NOVA SCOTIA COURT OF APPEAL

Citation: *Veinot v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2014 NSCA 12

Date: 20140204
Docket: CA 406386
Registry: Halifax

Between:

Garnet Veinot

Appellant

v.

Workers' Compensation Appeals Tribunal, The Workers' Compensation Board of Nova Scotia, Attorney General of Nova Scotia and Canada Post Corporation

Respondents

Judges:	Oland, Farrar and Scanlan, JJ.A.
Appeal Heard:	December 4, 2013, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Farrar, J.A.; Oland and Scanlan, JJ.A. concurring.
Counsel:	Kenneth H. LeBlanc and Vanessa Nicholson, for the appellant Rebekah L. Powell, for the respondent Canada Post Corporation Alexander MacIntosh, for the respondent Workers' Compensation Appeals Tribunal (Watching Brief Only) Paula Arab, for the respondent Workers' Compensation Board of Nova Scotia (Watching Brief Only) Edward A. Gores, Q.C., for the respondent Attorney General of Nova Scotia (not participating)

Reasons for judgment:

Facts

[1] The appellant, Garnet Veinot, suffers from a neurological condition known as primary lateral sclerosis, a progressive degenerative disease of the motor neurons which causes weakness and spasticity in his voluntary muscles. He relates his condition to an incident which occurred on December 16, 2005, when, while working as a mail carrier, he slipped and fell backwards hitting his back and head on the ground.

[2] On January 13, 2006, he filed an Accident Report indicating that he had suffered a concussion while working for Canada Post. On March 30, 2006, his claim was approved by a Workers' Compensation Board case manager. Mr. Veinot received temporary earnings-replacement benefits from December 16, 2005 to December 24, 2005 and medical expenses from December 16, 2005 to February 21, 2006.

[3] In 2005-2006 he worked part-time for Canada Post and also with King's Transport Authority as a driver.

[4] In 2007 until October 8, 2009 he worked full-time with King's Transport until he was forced to resign as a result of his neurological condition. Mr. Veinot has not worked since then.

[5] Although he was able to work until the fall of 2009, the medical records indicate that his condition deteriorated in the years following the accident. Eventually he was diagnosed with primary lateral sclerosis.

[6] After ceasing work in 2009 Mr. Veinot sought workers' compensation benefits for his loss of earnings claiming his neurological condition was the result of the 2005 slip and fall.

[7] On September 17th, 2010, a case manager found that his earnings loss was not due to his injury of December 16th, 2005, but rather, arose independently of that injury.

[8] Mr. Veinot appealed that decision to a Hearing Officer. Again, it was found that his neurological condition was not related to the December, 2005 injury.

[9] Mr. Veinot appealed that decision to the Workers' Compensation Appeals Tribunal("WCAT"). In a decision dated July 13, 2012 (reported as WCAT #2011-54-AD), WCAT denied his claim, again, finding his neurological condition arose independently of the accident.

[10] Mr. Veinot sought leave to appeal to this Court and was granted leave to appeal on the following grounds:

> 1. Did the WCAT Commissioner err in law by misapprehending the medical evidence such that he applied, or came to accept, a burden of proof based on something akin to scientific certainty ("absence of incontrovertible evidence suggesting that this is probable or even possible")?
>
> 2. If so, was the appellant [the Worker] deprived of the benefit of s.187 of the *Workers' Compensation Act*, S.N.S. 1994-95, c.10?

Standard of Review

[11] Section 256(1) of the **Workers' Compensation Act**, S.N.S. 1994-95, c. 10 ("the **Act**") provides participants before WCAT with a limited appeal to this Court:

> 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.

[12] Mr. Veinot does not challenge WCAT's jurisdiction. Therefore, he is left to persuade us that WCAT erred with respect to a question of law.

[13] Mr. Veinot and Canada Post agree that Mr. Veinot's challenge to WCAT's decision ought to be reviewed on a standard of reasonableness. The appellant, after reviewing the case law, correctly concludes as follows:

> 30. The question of law raised in this appeal does not justify this Court applying the correctness standard because it does not involve a constitutional question, a question of central importance to the legal system, or a question delineating WCAT's authority from that of another tribunal. It follows, therefore, that this Court should apply the reasonableness standard to its review of the question of law raised in this appeal.

[14] I agree. The decision under appeal is well within the expertise of WCAT in interpreting the **Act** and applying it to the facts before it. The decision will be reviewed on a reasonableness standard.

[15] The reasonableness standard of review requires us to read WCAT's reasons together with the outcome to determine whether the result falls within a range of possible, acceptable outcomes (**Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)**, 2011 SCC 62).

Analysis

1. Did the WCAT Commissioner err in law by misapprehending the medical evidence such that he applied, or came to accept, a burden of proof based on something akin to scientific certainty ("absence of incontrovertible evidence suggesting that this is probable or even possible")?

