NOVA SCOTIA COURT OF APPEAL

Citation: ***Metropolitan Entertainment Group v. Nova Scotia (Workers' Compensation Appeals Tribunal)***, 2007 NSCA 30

Date: 20070306
Docket: CA 265484
Registry: Halifax

Between:

Metropolitan Entertainment Group

Appellant

v.

The Nova Scotia Workers' Compensation Appeals Tribunal,
The Workers' Compensation Board of Nova Scotia and
Nancy Noel

Respondents

Judge(s): Roscoe, Cromwell & Saunders, JJ.A.

Appeal Heard: February 6, 2007, in Halifax, Nova Scotia

Held: Appeal allowed, the decision of WCAT set aside, and the case remitted to WCAT for a rehearing before a differently constituted Tribunal, as per reasons for judgment of Saunders, J.A.; Roscoe & Cromwell, J.A. concurring

Counsel: Jack Graham & Bradley Proctor, for the appellant
Kenneth LeBlanc & Anne Clark, for the respondent Worker, Nancy Noel
Janet E. Curry, for WCB
Alexander MacIntosh, for WCAT
Edward Gores, Q.C., for the Attorney General of Nova Scotia

Reasons for judgment:

Background

[1] Leave to appeal was granted on October 5, 2006 by an order of this panel.

[2] The respondent Nancy Noel was a blackjack dealer at the Halifax Casino. She filed an accident report in September 2004 claiming that she had injured her left elbow and neck as a result of spinning the roulette table and dispensing betting chips to players. She said these activities were especially strenuous that summer because of unusually sticky tabletops on days with high humidity, and longer shifts without a break due to reduced staff.

[3] In November 2004 her claim for compensation was denied. After reviewing the file and extensive medical reports the adjudicator was not satisfied the respondent's "medical findings arose out of and in the course of her employment as a dealer."

[4] In April 2005 the same adjudicator filed an addendum to her November, 2004 decision concluding that the appellant ". . . did not aggravate, activate or accelerate a pre-existing disease or disability while in the course of employment with Casino Nova Scotia."

[5] The respondent appealed. After a full oral hearing where both the respondent and the employer presented evidence, the Hearing Officer by decision dated November 9, 2005 denied the appeal, concluding:

> [t]here is insufficient evidence to establish that the Worker has sustained a personal injury by accident arising out of and in the course of her employment.

[6] The respondent appealed the Hearing Officer's decision to the WCAT. After a paper review, the WCAT Commissioner filed a decision dated March 31, 2006 in which she allowed the appeal, concluding that the respondent was entitled to receive benefits for an injury pursuant to s.10(1) of the **Workers' Compensation Act**, R.S.N.S. 1989, c. 508 as amended ("the **Act**").

[7] It is from the Tribunal's decision that the employer now appeals.

[8] For the reasons that follow I would allow the appeal, set aside the decision of the WCAT, and remit the case to WCAT for a rehearing before a differently constituted Tribunal.

[9] Having regard to the manner in which I have disposed of this appeal it will not be necessary for me to review the facts in detail. Rather, it would be more instructive to simply set out the grounds of appeal, identify the points on which this case turns, and add a brief reference to the particular evidence that relates to those points.

Issues

[10] The notice of appeal upon which leave of this Court was granted, set out nine grounds:

> 1) The Tribunal erred in applying the legal principles of causation, more specifically, in requiring evidence that the Worker's symptoms were brought on by activities outside the workplace;
>
> 2) The Tribunal made patently unreasonable errors in interpreting and applying section 187 of the *Act* with respect to the medical evidence regarding epicondylitis;
>
> 3) The Tribunal made patently unreasonable errors in interpreting and applying section 187 of the *Act* with respect to the medical evidence regarding postural insufficiency;
>
> 4) The Tribunal made patently unreasonable findings of fact with respect to the medical evidence. More specifically, the Tribunal attributed conclusions to the medical experts that are expressly rejected in their written reports;
>
> 5) The Tribunal erred in failing to apply section 186 of the *Act* by failing to consider the "real merits and justice of the case". More specifically, the Tribunal was unduly influenced by this Court's decision *Metropolitan Entertainment Group v. Durnford* [2000] N.S.J. No. 343 (C.A.) because it dealt with the same employer and a similar medical condition;

