Date: Docket: C.A. 144006

NOVA SCOTIA COURT OF APPEAL
Cite as: Richard v. Nova Scotia (Workers' Compensation Board),
1998 NSCA 118
Freeman, Flinn and Cromwell, JJ.A.

BETWEEN:

WORKERS' COMPENSATION BOARD OF NOVA SCOTIA Appellant Respondent on cross-appeal	David P.S. Farrar and John R. Ratchford for the Appellant Respondent on cross-appeal
- and -	K.H. (Kenny) LeBlanc and Linda L. Zambolin for the Respondent
WILLIAM RICHARD Respondent Appellant on cross-appeal	Sarah Bradfield for the Respondent Tribunal
- and -	
WORKERS' COMPENSATION APPEALS TRIBUNAL OF NOVA SCOTIA Respondent Respondent on cross-appeal	Appeal Heard: May 22, 1998 Judgment Delivered:

THE COURT: Appeal allowed and cross-appeal dismissed per reasons for judgment of Cromwell, J.A.; Freeman and Flinn, JJ.A. concurring.

CROMWELL, J.A.:

I. Introduction:

William Richard injured his back while employed as a munitions worker. Initially, he received temporary total disability benefits from the Workers' Compensation Board. He then claimed for an extension of his temporary disability benefits, an assessment for permanent medical impairment and a referral for vocational rehabilitation assistance. These were refused by the Board but granted on appeal to the Workers' Compensation Appeals Tribunal. However, the Tribunal decided that his permanent partial disability benefits should be apportioned because it found the disability was due, in part, to a pre-existing condition.

The Board now appeals from the Tribunal's award of permanent partial disability benefits and its referral for vocational rehabilitation counselling. Mr. Richard cross-appeals the apportionment of the award. There is no appeal with respect to the temporary disability award. Both the appeal and the cross-appeal are limited by the **Workers' Compensation Act**, R.S.N.S. 1994-95, c. 10, to questions as to the jurisdiction of the Tribunal. This Court is not permitted to consider any other question of law or fact: see s. 256(1).

II. The Tribunal's Decision:

The Tribunal, relying on the decision of this Court in **Doward v. Workers' Compensation Appeals Tribunal and Workers' Compensation Board**

(1997), 160 N.S.R. (2d) 22 decided that the provisions of the former Act, R.S.N.S. 1989, c. 508, applied. Having heard oral evidence, the Tribunal concluded that it should review the Hearing Officer's decision for correctness.

After reviewing the medical reports and the other evidence, the Tribunal found that Mr Richard was "... permanently disabled from returning to his pre-accident type of employment" and that there was a reasonable inference that this disability "... arose out of his injury in May of 1991 in combination with the ongoing stress of his work." Although the Hearing Officer had concluded that this disability resulted from Mr Richard's pre-existing spondylitic spondylolisthesis and not from his injury at work, the Tribunal disagreed, stating:

> It is clear from Dr. Canham's report of January 31, 1994, that the Appellant suffers from a permanent injury. He is permanently disabled from returning to his pre-accident type of employment. Dr. Canham indicates that the Appellant must avoid heavy lifting and must wear his brace. He indicates that he can get around without difficulty but if he is required to lift heavy objects or work at a labour-intensive type of job, he will have problems. He indicates that the Appellant lacks at least 20% of the spinal motion in his lumbar spine. He indicates that the Appellant's pre-accident employment would significantly aggravate his injury and therefore, it would be reasonable to re-train the Appellant for some lighter type of office work. Dr. Kajetanowicz indicates in her report of April 8, 1994 that the Appellant is still experiencing mechanical back pain and she does not think that he will ever be able to return to his pre-accident employment since it would most probably aggravate his problem. She indicates that his permanent partial disability results from his injury at work.
>
> Another circumstance in the Appellant's favour is the fact that although he had an underlying condition, he was able to work for many years without difficulty. He had an incident

> twelve years earlier which required him to miss a few weeks from work, but it did not constitute an ongoing disability. Therefore, a reasonable conclusion based on the evidence on file is that the injury in May of 1991, in combination with the nature of the Appellant's work, was the trigger mechanism for the permanent injury suffered by the Appellant. I find that the Hearing Officer erred in failing to draw this conclusion.

