Saftner v. WCB of NWT and Nunavut, 2001 NWTSC 11

Date: 2001 01 29
Docket: CV 08837

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

PAUL SAFTNER

Applicant

-and-

WORKERS' COMPENSATION BOARD OF THE NORTHWEST TERRITORIES AND NUNAVUT

Respondent

Application for judicial review of a decision rendered on March 31, 2000 by the Appeals Tribunal established under the *Workers' Compensation Act*, R.S.N.W.T. 1988, c W-6, s.7.1.

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

Heard at Yellowknife, Northwest Territories
on December 14, 2000.

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

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REASONS FOR JUDGMENT

[1] This is an application for judicial review of a decision rendered on March 31, 2000 by the Appeals Tribunal established under the *Workers' Compensation Act*, R.S.N.W.T 1988, c. W-6, s. 7.1. The Applicant says that the Appeals Tribunal erred in law in denying him an increase in his Permanent Partial Disability ("PPD") benefits and denying him further vocational and educational training and assistance. The errors alleged are set out as follows in the Applicant's Brief of Argument:

> (a) by failing to find that the chronic pain and a psychological condition of the Applicant that prevent him from returning to work are personal injuries for which compensation is payable, pursuant to ss.14 and 43 of the *Act*, thereby exceeding its jurisdiction;
>
> (b) by failing to assess the effects of the Applicant's injuries and resulting disabilities on his "earning capacity" as required under s.43 of the *Act*, thereby making a patently unreasonable error of law; in particular, by substituting a medical assessment of disability for an assessment of the percentage impairment of earning capacity from the nature and degree of disability; and
>
> (c) by failing to take into account evidence of the Applicant's post-accident employment prospects and earning capacity, and failing therefore to draw an inference in his favour pursuant to s.7(5) of the *Act*, thereby making a patently unreasonable error of law; in particular, by failing to take into account

evidence of the WCB's vocational rehabilitation counselor that the Applicant was unemployable even at minimum wage.

Background

[2] This case has a lengthy history which I will summarize as follows. The Applicant, then a firefighter, injured his left shoulder in an on-the-job accident in May 1983. He worked until September 1983, when he sought medical attention for the injury. He was diagnosed at that time with pulled muscles in the shoulder region and told not to work for two weeks. He was seen again approximately two weeks later and considerable improvement was noted and a further two weeks off work advised.

[3] The Applicant returned to work in late September 1983 but resigned from his job a few days later. He was self-employed between September 1983 and November 1988 and there is no record of his receiving any further medical treatment during that time.

[4] In 1988, the Applicant was examined by the Workers' Compensation Board ("W.C.B.") Medical Advisor as a result of his complaint of continuing shoulder pain. Numerous examinations and assessments were conducted, pending which the Applicant was paid some benefits. The medical opinions varied as to whether the Applicant's shoulder pain was the result of the 1983 accident and whether he was left with any measurable disability. There was some medical evidence that the Applicant was left with a shoulder problem as a result of the accident but that he could do light or sedentary work with restrictions on lifting or raising his arms above shoulder level.

[5] In the result, in May 1990, the Applicant was assessed a 2.5% impairment by the Review Committee under the *Workers' Compensation Act.* He appealed that decision to the Appeals Tribunal, arguing that his disability was more serious than 2.5%. The Appeals Tribunal upheld the Review Committee's assessment.

[6] A medical reassessment was done in 1991. The Applicant complained of neck problems and there were conflicting medical views as to whether the neck problems were related to the 1983 shoulder injury. However, in May 1992, having reviewed a report from the British Columbia W.C.B. Medical Advisor (the Applicant having moved to that province in 1989), the Northwest Territories W.C.B. Medical Advisor

recommended a PPD of 8.6% for the Applicant's neck problems. He recommended no change to the shoulder PPD assessment of 2.5%. The 8.6% assessment was accepted by the W.C.B. and paid to the Applicant. The 8.6% was apparently meant to be added to the earlier 2.5% for a total of 11.1%, although through an error the 2.5% was initially not added on. This mistake was later corrected by the W.C.B. so that the Applicant did receive a total 11.1% PPD benefit.

