Date: 1998 08 24
Docket: CV 07443

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KEITH CLARK

Applicant

- and -

THE WORKERS' COMPENSATION BOARD OF THE NORTHWEST TERRITORIES

Respondent

Application for judicial review of decision of the Appeals Tribunal under the *Workers' Compensation Act.*

Heard at Yellowknife, NT, on July 7, 1998

Reasons for Judgment filed: August 24, 1998

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Applicant: James R. Posynick

Counsel for the Respondent: Adrian Wright and Michael Triggs

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REASONS FOR JUDGMENT

[1] The Applicant, Keith Clark, suffered a back injury while on the job in March of 1993. He was unable to work and applied for and received benefits from the Respondent. The nature of the injury was a back strain which occurred while he was cleaning the floor.

[2] Several months after the back injury occurred, the Applicant underwent surgery for an unrelated vascular problem (atherosclerosis). Several months after that, he was referred by his physician for physiotherapy to help him recover from the back injury. During the course of the physiotherapy, bleeding occurred in the area where he had undergone surgery for the vascular problem. The Applicant discontinued physiotherapy and underwent a second surgical procedure.

[3] In the course of all of this, the Applicant became inactive. In September of 1994, x-rays showed him to have osteoporosis as well as a compression fracture said to have occurred within the past year.

[4] In November of 1994 an adjudicator for the Workers' Compensation Board ruled that the Applicant's problems were not related to the back injury of March, 1993 and that benefits would be discontinued.

[5] In May of 1995 a Review Committee varied that decision to provide benefits during the time period that the Applicant would have been eligible for same had he been able to attend physiotherapy, but held that he was not entitled to long term benefits.

[6] The Applicant appealed the denial of long term benefits to the Appeals Tribunal, which upheld the decision of the Review Committee.

[7] The Applicant now seeks judicial review of the Appeals Tribunal's decision. Throughout, his position has been that his present inability to work is the result of his osteoporosis which was caused or worsened by his inactivity which in turn was caused by complications resulting from the bleeding during the course of physiotherapy. Since the physiotherapy was prescribed for the March, 1993 back injury, this sequence of events was initiated by that back injury. This is the causal link or chain that the Applicant relies upon. The Appeals Tribunal held that there was no causal link between the Applicant's osteoporosis and the March, 1993 accident.

The Issues:

[8] The issues which arise are the following:

1. What is the appropriate standard of review for the decision of the Appeals Tribunal?

2. If the standard of review is patent unreasonableness, was the decision of the Appeals Tribunal patently unreasonable; and

3. If the standard of review is correctness, was the decision of the Appeals Tribunal correct; and

4. Was it patently unreasonable for the Appeals Tribunal to refer the Applicant back to the adjudicative level on the question whether his condition was related to an earlier accident?

What is the appropriate standard of review for the decision of the Appeals Tribunal?

[9] The Appeals Tribunal is established by s. 7.1 of the *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6 as amended. Its jurisdiction is set out in s. 7.3 of the Act:

> 7.3. Subject to section 7.7, the appeals tribunal has exclusive jurisdiction to examine, inquire into, hear and determine all matters arising in respect of an appeal from a decision of a review committee under section 24 or 64, and it may confirm, reverse or vary a decision of the review committee.

[10] Section 7.7 is irrelevant for purposes of this application.

[11] Sections 7.8 and 7.9 provide as follows:

> 7.8. The appeals tribunal may vary a decision made by it and may, on its own motion, rehear an appeal.
>
> 7.9.(1) Subject to sections 7.7 and 7.8, a decision of the appeals tribunal on an appeal is final and conclusive.
>
> (2) A decision of the appeals tribunal on an appeal may not be questioned or reviewed in any court.

[12] It will be noted that there is no statutory right of appeal from a decision of the Appeals Tribunal and that s. 7.9(2) is clearly a privative clause intended to oust the jurisdiction of a court to review the decisions of the Appeals Tribunal.

[13] It has been said that the effect of a privative clause is to confer on a tribunal which has acted within its jurisdiction "the right to be wrong": *Re Ontario Public Service Employees Union and Forer et al* (1985), 23 D.L.R. (4th) 97 (Ont. C.A.).

