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NOVA SCOTIA COURT OF APPEAL
[Cite as: *Nova Scotia (Workers' Compensation Board) v. Johnstone*, 1999 NSCA 164]

Chipman, Freeman and Cromwell, JJ.A.

BETWEEN:

The WORKERS' COMPENSATION BOARD OF NOVA SCOTIA)

Appellant

Janet E. Curry
Madeleine F. Hearns
for the appellant

- and –

THE WORKERS' COMPENSATION) APPEALS TRIBUNAL OF NOVA SCOTIA) and ARTHUR JOHNSTONE)
(WCB Claim No. 5058161))

Respondents

Anne Clark
for the respondents

Appeal Heard: November 15, 1999
Judgment Delivered: December 24,1999

THE COURT: Appeal dismissed as per reasons for judgment of Freeman, J.A., Chipman and Cromwell, JJ.A., concurring.

FREEMAN, J.A.:

[1] The respondent, Arthur Johnstone, began working for the Sydney Steel Corporation as a student in 1968, and from 1971 was steadily employed there as a labourer and machinist until he had to cease work as roller shop foreman

September 3, 1993, as the result of bladder cancer which was first diagnosed in 1988. He claimed Workers' Compensation by notice filed on January 27, 1996.

[2] His claim was rejected by the Workers' Compensation Board on grounds that the evidence was insufficient to reasonably associate his bladder cancer with his employment. His appeal to the Workers' Compensation Appeals Tribunal was allowed. It was found that:

> The appellant's bladder cancer is causally connected to his employment, pursuant to s. 187 of the **Act**. The Appellant is entitled to recognition of his claim.

[3] It was not in issue that this was a finding that Mr. Johnstone suffers from an occupational disease within the meaning of the present **Act** which, if not overturned on appeal, would entitle him to compensation.

[4] The **Act** referred to is the **Workers' Compensation Act**, S.N.S. 1994-95 c.

10, all relevant sections of which were proclaimed November 21, 1995, to come into force February 1, 1996. Sometimes referred to as the "new" or "current" **Act",** it repealed what is known as the "old **Act**," or "former **Act**," **Workers' Compensation Act** R.S.N.S. 1989, c. 508. While transitional difficulties persist, the general rule is that, except where contrary intentions appear, outstanding claims which arose prior to February 1, 1996, are to be determined under the new **Act**--see **Workers' Compensation Board (N.S.) v. Muise et al.** (1998), 170 N.S.R. (2^{nd}) 253, (Leave to appeal to Supreme Court of Canada refused ,[1998] S.C.C.A. No. 394.)

[5] The Board was granted leave to appeal the Tribunal's decision to this court pursuant to s. 256 (1) of the current **Act**:

> 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.

[6] Prior to an amendment contained in S.N.S. 1999 c. 1, s. 36, the right of appeal to this court was limited to the Tribunal's jurisdiction alone.

[7] The grounds of appeal were as follows:

1. That the Workers' Compensation Appeals Tribunal erred in law and jurisdiction in its application of section 187 of the current Act in its determinations that it could draw an inference under section 187 in the absence of evidence to do so.

2. That the Workers' Compensation Appeals Tribunal, erred in law in failing to apply subsection 83(6) of the current Act to this appeal, given that subsection 83(6) presented a complete bar to compensation for the Appellant in the appeal before them.

[8] Section 83 is a limitation provision related to the filing of the claim, which in the case of an occupational disease, requires a notice of claim to be filed "within twelve months after the worker learns that the worker suffers from the occupational disease for which the worker is claiming compensation." Extensions for filing may be granted but, pursuant to s. 83(6), not beyond a five year period. Section 69 of the old **Act** relating to notice of the accident does not purport to impose an absolute limitation on the right to grant filing extensions. While s. 83(6) was not argued before the Board or the Tribunal, the Board submitted that it applied nevertheless. The respondent was aware he had bladder cancer in 1988, but the issue whether he knew he had an occupational disease within the meaning of

the Act was not determined. In any event, his notice was filed January 27, 1996, four days before the new **Act** took effect. This ground was withdrawn by the appellant in the course of the hearing.

[9] Section 187 provides:

> 187 Notwithstanding anything contained in this Act, on any application for compensation an applicant is entitled to the benefit of the doubt which means that, where there is doubt on an issue respecting the application and the disputed possibilities are evenly balanced, the issue shall be resolved in the worker's favour.

[10] The main thrust of the Board's appeal was that the Tribunal had committed a patently unreasonable error in drawing an inference in favour of the worker on the basis of the evidence before it, which did not include an expert medical opinion that Mr. Johnstone's cancer was causally linked to exposure in the workplace. This involves consideration of the burden of proof under s. 187, the evidence, causation, and the standard of review.