[16] Mr. Veinot's situation is very unfortunate. Despite the very able arguments by Mr. LeBlanc on his behalf, I am not persuaded that WCAT's decision is unreasonable. In my view, the decision falls within a range of possible, acceptable outcomes.

[17] The Appeal Commissioner understood the issue he had to decide was whether the worker's neurological condition resulted from the December, 2005 slip and fall. He conducted a thorough review of Mr. Veinot's file which included the decisions of the Case Manager and Hearing Officer as well as the medical evidence from the physicians who had treated or consulted with Mr. Veinot following his accident. He also cited the relevant statutory provisions, in particular, s. 187 which 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.

In his decision the Appeal Commissioner spoke of "probabilities" rather than "possibilities" when citing s. 187. However, this discrepancy has no bearing on his ultimate conclusion. I will address this later in these reasons.

[18] The Appeal Commissioner also set out the proper test to be applied when causation is in dispute. He said:

> Briefly, the onus rests on a worker to demonstrate that he or she has sustained his compensable injury arising out of or in the course of employment. .... A claim can be allowed if the compensable incident constitutes only one of the causes of a worker's disease (in this appeal, a neurological condition), or that the incident aggravated, activated or accelerated the development of the disease. A worker must demonstrate that the disease would not have resulted, as described above, "but for" the compensable incident. In those instances where the "but for" test cannot be applied, a worker need only demonstrate that the compensable incident materially contributed to the development of the disease.

[19] Recently, in **McGrath v. Nova Scotia (Workers' Compensation Board)**, 2013 NSCA 37, Justice Saunders approved WCAT's articulation of the test for causation in very similar terms:

> [20] ... Causation is a practical question of fact. The general legal test for causation is a "but for" test. If this test is unworkable, a "material contribution" test is applied. Medical opinion evidence is often helpful when determining causation, but it is not necessarily determinative. Common sense may be used to infer causation where appropriate.

[20] At the conclusion of these reasons, I will come back to the "material contribution" test as referenced in WCAT decisions and case law from this Court.

[21] After correctly identifying the test he had to apply, the Appeal Commissioner set out to resolve the issue of whether Mr. Veinot's claim for compensation could be reasonably linked to the injury he suffered in December, 2005, and which he blames as the source of his present difficulties.

[22] The appellant does not dispute the Appeal Commissioner articulated the proper test for causation. He focuses on the application of the test to the facts of this case. Mr. Veinot argues that the Appeal Commissioner erred by requiring him to prove the relationship between his fall and his neurological condition to a level of absolute certainty.

[23] With respect, in my view, upon a fair reading of the decision as a whole, the Appeal Commissioner made no such error. To explain, some further background information is necessary.

[24] The appeal before WCAT proceeded by way of written submissions. The appellant filed medical reports of Mr. Veinot's treating neurologist , Dr. Timothy Benstead dated December 1, 2011 and November 25, 2010. He also filed other medical reports as well as the usual notes and charts from the various physicians who had treated or consulted with Mr. Veinot.

[25] The employer representative filed two medical reports prepared by Dr. Steven K. Baker, a specialist in physical medicine rehabilitation and neurology. Those reports are dated January 30, 2012 and May, 2011.

[26] Although there was other medical evidence on file, the Appeal Commissioner concluded that the determination of issues before him turned on his assessment of the expert evidence:

> However, the resolution of this appeal substantially turns on an assessment of the expert opinion evidence of Dr. Benstead and Dr. Baker.

[27] Dr. Benstead first saw Mr. Veinot on September 1, 2009. In his report to Mr. Veinot's family doctor on September 16, 2009, he wrote:

> … He is convinced that there was no difficulty before the fall in 2005, but given how things have unfolded it is possible that his original fall was due to early manifestations of his problem.

[28] On November 4, 2010, Mr. Veinot's Worker Advisor wrote to Dr. Benstead asking him a number of questions, including:

> 4. Do you think it is <u>likely or possible</u> that the Worker's injury from the fall on December 16, 2005, made a significant contribution to his subsequent medical condition and related symptoms. Alternatively, is it <u>likely or possible</u> the injury from the fall aggravated, activated, or accelerated a pre-existing condition the Worker had before the injury? Please explain the reasons for your opinion in this regard. (Emphasis in the original letter)

[29] In his report of November 25th, 2010, Dr. Benstead responded as follows:

> Mr. Veinot has an acquired neurological disorder, primary lateral sclerosis. It is not an inherited neurological disease, as had been previously suggested. The etiology of motor neuron disease is currently unknown. This is true for all subtypes of motor neuron disease including primary lateral sclerosis. For many years trauma has been a factor considered to possibly play a role in the development of motor neuron disease, though that relationship is unproven. In