6) The Tribunal erred by failing to show adequate deference to the findings made by the Workers' Compensation Board Hearing Officer in her November 9, 2005 decision. In addition, the Tribunal erred in interpreting this Court's decisions in *Durnford, Supra* and *Canada Post Corporation v. Nova Scotia (Workers' Compensation Appeals Tribunal)* (2004), 222 N.S.R. (2d) 191 (C.A.) and others, in determining the requisite degree of deference owed to the Hearing Officer's findings;

7) The Tribunal erred in finding the Hearing Officer did not make assessments of credibility in her November 9, 2005 decision;

8) The Tribunal erred in law by ignoring conclusive and relevant evidence, misapprehending the evidence and by drawing erroneous inferences and conclusions from the evidence in finding that Nancy Noel suffered a personal injury by accident arising out of and in the course of employment; and

9) Such other grounds that may appear.

[11] The appellant should succeed on the fourth ground of appeal. In my respectful view the Tribunal Commissioner (WCAT) made a series of patently unreasonable findings with respect to the medical evidence, and attributed conclusions to the medical experts that are expressly rejected by those same physicians in their written reports. These mistakes in understanding, interpreting, describing and applying the factual evidence were central to the tribunal's reasoning, and amount to errors of law requiring our intervention. I will address four in particular.

[12] In the reasons that follow I will refer to the medical evidence and explain the errors committed by the WCAT Commissioner when she assessed the merits of the respondent's claim for compensation. Given the appellant's success on this ground of appeal it will not be necessary for me to comment upon the other grounds advanced by the employer.

[13] First I will consider the standard of review that ought to be applied in this instance.

Standard of Review

[14] In the context of appeals from WCAT the standard of review is determined by taking a pragmatic and functional approach, **Puddicombe v. Workers' Compensation Board (N.S.)**, [2005] N.S.J. No. 137 (C.A.). Here the question to be decided by the Tribunal was whether Ms. Noel had suffered a personal injury by accident arising out of and in the course of her employment. In the circumstances of this case I view the determination of that question as largely a fact-driven exercise, dependant upon a consideration of the testimony, records and medical opinions of the several specialists who had treated or examined the claimant, or who had studied her file.

[15] Section 256 of the **Act** allows appeals to this court (with leave) on questions of law and jurisdiction, but not on questions of fact. While the principal question in this case obliged the decision-maker to draw conclusions from findings of fact, there are however, situations where mis-stating evidence or making egregious factual errors will amount to an error in law. **Southam Inc. v. Canada (Director of Investigation and Research)**, [1997] 1 S.C.R. 748. Findings, inferences, and conclusions which are seen to be so flawed as to be patently unreasonable, are transformed into errors of law. See for example **Nova Scotia (Director of Assessment) v. Gatsby's Bar and Eatery Limited**, [2004] N.S.J. No. 145 (C.A.); **McCarthy v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, [2001] N.S.J. No. 175 (C.A.); and **Stulac v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, [2001] N.S.J. No. 132 (C.A.).

[16] This court described the type of findings which could be said to be patently unreasonable in **Children's Aid Society of Cape Breton-Victoria v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, [2005] N.S.J. No. 75 at ¶ 41:

> The patently unreasonable standard of review requires a very high level of deference on the part of the reviewing court. A decision is patently unreasonable if it borders on the absurd, is clearly irrational or evidently not in accordance with reason: **Voice Construction Ltd v. Construction & General Workers' Union Local 92**, [2004] 1 S.C.R. 609 at para. 18; **Law Society of New Brunswick v. Ryan**, [2003] 1 S.C.R. 247 at para. 52.