The Tribunal then turned to the question of apportionment, referring to s. 9(2) of the former Act. That section provides that, where an injury is due in part to employment and in part to other causes or where it aggravates, activates or accelerates a disease or disability existing prior to the injury, compensation is payable for the proportion of the disability which is reasonably attributed to the injury. The Tribunal found the section applicable and remitted the issue of the appropriate percentage for apportionment to the Board. The Tribunal said:

> I find that the medical evidence on file does not support a conclusion that the Appellant would have remained symptom-free had it not been for his work and/or work-accident. Although, Dr. Canham in both his May, 1992 report and his January, 1994 report clearly links the Appellant's ongoing disability with his work injury and the nature of the work he performed, he does not state categorically that the Appellant would have remained symptom-free but for the accident. Dr. Canham diagnosed the Appellant's condition as an injury superimposed on the spondylitic spondylolisthesis. Therefore, it seems reasonable that a portion of responsibility for the Appellant's permanent disability rests with his pre-existing condition, and a portion rests with the nature of his work and the work incident in May of 1991 which aggravated his condition to the point where he is now unable to return to his pre-accident employment.
>
> I am unable, on the evidence before me, to make a finding as to what portion of disability should be attributed to the

> compensable cause and what portion should be attributed to the non-compensable cause. I therefore direct that any evidence on the issue of percentages for apportionment be forwarded directly to the Board.

Turning next to the quantification of the permanent disability, the Tribunal made two findings.

First, it concluded that the Board's Guidelines for the Assessment of Permanent Medical Impairment (referred to as the PMI Guidelines) did not apply to Mr Richard. Relying on **Doward**, the Tribunal decided that Mr. Richard's case was governed by the transitional provisions in s. 228 of the current Act and that the PMI Guidelines would apply only if authorized by the transitional provisions of the current Act. The Tribunal found that the transitional provisions do not specifically authorize such application and, therefore, that the Guidelines would not apply.

The result, according to the Tribunal, was that Mr. Richard's case should be considered under s. 45(1) of the former Act which required evidence of a permanent medical impairment and a resulting wage loss in order to qualify for permanent partial disability benefits. The Tribunal found Mr. Richard met those requirements, stating:

> I find that the evidence on file supports a reasonable inference that the Appellant has suffered from a permanent impairment, in other words a loss of physical function, as a result of his workplace injury. Both Dr. Canham and Dr.

> Kajetanowicz make clear statements in this regard. Also, the evidence on file, and in particular, the Appellant's testimony, establishes that the Appellant suffers from a wage loss as a result of his permanent physical impairment. Accordingly, I find that the Appellant is entitled to a permanent partial disability award pursuant to s. 45(1) of the *former Act* calculated in accordance with s. 228 of the current Act.

Second, the Tribunal found that, even if the PMI Guidelines were applied, Mr. Richard would qualify for a 10 - 30 per cent impairment rating. The determination of the specific figure was remitted to the Board:

> The actual degree of the Appellant's permanent medical impairment has no bearing on the wage loss award to which the Appellant is entitled pursuant to s. 45(1) of the *former Act*. However, I find that the Appellant would meet the requirements of the PMI Guidelines under either the former or the current Act. The spondylolisthesis section under the Lumbar Spine heading of the Guidelines contemplates awards pursuant to either s. 10(5) of the current Act or s. 9(2) of the former Act. The section provides for circumstances such as the Appellant's where there has been a fusion with significant objective abnormalities on examination. The Guidelines indicate that the worker is entitled to a permanent medical impairment rating of 10 to 30 percent. I find that the Appellant would be entitled to a rating within this range, however, I am prevented from assigning a specific figure because of the lack of evidence on this point. Again, I direct that any evidence on this issue be forwarded directly to the board.

That left for consideration the issue of vocational rehabilitation assistance. The Hearing Officer had found that Mr. Richard was not entitled to vocational rehabilitation assistance, presumably because of the conclusion that his ongoing problems did not result from the work-related injury. The Tribunal,

having reached the opposite conclusion with respect to the cause of the disability, found that it was appropriate to order a referral to vocational rehabilitation. The Tribunal addressed the question of whether the relevant policies of the Board under the current Act should be applied to this issue. It concluded that such policies should not be considered:

> I agree with the Board that s. 83 of the *former Act* is the section which governs the Appellant's entitlement to vocational rehabilitation assistance and it establishes that the decision to award vocational rehabilitation assistance is a discretionary one. However, I do not agree that Policy 4.1.1 of the current *Act* is applicable to a determination of entitlement to vocational rehabilitation assistance in the Appellant's case. I reference Tribunal *Decision No. 96-401A-TAD* which considered the role of the current *Act* policies when determining entitlement pursuant to the *former Act*. The Tribunal referenced a portion of the *Doward, supra*, decision at pp. 45 and 46 where the Court of Appeal stated that "regulations and policies enacted pursuant to the former *Act* are what must be applied." I agree with the finding of the Tribunal that no policies of the current *Act* would apply to cases governed by the Transitional Provisions, unless expressly mandated in the Transitional Provision itself. A contrary finding would ignore the presumption against retroactivity and I find no authority in the comments of the Court of Appeal in *Doward, supra*, or elsewhere, to make an exception to the presumption against retroactivity where the policy or provision in question deals with discretionary benefits. Therefore, I do not agree with the Board's submissions in this regard and I have not applied Policy 4.1.1.
>
> However, there was a policy formulated under the *former Act* which set out criteria for eligibility to vocational rehabilitation benefits pursuant to s. 83 of the *former Act*. It is essentially the same as Policy 4.1.1 enacted under the *current Act*. It provides that vocational rehabilitation services may be provided where, in the opinion of the Board, the worker is likely to suffer a permanent medical impairment and also is likely to suffer an earnings loss as a result of the permanent medical impairment. Having found that the Appellant does

> suffer from a permanent medical impairment and an earnings loss as a result of his work injury, I find that he meets the criteria for vocational rehabilitation services under both the *former* and current *Act* policies.
>
> I note the Board's argument that it is appropriate to refer to the PMI Guidelines in assessing entitlement to vocational rehabilitation assistance, even if it is not appropriate to apply the Guidelines to a determination of entitlement to permanent partial disability benefits. For the reasons stated above, I find that the PMI Guidelines, as contained in current *Act* Policy 3.3.2 should not be applied. There were Guidelines formulated pursuant to the *former Act* which, although not in the form of a policy, were utilized by the Board in determining entitlement to permanent partial disability benefits, as well as vocational rehabilitation assistance. However, it is not necessary for me to make a ruling regarding whether or not the PMI Guidelines are relevant to determinations respecting Vocational Rehabilitation Assistance because I have found that the Appellant's disability fits with the Board's PMI Guidelines under the former Act. A decision on this issue would flow more logically from a situation where the worker seeking Vocational Rehabilitation Assistance did not fit within the Guidelines.

III. Issues on the Appeal and Cross-Appeal

Although the Notice of Application for leave to appeal sets out four grounds, it is more convenient to re-organize them into two main issues.

The first is whether the Tribunal erred in jurisdiction in deciding that policies of the Board made under the current Act do not apply to transitional cases under s. 228. This issue calls into question the Tribunal's interpretation and application of this Court's decision in **Doward**. The Board's position, in

essence, is that the Tribunal misapplied **Doward** and that the current Act policies apply so long as they do not limit or negate substantive benefits provided by the former Act.

The second issue concerns the Tribunal's order referring Mr. Richard for vocational rehabilitation assistance. The Board's submission on this issue is that vocational rehabilitation assistance is within the discretion of the Board, not the Tribunal, and that it was, therefore, beyond the jurisdiction of the Tribunal to order the referral.

On the cross-appeal, Mr. Richard raises two issues which, for the purposes of analysis, may be considered as one. It is whether the Tribunal erred in jurisdiction in concluding that Mr. Richard's disability was due to a combination of his compensable injury and a pre-existing condition and that the award should therefore be apportioned.

IV. THE APPEAL

(a) The Application of Current Act Policies to s. 228 Transitional Cases

The Board policies in issue are Number 3.3.1, Number 3.3.2 and Number 4.4.1. Policy 3.3.1 and 3.3.2 concern the calculation of permanent impairment benefits as set out in s. 34. Section 34(2) specifically requires the Board to establish a permanent impairment rating schedule. Policy 4.1.1 deals

with eligibility for vocational rehabilitation under s. 112 of the **Act**. The general legislative authority for policies is found in s. 183 of the current Act. The most relevant portions of s. 183 are as follows:

> (2) The Board of Directors may adopt policies consistent with this Part and the regulations to be followed in the application of this Part or the regulations.
>
> . . . . .
>
> (5) Until a different policy is adopted, every policy adopted by the Board of Directors pursuant to subsection (2) is binding on the Board itself, the Chair, every officer and employee of the Board and on the Appeals Tribunal.
>
> (6) Any policy adopted by the Board of Directors may be retrospective or prospective in application and may be made retroactive to any date designated by the Board of Directors.
>
> (7) The Chair, every officer and employee of the Board and the Appeals Tribunal may, in the performance of functions under this Part, interpret the policies, but it is not within the jurisdiction of any of them to refuse to apply a policy on the ground that it is inconsistent with this Act or the regulations.