[14] The test for review of decisions of a statutory tribunal made within the tribunal's jurisdiction is "patent unreasonableness": *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890; *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3.

[15] The test for patent unreasonableness is a strict one, as noted by Cory J. in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 (at p. 964):

> It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.

[16] In *Syndicat des Employés de Production de Québec & de L'Acadie v. Canada (Labour Relations Board)*, [1984] 2 S.C.R. 412, Beetz J. said that a tribunal's

interpretation of a provision that it is required to apply within the bounds of its jurisdiction would have to amount to "a fraud on the law or a deliberate refusal to comply with it" before the court would be justified in concluding that the tribunal's interpretation was patently unreasonable.

[17] Clearly, therefore, the test for patent unreasonableness is stringent. The court does not look at whether the decision is correct on the facts or whether it would have made the same decision. The court may examine the record, although there may also be cases where the unreasonableness of a decision is apparent without a detailed examination of the record. Where the court does examine the record, the standard is as set out by Cory J. in *The Board of Education for the City of Toronto v. Ontario Secondary School Teachers' Federation et al*, [1997] S.C.R. 487 (at p. 509):

> Therefore, in those circumstances where the arbitral findings in issue are based upon inferences made from the evidence, it is necessary for a reviewing court to examine the evidence that formed the basis for the inference. I would stress that this is not to say that a court should weigh the evidence as if the matter were before it for the first time. It must be remembered that even if a court disagrees with the way in which the tribunal has weighed the evidence and reached its conclusions, it can only substitute its opinion for that of the tribunal where the evidence viewed reasonably is incapable of supporting the tribunal's findings.

[18] However, where the court is considering an alleged jurisdictional error, such as the interpretation of a provision limiting the tribunal's jurisdiction, the standard is not patent unreasonableness but rather correctness: *Pasiechnyk, supra*.

[19] In this case, the primary argument made by the Applicant was that the decision of the Appeals Tribunal was patently unreasonable. Failing that, however, he submitted that the standard in this case is the lesser one: correctness. It was argued that the Appeals Tribunal erred in failing to apply s. 7(5) of the *Workers' Compensation Act* and that, s. 7(5) being a provision which limits the tribunal's jurisdiction, the correctness standard is invoked.

[20] Section 7(5) reads as follows:

> 7(5) All decisions of the Board shall be given according to the justice and merits of the case, and the Board shall from the circumstances of the case, the evidence adduced and medical opinions draw all reasonable inferences and presumptions in favour of the worker.

[21] The Applicant's argument is that the Appeals Tribunal should have applied s. 7(5) and drawn the inference from the "circumstances of the case, the evidence adduced and medical opinions" that the Applicant's current condition is causally linked to the March, 1993 injury.

[22] Should s. 7(5) be characterized as a provision which limits the jurisdiction of the tribunal?

[23] Section 7(5) deals with the burden or standard of proof. It does not provide that a certain set of facts must lead to a specific presumption or inference. It still requires a determination on the part of the tribunal as to what is reasonable.

[24] Counsel for the Applicant relied on *Litke v. Manitoba (Workers Compensation Board)*, [1993] 8 W.W.R. 487 (Man. Q.B.) to argue that s. 7(5) limits the jurisdiction of the Appeals Tribunal. *Litke* dealt with a provision in the Manitoba legislation which provided that where an accident occurred during the course of employment, unless the contrary is proven on a balance of probabilities, it shall be presumed that it arose out of employment (similar to s. 14(3) of the Northwest Territories legislation). In *Litke*, the reviewing court held that there was no evidence proving the contrary and that the tribunal was therefore obliged to apply the presumption. It was in that sense that the court held that the provision imposed jurisdictional limits on the manner in which the tribunal could deal with inferences arising from facts.

[25] In my view *Litke* must be viewed as a "no evidence" case. The court stated that the tribunal was obliged either to seek further evidence or to apply the presumption. It cannot have meant that the presumption was to be applied no matter what the evidence, otherwise why say that the tribunal had the option of obtaining further evidence. However, where the tribunal had chosen not to obtain further evidence and was therefore left with no evidence to the contrary of what was asserted by the worker, it had to apply the presumption.

[26] The case before me is not a "no evidence" case. I will refer to the evidence later on these reasons.