[17] I will turn now to four specific errors in the WCAT's analysis which require our intervention:

(i) mistakenly attributing to Dr. Thomas D. Loane a critical medical conclusion which is contrary to Dr. Loane's evidence;

(ii) ignoring the basis on which the claim had been presented up to that point, and embarking upon an entirely different assessment as to whether the worker's regular duties, and posture, had aggravated an underlying condition. In doing so WCAT misinterpreted and mis-stated important medical evidence;

(iii) mistakenly interpreting the medical opinions presented as <u>all</u> being consistent with the appellant's position on causation; and

(iv) in finding that the Hearing Officer had not made assessments of credibility in her November 9, 2005 decision.

(i) Mistakenly attributing to Dr. Thomas D. Loane a critical medical conclusion which is contrary to Dr. Loane's evidence.

[18] One of the physicians who examined the claimant was Dr. Thomas D. Loane, a specialist in physical medicine and rehabilitation. His independent medical examination report (IME) is dated May 9, 2005.

[19] In my respectful view WCAT erred in a patently unreasonable manner by attributing a medical opinion to Dr. Loane on a significant matter which is clearly contrary to what appears in his IME. In her decision the WCAT Commissioner notes:

> The Employer's Representative emphasizes Dr. Loane's statement that the Worker's regular duties as a dealer did not trigger her elbow pain. While Dr. Loane clearly attributes the Worker's troubles to the sticking cards, <u>he does not state that the Worker's regular duties could not have triggered her left lateral epicondylitis</u>. (Underlining mine)

[20] In fact, Dr. Loane specifically states in his IME:

> . . . The left lateral epicondylitis does not appear to be work related. <u>Although her regular duties did not trigger the elbow pain</u>, the episodes with the sticking cards does appear to have been the trigger . . . (Underlining mine)

[21] While Dr. Loane could not have been any clearer in declaring "although her regular duties did not trigger the elbow pain," WCAT found "he [Dr. Loane] does not state that the Worker's regular duties could not have triggered her left lateral epicondylitis." In my respectful opinion such an egregious factual error led to a finding that is "absurd . . . clearly irrational or evidently not in accordance with reason." **Voice Construction**, supra. The defect in WCAT's decision is obvious and immediately apparent. **Southam**, supra.

[22] I reject the respondent's submission that no mistake should be attributed to the WCAT because the Commissioner was simply acknowledging that Dr. Loane "could not" discount the possibility that the claimants' regular duties were not the trigger of her left-sided lateral epicondylitis. Such an interpretation ignores Dr. Loane's unambiguous conclusion: that the worker's duties did not trigger the pain she experienced in her left elbow. Whatever other *possibilities* might or might not account for her discomfort were clearly irrelevant for the purposes of Dr. Loane's opinion, and ought not to have entered into the Commissioner's analysis.

(ii) Ignoring the basis on which the claim had been presented up to that point, and embarking upon an entirely different assessment as to whether the worker's regular duties, and posture, had aggravated an underlying condition. In so doing WCAT misapprehended and mis-stated important medical evidence.

[23] Until this case reached the desk of the WCAT Commissioner, the whole thrust of the worker's claim was that she had suffered a workplace injury for two reasons. First, higher levels of humidity that summer dampened the cards and caused them to stick together. This caused the cards to swell and make it difficult for the dealer to slide them out of the "shoe." The worker testified that on a bad day she would have to bang the "shoe" on the tabletop every time she dealt the decks. She said she "might have to bang them . . . every two minutes." She said the humidity made pulling and pushing chips across the tabletop very difficult. She noticed discomfort in her arm and began taking Advil and wearing a support band. Eventually she underwent treatments with her physician - including Cortisone shots - and her physiotherapist. Second, she complained that throughout the summer they were short staffed at the casino, which she said obliged her to spin the roulette wheel more often, but with fewer breaks.

[24] These two specific complaints were central to her testimony before the Hearing Officer on October 13, 2005. These were the same two specific complaints identified by the worker in her initial WCB accident report where she stated that the pain in her elbow and neck on her left side first arose on June 20, 2004.

[25] During the paper review conducted by the WCAT Commissioner the focus shifted completely from a consideration of the worker's testimony and the medical evidence with respect to those two particular allegations, to an entirely different consideration of the worker's "regular duties," and posture while seated.