[11] The appeal commissioner, Joyce Dassonville, acknowledged that no treating physician had expressed an opinion that the respondent's cancer was causally connected to his work for the employer, but none had expressed a contrary view. One medical report by Dr. P.K. Joseph, a radiation oncologist, stated that "even though there are clear associative factors, one cannot be definitive about the causal relationships as he (the respondent) would wish."

[12] The Tribunal also considered the expert evidence of Dr. Muir, an occupational health and environmental medicine specialist, given January 23, 1997 in the case of another worker:

> If we accept that coke oven exposure is associated with bladder cancer and transitional cell cancer of the kidney then adjudication would have to take account of the duration of exposure. Coke oven exposure in modern times is not a powerful cause of bladder cancer, at least by comparison with cigarette smoking. In the absence of specific exposure information it would be reasonable to accept a case where coke exposure was 10 years or more in a non smoker and 15 years or more in a smoker.

[13] This was generic evidence like that derived from textbooks, non-specific to the respondent but relevant to the cause of bladder cancer. (The Tribunal's ability to cross reference such evidence from its experience with other cases seems to characterize it as a specialized body with growing expertise, a point to be weighed in determining the deference to which it is entitled.)

[14] The Tribunal considered circumstantial evidence: the length and type of employment, the fact of the disease, the worker's non-contributory family history, evidence of carcinogens in the workplace, summaries of generic studies of the correlation between machinists and other workers in workplaces such as coke ovens and urinary tract cancers, factors such as the high cancer rate in the Sydney area, and evidence that other workers of the employer with similar work histories developed bladder cancer. (It was not known whether the six named similarly afflicted employees or former employees had been accepted for Workers' Compensation or, indeed, whether they had filed claims.)

[15] The Tribunal, like the Board, is entitled under s. 178 to exercise the same powers of inquiry as a commissioner pursuant to the **Public Inquiries Act**, and may accept oral or written evidence except evidence inadmissible under a statute or by reason of privilege. It may also "require the production of any document or thing the Board or the Appeals Tribunal considers necessary for the full investigation and consideration of any matter." Section 183 provides that

written statements of policy adopted by the Board of Directors are binding on the Tribunal. Policy 1.4.1 provides:

> 1. A decision-maker may rely on a textbook or other similar resource as evidence.
>
> 2. For greater certainty, and not so as to restrict the scope of this policy, paragraph (1) applies to a case where the textbook or other resource states an opinion on an issue that is not raised elsewhere in the evidence before the decision-maker.
>
> 3. It is not the intention of this policy to make evidence from a textbook (or other similar resource) binding, but rather to ensure that the textbook or other similar resource may be weighed together with other relevant evidence.

[16] Thus the rules of evidence under which the Tribunal functions appear to be less restrictive than those which apply to courts. The appellant did not object to the nature of the evidence considered by the Tribunal, and did not submit there was no evidence before it. Rather, it remained focused on the argument that the Tribunal's conclusion based on an inference drawn from the evidence was patently unreasonable.

[17] The Tribunal's decision stated:

> There are numerous documents on file which discuss the carcinogens at the workplace, some of which have been clearly identified with cancer and even bladder cancer in particular. There are also carcinogens in the Sydney area in general. The appellant ceased smoking in 1981, some 15 years* before the cancer diagnosis.
>
> The Appellant worked for 30 years* with the Employer. He worked in numerous areas including the coke ovens. He was also exposed to the tar ponds. In addition, he worked as a machinist. In the course of his employment, the Appellant was exposed to numerous known carcinogens. Evidence in the file also points to the fact that numerous other workers of the Employer, all with similar work histories as the Appellant, have developed bladder cancer. There is also some generic evidence that coke oven workers and machinists have been linked to bladder cancer. . .
>
> The death rate from cancer for residents of Sydney and surrounding areas is 16% higher than the national average, and the residents of Sydney have an almost 50% higher risk of developing cancer than people living elsewhere in Nova Scotia.

> Evidence from the Employer did not indicate that the Appellant was exposed to the three chemicals known to be associated with bladder cancer. On that basis, the Board Medical Advisor recommended the claim not be considered. No expert report was sought by the Board. The Appellant also failed to produce an expert medical report. It does not appear that the treating physicians were asked to give a medical legal opinion on causation. There is evidence that the Board intended, at one time in the history of the claim, to seek a report from an expert in Ontario but never did so.

[18] (*Minor discrepancies in the Tribunal's decision have no bearing on the conclusion.)