[27] Counsel for the Respondent argued that s. 7(5) is a provision which confers jurisdiction on the tribunal. He relied on *Bouchard v. Manitoba (Workers' Compensation Board)*, [1997] M.J. No. 116 (Man. C.A.). That case dealt with the same provision at issue in *Litke*. The Manitoba Court of Appeal decided that the intent of the legislature was that the tribunal decide the issue of whether the accident arose out of the

employment and that the standard was therefore patent unreasonableness. The Court held that there was some evidence upon which the tribunal in that case could make the decision it did and it was not to be second-guessed in the weighing of that evidence.

[28] Section 7(5), as I have pointed out, is less specific than the section that was dealt with in the Manitoba cases. It is, however, similar to section 24 of Nova Scotia's *Workers' Compensation Act*, which reads as follows:

> 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 the medical opinions, all reasonable inferences in favour of the applicant.

[29] Section 24 was considered by the Nova Scotia Court of Appeal in *Hubley v. Nova Scotia (Workers' Compensation Board)* (1992), 7 Admin. L. R. (2d) 220. The Court of Appeal held that s. 24 limits the tribunal's powers, that the tribunal's power to draw inferences from the circumstances, the evidence and the medical opinions is circumscribed by the requirement that it draw all reasonable inferences in favour of the applicant worker. Failure to apply s. 24 in accordance with its expressed intent would, the Court said, result in a loss of jurisdiction and judicial review.

[30] *Hubley* appears to me, however, to be another case of "no evidence". All of the evidence before the tribunal in that case pointed to the work accident as the cause of the worker's injury, although none of the doctors could say with absolute certainty that it was the cause. There was no evidence of any other cause. The inference that the accident caused the injury was a reasonable one; by failing to draw it the tribunal had committed jurisdictional error.

[31] In considering the issue of whether s. 7(5) goes to the tribunal's jurisdiction, I find helpful the words of Dickson J. in *C.U.P.E. Loc. 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227:

> The question of what is and what is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.

[32] Dickson J. went on to state the question or test to be applied when the contention is that the tribunal has done something outside of its jurisdiction as follows:

> Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?

[33] Those words were considered in two cases which dealt with s. 99 of the *Workers' Compensation Act* of British Columbia, which provides as follows:

> 99. The Board is not bound to follow legal precedent. Its 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.

[34] In *Evans v. Workers' Compensation Board and British Columbia* (1981), 26 B.C.L.R. 283 (S.C.) the court said of s. 99 and another "deeming" provision that they "lay down rules by which the board is to be guided in considering those questions, but the application of those sections to any given case is a matter in respect of which the board can be wrong without affecting its jurisdiction".

[35] Section 99 was also considered in *Hanney v. Workers' Compensation Board* (1981), 33 B.C.L.R. 120 (S.C.) by Berger J., who concluded that if the Board refused to apply s. 99, a mandatory provision of the statute, the court would be required to intervene. He reasoned as follows:

> . . . It is said that the Workers' Compensation Board declined to apply s.99. I think there is a distinction between a case where the Workers' Compensation Board has struggled to apply s.99 to the facts in the case, and a case where the Workers' Compensation Board has, in effect, refused to apply or to be bound by s.99. Laskin C.J.C. in *Forsythe v. R.*, [1980] 2 S.C.R. 268, 19 C.R. (3d) 261, 53 C.C.C.(2d) 225 at 228-29, 112 D.L.R. (3d) 385, 32 N.R. 520, said that jurisdiction could be lost by a failure to observe a mandatory provision of the Criminal Code, R.S.C. 1970, c.C-34. The same principle would apply on the civil side.

[36] Having considered these cases, I prefer the reasoning in *Evans* and *Hanney*, along with *Bouchard*. They are consistent with *Hubley* when the latter is viewed as a "no evidence" case. This reasoning is also consistent with what was said by Sopinka J. in *Pasiechnyk* about the test as to whether a provision is one that limits jurisdiction: "was

the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board?"