[26] Immediately following the WCAT's misstatement and misapprehension of Dr. Loane's evidence, the Commissioner refers rather critically to the position asserted by the appellant employer. She writes:

> . . . He cites many examples where the medical evidence reference trouble with sticking cards. <u>However, he does not address the references with over-reaching at the tables and spinning the roulette ball</u> as causes of her condition.
>
> . . .
>
> <u>Neither Dr. Burnstein nor the Medical Advisors addressed the possibilities that spinning the roulette ball or reaching across the table could have aggravated</u> an underlying condition such as epicondylitis or postural insufficiency. The possibility that an underlying condition was aggravated by workplace activities other than dealing cards that were difficult to move was suggested by both Dr. Englund and the worker's physiotherapist.
>
> (Underlining mine)

[27] Here, as I will demonstrate, one sees again that the WCAT Commissioner has mis-stated and misapprehended certain key evidence, as well as taken other important evidence out of context or interpreted it unfairly.

[28] In my respectful view WCAT made a patently unreasonable finding in noting:

> Neither Dr. Burnstein nor the Medical Advisors address the possibility that <u>spinning the roulette ball</u> or reaching across the table could have aggravated an underlying condition such as epicondylitis or postural insufficiency. [. . .]

(Underlining mine)

[29] The fact is that in his April 15, 2005 report Dr. Burnstein specifically addressed the very point WCAT said was missing. After a lengthy discussion of the types of events that can cause such injuries, Dr. Burnstein states as follows:

> I have served as the medial consultant to the Casino for the past 10 years and am very familiar with the work activities of their employees.
>
> . . .
>
> I do not believe the work of the dealer has the potential to cause a repetitive strain injury, and specifically, I do not believe it could cause a lateral epicondylitis. This opinion is based on having observed the work activities of dealers on numerous occasions.

(Underlining mine)

[30] Further, the WCAT Commissioner ignored or appears to have forgotten the opinion of Dr. Thomas Dobson. In October 2004 the WCB asked Dr. Dobson to prepare a medical opinion. The Board provided Dr. Dobson with sufficient background information and advised that the respondent's family physician Dr. O'Neil had offered a diagnosis of "cervical strain and left lateral epicondylitis." The Board further advised Dr. Dobson that the worker's "main job tasks are dealing cards, spinning the ball at the roulette table, pushing chips and dragging chips across layout." The Board then asked Dr. Dobson:

> 1) Please advise if the duties of the worker's position as a dealer could cause the diagnosis provided. Why or why not?

In his reply dated October 28, 2004 Dr. Dobson answered:

> I cannot relate, as this work is light by any standard, and not compatable (sic) with her medical problems.

(Underlining mine)

[31] Dr. Burnstein also rejected the claimant's assertions that working too long without a break, or during periods of unusually high humidity, brought on the worker's complaints. He wrote:

> . . . the work activities of the dealer simply do not involve the forces or factors that are associated with the development of repetitive strain injuries. This work does not involve high force, vibration, the extremes of temperature, awkward position, or highly repetitive motions. In Ms. Noel's case, the work is not new or unfamiliar. I understand Ms. Noel has been a dealer since 1995.
>
> Furthermore, the Casino has been proactive in preventing this type of injury, by taking the extra step of regularly rotating workers, and providing them with frequent breaks. This goes well beyond what occurs in most labor environments, from which most of the data on repetitive strain injuries are derived. Dealers at the Casino generally have a break of 20 minutes duration every hour and then work at a different game. During the games themselves, a variety of arm motions are required, and there are frequent opportunities for rest. Furthermore, a dealer may be placed at a station with no, or only a few, customers.
>
> I understand Ms. Noel has suggested that humidity has played a role in changing the surface tension on the table, such that the chips and cards were more difficult to move. From our discussion, I understand that humidity problems are a rare problem in the climate controlled environment of the Casino. Furthermore, the weight of the chips and cards is so minimal that even if a slight increase in friction occurred, the force required would still be negligible. The Ergonomic Assessment performed by Jacque Saidon at the Windsor Casino showed that the force required to move a card from a shoe corresponded to 5.2% of the maximum finger force for a weak man. The acceptable ergonomic limit is 33%. The force required to raise a pile of 20 tokens corresponds to 9.9% of the maximum force of a weak woman's finger force. The acceptable ergonomic limit is 33%. Thus, even if the humid weather doubled the force required, to move a chip or card, it would still be well under the acceptable ergonomic limit.
>
> In summary, it is highly unlikely that Ms. Noel's left elbow condition, diagnosed as lateral epicondylitis, arose as a consequence of her work activities as a Dealer at Casino Nova Scotia.