[7] The Applicant continued to obtain medical assessments and treatment, maintaining that his disability was greater than had been assessed. In 1994, the W.C.B. Medical Advisor instituted a reassessment of the Applicant's PPD and potential work capabilities. An examination by a neurosurgeon in September 1994 referred to a number of problems apart from the neck and shoulder injury, including degenerative disc disease not related to the 1983 accident, morbid obesity and hypertension. The weight to be given to that particular examination was strongly contested by the Applicant and there was other medical evidence which disagreed with that of the neurosurgeon. Throughout, the Applicant's personal physician reported that he was unable to work because of pain.

[8] A second medical opinion questioned whether the neck problems were brought on by the shoulder injury and rated impairment somewhere around 10%. The 8.6% rating was not, however, changed by the W.C.B.

[9] In 1994 the W.C.B. referred the Applicant to a vocational rehabilitation consultant, T. McLeod, for counseling and development of a rehabilitation plan.

[10] In June 1995 the Applicant asked for a review of his case. At about the same time, McLeod reported that he had been unable to find employment for the Applicant, despite extensive efforts to do so.

[11] The Review Committee found in a decision dated June 6, 1996, that the Applicant was fit for some kind of employment and that he was not entitled to Temporary Total Disability benefits or any increase in his PPD. He appealed that decision to the Appeals Tribunal. More assessments were then undertaken, including an assessment at the Canmore Pain Clinic. It concluded that the Applicant could work at a sedentary occupation but that the Applicant had no goals, physical or otherwise, and saw himself as unemployable. He was deemed by the Clinic not to be a suitable candidate for its pain management program.

[12] The W.C.B. Medical Advisor, based on information from the Canmore Pain Clinic, concluded that the Applicant was capable of working at a sedentary occupation and that there was nothing to warrant an increase in his PPD benefits.

[13] On March 31, 2000, the Appeals Tribunal dismissed the Applicant's appeal. This is the decision of which the Applicant now seeks review in this Court. I will refer to the decision in greater detail further on, but it will suffice at this point to say that the Appeals Tribunal found that the Applicant was employable, that there were obstacles other than the shoulder injury hindering his return to work and that the total 11.1% PPD award was properly assessed for his on-the-job injury. Finally, the Appeals Tribunal said that the issue of vocational and educational assistance had to be dealt with at the adjudication and Review Committee levels before being heard by the Appeals Tribunal.

The Standard of Review

[14] The first issue is the standard of review to be applied. The Applicant says that the Court should not accord a high level of deference to the Appeals Tribunal's decision and therefore the standard is whether the decision is correct. The Respondent says that the standard is whether the decision is patently unreasonable. Both agree that the factors to be considered in determining the standard of review are those set out by Bastarache J. in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 and 1222.

[15] In *Pushpanathan*, Bastarache J. identified four categories of factors to be taken into account in determining how much deference should be given by a court to a decision by an administrative tribunal and thus what the standard of review should be. They are as follows:

(i) Privative Clauses

[16] In *Pushpanathan*, Bastarache J. said, at page 1006:

> ... the presence of a "full" privative clause is compelling evidence that the court ought to show deference to the tribunal's decision, unless other factors strongly indicate the contrary as regards the particular determination in question. A full privative clause is "one that declares that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded" (*Pasiechnyk*, *supra*, at paragraph 17, *per* Sopinka J.). Unless there is some contrary indication in the privative clause itself, actually using the words "final and conclusive" is sufficient, but other words might suffice if equally explicit ... . At the other end of the spectrum is a clause in an Act permitting appeals, which is a factor suggesting a more searching standard of review.

[17] The Applicant takes the position that the privative clause in the *Workers' Compensation Act* which applies to decisions of the Appeals Tribunal should not be considered a full one as described in *Pushpanathan* because it does not exclude either appeals or judicial review and because, under s. 7.7, the Board may intervene where the Tribunal fails to do certain things.