[19] Ms. Dassonville appears to be suggesting that the Board made a decision unfavourable to the worker on the basis of insufficient evidence. The worker has the primary burden of proof but, in the case of occupational illnesses as opposed to accidents, his or her own knowledge is likely limited to the fact of the employment and the fact of the sickness. His or her physician may not have the specialized knowledge to offer an expert opinion as to a causative link between the workplace and the malady. The Board has resources, investigative powers and expertise which may not be available to the worker. Section 187 of the new **Act** appears intended to offset this imbalance by relieving the worker of the requirement of proving his or her claim beyond the balance of probabilities. To reiterate, it provides:

> 187 Notwithstanding anything contained in this Act, on any application for compensation an applicant is entitled to the benefit of the doubt which means that, where there is doubt on an issue respecting the application and the disputed possibilities are evenly balanced, the issues shall be resolved in the worker's favour. (Emphasis added.)

[20] This replaces s. 24 in the old **Act**, which provided:

> 24 Notwithstanding anything in this Act, on any application for compensation an applicant shall be entitled to the benefit of the doubt, which shall mean that it shall not be

> necessary for the applicant to adduce conclusive proof of his right to the compensation applied for, but that the Board shall be entitled to draw and shall draw from all the circumstances of the case, the evidence and medical opinions, all reasonable inferences in favour of the applicant.

[21] While both provisions are intended to provide the benefit of the doubt to the worker, one by reducing the burden of proof, the other by requiring a positive inference, the approaches are significantly different and little is to be gained by comparing their operations. The Hearing Officer's decision, which predated **Muise**, referred to s. 24. In my view it was proper for the Tribunal to decide the appeal applying s. 187.

[22] Counsel were of the view that s. 187 was not adopted from another jurisdiction but was drafted to meet perceived requirements in Nova Scotia. However s. 99 of the British Columbia Workers' Compensation statute is comparable:

> 99. The board is not bound to follow legal precedent. It's decision shall be given according to the merits and justice of the case and, where there is doubt on an issue and the disputed possibilities are evenly balanced, the issue shall be resolved in accordance with that possibility which is favourable to the worker.

[23] This has been held in British Columbia not to interfere with the ordinary standard of proof in civil cases; see **Hanney v. British Columbia (Workers' Compensation Board),** [1984] B.C.J. No. 1942 (Q.L.). However I am not aware of a case in which the courts of British Columbia have addressed the threshold question before this court in the present case: what onus of proof must a worker meet to raise a doubt that must be resolved in his favour when the disputed possibilities are equally balanced?

[24] In the present case the disputed possibility related to causation. In reviewing the Tribunal's application of s. 187, it is clear the worker proved his employment record and the existence of his cancer. These are not in doubt. They are facts established by the worker's evidence. Relieved of the burden of proving probability, need the worker show more? These facts support an inference that it is possible the employment caused the illness--but whether or not the inference is a reasonable one depends on the circumstances of both the employment and the illness. Such an inference would be reasonable, for example, in the case of a worker who caught smallpox if he or she worked in a smallpox clinic, but not reasonable if he or she worked in a shoe factory. Drawing such an inference is a matter of fact for the Board or the Tribunal, but it is subject to review for patent unreasonableness.

[25] The question does not have to be determined in this appeal because the other evidence referred to above was before the Tribunal in support of the possibility asserted by the worker. The onus was therefore thrown on the employer or the Board to introduce evidence casting doubt on the possibility to throw it into dispute. No such evidence was introduced with the possible exception of a report by the Board's consultant medical advisor, Dr. Dobson, that there was no evidence of exposure with three chemicals he had referred to or to by-products of aromatic amines "which are known to be associated with bladder cancer." When there is no evidence raising a doubt, or if the evidence disputing the possibility is no stronger than the evidence in support of it, the decision must go to the worker. While s. 187 relieves the worker of proving the possibility he asserts to the civil standard of a preponderance of probabilities, there is no such relief in s. 187 for those opposing the worker's claim, who must meet the civil standard.

[26] In applications that involve an analysis under s. 187, the relative weight of the evidence brought by the worker and his adversaries is to be determined by the Board in the first instance and by the Tribunal in appeals from the Board. The role of this court is to consider whether there is any evidence, whether s. 187 has been applied, and whether the result is patently unreasonable.

[27] In following the proper process and in applying s. 187, it was for the Tribunal alone to determine whether Dr. Dobson's report constituted evidence disputing the possibility, and the weight, if any, to be attached to such evidence in making its finding of fact. The findings of fact reached by the Tribunal in weighing the evidence are not within the appeal jurisdiction of this court unless the conclusions are patently unreasonable.