[32] Thus, WCAT's conclusion that the medical advisors did not "address the possibility that spinning the roulette ball or reaching across the table could have aggravated the underlying condition" when physicians, including Dr. Burnstein

and Dr. Dobson in fact did so explicitly, is an egregious factual error, amounting to an error in law.

(iii) Mistakenly interpreting the medical opinions tendered as all being consistent with the appellant's position on causation.

[33] These serious errors are compounded by the Commissioner's next conclusion:

> A finding that the Worker's condition was aggravated by her job functions is consistent with all expert medical opinion on file. Dr. Burnstein and the Medical Advisors state that the Worker's condition could not be caused by her employment duties, but they do not rule out the possibility that her condition could have been aggravated by her employment duties. (underlining mine)

[34] It is wrong to say that "all" of the physicians' opinions were "consistent with a view that the claimants condition was aggravated by her job functions." In fact this notion of "aggravation" had never been put to any specialist with the single exception of Dr. Mark Sorhaindo. He was specifically asked by the Board's Adjudicator, Ms. Kathy Stairs:

> After reviewing all the information on file, could this worker's job duties (sic) aggravated, accelerated or activated this worker's condition?

In his report to the Board dated 26/04/2005 Dr. Sorhaindo replied:

> "Unlikely."

[35] This important evidence was considered and accepted by the adjudicator who, in her decision dated November 19, 2004 declared:

> I am in agreement with the Medical Advisor's opinion that the cervical sprain and epicondylitis are not at all related to the duties described of a Dealer.
>
> (Underlining mine)

[36] In an addendum dated April 27, 2005 the same adjudicator specifically addressed the question:

> Did the Worker aggravate, activate or accelerate a pre-existing disease or disability while in the course of employment with Casino Nova Scotia?

and after a detailed review of the record and medical reports answered that question in the negative.

[37] Similarly, Dr. O'Neil, the worker's own family physician never expressed an opinion that any pre-existing disease or disability was aggravated, activated or accelerated by virtue of the worker's employment with Casino Nova Scotia. In fact, a careful review of the reports of Drs. Burnstein, O'Neil, Loane, Sorhaindo and Dobson contradict the WCAT Commissioner's conclusion. In other words they either express the considered opinion that the worker's condition could not have been aggravated by her employment duties, or are neutral in the sense that the physician was never asked to provide such an opinion. This failure to appreciate the substance of the medical reports at issue amounts to reversible error.

[38] Similar considerations arose recently in **Page v. New Brunswick (Workplace Health, Safety and Compensation Commission)**, [2006] N.B.J. No. 394 (C.A.). In that case the Appeals Tribunal overstated the opinion of a physician who - in fact - had not concluded that the worker was no longer disabled. The New Brunswick Court of Appeal found that the Tribunal's mis-statement of the expert evidence gave rise to a palpable and overriding error at ¶ 72-73:

> In summary, Dr. Comper's opinion letter does not profess to hold that Mr. Page is no longer disabled as a result of a work-related injury. Rather, his report is directed at supporting one finding: Mr. Page did not suffer a work-related injury.
>
> [. . .] At this juncture, it is clear that the Commissioner's decision to discontinue paying benefits to Mr. Page was based entirely on Dr. Comper's opinion letter. Regrettably, and putting the case in the light most favourable to the Commission, it misinterpreted that opinion letter. Consequently, there was no objective evidence to support the Commission's decision to terminate the payment of benefits to Mr. Page. In my respectful view, the failure of the Appeals Tribunal to appreciate the substance of Dr. Comper's opinion letter constitutes a palpable and overriding error that warrants intervention. . . .
>
> (Underlining mine)

(iv) In finding that the Hearing Officer had not made assessments of credibility in her November 9, 2005 decision.