[37] In my view, the issues of disability, cause of disability and whether disability exists by reason of an accident (s. 7(2)(b) of the *Act*) are clearly ones that the legislators intended be left to the tribunals established under the *Act* subject to the rights of appeal provided. When the case reaches the Appeals Tribunal, it has to consider and weigh the evidence and information before it and decide what inferences are reasonable and whether to uphold the decision appealed from or not. This was intended to be left to the exclusive jurisdiction of the Appeals Tribunal, as is clear from the privative clause.

[38] I conclude therefore that it is only if the Appeals Tribunal refuses to apply s. 7(5) or interprets it in a way that is patently unreasonable, that the court can intervene on judicial review. The appropriate standard is not simply correctness.

[39] The appropriate standard for review on this application is therefore patent unreasonableness.

[40] This then leads me to the decision of the Appeals Tribunal.

Was the decision of the Appeals Tribunal patently unreasonable?

[41] In its decision, the Appeals Tribunal set out a lengthy review of the evidence presented before it and the submissions it heard. In its review of the submissions made by the Applicant's counsel, there are three references to s. 7(5). Therefore, although s. 7(5) is not referred to in the "rationale" portion of the decision, I am satisfied that the Tribunal must have had the section in mind.

[42] In its decision to uphold the Review Committee's denial of benefits, the Appeals Tribunal stated the following:

> The Appeals Tribunal believes there is no causal link between the appellant's osteoporosis condition and the accident of March 30, 1993; therefore no further benefits, either on a temporary or permanent basis, are to be paid. Osteoporosis is defined as a loss in bony substances producing brittleness and softness of bones, a condition of bone where there is reduced calcium, and hence fragility. It can be caused by a number of factors including inactivity, old age, illness, malnutrition, heredity, etc.

In coming to its conclusion, the Appeals Tribunal considered the views of various examining medical authorities, as follows:

> 1. Dr. Carla Wallace, in her report dated September 14, 1994, in interpretations of Magnetic Resonance Imagery (MRI) conducted on September 13, 1994, indicated that the T11 compression fracture was likely less than a year old, in effect confirming that this most recent injury was not related to the accident of March 4, 1993.
>
> 2. Dr. Lowell van Zuiden, Orthopaedic surgeon and independent referee, in his report of September 16, 1994, concludes: '*. . . My feeling is that a majority of his symptoms relate to the osteoprosis of the lumbar and thoracic spine and the recent compression fracture of T11*."
>
> 3. The Medical Advisor of the WCB in his report of July 23, 1996, concluded as follows: "*. . . This indicates that the worker had the T11 compression fracture at some time after the work related incident of March 30, 1993, and that it is not work related. The likely cause of the T11 compression fracture is the worker's osteoporosis, Compression fractures can occur spontaneously with this condition*".

[43] It is clear from the above that the Appeals Tribunal was of the view that the medical evidence indicated that the Applicant's current problems arose from the post-accident compression fracture and his osteoporosis.

[44] Unfortunately, the reasons given by the Appeals Tribunal do not explain why or how the Tribunal came to the conclusion that there was no causal link between the osteoporosis and the March, 1993 accident. In the absence of any stated reasons, I have to look at the record to determine whether that conclusion was patently unreasonable.

[45] The medical reports listed above that were referred to by the Appeals Tribunal speak of the cause or causes of the Applicant's current condition. They do not speak to the cause of the osteoporosis itself. Therefore, I have reviewed the record to see what evidence does speak to that issue.

[46] In a report dated September 16, 1994, Dr. van Zuiden stated that osteoporosis was noted in the Applicant in 1987 and 1989, thus prior to the accident of March, 1993.

[47] In a report dated October 26, 1994, Dr. Gibson stated that osteoporosis can be caused by a number of factors including "inactivity, old age, illness, malnutrition, heredity, etc, etc.".

[48] The following excerpt is taken from Dr. Glasgow's report of January 3, 1997:

> This patient's prime problem is his osteoporosis which has not been explained to my satisfaction as yet and I do not know whether he has been thoroughly worked up from a medical point of view, but things like thyroid or parathyroid dysfunction should be evaluated along with his kidney function to make sure there is not a physiological reason for this. The injuries that he received were relatively minor and in my opinion have very little to do with the condition that he has presently. The kyphosis is due to the osteoporosis and although we all know that inactivity of a severe nature, which would mean bedrest can precipitate osteoporosis, in his case he is not quite that immobile and I think there are other factors in his lifestyle which could very well accentuate the osteoporosis such as smoking.
>
> There is evidence that this patient had some osteopenia back in 1987 which has progressively worsened over the years and is going to continue to do so unless an etiological cause is found for it and reversed. The part to play from his Workers' Compensation Board injury other than an exacerbation of a pre-existing condition is not the prime cause of his present disability.