[28] The decision of the Board's hearing officer dismissing Mr. Johnstone's claim states that "in light of all the evidence on file, I am unable to reasonably associate the Worker's bladder cancer with his employment." This decision predates the **Muise** decision determining which of the former or current provisions are to be applied; it relies on s. 24 which requires a positive inference to be drawn from the evidence. It appears to assume a burden of proof on the worker, rather than on an adversary disputing the possibility raised by the cancer and the employment record and the other evidence, which is inconsistent with s. 187.

[29] This error of law by the hearing officer was alluded to early in Ms. Dassonville's decision as follows:

> ...Not one physician has expressed an opinion that the Appellant's cancer is causally

> connected to his work with the Employer. Not one treating physician has expressed a contrary view either. The medical reports on file simply deal with the treatment of the Appellant, not the cause of his cancer.

[30] On an appeal from a Board decision under s. 243(7) of the current **Act** the Tribunal enjoys considerable fact finding powers; it is not limited to the standard of patent unreasonableness and can exercise independent judgment. After a thorough review of the statute, Justice Chipman concluded in **Doward v. Workers' Compensation Board (N.S.)** (1997), 160 N.S.R. 2d 22 that:

> . . . 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.

[31] In the present case the hearing officer enjoyed no advantages that were not available to the Board.

[32] Ms. Dassonville reasoned that the respondent's employer was a major contributor to the industrial pollution in the Sydney area and "a logical conclusion is that the levels of carcinogens in general, are at least as high within the confines of the Employer's premises as they are in the general community of Sydney." She concluded that the respondent's cancer was caused either by his employment or his residency in the Sydney area.

> While the Appellant had not proven his case on a balance of probabilities, due to the lack of at least one medical report definitively in his favour, he is entitled to the benefit of the doubt pursuant to s. 187 of the **Act**. When all the circumstantial evidence is read together, I find that the evidence supporting the two possible causes of cancer are equally balanced. The benefit of the doubt resolves the issue in the Appellant's favour.

[33] With respect, the real issue is not a contest between the workplace and the general environment as possible sole causes of Mr. Johnstone's cancer. On these premises, the likelihood is that both would be contributing causes. Tort principles of causation apply.

[34] In **Marinelli et al. v. Keigan et al.** (1999), 173 N.S.R. (2nd) 56, this court quoted the decision of Major J. in **Athey v. Leonati** ,[1996] 3 S.C.R. 458:

> 16 In **Snell v. Farrell**, supra, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in **Alphacell Ltd. v. Woodward**, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is " essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.
>
> 17 It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. ...

[35] In the s. 187 analysis in this case it would be more appropriate to say that the worker discharged his onus of showing on the whole of the evidence that there was a reasonable inference of causation that was at least evenly balanced with any other possible inferences. Essentially, that is what the Tribunal found.

[36] The standard of review for administrative decisions has been evolving in the jurisprudence of the Supreme Court of Canada and the recent decision of L'Herueux- Dube J. in **Baker v. Canada (Minister of Immigration)** ,[1999] S.C.C. bears consideration. She stated in Paragraph 55:

> The "pragmatic and functional" approach recognizes that standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and others entitled to less: **Pezim**, supra, at pp. 589-90; **Southam**, supra, at para. 30; **Pushpanathan**, supra, at para. 27. Three standards of review have been defined: patent unreasonableness, reasonableness *simpliciter*, and correctness: **Southam**, at paras. 54-56. In my opinion the standard of review of the substantive aspects of discretionary decisions is best approached within this framework, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. The pragmatic and functional approach takes into account considerations such as the expertise of the tribunal, the nature of the decision being made, and the language of the provision

> and the surrounding legislation. It includes factors such as whether a decision is "polycentric" and the intention revealed by the statutory language. The amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made are also important considerations in the analysis. The spectrum of standards of review can incorporate the principle that in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament. ...

[37] Considering the expertise of the Workers' Compensation Appeals Tribunal, the nature of its decisions, and the legislative intent expressed in the language of the statutory scheme, I agree with counsel that the standard of review of the Tribunal's decisions on conclusions of fact by this court remains patent unreasonableness. Conclusions of fact made by the Tribunal are beyond the jurisdiction of this court on appeal unless they are transformed into errors of law or jurisdiction by reason of patent unreasonableness. In my view, no such patently unreasonable error or any error of jurisdiction or law has occurred in the decision under appeal.

[38] I would dismiss the appeal.

Freeman, J.A.

Concurred:

Chipman, J.A.

Cromwell, J.A.