Federal Court  Cour fédérale

**Date: 20110315**

**Docket: T-617-09**

**Citation: 2011 FC 309**

**Ottawa, Ontario, March 15, 2011**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**BRIAN C. BRADLEY**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

## I. INTRODUCTION

[1] This Applicant, a self-represented former member of the Armed Forces, has been locked in litigation over his disability claim for a slip in the shower of HMCS *Qu'Appelle* for several years and in this Court since 1999 (see *Bradley v. Canada (Attorney General)*, [1999] F.C.J. No. 144). His first application for a pension based on upper back and neck injuries was finally settled in 2004.

[2] After the 2004 Federal Court decision, the Applicant started a second application for mechanical lower back pain based on the same incident. After further proceedings it was determined that the Department of Veterans Affairs was required to determine this new claim. It is the new claim which is the subject matter of this judicial review.

## II. FACTUAL BACKGROUND

[3] The Applicant was undergoing officer training as an Acting Sub-Lieutenant aboard HMCS *Qu'Appelle*, a destroyer escort. The ship was alongside in Vancouver near the end of a training cruise in the Pacific. The ship was ultimately destined to its home port of CFB Esquimalt.

[4] The Applicant, having completed training for the day, went to the mess (presumably the Wardroom) where he had a few beers. The exact quantity was not established but the drinking took place on board a warship in a tightly regulated environment.

[5] Mr. Bradley contends that he slipped while in the shower cleaning up from his daily duties and prior to going ashore. He was found the next day in his bunk in severe pain. There was a notation in the medical file that he had significant alcohol in his system. There was some suggestion drawn that there was a connection between the shower incident and the consumption of alcohol on board; however, how that could have happened in the circumstances of an officer in training, in a wardroom, was not established.

[6] When the Department finally considered this new claim, it reached the conclusion that the fall in the shower did not arise out of, and was not directly connected with, the Applicant's military

service. The Department made no further determination as to whether the fall caused the mechanical low back pain.

[7] A Review Panel affirmed the Department's decision to deny the Applicant pension entitlement.

[8] The Applicant appealed to the Appeal Board; however, on August 5, 2008, the Appeal Board affirmed the negative decision. It is this decision which is the subject of this judicial review.

## III. APPEAL BOARD DECISION

[9] Despite the new evidence in the form of two medical opinions linking the fall in the shower to mechanical lower back injury, the Appeal Board rejected the causal relationship. While acknowledging the legislative presumption favouring an applicant (including presumably s. 39 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18 (Act)), the Board simply found itself not satisfied that there was a linkage to the 1990 injury.

[10] There was no evidence contrary to the Applicant's own testimony or to the medical evidence submitted.

[11] The Appeal Board also found that the showering incident was not related to military service. In that regard, the Appeal Board made five specific findings:

1. The exact nature of the activity of showering was an ordinary personal event.

2. The specific location, on a warship, was more analogous to a personal residence or a barracks and thus not "suggestive of any worthwhile degree of relation to the performance of duty".
3. There was no control over the Applicant because his superiors did not know what he was doing at the precise moment of injury, he was not part of a shore party and he had consumed an amount of alcohol such that he was not deployable.
4. The Applicant was not "on duty" at the time of the injury.
5. The accident was not rooted in some way to the performance of service because of his consumption of alcohol in the mess having come off watch.

## IV. LEGAL ANALYSIS

### A. *Standard of Review*

[12] The standard of review was not really addressed by the Applicant. The Respondent, quite properly, argues that the standard of review is reasonableness as held in *Wannamaker v. Canada (Attorney General)*, 2007 FCA 126 at para. 12. The Respondent pleads for curial deference on the basis of *McTague v. Canada (Attorney General) (T.D.)*, [2000] 1 FC 647 at paras. 46 and 47.

[13] The Court concurs that the standard of review is reasonableness with respect to specific findings.

[14] This Court has had several occasions on which to address whether the Appeal Board has carried out its responsibilities as mandated by both the letter and the spirit of the legislation (see examples, *Schut v. Canada (Attorney General)*, [2000] FCJ No. 424, *McTague*, above, *Frye v.*

*Canada (Attorney General)*, 2004 FC 986, *Wannamaker*, above). There are unique features to the Act which sets the framework and approach to the Appeal Board's decisions.

[15] Sections 3 and 39 of the Act establish the overall intent of Parliament to recognize that those who serve this country in the military are deserving of special care and attention when they are injured or killed.

Section 3 sets the tone of the legislation.

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| **3.** The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled. | **3.** Les dispositions de la présente loi et de toute autre loi fédérale, ainsi que de leurs règlements, qui établissent la compétence du Tribunal ou lui confèrent des pouvoirs et fonctions doivent s'interpréter de façon large, compte tenu des obligations que le peuple et le gouvernement du Canada reconnaissent avoir à l'égard de ceux qui ont si bien servi leur pays et des personnes à leur charge. |

Section 39 establishes one of the ways by which the objective of s. 3 is fulfilled. It is more than "a tie goes to the runner" provision.