[49] In a letter dated January 10, 1997, responding to questions put by counsel for the Applicant, Dr. Glasgow stated:

> This is the first time I had an opportunity to look at Dr. Vezpremi's examination and it would be my opinion that the back pain is primarily due to his severe osteoporosis which is highly unusual in a 52 year old male and brought on, as I have stated before, by other factors. This patient I also see has had bilateral aortal bifemoral bypass surgery and required further surgery in that area. He may very well have some pain due to the wedge fracture, but as I stated above, the injury in 1993 under normal circumstances causes this and could have been an aggravational factor of his pre-existing condition and on that basis he is maybe not compensated adequately.

[50] By letter dated June 27, 1997, Dr. McGlynn stated:

> In response to your questions concerning the above-named, Mr. Clark has been a patient of mine for a number of years, who has sustained a back injury in 1987. As a result of this back injury he has been seen on a number of occasions by visiting orthopedic specialists and by myself, and since his case is inoperable, he has required the use of analgesics and

> has been advised that he cannot work again, even at light duties. His problem is compounded at present by the fact that he also osteoporosis which was diagnosed on a bone density scan, although my feeling is that this is most likely caused by the fact that he's been so inactive over the years that osteoporosis has set in. As noted, he requires the use of Tylenol III on an ongoing basis for his pain.

[51] I note that Dr. McGlynn does not refer at all to the March, 1993 accident and does not say what time period he is referring to when he states that the Applicant has been so inactive "over the years".

[52] The Applicant relied as well on evidence which he suggested showed a worsening of his osteoporosis after it was noted in 1987 and 1989. Approximately a year and a half after the March, 1993 accident, x-rays demonstrated "relatively mid changes of diffuse osteoporosis" to his lumbosacral spine as well as the compression fracture referred to earlier.

[53] The medical and other information, as well as the submissions made by counsel for the Applicant before the Appeals Tribunal, put the issue squarely before the Tribunal. The Tribunal, in my view, must have been aware that the issue was not whether the accident itself caused the osteoporosis, but rather whether it triggered the chain of events that the Applicant argued resulted in his current condition of osteoporosis: the physiotherapy for the injury received in the accident, the bleeding in the area of the unrelated vascular surgery during the course of the physiotherapy, the further surgery and resultant inactivity, leading to worsened osteoporosis.

[54] None of the medical reports provide clear support for the chain of events having the result put forward by the Applicant. Uncertainties are present in the suggested chain of events. For example, there is the possibility or even likelihood that the bleeding that occurred in the course of physiotherapy would have happened in any event as a result of normal daily activity, as suggested by Dr. MacMillan in his May 9, 1994 letter and agreed to by Dr. Titterington in his May 18, 1994 report. There is not a great deal of evidence about the Applicant's level of inactivity and really no evidence that it was sufficient to cause osteoporosis to the extent suffered by the Applicant. Dr. Glasgow's opinion was that his inactivity was not of such a severe nature and that other factors could worsen the osteoporosis from which he was already suffering. Dr. McGlynn's opinion is not clear on that point as I have already noted.

[55] The Appeals Tribunal's decision indicates that it was not satisfied that there was a causal connection as urged by the Applicant. Put in terms of s. 7(5) of the *Act*, the

Appeals Tribunal must have decided that it was not reasonable to infer that there was a causal connection between the accident and the osteoporosis such that it could be said that the Applicant's disability existed "by reason of an accident" as per s. 7(2)(b) of the *Act*.

[56] Counsel for the Applicant referred to s. 14(1) of the *Act*, which provides that where a worker suffers personal injury as a result of an accident arising out of and during the course of his or her employment, compensation shall be paid unless certain factors (which do not apply in this case) exist. I do not think that section changes the issues in any way in this case. The issue was still whether the current problem, the osteoporosis, could be linked back to the accident. It is clear from the record that the Applicant was found to have suffered an injury as a result of the accident and that he had been compensated for the time lost from work as a direct result of that injury.