In summary, the section authorizes the Board of Directors of the Workers' Compensation Board (hereafter "the Board") to adopt policies consistent with Part I of the **Act** and the **Regulations.** These policies are binding on the Board and the Tribunal, among others. They may apply retrospectively or prospectively and be made retroactive to any date designated

by the Board.

Policy 3.3.1 was approved by the Board on March 1, 1995. It came into effect February 1, 1996, and applies “to workers injured on or after March 23, 1990". (Mr. Richard was injured in May of 1991). The policy provides that where the Board determines that a worker has a permanent medical impairment as the result of a work-related injury, the worker is entitled to a Permanent Impairment Benefit (PIB). The degree of the impairment is to be determined by the Board based on a rating schedule established by the Board. Reference is made to Policy 3.3.2.

Policy 3.3.2 was approved by the Board on September 15, 1995 and came into effect on February 1, 1996. It applies to <u>all decisions made</u> on or after February 1, 1996. (The Tribunal’s decision in this case was made on November 20, 1997). This policy directs that to determine “the existence and degree of a worker’s permanent impairment, the Board shall use the Guidelines for Assessment of Permanent Medical Impairment (the Guidelines)” attached to the policy.

Policy 4.1.1 was approved by the Board on June 1, 1995, and came into effect February 1, 1996, and as with Policy 3.3.2, applies to <u>all decisions made</u> on or after February 1, 1996.

The Tribunal found that if these policies apply, Mr. Richard would receive a rating of 10-30% under the Spondylolisthesis Section of the Guidelines annexed to Policy 3.3.2. The Tribunal also found that Mr. Richard met the criteria for vocational rehabilitation services under both the former and the current Act policies. As noted earlier, however, the Tribunal found that the current Act policies do not apply to s. 228 cases such as this one. In its view, **Doward** decided that the policies could not have such a retroactive application because they are not specifically mandated by the transitional provisions of the **Act**.

In my respectful view, the Tribunal misinterpreted **Doward** in this respect and, as a result, made a jurisdictional error.

(b) Scope of Review

Before turning to the interpretation of **Doward**, it is helpful to examine why the Tribunal's decision on this issue goes to its jurisdiction. Where, as here, the Court's review of the Tribunal is restricted to jurisdictional questions, an error of law is reviewable by the Court if the error is made in interpreting a provision that limits the Tribunal's jurisdiction. As Sopinka, J. said in **Pasiechynk v. Saskatchewan Workers' Compensation Board** (1997), 149 D.L.R. (4th) 577 at 588:

> The test as to whether the provision in question is one that limits jurisdiction is: was the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board?

On questions of jurisdiction, the Tribunal is reviewable for "mere error"; in other words, on the correctness standard: see **Pasiecynyk, supra**, at p. 587-8.

In this case, the essence of the Tribunal's decision is that the Policies do not apply because they are inconsistent with the transitional provisions, notably s. 228, of the **Act**. Section 183(7) (set out above) of the **Act** provides that it is not within the jurisdiction of the Tribunal to refuse to apply a policy on the ground that it is inconsistent with the **Act** or the **Regulations**. Section 183(8) provides for appeals (with leave) directly to this Court from a final order of a hearing officer (and bypassing the usual appeal to the Tribunal) if it is alleged that "a policy upon which the decision of the hearing officer depends is not consistent with this **Act** or the **Regulations** ...". The combined effect of these sections is to show the Legislature's intent that the question of the consistency of Board policies with the **Act** and **Regulations** is a jurisdictional one to be decided, ultimately, by this Court.

I conclude, therefore, that the issue of whether the policies are inconsistent with the **Act** is jurisdictional and that the standard of review to be applied by this Court to this issue is correctness.

(c) The Interpretation of Doward

Doward was the first of a series of decisions of this Court interpreting transitional provisions in ss. 226 through s. 229 of the current Act. It concerned (as does this case) section 228, which, as subsequent cases have shown, has unique wording making its interpretation particularly difficult. It is helpful to place **Doward**'s interpretation of s. 228 in the context of the interpretations subsequently given to its companion sections 226, 227 and 229.