[18] The relevant sections of the *Act* are as follows:

> 7.7 (1) The appeals tribunal shall, in determining an appeal, apply the policy established by the Board.
>
> (2) Where the Board considers that the appeals tribunal has failed to properly apply the policy established by the Board, or has failed to comply with the provisions of this Act or the regulations, the Board may, in writing, direct the appeals tribunal to rehear the appeal and give fair and reasonable consideration to that policy and those provisions.
>
> (3) The Board may stay a decision, ruling or order of the appeals tribunal pending a rehearing of the appeal.
>
> (4) The chairperson of the appeals tribunal shall not participate in any decision of the Board as to whether
>
> (a) the appeals tribunal has failed to properly consider the policy established by the Board;
>
> (b) the appeals tribunal should be directed to rehear an appeal, or

> (c) the Board should stay a decision, rule or order of the appeals tribunal.
>
> 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.

[19] In my view, the inclusion of the words "final and conclusive" in s. 7.9(1) and "may not be questioned or reviewed in any court" in s. 7.9(2) fall squarely within what Bastarache J. said constitutes a full privative clause. The wording of s. 7.9(2) can only mean that the legislators intended to exclude any appeals or judicial review.

[20] Indeed, a number of decisions in this jurisdiction have recognized that the privative clause in s. 7.9 is a very strong one: *Fullowka v. Witte*, [1999] N.W.T.J. No. 134 (C.A.); *Northern Transportation Co. v. Northwest Territories (Workers' Compensation Board)*, [1998] N.W.T.J. No. 3 (S.C.); *Northwest Territories (Workers' Compensation Board) v. Nolan*, [1999] N.W.T.J. No. 12 (S.C.).

[21] Some cases from this jurisdiction have also said that the standard of review of a decision of the Appeals Tribunal is patent unreasonableness, indicating that a high level of deference should be accorded its decisions: *Braden-Burry Expediting Services Ltd. v. Northwest Territories (Workers' Compensation Board)*, [1998] N.W.T.J. No. 174 (S.C.); *Clark v. Northwest Territories (Workers' Compensation Board)*, [1998] N.W.T.J. No. 122 (S.C.).

[22] The Applicant argued, however, that s. 7.7 of the *Act* indicates that s. 7.9 was not meant to be a full privative clause, that the power of the Board in s. 7.7 is a factor that strongly indicates the contrary. He submitted that this is evident from the Board's power under s. 7.7(2) to direct the Appeals Tribunal to rehear an appeal and give fair and reasonable consideration to a Board policy or the provisions of the *Act* or the regulations. The power of the Board to give such direction undermines, he submitted, the finality of the decisions of the Appeals Tribunal and thus leads to the inference that

the legislators did not intend that those decisions be accorded a high degree of deference.

[23] Section 7.7(2) was extensively discussed by Vertes J. in both the *Braden-Burry* and *Northern Transportation Co.* cases. In the latter case, he noted that while the Appeals Tribunal must apply the Board's policies, it is not an instrument of the Board and is not under the direction of the Board save for the Board's limited authority to direct a rehearing. The Appeals Tribunal is still the decision maker and it decides whether a policy applies and if it does, how it applies.

[24] In my view the Board's limited authority to direct a rehearing and direct that fair and reasonable consideration be given to Board policy or the legislation does not detract from the Appeals Tribunal's status as the final level of appeal within the structure established by the *Act*. In *Northwest Territories (Workers' Compensation Board) v. Nolan*, I made the same ruling in response to an argument made in different circumstances (but by the Board in that case) that because of the Board's powers under s. 7.7, the Tribunal could not be said to be the final adjudicative body within the scheme of the *Act*. In that case, I said that the strongly worded privative clause confirmed the Tribunal's status as the final decision maker. In my view, the same reasoning should apply here and I find that the powers given the Board in s. 7.7 of the *Act* do not lead to the conclusion that the court should give little deference to a decision of the Appeals Tribunal.

[25] I find, therefore, that the privative clause applicable to the Appeals Tribunal is a full one, suggesting that a high level of deference should be accorded the Tribunal's decisions.

(ii) Expertise

[26] Bastarache J. indicated that a high degree of expertise on the part of a tribunal relative to the court militates in favour of a high level of deference and towards a standard of review of patent unreasonableness.

