. 817 does not suggest that the Court should defer to the Tribunal as to how the Court's decisions ought to be interpreted. I agree with the submissions on behalf of the appellant and the respondent Cape Breton Development Corporation that correctness is the appropriate standard of review on the appeal to this Court with respect to this question.

IV. The Proper Interpretation of Penney:

[11] The **Penney** case came to the Appeal Division of the Supreme Court (as it then was) by way of stated case. The first of the two questions referred to the Court asked whether the Workers' Compensation Appeal Board had jurisdiction to order compensation to the widow of a deceased worker who had been awarded partial disability benefits on the basis of pneumoconiosis related to his work as a coal miner where the "...compensable disease was not the sole factor causing his death but rather a substantial contributing factor."

[12] The Court answered this question in the affirmative. However, it is clear in the reasons of the Court, delivered by Jones, J.A., that in upholding the jurisdiction of the Appeal Board to award benefits where the disease was a substantial contributing factor, the Court did not, and did not intend, to depart from the general principles of causation as applied in the many workers compensation authorities to which the Court referred in its reasons.

[13] Jones, J.A. in **Penney** referred, with approval, to various descriptions of the correct test for determining whether the necessary causal link has been established in workers compensation law. The phrases referred to include that the disease must "contribute something" , that the causal link must be "real and not fictitious", that it must be a "contributing cause" or that it must contribute in a "material degree": see § 8, 9, 10 and 11. He also cited with approval authorities relying on the "but for" test for causation — that the death would not have occurred "but for" the disease: see § 10.

[14] It is suggested that the comment of Jones, J.A. in **Penney** that "... the principles of tort law have no application to workmen's compensation legislation... " means that tort law principles of causation should not be considered in workers compensation cases. I do not interpret Jones, J.A.'s statement in that way, particularly having regard to the fact that he refers to and draws support for his conclusion from a leading tort causation case in the very next sentence of his reasons.

[15] Of course, one of the purposes of a workers' compensation scheme is to take compensation for work injury and occupational disease out of the fault based tort system. Concepts such as "fault" and "damages", so central to tort law, are not consistent with the purposes of the workers' compensation scheme. It was in this general sense that Jones, J.A. stated that tort law principles do not apply to the workers' compensation system. However, where the Legislature, as it has in ss. 12 and 60 of the **Act**, uses general legal terminology, such as the phrases "caused by" and "as the result of" without definition or qualification, it is relevant to the interpretation of such provisions to take account of their legal meaning. Of course, one must also have regard as well to all the other appropriate interpretative considerations, such as the purpose of the legislation and the context supplied by its other provisions.

[16] This is precisely what Jones, J.A. did in **Penney**. He began his judgment by stressing the remedial nature of workers' compensation legislation and the need to interpret it liberally so as to give effect to this remedial intent: see § 7 and 8. He then reviewed many workers compensation authorities on the question of causation and concluded by referring to tort law principles of causation as a touchstone for his analysis. He referred to a leading decision of the House of Lords on causation, **McGhee v. National Coal Board**, [1972] 3 All E.R 1008 (H.L.). That case provided the point of comparison which sustained Jones, J.A.'s view that a more restricted approach to causation than that applying in tort cases could not have been intended to apply in workers' compensation matters having regard to the remedial nature of the legislation.

[17] For reasons that I will develop shortly, I think the Tribunal in this case was misled by the term “substantial contribution”. I would point out, therefore, that in **Penney**, by affirmatively answering the question in the stated case that posited a substantial contribution, the Court was clear that no higher degree of causal connection was required than was described in the numerous authorities to which it referred. I note that in **McGhee**, to which Jones, J.A. referred, the test for causation is in some instances described as requiring a substantial contribution: see e.g. Lord Wilberforce at p. 1012 and Lord Simon of Glaisdale at page 1014. However, the term “substantial” is explained by those Law Lords to mean “not negligible” (per Lord Wilberforce at p. 1012) and as “... not so negligible that the maxim ”*de minimis*” is applicable” (per Lord Simon at p. 1014). Jones, J.A.’s conclusion was that the required causal link between the disease and death for the purposes of entitlement to survivor benefits was no more onerous than that described in **McGhee**. It follows that causation for such purposes is established if it is shown that death would not have occurred “but for” the disease or if the disease was more than a negligible (or *de minimis*) contributing factor to the death.

[18] The relevance to the interpretation of causation provisions in the **Workers’ Compensation Act** of these general legal principles of causation is confirmed by the judgment of this Court in **Nova Scotia (Workers’ Compensation Board) v. Johnstone** (1999), 181 N.S.R. (2d) 247. In that case, Freeman, J.A., for the Court, affirmed the relevance of tort law principles of causation to the question of whether the

worker's disease arose from employment. Freeman J.A. recognized, of course, that in workers compensation cases, other provisions, such as that giving the worker the benefit of the doubt (s. 187) also come into play and that the overall scheme of the **Act** must be considered in its interpretation. But he, like Jones, J.A. in **Penney**, also recognized that general legal principles of causation are highly relevant to the interpretation of the causation provisions in the statute.