This Court in **Lowe v. The Workers' Compensation Appeals Tribunal of Nova Scotia and the Workers' Compensation Board of Nova Scotia** (1998), 166 N.S.R. (2d) 321(C.A.) held that ss. 226 and 227 are a complete code that applies to workers injured before March 23, 1990 and that by enacting these sections, the Legislature intended to legalize, retroactively, the compensation formula that was applied by the Board before **Hayden v. Workers' Compensation Appeal Board (N.S.)(No. 2)** (1990), 96 N.S.R. (2d) 108 (C.A.). It was further held that, unlike s. 228 which was considered in **Doward**, these sections specifically incorporate and authorize the application of permanent impairment ratings.

Section 229 was considered in **Workers' Compensation Board of Nova Scotia v. Workers' Compensation Appeals Tribunal of Nova Scotia and Muise** (May 12, 1998). This Court held that, except where a contrary intention appears in the statute, as it does in section 228, the current Act is intended to apply to parties who had suffered injuries prior to its enactment. Justice Bateman,

for the Court, said:

> **Sections 226 to 230** are primarily directed at the recalculation of compensation paid pursuant to the former **Act**. What is not specifically addressed in the wording of those sections is the resolution of the outstanding claims of workers, injured before the effective date of the new legislation. I conclude that the legislators intended that those claims be decided in accordance with the new legislation, unless a contrary intention appears. The drafters of the legislation could not have been unaware of the backlog, documented in the Minister's paper of October 1994. In the face of the inability of the Board of Directors to devise an acceptable compensation policy within the former **s. 45** and given the fact that no permanent awards were made pursuant to the **Hayden** decision, it could not have been the intention of the legislature that unresolved claims be decided in accordance with the former **Act**. That **Act** had proved to be unworkable in the face of **Hayden**. To suggest that it was the intention of the legislature to keep the former **Act** alive for the purpose of thousands of unresolved claims is incompatible with the "circumstances in which it was enacted" (**Healy, supra**). (emphasis added)

The Tribunal, in the present case, adopted an expansive interpretation of **Doward**. On its reading of the case, **Doward** stands for the proposition that the PMI Guidelines only apply if authorized by the transitional provisions of the **Act**. While there are some broad statements in **Doward** which, taken in isolation and out of the context of the decision, support this interpretation, I am of the view that **Doward**, properly understood, supports a less sweeping rejection of the applicability of the Guidelines to s. 228 cases.

It is important to remember that **Doward** involved an injury that the Tribunal found was compensable under the provisions of the former Act - the **Act**

in force at the time of the injury. The Tribunal found that there was no requirement for objective findings of impairment anywhere under the former Act and that the hearing officer had been wrong to conclude that chronic pain syndrome could not support a claim for compensation on the law as it stood at the time of the Hearing Officer's decision and at the time of the injury. However, the Tribunal also found that it should apply Policies 3.3.1 and 3.3.2 which "0-rated" Ms. Doward's injury because there were not "significant objective abnormalities on examination." The Tribunal's application to Ms. Doward's case of these Policies, made under the current Act, had the effect of denying compensation for an injury suffered prior to the coming into force of the current Act and which, according the Tribunal, was compensable under the former Act in force at the time of the injury.

The focus of this aspect of the **Doward** decision was the Court's concern that the Policies were being applied retroactively so as to take away rights acquired under the former legislation. The Court applied a well-established approach to statutory interpretation and concluded that only a very clear grant of statutory authority, which was not found in the current Act, would suffice to allow the Board, through its policy-making authority, to take away, after the fact, rights which had accrued under the former Act. In short, the Court found that neither s. 34 nor s. 183 clearly evidenced a legislative intent to authorize Board policies which take away rights preserved by s. 228. This core aspect of the decision is put very clearly in paras. 132 and 133 of Justice Chipman's reasons:

> As I have pointed out, this is a transitional appeal. The

> appellant's hearings before the Board all took place before February 1, 1996. The "decision" which the Tribunal was called upon to review on appeal was the decision of the hearing officer which was made on August 4, 1995, before the effective date of Policy 3.3.2. In my opinion the Tribunal erred in a patently unreasonable manner in concluding that that policy applied to its decision because, in so doing, it was changing the rules in the middle of the game. For this reason as well, Policy 3.3.2 and the PMI Guidelines are inapplicable to the appellant's case.
>
> The PMI Guidelines are substantive in nature and by the Tribunal's own decision, operated to eliminate the appellant's condition from consideration for permanent disability by a table with zero percentage. Subject only to recalculation, any rating schedule made pursuant to s. 34 which is not consistent with awarding compensation "in accordance with the former **Act**" [i.e. as required by s. 228] is *ultra vires*. The presumptions against retroactivity and interference with vested rights operate. (emphasis added)