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| **39.** In all proceedings under this Act, the Board shall | **39.** Le Tribunal applique, à l'égard du demandeur ou de l'appelant, les règles suivantes en matière de preuve : |
| (*a*) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant; | *a*) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci; |

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| (*b*) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and | *b*) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence; |
| (*c*) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case. | *c*) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande. |

[16] These provisions give context against which to apply the standard of review. This is legislation designed to protect and respect the members of the Armed Forces.

B. *Reasonableness of Decision*

[17] Members of the Armed Forces are not entitled to a pension simply because they become injured while they are members. There must be a relationship between the injury and military service. The injury must "arise out of" military service.

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| **21.** (2) In respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time, | **21.** (2) En ce qui concerne le service militaire accompli dans la milice active non permanente ou dans l'armée de réserve pendant la Seconde Guerre mondiale ou le service militaire en temps de paix : |
| (*a*) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be | *a*) des pensions sont, sur demande, accordées aux membres des forces ou à leur égard, conformément aux taux prévus à l'annexe I pour les pensions de base ou supplémentaires, en cas d'invalidité causée par une |

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| awarded to or in respect of the member in accordance with the rates for basic and additional pension set out in Schedule I; | blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire; |
| *Pension Act*, R.S. 1985, c. P-6 | *Loi sur les pensions*, L.R., 1985, ch. P-6 |

[18] The Supreme Court of Canada has held that the words “arising out of” are to be interpreted broadly in circumstances akin to those of the case at bar.

> **21** The question is whether the requisite nexus or causal link exists between the shooting and the appellant's ownership, use or operation of the van. With respect to causation, it is clear that a direct or proximate causal connection is not required between the injuries suffered and the ownership, use or operation of a vehicle. The phrase "arising out of" is broader than "caused by", and must be interpreted in a more liberal manner. A formulation of the causation principle is found in *Kangas v. Aetna Casualty & Surety Co.*, 235 N.W. 2d 42 (1975), where the Michigan Court of Appeals stated at p. 50:
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> > . . . we conclude that while the automobile need not be the proximate cause of the injury, there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle.
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> That court recognized that the words "arising out of" have been viewed as words of much broader significance than "caused by", and have been said to mean "originating from", "having its origin in", "growing out of" or "flowing from", or, in short, "incident to" or "having connection with" the use of the automobile. The altercation in *Kangas* from which the injuries flowed occurred after the passenger in the insured automobile alighted from the stopped vehicle, and assaulted a pedestrian. It was similar to the fact patterns in cases such as *Johnstone v. Lee and Insurance Corp. of British Columbia*, *supra*. The *Kangas* causation test has been cited frequently in American decisions, and the case law shows a general trend towards a fairly narrow application of the causation

> principle (e.g., *Thornton v. Allstate Insurance Co.*, 391 N.W. 2d 320 (Mich. 1986), *Fortune Insurance Co. v. Exilus*, 608 So.2d 139 (Fla. App. 1992), appeal dismissed 613 So.2d 3 (Fla. App. 1992)). While a majority of the Supreme Court of Florida adopted a more generous causation test in *Novak v. Government Employees Insurance Co.*, 424 So.2d 178 (Fla. App. 1983), aff'd 453 So.2d 1116 (Fla. 1984), the injured plaintiff is still required to prove the intent of his or her assailant (i.e., the intent to steal or hijack the vehicle) before a causal link will be found.
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> *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405

[19] The Applicant is back in the same circumstance as in Justice MacKay's decision in *Bradley v. Canada (Attorney General)*, 2001 FCT 793, in that the Board took the same narrow approach to causality and committed the same legal errors.

> **25** In this case, the Board states that the applicant was engaged in a personal activity of daily living when the accident occurred, and because this is an normal activity which can occur anywhere, the injury did not arise out of, nor was it directly connected with, his military service. However, it is not the activity of showering considered in isolation from Mr. Bradley's military service which is important. The activity might take place anywhere, but in this case the applicant was assigned to duty on a ship and showering could only take place onboard the ship which was away from its home port. Although he was not ordered to take a shower, Mr. Bradley showered onboard HMCS *Qu'Appelle* because there was no other choice. Assuming for the moment that his claimed disability arose from that activity, whether it arose out of military service is the question the Board ought to have determined. I note that in his decision in the first application for judicial review, my colleague Mr. Justice Blais specifically found that the applicant was on training at the time of the incident alleged on board the *Qu'Appelle*.
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> **26** In my opinion, the Board's decision, which isolated the activity in which the applicant was engaged at the time of his injury from the circumstances of his military service, was unreasonable. The VRAB erred in law, as the Board was found to have done in *R.E.C v. Canada*, *supra*, by Hugesseon, J [*sic*].