[57] The argument put forward for the Applicant is in essence that because one can find some support for the causal connection in the evidence, the Appeals Tribunal was obliged to rule in his favour. A similar argument was made in *Poan v. Workers' Compensation Board of Nova Scotia*, [1994] N.S.J. No. 134 (S.C.). In referring to section 24 of the Nova Scotia legislation, which I have quoted above, the Chambers Judge on a judicial review application said the following:

> I do not think that s.24 required the hearing officer to isolate a portion of Dr. MacMurdo's report and couple it with the assertion of the applicant taking them together, and by ignoring all the other evidence, be bound to conclude that such was reasonable, therefore giving rise to the mandatory obligation of giving the benefit of that reasonable inference to the applicant. If that is the correct conclusion, then the determination of entitlement will be made outside the statute in every case where the applicant makes the assertion and a physician expresses a support of opinion.

[58] The same considerations apply in this case. The Appeals Tribunal had before it a great deal of evidence about the Applicant and his medical condition, as well as the circumstances since his 1993 accident. It was for the Appeals Tribunal to decide what to make of that evidence and what inferences to draw from it. This is the task the legislature has entrusted to it.

[59] As I have indicated above, the test on judicial review is not whether I agree with the decision of the Appeals Tribunal. The test is whether its decision was patently unreasonable. For the reasons given, I have concluded that the decision was not irrational; there is support in the evidence, as I have set out above, for the finding that

the Applicant's current condition is not linked through the chain of events referred to, to the March, 1993 accident. The decision cannot be said to be patently unreasonable.

Was it patently unreasonable for the Appeals Tribunal to refer the Applicant back to the adjudicator on the question of a connection with his earlier accident?

[60] The Applicant also argued that the Appeals Tribunal acted in a fashion that was patently unreasonable arising out of the following comment in its decision:

> While denying the appellant his request for additional TTD and PPD for this accident, the Appeals Tribunal considers there may be some possibility of a causal link between the appellant's current condition, and his previous 1987 back accident. The appellant may wish to approach Client Services to discuss his prior 1987 claim.

[61] The Applicant had been receiving benefits because of an on-the-job accident which occurred in 1987; thus the above comment.

[62] The Applicant argued that instead of referring him back to the adjudicative level, the Appeals Tribunal itself should have dealt with the possibility of a causal link with the 1987 accident. He relied on s. 7.3 of the *Act*:

> 7.3 Subject to section 7.7, the appeals tribunal has exclusive jurisdiction to examine, inquire into, hear and determine all matters arising in respect of an appeal from a decision of a review committee under section 24 or 64, and it may confirm, reverse or vary a decision of the review committee.

[63] The difficulty I have with the Applicant's submission is that there is no indication that the Appeals Tribunal had before it all the information that would be necessary to deal with this issue; in fact, I infer that it did not since it referred the Applicant to an adjudicator. Further, the Tribunal had not received any submissions on that issue and its review of the submissions it heard indicates (at pp. 5 - 6 of the decision) that the Tribunal was urged to focus only on the 1993 accident. Nor did the Review Committee's decision raise a connection between the 1987 incident and the Applicant's current condition.

[64] Counsel for the Applicant referred to *Blencoe v. British Columbia (Human Rights Commission),* [1998] B.C.J. No. 1092 (C.A.) in arguing that the Applicant should not be sent back to the adjudicative level at this point. That case dealt with prejudice resulting to the person complained of where complaints of sexual harassment did not proceed to hearing in an expeditious manner. I am not convinced that the same considerations apply in the circumstances set out above.

[65] In all the circumstances, I cannot say that the Appeals Tribunal's referral of the Applicant to an adjudicator was patently unreasonable.

[66] For the foregoing reasons, the application for judicial review is dismissed.

[67] Costs normally follow the event. If counsel are not able to agree they may arrange to speak to the matter before me in Chambers.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT, this
24th day of August 1998

Counsel for the Applicant: James R. Posynick
Counsel for the Respondent: Adrian Wright and Michael Triggs

CV 07443

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