I find further support for this interpretation elsewhere in **Doward**. For example, Justice Chipman held that the Policy applied to recalculation to the extent that it is not inconsistent with the legislation. Having so decided, Justice Chipman said:

> To the extent that this policy is not inconsistent with s. 34 in recalculating "the compensation awarded in accordance with the former **Act**", it applies to the exercise. As I pointed out earlier, s. 228(1) of the current **Act** is subject to s. 228(2) which requires recalculation in accordance with ss. 34-58. Reference is made in paragraph 2 to Policy 3.3.2. This policy is not applicable if it is inconsistent with the entitlement provisions of the former **Act** because s. 228 provides that subject to recalculation "the compensation ... is deemed to be and always to have been awarded in accordance with the former **Act**". There is no clear legislative intent in ss. 34-58 to make policies retroactive in such a manner as to render the compensation not in accordance with the former **Act.** To give ss. 34-58 that

> interpretation would be to ignore the presumption in the **Interpretation Act** against retroactivity and rewrite s. 228. (emphasis added)

Even in portions of the reasons in **Doward** that at first blush appear to take a broader approach, the concern that policies cannot take away vested rights arising under legislation is clear. For example, in paragraph 124, which contains the quotation relied on by the Tribunal, the following appears:

> Simply because the Tribunal is, generally, governed by the entire **Act** does <u>not entitle it to apply sections therein which are contradictory to the legislative intention respecting transitional cases.</u> (emphasis added)

The interpretation of **Doward** that I would adopt is consistent with several other cases decided by this Court since **Doward** and is not inconsistent with any cases in this Court to which we have been referred by counsel or which I have discovered in my own research. For example, **Roberts v. The Workers' Compensation Appeals Tribunal of Nova Scotia and The Workers' Compensation Board of Nova Scotia** (1998), 165 N.S.R. (2d) 236 (C.A.), **Clattenburg v. The Workers' Compensation Appeals Tribunal of Nova Scotia and The Workers' Compensation Board of Nova Scotia** (1998), 165 N.S.R. (2d) 291 (C.A.), **Brown v. The Workers' Compensation Appeals Tribunal of Nova Scotia and The Workers' Compensation Board of Nova Scotia** (1998), 165 N.S.R. (2d) 288 (C.A.) and **Weldon v. The Workers' Compensation Appeals Tribunal of Nova Scotia and The Workers' Compensation Board of Nova**

Scotia (1998), 165 N.S.R. (2d) 284 (C.A.) were s. 228 cases in which application of the policies had the effect of denying compensation.

I conclude that **Doward** does not stand for the broad proposition attributed to it by the Tribunal that current Act policies are irrelevant to s. 228 cases. Instead, in my respectful view, **Doward** holds that current Act policies, which are otherwise lawful and applicable to s. 228 cases, must not be interpreted or applied so as to take away vested rights available to workers under s. 228. There is no suggestion in the present case that the application of the policies would have that effect. It follows that the Tribunal erred as to its jurisdiction in failing to apply them.

(d) Vocational Rehabilitation

The Tribunal ordered that Mr Richard be referred for vocational rehabilitation assessment. The Board submits that this was beyond the Tribunal's jurisdiction because this determination is solely within the discretion of the Board and its hearing officers. Simply put, the Board's position is that the Tribunal does not have jurisdiction to determine whether vocational rehabilitation assistance should be provided.

It is common ground that the benefits in question are to be considered pursuant to s. 83 of the former Act which provides:

> 83. To aid in getting injured workers back to work and to assist in lessening or removing any handicap resulting from their

> injuries, the Board may take such measures and make such expenditures as it may in its discretion deem necessary or expedient, and the expense thereof shall be born out of the Accident Fund, and may be collected in the same manner as moneys required to pay compensation or expenses of administration.