[27] In arguing that the Appeals Tribunal does not have that degree of expertise that justifies deference by a court, the Applicant has framed the issue that was before the Appeals Tribunal as a question of law. In doing so, he relied primarily on s. 14 of the *Act*, subsection (1) of which provides:

> 14. (1) 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,
>
> (a) the injury is attributable solely to the serious and wilful misconduct of the worker and neither death nor serious disablement result from it; or
>
> (b) the accident occurs as a direct result of enemy action or of action taken in combatting an enemy force or in an attempt to repel a real or apprehended attack by such force.

[28] The Applicant's argument is that the Appeals Tribunal failed to find that the chronic pain and the psychological barriers that he says prevented him from returning to work were personal injuries for which compensation is payable. In failing to make that finding, he says, the Tribunal erred in law and exceeded its jurisdiction. He submitted that the Appeals Tribunal cannot be said to have any expertise with respect to what constitutes a personal injury within the meaning of s. 14(1) and the *Workers' Compensation Act* does not evidence a legislative intention to give the Appeals Tribunal any deference on questions of law.

[29] In my view, however, it is not correct to characterize the issue before the Appeals Tribunal as a question of law. Rather, the issue before the Appeals Tribunal was simply a factual one involving causation: was the Applicant able to work and if not, was his inability to work the result of the 1983 injury? The Record indicates that the Applicant's counsel put the issue this way in his submissions to the Appeals Tribunal (from page 8 of the Appeals Tribunal's decision):

> Mr. Posynick then stated that at worst, the appellant's ability to work at anything at all is compromised by: his worsening pain, his age, his general physical condition and his attitudinal factors. The appellant does not dispute the fact that his attitude affects his return to the workforce; he is living in disabled quarters; does not have any money and is concerned that he has not been paid for his loss of earnings.
>
> If the appellant's inability to find employment is due in part to an attitudical disorder, and the cause of the attitudinal disorder is directly related to the on-the-job injury, then surely this is merely another manifestation of a "*personal injury"* within the meaning of Section 14 of the *Act.* It is an element, along with the abundantly favourable

> medical evidence, that should help the Tribunal assess the nature and degree of this worker's disability.
>
> Mr. Posynick then read Section 14 of the *Act* and asked that if the panel is looking at the appellant's attitude, then the panel should refer to this section of the *Act*. The Appeals Tribunal can award him a benefit. The panel should look at whether it would be beneficial to assist this appellant via treatment or award him a benefit. The appellant is entitled to help from the WCB. Disabled persons have special/specific needs, "*attitude"* is one of those needs and the Board has to help him.

[30] It may be helpful to review the areas in which the Board must make inquiry and determination when it considers whether to award compensation. Section 7(2) of the *Act* provides an outline in that regard:

> 7 (2) Without restricting the generality of subsection (1), the exclusive jurisdiction of the Board extends to examining, inquiring into, hearing and determining
>
> (a) whether an accident is an accident within the meaning of this Act;
>
> (b) whether disability exists by reason of an accident and the degree of the disability;
>
> (c) the duration of disability by reason of an accident;
>
> (d) whether earning capacity has been impaired by reason of an accident and the degree by which it has been impaired;
>
> (e) the amount of remuneration;...

[31] From the above it may be seen that the issues the Board and, on appeal, the Appeals Tribunal, deal with are whether there has been an accident, whether disability exists by reason of the accident and the degree and duration of disability, whether earning capacity has been impaired by reason of an accident and the degree by which it has been impaired. Disability and impairment of earning capacity are therefore the key issues once the occurrence of the accident has been established. They are factual issues which the Board and the Tribunal must deal with all the time.

[32] The Appeals Tribunal is composed in part of representatives of both workers and employers. It has broad powers to call witnesses and obtain documents. It is

given the jurisdiction under s. 7.3 to "examine, inquire into, hear and determine all matters arising in respect of an appeal ...". Its members are appointed for terms which may not exceed three years and they may be reappointed when their term of office expires.

[33] In *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, Sopinka J. noted that the expertise of workers' compensation boards has long been recognized. Referring to the Saskatchewan Worker's Compensation Board, he observed that the composition, tenure and powers of the Board demonstrate its considerable expertise in dealing with all aspects of the workers' compensation system. He concluded that expertise was not just in the handling of compensation claims but also in ensuring that the purposes of the legislation are not defeated.