> Mr. Veinot's situation, the most compelling factor that suggests a possible link between his neurological disorder and the injury from the fall on December 16, 2005, is the close temporal relationship to the injury and the onset of his neurological symptoms. After the fall he began to have neurological symptoms and progressively since the fall he has had a worsening neurological condition. Based on this temporal relationship and the uncertainty in the role that trauma can have in motor neuron disease; it is possible that the injury from the fall made a significant contribution to his medical condition.
>
> I have no information that would suggest the injury from the fall aggravated, activated or accelerated a pre-existing condition as there was no evidence for a pre-existing condition before the fall. (Emphasis added)

[30] What is of significance in the response, and what was significant to the Appeal Commissioner, was Dr. Benstead's choice of "possible" out of the two choices given to him by the Worker's Advisor of "possible" or "likely".

[31] The Appeal Commissioner picked up on this in his decision:

> The Worker's Representative's question to Dr. Benstead emphasized the distinction between "likely" or "possible". Dr. Benstead opined it was "possible" that the fall caused the primary lateral sclerosis, a word choice that I view as notable.

[32] He then went on to reference Dr. Benstead's original suggestion, referenced above, that the condition may have been the cause of the original fall, not the consequence of it:

> Indeed. I note Dr. Benstead's original suggestion that the early stages of the primary lateral sclerosis may have been the cause of the original fall, not the consequence of it.

[33] Dr. Benstead's opinion as set out in his report dated November 25, 2010, cited above, did not change in his second report of December 1, 2011.

[34] It is Dr. Baker's report of January 30, 2012 that is the focus of the appellant's argument on this appeal. In that report Dr. Baker writes:

> ...can trauma lead to neurodegenerative disorder? There is an absence of incontrovertible evidence suggesting that this is probable or even possible in humans.

[35] The appellant focuses on this excerpt from Dr. Baker's report to argue that WCAT was requiring Mr. Veinot to prove his case to a medical certainty.

[36] With respect, I do not read Dr. Baker's report nor the Appeal Commissioner's decision in this way. "Incontrovertible" is defined in Webster's 9th New Collegiate Dictionary as:

> Not open to question: indisputable.

[37] Dr. Baker is simply saying that any evidence that suggests that trauma can lead to neurodegenerative disorder is questionable or in dispute.

[38] Dr. Baker goes on to note the lack of scientific evidence to validate the hypothesis that trauma could trigger, and therefore be related to a subsequent neurological disease such as primary lateral sclerosis. He concluded:

> ... Furthermore, it is likely, although not certain, that Mr. Veinot's clinical condition would not be significantly different today were he never to have fallen in the first place.

[39] He does say, in essence, if it is only a mere possibility that is required to show causation then Mr. Veinot's claim should be compensable. As the Appeal Commissioner correctly says, a mere or remote possibility is not sufficient to satisfy the appellant's evidentiary burden under the **Act**. After a thorough review of the evidence he concluded:

> On reviewing all the evidence, the Worker has failed to demonstrate it is as likely as not that his neurological condition was caused by the December 16, 2005 slip and fall. ....
>
> Dr. Baker opines it is likely that the Worker's clinical condition would not be significantly different today if he had never experienced the December 16, 2005 fall. Consequently, one cannot conclude that the Worker would not have primary lateral sclerosis, but for the fall. Although Dr. Baker recognized a possibility that there could be a link between the fall and the development of the neurological condition, his report indicates this is quite a remote possibility which does not meet the standard of "as likely as not" as established by section 187 of the *Act*. (Emphasis added)

[40] Earlier I had commented that the Appeal Commissioner incorrectly referred to "probabilities" when discussing s. 187 of the **Act**. I also indicated it was my view this discrepancy has no bearing on his conclusion. I say this because, despite

the error, when applying s. 187 of the **Act** in the passage above, the Appeal Commissioner correctly references "possibility". For this reason his misstatement did not result in an improper application of the provision.

[41] The Appeal Commissioner clearly placed more weight on Dr. Baker's opinion in concluding Mr. Veinot's condition was not compensable:

> The Worker perceives that his neurological symptoms date from the time of the injury. However, in assessing the causal connection between the fall and the neurological condition, I place more weight on the specialist evidence, particularly that of Dr. Baker, which directly addresses the likelihood of the fall causing the Worker's neurological condition. …

[42] The Appeal Commissioner was alive to the differing views expressed by Drs. Benstead and Baker. He did not miss or misapprehend important evidence. It was up to him to consider and evaluate the evidence and to decide the weight – if any – to be attributed to it. Contrary to the submissions of the appellant, he did not require Mr. Veinot to prove his case to a medical certainty. That is apparent from the decision when read as a whole, including the passages which I have cited above.