As noted by this Court in **Workers' Compensation Board of Nova Scotia v. Workers Compensation Appeals Tribunal and MacLeod**, (May 21, 1998) at page 2, the provisions of the **Act** respecting appeals from a Hearing Officer to the Tribunal include broad powers of review. Similarly in **Doward**, this Court held that the matters to be considered and the discretion to be exercised by the Tribunal on appeal are similar to those of the Board acting through a Hearing Officer. In this regard, Justice Chipman said, at para. 76, 81 and 84:

> I agree with counsel for the appellant that a comparison between the provisions governing a hearing before a hearing officer and those governing a hearing before the Tribunal shows that each has a similar method of operation, must consider similar matters in reaching a decision and has similar discretions which may be exercised.
>
> . . . . .
>
> Support for this approach can be found in the very wide scope of review of a hearing officer's decision given to the Tribunal by s. 243(7)(e). This suggests that the Legislature intended the Tribunal to be able to substitute its judgment for that of the hearing officer in the instances where an appeal lies. .....
>
> By their very nature, decisions tested under s. 243(7)(a), (b), (c) and (d) are subject to review by the Tribunal for correctness. Under s. 243(7)(e), the Tribunal is given power to exercise an independent judgment in areas where the hearing officer has made findings. There is no apparent difference in the degree of expertise between the hearing officer and the Tribunal, as was the case between the Competition Tribunal

and the court in **Southam**, supra. (emphasis added)

The soundness of this approach to the Tribunal's role is amply demonstrated by the provisions relating to its jurisdiction. Leave to appeal to the Tribunal may be granted if "the hearing officer erred in granting or denying a benefit . . . ": s. 243(7)(e). The nature of such error is not limited by definition. The Tribunal may hold an oral hearing (s. 245(2)) and, in addition to evidence previously submitted or collected by the Board, it may receive any additional evidence that the participants present or that it may request or obtain: s. 246(1)(b) and (e). The Tribunal is, on appeal, empowered to "confirm, vary or reverse" the decision of a hearing officer: s. 252(1). A comparison of these powers with those granted to hearing officers in s. 196 and following suggests not only that the Tribunal's authority to review and decide are extremely broad but that they were intended to parallel the authority of hearing officers.

I conclude that, with respect to cases within its jurisdiction, the Tribunal has broad powers of review, including the power to exercise the discretion of a Hearing Officer with respect to a referral for vocational rehabilitation where that issue was both properly before the Hearing Officer and before the Tribunal on appeal. Of course, the Tribunal in this, as in all other matters, is bound by Board policies lawfully applicable to it: see s. 183(5) and 183(8).

The question of vocational rehabilitation was addressed by the Hearing

Officer in this case. The issue was properly before the Tribunal. There was no jurisdictional error (apart from the refusal to apply the current Act policies as discussed earlier in these reasons) in considering the issue and making the order it did.

The Tribunal has considerable flexibility in how it approaches its task. It is to determine its own procedure and may refer appeals to the Chair of the Board or to a Hearing Officer: s. 247(1) and 251. It may be that, just as appellate courts have developed guidelines for the exercise of their authority, the Tribunal may choose, in ways consistent with its responsibilities, to do the same. It may decide that, when dealing with a discretionary matter, the wiser course generally will be to refer the matter back to the Board for reconsideration in light of the Tribunal's factual conclusions. These are matters within the jurisdiction of the Tribunal and, provided they are not resolved in a patently unreasonable manner, they cannot attract intervention by this Court.

(e) Conclusions Respecting the Appeal

The Tribunal made a jurisdictional error in concluding that current Act policies are irrelevant to s. 228 cases like this one. Such policies, if applicable according to their terms, and otherwise lawful, apply to s. 228 cases provided that they do take away vested rights available to workers under s. 228.

On the second issue, the Tribunal did not make a jurisdictional error in

ordering the referral for vocational rehabilitation.

VI. The Cross-Appeal

On the cross-appeal, Mr. Richard submits that the Tribunal erred in jurisdiction when it determined that the amount of compensation payable to him for permanent medical impairment and permanent partial disability was subject to be apportioned pursuant to s. 9(2) of the former Act.

Mr. Richard's argument may be summarized in the following propositions:

(i) Section 24 of the former Act applies to the question of apportionment so that the Tribunal is required to determine whether there is a reasonable inference in favour of full compensation;

(ii) In determining whether there is a reasonable inference, the Tribunal must be correct;

(iii) Here, the evidence in his claim supports the reasonable inference that his pre-existing spondylitis spondylolisthesis was itself the result of his employment activities;

(iv) Alternatively, if the standard of review is patent unreasonableness, the Tribunal's decision should still be set aside.