[19] Freeman, J.A. in **Johnstone**, concluded that the test for causation in the case before him, and subject to the other relevant provisions to which he refers, was as set out by the Supreme Court of Canada in **Athey v. Leonati**, [1996] 3 S.C.R. 458. In that case, the Court stated that the general test for causation is the "but for" test and that when its application is unworkable, causation is established where the act or condition is a material contributing factor. The Court, after citing **McGhee**, among other authorities, went on to state, that "... a contributing factor is material if it falls outside the *de minimis range*...": § 15. It is clear, therefore, that the test approved by the Court in **Johnstone** for the purposes of the causal link between the disease and the worker's employment (and, of course, subject to the relevant statutory provisions addressing causation or proof of causation) was the same as that approved by the House of Lords in **McGhee**, by the Supreme Court of Canada in **Athey**, and by this Court in the context of the required link between the disease and death in **Penney**.

[20] I conclude, therefore, that **Penney** affirms that the test for causation between

an occupational disease and the worker's death is as set out in the numerous workers' compensation authorities to which the judgment refers. The correct standard by which to assess whether the required causal link has been established is that the occupational disease must be a contributing cause in the sense that, "but for" the occupational disease, death would not have occurred when it did or, that the occupational disease contributed to the death in a material degree. The term "material degree" should be understood, as it was in **McGhee** and **Athey,** to mean something beyond the *de minimis* range, that is, something that is not negligible.

V. Did the Tribunal Misinterpret Penney?

[21] It is apparent from the Tribunal's reasons that, in its view, **Penney** required a stronger causal link than that which I have just described. There is no other explanation, in my opinion, for the Tribunal's decision to refuse benefits notwithstanding its acceptance of Dr. Acres' report. That report was clear that "but for" the occupational disease, death would not have occurred when it did. It was also clear that the occupational disease contributed in more than a *de minimis* way or to more than a negligible extent to the death. In short, the report, which WCAT accepted, established the necessary causal link between the occupational disease and the death according to the standard established in **Penney** properly interpreted.

[22] I conclude, therefore, that the Tribunal erred in law in its interpretation of **Penney** and that its decision must be set aside. I would remit the matter to the Tribunal

to be dealt with according to law.

[23] I will refer briefly to some other matters raised in argument.

[24] There was discussion during argument about whether the term “substantial” is the same as “material” or suggests some higher standard. Whether or not one should use the word “substantial” to express the test is a question of semantics. I would respectfully discourage its use because the term substantial seems to have suggested to the Tribunal some higher standard than that set out in the numerous authorities reviewed in **Penney**. While the term is used in some of the speeches in **McGhee**, it is clearly used as meaning something which is not *de minimis* or negligible. The important point is that by using the term substantial which was contained in the question posed to the Court by the Appeal Board, the judgment in **Penney** did not establish some higher standard than that described in the many authorities to which it refers with approval.

[25] There were also submissions about the use of percentages to describe causation. While this is a common practice, I agree with the appellant that the use of percentages to express the strength of the causal link can be misleading and counterproductive. Percentages may be helpful where apportionment is in issue, but no issue of apportionment arose in this case. It was stressed in the authorities reviewed in **Penney** that the assessment of whether there is a causal link does not involve the weighing of intangibles. Provided that the correct legal test is applied, causation, as

was pointed out in **Athey**, need not be determined with scientific precision but is instead a practical question of fact which can best be answered by ordinary common sense: at § 16. While it is not an error of law to express causation in percentage terms, care must be taken that this does not focus the analysis on some question other than the one which the legal test for causation requires to be answered.

[26] That leads to a related point, which is simply to underline that the Court's role in reviewing the Tribunal's decisions on questions of causation is, absent patently unreasonable findings, to determine if the correct legal test for causation has been applied. My view that the Court ought to intervene in this case is based on what, in my opinion, is an error of law. In this case, it is clear from the Tribunal's reasons that it could not have reached the result it did on the evidence which it accepted other than by applying the wrong test for causation. I stress that the weighing of the evidence relating to causation is, as was pointed out by Freeman, J.A. in **Johnstone** at § 37 and by Roscoe, J.A. in **Brown v. Workers' Compensation Board (N.S.),** 2000 NSCA 101 at § 8, a question of fact for the Tribunal.

[27] It was argued that the decision of this Court in **Workers' Compensation Board (N.S.) v. Workers' Compensation Appeals Tribunal (N.S.) and MacPherson** (1999), 175 N.S.R. (2d) 193 supports the approach taken by the Tribunal in this case. I disagree. The issue of the proper test for causation was not argued in **MacPherson**: see § 8. The judgment simply refers to **Penney** as setting out the applicable test and

holds that the Tribunal did not err, as it had in **Workers' Compensation Board (N.S.) et al. v. McGean et al.** (1998), 168 N.S.R. (2d) 70 by using the automatic assumption provisions for the purposes of eligibility for survivor benefits. There was no issue in **MacPherson** about the proper interpretation of the test set out in **Penney**.

VI. Disposition:

[28] I would, as indicated, allow the appeal and remit the matter to the Tribunal to be dealt with according to law.

Cromwell J.A.

Concurred in:

Hallett, J.A.

Bateman, J.A.