[34] I can think of no reason why the Appeals Tribunal should be viewed as having any less expertise than a workers' compensation board. Because of the part the Appeals Tribunal plays in the structure established by the *Act* it will have developed expertise in the same areas as the Board itself, including the assessment of evidence as to disability and the effects of injuries on a claimant's ability to work.

[35] In *Clark v. Northwest Territories (Workers' Compensation Board)*, *supra*, a similar issue arose. In that case, the Appeals Tribunal had to consider whether an accident had triggered a chain of events which resulted in the claimant's medical condition. It had to determine whether there was a causal connection. As I said in *Clark*, it was for the Appeals Tribunal to decide what to make of the evidence about the claimant, his medical condition and his circumstances since the accident, and what inferences to draw from all that.

[36] I would characterize the Appeals Tribunal as having a high degree of expertise in the matters that were before it in this case, those being the factual issues pertaining to the Applicant's condition and his ability to work. That expertise calls for a high degree of deference from this Court in considering the decision made by the Tribunal.

(iii) Purpose of the Act as a Whole and the Provision in Particular

[37] Under this heading, Bastarache J. noted that purpose and expertise often overlap. He held that, "Where the purposes of the statute and of the decision-maker are conceived not primarily in terms of establishing rights as between parties, or as

entitlements, but rather as a delicate balancing between different constituencies, then the appropriateness of court supervision diminishes" (at page 1008).

[38] In the Applicant's submission, the Appeals Tribunal is empowered to determine entitlements as between parties rather than to perform a balancing between different constituencies. I do not think that characterization is correct. As has been noted many times, particularly in *Pasiechnyk*, the workers's compensation scheme reflects the historic trade-off by which workers traded the right to sue their employers in exchange for compensation that depends neither on the fault of the employer nor its ability to pay. On the other hand, employers were forced to contribute to an insurance fund, but no longer risked potentially devastating financial liability. Therefore, the scheme does not involve the determination of entitlements as between employer and employee but rather the speedy adjudication of claims without regard to fault.

[39] In my view, however, no matter how the purpose of the *Act* or its provisions for compensation are characterized, clearly the legislative intent was that the Appeals Tribunal would deal with the issues in question.

(iv) The "Nature of the Problem": A Question of Law or Fact?

[40] In *Pushpanathan*, Bastarache J. said that generally courts accord deference to administrative tribunals on questions of fact but not so much on questions of law. There will be exceptions to this, as was the case in *Pasiechnyk*. And there will be cases where a clear line cannot be drawn between a question of fact and a question of law.

[41] I do not agree with the Applicant's characterization of the problem as a question of law, involving an analysis of the law of tort, in particular, the definition of "personal injury" in tort law. As was noted by Donald J.A. in dissent in *Kovach v. British Columbia (Workers' Compensation Board),* [1998] B.C.J. No. 1245 (C.A.) [appeal to the Supreme Court of Canada allowed substantially for the reasons given by Donald J.A.: [2000] 1 S.C.R. 55], what works for a tort based system may be unsuitable for a no fault scheme. In any event, I repeat my earlier comments that what this case involved was simply a factual question of causation.

[42] Accordingly, I conclude that the nature of the problem before the Appeals Tribunal was a question of fact and not law. This conclusion leans in favour of deference.

[43] Having thus reviewed all the factors as set out in *Pushpanathan,* I conclude that deference to the decision of the Appeals Tribunal is appropriate and so the standard of review is patent unreasonableness.

Was the decision of the Appeals Tribunal patently unreasonable?

[44] In determining whether the decision of the Appeals Tribunal was patently unreasonable, the question is not whether the Court agrees with the decision or would have made the same decision. The question is whether the decision is irrational or whether the evidence viewed reasonably is incapable of supporting the tribunal's findings: see the cases referred to in *Clark, supra*.

[45] The Appeals Tribunal upheld the Permanent Partial Disability award of 11.1%. In doing so, it made findings and comments about why the Applicant had been unable to work. It stated that it found no objective medical evidence on file to warrant an increase in the Permanent Partial Disability assessed.