[39] In her decision the WCAT Commissioner properly recognized as an important issue the deference owed to the Hearing Officer's reasons, referring to previous decisions of this court in such cases as **Doward v. Workers' Compensation Board (NS)** (1997), 160 N.S.R. (2d) 22; **Canada Post Corporation v. Nova Scotia (Workers' Compensation Appeals Tribunal)** (2004), 222 N.S.R. (2d) 191; and **Metropolitan Entertainment Group v. Durnford et al** (2000), 188 N.S.R. (2d) 318. After doing so the WCAT Commissioner declared:

> Based on these authorities I find the deference which is owed to the Hearing Officer's decision is limited to the advantages that the Hearing Officer had in the fact finding process, including the opportunity to assess the credibility of witnesses. I am bound by her findings where they are based on the testimony that was before her, but I am not bound by her conclusions based on the testimony and I am not bound by findings based on expert opinion evidence. She did not have any advantage over the Tribunal regarding the expert evidence.
>
> The Hearing Officer has not made findings of credibility. While she prefers the testimony of the Employer's witness over the Worker and her three witnesses, she does not say that any of them are not credible.

(Underlining mine)

[40] With respect, I conclude that the WCAT Commissioner erred in finding that the Hearing Officer had not made assessments of credibility in her November 9, 2005 decision, and this resulted in WCAT failing to defer to key factual conclusions about workplace conditions which in turn were critical to a proper assessment of the medical evidence. The concept of "credibility" is much more broadly defined than a simple declaration by the decision maker that he or she has found a particular witness to be untruthful. It may be that, or it may of course be much more. Properly understood, "credibility" relates to the reliability of the evidence and the level of persuasion such evidence provides. Simply because a decision maker has not explicitly stated that he or she "does not believe" someone does not mean that the decision maker has not tested the overall reliability of the witness's evidence in deciding whether to accept all, part or none of it.

[41] In this case the respondent's theory was that her injury was caused by especially strenuous activities as a blackjack and roulette dealer in the summer of 2004 when the city experienced days of high humidity. This she said caused the tabletops to be especially sticky, making it more difficult to distribute or gather the chips. As well, she was obliged to take longer shifts due to a shortage in staff which added to the physical demands when working the roulette table. It is obvious from reading the Hearing Officer's decision that she carefully considered but rejected the respondent's evidence, much preferring the evidence presented by the appellant employer. That exercise was clearly a function of the Hearing Officer's duties in assessing credibility. With respect, the WCAT Commissioner erred in concluding that the Hearing Officer had not made findings of credibility. On the contrary, the Hearing Officer accepted the employer's evidence that the humidity levels were well within normal acceptable limits, and that the playing cards were not so affected that the respondent was required to forcefully "bang the shoe" on the tabletop or otherwise strain herself.

[42] After a full hearing, in a comprehensive report covering 27 pages, the Hearing Officer thoroughly reviewed the testimony offered by the respondent and several witnesses and the entire medical file before stating several very strong conclusions to explain her rejection of the claim. Among them were these:

> . . . I find that there is insufficient evidence to establish that the Worker has sustained a personal injury by accident arising out of and in the course of her employment.
>
> A review of the medical evidence . . . most favourably supports a finding that the Worker's regular duties as a Dealer did not cause the repetitive strain injury . . .
>
> The Worker's Physiotherapist gave the opinion on September 13, 2004 that the Worker's injury was a repetitive strain injury due to her work. However, this was based on the Worker's reports regarding her work conditions. I am unable to find that the Worker's reports regarding her work conditions are supported by the totality of the evidence.
>
> . . . the opinions of Doctors Loane, O'Neil and Englund, as well as the Worker's Physiotherapist, with respect to causality of the Worker's difficulties, are based on the Worker's reports regarding her conditions at work. . . . Specifically, the Worker attributes her injury to constant extreme temperature conditions, in particular, high levels of humidity . . . I am unable to reasonably accept the assertion that humidity levels were so high that cards were sticking in the shoe so