[43] The weighing and evaluation of evidence falls squarely within WCAT's expertise and authority. It is not our role to re-evaluate the evidence or second guess WCAT's decision.

[44] To be entitled to compensation Mr. Veinot had to establish that his present condition was causally connected to the injury suffered in December, 2005. Unfortunately, the evidence fell far short of establishing that connection.

[45] In conclusion, I am not satisfied that the Appeal Commissioner erred by misapprehending the medical evidence that he applied, or that he came to accept or apply a burden of proof based on something akin to scientific certainty.

2. If so, was the appellant [the Worker] deprived of the benefit of s.187 of the *Workers' Compensation Act*, S.N.S. 1994-95, c.10?

[46] As a result of answering the first issue in the negative, it is not necessary to address the second issue raised on this appeal.

Material Contribution

[47] Earlier I made reference to the test for causation and the reference by WCAT to the material contribution test as an alternative to the "but for" test. That is, if the "but for" test is unworkable, a worker need only demonstrate that the compensable incident materially contributed to the development of the disease.

[48] The causation test in workers' compensation law has its roots in tort law. In **Nova Scotia (Workers' Compensation Board) v. Johnstone**, 1999 NSCA 164, Justice Freeman found that tort principles of causation apply in the workers' compensation context (¶33). This was elaborated on in **Ferneyhough v. Nova Scotia (Workers' Compensation Board)**, 2000 NSCA 121 where Justice Cromwell held as follows:

> [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. …

[49] This test has been consistently applied in the workers' compensation context in Nova Scotia.

[50] However, recently, in **Clements v. Clements**, 2012 SCC 32, the Supreme Court of Canada discussed the origins of the "but for" causation test and "material contribution" test. This may call into question the use of "material contribution" as a test for causation.

[51] Chief Justice McLachlin, writing for the majority in **Clements**, set out the distinction between "but for" and "material contribution" as follows:

> 14 "But for" causation and liability on the basis of material contribution to risk are two different beasts. "But for" causation is a factual inquiry into what likely happened. The material contribution to risk test removes the requirement of "but for" causation and substitutes proof of material contribution to risk. As set out by Smith J.A. in *MacDonald v. Goertz*, 2009 BCCA 358, 275 B.C.A.C. 68, at para. 17,
>
> > ... "material contribution" does not signify a test of causation at all; rather it is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation. In such cases, plaintiffs

> are permitted to "jump the evidentiary gap": see "Lords a 'leaping evidentiary gaps", (2002) Torts Law Journal 276, and "Cause-in-Fact and the Scope of Liability for Consequences", (2003) 119 L.Q.R. 388, both by Professor Jane Stapleton. That is because to deny liability "would offend basic notions of fairness and justice": *Hanke v. Resurfice Corp.*, para. 25.
>
> 15 While the cases and scholars have sometimes spoken of "material contribution to the injury" instead of "material contribution to risk", the latter is the more accurate formulation. As will become clearer when we discuss the cases, "material contribution" as a substitute for the usual requirement of "but for" causation only applies where it is impossible to say that a particular defendant's negligent act in fact caused the injury. It imposes liability not because the evidence establishes that the defendant's act caused the injury, but because the act contributed to the risk that injury would occur. Thus this Court in *Snell* and *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, raised the possibility of a material contribution to risk approach. The English law takes the same approach, as discussed below. (Emphasis added)

[52] The terminology that is often used when discussing causation and the material contribution test in the workers' compensation context is whether it is a "material contribution to the disease" (as in this case) or a material contribution to the injury. As currently understood it appears that the more accurate formulation of the material contribution test is the "material contribution to risk" and it is not a test of causation at all but a policy-driven rule of law.

[53] Workers' compensation is a no fault system where it is only necessary to show the injury arose out of or in the course of employment to be entitled to compensation. Whether it is the worker, a co-worker, the employer or a third party who creates the risk, would appear to be irrelevant to that analysis. The worker is entitled to recover regardless of whose act created or magnified the risk. In light of **Clements**, one may question whether "material contribution", as a test for causation, has any application in this workers' compensation context.

[54] The **Act** itself may provide an alternative to the "but for" test in s. 187. If a worker is unable to prove causation on the "but for" test, s. 187 of the **Act** provides an alternative to reduce the burden to one of "as likely as not".

[55] Having said this, it is not necessary to address the issue in this appeal. It was neither raised nor addressed by the parties and, on the particular facts of this case, it is not an issue. However, in future cases where WCAT references the

"material contribution" test it may be necessary to revisit the issue to determine if it is still applicable in light of **Clements**.

Conclusion

[56] I would dismiss the appeal.

Farrar, J.A.

Concurred in:

Oland, J.A.

Scanlan, J.A.