[46] The Appeals Tribunal did not accept the argument made to it by the Applicant's counsel that a disability percentage should be calculated at 41%, which is the percentage difference between the salary the Applicant was earning at the time of the accident and what he could earn now at minimum wage. The Tribunal dealt with the Applicant's calculation as follows:

> This calculation is not a fair one for a number of reasons. First of all, it is assuming that the appellant is only capable of making minimum wage. Secondly, evidence given at the hearing as well as evidence in the file show that there are other barriers preventing the appellant from returning to work other than his shoulder and neck. The Appeals Tribunal does not agee that the WCB should be responsible for the following conditions that are apparently hindering the appellant's return to work. These include:
>
> 1) The appellant's general physical condition.
>
> 2) The appellant's negative attitude.
>
> 3) Geographic location.
>
> These are all conditions that are under the appellant's control and only he can deal with. To award a disability percentage in this way, taking these factors into consideration would be unfair to the WCB and lead to high inconsistencies in awarding disability pensions to injured workers.

[47] The Tribunal then went on to define disability as "the incapacity to perform certain job-related tasks" and concluded that the lifetime pension for a permanent partial disability should reflect the worker's inability to perform tasks that are job-related. It found that:

> In this case the worker has properly been assessed a Permanent Partial Disability as it relates to his job injury. It seems that the majority of his obstacles, in not returning to the work force is his psychological outlook which is echoed in reports throughout the file: .... (Emphasis in original)
>
> The Appeals Tribunal further finds that the 11.1% Permanent Partial Disability award fairly compensates the appellant in relation to overhead and or heavy lifting and that the worker is capable and fit for most sedentary work. While Dr. Barr disagrees that the appellant is capable of working, there are several doctor's reports that say he can.
>
> ...
>
> The Appeals Tribunal finds that the evidence contained in the file indicate the appellant is employable.

[48] The Applicant says that the Appeals Tribunal simply decided that his problems (or obstacles, such as his attitude) were not personal injuries and did not consider whether they were caused by the accident. The failure to consider whether the link between the accident and the complaints could be made makes the decision patently unreasonable according to the Applicant. Alternatively, he says that if the Appeals Tribunal did consider that issue but concluded that the complaints were not caused by the accident, that decision is patently unreasonable.

[49] The Applicant had the burden of demonstrating to the Appeals Tribunal that he was disabled, the extent of his disability and that the barriers to his return to employment were causally connected to the 1983 accident. The mere fact that he had been injured in that accident (which was not in dispute) does not lead to the inevitable conclusion that all subsequent complaints are causally connected to the accident or to that injury.

[50] The issue as to whether the barriers to employment, in particular the Applicant's attitude, were caused by the accident, was squarely put before the Appeals Tribunal and in my view, although the Tribunal did not explicitly say so, the decision can reasonably be read as finding that no causal link had been demonstrated. The

reference to the barriers to employment being conditions under the Applicant's control and that only he could deal with suggests that those barriers were viewed by the Appeals Tribunal as choices made by the Applicant since the accident rather than results of the accident beyond his control. This is reinforced by the Appeals Tribunal's statement that the main obstacle to employment seemed to be his psychological outlook, and its reference (not included in the excerpts quoted above) to evidence which indicated that the Applicant wanted to be retired and did not want to return to work, that he was not motivated to improve his condition or his physical tolerance and that he felt that psychologically he was healthy.

[51] There was no clear statement in any of the medical reports before the Appeals Tribunal that the Applicant's psychological outlook was caused by the accident or the accident-related injury. The causal link was an inference the Applicant asked the Appeals Tribunal to draw. In order to decide whether to draw the inference, it had to consider all the evidence, including the Applicant's assertions. There is no reason to think that it did not do this. In the result, however, it declined to draw the inference, which is a decision it had jurisdiction to make. Section 7(5) of the *Act* does not require that the Appeals Tribunal draw those inferences which are favourable to the worker when faced with conflicting evidence: see *Clark v. Northwest Territories (Workers' Compensation Board), supra*.