> that the Worker was required to strike the shoe on the table with such force as to cause injury, and yet, no Supervisors in the immediate work environment noticed and no action was taken.
>
> I am also unable to accept that the playing cards would have been in such poor condition as to require extraordinary force on the part of the Worker to use them . . .
>
> I am unable to find it reasonable to accept that the Worker was required to bang the shoe with so much force and on such a regular basis that it resulted in injury, and yet there was no intervention by the Employer in any capacity.
>
> I find it reasonable to accept that if the Worker, as well as other Dealers, would have been required to bang the shoe with such force . . . as to cause injury, this problem would have come to the attention of the Employer.
>
> In summary, I am unable to find that the medical evidence supports that the Worker's regular duties as a Dealer for the Employer resulted in her lateral epicondylitis condition. In addition, I am unable to find that the totality of the evidence supports that conditions were such that the Worker was required to exert additional force to such an extent that she was injured as a result.
>
> This appeal is denied. There is insufficient evidence to establish that the Worker has sustained a personal injury by accident arising out of and in the course of her employment.

[43] Board Policy 3.9.11 R which was applicable to this worker's case contained very specific definitions of "acceleration", "activation", and "aggravation." I am satisfied that these terms were properly understood and applied in the Board's consideration and rejection of the respondent's claim.

[44] It is important to note that these terms "acceleration," "activation," and "aggravation" are used to describe a situation where benefits may be obtainable provided specific circumstances exist. That is to say they depend upon, and are not triggered without, a condition precedent which is "a pre-existing disease or disability." Without such a condition there is nothing to be accelerated, activated or aggravated within the meaning of the Policy. In this case I see no evidence of the pre-condition. While in certain reports there may be reference to pain or discomfort experienced by the respondent worker, such references appear in a context which clearly denotes mere symptoms, but nothing more. There is nothing that would constitute a medical diagnosis of a "pre-existing disease or disability"

which might then invite an assessment of whether the “disease” or “disability” that existed prior to a work-related injury, actually worsened on account of activities in the course of employment.

[45] For all of these reasons I would allow the appeal. But before concluding this decision I wish to add a brief comment concerning statements made by the WCAT Commissioner in her decision. In her reasons, she remarked on three separate occasions “. . .there was no suggestion that her symptoms were brought on by activities outside of work.” Evidently this sentiment was seen by the Commissioner to reflect an important consideration because she said it three times, twice in her ***Causation*** section and repeated again in her ***Summary***. To lend context to these words I will quote from the penultimate paragraph of the WCAT Commissioner’s ***Summary***:

> There is medical opinion that her job duties could have caused or aggravated her condition [which I have shown to be an egregious error of fact amounting to an error in law] <u>and there is no suggestion that any of the Worker’s symptoms were brought on by activities outside of work</u>.
>
> (Underlining mine)

[46] If by these repeated references the Commissioner intended to say no more than that evidence suggesting a worker’s complaints were brought on by activities outside of employment is a *relevant* consideration when assessing causation, I have no quarrel with such an observation. If, however, the Commissioner intended to suggest that there was somehow an onus upon an employer to show that the worker’s complaints were brought on by non-workplace activities, such a statement would be incorrect and reviewable as an error of law.

Conclusion

[47] In conclusion, I find that the WCAT Commissioner erred by ignoring, or failing to correctly interpret and apply the evidence before her, in ways which were central to the Tribunal’s reasoning. Consequently these mistakes were egregious and amounted to errors in law, which warrant our intervention.

[48] I would allow the appeal, set aside the decision of WCAT, and remit the case to WCAT for a rehearing before a differently constituted Tribunal.

Saunders, J.A.

Concurred in:

Roscoe, J.A.

Cromwell, J.A.