I will first consider the standard of review issue raised by propositions (ii)

and (iv).

Since the argument of this appeal, this Court has released its reasons for judgment in **Rijntjes v. Workers' Compensation Appeals Tribunal and Workers Compensation Board** (July 9, 1998). That case decides that, given the evolution in the jurisprudence on the standards of judicial review, particularly in the Supreme Court of Canada, the strong privative clause in the current Act, the wide-ranging power of review by the Tribunal and other factors fully described in that judgment, the interpretation and application of s. 24 by the Tribunal are matters within its jurisdiction. The Court concluded, therefore, that the Tribunal's decision in relation to s. 24 is not reviewable as to its correctness and that the Court may intervene only if the Tribunal's decision is patently unreasonable: see **Rijntjes, supra**, at pp. 19-20, *per* Flinn, J.A. for the Court.

The issue in this appeal is, therefore, whether the Tribunal was patently unreasonable in failing to draw the inference in favour of full compensation. In stating the issue in this way, I am not overlooking the Board's submissions relating to the difficulty of applying s. 24 to the s. 9(2) determination. There are intricate questions raised by the interaction of these two sections. Given the view I take of the case, I will approach it by assuming, without deciding, that if there was a reasonable inference in favour of full compensation, as opposed to apportionment, the Tribunal should have drawn it and that the Court should intervene if the

Tribunal's failure to do so was patently unreasonable.

The Tribunal's reasons on this issue were brief. It concluded, based on the medical evidence, that Mr. Richard's condition resulted from an injury superimposed on spondylitis spondylolisthesis. It is implicit in this conclusion that the Tribunal decided either that the spondylitis spondylolisthesis was a partial cause of the injury, as was the back injury at work or that the spondylitis spondylolisthesis was a "disease or disability existing prior to the injury" which the work place injury "aggravated, activated or accelerated": see s. 9(2).

Mr. Richard's submission, in essence, is that the evidence supported a reasonable inference that his spondylitis spondylolisthesis was the result of his employment activities.

The case was treated throughout by the Board as a s. 9(2) case. The claim was initially accepted on an "aggravation basis". At the hearing before the Tribunal, Mr. Richard's counsel submitted that the spondylitis spondylolisthesis was an underlying condition that was "triggered" by the injury at work. While there was some evidence that, in a very small percentage of cases, it is possible that an injury may produce spondylitis spondylolisthesis, there was no evidence that this was the case with Mr. Richard. In fact, his counsel before the Tribunal did not argue that it was. When specifically asked about s. 9(2), counsel responded as follows:

> I guess my submission would be -- I think there's an argument

> that -- depending on the interpretation of that phrasing that what he had was an underlying condition. It certainly, I would submit, hasn't aggravated it because it wasn't bothering him to that point. It may have accelerated it and may have triggered it. That may be something we'd have to lead (sic) up to the Board's examining doctors.
>
> It's not something that Dr. Canham had addressed. Unfortunately, as much as we may have liked to have referred him or had him here because it's a little hard to get a hold of him in North Dakota. But, certainly, recognize that may play some factor. But, certainly, it appears that the work injury is what was the triggering event. It wasn't an existing disability at the time. (emphasis added)

I have reviewed the medical evidence in light of the submissions made on behalf of Mr. Richard. In my respectful view, the Tribunal's conclusion concerning the application of s. 24 to the evidence, in the context of its consideration of s. 9(2), was not patently unreasonable.

In my view, the cross-appeal accordingly fails.

VII. Disposition

The appeal should be allowed on the basis that the Tribunal erred in failing to apply current Act policies, otherwise applicable to this case, to the extent they do not take away vested rights available under s. 228. The cross-appeal should be dismissed. The matter is remitted to the Tribunal for reconsideration in light of the applicable policies.

Cromwell, J.A.

Concurred in:

Freeman, J.A.

Flinn, J.A.

C.A. No.144006

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

WORKERS' COMPENSATION BOARD OF NOVA SCOTIA	)	
Appellant Respondent on cross-appeal	)	
- and -	)	REASONS FOR JUDGMENT BY:
WILLIAM RICHARD	)	CROMWELL, J.A.
Respondent Appellant on cross-appeal	)	
- and -	)	
WORKERS' COMPENSATION APPEALS TRIBUNAL OF NOVA SCOTIA	)	
Respondent Respondent on cross-appeal	)	