[52] Counsel for the Applicant put some emphasis on the evidence of the vocational rehabilitation counselor that he had been unable to find employment for the Applicant. Counsel argued that his evidence proved that the Applicant was unemployable. In fact, his evidence demonstrated only that despite extensive effort, he had been unable to find employment for the Applicant in the area where the Applicant had chosen to live. At the same time, the counselor was of the view that he was employable and he suggested a number of occupations at which the Applicant could work. There is a difference between an individual who is unable to work and an individual who is able to work but cannot find work. The Appeals Tribunal clearly found that the Applicant fell within the latter category. On the evidence, that decision was not patently unreasonable.

[53] As I indicated to counsel during argument, the remark made by the Appeals Tribunal that it would be unfair to the W.C.B. should the Tribunal take factors under the Applicant's control into account in awarding a disability percentage, struck me as somewhat troubling. However, taken in context, I think it is clear that the Appeals Tribunal was simply saying that compensation is to be paid based on disability and

impairment of earning capacity resulting from an accident; it is not to be paid based on all negative circumstances encountered by the worker after the accident.

[54] For the foregoing reasons, I conclude that the Appeals Tribunal's decision as it relates to the Applicant's attitude and barriers to employment was not patently unreasonable.

[55] The Applicant also submitted that the Appeals Tribunal's decision is patently unreasonable because of the way it evaluated disability. As I have already set out above, the Appeals Tribunal disagreed with the percentage calculation that the Applicant had urged it to accept. It found that there was no objective medical evidence that the Applicant's earning capacity had been diminished by an amount greater than that already assessed. The reason for that must be that the Tribunal did not accept that the barriers to the Applicant becoming employed were causally connected to the injury he suffered in the accident. Although the Applicant submits that the Appeals Tribunal was wrong to require objective medical evidence, it was up to the Tribunal to determine whether it preferred to have such evidence or whether it was prepared to accept the assertions made by the Applicant. Again, the real issue was the causal link.

[56] The Applicant also challenged the Appeals Tribunal's decision on the basis that the Tribunal equated physical disability under the American Medical Association ("AMA") Guidelines with percentage impairment of earning capacity. It is not clear to me that that is in fact what the Appeals Tribunal did. It did reject the Applicant's argument that the calculation should be based on the percentage difference between what he earned at the time of the accident and what he could now earn at minimum wage. It rejected the Applicant's argument that there should be any increase to the 11.1% PPD benefits he was receiving. In finding that the 11.1% assessment was correct, the Appeals Tribunal referred not only to the AMA Guidelines but also to two physicians' reports and the W.C.B. Medical Advisor's assessment. It also found that the 11.1% award "fairly compensates [the Applicant] in relation to overhead and or heavy lifting and that [he] is capable and fit for most sedentary work". Clearly, therefore, the Appeals Tribunal did not simply take a number from a chart without considering whether it was otherwise an appropriate assessment. In the circumstances, I cannot say that the finding that 11.1% was an appropriate assessment of percentage impairment of earning capacity was patently unreasonable.

[57] Finally, the Applicant says that the Tribunal's decision not to deal with vocational and educational training for him was patently unreasonable. In his written

submissions before the Tribunal, the Applicant had stated that if the Tribunal was of the view that he was employable, he would request appropriate vocational and educational assistance. In argument before the Tribunal, counsel for the Applicant said that the Applicant was willing to take vocational training, but questioned whether that was a good investment. He pointed out that the Applicant was of an age at which finding any employment would be difficult.

[58] In its decision, the Tribunal noted that such training was not the issue on appeal and that it had not been canvassed to any degree before it. It said that to pursue that avenue, the Applicant would have to raise it at the adjudication and Review Committee levels.

[59] While it might have been more helpful and efficient had the Appeals Tribunal dealt with the issue of vocational and educational training, I do not think it can be faulted for not doing so when the gist of the submission made seemed to be that it was not really what the Applicant wanted and it might not be a good investment. Had there been before the Appeals Tribunal a concrete suggestion or plan for training, it might have been unreasonable for the Tribunal to send the Applicant back to the adjudication level. But in the circumstances of this case, I cannot say that the decision on that point was patently unreasonable.

[60] Having considered all the arguments raised by the Applicant, I conclude that the decision of the Appeals Tribunal was not patently unreasonable and the application for judicial review is therefore dismissed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT
this 29th day of January, 2001.

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