[20] In assessing the reasonableness of the Appeal Board's decision, the Court must consider not only the decision's constituent parts but also its overall approach. For the reasons outlined below, the Court finds that the Appeal Board took an approach to the case which was inconsistent with s. 3 of the Act and approached the claim in a bureaucratic, narrow and parsimonious manner. This is inconsistent with the legislation and the decisions of this Court and the Court of Appeal with respect to the manner in which the assessment of a pension claim is to be conducted. It is not sufficient to pay lip service to the generous reading and application of the legislation which Parliament intended, this Court has affirmed and which members of the Armed Forces deserve.

[21] In the Appeal Board's approach to the nature of the activity, it focused on the mundane act of showering. In so doing, it adopted an approach to shipboard life which would involve a decision maker in "slicing and dicing" or dissecting every activity minutely as to whether it was a military duty. An injury from something as simple as a burn from coffee would be analysed from the perspective of whether it occurred on the bridge or on the mess deck, whether the injured party was on duty, off duty or in between duties, whether the cause of the burn was a ship passing and if so, what type of ship.

[22] In this instance, showering is an everyday event but it is also a matter of hygiene (critical in confined spaces of a ship) as well as a matter of discipline. The parallel with civilian life is not entirely satisfactory.

[23] The Appeal Board's analysis of the specific location equates living on a floating weapons platform (a ship) with that of base housing. The Appeal Board failed to consider the unique nature of shipboard life, its confinement, its closeness and the nature of the spaces on board.

[24] In considering the degree of control by superiors, the Appeal Board imports the requirement to be performing a "military duty". That test conflates virtually all the other factors and raises the same problem of failing to consider whether the injury arose from military service (not a specific military duty).

[25] The Appeal Board appeared to be much influenced by the issue of alcohol consumption. While acknowledging that it did not know how much alcohol was consumed between coming off watch and taking the shower, the Appeal Board appears to have drawn conclusions from the report of the Applicant being found 12 hours later in his rack, in pain and intoxicated.

[26] There is a conclusion that, based on the Applicant's condition 12 hours later, he was incapable of performing military functions when he was injured. There is no analysis or evidence of how a young man could, between 1600 when duty ended, and at or about 1800, consume sufficient alcohol in the disciplined conditions of officers in training and Wardroom life, to be in an inebriated state apparently so severe that it lasted for 12 hours.

[27] The Appeal Board's conclusions, so central to its overall analysis, are purely speculative. They are also inconsistent with s. 39, in particular paragraphs *(a)* and *(c)*.

[28] While a sailor securing excessive liquor on board a ship may not be entirely unheard of, there must be more than speculation to ground a finding with such severe consequences.

[29] The factor of being “on duty” is a reasonable consideration. It does lack, however, any consideration of what “off duty” means on a ship, particularly a training ship. There is no consideration of the restrictions and obligations of shipboard life or those of an officer in training while said to be off duty. There is no consideration of the fact that the Applicant is subject to Ship’s Standing Orders and military discipline and cannot come and go as he may please.

[30] In the Appeal Board’s consideration of whether the cause of the accident was rooted in the performance of service, the Appeal Board acknowledges the principles of the Act. However, it does not address the issue of “arising from service” which is a broader notion than the performance of service. The analysis suffers from the same deficiencies as outlined in the preceding paragraph.

[31] The Appeal Board, in general, focused on whether the Applicant was performing a specific military function or duty at the specific moment of the injury, rather than whether the Applicant’s injury arose from his being in military service. In *Wannamaker*, above, a precedent on standard of review, the applicant slipped on ice at the Downsview base while going to work. A pension was granted. The distinction between that case and this case where the Applicant slipped while coming off duty but still on a military site is an immaterial distinction given the purposes of the Act.

[32] Therefore, the Court concludes that the Appeal Board’s decision on this aspect was unreasonable.

[33] On the question of the medical evidence of causation, the decision is also unreasonable. There is no contrary evidence yet the new medical evidence was dismissed out of hand.

[34] While s. 39 does not negate the burden of proof imposed on the Applicant to prove his case (see *Moar v. Canada (Attorney General)*, 2006 FC 610), there is a reasonable question as to whether the Appeal Board truly applied the benefits of that provision.

[35] There was evidence which would allow a reasonably instructed Appeal Board to grant this application. Given the Appeal Board's approach to the issue of military service, the Court cannot be confident that the Appeal Board applied the favourable presumptions.

## IV. CONCLUSION

[36] For these reasons, this judicial review will be granted and the Appeal Board's decision quashed.

[37] In so doing, the Court is not suggesting that the Applicant's claim should be granted; only that he is entitled to a fair process consistent with the legislation which recognizes Canadian society's obligation to protect those who protect us. What the merits of the Applicant's claim may be awaits the results of a proper process.

## JUDGMENT

**THIS COURT'S JUDGMENT is that** the application for judicial review is granted and the Appeal Board's decision is quashed.

"Michael L. Phelan"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-617-09 |
| **STYLE OF CAUSE:** | BRIAN C. BRADLEY<br>and<br>ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | Calgary, Alberta |
| **DATE OF HEARING:** | December 14, 2010 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | Phelan J. |
| **DATED:** | March 15, 2011 |

**APPEARANCES:**

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| Ms. Kerry Boyd | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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